



Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
ARBITRATION PETITION (L) NO. 6804 OF 2020**

Viren Umedial Mehta ...Petitioner  
*Versus*  
Royal Food & Hospitality & Ors ...Respondents

**Mr Bipin Joshi, for the Petitioner.**  
**Mr Pradeep Thorat, for the Respondent.**

**CORAM: G.S. PATEL, J**  
**(Through Video Conference)**  
**DATED: 4th December 2020**

**PC:-**

1. Heard through video conferencing.
2. The petition is under Section 9 of the Arbitration and Conciliation Act 1996 for reliefs pending arbitration. According to Mr Joshi for the Petitioner, between the parties there was an arbitration agreement. There is no doubt that the parties entered into a Leave and Licence agreement dated 19th June 2018 as also a Service Agreement of the same date. My attention is drawn to clause 34 of the Leave and Licence agreement at page 35. This is how it reads:

**“34 Arbitration & Jurisdiction:** This agreement shall be deemed to have been made / executed at Mumbai for all purposes. In the event of any dispute related to the

interpretation and/or rights or liabilities arising out of this agreement, the same shall, at first instance be amicably settled between the parties.”

3. The next clause deals with governing law. It specifically invokes the provisions of the Maharashtra Rent Control Act 1999.

4. Mr Thorat for the Respondent argues that even though this may be a Section 9 Petition, unless it is shown that there exists an arbitration agreement, no relief under Section 9 can be granted. A Section 9 relief is a step in aid of arbitration and pre-supposes the existence of a valid arbitration agreement — if there be no arbitration agreement at clause, no question arises of Section 9 relief ‘pending’ arbitration or ‘before arbitration’. Mr Thorat submits that except for the word ‘Arbitration’ in the caption of Clause 34, there is nothing in the substantive part of that clause that even remotely connotes a reference to arbitration.

5. Mr Joshi invites reference to the pre-litigation correspondence between the parties, and, specifically, a 1st October 2020 letter from the Respondent’s attorneys to the Petitioner’s attorneys at Exhibit ‘L’, at page 85. In paragraph 18, the Respondent’s attorneys stated that their clients reserved ‘their right to refer the dispute to arbitration in accordance with the terms of the Arbitration and Conciliation Act 1996’.

6. Mr Joshi submits that this, read with Clause 34, makes it clear that the parties had agreed that their disputes would be referred to arbitration. The exact wording of clause 34 is immaterial, in his

submission. He relies on a decision of the Supreme Court in *Trimex International Fze Ltd Dubai v Vedanta Aluminium Ltd*.<sup>1</sup> His submission is that before the Supreme Court a similar argument was taken that there was no arbitration agreement and the relevant clause 6 in that litigation was vague and ambiguous. The Supreme Court was asked to consider from the material before it whether there was a valid arbitration agreement (SCC report paragraph 44). Clause 6 only said that the contract was ‘governed by Indian Law and arbitration in Indian Courts’.

7. According to Mr Joshi, the Supreme Court clearly held that an inference can — and must — be drawn that the parties intended to refer their disputes to arbitration. This is displaced only by a contrary inference that the parties intended to be bound only by a formal agreement. The Supreme Court held on the basis of a long chain of documents that what had passed between the parties was a concluded contract. It then made reference to Section 7 of the Arbitration and Conciliation Act 1996 to say that that the existence of an arbitration agreement can be inferred from a documents signed by the parties. On this basis the Supreme Court in *Trimex International* held there to be a valid arbitration agreement.

8. Now Section 7 of the Arbitration and Conciliation Act 1996 reads thus:

**“7. Arbitration agreement.**—(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

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1 (2010) 3 SCC 1.

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—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means 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.

9. There is no doubt that Section 7 explicitly recognizes that an arbitration agreement may be contained in an exchange of letters, telexes, telegrams or other modes of telecommunication. Mr Joshi uses this to submit that the Respondent's reference to arbitration, reserving their right to have disputes settled by arbitration, indicates the existence or pre-existence of an arbitration agreement between the parties.

10. Mr Joshi then relies on another decision of the Supreme Court in *Mahanagar Telephone Nigam Ltd v Canara Bank & Ors*<sup>2</sup> for the same proposition. There can be no quarrel with these propositions.

11. Neither of these decisions is at variance with the earlier decision of the Supreme Court in *Jagdish Chander v Ramesh Chander & Ors*<sup>3</sup> and which I had occasion to deal with just a few days ago.<sup>4</sup> In that judgment, the Supreme Court laid down the parameters and ingredients that are required to be satisfied under Section 7. In paragraph 8(ii), the Supreme Court held that the absence of words like 'arbitration' and 'arbitral tribunal' or 'arbitrator' are not determinative. An arbitration agreement may well be valid even without such wording. It must, however, have the element and attributes of a valid arbitration agreement. The four essentials are, the Supreme Court said, that: (a) the agreement must be in writing; (b) The parties must have agreed to refer any present or future disputes to the decision of a private tribunal; (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving the parties due opportunity to put forth their respective cases; (d) the parties should have agreed that the decision of the private tribunal in respect of the disputes will bind them.

12. It is clear that all four of these must be completely satisfied. In paragraph 9 the Supreme Court went on to hold that the essential

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2 (2019) SCC OnLine 995.

3 (2007) 5 SCC 719.

4 *Dhargalkar Technoosis (I) Pvt Ltd v Mumbai Metropolitan Regional Development Authority*, Arbitration Petition (L) No. 55 of 2020, decided on 3rd December 2020.

requirement of a valid arbitration agreement is that there must be a demonstrated consensus ad idem between the parties.

13. With this as the settled position in law, then what remain to be seen whether on the basis of Clause 34 as I have extracted it above, read with the sentence in the letter dated 1st October 2020, it can be unequivocally held that there exists an arbitration agreement. Mr Thorat may be correct in saying that merely 'reserving' a right to refer the disputes to arbitration does not in itself indicate the existence of an arbitration agreement. For instance, parties may well, in a regular civil proceeding, arrive at a separate agreement to refer their disputes to arbitration. At best, this 'reservation' indicates that the Respondents *may* consent to such a course of action. Notably, as he points out, paragraph 18 of the Respondent's Advocate's letter dated 1st October 2020 does not make any reference to an arbitration clause as between the parties.

14. This, I think, is pivotal. An arbitration agreement cannot, *Jagdish Chander* tells us, be an option at the discretion of one or the other party. A valid arbitration agreement demonstrating consensus necessarily has to say that the parties *shall* refer any disputes to arbitration. Indeed, this was precisely the issue in *Jagdish Chander*, where the clause in question said (see paragraph 2) that any disputes were to be '*mutually decided by the partners or shall be referred for arbitration if the parties so determine.*' There was, the Supreme Court held, no demonstrated consensus ad idem of the parties that their disputes *had to be* referred to arbitration. Therefore, Mr Thorat's submission as regards the statement in correspondence is correct.

Reserving one's right to arbitrate under the Act is not an unequivocal commitment to arbitration, nor does it demonstrate the existence of an arbitration agreement.

15. I am unable to accept Mr Joshi's submission that from this one circumstance alone, viz., this line in the Respondent's Advocate's letter, I must necessarily infer the existence of a proper, valid and subsisting arbitration agreement.

16. I am not addressing the other questions raised by Mr Thorat, one of jurisdiction. In any proceeding, whether before this Court or before an Arbitral Tribunal, Mr Thorat states that he proposes to take up the plea of an ouster of jurisdiction since there is clearly a reference to the Maharashtra Rent Control Act 1999. The issue, he submits, is fully covered by the Full Bench decision of this Court in *Central Warehousing Corporation v Fortpoint Automotive (P) Ltd.*<sup>5</sup> The Court held that an arbitration agreement, the exclusive jurisdiction of the Small Causes Court is not ousted. Therefore, even if there is an arbitration agreement, which he denies, only the Small Causes Court has jurisdiction to try it. There can be no arbitration. Consequently, the Section 9 petition itself is not maintainable and will not lie. I express no opinion on that aspect of the matter. I am not required to, and would have had to do so only if the existence of an arbitration agreement was shown to begin with. If there is no arbitration agreement, no question arises of addressing the jurisdictional issue.

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<sup>5</sup> 2009 SCC OnLine Bom 2023 : (2010) 1 Bom CR 560 (FB) : (2010) 1 Mah LJ 658 (FB).

17. There being no arbitration agreement, no relief is possible under Section 9.

18. The Petition is dismissed. No costs.

19. All observations in this order are for the purposes of the Section 9 Petition alone.

20. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production of a digitally signed copy of this order.

**(G. S. PATEL, J)**