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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION PETITION NO.135 OF 2018

M/s.Vibgyor Infraprojects Pvt. Ltd.	..Petitioner
Vs.	
Millenium Tower Harmony CHS Ltd.	..Respondent

Mr.Thomas James i/b. M/s.Auris Legal for Petitioner.
Mr.N.G. Karekar for Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 17th JULY, 2019

P.C.:

Heard learned Counsel for the petitioner and learned Counsel for the respondent.

2. The respondent-society was served on 12 January 2019 and affidavit of service of Mr.Sachin Main is placed on record. The petition is of the year 2016 and has remained pending for quite sometime. On 3 July, 2019, at the request of learned Counsel for the respondent, the matter was adjourned for today as a last chance with a clear direction that there shall be no further adjournment.

3. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") whereby the petitioner prays for appointment of an arbitral tribunal to adjudicate the disputes

and differences between the parties which are stated to have arisen under the Articles of Agreement dated 4 February 2011 which was for structural repairs, waterproofing, civil works, painting & allied works from the respondent's premises situated at Navi Mumbai.

4. Learned Counsel for the petitioner has drawn my attention to the Articles of Agreement dated 4 February 2011 as entered between the respondent and the petitioner whereby in clause (1) the parties have agreed that the documents which form part of the contract would inter-alia be the tender notice, instructions to tenderers, conditions of contract, special conditions of contract, etc. Clause (1) reads thus:-

“(1) the documents which form part of the contract will be the tender notice, instructions to tenderers, conditions of contract, special conditions of contract, schedule of quantities of work, revised bill of quantities after negotiations held on 25.1.2011 specifications, drawings and other documents, constituting the 'Tender' and acceptance thereof. It is further agreed that the work order Dated 28.1.2011 issued by MILLENIUM TOWER HARMONY CO-OP. HSG. SOC. LTD. shall constitute a legally binding & valid contract between the two parties.”

5. The contention as urged on behalf of the petitioner is that all conditions as contained in the General Conditions of Contract thus form part of the contract entered between the parties. Learned Counsel for the petitioner has drawn my attention to Clause (18) of the General Conditions of Contract which is stated to be arbitration agreement between the parties which reads thus:-

“18] ARBITRATION

All disputes shall be subject to jurisdiction of the courts in NAVI MUMBAI.

i) In case of dispute between the Society and the Contractor, either party shall as soon as possible give to the other, notice in writing of the existence of such question of dispute or differences specifying its nature and the point at issue upon by each party or failing such agreement to an UMPIRE appointed on the application of Arbitration Act or any statutory modifications or re-enactment thereof provided that question of dispute or difference relating a decision, instruction or order of the Consultants shall not be referred to Arbitration, unless notice has been given by the Contractor.

ii) The specifications of the works and the Consultant's decision about quality of the work for acceptance shall be outside the scope of above Arbitration.”

6. The case of the petitioner is that the disputes and differences have arisen between the parties on several issues in respect of the contract as executed between the parties which is on material cost, labour force, machinery, scaffolding, overheads, entrances etc. Learned Counsel for the petitioner would refer to the notice dated 26 February 2016 addressed on behalf of the petitioner to the respondent setting out all claims thereby invoking the arbitration agreement and calling upon the respondent to appoint an arbitrator to adjudicate the disputes between the parties as stated in paragraph 17 of the said notice. As there was no response to the invocation notice, a reminder letter dated 16 April 2016 came to be issued on behalf of the petitioner to the respondent. As no steps were taken by the respondent for appointment of an arbitral tribunal, the present petition came to be filed.

7. Learned Counsel for the petitioner would contend that there is arbitration agreement as contained in clause (18) which forms part of the contract entered between the parties. Also there is a proper invocation of the arbitration agreement as per law and the respondent having failed to appoint an arbitrator within a period of 30 days to refer the disputes for arbitration by appointing an arbitral tribunal, the petitioner was justified invoking jurisdiction of this Court under Section 11 of the Act.

8. Mr.Karekar, learned Counsel for the respondent, has however opposed this petition. The opposition is on two grounds, firstly it is contended that the respondent has initiated proceedings against the petitioner before the Consumer Forum and there was adjudication on certain issues and now the proceedings are pending before the Apex Court. The second contention is that there is no arbitration agreement between the parties on the basis of clause (7) of the Articles of Agreement which reads thus:

“(7) In case of any disputes, arising out of the said contract between the society and the contractor, the society in consultation with consultant shall decide on the disputed issue/s. The said decision shall be final and binding on the contractor.”

9. It is his submission that in view of clause (7), clause 18 of the General Conditions of Contract is rendered inconsequential and thus, the petition is not maintainable due to lack of an arbitration agreement

between the parties.

10. Having heard learned Counsel for the parties and having perused the record, I am not persuaded to accept the submissions as urged by Mr.Karekar, learned Counsel for the respondent.

11. It appears from clause (1) of the Article of Agreement as noted above that the general conditions of contract are agreed between the parties to form part of the articles of agreement. A plain reading of clause 18 clearly indicates that the parties have agreed to refer the disputes arising under the contract for arbitration. The reliance of Mr.Karekar on clause (7) of the Articles of Agreement to contend that clause (7) would indicate that the resolution of the disputes would be by a consultant in a manner as set out, cannot be accepted. In clause (7) the parties have provided that in case of any disputes which would arise under the said contract between the respondent-society and the contractor, it would be the respondent-society in consultation with the consultant who shall decide the disputed issues. A reading of clause (7) shows that clause (7) does not provide for any role of the petitioner in such disputes to be decided by the respondent in consultation with the consultant. In any case whatever the decision it may be arrived under clause (7), cannot be called to be for adjudication of disputes or to

accept a situation that the parties have agreed to displace the arbitration agreement as specifically provided in clause (18) of the General Conditions of Contract. In any case the society cannot be itself an adjudicator in consultation with the consultant of any dispute which may be raised by the petitioner against the society. Even otherwise the consultant under the contract has a specific role. A perusal of the General Conditions of the Contract would clearly indicate that the parties have agreed in clause 1.4 for appointment of a consultant.

Clause 1.4 reads thus:-

“1.4) CONSULTANT means ASSOCIATED ENGINEERS, Singh Industrial Estate No. 03, Unit No.54, Ram Mandir Road, Goregaon (West), MUMBAI: 400 104, who are the consultants to the society for this project, or their representative.”

12. Further a consultant has a role in execution of the various works under contract and any issue of interpretation which would arise in respect of certain aspects, which is clear from Clause 5 and clause 18.2 which read thus:-

“5] INTERPRETATION OF CONTRACT DOCUMENT

5.1) Complete documents forming the contract are to be taken as mutually explanatory should there be any discrepancy, inconsistency, error or omission amongst the any of the matter may be referred to consultants who shall give his decision and issue the instructions to the contractor directing what manner the work is to be carried out. The decision of the consultants/ society shall be final and conclusive the contractor shall carry out in accordance with the decision.

5.2) Works shown in the drawings but not mentioned in the specifications or described in the specifications but not shown in the drawings shall nevertheless be deemed to be

included in the same manner as if they had been specifically shown upon the drawings as well as described in the specifications.

18(ii) The specifications of the works and the Consultant's decision about quality of the work for acceptance shall be outside the scope of above Arbitration.”

13. A cumulative reading of clauses 1.4, 5, 18(ii) and clause 7 of the articles of agreement makes it clear that a role of a consultant to be accepted as that of an arbitrator is a contention too farfetched. Also clause 18(ii) read with clause 7 of the articles of agreement also no manner exposit any intention of the parties as specifically contained in clause 18 of the GCC to refer the disputes for arbitration under the Act.

14. In view of the above discussion, I am of the clear opinion that there exists an arbitration agreement between the parties as also there is a proper invocation of the agreement. The disputes are thus required to be referred for adjudication by appointing an arbitral tribunal. The petition accordingly succeeds. Hence, the following order:-

ORDER

- (i) Dr. Smt. Justice P.D. Upasani (Retd.) is appointed as a prospective sole Arbitrator to arbitrate the disputes and differences between the parties under the Articles of Agreement dated 4 February 2011;
- (ii) The learned prospective sole arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary

& Senior Master of this Court, to be placed on record of this petition with a copy to be forwarded to both the parties;

(iii) At the first instance, the parties shall appear before the prospective arbitrator within 15 days from today on a date which may be mutually fixed by the prospective sole arbitrator;

(iv) All contentions of the parties on merits of the disputes are expressly kept open;

(v) The fees payable to the arbitral tribunal shall be in accordance with the Bombay High Court (Fee Payable to the Arbitrators) Rules, 2018;

(vi) The above petition is disposed of in the above terms. No costs.

(vii) Office to forward a copy of this order to the learned Arbitrator on the following address:

“301-302, 3rd Floor, 'A' Wing, Muley Building, Shivaji Nagar,
Naupada, Thane (W.) 400 602.
Mobile – 9870494546
E-mail: justicedrpdupasani@yahoo.com”

[G.S. KULKARNI, J.]