HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN IT'S COMMERCIAL DIVISION
COMMERCIAL ARBITRATION APPLICATION NO. 52 of 2022
WITH
COMMERCIAL ARBITRATION PETITION NO.323 of 2021

GTL Infrastructure Ltd .. Petitioner

Versus

Vodafone India Ltd (VIL) .. Respondent

…

Mr.Ashish Kamath with Akshay Puranik, Rucha Surve, Priyanka Palsodkar i/b Alathes Law LLP for the petitioner.
Mr.Zal Andhyarujina, Sr. Advocate with Karan Bhide with Pranay Kumar i/b Trilegal for respondent in both petitions.

CORAM: BHARATI DANGRE, J.
RESERVED ON : 21st NOVEMBER, 2022
PRONOUNCED ON : 2nd DECEMBER, 2022

JUDGMENT

1 The two proceedings are filed by the petitioner, one invoking Section 9 and another invoking Section 11 of the Arbitration and Conciliation Act, 1996.

The proceedings revolve around an agreement in form of "Master Services Agreement" as well as various

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addendum to the principal agreement and the cause for instituting the proceedings is the termination letter issued to the petitioner/applicant in terms of the agreement.

2 GTL Infrastructure Limited, a Company registered under the Companies Act, is *inter alia* engaged in the business of providing passive telecom infrastructure and related operations and maintenance services to various cellular operators on shared basis to various telecom service providers in India. It is also registered as an Infrastructure provider under the Infrastructure Provider Category (IP – 1) by the Department of Telecommunications, New Delhi. In the pursuit of it's business, the petitioner owns, develops, operates and maintains Telecom towers which include Ground Based Towers (GBT) and Roof Top Towers (RTT) and while operating and maintaining the said towers, it incurs costs of energy charges, capital expenditure etc.

3 The respondent is also a Company engaged in the business of Providing Pan India voice and Data Services across 2G, 3G and 4G platform and is listed on National Stock Exchange (NSE) and Bombay Stock Exchange (BSE) in Mumbai.

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The interface between the two Companies occasioned when the petitioner and the predecessor of the respondent i.e. Vodafone Essar Ltd (VEL) and other subsidiary entities belonging ot the Vodafone Group entered into Master Service Agreement dated 15/11/2007, to the effect that the petitioner shall provide Passive Telecom Infrastructure, so as to enable the respondent to instal it's telecom equipment on such site(s), on such terms and conditions, as stipulated therein. The Master Agreement dated 15/11/2007 was duly amended through various addendum, a reference to which is extensively made in the petition filed u/s.9 of the Act.

4 Commercial Arbitration Petition No.52/2022 deals with the disputes that arose under the Master Service Agreement between the parties, alleging that it stems from the breaches of the conditions provided therein, though not limited to non-payment of certain contractual dues by the respondent to the petitioner, particularly contemplated under the notice of invocation of arbitration and the amount which is alleged to be involved in the dispute, is estimated to Rs.116,51,695/-, on account of the penalty

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for terminated sites and operational outstanding dues.

I need not venture deep into the merit of the dispute at this stage, while dealing with the Application u/s.11 being Arbitration Petition No.323/2021, where a relief is sought to appoint a sole arbitrator to adjudicate the dispute between the parties arising out of the principal agreement and the addendum thereto, since before exercising the said power under sub-section(6) of Section 11, the limited scope which is available, is to ascertain whether there exists an "Arbitration Agreement", as the respective counsel representing the parties are at loggerhead, whether the dispute resolution clause in the agreements would make the reference to the Arbirator, imperative.

5 Heard learned counsel Mr.Kamath for the petitioner, who would justify invocation of Arbitration in the backdrop of an existing arbitration clause in the agreement executed between the parties and Mr.Kamat would submit that the Courts will always lend in favour of existence of an arbitration agreement. He would further submit that when the petitioner asserted the existence of

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an arbitration agreement, there was no denial and by inviting my attention to the response to the invocation notice by the petitioner, the submission advanced is there is a reference to a pre-arbitral arrangement, pre-supposing that an arbitration agreement exist and that was so perceived by the parties. The submission is, the conduct of the parties is relevant and ultimately if the parties have understood a particular clause, to be an arbitration clause, it is not open for the Court to unravell the understanding.

By referring to the distinct clauses in the agreement, Mr.Kamat would submit that any dispute/disagreement or controversy arising between the parties out of the agreement, as contemplated, is to be resolved by co-ordination committee or through mediation, but if it could not be so resolved, then the matter may be referred by mutual agreement amongst the parties for 'Arbitration' to be conducted in accordance with the Arbitration and Conciliation Act, 1996. Stressing upon the binding nature and it's conclusiveness as contemplated in the dispute resolution clause, according to him, is indicative of the parties concurring for arbitration, if the mechanism of resolving

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the disputes either through the Co-ordination Committee or through the process of mediation, fail. Mr.Kamat would urge to construe the word "may" used in the clause, restricted to the available option of mediation or arbitration, but according to him, reference to arbitration proceedings is imperative.

Mr.Kamat would submit that when the service of the petitioner was terminated by the respondents on 31/8/2018, by making reference to the Master Service Agreement as well as the Operation and Maintenance agreement, the petitioner has invoked arbitration for payment of it's outstanding dues in adherence to the Master Service Agreement and despite this, when the dues to the tune of INR 166,88,50,876/- (Rupees One hundred Sixty Six Crores, eighty eight lakhs, fifty thousand, eight hundred and Seventy Six only) were not paid, the petitioner invoked arbitration and suggested the name of the sole arbitrator from their side and requested the respondent to appoint their arbitrator, so that jointly they can nominate a presiding arbitrator to constitute the Arbitral Tribunal.

6 Mr.Kamat would emphasize on the reply received to

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the invocation notice through the counsel of the respondent and he rely upon two paragraphs to submit that even the respondent construed the clause to be an arbitration clause. The following assertion in para 5 and 6 of the reply to the notice of the petitioner, read as under :-

> "5 In this regard, we state that the present attempt by GIL to invoke arbitration through the Notice, is in explicit contravention to the dispute resolution mechanism as was decided by the parties at the time of entering into the MSA. Further, as has been held by the Hon'ble Supreme Court and the various High Courts of India on various occasions, pre-arbitral steps as decided by the parties at the time of entering into an arbitration agreement, are mandatory in nature for invocation of a valid arbitration and have to be necessarily complied with.
> 6. Further, the mandatory nature of the pre-arbitral steps under Clause 15.1 is also substantiated by Clause 15.2 of the MSA, which categorically sets out the framework for '*costs*' of such '*mediation*' as well as '*arbitration*'.

7 In wake of the above, Mr.Kamat would urge that the reply so worded, shed light on the use of the phrase "may" in the clause pertaining to dispute resolution and he wold submit that the scope of the term is restricted only on exhausting remedy by

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mediation' and do not leave recourse to arbitration optional.

By relying upon the decision of Apex Court in case of *International Hotels Group (India) P Ltd vs. Waterline Hotels Pvt.Ltd, 2022 7 SCC 662,* the learned counsel would submit that the scope available to the Court at pre-appointment stage under Section 8 and 11 of the Arbitration and Conciliation Act, is very limited, being to take 'prima facie' view on issues of arbitrability/validity, as the issue of arbitrability is a matter to be adjudicated upon by the Arbitrators, with the only narrow exception carved out, being to cut the "deadwood". He would also emphatically rely upon the principle that has emerged in arbitration proceedings with the passage of time being, "when in doubt, do refer".

Apart from this, Mr.Kamat would also make a reference to two other decisions in order to deal with the objection raised by the learned counsel Mr.Zal Andhyarujina objecting to the composite reference being made and no recourse being taken to mediation proceedings being in case of *Visa International Limited Vs. Continental Resources (USA) Limited,*

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(2009) 2 SCC 55 and *Duro Felguera S.A Vs. Gangavaram Port Limited (2017) 9 SCC 729.*

8 Opposing the submission of the learned counsel Mr.Kamat and in particular about the existence of an arbitration clause in the agreement, Sr. counsel Mr.Zal Andhyarujina would submit that the clause involved, when carefully read, would make it evident that arbitration is an optional mode, as the word used 'may' indicate. He would submit that the parties always understood the availability of the option of arbitration as one of the modes for settlement of the dispute, provided there is mutual agreement for being referred to arbitrator, upon the attempts to settle the discord through mediation or co-ordination committee, having resulted into a failure.

He has also raised a serious objection about not taking recourse to the process of settlement stipulated in the clause and directly invoking arbitration, as if it was the mandate. Apart from this, he would seriously contest the invocation as attempted by the petitioner, by grouping the arbitration clauses in distinct agreements.

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9 Mr.Zal Andhyarujina would invoke the principle set out in authoritative pronouncement of the Apex Court in case of *Jagdish Chander vs. Ramesh Chander and ors, (2007) 5 SCC 719*, where it was held that the clause providing that in the event of disputes, the same "shall be refereed for arbitration if the parties so determined" as not amounting an arbitration agreement, but as a provision which enabled arbitration, only if the parties mutually decide so, after due consideration whether the dispute should be referred for arbitration or not.

He would also rely upon the decision of the Apex Court in case of *Wellington Associates vs. Kirit Mehta, (2000) 4 SCC 272*, and also the following decisions of the Bombay High Court and two decisions of the Delhi High Court:-

> (i) Quick Heal Technologies Ltd. vs. NCS Computech Pvt.Ltd & Anr, 2020 SCC Online Bom 687.
>
> (ii) Derivados Consulting Pvt.Ltd vs. Pramara Promotions Pvt.Ltd, Order dated 8th June, 2022 of the Hon'ble Bombay High Court in Arbitration Application No.4 of 2022.
>
> (iii) Linda Heavy Truck Division Ltd vs. Container Corporation of India Ltd and Anr, 2012 SCC Online Del

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(iv) Avant Garde Clean Room & Engg Solutions Pvt.Ltd vs. Ind.Swift Limited, 2014 SCC Online Del 3219.

9 With the able assistance of the respective counsel, I have perused the copy of the Petitions/Applications along with it's annexures.

The jurisdiction of the Arbitral Tribunal undisputedly emanates from the agreement between the parties. Therefore, existence of a agreement between the parties is a *sine qua non* for reference of the dispute amongst them for arbitration. Section 7 of the Arbitration Act prescribe, what would amount to an arbitration agreement and it reads thus :

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in —

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(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

10 True it is, that existence of valid arbitration agreement should be determined from the facts and circumstances of a case, including the intention of the parties gathered from the correspondence exchanged between them, the surrounding circumstances and conduct of the parties. The Act do not contemplate, the Arbitration Agreement being in any particular form, and use or absence of word "Arbitration/Arbitrators", is immaterial, when intention of the parties , to seek arbitration, in case of any future disputes, is plain and clear, then, artistic drafting of arbitration clause cannot be taken advantage of by any party. The intention of the parties expressing consensual acceptance to refer disputes to arbitrator, is

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mandatory and the existence of an arbitration agreement, to confer jurisdiction upon the Arbitrator to hear and decide the dispute, is imperative. When there is no such agreement, there is no jurisdiction in the Arbitrator.

In other words, parties must have consented for being referred for arbitration, as against the disputes and differences that have arisen between them in unequivocal terms and it is imperative that they do not leave any scope to depart from the arrangement that is worked out amongst themselves and make it a imperative mandate.

11 The aforesaid principle of law, is reiterated by the Hon'ble Apex court, in case of Babanrao Rajaram Pund Vs. Samarth Builders and Developers & Anr (2022) 9 SCC 691, by highlighting the essential elements of an arbitration clause in the following words

> 18. Encon Builders (supra) placed reliance on K.K. Modi's case and further condensed the essential features of an arbitration agreement into four elements i.e.:
>
> "13.The essential elements of an arbitration agreement are as follows: (1) There must be a present or a future difference in connection with some contemplated affair. (2) There must be

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the intention of the parties to settle such difference by a private tribunal. (3) The parties must agree in writing to be bound by the decision of such tribunal.
(4) The parties must be ad idem.

25 Even if we were to assume that the subjectclause lacks certain essential characteristics of arbitration like "final and binding" nature of the award, the parties have evinced clear intention to refer the dispute to arbitration and abide by the decision of the tribunal. The party autonomy to this effect, therefore, deserves to be protected.

26 The deficiency of words in agreement which otherwise fortifies the intention of the parties to arbitrate their disputes, cannot legitimise the annulment of arbitration clause. A three Judge Bench of this Court in Enercon (India) Ltd. and Ors. v. Enercon Gmbh and Anr. dealt with an arbitration clause that did not provide for a method of electing the third arbitrator. The court held that "the omission is so obvious that the court can legitimately supply the missing line." The line "the two arbitrators appointed by the parties shall appoint the third arbitrator" was read into the clause so as to give effect to it. It was further held that:

> "88. In our opinion, the courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. Therefore, when faced with a seemingly unworkable arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. In other words, a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate. In such a case, the court ought to adopt the attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may be peculiar to the business venture. The arbitration clause cannot be construed with a purely legalistic mindset, as if one is

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construing a provision in a statute…."

12 It is thus imperative upon the Courts while exercising the power u/s.11 of the Arbitration Act, to give greater importance to the substance of a clause, predicated upon the evident intention of the parties, to choose a specific form of dispute resolution to manage the conflict between them. The intention of the parties that flows from the substance of the agreement to resolve their dispute by arbitration, must gain due weightage.

Whether there exists an arbitration agreement or not, has to be decided with reference to the contract document and not by making reference to any contention raised before the Court of Law after the dispute has arisen. Unless the wording of a clause contained, in an agreement between the parties, unambiguously indicate the intention and agreement, of both the parties, enforceable in law, to refer disputes to adjudication of the arbitrator, the clause cannot be construed as 'arbitration clause', necessitating a reference to arbitration.

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13 In the light of the aforesaid legal scenario holding the field, I must reproduce the respective clauses in the two distinct agreements, projected by Mr. Kamat as 'Arbitration Clause' necessitating a reference to the Arbitrator.

In Commercial Arbitration Application No.52/2022, the Master Services Agreement comprise the following clause for dispute resolution

> **DISPUTE RESOLUTION :** Except as provided otherwise in this Agreement, any dispute, disagreement or controversy between the parties arising out of this Agreement and/or Service Order or breach thereof shall be resolved by the Coordination Committee and if the same is not resolved within 30 days, then the matter may, if mutually agreed upon by the parties, be submitted for arbitration in accordance with the Arbitration and Conciliation Act, 1996 before an arbitral panel comprising three arbitrators, one arbitrator appointed by each of the Parties and the third arbitrators appointed by two arbitrators so appointed by the Parties. The venue of arbitration shall be Mumbai, India. The decision of such arbitration shall be binding and conclusive upon the Parties. The Courts in Mumbai only shall have jurisdiction".

In Commercial Arbitration Application No.323/2022, the clause for Dispute Resolution in form of para 15.1 reads thus :-

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> "General : Except as provided otherwise in this Agreement, any controversy between the parties arising out of this Agreement and/or Service Order or breach thereof, is subject to a mediation process as evolved by the parties. If not resolved by mediation, then the matter may, if mutually agreed upon by the parties, be submitted for arbitration in accordance with the Arbitration and Conciliation Act, 1996 before an arbitral panel comprising three arbitrators, one arbitrator appointed by each of the Parties and the third arbitrators appointed by two arbitrators so appointed by the Parties. The venue of arbitration shall be Mumbai"

14 From bare reading of the aforesaid clauses, without looking into any surrounding circumstances, one can discern that any dispute, disagreement or controversy between the parties arising out of the agreement, shall be resolved by the Coordination Committee/Mediation Process evolved by the parties. If the same could not be resolved by the mode prescribed, then, the matter may be, if mutually agreed upon by the parties be submitted for arbitration, in accordance with the Arbitration and Conciliation Act, 1996 before an Arbitral Panel comprising of three arbitrators.

The Dispute Resolution clause, before making reference to Arbitration has spelt out an alternative mode for

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Dispute Resolution and this is made imperative by use of the word "shall", but if the parties are unable to resolve their dispute/disagreement through this alternative mode, then the process for arbitration ticks in. The question for consideration is, whether it is mandatory for the parties to be referred for arbitration, particularly when the words applied in the clause are "then the matter may". There is another rider, which can be apparently noticed in referring the parties for arbitration, being "if mutually agreed upon by the parties". The use of the word "may" and "mutual agreement between the parties" for being submitted for arbitration are the two salient features of the respective clauses, found in the agreement entered between the parties, which according to Mr.Kamat, amount to an arbitration clause and according to Mr. Andhyarujina, fall short of being construed as 'Arbitration Clause'.

15 Despite the binding nature and conclusiveness being conferred upon the decision of the Arbitrator being contemplated, the question that arises for consideration is whether the aforesaid clauses can be construed as amounting to

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'arbitration clause' in the agreement.

16 In *Jagdish Chander Vs. Ramesh Chander & ors, (2007) 5 SCC 719,* the Apex Court was confronted with a clause which read thus :

> "(16) If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine".

The question that arose for consideration, was whether the above clause is an 'Arbitration Agreement', within the meaning of Section 7 of the Act.

By reproducing the well settled principle on the attributes or essential elements of arbitration agreement, the Apex Court held as under :-

> 9. Para 16 of the Partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been an arbitration agreement. But the use of the words "shall be referred for arbitration if the parties so determine" completely changes the complexion of the provision. The expression "determine" indicates that the parties are required to reach

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a decision by application of mind. Therefore, when clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration is missing in clause 16 relating to settlement of disputes. Therefore it is not an arbitration agreement, as defined under Section 7 of the Act. In the absence of an arbitration agreement, the question of exercising power under Section 11 of the Act to appoint an Arbitrator does not arise.

17 In a subsequent decision in case of *Wellington Associates Ltd vs. Kirit Mehta (2000) 4 SCC 272*, where the Arbitration Clause was worded as under :-

> "It is also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1947, by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire."

The Apex Court decided in the following manner :-

> "21 Does clause 5 amount to an arbitration clause as defined in section 2(b) read with section 7? I may here state that in most arbitration clauses, the words normally used are that "disputes shall be referred to arbitration". But in the case before me, the words used are `may be referred'.

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> 22 It is contended for the petitioner that the word 'may' in clause 5 has to be construed as `shall'. According to the petitioner's counsel, that is the true intention of the parties. The question then is as to what is the intention of the parties? The parties, in my view, used the words `may' not without reason. If one looks at the fact that clause 4 precedes clause 5, one can see that under clause 4 parties desired that in case of disputes, the Civil Courts at Bombay are to be approached by way of a suit. Then follows clause 5 with the words `it is also agreed' that the dispute 'may' be referred to arbitration implying that parties need not necessarily go to the Civil Court by way of suit but can also go before an arbitrator. Thus, clause 5 is merely an enabling provision as contended by the respondents. I may also state that in cases where there is a sole arbitration clause couched in mandatory language, it is not preceded by a clause like clause 4 which discloses a general intention of the parties to go before a Civil Court by way of suit. Thus, reading clause 4 and clause 5 together, I am of the view that it is not the intention of the parties that arbitration is to be the sole remedy. It appears that the parties agreed that they can "also" go to arbitration also in case the aggrieved party does not wish to go to a Civil Court by way of a suit. But in that event, obviously, fresh consent to go to arbitration is necessary. Further, in the present case, the same clause 5, so far as the Venue of arbitration is concerned, uses word 'shall'. The parties, in my view, must be deemed to have used the words `may' and `shall' at different places, after due deliberation.

18 While construing the word ‘may’, the Apex Court further clarified as under :-

> 24 Before leaving the above case decided by the from Rajasthan High Court, one other aspect has to be

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referred to. In the above case, the decision of the Calcutta High Court in Jyoti_Brothers vs. Shree Durga Mining Co. [AIR 1956 Cal. 280] has also been referred to. In the Calcutta case, the clause used the words "can" be settled by arbitration and it was held that fresh consent of parties was necessary. Here one other class of cases was differentiated by the Calcutta High Court. It was pointed out that in some cases, the word `may' was used in the context of giving choice to one of the parties to go to arbitration. But, at the same time, the clause would require that once the option was so exercised by the specific party, the matter was to be mandatorily referred to arbitration. Those cases were distinguished in the Calcutta case on the ground that such cases where option was given to one particular party, the mandatory part of the clause stated as to what should be done after one party exercised the option. Reference to arbitration was mandatory, once option was exercised. In England too such a view was expressed in Pittalis and Sherefettin [1986 (1) QB 868]. In the present case, we are not concerned with a clause which used the word `may' while giving option to one party to go to arbitration. Therefore, I am not concerned with a situation where option is given to one party to seek arbitration. I am, therefore, not to be understood as deciding any principle in regard to such cases.

19 The learned Single Judge of this Court in *Quick Heal Technologies Ltd. vs. NCS Computech Pvt.Ltd & Anr, 2020 SCC Online Bom 687,* was confronted with a similar clause and rather close to the clause which I am required to construe as an Arbitration clause which was worded as under :-

"17(a) All disputes under this Agreement shall be amicably discussed for resolution by the designated

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> personnel of each party, and if such dispute/s cannot be resolved within 30 days, the same may be referred to arbitration"

20 By relying upon Jagdish Chander Vs. Ramesh Chander (supra), which had analyzed the effect of use of the word 'may' or 'shall' , it was held as under :-

> "A reading of Clause 17 of the said Agreement shows that unlike the pre- existing agreement between the parties in the case of Zhejiang Bonly Elevator Guide Rail Manufacture Company Limited (supra) and Indel Technical Services (P) Ltd. (supra), in the instant case there is no pre-existing agreement between the parties that they "should" or they "will" refer their disputes to arbitration or to the Court. In other words, the parties have at no stage agreed to an option of referring their disputes under the said Agreement to arbitration or to the Court. Instead, it is clear beyond any doubt that Clause 17 of the Agreement is a Clause which is drafted with proper application of mind. Under sub-clause (a) of Clause 17, the parties have first agreed that all disputes under the Agreement "shall" be amicably discussed for resolution by the designated personnel of each party, thereby making it mandatory to refer all disputes to designated personnel for resolution/settlement by amicable discussion. It is thereafter agreed in Sub-Clause (a) of Clause 17 itself, that if such dispute/s cannot be resolved by the designated personnel within 30 days, the same "may" be referred to Arbitration, thereby clearly making it optional to refer the disputes to Arbitration, in contrast to the earlier mandatory agreement to refer the disputes for amicable settlement to the designated personnel of each party. Again it is made clear in Sub-Clause (a) of Clause 17 that the parties may refer their disputes to Arbitration as stated below i.e. as stated in

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Sub-Clause (b) of Clause 17, meaning thereby that if the parties agree to refer their disputes to Arbitration, such Arbitration shall be as stated in sub-clause (b) of Clause 17, i.e. upon such agreement between the parties, the disputes under the said Agreement shall be referred to arbitration as per the Arbitration and Conciliation Act, 1996, as amended from time to time; the place of arbitration shall be at Pune and the language shall be English. The Arbitral Tribunal shall comprise of one Arbitrator mutually appointed by the parties, failing which there shall be three Arbitrators, one appointed by each of the parties and the third Arbitrator to be appointed by the two Arbitrators. Therefore, the words 'shall' and 'may' used in sub- clauses (a) and (b) of Clause 17 are used after proper application of mind and the same cannot be read otherwise. In fact, sub-clause (c) of Clause 17 reads thus :

> c. Subject to the provisions of this Clause, the Courts in Pune, India, shall have exclusive jurisdiction and the parties may pursue any remedy available to them at law or equity."

Clause (c) therefore further makes it clear that if the disputes are not settled within 30 days by the designated personnel, the parties will have an option to refer the same to Arbitration ; if the parties agree to refer their disputes to Arbitration, the same shall be referred to Arbitration as per the Arbitration and Conciliation Act, 1996, as amended from time to time, as set out in Sub-Clause (b) of Clause 17 ; and if the parties decide not to exercise the option of Arbitration, the Courts in Pune, India, shall have the exclusive jurisdiction to enable the parties to pursue any remedy available to them at law or equity.

21 I need not multiply the authorities wherein the

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intention of the parties have clearly guided the Courts to construe a particular clause in an agreement to be not an imperative mandate, if it do not conform the essential attributes of an Arbitration Agreement under Section 2(b) and Section 7 of the Act. Ultimately, the position of law which could be discerned from the authoritative pronouncements, is that the word 'may' however conclusive and mandatory affirmation between the parties to be certain, to refer to disputes to arbitration and the very use of the word 'may' by the parties does not bring about an arbitration agreement, but it contemplate a future possibility, which would encompass a choice or discretion available to the parties. It thus provides an option whether to agree for resolution of dispute through arbitration or not, removing the element of compulsion for being referred for arbitration. This would necessarily contemplate future consent, for being referred for arbitration. Since the intention of the parties to enter into an arbitration agreement has to be gathered from the terms of the agreement and though Mr.Kamath has submitted that by the reply to the notice of invocation of arbitration by the respondent,

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they have indicated that the parties are referrable for arbitration, I am unable to pursuade myself to accept the said argument. If the terms of the agreement clearly indicate an intention on part of the parties, the material in form of the correspondence exchanged, shall not overrule or surpass the intention. Where there is a possibility of the parties agreeing to arbitration in future as contrasting from an application to refer disputes to arbitration, there can be no valid and binding arbitration agreement. It is only when there is a specific and direct expression of intent to have the disputes settled by arbitration, it may not be necessary to set out the atributes of an arbitration agreement to make it so, but where the clause relating to settlement of disputes, contain words which specifically exclude any of the attributes of an arbitration agreement, it will not be amounting so. The correspondence exchanged between the parties or any contention raised before the Court of Law, after the dispute has arisen is of no consequence if the clause in the agreement entered between the parties indicate otherwise.

Though Mr.Kamath has also made a feeble attempt to

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distinguish the judgment in case of Quick Heal Technologies Ltd, by submitting that at the relevant point of time, the decision in case of *Vidya Drolia Vs Durga Trading Corporation*, (Supra), was not available, which has propounded a principle, "when in doubt, do refer". I do not think that the principle laid down by the learned Single Judge in Quick Heal Technologies (supra) is in any way impacted. Apart from this, merely because there was no correspondence between the parties, is also not a ground to distinguish the said judgment, as ultimately what is to be looked into, is the wording of a clause in an agreement, though it is permissible to look into the correspondence exchanged between the parties, to ascertain whether there exists an arbitration agreement.

22 Reading of the clauses in the two agreements which are subject matter of consideration before me, the use of the word "may be referred", perforce me to arrive at a conclusion that the relevant clause for dispute resolution is not a firm or mandatory arbitration clause and in fact, it postulates a fresh consensus between the parties, when an option become available to them,

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to be referred for arbitration. The mandatory nature of it gets ripped off, once the option is available to one particular party, and consciously not to be referred for arbitration. The parties have carefully used the term "Shall" and "May", which indicate their clear intentions and I must honour it.

Since I am convinced that the relevant clause in the master Service Agreement in the two applications, do not amount to an "arbitration clause", I need not go into the further objections raised by Mr.Andhyarujina, as regards whether the invocation of arbitration is properly done, by a composite reference and whether it was necessary for the parties to mandatorily resort themselves to the alternative mechanism of mediation or being referred to the Coordination Committee, as a precondition before they invoke arbitration. I do not deem it necessary to deal wit the submissions advanced by the parties on the said aspect.

23 Recording that there is no valid arbitration agreement between the parties, for initiation arbitration process, the relief claimed for appointment of arbitrator in the light of the respective clauses in the agreement is declined. Similarly no relief can be

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granted in favour of the petitioner in a petition filed under section 9 of Act.

Both the proceedings, Arbitration Petition and Arbitration Application are dismissed

(SMT. BHARATI DANGRE, J.)

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