IN THE HIGH COURT OF MADHYA RADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 10th OF MAY, 2024

ARBITRATION CASE No. 106 of 2023

BETWEEN:-

TRBEX IMPEX PVT. LTD. THROUGH ITS AUTHORIZED SIGNATORY MR KAWALJEET SINGH S/O SHRI BALDEV SINGH, AGED ABOUT 35 YEARS, A COMPANY INCORPORATED UNDER THE COMPANIES ACT 1956 HAVING ITS REGD OFFICE TRB HOUSE G.T. ROAD DHANDARI KALAN LUDHIANA 141010 PUNJAB (PUNJAB)

.....PETITIONER

(BY SHRI RAGHVENDRA SINGH RAGHUVANSHI, ADVOCATE)

AND

M/S ASHOK FINE SPUN THROUGH ITS DIRECTOR MR. ASHISH DOSHI A UNIT OF MAHIMA FIBRES PVT. LTD. REGD OFFICE AT 406 CORPORATE HOUSE 169 R.N.T MARG INDORE (MADHYA PRADESH)

.....RESPONDENT

(BY SHRI DHEERAJ SINGH PANWAR, ADVOCATE)

……..

Reserved on : 23/04/2024

Pronounced on : 10.05.2024

……...

This petition coming on for admission this day, the court

passed the following:

ORDER

1] This Arbitration Case has been filed by the applicant under Section 11 (6) of the Arbitration and Conciliation Act, 1996, for appointment of Arbitrator.

2] In brief, the facts of the case are that the petitioner-a company registered under the Companies Act,1956 entered into an Agreement dated 30th of June, 2017 (Annexure P/1), for supply of solar generated electricity to the non-applicant Ms. Ashok Fine Spun (A unit of Mahima Fibres Pvt. Ltd.).

3] Admittedly, a dispute has been arisen between the parties in respect of the outstanding amount of Rs.5,22,84,012/- which is due to the non-applicant, and according to the applicant, despite repeated requests, the amount has not been paid by the non-applicant, and lately, a legal notice dated 09.8.2023 (Annexure P/13) was also served on the non-applicant for appointing Arbitrators as per clause 14.7 of the Agreement which refers to the dispute resolution.

4] A reply to the notice has also been sent by the non-applicant traversing all the contentions, and thus,, the present application has come to be filed for appointment of an Arbitrator, as per clause 4.7 of the Agreement.

5] A reply to the present application has also been filed by the non-applicant, denying that there was an arbitration agreement what is contended by Shri Dheeraj Singh Panwar, learned counsel

appearing on behalf of the non-applicant is that in the aforesaid dispute resolution clause, the arbitration was optional, and since the non-applicant has already refused to settle the dispute through Arbitration, there is no question of appointing any Arbitrator.

6] Counsel has submitted that the arbitration clause provides that the Party may refer the dispute for resolution to a panel of three Arbitrators, and thus, a choice is given to the parties either to refer the matter to the Arbitration or to decide otherwise. Thus, it is submitted that no case for appointment of an Arbitrator is made out, and the application is liable to be dismissed.

7] In support of his submissions that the arbitration clause is not mandatory, Shri Panwar has also relied upon the decision rendered by the Bombay High Court in the case of ***GTL Infrastructure Ltd. vs Vodafone Idea Ltd.(VIL)***, passed in Commercial Arbitration Application No.52 of 2022, reported (2023) 1 HCC (Bom) 1 wherein, the Court has discussed in detail the various judgments of the Hon'ble Supreme Court **governing the field** and has come to a conclusion that the use of word "may" in an agreement cannot be treated as "shall" for referring the parties to the Arbitration, as the parties have mutually agreed that they may refer the dispute to the Arbitration.

8] Shri Panwar has also relied upon the decision rendered by the Supreme Court in the case of ***Wellington Associates Ltd. vs. Kirit Mehta*** reported as (2000) 4 SCC 272, which judgment has

also been relied upon by the Bombay High Court in the case of ***GTL Infrastructure Ltd.*** (supra).

8] In rebuttal, Shri Raghvendra Singh Raghuvanshi, learned counsel appearing on behalf of the applicant has submitted that the aforesaid judgment is distinguishable as in the present case, the Arbitration clause clearly provides that it is only the time to resolve the dispute on their own that can be extended by mutual agreement and not the reference to the Arbitration.

9] Heard the learned counsel for the parties and also perused the record.

10] From the record, it is apparent that the Agreement dated 30.06.2017 contains a dispute resolution clause 14.7, which reads as under:-

14.7 DISPUTE RESOLUTION

> " If any dispute, difference or claim arises between the Parties hereto in connection with this Agreement or the validity, interpretation, implementation or breach of this Agreement or anything done or omitted to be done pursuant to this Agreement, the parties shall make a good faith effort in the first instance to resolve the same through negotiation. If the dispute is not resolved through negotiation within (3) days after commencement of discussions or within such longer period as the Parties may *mutually agree* to in writing, then the Parties *may refer the dispute* for resolution to a panel of three Arbitrators – one each appointed by the Parties and the third appointed by the two arbitrators. The arbitration *shall* be in accordance with the provisions of the Arbitration and Conciliation Act, 1996, or any statutory modification or re-enactment for the time being in force and shall take place in Indore. The award of arbitration shall be final and binding on the Parties, and the Parties shall comply with/carry out all directions and orders of the arbitrators."
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> **(*emphasis supplied)***

11] So far as the decision rendered by the Bombay High Court in the case of ***GTL Infrastructure Ltd.*** (supra) is concerned, the relevant paragraphs of the judgement read as under :-

> **"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.
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> In Commercial Arbitration Application No. 52 of 2022, the master services agreement comprise the following clause for dispute resolution.
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> "*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."
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> In Commercial Arbitration Application No. 323 of 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."
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> **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 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 "arbitration clause" in the agreement.

16. In *Jagdish Chander* v. *Ramesh Chander* [*Jagdish Chander* v. *Ramesh Chander*, (2007) 5 SCC 719] , the Supreme 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 Supreme Court held as under: (*Jagdish Chander case* [*Jagdish Chander* v. *Ramesh Chander*, (2007) 5 SCC 719] , SCC pp. 725-26, para 9)

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 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 *Wellington Associates Ltd.* v. *Kirit Mehta* [*Wellington Associates Ltd.* v. *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 Supreme 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'.

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 Clauses 4 and 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 Supreme Court further clarified as under:

24. Before leaving the above case decided by the from Rajasthan High Court, one other aspect has to be referred to. In the above case, the decision of the Calcutta High Court in *Jyoti Bros.* v. *Shree Durga Mining Co.* [*Jyoti Bros.* v. *Shree Durga Mining Co.*, 1956 SCC OnLine Cal 188 : 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* v. *Sherefettin* [*Pittalis* v. *Sherefettin*, 1986 QB 868(1986) 2 WLR 1003] . 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.* v. *NCS Computech (P) Ltd.* [*Quick Heal Technologies Ltd.* v. *NCS Computech (P) Ltd.*, 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 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* v. *Ramesh Chander* [*Jagdish Chander* v. *Ramesh Chander*, (2007) 5 SCC 719] , which had analysed the effect of use of the word "may" or "shall", it was held *Quick Heal Technologies Ltd.* v. *NCS Computech (P) Ltd.* [*Quick Heal Technologies Ltd.* v. *NCS Computech (P) Ltd.*, 2020 SCC OnLine Bom 687] :

"A reading of Clause 17 of the said agreement shows that unlike the pre-existing agreement between the parties in *Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd.* v. *Jade Elevator Components* [*Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd.* v. *Jade Elevator*

Components, (2018) 9 SCC 774 : (2018) 4 SCC (Civ) 574] and *Indtel Technical Services (P) Ltd.* v. *W.S. Atkins Rail Ltd.* [*Indtel Technical Services (P) Ltd.* v. *W.S. Atkins Rail Ltd.*, (2008) 10 SCC 308] , 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-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 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 Sections 2(*b*) and 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 Kamat has submitted that by the reply to the notice of invocation of arbitration by the respondent, they have indicated that the parties are referrable for arbitration, I am unable to persuade 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 attributes 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 Kamat has also made a feeble attempt to distinguish the judgment in *Quick Heal Technologies Ltd.* v. *NCS Computech (P) Ltd.* [*Quick Heal Technologies Ltd.* v. *NCS Computech (P) Ltd.*, 2020 SCC OnLine Bom 687] , by submitting that at the relevant point of time, the decision in *Vidya Drolia* v. *Durga Trading Corpn.* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , 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 Ltd. case* [*Quick Heal Technologies Ltd.* v. *NCS Computech (P) Ltd.*, 2020 SCC OnLine Bom 687] 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, 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.
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> **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.
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> Both the arbitration applications are dismissed."
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> (***emphasis supplied***)

12] If the facts of the case in hand are tested on the anvil of the aforesaid decision of the Bombay High in which, various judgments of the Supreme Court have been relied upon, touching upon the same issue *i.e.,* where the parties have agreed that they *"may"* refer to the dispute to the Arbitrator, and whether it should be treated as *"shall"*.

13] T dispute resolution clause in the case at hand, as provided in Clause 14.7, which is once again being reproduced herein for the sake of convenience, reads as under:-

> **14.7 DISPUTE RESOLUTION**
>
> **"**If any dispute, difference or claim arises between the Parties hereto in connection with this Agreement or the validity, interpretation, implementation or breach of this Agreement or anything done or omitted to be done pursuant to this Agreement, the parties

> ***shall*** make a good faith effort in the first instance to resolve the same through negotiation. If the dispute is not resolved through negotiation within (3) days after commencement of discussions or within such longer period as the Parties may mutually agree to in writing, then the Parties ***may*** refer the dispute for resolution to a panel of three Arbitrators – one each appointed by the Parties and the third appointed by the two arbitrators. The arbitration shall be in accordance with the provisions of the Arbitration and Conciliation Act, 1996, or any statutory modification or re-enactment for the time being in force and shall take place in Indore. The award of arbitration shall be final and binding on the Parties, and the Parties shall comply with/carry out all directions and orders of the arbitrators."

It reveals that the parties have agreed that they ***shall*** try to resolve the dispute through negotiation within three days or such additional time as is mutually agreed upon by them, and if they fail in resolving the dispute, in that case, they ***may*** refer the dispute for Arbitration as provided in the agreement. Thus, the parties have used the words 'shall' and 'may', at appropriate stages of the agreement clearly expressing their intentions. It is apparent that the parties had left it open if they wanted to refer the dispute to the Arbitrators, and this discretion was to be exercised by both the parties in unison that they intend to appoint the Arbitrators for resolution of their dispute, and ones they agreed to appoint the Arbitrators, the procedure as provided under the Act of 1996 was to be followed by them in strict compliance of the same.

14] In such circumstances, this Court is of the considered opinion that the respondent cannot be compelled to opt for Arbitration when it

was provided in the Agreement itself that it shall be the discretion of the parties to refer the dispute to the Arbitration, and they may or may not refer the dispute to the arbitration.

15] In view of the same, no case for appointment of the Arbitrator is made out. Accordingly, the application being devoid of merits, is hereby ***dismissed.*** However, with liberty reserved to the petitioner-Company to take recourse of such remedy as is available to it under law. Needless to say, the time spent in prosecuting this application shall be excluded from the period of limitation.

16] With the aforesaid observation and direction, the Arbitration Case stands ***dismissed*** and ***disposed of.***

(SUBODH ABHYANKAR)

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