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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 9th May, 2018

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O.M.P. (T) (COMM.) 75/2017

APPLIED COMMUNICATION AND CONTROLS

..... Petitioner

Through: Mr. Shiv Khurana, Adv.

versus

UNION OF INDIA & ANR

..... Respondents

Through: Mr. Ruchir Mishra, Mr. Mukesh
Tiwari & Mr. Abhishek Rana, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking termination of the mandate of Shri. A.K. Sharma, IG (COMM. & IT) who has been appointed as a Sole Arbitrator for adjudicating the disputes that have been arisen between the parties in relation to the Rate Contract dated 17.01.2013.
2. The Rate Contract between the parties contains an Arbitration Agreement in the form of Clause 23.1 thereof, which is reproduced herein below:-

"23.1 In the event of any question, dispute or difference arising under these conditions or any Special Conditions of Contract, or in connection with this Contract (except as to any matters the decisions of which is specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of an officer in the Ministry of Law, appointed to be the arbitrator by the Directorate General of Supplies & Disposals as per Clause 24 of Conditions of

Contract Form DGS&D 68 (Revised). ”

3. A reading of the above Clause would show that the disputes have to be referred to a Sole Arbitrator who would be appointed by the Directorate General of Supplies & Disposals as per Clause 24 of the Conditions of Contract Form DGS&D 68 (Revised) and shall be an officer in the Ministry of Law. Clause 24 of Conditions of Contract Form DGS&D 68 (Revised) is reproduced hereinunder:-

“CLAUSE- 24- ARBITRATION

i) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of an officer in the Ministry of Law, appointed to be the arbitrator by the Director General of Supplies & Disposals. It will be no objection that the arbitrator is a Government Servant that he had to deal with the matters to which the contract relates or that in the course of his duties as a Government servant he has expressed views on all or any of the matters in dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

(ii) In the event of the Arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, shall be lawful for the Director General of Supplies & Disposals to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(iii) It is further a term of this contract that no person other than the person appointed by the Director General of Supplies & Disposals as aforesaid should act as arbitrator and that, if for any reason that is not possible, the matter is not to be referred to Arbitration at all.

(iv) The arbitrator may from time to time with the consent of all the parties to the contract enlarge the time for making the award.

(v) Upon every and any such reference, the assessment of the costs incidental to the reference and award respectively shall be in the discretion of the arbitrator.

(vi) Subject as aforesaid, the Arbitration Act, 1940 and the rules there under and any statutory modification thereof for the time being in force shall be deemed to apply to the Arbitration proceedings under this clause.

(vii) If the value of the claimant reference exceeds Rs. 1 lakh, the arbitrator shall give reasoned award.

(viii) The venue of arbitration shall be the place from which formal; Acceptance of Tender is issued or such other place as the Director General of Supplies & Disposals at his discretion may determine.

(ix) In this clause, the expression "the Director General of Supplies and Disposals" means the Director General of Supplies and Disposals for the time being and includes if there be no Director General of Supplies & Disposals or if Director General of Supplies & Disposals is on leave or is absent from duty or is not available for any reason whatsoever, the Additional Director General of Supplies & Disposals; in case both the Director General and the Additional Director General of Supplies & Disposals are on leave or are absent from duty or are not available for any reason whatsoever, the officer who is looking after the current duties of Director General and/or Additional Director General of Supplies & Disposals whether in addition to other functions or otherwise."

4. A reading of the above would again show that an Officer from the Ministry of Law is to be appointed as an Arbitrator by the DGS&D.

5. As certain disputes arose between the parties, the petitioner sought the appointment of an Arbitrator. On failure of the respondent to appoint an Arbitrator, the petitioner filed an application under Section 11 of the Act being ARB. P. 208/2016 before this Court. On 18.07.2016, the counsel for the respondent informed the Court that Mr.Anil Kumar, IG (Prov), Headquarters DG, BSF has been appointed as an Arbitrator. The petitioner did not challenge the appointment and the parties agreed that the Arbitrator so appointed shall adjudicate the disputes within a period of nine months from the date of the order.

6. However, Mr.Anil Kumar, did not proceed with the arbitration. The respondent, in its affidavit states that this was because Mr.Anil Kumar was repatriated to his parent department.

7. The respondent no.2 thereafter by its order dated 14.09.2016 appointed Mr.A.K. Sharma, IG (Comm/Prov),BSF, as a Sole Arbitrator for adjudicating the disputes.

8. The petitioner protested against such appointment stating that only an Officer from the Ministry of Law can be appointed as a Sole Arbitrator. The petitioner even filed an application under Section 13 of the Act calling upon the Arbitrator to withdraw himself from the proceedings. The Arbitrator, however, by his order dated 15.07.2017 rejected the said application relying upon Correction Slip no. 64 dated 21.10.2014 issued by the Ministry of Commerce and Industries, Government of India making an amendment to the DGS&D Manual to the effect that for the settlement of disputes relating to supply orders placed by various Direct Demanding Officers (DDO) against DG&D Rate Contracts, each DDO shall himself nominate an Arbitrator at the time of the placement of supply orders. The petitioner has

therefore filed the present petition challenging the authority of Mr.A.K. Sharma to proceed with the arbitration proceedings and seeking appointment of a substitute Arbitrator in his place.

9. As noted above, the Rate Contract between the parties contains a specific arbitration agreement in the form of Clause 23.1 which provides for two conditions; (a) the appointment is to be made by the Director General of Supply and Disposals; (b) The Arbitrator is to be an Officer in the Ministry of Law.

10. By a unilateral amendment to the DSG&D Manual, the respondent cannot amend the specific contract that has been executed between the parties. Any such amendment has to take place with the consent of both the parties.

11. The counsel for the respondent submits that as the petitioner, on the earlier occasion had agreed for the appointment of an Arbitrator by the DDO and of a person who was not an Officer in the Ministry of Law, the petitioner is deemed to have accepted the amendment in the Contract in the form of Correction Slip no. 64 as referred above. In my opinion, no such inference can be drawn against the petitioner in the above facts.

12. In any case, the petitioner has challenged the appointment of the substitute Arbitrator also on the ground of him being an Officer of the respondent. Such appointment would clearly be barred under Section 12(5) of the Act and the Arbitrator so appointed would be ineligible to proceed with the reference.

13. Another important factor to be taken into consideration is that the petitioner had agreed to the earlier appointed Arbitrator on an assurance given by the respondent that the Arbitrator would complete the proceedings

within a period of nine months. Admittedly Mr. Anil Kumar, the earlier appointed arbitrator did not even get to enter upon the reference, leave alone the question of conducting the proceedings expeditiously. The justification for the same as given by the respondent is that the Arbitrator so appointed had been repatriated to his parent department. As observed by the Supreme Court in *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523, arbitration is supposed to be an expeditious remedy and when the respondent insists on its own Officer being appointed as an Arbitrator, the said intent will be defeated by the repeated transfer of such officer. The Supreme Court further held as under:-

“15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of the parties’ choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the arbitration agreement, the Chief Justice or his designate, required to exercise power under Section 11 of the Act, can step in and pass appropriate orders.”

14. In view of the above, I have no hesitation in terminating the mandate of Mr. A.K. Sharma.

15. I appoint Justice M.C. Garg, Retired Judge of this Court (R/o C-113, East of Kailash, New Delhi-110065, Mobile: 9899337979) as a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the above mentioned Rate Contract. The Arbitration shall be held under the aegis of Delhi International Arbitration Centre (DIAC) and shall be governed by its rules as to the procedure and fee. The Arbitrator

shall give his disclosure in compliance with Section 12 of the Act before proceeding with the reference. The Arbitrator shall proceed from the stage that the proceedings were at before the earlier Arbitrator. The respondent shall collect the Arbitral Record from the earlier Arbitrator and file the same before the DIAC. This exercise must be done by the respondent within a period of two weeks from today.

16. The petition is allowed in the above terms and with no order as to cost.

Dasti.

NAVIN CHAWLA, J

MAY 09, 2018/rv