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

+ ARB.P. 712/2017

K SALES AND SERVICE

..... Petitioner

Through: Ms Seema Singh, Advocate.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr Jaswinder Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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23.04.2018

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes that have arisen between the parties in relation to an agreement dated 21.11.2016 (hereafter 'the Agreement'). The General Conditions of Contract, which form a part of the Agreement, includes an arbitration clause that reads as under:-

“70. Arbitration.- All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer officer to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Work or termination or determination of the Contract

under Condition Nos.55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos.52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, *ex parte*, if either party, in spite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge the time up to but not exceeding one year from the date of his entering on the reference, for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The award of the Arbitrator shall be final and binding on both parties to the Contract."

2. The petitioner invoked the arbitration clause by a letter dated 26.09.2017. This was followed by another letter dated 26.10.2017 once again calling upon the respondent to appoint an arbitrator in terms of the arbitration clause. In view of the request made by the petitioner, the respondent, by a letter dated 16.11.2017, appointed Shri Rajiv Kumar, SE, Director E/M, HQ CE (AF) Palam as a Sole Arbitrator. The petitioner objected to the said appointment, *inter alia*, on the ground that Shri Rajiv Kumar was ineligible to act as an arbitrator by virtue of Section 12(5) of the Act. This Court is further informed that Shri Rajiv Kumar has since resigned on account of his being posted out of Delhi and the respondent has appointed another serving officer (Lt. Col. Saravanan Babu) as an Arbitrator in his place.

3. The petitioner states that in view of Section 12(5) of the Act, a serving officer cannot be appointed as an Arbitrator. The learned counsel appearing for the respondent does not dispute the above proposition. He; however, submits that since the petitioner had already filed its Statement of Claim, the petitioner has acquiesced in the appointment of a serving officer as an arbitrator.

4. The above contention is unmerited. Section 12(5) of the Act reads as under:-

“(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having

arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

5. Proviso to Section 12(5) of the Act makes it amply clear that unless there is an express agreement in writing between the parties waiving the applicability of the said provision, the persons falling under any of the categories in the Seventh Schedule of the Act would be ineligible for being appointed as an arbitrator. Indisputably, there is no agreement in writing whereby the petitioner has waived the applicability of Section 12(5) of the Act. On the contrary, the letter dated 25.11.2017 (a copy of which is handed across by the learned counsel for the petitioner) expressly refers to Section 12(5) of the Act and requests the respondent to appoint a Sole Arbitrator as per the prevailing laws.

6. In view of the above, it is apparent that by virtue of Section 12(5) of the Act, the arbitrator appointed by the respondent is ineligible to act as such. Furthermore, the respondent had appointed the arbitrator after the petitioner had moved this present petition (which was moved on 08.11.2017). In this view, the respondent had also forfeited its right to appoint an arbitrator.

7. In the aforesaid facts, this Court considers it apposite to appoint Mr S.K. Tandon, Retd. ADJ, Delhi (Mobile No. 9811719888) as a Sole Arbitrator to adjudicate the disputes that have arisen between the parties. This is subject to the Arbitrator making the necessary disclosure under Section 12 of the Act and not being ineligible under Section 12(5) of the Act. The Arbitrator shall fix the arbitral fees in consultation with the learned counsel for the parties and having regard to Schedule IV of the Act.

8. The parties are at liberty to approach the Arbitrator for further proceedings.
9. The petition is disposed of.
10. Order *dasti*

VIBHU BAKHRU, J

APRIL 23, 2018
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