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

+ **ARB.P. 225/2018**

PURVANCHAL CONSTRUCTION WORKS PVT. LTD. Petitioner

Through: Mr. Raghvendra M. Bajaj, Ms.
Garima Bajaj and Mr. Mrigank
Prabhakar, Advocates.

versus

**SUPREME COURT BAR ASSOCIATION MULTI-STATE
COOPERATIVE GROUP HOUSING SOCIETY
LTD. (REGD.)**

..... Respondent

Through: Mr. Dhruv Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% **09.05.2019**

1. The present petition is under Section 11(6) of the Arbitration Conciliation Act. The respondent does not dispute the existence of the arbitration agreement. He also does not dispute the invocation thereof. However, he objects to the present petition on the ground that the petitioner has not exhausted the pre-arbitration procedure, and therefore the present petition is premature and not maintainable.

2. On 8th May 2019 learned counsel for the Respondent had sought time to seek instructions as to the availability of the "Engineer". Today, learned counsel for the Respondent has obtained instructions from his client and states that presently there is no "Engineer" of the Respondent Association in terms of Clause 47.2. He however states that in 2015, when the Arbitration was first invoked by the

Petitioner, the Engineer was holding the post. Learned counsel for the Petitioner states that the said Engineer had in fact resigned on 8th September 2015.

3. Learned counsel relies upon clause 47 relating to settlement of dispute and in particular clause 47.2. He argues that in terms of the said clause disputes or differences arising out of the contract, have to be referred to and settled by an Engineer and this procedure has to be necessarily complied with by the Petitioner. In support of this submission, learned counsel for the Respondent has relied upon the judgment of this Court in ***Ved Prakash Mithal & Sons v Delhi Development Authority*** in Arb. P. No. 212/2018 decided on 10th July 2018 and ***Sushil Kumar Bhardwaj v. Union of India*** in A.A. No. 389/2006 decided on 17th March 2009.

4. The aforesaid judgments are distinguishable and have no application to the facts of the present case. As noted above, Respondent does not dispute that as on date, there is no Engineer in place. Further, in the case of ***MK Shah Engineers & Contractors v State of Madhya Pradesh 1999 2 SCC 594***, where the arbitration clause in the agreement provided for reference of disputes to arbitration, however, such reference was required to be preceded by a decision of the Superintending Engineer and a challenge to such decision within 28 days by the party feeling aggrieved, it was held by the Apex Court:

"The steps preceding the coming into operation of the arbitration clause though essential are capable of being waived and if one party has by its own conduct or the conduct of its officials disabled such preceding steps being taken, it will be deemed that the procedural pre-requisites were waived. The party at fault cannot be permitted to

set up the bar of non-performance of pre-requisite obligation so as to exclude the applicability and operation of the arbitration clause."

5. Therefore, the objection of the Respondent that the Petitioner has not availed of the remedy of first approaching the Engineer is bereft of merit. The Respondent have never hereto before taken this objection at any point of time. Pertinently, since presently there is no Engineer it would be of no avail to ask the Petitioner to exercise an option that does not exist. Thus, for the reasons stated above, with the consent of the parties, it is directed that an Arbitrator be appointed under the Rules of the DIAC. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules.

6. At this stage, learned counsel for the Respondent state that they would first like to explore a possibility of settlement and request that the matter be referred to Delhi High Court Mediation and Conciliation Centre. Learned counsel for the Petitioner does not oppose the said request. Accordingly, the parties are directed to appear before the Delhi High Court Mediation and Conciliation Centre on 7th July 2019.

7. The order passed today appointing the Arbitrator shall be kept in abeyance for a period of one month from today. The representatives of the parties shall appear before the Co-ordinator, DIAC on 25th July 2019 at 11:00 AM. In case the Mediation succeeds, DIAC shall not proceed with the appointment of Arbitrator.

8. Learned counsel for the Respondent states that he would also request the members of the Supreme Towers Apartments and Owners Association

(STAOAs) to join the mediation and the Chairman thereof to remain present in person during the mediation process.

SANJEEV NARULA, J

MAY 09, 2019

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