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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 380/2016

WESTERN INDIA GENUINE GHEE CO.
(PVT.) LTD.

..... Petitioner

Through: Mr S. K. Chaturvedi Advocate.
versus

UNION OF INDIA & ANR.

..... Respondents

Through: Ms Sunieta Ojha, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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19.09.2016

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for appointment of an Arbitrator.

2. The petitioner is engaged in the business of manufacturing and trading of various types of lubricant oils, gear oils, processed vegetable oils, essential oils and other petroleum products. Respondent no.1 floated a tender enquiry in the year 2007 for procurement of DAFC-50% (Glycol based anti-freeze coolant). The petitioner submitted its offer pursuant to the aforesaid enquiry. The said offer was declared the lowest and the petitioner was awarded the contract for supply of DAFC-50% on 11.07.2008 (hereafter 'the

Agreement'). Certain disputes have arisen between the parties in relation to the Agreement.

3. The principal question that arises for consideration is whether there exists an arbitration agreement between the parties. The Agreement does not include any arbitration clause. However, clause 9 of the Agreement, specifically stipulates that "Condition of the contract will be governed by stipulations contained in the Tender Enquiry, CVC Guidelines and as per the DPM-2006" (Defence Procurement Manual - 2006).

4. The "Schedule to Invitation to Tender-Questionnaire" (DGST Form No.105) – which admittedly is a part of the contract between the parties - included the question whether the petitioner was agreeable to appointment of a sole arbitrator for resolution of any disputes, to which the petitioner had answered in the affirmative. The relevant question and its answer is extracted below:-

"23. Do you agree to sole : YES"
arbitration by an office to
be appointed as arbitrator
by the Director General of
Supplies and Transport and
as per arbitration and
conciliation act 1996.

5. The DPM-2006 also includes a clause which reads as under:-

“Arbitration

7.16 There may arise a situation when there is a dispute between the purchaser and the supplier, which could not be resolved through mutual discussion. In such circumstances, the parties may agree for arbitration. MOD/CFA's should prepare a panel of arbitrators for selection by the Defence Secretary /CFA's who appoint an arbitrator, whose decisions taken after due consideration of factors brought out by both parties are considered final. The option of approaching Ministry of Law for appointment of Arbitrator can also be exercised. **In respect of Services HQs, OFB and DRDO HQs, they have power for appointing Arbitrators within their delegated financial powers.** A standard Arbitration clause has been placed at **Appendix ‘J’**.

7.16.1 There may be situations when either party may approach a court of law for appointing an independent arbitrator. In case of import contract, the arbitration is normally in the international court of law. Purchase officers must consult the legal advisor and Govt. counsel in all cases of arbitration.”

6. On the Agreement being finalised, the petitioner had sent a letter dated 22.07.2008 pointing out that clause No.23 of the DGST Form No. 105 is missing in the Agreement and *‘thus amendment in clause 19(ac) for the sole arbitration is required to be amended’*.

Clause 19(ac) of the Agreement only provided that the disputes and differences arising under the Agreement would be subject to the jurisdiction of the Courts at New Delhi only.

7. In response to the aforesaid letter, respondent no. 1 sent a letter dated 10.08.2010, *inter alia*, stating as under:-

“3. Regarding amendment to Clause 19 (ac) of the AT it is clarified that the said Clause indicates only jurisdiction of the court. So far as arbitration clause is concerned, it already has a provision in DPM-2006 as well as DGS&D 68 (R) under which tender has been accepted and contract awarded. You had also accepted that arbitration clause in your tender against Clause 23 of DGST Form No 105. Since your tender has been accepted accordingly, provision of arbitration exists in the contract.”

8. In view of the disputes that arose subsequently, the petitioner called upon respondent no. 1 to appoint an Arbitrator by a letter dated 12.04.2016. Respondent no. 1 responded to the aforesaid letter by stating that the case is under process. This has led the petitioner to file the present petition.

9. Although, the Agreement does not contain any arbitration clause, however, DGST Form No. 105 as well as DPM-2006 clearly indicates the intention of the parties to resolve their disputes by

arbitration. Admittedly, both DGST Form no. 105 as well as DPM-2006, have been incorporated in the Agreement by reference.

10. In my view, the letter dated 10.08.2010 sent by respondent no. 1 also puts the issue beyond the pail of doubt as respondent no. 1 has clearly and unequivocally stated therein that *“since your tender has been accepted accordingly, provisions of arbitration exists in the contract”*.

11. The learned counsel appearing on behalf of the respondents also fairly submitted that there is some confusion as regarding the procedure for appointing an Arbitrator and, therefore, no Arbitrator has been appointed so far. She submits that appendix J to DPM-2006 referred to the constitution of an Arbitral Tribunal of three arbitrators.

12. A plain reading of clause No.7.16 of the DPM-2006 clearly indicates that a panel of arbitrators was to be prepared for the appointing authority (Defence Secretary/CFA's) to appoint 'an arbitrator'. The expression 'an arbitrator' would clearly indicate that parties contemplate to refer the disputes to a sole Arbitrator. The DGST Form no. 105, which forms a part of the Agreement, also

indicates that the disputes were to be referred to “sole arbitration”. The learned counsel for the respondents also does not object to appointment of a sole arbitrator instead of an Arbitral Tribunal of three arbitrators.

13. In the circumstances, the present petition is allowed. It is directed that a sole Arbitrator be appointed under the Rules of the Delhi International Arbitration Centre (DIAC). The representatives of the parties shall appear before the co-ordinator, DIAC on 18.10.2016 at 11:00 AM. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules.

SEPTEMBER 19, 2016
MK/M

VIBHU BAKHRU, J