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

+ O.M.P.(I) 481/2015

THE STATE TRADING CORPORATION OF INDIA

..... Petitioner

Through: Mr.Ravi Sikri, Sr. Adv. with
Mr.Gaurav Goyal & Ms.Parul
Sharma, Advs.

versus

MORPHO DETECTION(U.K.)LTD & ORS.

..... Respondents

Through: Mr.Bishwajit Dubey, Mrs.Radhika
Dubey & Ms.Surabhi Khattar, Advs.
for R-1.
Mr.Sachin Sharma & Mr.Ajeet
Kumar, Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

% **16.07.2018**

This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner *inter alia* praying for the following reliefs:-

“a. direct Respondent No.1 to carry out the tests as per the order dated 21.05.2014 of the sole arbitrator ADG Security police U.P. on all 37 Nos. VT2 explosive detectors in the presence of an officer appointed by the Intelligence Bureau and parties be directed to cooperate with the officer in whose presence and supervision tests will be carried out and further to secure first hand evidence about the functioning of the equipments;

b. appoint an officer from the Intelligence Bureau in whose presence tests as indicated in the order dated 21.05.2014 of the sole arbitrator

ADG security police should be carried out by Respondent No. 1 on 37 nos. VT2 explosive detectors lying at the security headquarters U.P. police Lucknow, U.P.;”

Petitioner entered into two separate agreements dated 15.02.2005, whereby respondent no. 2 placed an order of 30 & 7 VT2 Explosive Detector on the petitioner. In turn, the petitioner placed a Purchase Order dated 05.04.2005 on the respondent no. 1 for the supply of 37 Nos. Vapor Tracer 2 Desorber Portable Explosive Detector Kit alongwith accessories.

It is an admitted case of the parties that the equipment was supplied by the respondent no. 1 to the petitioner sometime in 2005.

On such supply, respondent no. 2 raised certain objections with respect to the quality of the product. Accordingly, the petitioner filed an application under Section 9 of the Act being OMP 38/2008 before this Court. In the said application, vide order dated 28.11.2008, it was agreed between the parties that to put end to the controversy with regard to the quality of the product supplied by respondent no. 1 to the petitioner, which in turn was supplied by the petitioner to respondent no. 2, it would be proper to carry out “one final test of 37 VT2 explosive detectors in the presence of officers from the Intelligence Bureau”. In view of this agreement between the parties, the petitioner was directed to take steps to approach the Director, Intelligent Bureau for appointment of a Special Official to conduct and supervise the test.

By a subsequent order dated 14.01.2009 passed in the above application, this Court passed the following direction:-

“It is submitted by counsel for respondent No.1 that the said respondent has no objection to the testing but it has by letter dated January 08, 2009 addressed to the

petitioner put some pre-conditions to the testing. In view of the fact that respondent No.1 is agreeable to the testing and as this Court vide order dated November 28, 2008 has already directed the Director, Intelligence Bureau to appoint a Special Officer to conduct and supervise the testing of 37 VT2 Explosive Detectors, it is directed that the Officer so appointed by the Director, Intelligence Bureau shall take into account the pre-conditions as mentioned in the letter dated January 08, 2009 and shall further take notice of the testing procedure which is "Vapor Tracer Site Acceptance Test Procedure". The concerned Officer shall give to the parties schedule with regard to the testing and shall ensure that the testing is done as expeditious as possible. A report of the testing shall be given to all the parties."

Pursuant to this order, the testing was conducted and report dated 26.06.2009 was prepared. The conclusion recorded in the said report is reproduced herein below:-

Conclusion

"1. As per Site Acceptance Test (SAT), all the 37 VT2 Explosive Detector have been found working satisfactorily when operated on AC mains. A report in this regard signed and accepted by IB, STC, UP Police and M/s GE Security has already been given to all the parties vide IB letter dated May 21, 2009 (Annexure 'G').

2. As regards the test to be conducted for evaluating the performance/efficacy of these equipments in the detection of explosive as per User's Manual Guide provided with the detector as requested by the UP police vide their letter dated May 20, 2009, the same need to be undertaken by M/s GE Security before these Explosive Detectors are accepted by the UP police.

3. It may be reiterated that since Vapor Tracer2 Explosive Detector is very sophisticated equipment, it is strongly recommended that the vendors must impart the necessary operational training to UP Police operators for handling & maintenance of these detectors."

Respondent no. 2 still being unsatisfied by this test report invoked the Arbitration Agreement between itself and the petitioner. Respondent No. 1 was not made a party in such arbitration proceedings as respondent no. 1 was not a party to the agreement between the respondent no. 2 and the petitioner. At the same time, the petitioner never invoked the Arbitration Agreement between itself and the respondent no. 1 which is contained in the Purchase Order dated 05.04.2005.

In the arbitration proceedings between the respondent no. 2 and the petitioner, the Arbitrator by his order dated 21.05.2014 *inter alia* directed the testing of 37 VT2 equipment supplied by the petitioner. The arbitrator rejected a proposal given by the respondent no. 1 to the petitioner for testing only five of such equipments and not all 37.

Respondent no. 1 not being a party to these arbitration proceedings was not bound by this order and refused to comply with the same. The petitioner has filed the present petition seeking a direction against the respondent no. 1 to carry out the testing as directed by the arbitrator.

It is noted that though almost 13 years have passed since the supply of the equipment and a further period of more than nine years have passed since tests carried out under the direction of this Court, the petitioner is yet to invoke arbitration agreement against the respondent no. 1.

In ***Sundaram Finance Ltd. vs. NEPC India Ltd.***, (1999) 2 SCC 479, Supreme Court, while holding that an application under Section 9 of the Act can be filed before the initiation of arbitration proceedings, cautioned that in such cases the Court must be satisfied that the applicant intends to take the dispute to arbitration. In the present case, I do not find such intention on part of the petitioner, as the petitioner even after passing of orders dated

28.11.2008 and 14.01.2009 and initiation of arbitration proceedings against it by respondent no. 2, is yet to initiate arbitration proceedings against respondent no. 1. Further, whether the petitioner can force the respondent no. 1 to participate in any further testing of the supplied product or not, can only be determined by the Arbitral Tribunal and cannot be a matter for adjudication under Section 9 of the Act.

In this view of the above, I find no merit in the present petition and the same is accordingly dismissed with no order as to cost.

NAVIN CHAWLA, J

JULY 16, 2018/rv