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**IN THE HIGH COURT OF DELHI AT NEW DELHI**  
**CORAM: HON'BLE MS. JUSTICE MUKTA GUPTA**  
**ARB.P. 325/2022; March 25, 2022**  
**FOOMILL PVT. LTD. Versus AFFLE (INDIA) LTD.**

**Arbitration and Conciliation Act, 1996 - Mere use of word 'Arbitration' in the heading in the Clause of Agreement would not lead to the inference that there exists an agreement between such parties seeking resolution of disputes through arbitration. (Para 6)**

*Petitioner Represented by: Mr.Rajiv Kr.Choudhary, Advocate with Mr.Manash Barman, Advocate.*

*Respondent Represented by: Mr.Kapil Madan, Advocate with Ms.Ramya Verma, Advocate.*

**1.** By this petition, the petitioner seeks appointment of an Arbitrator for resolving the disputes in relation to the software development arising out of the agreement dated 29th July 2021 between the parties and costs.

**2.** According to the petitioner, the petitioner and the respondent entered into a Master Service Agreement on 29<sup>th</sup> July 2021. After the start of the project, the petitioner raised concerns due to the delay on the part of the respondent. On 3<sup>rd</sup> December 2021, the petitioner wrote an email to the respondent to resolve all differences amicably by dialogue. On 6<sup>th</sup> December 2021, the respondent informed the petitioner that there is an 'expectation mismatch' and therefore, the 'project is put on hold'. The respondent introduced a new person for communication with the petitioner and showed no intent of resolving the issues flagged by the petitioner. Hence, on 8<sup>th</sup> February 2022, the petitioner sent a legal notice to the respondent invoking arbitration. The respondent replied to the legal notice of the petitioner on 13th February 2022 stating that there was no arbitration agreement between the parties.

**3.** Clause 11 of the Master Service Agreement dated 29th July 2021 between the parties reads as under:-

*"11. Jurisdiction, Arbitration & Dispute Resolution*

*This Agreement and any dispute or claim relating to it, its enforceability or its termination shall be governed and interpreted according to the laws of India Subject to this Clause 11, the Courts at Delhi, shall have exclusive jurisdiction over any disputes under this Agreement"*

**4.** Clause 11 of the Agreement dated 29th July 2021 does not provide that the parties agreed to refer their disputes for resolution through arbitration though the heading of Clause 11 mentions the words 'Arbitration & Dispute Resolution'. On the basis of the heading of the Clause 11 noting the word 'Arbitration', the petitioner claims resolution of disputes arising between the parties through arbitration.

5. The issue whether the use of word 'Arbitration' in the heading of an Agreement would entail existence of an arbitration agreement was dealt by this Court in the decision reported as **(2014) 210 DLT 714 Avant Garde Clean Room & Engg. Solutions Pvt. Ltd. Vs. Ind Swift Limited**. This Court held:-

*"15. In Bernhard Consultancy Private Ltd. (supra), the term which was set up as an arbitration agreement contained in clause 14 read as follows:*

*"Arbitration - The parties agree that the jurisdiction in relation to all matters arising under and/or in any way connected with this MoU shall be subject to the jurisdiction of Courts at Hyderabad. Arbitration if any shall also be at Hyderabad. The parties have confined the jurisdiction to Hyderabad Courts also have jurisdiction in the matter, the parties hereto shall be prevented from moving a Court other than the Court at Hyderabad."*

16. The Chief Justice of the Andhra Pradesh High Court rejected the petition by observing as follows:

*"8. Although the heading of clause (14) aforementioned is "arbitration" the same is not an arbitration agreement within the meaning of the Act. It merely provides that the Courts at Hyderabad shall have jurisdiction to entertain any suit. It merely adds that arbitration if any shall also be at Hyderabad but by reason thereof only, it cannot be said that any arbitration agreement has been entered into which was enforceable in terms of Section 11 of the Act."*

17. In *Trimex International FZE Limited, Dubai (supra)*, though the respondent contended that the clause extracted above suffered from the vice of being unclear and ambiguous and, therefore, not capable of being enforced, the Supreme Court rejected the said submission by observing that it was clear that the intention of the parties was to arbitrate any dispute which arose in relation to the offer and acceptance. In this decision, one does not find any discussion of the applicable principles-as found in the other decisions cited by the respondent, which could apply for determination of the issue whether a clause in a contract tantamounts to an arbitration agreement, or not.

18. In the light of the aforesaid decisions relied upon by the parties, it appears to me that clause 11 contained in the work order dated 10.12.2013 does not tantamount to an arbitration agreement. The said clause merely uses "arbitration" in the heading of clause 11. However, the main body of the said clause completely contra-indicates the existence of any arbitration agreement since it provides that disputes, if any, arising out of the agreement "shall be subject to the exclusive jurisdiction of the courts in city of Delhi". In my view, the present is much a clearer case than even those considered by the Courts in *Wellington Associates Ltd. (supra)*, *Jagdish Chander (supra)*, *Sankar Sealing Systems Pvt. Ltd. (supra)* and *Bernhard Consultancy Private Limited (supra)*. In fact, like in *Bernhard Consultancy Private Limited (supra)*, the expression, "arbitration" has been used in the heading of the clause 11 in the present case. The expression "arbitration" or "arbitrator" has not been used at all in the main body of the clause. Clause 11 does not contain any term or condition to even remotely show that parties agreed to constitute a private tribunal to adjudicate their disputes under the agreement finally. In *Bernhard Consultancy Private Limited (supra)*, the clause, inter alia, provided arbitration, if any, shall also be at Hyderabad. Even this clause

was not accepted by the Court as a binding arbitration agreement on account of the use of the expression, “if any”.

19. In the present case, the mere use of the expression, “arbitration” in the heading of clause 11 would not militate against the substance of the said clause which, in unequivocal terms, states that disputes arising under the agreement shall be subject to the “exclusive jurisdiction of the courts.....”.

20. The Supreme Court rejected the argument that if the intention of the parties was not to refer their disputes to arbitration, there was no need to incorporate a clause which uses the expression, “arbitration” in *Jagdish Chander (supra)*. Even in that case, the main body of the clause provided that the disputes touching the partnership between the partners, in the alternative, “shall be referred for arbitration”. However, the said clause further provided, “if the parties so determined”. Therefore, the Supreme Court held that there was no binding agreement between the parties. The settled principle culled out by the Supreme Court in *Jagdish Chander (supra)* leave no doubt in my mind that the clause in question cannot be construed in arbitration agreement. The intention of the parties to enter into an arbitration agreement has to be gathered from the terms of the agreement. It cannot be said that the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication, and willingness to be bound by the decision of such tribunal. The words used in clause 11 in the present case do not disclose any obligation to go to arbitration. In fact, in the present case, the clause relating to settlement of disputes contains words which specifically excludes any of the attributes of an arbitration agreement, and contains words which detract from an arbitration agreement—since the clause provides that disputes arising in the agreement, “shall be subject to the exclusive jurisdiction of the courts in the city of Delhi.”

21. In *Jagdish Chander (supra)*, the Supreme Court has observed that mere use of the word, “arbitration” or “arbitrator” in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. Pertinently, in the present case, the main body of the clause does not even contemplate that the parties may agree to arbitration in future”.

6. In view of the decisions referred above, it is clear that mere use of the word ‘Arbitration’ in the heading in the Clause 11 of the Agreement between the parties in the present proceedings would not lead to the inference that there exists an agreement between the parties seeking resolution of disputes through arbitration.

7. Consequently, this Court finds no ground to appoint an Arbitrator to adjudicate the disputes between parties.

8. Petition is dismissed.