

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION APPLICATION NO. 9 OF 2022
AND
COMMERCIAL ARBITRATION PETITION NO. 17 OF 2022**

Sangeeta Rakesh Solanki & Anr. ..Applicants/Petitioners
Vs.

M/s. Pragati Infrsquare LLP & Anr. ..Respondents

Mr. Ruchir Tolat with Mr. Rushil Mehta for the Applicants/Petitioners.
Mr. Aditya Shiralkar with Mr. Mohit Bagal i/b. Wadia Ghandy & Co. for
Respondents.

CORAM : G.S. KULKARNI, J.

DATE : JULY 06, 2022.

P.C.:

1. These are two proceedings. Commercial Arbitration Application No. 9 of 2022 is filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) and Commercial Arbitration Petition No. 17 of 2022 is filed under Section 9 of the Act.

2. At the outset, Mr. Shiralkar, learned counsel for the respondents has raised an objection to the maintainability of the present proceedings on the ground that there is no arbitration agreement as would be seen from clause 41 which reads thus:-

“41. In the event of any dispute or different which may arise by and between the parties hereto, the same shall be resolved in accordance with the provisions of the Indian Arbitration & Conciliation Act, 1996 as also u/s. 91 of MCS Act, 1960 as amended up to date or by referring to the Sole Arbitrator as may be mutually agreeable by and between the parties hereto.”

3. It is clear from the plain reading of the said clause that there is no agreement between the parties to refer the disputes to arbitration. The parties were required to select the mode of resolution of disputes by

taking recourse to either arbitration or by filing the proceedings under Section 91 of the Maharashtra Co-operative Societies Act (for short, “the MCS Act”). It is not in dispute that consequent to such clause, no further agreement was entered between the parties to the effect that the parties would take recourse to arbitration and subject themselves in any arbitration proceedings.

4. In such view of the matter, Mr. Shiralkar would be correct in his contention that clause 41 is an enabling clause which merely enables the parties to enter into a further agreement, and decide as to whether they would be inclined to take recourse to an arbitration or take recourse to Section 91 of the MCS Act namely to invoke the jurisdiction of the cooperative Court for adjudication of the disputes between the parties.

5. In the context of such enabling clause, it may be apposite to refer to a recent decision of this Court in **Derivados Consulting Pvt. Ltd. vs. Pramara Promotions Pvt. Ltd.**¹ in which considering some what similar clause, this Court advertent to the well settled principles of law had observed that the endeavour of the Court in the Section 11 proceedings would be to examine, whether an arbitration agreement between the parties at all exists. This, more particularly considering the provisions of sub-section (1) of Section 7 of the Act which provides that the arbitration agreement means an agreement by the parties “to submit to arbitration”. Thus, the basic requirement being that the parties need to subject themselves to refer the disputes to arbitration. Applying such requirement of law to the arbitration clause subject matter of such proceedings, which also contained the word “may”, the Court came to a conclusion, that use of the word “may” indicated, that the parties agreed to a future possibility and/or a choice or a discretion as available to the parties to enter into an arbitration agreement, which would not mean

¹ Arbitration Application No. 4 of 2022, decided on 08 June, 2022

that the parties have agreed to subject themselves to arbitration leading to a conclusion that there was no arbitration agreement between the parties. It may be appropriate to note the following observations of the Court which also become applicable in the facts of the present case:-

“9. The Court being called upon to exercise jurisdiction under Section 11 of the Act, it would be incumbent and necessary for the Court, to examine whether any arbitration agreement at all exists between the parties. This more particularly as sub-section (1) of Section 7 of the Act defines an arbitration agreement to mean “*an agreement by the parties to submit to arbitration*” which would ordain such agreement between the parties which would mandate adjudication of dispute in arbitration by appointing an arbitral tribunal. The scope of the jurisdiction of this Court under Section 11(6) read with Section 11(A) is to confine itself to examine the existence of an arbitration agreement which is to be understood in a narrow sense (See **Mayavati Trading Pvt. Ltd. vs. Pradyut Deb Burman**²).

10. Further from a plain reading of sub-section (1) of Section 7 of the Act, there appears to be no scope to hold that when the parties to an arbitration agreement provide that they “*may*” refer the disputes to arbitration, the word “*may*” takes away a conclusive and a mandatory affirmation between the parties, to be certain, to refer the disputes to arbitration.

11. From the above perspective Clause 12 needs to be considered. It can be stated that such clause is quite novel and is peculiarly worded. However, as noted above, the concern of the Court would be to examine whether there is a clear, unfettered and an absolute intention of the parties as discerned from such clause to refer the disputes to arbitration. Thus, the first endeavour of the Court would be to discover the intention of the parties as revealed from a plain reading of Clause 12 as it stands. A bare reading of the clause 12 would indicate that the parties having agreed that if any dispute, controversy or claim relating to the agreement arises, either party, ‘may’ and by further providing that “but is not required to submit the dispute to binding arbitration in accordance with the Arbitration and Conciliation Act, 1996” is discernible of the fact that the parties have not agreed to have an arbitration agreement. The reason being that the very use of the word “*may*” by the parties, does not bring about any arbitration agreement between the parties, when tested on the touchstone of what sub-section (1) of Section 7 provides, namely an “*agreement by the parties*” to submit to arbitration. The use of the word “*may*” cannot be without reason and needs to be given its due meaning, which is the intention of the parties, and more particularly in the light of the above noted succeeding words, the parties have incorporated, in the said clause.

12. It cannot be that the Court would not attribute any meaning to the specific words as contained in such clause as agreed between the parties. Once the parties have agreed to use the word 'may', it is clear that they agree to a future possibility, which would encompass a choice or a discretion available to a party to enter into an agreement. Certainly, the use of the word 'may' in such context cannot be construed to be mandatory for a party that it would be bound to submit or agree to refer the disputes to arbitration. Further the words succeeding the word 'may' completely highlight nay underscore such intention of the parties that there is no binding arbitration agreement, when the words used are categorical to say "***but is not required to submit the Dispute to binding arbitration***".

13. The above discussion leads me to come to an inescapable conclusion and in the present case, the intention of the parties, is crystal clear not to bring about any binding arbitration agreement. The parties have left it to their respective choice and discretion to call upon the other party, to take a decision whether to refer the disputes for arbitration. Thus, the obvious consequence would be once such choice is exercised by one party, the other party to the arbitration agreement needs to approve of such choice and/or not to agree to such request, to refer the disputes to arbitration. Thus to my mind, clause 12 is nothing but an enabling clause, which enables the parties to enter into a further agreement, namely, an arbitration agreement. It is hence a clause which does not create any binding arbitration agreement between the parties. It may also be observed that any agreement between the parties to refer disputes to arbitration needs to clearly satisfy the mandate of Section 7 of the Act. Such arbitration agreement/clause needs to be unambiguous reflecting a clear intention of the parties to refer the disputes to arbitration. The clause in question certainly does not qualify any of these basic requirements."

6. It is thus clear that when clause 14 in question uses the word "may" in the manner as the parties have chosen to use in the said clause, certainly the parties have not subjected themselves to arbitration.

7. In the circumstances, I am certain that there is no arbitration agreement between the parties. Hence, the present proceedings would not be maintainable. They are accordingly dismissed. The parties are, however, permitted to take recourse to appropriate remedy as available in law. All contentions of the parties are expressly kept open. No costs.

[G.S. KULKARNI, J.]