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NMCDL407.17-27

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

**IN ITS COMMERCIAL DIVISION**

**NOTICE OF MOTION (L) NO.407 OF 2017  
IN  
COMMERCIAL ARBITRATION PETITION NO.426 OF 2017**

Municipal Corporation of Greater Mumbai )....Applicant

IN THE MATTER BETWEEN :

Pratibha Industries Ltd. )....Petitioner

V/s.

Municipal Corporation of Greater Mumbai & Ors. )..Respondents

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Mr.U.J.Makhija a/w Mr.Parag Khandar, Mr.Sohil Shah i/by DSK Legal  
for petitioner.

Mr.E.P.Bharucha, senior advocate a/w Mr.R.Y.Sirsikar for  
respondent/applicant.

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**CORAM : K.R.SHRIRAM,J  
DATE : 12.9.2017**

**P.C.:-**

1 This Notice of Motion is taken out by respondent to re-call the order dated 27.6.2017 to the extent of appointment of the Arbitrator. The Municipal Commissioner of the Corporation has also filed an affidavit in support of this Notice of Motion.

2 The petitioner had filed the above arbitration petition to restrain respondent nos.1 & 4 from encashing 3 bank guarantees.

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The above matter was listed for hearing on 27.6.2017 when the advocate for the petitioner stated that they were ready and willing to go for arbitration and had suggested the name of Mr. Justice V.M. Kanade (Retd.) to be appointed as sole arbitrator. Counsel for respondent Mr. E.P. Bharucha on instructions from one Mr. Agashe Assistant Engineer (Meter Workshop City-BMC) who was representing the respondent nos. 1 & 4 and who was also present in the court stated that said respondents have no objection to the appointment of Mr. Justice V.M. Kanade (Retd.) as sole arbitrator. Accordingly, the order dated 27.6.2017 was passed appointing Mr. Justice V.M. Kanade (Retd.) as sole arbitrator and the petition was disposed.

3 The respondent nos. 1 & 4 have subsequently taken out this Notice of Motion on the ground that the agreement as tendered dated 19.9.2008 along with Corrigendum issued by respondent no. 1 for supply, installation and maintenance of AMR water meters of various sizes in the city area of Mumbai consisting of wards A, B, C, D, E, F/North, F/South, G/North and G/South (the project) expressly provides "no arbitration is allowed".

4 Mr. Bharucha senior counsel submitted that since the agreement expressly provides "no arbitration is allowed" the

petitioner could not have approached this court for the reliefs under Arbitration & Conciliation Act 1996 and consequently the order of 27.6.2017 also could not have been passed. Mr.Bharucha expressed regret that he agreed based on incorrect information received from the officer who was present in court and requested the order be recalled.

5 Mr.Makhija, per contra, submitted that the contract did provide for arbitration and relied on clause-22 of the tender notice with instructions to the bidders. Clause-22 reads as under :-

**"IT.22 Jurisdiction of Courts**

*In case of any claim, dispute or difference arising in respect of the contract, the cause of action thereof shall be deemed to have arisen in Mumbai and all legal proceedings in respect of any such claim, dispute or difference shall be instituted in a competent court in the city of Mumbai only.*

*If any dispute, difference or claim is raised by either party relating to any matter arising out of the contract, the aggrieved party may refer such dispute within a period of 7 (seven) days to the concerned Deputy Municipal Commissioner (DMC) of Municipal Corporation of Greater Mumbai who shall constitute a committee comprising of 3 (three) MCGM officers i.e., concerned D.M.C or Dir (ES & P), Chief Engineer other than the Engineer of contract & concerned C.A the committee shall give decision in writing within 60 (sixty) days.*

*Appeal for the order of the committee may be referred to Municipal Commissioner (M.C) of Municipal Corporation of Greater Mumbai within 7(seven) days. Thereafter M.C shall constitute the committee comprising of 3 (three) D.M.C including D.M.C. in charge of finance department. The decision given by this committee shall be final & binding upon the parties/bidders."*

6 Relying upon a judgment of a single judge of this court (S.J.Kathawala,J) in <sup>1</sup>**Tatva Global Environment (Deonar) Ltd. Vs. The Municipal Corporation of Gr. Mumbai**, Mr.Makhija submitted that this clause-22 in effect constitutes an arbitration agreement and therefore, there was an arbitration clause. Mr.Makhija also submitted that it is now settled law that a party cannot appoint its own officer or employee as an arbitrator.

7 Mr.Bharucha submitted that clause-22 is not an arbitration clause and further submitted that clause-17 of general conditions of the contract expressly provides “no arbitration is allowed”. Clause-17 reads as under :-

**“17. DISPUTES AND ARBITRATION**

*13.1 No Arbitration is allowed.*

*13.2 In case of disputes or difference of opinion arising between the Hydraulic Engineer and the bidder, the bidder can refer the matter to the Municipal Commissioner of Greater Mumbai with an advance copy to the Hydraulic Engineer and the decision of Commissioner will be final in such case.”*

8 Having heard the counsel and also considered the judgment relied upon by Mr.Makhija, in my view, **Tatva Global** (supra) is not applicable to the facts & circumstances of the present case. Paragraph-15 of the said judgment reads as under :-

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1 2015 SCC OnLine Bom 4144

"15. I have considered the submissions advanced on behalf of the Applicant as well as the Respondent. The main contention of the Respondent is that Clause 21 of the said Agreement does not amount to an arbitration clause/arbitration at all. Clause 21 of the Agreement only refers to an internal procedure for any dispute, difference or claim arising out of the Agreement. It does not contemplate referral of any such difference or claim etc. to any third party for adjudication. The contention raised for the first time before the Court that Clause 21 provides for reference of the dispute to a highly placed officer of the Respondent, who in turn is required to constitute a Committee of three experts, is nowhere mentioned in the Affidavit In Reply. The Hon'ble Supreme Court of India has in its judgment in the case of Bihar State Mineral Development Corporation & Anr. vs. Encon Builders (I) (P) Ltd. (supra) laid down the essential elements of an arbitration agreement. The Hon'ble Supreme Court has inter alia held that the essential elements of an arbitration agreement are that:

- (i) there must be a present or a future difference in connection with some contemplated affair.
- (ii) there must be an intention of the parties to settle such differences by a private tribunal.
- (iii) the parties must agree in writing to be bound by the decision of such tribunal,
- (iv) the parties must be ad idem.

In the case of Jagdish Chander vs. Ramesh Chander and others (supra), it has been held that the intention of the parties to enter into an arbitration agreement must be gathered from the terms of the agreement and that it is not necessary that the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are used in the agreement in order for it to constitute an arbitration agreement. In the facts of the present case, I am satisfied from a perusal of Clause 21 of the Agreement that it meets the test of an arbitration agreement as laid down in the aforesaid judgments of the Hon'ble Supreme Court and that the Parties intended that the disputes be decided and adjudicated upon by arbitration. The fact that Clause 21 provides that the decision given by the Committee "shall be final and binding upon the parties" establishes that Clause 21 has to be construed as an arbitration agreement and not a mere internal procedure. Even if there is an iota of doubt as to whether Clause 21 of the Agreement can be construed as an arbitration clause/agreement, the same is put to rest from a conjoint reading of Clauses 21 and 23 of the Agreement between the Parties which makes it clear that the Parties intended that their disputes be determined and adjudicated upon by arbitration. Clause 23, while making a reference to Clause 21 clearly "speaks of arbitration between the parties". Therefore the contention of the Respondent that Clause 21 of the said Agreement does not constitute an

*arbitration agreement and Clause 23 of the said Agreement lends no assistance in interpreting Clause 21, cannot be accepted and is hereby rejected.*

9 Clauses-21 & 23 of **Tatva Global** (supra) is similar to clause-22 of the present case. It is not identical. In **Tatva Global** one of the reason why the court came to a conclusion that a conjoint reading of clauses-21 & 23 of **Tatva Global** makes it clear that the parties intended that the disputes be determined and adjudicated by arbitration was because clause-23 while making a reference to clause-21 clearly speaks of arbitration between the parties.

10 In the present case there are no such words used. Moreover in **Tatva Global** there was no clause similar to clause-17 of the general conditions of contract expressly barring arbitration.

11 In the circumstances, it is quite clear that the parties did not intend their disputes be determined and adjudicated by arbitration. In view of the above, the petition itself could not have been filed under Section 9 of the said Act and consequently the order dated 27.6.2017 could not have been passed.

12 The order dated 27.6.2017 is hereby recalled. Notice of Motion is allowed and the petition accordingly stands disposed with no order as to costs.

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13 It is open for the petitioners to take such steps in accordance with law as available to them.

Notwithstanding disposal of the Notice of Motion respondents to remove all office objections and get the Notice of Motion numbered within a period of 3 weeks from today.

**(K.R.SHRIRAM,J)**