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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ARB. P.218/2017**

Date of decision: 30th November, 2017

CAPACITE INFRAPROJECTS LIMITED Petitioner

Through Mr.Rishi Bhatnagar and
Ms.Tarinia Sahai, Advs.

versus

RAMPRASTHA PROMOTERS & DEVELOPERS LIMITED

..... Respondent

Through Mr.Anil Airi, Sr. Adv. with
Mr.Harpreet Singh Popli,
Ms.Sukanya Lal, Ms.Sadhna
Sharma and Ms.Kamakshi,
Advs.

**CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA**

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to the 'Act') has been filed by the petitioner praying for appointment of an Arbitrator for adjudication of the disputes that have arisen between the parties under the agreement dated 22.03.2013 for "Construction of Multistoried Housing Complex, "Rise" at Ramprastha City, Sector 37-D, Gurgaon, Haryana".

2. It is contended by the learned counsel for the petitioner that the said agreement contains an Arbitration Agreement in Clause 69 of the General Condition of Contract-Part-1 of the Agreement. Relying upon the Clause 68,69 and 70, it is submitted that while Clause 68 provides for settlement of disputes through the intervention of the Chairman of the respondent, Clause 69 provides for resolution of the disputes through Arbitration and the Chairman of the respondent has been designated as the Arbitrator. He further submits that Clause 70 of the Agreement provides for venue for the arbitration to be at New Delhi and therefore this Court would have jurisdiction to entertain this request for appointment of an Arbitrator. It is further submitted that the petitioner had invoked the Arbitration Agreement vide its notice dated 06.02.2017, however, as respondent has failed to appoint an arbitrator, the present petition under Section 11 of the Act has been filed

3. Learned senior counsel for the respondent submits that, in fact, there is no Arbitration Agreement between the parties. It is submitted that Clause 69 of the Agreement referred by the petitioner is not an Arbitration Agreement; it is only a mode of further settlement of the disputes. He relies upon the judgments of Supreme Court in *P. Dasaratharama Reddy Complex v. Government of Karnataka*, (2014) 2 SCC 201; *International Amusement Ltd. v. India Trade Promotion Organization*, (2015) 12 SCC 677 and *M/s Master Tours and Travels v. The Chairman, Shri Amarnath Ji Shrine Board & Ors*, 2016(1) SCALE 69 in support of his submission. He further submits that merely because the heading of Clause 69 of the

Agreement reads “Arbitration”, the same would not make this an Arbitration Agreement. He relies upon the judgment of the Supreme Court in *M/s H.M.Kamaluddin Ansari and Co. v. Union of India and Ors.*(1983) 4 SCC 417 to submit that the heading of a Clause will not control the plain meaning of the words of the Clause. He submits that use of words “venue of Arbitration”, by themselves cannot amount to an Arbitration Agreement. In this regard, he relies upon the judgment of Karnataka High Court in *Durha Constructions Pvt. Ltd v. Bateman Engineering (India) Pvt.Ltd.*, MANU/KA/2252/2011.

4. I have considered the submissions of the learned counsel for the parties. For answering the submissions made by the parties, I first reproduced Clause 68, 69 and 70 of the Agreement as under:

“68. SETTLEMENT OF DISPUTES BETWEEN EMPLOYER & CONTRACT:

If any dispute or difference of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of the Contract, whether during the progress of the works or after their completion and whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall in the first place, be referred to and settled by the Chairman of M/s Ramprastha Promoters and Developers Pvt. Ltd.(Employer) who shall, within a period of thirty days after being requested by the contractor to do so, give written notice of his decision to the Contractor and the employer. Upon receipt of the written notice of the decision of the Employer the Contractor shall promptly proceed without delay to comply with such notice of decision.

69. ARBITRATION

All question & dispute relating to the meaning of specification, designs, drawings and instructions and to the quality of workmanship or materials used in the work or as to any other question, claim, right, matter of thing whatsoever in any way arising out of or relating to Contract, specifications, instructions whether arising during the progress of work or after the completion or abandonment of work cannot be settled between the parties, it shall be referred to the Chairman of M/s Ramprastha Promoters and Developers Pvt. Ltd.(Employer) and his decision will be final and binding to the Contractor.

70. JURISDICTION

The venue of arbitration shall be New Delhi

Only the courts in Delhi shall have jurisdiction in any cases related to this contract.”

(emphasis supplied)

5. There is no dispute that Clause 68 merely provides for settlement of the disputes between the parties under an aegis of the Chairman of the respondent. Clause 69 of the Agreement which has the heading “Arbitration”, again refers the ‘disputes’ to the Chairman of the respondent. Both Clauses 68 and 69 use the words “decision”. In *P.Dasaratharama Reddy Complex (supra)* Supreme Court after analyzing various judgments on the issue of existence of Arbitration Agreement under different contracts, held as under:

“27. To the aforesaid proposition, we may add that in terms of Clause 29(a) and similar other clauses, any dispute or difference irrespective of its nomenclature in matters relating to specifications, designs, drawings,

quality of workmanship or material used or any question relating to claim, right in any way arising out of or relating to the contract designs, drawings etc. or failure on the contractor's part to execute the work, whether arising during the progress of the work or after its completion, termination or abandonment has to be first referred to the Chief Engineer or the Designated Officer of the Department. The Chief Engineer or the Designated Officer is not an independent authority or person, who has no connection or control over the work. As a matter of fact, he is having over all supervision and charge of the execution of the work. He is not required to hear the parties or to take evidence, oral or documentary. He is not invested with the power to adjudicate upon the rights of the parties to the dispute or difference and his decision is subject to the right of the aggrieved party to seek relief in a Court of Law. The decision of the Chief Engineer or the Designated Officer is treated as binding on the contractor subject to his right to avail remedy before an appropriate Court. The use of the expression 'in the first place' unmistakably shows that non-adjudicatory decision of the Chief Engineer is subject to the right of the aggrieved party to seek remedy. Therefore, Clause 29 which is subject matter of consideration in most of the appeals and similar clauses cannot be treated as an Arbitration Clause."

6. In ***International Amusement Limited (supra)*** Supreme Court construed the following Clauses and held that the same do not amount to an Arbitration Agreement between the parties therein:

"28. In case of any dispute arising out of or in connection with this agreement the disputes shall be referred to the sole arbitration of the Chairman, India Trade Promotion Organization or his nominee whose decision/award shall be final, conclusive and binding on the parties. Application for reference to arbitration

shall be made by either party within two months of arising of the dispute”.

7. Similarly, in *M/s Master Tours and Travel(supra)* Supreme Court held that Clause 13 of the work order therein, which read as under, cannot be construed an Arbitration Agreement:

“In case of any dispute the matter shall be referred to the Chief Executive Officer-Shri Amarnathiji Shrine Board, whose decision in the matter shall be final.”

8. In the present case, under Clause 68 and 69, the disputes are to be “referred” to the Chairman of the respondent. As noted above, both the clauses state that his “decision” shall be final and binding. In that view of the matter, it cannot be said that Clause 69 was inserted in the agreement to provide the power of arbitration to the same person against whose decision, which he would take under Clause 68 first trying under settlement procedure, would be under challenge. No one can be a judge of his own cause. Clause 69, to my mind, therefore, appears to be an extension of Clause 68 which is a settlement process. It cannot be disputed that the agreement, as far as these two clauses is concerned, is not happily drafted. Given the fact that the power to thrive at a settlement under Clause 68 is given to the same person who then, if the submission of the petitioner is to be accepted, is vested with the power to adjudicate the disputes against his own decision, it would be an antitheses in terms and cannot be accepted. As rightly contended by the learned senior counsel for the respondent, merely because Clause 69 has a heading “arbitration” or Clause 70 uses words

“venue of the arbitration”, the said Clause cannot amount to an Arbitration Agreement between the parties.

9. Even if I assume that Clause 69 is an Arbitration Agreement between the parties in terms thereof, the disputes are to be referred to the Chairman of the respondent, who would be disqualified to act as an Arbitrator under Section 12(5) of the Act. In *Newton Engineering and Chemicals v. Indian Oil Corporation Limited*, (2013) 4 SCC 44 Supreme Court held that if a person named as an Arbitrator in the Arbitration Agreement cannot act as an Arbitrator, the Arbitration Agreement between the parties would stand terminated and the parties cannot be referred to an Arbitrator who they never intended to appoint as an Arbitrator. In such circumstances, the arbitration clause would not survive and has to be treated as having worked its course.

10. In view of the above, the present petition is dismissed with no order as to cost.

NAVIN CHAWLA, J

NOVEMBER 30, 2017/vp