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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 1150 OF 2018
AND
ARBITRATION APPLICATION NO.349 OF 2019**

Popular Caterers	...Petitioner
<i>Versus</i>	
Drunal Shailesh Mody And Ors	...Respondents

Mr Rohan Sawant, *with Ms Simeen Shaikh, Ms Tulsi Shah & Ms Vasudha Kale, i/b KV Sharafudeen and Simeen Shaikh, for the Petitioner.*

Mr Girish Godbole, *with Priyanka Rathi, for Respondents Nos. 1 and 6.*

Mr Shanay Shah, *with Miloni Sanghvi, i/b Nikhil Kadam, for Respondents Nos. 3 and 5.*

Mr Piyush Shah, *i/b Abhishek Patil, for Respondents Nos. 2 and 4.*

CORAM: G.S. PATEL, J.
DATED: 11th November 2019

PC:-

1. All affidavits accepted. To be lodged in the registry.

2. The 6th respondent is a Limited Liability Partnership engaged in the business of catering at events. Respondents Nos. 1 to 5 are alleged by the petitioners to be the partners of 6th respondent, although respondent Nos. 2 and 4 claim that they retired from this

partnership some time ago. The petitioner is a contractor appointed by the 6th respondent LLP. Between the 6th respondent and the petitioner there was an Memorandum of Understanding (“**MoU**”) dated 25th May 2017. By this MoU, the 6th respondent engaged the petitioner to provide catering services at various establishments with which the 6th respondent had separate contract arrangements. One of these was the Tulip Star Hotel.

3. Clause (h) of the MoU at page 35 required the petitioner to place a deposit of Rs. 8 crores with the 6th respondent. This was in the form of a performance security.

4. There is no dispute that the petitioner placed an amount of Rs. 4 crores with the 6th respondent.

5. The petitioner claims that it is entitled to a refund or return of this amount and seeks security from the 6th respondent as also the other respondents for the return of this amount of Rs. 4 crores. There are also prayers for disclosure of assets.

6. The petitioners are unable to show complete compliance with Clause (h) i.e. payment of the entire amount of Rs. 8 crores. Mr Sawant for the petitioner urges that while there is no dispute that Rs. 4 crores was placed on deposit, there were subsequent discussions during the course of which it was orally agreed that the remaining amount of Rs. 4 crores, contractually due on 7th July 2017, would not need to be deposited with the LLP. I am shown

certain e-mails and drafts exchanged but there seems to be no concluded agreement in this regard.

7. Mr Godbole for the 1st and 6th respondents states that the petitioner itself is in default. The remaining amount of Rs. 4 crores that the petitioner ought to have paid to the LLP was instead diverted to an another establishment with which the petitioner had taken a contract. The petitioner is itself in breach. It cannot therefore seek enforcement.

8. The arbitration agreement is contained in Clause (r) at page 39 and the agreement is to make a reference of the disputes to the sole arbitration of a Counsel practising in this Court.

9. Whether the petitioners have a valid and subsisting claim in arbitration against respondents Nos. 2 and 4 is an another issue that arises. They claim that they retired from the partnership firm on 26th September 2017 and were never personally liable for the repayment of amounts given to the 6th respondent LLP. Mr Sawant points to Clause (I) of the MoU which says that the promoters of the 6th respondent would be personally liable for the repayment. Further, Clause (j)(viii) says that any change in management of the 6th respondent would not affect the MoU.

10. Mr Shah on behalf of the respondents Nos. 3 and 5 says that his clients, too, retired from the 6th respondent LLP during the same period. However respondents Nos. 3 and 5 are agreeable to refer the disputes to arbitration. Respondent Nos. 2 and 4 are not.

11. There is however no dispute that respondent Nos. 2 and 4 were indeed parties to this MoU which contains the arbitration clause. All that is necessary, therefore, is to leave the contentions of respondents Nos. 2 and 4 open, which I hereby do, to contend before the learned sole arbitrator I will proceed to appoint that there can be no claim made against them in arbitration, seeking their deletion as parties to the arbitration and reserving to them their right to seek an order of costs for being wrongly joined to the arbitral proceedings. All contentions in that behalf are left open. This application by respondents Nos. 2 and 4 may take the form of a Section 17 application as well.

12. Having regard to the nature of the clause, by consent I appoint Ms Manjari Shah, learned Advocate of this Court, subject to her availability as the sole arbitrator before whom the parties will appear on a date that she nominates. Hence the following

ORDER

- (a) **Appointment of Arbitrator:** By consent, Ms Manjari Shah, learned Advocate of this Court, is hereby nominated to act as a Sole Arbitrator.
- (b) **Communication to Arbitrator of this order:**
 - (i) A copy of this order will be communicated to him by the Advocates for the Applicant within one week from today of the order being uploaded.

- (ii) In addition, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator within one week of the order being uploaded at the following postal and email addresses:

Arbitrator/s Ms Manjari Shah, Advocate

Address Flat No. 19, 5h Floor,
Dhanvantari Bhavan,
143B, August Kranti Marg
Mumbai 400 036

Mobile +91 98211 15928

Email majaridshah@gmail.com

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward her statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Prothonotary and Senior Master of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently in advance of his entering upon the reference to her arbitration. That statement will be retained on the file of this application. Copies will be given to both sides.
- (d) **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as she nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.

- (e) **Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email id.
- (f) **Interim Application/s:** Liberty to the parties to make an interim application or interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator. The present application under Section 9 will be presented and treated as an application under Section 17. All affidavits in reply already filed to be treated as replies to the Section 17 application. Liberty to apply to the learned Sole Arbitrator for leave to file further affidavits. The application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.
- (g) **Fees:** The arbitral tribunal's fees shall be governed by the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018.
- (h) **Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares.
- (i) **Consent to an extension if thought necessary.** Parties immediately consent to a further extension of up to six

months to complete the arbitration should the learned Sole Arbitrator find it necessary.

- (j) Venue and seat of arbitration:** Parties agree that the venue and seat of the arbitration will be in Mumbai.
- (k) Contentions kept open.** Rival contentions are kept open and will be unaffected by any observations in this order.

13. The arbitration petition and the arbitration application are disposed of in these terms. There will be no order as to costs.

(G. S. PATEL, J)