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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.43 OF 2018

Quick Heal Technologies Limited,)
A Company having its Registered Office at Marvel Edge)
No.7010 C and D, 7th Floor, Viman Nagar,)
Pune – 411 014)… Petitioner

Versus

1. NCS Computech Private Limited,)
A Company having its Office at 3, Commercial Building,)
23 Netaji Subhash Road, Kolkata,)
West Bengal – 700 001)

2.Innovative Edge,)
A Partnership Firm, having its Office at3,)
Commercial Buildings, 23 Netaji Subhash Road,)
Kolkata, West Bengal 700 001.)… Respondents

Mr. Ashwin Shete with Mrs. Aakanksha Agarwal, Mr. Harsh Moorjani I/by M/s. Jayakar and Partners, for Petitioner.
Mr.Anubhav Sinha alongwith Mr. Sarthak S.Diwan and Ms Akanksha Helaskar for Respondent No.1.

CORAM : S.J. KATHAWALLA, J.
DATED : 5TH JUNE,2020

JUDGEMENT :

1. The above Arbitration Petition is filed by the Petitioner – Quick Heal Technologies Ltd. against NCS Computech Pvt. Ltd. (‘**Respondent No.1**’) and Innovative Edge (‘**Respondent No.2**’), for appointment of a Sole Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (‘**the Act’**), to adjudicate

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the disputes and differences that have arisen between the parties relating to the Software Distribution Agreement dated 2nd April, 2011 (Exhibit A to the Petition).

2. According to the Petitioner, the facts in brief leading to the filing of the present Petition, are as under :

2.1 The Petitioner Company is engaged in the business of development and manufacture of anti-virus software under the brand name "Quick Heal", whose products are popularly known as "Quick Heal Range of Products". Respondent No.1 is a Private Limited Company and is carrying on the business of distribution of software products. Respondent No.2 is a Partnership Firm and the sister concern of Respondent No.1 Company.

2.2 In or around 2011, the Directors of Respondent No.1 and the Partners of Respondent No.2 approached the Petitioner and represented that they were desirous of selling and distributing the "Quick Heal Range of Products" developed and manufactured by the Petitioner and requested the Petitioner to appoint them as 'Distributors' for the same.

2.3 Pursuant to the discussions between the said parties, on 2nd April, 2011, the Petitioner entered into a Software Distribution Agreement ('the said Agreement') with the Respondents. Clause 17 of the said Agreement pertains to Dispute Resolution and is reproduced hereunder :

"17. Dispute Resolution :

a. All disputes under this Agreement ***shall*** *be amicably discussed for*

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resolution by the designated personnel of each party, and if such dispute/s cannot be resolved within 30 days, the same ***may be referred to arbitration as stated below****.*

b. Disputes under this 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 language shall be English. The arbitral tribunal shall comprise one arbitrator mutually appointed, failing which, three (3) arbitrators, one appointed by each of the Parties and the third appointed by the 2 so appointed arbitrators and designated as the presiding arbitrator and shall have a decisive vote.

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." *(emphasis supplied)*

2.4 Under the said Agreement, the parties had set out details for sale and distribution of the Petitioner's product in the region/areas mentioned therein.

2.5 Pursuant to the said Agreement, the Respondents from time to time placed orders with the Petitioner for Quick Heal Range of Products and the Petitioner supplied the same to the Respondents.

2.6 As on 31st March, 2013, the balance amount payable by the Respondent No.1 to the Petitioner was Rs.32,78,43,886/-. Despite confirmation of balance, the Respondents failed to pay the amounts due to the Petitioner.

2.7 Since disputes arose between the parties, the Petitioner, through their Advocate's Letter dated 7th August, 2017 addressed to the Respondent No.1 and a

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Letter dated 2nd January, 2018 addressed to the Respondent No.2, invoked the Arbitration Agreement contained in Clause 17 of the said Agreement and proposed the name of the Hon'ble Mr. Justice S.R.Sathe (Retired) as the Sole Arbitrator.

2.8 Sub-clause (a) of Section 17 of the said Agreement, inter alia, provides that prior to commencing the arbitration, the parties through their designated personnel, 'shall' amicably discuss all the disputes under the Agreement in an attempt to reach a resolution. The said process has in a realistic sense been exhausted, as the repeated requests made by the Petitioner to the Respondents to pay the outstanding amounts and settle the matter amicably has failed.

2.9 The Petitioner is therefore, constrained to file the above Arbitration Petition under Section 11 of the Act seeking appointment of a Sole Arbitrator.

3. The Respondent No.1 has filed its Affidavit in Reply disputing the allegations made in the Petition, and raising several defenses. However, it is agreed to initially hear and decide the main defence raised by the Respondents, which are two-fold, namely: (i) that the above Petition seeking appointment of an Arbitrator is not maintainable since the said Agreement does not contain any mandatory Arbitration Agreement; the Disputes Resolution Clause, i.e. Clause 17 of the said Agreement, merely provides that if the disputes cannot be resolved within 30 days, the same "**may**" be referred to Arbitration, which suggests that there has to be consensus / fresh agreement between the parties to refer the matter to arbitration; and (ii) in any event, the Petition deserves to be rejected as being premature, since under Clause 17

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of the said Agreement, the parties have agreed that all disputes under the said Agreement **shall** be amicably discussed for resolution by the designated personnel of each party, and if such dispute/s, cannot be resolved within 30 days, the same may be referred to Arbitration, as stated therein. It is only in case of failure to resolve the disputes by conciliation that the parties may agree to refer their dispute to Arbitration as set out in Clause 17 and such amicable discussion for resolution has not taken place between the designated personnel of each party and the Petitioner has filed the present Petition by by-passing the agreed procedure, which is mandatory/binding on the parties.

4. The Learned Advocate appearing for the Petitioner has submitted as follows:

4.1 That Clause 17 ought to be read in its entirety. Under sub-clause (a), the parties have agreed to refer disputes that shall be amicably discussed for resolution and in case such disputes are not settled the same may be referred to arbitration as stated in clause (b) thereunder. Sub Clause (b) is extremely crucial as disputes under the said Clause are mandatorily required to be referred to arbitration by specific use of the term "shall" in the said Clause. The said Sub Clause (b) envisages disputes of all nature, without any qualification whatsoever, as the Clause starts with the words "*Disputes under this Agreement*" and not "*Disputes as referred in Sub Clause (a) above*". Thus, Sub Clauses (a) and (b) of Clause 17 of the Dispute Resolution Clause provides for two distinct types of disputes. In case of disputes where there is no scope for discussion

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i.e. disputes of Sub-Clause (b), such disputes are agreed to be referred to arbitration. Thus the disputes set out in the invocation notice are disputes on which there can be no discussion.

4.2. Sub-clause (c) of Clause 17 also gives an option to the parties to pursue any remedy available to them at law or equity in court.

4.3 That under Sub-Clause (b) of Clause 17 there is a clear consensus ad idem between the parties to refer disputes under the said Software and Distribution Agreement to arbitration as per the provisions of the Arbitration Act. By use of the word "shall" in sub-clause (b) the same is then couched with a mandatory requirement of referring the disputes to arbitration.

4.4 That it is not the Applicant's case that in Clause 17 "shall" should be read as "may" or "may" should be read as "shall".

4.5 That it is recently laid down by the Hon'ble Supreme Court in the case of ***Zhejiang Bonly Elevator Guide Rail Manufacture Company Limited versus Jade Elevator Components***[1]**,** that in case where the Clause gives an option to the parties to refer the dispute to Arbitration, or the Court, on a party having then invoked the arbitration clause, the matter will have to be referred to arbitration.

4.6 That under Clause 17 also the parties had consciously opted for referring the disputes to arbitration or the courts. The intention of the parties to refer the disputes to arbitration is clearly spelt out in Sub-Clauses (a) and (b) of Clause 17 whereas the

1 (2018) 9 SCC 774

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option of court remedy is then recorded in sub-clause (c) of Clause 17. The Applicant has therefore invoked its option of referring the dispute to arbitration by issuing Invocation Notice under Section 21 of the Act.

4.7 That as held in the case of ***Jagdish Chander versus Ramesh Chander & Ors.***[2], para 8 sub-clause (iv), the use of the word "MAY" or "SHALL" is not the decisive factor. In the said Judgment though the arbitration clause uses the word "SHALL", the matter was not referred to arbitration as the words *"so determined"* appearing in the clause did not show consensus ad idem. Thus the Hon'ble Supreme Court in para 9 held that the main attribute of an arbitration agreement i.e. the consensus ad idem to refer the dispute to arbitration was missing in clause 16 relating to settlement of dispute.

4.8 That consensus ad idem between the parties, is clearly reflected from Sub-Clause (b) of Clause 17 of the said Agreement which mandates reference of disputes to arbitration.

4.9 That a Single Judge of this Court in the case of ***Rajiv Vyas versus Johnwin***[3] has held that even if a party invokes the arbitration clause contrary to the Arbitration Agreement, there is nothing that prevents it from making an application under Section 11 in accordance with the terms of the Arbitration Agreement.

4.10 That it is therefore open to this Court to hear the Application under Section 11 of the Act and refer the matter to arbitration even when the procedure laid down in

2 (2007) 5 SCC 719
3 (2010) 6 Mh.L.J. 483

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the Arbitration Agreement and/or arbitration clause is not followed, provided the Applicants undertake to follow the procedure prescribed in the Agreement.

4.11 That the Petitioner reserves its rights to deal with the other submissions raised by the Respondents, in case the fundamental objections of the Respondents as stated above, are rejected by this Court.

5. The Learned Advocate appearing for the Respondents has submitted as follows :-

5.1 That the dispute resolution clause contained in Clause 17 of the Software Distribution Agreement provides for a mandatory reconciliation process and/or mechanism of amicable settlement of disputes. Thereafter, if such amicable settlement cannot be arrived at, the parties may decide to go for arbitration. The Respondent – Company has sent various Letters dated 31st December, 2013 and 1st November, 2014 to the Petitioner in order to start the amicable settlement process. The Petitioner Company has however, ignored and/or not chosen to reply to the same in complete breach of the dispute resolution clause and has approached this Court for appointment of an Arbitrator. Such deviation on the part of the Petitioner from such mandatory clause is not permissible in law.

5.2. That in the case of ***Tulip Hotel versus Trade Links Ltd.***[4], the Learned Single Judge of this Court has clearly held that an unwilling party to such conciliation measures cannot be permitted to frustrate the mechanism agreed between the parties.

4 (2010) 2 Arblr 286

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The Hon'ble Supreme Court has considered a similar problem in the case of ***Visa International Ltd. versus Continental Resorts (USA) Ltd.***[5] and held that if from the correspondence between the parties, it becomes clear that both the parties do not intend to come to any kind of settlement, then at that stage such a precondition will not hinder furtherance of the dispute resolution process.

5.3. That the decision of the Learned Single Judge of this Court in ***Rajiv Vias v. Johnwin***[6], holding that it was possible for the High Court to allow an application under Section 11 of the Arbitration and Conciliation Act in spite of a conciliatory mechanism as a condition precedent, is not good law, since the Learned Judge did not consider the Judgment in the *Visa International Ltd.* which subject to the exception it carves out, clearly indicates that the condition precedent in the nature of conciliatory mechanism has to be mandatorily adhered to and also since the Learned Single Judge failed to take into consideration Section 61 of the Arbitration and Conciliation Act which applies to all conciliation mechanism under the statutory frame work of the Arbitration and Conciliation Act, 1996.

5.4 That the arguments advanced on behalf of the Petitioner, that there are various types of disputes which may be resolved at different stages in different modes i.e. either under Clause 17 sub-clause (a), Clause 17 Sub-Clause (b) or Clause 17 Sub-Clause (c) has no basis.

5.5 That the argument regarding Clause 17(b) providing for a distinct procedure

5 (2009) 2 SCC 55
6 2010 (6) Mh.L.J. 483

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independent of Clause 17(a) is not sustainable.

5.6 That the normal recourse for resolution of civil disputes has always been generally the Civil Courts of law. Arbitration is in the form of an alternative, which in most cases is agreed contractually between the parties. Therefore, an arbitration forum is the creation of a contract. An interpretation of any contractual clause requires one to come to a conclusion with regard to what was in fact agreed between the parties, i.e. consensus ad idem with respect to each ingredient of a clause in the contract.

5.7 That the Hon'ble Supreme Court in the case of ***Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. Vs. Jade Elevator Components***[7], dealt with an Arbitral Clause as set out hereunder :

> *'Dispute Handling – Common processing contract dispute, the parties should be settled through consultation; consultation fails by treatment of to the arbitration body for arbitration or the court.'*

The said clause uses the word "should" to denote that the parties had come to an agreement that they will go to arbitration or prefer a civil suit. Therefore the parties, had pre-decided that arbitration was one of the chosen modes of dispute resolution. The said Judgment also relies upon the Order of the Supreme Court in ***Indel Technical Services (P) Ltd. Vs. W.S. Atkins Rail Ltd.***[8]. The issue in ***Indel Tech***

7 (2018) 9 SCC 774
8 (2008) 10 SCC 308

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Services is related to the construction of the word "adjudication" or "adjudicator" and not with regard to the words "may" or "shall". However, the clause contained in Indel uses the word 'will' to indicate a pre-existing agreement between the parties. In the present case, there exists no such pre-existing agreement. The word used in Clause 17(a) is 'may', and the same cannot be understood as 'Should' or 'Will'. A reading of Clause 17(a) indicates that in case the amicable settlement between the parties fails, then there should be fresh consent between the parties to refer the disputes to arbitration. In other words, the parties retain the right to agree to refer the dispute to arbitration and/or to refuse the same, since the word 'may' does not denote any binding obligation. The aforementioned Supreme Court Judgments have not referred to various other judgments relating to the requirement of consensus ad idem in interpreting an arbitration clause. Further, the dispute resolution clauses present in the aforementioned Judgments and in the present case are factually distinguishable.

5.8. That the Delhi High Court in ***Panchsheel Constructions v. Davinder Pal Singh Chauhan & Anr.***[9] decided on 15th February, 2019, considered the Judgment in ***Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. vs. Jade Elevator Components*** but chose to follow the dictum in ***Wellington Associates v. Kirit Mehta (200) 4 SCC 272*** and held that there was no binding arbitration clause.

5.9 That in the case of ***Wellington Associates Ltd. v. Kirit Mehta***[10], clauses 4 and 5 of the Agreement were as under :

9 2019 SCC OnLine Del 7176
10 (2000) 4 SCC 272

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"4. It is hereby agreed that, if any dispute arises in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the courts in Bombay.

5. 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, 1940 by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay."

The Hon'ble Supreme Court analysed the above clauses and held as under :

"17…. The words in sub-section (1) of Section 7, "means an agreement by the parties to submit to arbitration" in my opinion, postulate an agreement which necessarily or rather mandatorily requires the appointment of an arbitrator/arbitrators. Section 7 does not cover a case where the parties agree that they "may" go to a suit or that they "may" also go to arbitration."

"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".

22. It is contended for the petitioner that the word "may" in clause 5 has to be construed as "shall". According to the

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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 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 the word "shall". The parties, in my view, must be deemed to have used the words "may" and "shall" at different places, after due deliberation. ……..

25. Suffice it to say, that the words "may be referred" used to clause 5, read with clause 4, lead me to the conclusion that clause 5 is not a firm or mandatory arbitration clause and in my view,

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it postulates a fresh agreement between the parties that they will go to arbitration. Point 2 is decided accordingly against the petitioner.

5.10. *That i*n ***Powertech World Wide Ltd. versus Delvin International General Trading LLC***[11], the Hon'ble Supreme Court was dealing with an arbitration clause, which is reproduced hereunder :

"Any disputes arising out of this Purchase Contract shall be settled amicably between both the parties or through an arbitrator in India/UAE".

The above clause was similar to the one before the Court in Zhejiang, where both the words "shall" and "or" were present in the dispute resolution clause. The Court followed Wellington and held :

"13. It is further the contention of the petitioner that the words "shall" and "or" appearing in the arbitration clause have to be given their true meaning. The expression "shall" has to be construed mandatorily while the expression "or" has to be read as distinctive. Upon taking this as the correct approach, the arbitration agreement would be binding upon the parties as the expression "settled amicably between both the parties" cannot be construed as a condition precedent to the invocation of the arbitration agreement and the reference to arbitration being an alternative and agreed remedy, the petitioner may unequivocally

11 (2012) 1 SCC 361

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be allowed to invoke the arbitration agreement.

14. …. The Court felt that the main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration, is missing in Clause ……..

26. It is in light of these provisions, one has to construe whether the clause in the present case, reproduced above, in para 3, constitutes a valid and binding agreement. It is clear from a reading of the said clause that the parties were ad idem to amicably settle their disputes or settle the disputes through an arbitrator in India/UAE. There was apparently some ambiguity caused by the language of the arbitration clause. If the clause is read by itself without reference to the correspondence between the parties and the attendant circumstances, may be the case would clearly fall within the judgment of this Court in ***Jagdish Chander (2007) 5 SCC 719****. But once the correspondence between the parties and the attendant circumstances are read conjointly with the petition of the petitioner and with particular reference to the purchase contract, it becomes evident that the parties had an agreement in writing and were ad idem in their intention to refer these matters to an arbitrator in accordance with the provisions of the Act.*

….

29. Thus, any ambiguity in the arbitration clause contained in the purchase contract stood extinct by the correspondence between the parties and the consensus ad idem in relation to the existence of an arbitration agreement and settlement of disputes through arbitration became crystal clear. The parties obviously had committed to settle their disputes by arbitration, which they

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could not settle, as claims and counterclaims had been raised in the correspondence exchanged between them. In view of the above, even the precondition for invocation of an arbitration agreement stands satisfied."

5.11 That in the present case, use of the word 'shall' clearly indicates that the parties had agreed that they would initiate amicable settlement between themselves and thereafter use of the word 'may' indicate that the parties in the case of failure of an amicable settlement would consider the proposition of an arbitral process. There was no consensus ad idem between the parties that they would in fact initiate any arbitration process after the failure of the amicable settlement. A reading of the said Clause in its entirety would show that there was no consensus between the parties with regard to arbitration and they only agreed to provide fresh consent (by use of the word "may") in order to proceed with the arbitration. In the present case, no fresh consent to proceed with any arbitration has been provided by any of the Respondents and as such there is no valid arbitration clause under which any Arbitrator can be appointed.

5.12 That the Three Judges Bench of the Hon'ble Supreme Court in ***The Labour Commissioner, Madhya Prddesh versus Burhanpur Tapti Mills Ltd. and others***[12] and ***Jamatraj Kewalji Gavani versus State of Maharashtra***[13], decided that in clauses

12 AIR 1964 SC 1687
13 AIR 1968 SC 178

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where the words "may" and "shall" appear, they would have their own distinct meaning and the word "may" could never be termed mandatory or obligatory. A similar view was taken by another Three Judge Bench of the Hon'ble Supreme Court in ***Mahalumxi Rice Mills and others versus State of U.P. and others***[14], where the Court held that, *"the employment of the said two monosyllables of great jurisprudential import in the same clause dealing with two rights regarding the same burden must have two different imports."*

5.13 That in the same vein if Clause 17(a) of the Software Distribution Agreement is looked at, it can be noticed that the parties to the Agreement use both words "shall" and "may" in the same clause. The parties were aware of the clear difference between the words and it must be assumed that they choose the words to provide an indication of their intent to make arbitration possible but only upon fresh consent.

5.14 That as per the aforementioned Judgments of the Hon'ble Supreme Court the words in Clause 17(a) have to be given the literal meaning and as such it would indicate that there is no binding arbitration clause.

5.15 I have considered the submissions advanced by the Learned Advocates for the Parties. At the cost of repetition, Clause 17 of the said Agreement is once again reproduced hereunder :

"17. Dispute Resolution :

14 (1998) 6 SCC 590

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a. All disputes under this Agreement shall be amicably discussed for resolution by the designated personnel of each party, and if such dispute/s cannot be resolved within 30 days, the same ***may be referred to arbitration as stated below****.*

b. Disputes under this 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 language shall be English. The arbitral tribunal shall comprise one arbitrator mutually appointed, failing which, three (3) arbitrators, one appointed by each of the Parties and the third appointed by the 2 so appointed arbitrators and designated as the presiding arbitrator and shall have a decisive vote.

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." (emphasis supplied)

6. It is clear from sub-clause (a) of Clause 17 reproduced above that the parties have agreed to a specific procedure / mode of settlement of all the disputes between them under the said Agreement, i.e. they have agreed to designate/appoint their respective personnel to amicably resolve / settle all their disputes by discussion, and if the disputes are not amicably settled within 30 days, the next step would be that they may refer their disputes to Arbitration as set out in Sub-Clause (b) of Clause 17.

7. The Learned Advocate appearing for Respondent No. 1 has submitted that under Sub-Clause (a) of Clause 17, the parties have agreed that all disputes under the Agreement shall be amicably discussed for resolution by the designated personnel of each party and only if such dispute/s cannot be resolved by the designated personnel

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within 30 days, the same may be referred to arbitration. It is submitted that such amicable discussion for resolution has not taken place between the designated personnel of each party and the Petitioner has filed the present Arbitration Petition by by-passing the agreed procedure, which is mandatory/binding on the parties.

8. As set out earlier, the Respondent has relied on the decision of this Court in the case of ***Tulip Hotel versus Trade Links Ltd.*** (supra) and the decision of the Hon'ble Supreme Court in the case of ***Visa International Ltd. versus Continental Resorts (USA) Ltd.*** (supra). It is pertinent to note that in the case of ***Visa International Ltd. versus Continental Resorts (USA) Ltd.*** (supra), the Hon'ble Supreme Court has held that if from the correspondence between the parties, it becomes clear that both parties do not intend to come to any kind of settlement then such a pre-condition will not hinder furtherance of the dispute resolution process.

9. I have noted that in the above Arbitration Petition, though the Petitioner has submitted that it had repeatedly requested the Respondents to make payments, they failed to do so, and therefore the agreed pre-condition to Arbitration, is in a realistic sense, exhausted. Such a limited averment would not have been enough to entitle the Petitioner to directly approach the Court for the appointment of an Arbitrator. However, the Respondents have annexed the e-mail correspondence to their Affidavit in Reply (Exhibit-AR-4, pages 310 to 313), a reading of which shows that though the Petitioner had sought a meeting only to work out the amount to be paid by the Respondent No.1 to the Petitioner, the Respondent No. 1 insisted on a 'single

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conclusive meeting' to discuss all the pending issues / claims. The correspondence further shows that the parties could not even agree upon the venue of the meeting to amicably resolve the disputes. Again, the said correspondence was in the year 2013-14, the Petition is filed in the year 2018. In the meantime, i.e. in the year 2016, the Respondent No. 1 has already filed a Suit against the Petitioner before the High Court at Kolkata levelling several allegations against the Petitioner and claiming an amount of Rs.1610 Crores. The Petitioner too has filed certain proceedings questioning the maintainability of the said Suit. I am therefore of the view that even in the instant case, for the reasons set out hereinabove, there was no scope for an amicable settlement and the decisions relied upon by the Respondents in support of their case that invocation of arbitration is pre-mature, renders no assistance to them.

10. I will now deal with the submission of the Respondents namely that the Arbitration Petition deserves to be dismissed since there is no binding Agreement between the parties to refer their disputes to arbitration.

11. The Petitioner as mentioned hereinabove, has relied on the decision of the Hon'ble Supreme Court in the case of ***Zhejiang Bonly Elevator Guide Rail Manufacture Company Limited*** (supra) , wherein the Arbitration Clause under consideration was as follows :

> *"15. Dispute handling. - Common processing contract disputes, the parties should be settled through consultation ; consultation fails by treatment of the arbitration body for arbitration or the court."* (emphasis supplied).

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From the above Clause, it is clear that it was agreed between the parties that the parties '**should**' settle their disputes through consultation and if the consultation fails, by arbitration **or** through the Court. In other words, there was a pre-existing agreement between the parties to settle their dispute through consultation, failing which, through arbitration or through the Court. The Hon'ble Supreme Court after referring to its decision in the case of ***Indel Technical Services (P) Ltd.*** (supra), wherein the parties had in the clause pertaining to the settlement of disputes (clause 13), agreed that the disputes / differences between the parties "will be referred to the adjudicator or the courts….", held that since clause 15 refers to 'arbitration or court', there is an option available, because of which the petitioner has invoked the Arbitration Clause. The Hon'ble Supreme Court thereafter further held that in the factual matrix of the case, they had no hesitation for appointment of an Arbitrator.

12. 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

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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-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 :

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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."(emphasis supplied)

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.

14. I am therefore not in agreement with the submissions of the Petitioner that under Clause 17, the parties had opted for referring the disputes to arbitration or the Courts.

15. As regards the submission advanced on behalf of the Petitioner that the types of disputes referred to under Clause 17 Sub-Clause (a) and Clause 17 Sub-Clause (b) are different, and that Clause 17(b) provides a distinct procedure, independent of Clause 17(a), the same is not sustainable. Clause 17(a) categorically provides for "all disputes", which clearly indicates that any dispute/s between the parties which arise

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under the Software Distribution Agreement has to mandatorily follow the mechanism suggested in Clause 17(a). Arbitration under Clause 17(b) refers to a situation where under Clause 17(a) parties have agreed, through a fresh consent to refer their disputes to arbitration, after failure of the amicable settlement process. Clause 17(b) thus cannot operate independently and cannot be used to initiate an arbitration process, if both the parties did not agree to refer their disputes to arbitration under Clause 17(a).

16. The decisions of the Hon'ble Supreme Court in ***Zhejiang Bonly Elevator Guide Rail Manufacture Company Limited*** (supra) and ***Indel Technical Services (P) Ltd.*** (supra) therefore do not lend any assistance to the Petitioner, whereas the case law relied upon by the Respondents support their submissions.

17. In view thereof, the above Arbitration Petition is dismissed on the ground that there is no binding Arbitration Agreement in the present case. However, there shall be no order as to costs.

(S.J.KATHAWALLA, J.)

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