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

ARBITRATION PETITION NO.129 OF 2017

- | | |
|---|---|
| 1. M/s Kishor Bauskar |] |
| a Partnership Firm |] |
| Having its registered office at |] |
| Flat No.605, Swami Siddhi Vinayak Soc. |] |
| Old Katrap Road, Katrap, Badlapur (E) 421 503 |] |
| Maharashtra |] |
| Through it's authorized signatory |] |
| Mr. Kishor Moreshwar Bauskar |] |
| residing at: 307, Darpan , Sector 28 |] |
| Pradhikaran Akurdi |] |
| Pune -411 044 |] |
| |] |
| 2. Mr. Prasad Kishor Bauskar |] |
| age 48 years |] |
| Partner of M/s Kishor Bauskar |] |
| Having his address at |] |
| Flat No.605, Swami Siddhi Vinayak Soc. |] |
| Old Katrap Road, Katrap, Badlapur (E) 421 503 |] |
| |] |
| 3. Mrs. Vasant Kishor Bauskar |] |
| age: 66 years, |] |
| Partner of M/s Kishor Bauskar |] |
| Having her address at |] |
| residing at: 307, Darpan , Sector 28 |] |
| Pradhikaran Akurdi |] |
| Pune -411 044 |] |
| Maharashtra, |] |
| |] |
| V/s. | |
| 1. National Insurance Academy |] |
| Balewadi Road, Pune 411 045 |] |
| Maharashtra |] |
| |] |

2. Life Insurance Corporation of India	] Respondents
Western Zone Office,	]
Engineering Department	]
1 st Floor, Yogakshama Building, West Wing	]
JeevanBima Marg,	]
Mumbai 400 020	]
Maharashtra	]

- Mr. Dormaan J. Dalal, for the Petitioners.
- Mr. Chirag Kamdar i/by Ms.Hemakshi Gandhi, for respondent No.1.
- Ms. Pooja Karadia i/by Mr.Mahesh Shah Legal, for respondent No.2.

CORAM : G. S. KULKARNI, J.

DATE : 12th June 2019.

ORAL JUDGMENT :

1] Heard learned counsel for the parties.

2] This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the ACA”), whereby the petitioner prays that an arbitral tribunal be appointed to adjudicate the disputes and differences between the parties which are stated to have arisen under the contract dated 30th June 2016 awarded to the petitioner by respondent no.1- National Insurance Academy (for short “ the NIA”) for the work of renovation of the Hostel at Pune.

FACTS

3] The case of the petitioner is that it had successfully participated in a tender issued by the NIA for the contractual work. Disputes and differences have arisen between the parties in respect of bills raised by the applicants, which are *inter alia* in relation to the cost of the deviation and extra items as undertaken by the petitioner, in execution of the contract in question.

4] Learned counsel for the petitioner has drawn my attention to the arbitration agreement as entered into between the parties. Clause No.36 relates to the “Settlement of Disputes, Arbitration, “ which reads thus :-

"36. Settlement of Disputes, Arbitration :

36. 1:- All disputes and differences of any kind whatsoever arising out of or in connection with the Contract or the carrying out of the work (whether during the progress of the work or after its completion and whether before or after determination, abandonment or breach of the contract) shall be referred by the Contractor to the Chief Engineer, LIC, WZO, MUMBAI within 15 (fifteen) days of any such matter arising. The Chief Engineer, LIC, WZO Mumbai shall upon receipt of such reference convey his written instructions or decision within 30 (thirty) days to the contractor. If the contractor be dissatisfied with the decision of the Chief Engineer, LIC, WZO, Mumbai, on any dispute, other than EXCEPTED MATTER, then and in any such case, the Contractor shall within 30 (Thirty) days after receiving notice of such decision give a written notice to the Employer requiring that such matters in dispute (other than excepted

matters) be arbitrated upon. Such written notice shall specify the matters which are in dispute or difference of which such written notice has been given and no other shall be and is hereby to be referred to the Arbitration. In case the Contractor fails to serve the written notice on any or all the issues in dispute within 30 (thirty) days the decision conveyed by the Employer shall be taken as final, binding and conclusive and shall not be open to arbitration.

36.2 Any disputes or differences that the employer may have with the contractor shall also be referred to Arbitration.

36.3 All disputes between the parties to the contract (other than those for which the decision of the Employer or any other person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the other of them be referred to sole arbitration by an arbitrator to be appointed by the Employer which shall be final and binding.

36.4 If the arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the appointing authority shall appoint a new arbitrator in his place.

36.5 Unless both the parties agree in writing, reference of such disputes to arbitration shall not take place until after the completion or alleged completion of the work or termination or determination of contract.

36.6 The Sole Arbitrator shall determine all matters in disputes other than EXCEPTED MATTERS (referred in CL No.34) which shall be referred to the Sole Arbitrator.

36.7 The Arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act 1996 or any statutory modifications thereof.

36.8 The Contractor hereby also agrees that Arbitration under this Clause shall be a condition precedent to any right of action under the Contract".

(emphasis added)

5] Learned counsel for the petitioner has drawn my attention to the petitioner's letter dated 20th April, 2017 addressed to the respondent No.2 Chief Engineer, LIC of India (for short, "**LIC**"), as also to another notice dated 7th June, 2017 addressed to the Chief Engineer, LIC, whereby the petitioner raised issues before the Chief Engineer of the LIC for settlement of the bills in terms of clause 36.1 whereby the Chief Engineer of the LIC was called upon to take a decision. The petitioner set out complete details of the work done in respect of which demands were being made. Paragraph No.22 of the said letter specifically mentions that failing realization of the said issues within 15 days from receipt of this Legal Notice, petitioner's client will request the **Director, NIA** that the disputes be settled through arbitration as per clause 36 of the Tender Agreement.

6] The Chief Engineer of the LIC by his letter dated 30th June, 2017 addressed to the petitioner *inter alia* stated that the points as mentioned in the notice of the petitioner were not acceptable. It would be appropriate to reproduce the said letter as under:-

"Ref. WZO /Engg/NIA/174

Date: 30.06.17.

To,

Shri.Kishor Bauskar,

Civil Engineer and Govt. Contractor,

Darpan, 307/28, Nigdi (Pradhikaran)

Pune 411 044

Sir,

**Ref: Proposed Renovation work of Hostel No.4 at NIA,Pune
-Legal Notice.**

This has reference to the notice dated 21.06.17, received from M/s Reddy & Reddy, Pune on the above work. In this connection we would like to inform you that the points mentioned in the notice are false and not acceptable by us. Our tender agreement and conditions of contract is very clear regarding for settlements of bills and extra and deviated items. The tender agreement mentioned the procedure for submission of final bills and extra items and deviated items etc clearly. The Executive Engineer, LIC Pune had called for meetings with you on many time and wanted to settle the dispute and final payment. However, in response to above call by EE, Pune, you are not in very keen or reluctant to accept for settlement of dispute between you and LIC.

As per condition of Contract, All dispute and difference of any kind what so ever arising out of (or) in connection with contract shall be referred by contractor to chief engineer, LIC WZO and also you may be allowed to meet Chief Engineer to get further clarification if required.

We, therefore, request you to submit the final bills along with your rate analysis for extra/deviated items with original purchase bills etc, immediately as per Tender.

Yours faithfully,

sd/-
Chief Engineer".

7] As the petitioner was dis-satisfied with the decision as taken by the Chief Engineer LIC, as contained in the said letter dated 30th June 2017 the petitioner in terms of clause 36.1 of the agreement by its advocate's notice dated 14.7.2017 recorded that an amount of about Rs.50 lacs was due and payable under the pending invoices, which were not accepted by

the Chief Engineer. Thus the petitioner invoking the arbitration agreement as entered between the parties called upon the “NIA” to appoint an arbitrator to adjudicate the disputes and differences between the parties. As no action was taken on behalf of NIA to appoint an arbitrator, present petition is filed.

8] At the outset, learned counsel for respondent LIC would submit that LIC is not a necessary party to the present proceeding, as LIC is not a party to the agreement in question. Learned counsel for the petitioner would not dispute this position that for adjudication of the present proceeding, LIC is not a necessary party as LIC had a limited role to play as provided in clause 36 of the agreement.

9] NIA has appeared and placed on record reply affidavit of Mr.Subash Chandra Patnaik, Chief Administrator. NIA would not dispute existence of an arbitration agreement between the parties. It is however, contended that clause 36 of the agreement in question provides for "excepted matters". An exhaustive list of such matters, referred to in the Tender Agreement can be found in clause 34.1 under the title "Excepted Matters". It is submitted that certain claims of the petitioner fall under excepted matters. The second contention of the respondent is in regard to

the procedure under clause 36 being not followed. It is contended that the present petition is thus premature and there is no necessity to refer the disputes to arbitration. In support of contention that the excepted matters need not be referred to arbitration, learned counsel for the respondent has placed reliance on the judgment of **State of Goa -vs- Pravin Enterprises**¹.

10] Learned counsel for the petitioner in rejoinder would submit that the contentions raised on behalf of NIA cannot be accepted. It is contended that the Chief Engineer by his letter dated 30th June, 2017 informed the petitioner, of the LIC not agreeing to claims as made by the petitioner and hence the claims of the petitioner are required to be referred to arbitration. Learned counsel for the petitioner would submit that in view of the provisions of sub Section 6(A) of Section 11, inserted by Amendment Act No.3 of 2016, in adjudicating an application filed under Section 11 of the Act, the Court is required only to ascertain the existence of an arbitration agreement. It is submitted that the issues which are raised by the NIA as to whether any of these issues would fall within "excepted matters", the NIA would be required to take recourse to section 16 of the ACA before the arbitral tribunal.

11] Having heard learned counsel for the parties and perused the

¹ (2012) 12 SCC 581

agreement as executed between the parties it is quite clear that clause 36 is the arbitration agreement between the parties. The petitioner had invoked the conditions as stipulated in clause 36.1 by approaching the Chief Engineer, with its grievances by notice dated 20th April, 2017 and the letter dated 7.6.2017.

12] The petitioner had specific grievances in regard to the pending bills and accordingly the Chief Engineer was called upon to take decision on issues which were raised by the petitioner. The Chief Engineer, however, by his letter dated 30th June 2017 addressed to the petitioner stated that the points mentioned in the notice are false and are not acceptable to the LIC. This letter of the Chief Engineer is required to be regarded as a decision, which is taken on the issues as raised by the petitioner vide its letters dated 7.6.2017, 20.4.2017, 5th September, 2017 and 7th June, 2017, which was in terms of clause 36.1 of the agreement. This decision of the Chief Engineer is not accepted by the petitioner and the petitioner was dis-satisfied with the same.

13] Clause 36.1 of the Tender clearly provides that if the contractor be dissatisfied with the decision of the Chief Engineer, LIC-WZO, Mumbai, on any dispute, other than excepted matters, then in such case, the

contractor shall within 30 days after receiving notice of such decision give a written notice to the Employer requiring that such matters in dispute (other than excepted matters) be arbitrated upon. Such written notice is required to specify the matters which are in dispute. In case the Contractor fails to serve a written notice on any or all the issues in dispute within 30 (thirty) days of the decision then the decision as conveyed by the employer is required to be taken as final and binding and not open to arbitration. Clause No.36.3. refers to all disputes between the parties to the contract (other than those for which the decision of the Employer or any other person is by the contract expressed to be final and binding) shall after written notice by either party to the contract, be referred to sole arbitration by an arbitrator to be appointed by the employer which shall be final and binding.

14] The record clearly indicates that the petitioner by notice dated 14.7.2017, invoked the arbitration agreement and called upon the respondent to refer the disputes for adjudication. This Notice was not responded by the NIA, there was also no assertion that there are any excepted matters. In the reply filed to this petition, first time an issue of excepted matters is raised in paragraph No.7 of the reply, to merely state that excepted matters cannot be referred to arbitration. There are no specific details either in the decision of the Chief Engineer or in the communication

which could have been possibly addressed to the invocation notice that there are excepted issues. Merely making an assertion of their being excepted matters, is not acceptable. The jurisdiction of the arbitral tribunal is well defined in clause 36 of the tender document as referred above , which would not include any excepted matters to be adjudicated by the arbitral tribunal. The arbitral tribunal is competent to decide on the arbitrability of the disputes. In **State of Goa -vs- Praveen Enterprises (supra)**, the Supreme Court has held that it would be the jurisdiction of the arbitral tribunal to decide which of the disputes are arbitrable. The relevant observations of the Supreme Court are in paragraph 11 of the report which reads thus :-

11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where "all disputes" are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counter claims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes".

15] In the light of above discussion, in my opinion there is clearly an arbitration agreement between the parties. Disputes and differences

have arisen between the parties. There is also an invocation of the arbitration as per the contractual terms by the petitioner. Accordingly, the disputes are required to be referred for adjudication by appointing an arbitral tribunal. The petition is accordingly allowed in terms of the following order:-

Order

i] Smt. Justice Dr. Shalini Phansalkar Joshi, former Judge of this Court, is appointed as the prospective sole Arbitrator to adjudicate the disputes and differences between the parties, arising under the the contract of renovation work of Hostel at National Insurance Academy, Pune, dated 30th June, 2016;

ii] The prospective sole arbitrator, ten days before entering the arbitration reference, shall forward a statement of disclosure as per the provisions of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Registrar (Judicial), High Court, Appellate Side, 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 10 days from date of receipt of copy of this order and the time as may be fixed by the prospective arbitrator;

iv] The learned prospective arbitrator shall endeavour to publish an award as expeditiously as possible and within the time

limit as prescribed under Section 29-A of the Act;

v) The fees of the arbitral tribunal shall be as prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018;

(vi) All contentions of the parties on merits of the matter are expressly kept open;

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

16] Office to forward a copy of this order to the learned Arbitrator on the following address:

Dr. Justice Smt. Shalini Phansalkar-Joshi
Former Judge
Bungalow No.12,
Bhagya Chintamani Society,
Opp. Kachra Depot, Paud Road,
Kothrud, Pune 411 038.

Mob No.9657188676

Email phansalkarjoshi@gmail.com

[G. S. KULKARNI, J]