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

+ **ARB. P. 757/2017**

Date of decision: 14th December, 2017

HONSHU BUILDCON PRIVATE LIMITED Petitioner
Through Mr. Rajesh Gupta & Mr.
Harpreet Singh, Advs.
versus

NORTH DELHI MUNICIPAL CORP. & ANR. Respondents
Through Ms. Mini Pushkarna, Standing
Counsel with Ms. Anushruti &
Ms. Vasundhara Nayyar, Advs.
for NDMC

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') has been filed by the petitioner seeking appointment of a Sole Arbitrator for adjudicating the disputes that have arisen between the parties under the Letter of Intent dated 17.05.2016.
2. The Licence Agreement annexed with the Letter of Intent contains an Arbitration Agreement between the parties, which is reproduced herein below:-

"28.2 Arbitration

*(a) Any Dispute which is not resolved amicably by conciliation, as provided in **Clause 28.1**, shall be*

*finally decided by reference to arbitration by an Arbitral Tribunal appointed in accordance with **Clause 28.2(b)**. Such arbitration shall be held in accordance with such rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The venue of such arbitration shall be Delhi and the language of arbitration proceedings shall be English.*

(b) The Commissioner, North D.M.C or any person including any officer of the North D.M.C so appointed by the Commissioner North D.M.C shall be the sole arbitrator.

*(c) The Arbitrator shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this **Clause 28.2** shall be final and binding on the Parties as from the date it is made and the Licensee/Advertiser and the North D.M.C agree and undertake to carry out such Award without delay.*

(d) The Licensee/Advertiser and the North D.M.C agree that an Award may be enforced against the Licensee/Advertiser and/or the North D.M.C, as the case may be, and their respective assets wherever situated.

(e) This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

(f) All legal disputes between the parties shall be subject to the jurisdiction of the court(s) situated in Delhi only.

3. The petitioner invoked the arbitration agreement vide its notice dated 03.10.2017. In response thereto, the respondent vide its communication dated 23.11.2017, informed the petitioner that the Commissioner, North Delhi Municipal Corporation had appointed a Sole Arbitrator for adjudicating the disputes that have arisen between the parties.

4. One of the controversies between the parties is whether such appointment had taken place prior to the filing of the present petition or thereafter. I need not go into the said issue in view of the fact that in any case, in my view, the respondent i.e. Commissioner, North Delhi Municipal Corporation was not entitled to appoint an arbitrator in the present case.

5. Clause 28.2(b) reproduced above states that the Commissioner, North Delhi Municipal Corporation or any person appointed by him shall be the Sole Arbitrator. A similar clause had come up for consideration before the Supreme Court in **TRF Limited vs. Energo Engg. Projects Ltd. (2017) 8 SCC 377**. Supreme Court held as under:-

“50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the

respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the “named sole arbitrator” and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in State of Orissa v. Commr. of Land Records & Settlement [State of Orissa v. Commr. of Land Records & Settlement, (1998) 7 SCC 162] . In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held:

“25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this

Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in [Roop Chand v. State of Punjab, AIR 1963 SC 1503]. In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an “officer”, an order passed by such an officer was an order passed by the State Government itself and “not an order passed by any officer under this Act” within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate.”

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54. *In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription*

contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”

6. In view of the above, the Commissioner, North Delhi Municipal Corporation was not entitled to appoint an arbitrator for adjudicating the disputes between the parties. As Clause 28.2(a) is an independent Arbitration Agreement, it would be for this Court to appoint a Sole Arbitrator for the parties, the parties having failed to appoint one consensually.

7. Accordingly and with the consent of the parties, I refer the parties to the Delhi International Arbitration Centre (DIAC), who shall appoint a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the above Letter of Intent. The arbitration fee shall be governed by the Rules of DIAC.

8. The parties to appear before the DIAC on 8th January, 2018 at 2.00 p.m.

9. The petition is allowed in the above terms.

Dasti.

NAVIN CHAWLA, J

DECEMBER 14, 2017/sd