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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMM. ARBITRATION APPLICATION NO. 186 OF 2025

Nisha Ajay Agrawl
R/at : Flat No. 1401, Plot No. 579,
Praman Splendour, Jame Jamshed Road,
Matunga (E), Mumbai – 400 019. ...Applicant

Versus

Big V Telecom Private Limited
A Company registered under the
Companies Act, 1956
having its registered office at
Plot No.62, K.B. Chambers, First Floor,
Canal Road, Gokulpeth,
Nagpur – 440 010. ...Respondent

Mr. Avinash Joshi *for the Applicant. .*

Mr. Sumit Khanna *a/w Mr. Anshuman Sambre i/b Mr. Onkar Wable for Respondent.*

CORAM : SOMASEKHAR SUNDARESAN, J.

DATE : JUNE 19, 2025

ORAL JUDGMENT :

Context and Background:

1. This Application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (***“the Act”***), seeking reference of disputes and differences between the parties pursuant to a Service Level Agreement dated February 2, 2021 (***“SLA”***) which purportedly contains an arbitration clause in Clause 3 (found at Page No.34 of the Application). The said provisions reads thus :

“This agreement shall always be subject to the exclusive jurisdiction of the Courts and arbitration situated at Mumbai”.

[Emphasis Supplied]

2. That such a clause would be controversial in nature for construing a binding commitment to arbitrate is writ large on the face of the clause. However, the matter does not rest there. On September 22, 2021, making a reference to this very same SLA the Applicant wrote to the Respondent stating, in fact, confirming, that the the parties had not provided for any arbitration clause although two clauses in the SLA referred to “arbitration”, and consequently, the Respondent was requested to consent to incorporate an explicit arbitration clause in the following terms :

“All disputes/differences relating to and/ or arising out of this Agreement and/or anything done in pursuance thereof shall be referred to a Sole arbitrator to be appointed by consonance of both the parties. The place of arbitration shall be at Mumbai and the arbitration proceedings shall be carried out in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (amended from time to time) and the decision of the sole arbitrator shall be binding on the Parties.”

[Emphasis Supplied]

3. In response to the said letter from the Applicant, by a letter dated September 24, 2021, the Respondent stated that the Respondent was in receipt of the aforesaid letter and was agreeable to the arbitration clause mentioned in the said letter as if it is a part of the SLA.

4. Consequently, I have no doubt in my mind that while the original version of the arbitration clause did not really emphatically indicate a commitment to proceed to arbitration, the aforesaid exchange of correspondence between September 22, 2021 and September 24, 2021 evidently led to the parties executing and confirming an arbitration agreement.

5. A bare reading of the Section 7 of the Act would show that one of the means of executing an arbitration agreement would be exchange of correspondence and therefore, the formal existence of an arbitration agreement is writ large on the face of the record.

Respondent's Objections:

6. However, Learned Counsel for the Respondent would object to there being a discernible arbitration agreement in existence. He would point to Exhibit "D" (Page No.38 of the Application), to state that it was the receipt of a letter from the Applicant indicating the suggestion of who should be appointed as a sole arbitrator that was being consented to. That such an exchange would not constitute an arbitration agreement, he would

submit, has already been held by a Learned Single Judge of this Court in an identically drafted agreement between the spouse of the Applicant and the same Respondent, as not constituting an arbitration agreement. It is submitted by the Respondent that there was another letter dated September 20, 2021 (i.e. prior to the exchange of correspondence by which the elaborate arbitration clause was confirmed) by which arbitration had already been invoked.

7. Consequently, he would submit that arbitration was invoked at a time when the proposed new arbitration agreement did not exist and only the clause in the SLA was in existence. That clause has already been held as not constituting an arbitration agreement, he would submit, rendering this Application meaningless and deserving of dismissal.

8. The view taken by the Learned Single Judge of this Court was subjected to a Review Petition, which was dismissed, and a Special Leave Petition seeking to challenge the said order is pending in the Supreme Court, which issued notice.

Analysis and Findings:

9. I have considered the contentions made on behalf of the Respondent. Even if one were to accept his submission for the sake of argument that the Applicant indeed wrote on September 20, 2021 proposing a name of an arbitrator, thereby invoking the purported

arbitration clause which has now been held by another Learned Single Judge of this Court as not constituting an arbitration clause, the needle would not turn in the Respondent's favour.

10. It cannot be forgotten that exactly two days after the invocation of arbitration, a detailed arbitration clause was set out in the letter dated September 22, 2021 as an offer by the Applicant to the Respondent. Acceptance of this offer was sent in writing by the Respondent by a letter dated September 24, 2021 stating that the arbitration clause mentioned in that letter in specific reference to the letter dated September 22, 2021 was being accepted as if it was part and parcel of the SLA. As stated earlier, in my view, this concluded the parties arriving at a binding arbitration agreement by exchange of correspondence.

11. Even assuming that the clause in the originally executed SLA did not constitute an arbitration clause at the time the letter invoking arbitration was issued (September 20, 2021), the exchange of correspondence between September 22, 2021 and September 24, 2021, unequivocally constitutes the existence of an arbitration agreement. Parties who do not have any arbitration agreement and are involved in court proceedings, too can execute a new arbitration agreement and proceed to arbitrate. In this case, contemporaneous to the events that developed, the parties actually exchanged correspondence to confirm that they would adopt the arbitration clause proposed on September 22, 2021.

12. Under Section 11(6A) of the Act, this Court can only look to the formally executed arbitration agreement being in existence. The scope of jurisdiction is confined to such examination of existence of an arbitration agreement. Having examined the material on record, I am satisfied that an arbitration agreement is in existence.

13. Now, one must turn to the precedent being cited in the form of a ruling in another proceedings between the spouse of the Applicant and the same Respondent.

14. A compilation of documents relied upon by the Applicant is marked "X" for identification and is taken on record. Essentially this compilation is to bring on record the developments in the other proceedings pursuant to which the Respondent contends the same clause and the same correspondence has been held as not constituting an arbitration agreement.

15. Having examined the record, I cannot agree with the Respondent. It is also seen from the decision of the Learned Single Judge of this Court dated March 3, 2023, and the decision dated August 14, 2024 in the Review Petition that there is no reference to exchange of the specific letters dated September 22, 2021 and September 24, 2021 that I have interpreted above.

16. The Learned Single Judge had been presented with another letter, also dated September 24, 2021, but responding to the earlier invocation letter dated September 20, 2021. The specific exchange of letters referred to above was not part of the record reviewed by the Learned Single Judge.

17. It is stated across the bar that letter (dated September 22, 2021) now annexed at Exhibit “C” to this Application, was sought to be introduced in the Review Petition, but the Court was not convinced that the view taken by the Court warranted a change.

18. When one reviews the first decision dated March 3, 2023 by the Learned Single Judge, there is no reference whatsoever to the letter dated September 22, 2021 containing the detailed arbitration clause that came to be accepted by the Respondent’s letter dated September 24, 2021. I have no doubt that if these two letters had been placed before the Learned Single Judge of this Court, the view would have been different. Since these two letters were not placed before the Learned Single Judge, and the first order dated March 3, 2023 was passed, that decision would not be a precedent for the analysis contained in this order. Although it is stated that the Review Petition sought to draw the attention of the Learned Single Judge to the aforesaid two letters, it is seen from the order dated August 14, 2024 that the letter dated September 22, 2021 was still nowhere considered. Therefore, I am not certain that the decision not to review creates any

precedent in the matter. In any case, I am informed that, the decisions of the Learned Single Judge have been carried to the Supreme Court and notice has been issued in the matter and the civil appeal is pending in the Supreme Court.

19. Consequently, regardless of the invocation being effected on September 20, 2021, by which time the clause that has been held as not being an arbitration agreement alone was in place, it is clear that two days later, a conventional arbitration clause was proposed and two days after that, it was accepted. This is nowhere analysed in the two decisions of the Learned Single Judge pressed into service. Those rulings would hold good for interpreting only the clause in the SLA that purported to be an arbitration clause. However, the lacuna in that clause was noticed and the parties replaced it with an exchange of correspondence.

20. Based on this replaced arbitration clause, an invocation notice dated September 4, 2024 is seen on the record. The reply to this invocation notice from the Respondent is essentially that the matter had already been adjudicated by the Learned Single Judge and has been set at rest. I am not satisfied that such an objection, which is now reiterated in arguments made today, is worthy of acceptance for the reasons already articulated above.

21. As a last roll of the dice, Learned Counsel for the Respondent makes a unique submission. He would contend that the reference to

“consent” in the letter dated September 24, 2021 from the Respondent accepting the arbitration clause proposed by the Applicant by his letter dated September 22, 2021 uses the phrase “equivocal consent”. The upshot of this argument is that the consent no consent at all since it was equivocal and not unequivocal.

22. To my mind, this is evidently a typographical mistake by persons engaged in commercial correspondence. Even in legal drafting, normal mistakes are made by not using the word “not” when the context indicates the diametrically opposite thinking. In any case, ours is a society that functions in English despite English not being the mother-tongue. One cannot place any value to the usage of the phrase “equivocal consent” when consenting to the arbitration clause proposed in the letter dated September 22, 2021. That apart, an overall reading of the letter dated September 24, 2021, leaves no scope at all for any other meaning of what was being consented to and how it was consented to.

23. For the reasons set out above, being satisfied about the existence of the arbitration agreement, this Application is *finally disposed of* in the following terms :

A] Justice (Retired) Shri. Anil Menon, a Former Judge of this Court is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties covered by this Application;

Address : Office 4 & 5, Yashwant Chambers, 3rd Floor,

18/B, Burjorji Bharucha Marg, Fort, Mumbai – 23.

B] A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocate for the Applicant within a period of one week from the date on which this order is uploaded on the website of this Court. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the Advocate for the Applicant so as to enable them to file the same in the Registry of this Court. The Registry of this Court shall retain the said Statement on the file of this Application and a copy of the same shall be furnished by the Advocate for the Applicant to the Respondent;

D] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

E] All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

24. Needless to say, nothing contained in this order is an expression of an opinion on merits of the matter or the relative strength of the parties. All issues on merits are expressly kept open to be agitated before the arbitral tribunal appointed hereby.

25. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]