ORDER O-8

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

AP/15/2022
SUNIL KUMAR SAMANTA
VS.
SMT. SIKHA MONDAL

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 7th April, 2025.

Appearance:

Ms. Mayuri Ghosh, Adv.
Ms. Somali Bhattacharya, Adv.
Ms. Megha Das, Adv.
...for petitioner.

1. Affidavit of service is taken on record. The respondent has refused service. Refusal is good service. The postal article is also taken on record. The matter proceeds.

2. The petitioner claims to be a lessee in respect of the property as described in the schedule below, on the strength of a registered deed of lease dated August 16, 2001.

Schedule:-

"That all that piece and parcel of land containing an area of 4 sataks more or less thereupon two storied building upon which ground floor occupied as leased premises situated at Mouza- Mahal, police station – Kotowali, Touzi no. 7, ParganaUkhora, Sub Registry office – Krishnanagar, R. S. Khatian No. 13394, 11924 and 11929, L. R. Khatian No. 2888(kri) and 892(1) (kri), R. S

dag No. 1394, L. R. Dag No. 3145 and 3146, Survey plot no. SA/4/2 in the district of Nadia, butted and bounded by

ON THE NORTH:- By survey plot no. A 3.

ON THE SOUTH:- By Survey Plot No. A 5.

ON THE EAST:- By Survey plot no. A 4/2.

ON THE WEST:- By Krishnanagar Santipur Road."

3. The said deed of lease was entered into between Jiten Mondal, the predecessor of the respondent (husband) and the petitioner. The lease was for a period of twenty one years. Jiten Mondal expired on June 26, 2013. Although the lease had come to anend on August 15, 2022, the respondent allegedly started to create disturbance and wanted to evict the petitioner. The lease contains a renewal clause. It is alleged that by a letter dated August 21, 2021, the learned advocate for the petitioner exercised the renewal option.

4. The respondent replied to the said letter through her learned Advocate and denied the right of renewal. Accordingly, disputes arose. It is stated that the Deed of Lease contained an arbitration clause which is quoted below :-

"The Lessor shall be bound to renew the lease for subsequent periods of same tenure if such option is exercised by the Lessee. The rent and other terms and conditions shall be mutually agreed and if not agreed upon

the same may be decided by an Arbitrator to be appointed by the parties."

5. According to the petitioner, the said clause is a binding arbitration clause and the dispute should be referred to arbitration. The respondent failed to renew the lease, which gives rise to a dispute.

6. The petitioner invoked arbitration. This Court finds that the arbitration clause provides that the lessor will be bound to renew the lease for subsequent periods of the same tenure, if such option is exercised by the lessee, and the rent and terms otherwise shall be mutually agreed upon. In case of failure to agree upon the same, it may be decided by an arbitrator to be appointed by the parties.

7. The use of the expression "may" indicates that the parties had agreed that, in future the parties may approach the arbitrator for settlement of disputes. The use of the expression "may" is a possibility and not a binding agreement. The meeting of minds of the parties to refer such dispute to arbitration is not available from the clause itself. Not only must an arbitration clause indicate that the parties had agreed that they 'shall' refer the disputes to arbitration, but the clause should also indicate that the parties agreed to refer the dispute to a private tribunal and would be bound by the decision of the said Tribunal.

8. Accordingly, the use of the expression "may" in the clause clearly indicates that the parties had not decided to refer their disputes to arbitration, but had kept an option open that in case of disputes not

being settled, the parties would have an opportunity to approach an arbitrator for adjudication of the disputes. This is not a binding arbitration clause. The use of word ‘may’ denotes a discretion and is typically non-binding.

9. In the matter of ***Wellington Associates Ltd vs. Kirit Mehta*** reported in ***(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.”
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> The Apex Court decided in the following manner:-
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> “**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".
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> 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. <u>It appears that the parties agreed that they can "also"</u>

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.

While construing the word 'may', the Apex Court further clarified as under :-

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

10. By relying upon ***Jagdish Chander Vs. Ramesh Chander and Ors. reported in AIR 2007 SC 107*** reported in , which had analysed 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 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- lause (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.

11. In the matter of ***GTL Infrastructure Ltd. vs Vodafone India Ltd. (VIL)*** decided in ***Commercial Arbitration Petition No. 323 of 2021***, the Bombay High Court held as follows:-

> **"21.** I need not multiply the authorities wherein the 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, 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.
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> **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,

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 with the submissions advanced by the parties on the said aspect."

12. In the matter of ***M/S Linde Heavy Truck Division Ltd vs Container Corporation of India Ltd & Anr.*** decided in ***CS(OS) 23/2012***, the Delhi High Court held as follows:-

"6. In ***Jagdish Chander v. Ramesh Chander and Ors. (2007) 5 SCC 719,*** the question before the Court was as to whether clause 16 of the deed of partnership was an arbitration agreement within the meaning of Section 7 of Arbitration and Conciliation Act, 1996 or not. The aforesaid clause reads asunder:-

"**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."
In the course of the judgment, the Court set out the following principle to determine as to what constitutes an arbitration clause agreement:-
.....
Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to

> arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."
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> **7**. .....This clause, in my view, does not indicate a firm determination of the parties and binding obligation on their part to resolve their disputes through arbitration. It merely gives an option to either of them to seek arbitration and on such an option being exercised, it would be for the other party whether to accept it or not. As held by Supreme Court in Jagdish Chander (supra), if the agreement between the parties requires or contemplates a further or fresh consent for reference to arbitration, it would not constitute an arbitration agreement. The view taken by the Apex Court was that if the agreement between the parties provides that in the event of any dispute, they may refer the same to arbitration that would not constitute a binding arbitration agreement.

13. The petitioner may have exercised such right by issuing a notice, but the respondent did not accept such suggestion, which itself shows that the parties did not agree to go to arbitration.

14. The application AP/15/2022 is accordingly dismissed.

(SHAMPA SARKAR, J.)

S. Kumar / R.D. Barua/SN/JM.