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

Date of decision: 17th October, 2019

+ LPA 341/2019 and CM APPL. 23391/2019 (stay)

M/S GLOBAL TRANSNATIONAL
TRADING FZE

..... Appellant

Through: Mr. Dayan Krishnan, Sr.
Advocate with Mr. Sriram
Krishna, Mr Siddhartha Singh
and Mr. Sanjeevi Seshadri,
Advs.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Manish Mohan, CGSC with
Ms. Manisha Saroha, Adv. for
respondent nos. 1 and 2
Mr. Tarkeshwar Nath, Adv. for
respondent no. 3

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER
17.10.2019

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D.N. PATEL, CHIEF JUSTICE (ORAL)

LPA 341/2019

1. This Letters Patent Appeal (LPA) has been preferred by the appellant (original petitioner), whose W.P. (C) No. 3722/2019 has been dismissed by the learned Single Judge, vide judgment and order dated 10th April, 2019 (Annexure A-1 to the memo of this LPA), whereby it has been held by the learned Single Judge that looking to the provisions of Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") an application would have been preferred by the

appellant (original petitioner). Moreover the agreement between the appellant (original petitioner) with respondent no. 3, also contain an arbitration clause.

2. Having heard counsel for both the parties and looking to the facts and circumstances of the case, it appears that on 12th June, 2015 a global tender was issued on behalf of Government of India for the supply of urea fertilizer. The procurement was to be made by respondent no. 3 which is one of the canalizing agency for the Department of Fertilizers, Government of India.

3. The appellant (original petitioner) was awarded the tender and a contract dated 23rd June, 2015 was entered into, for the purchase of 105,000 (+/- 5%) tolerance MTs Bulk granular urea.

4. The arbitration clause, contained therein (which is at page 112) reads as under:-

"20. ARBITRATION:

In the event of any dispute arising between the Parties in relation to or under this Agreement/EOI , the same shall be settled by arbitration conducted in accordance with the Rules of Arbitration of the Indian Council of Arbitration, New Delhi, The decision of the arbitration tribunal shall be final and binding. The venue of the arbitration shall be New Delhi, India. The language of arbitration shall be English. The governing laws shall be laws of India. The arbitral award shall be enforced in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any of its amendments thereof."

5. The specification and characteristics of the contracted commodity were annexed as Annexure-I of the contract (which is enumerated at pg no. 115 to the memo of this LPA). A sample analysis was carried out at the load port in Iran and the report of which, (dated 29th July, 2015) (found at page 132) as submitted by the counsel for the appellant, was found within the specified parameters.

6. Thereafter, when the goods reached to India, another sample was drawn of the goods in question, namely, granular urea and the said sample was divided into three parts and one of the parts was analyzed at the Discharge Port. The report is dated 2nd September, 2015, (is report no. 2). It is further submitted by the counsel for the appellant (original petitioner) that this report is also in consonance with the parameters except slight deviation in 2.0 mm granular diameter. For this wrongful deviation, penalty has been levied by the respondents, which is paid by the appellant (original petitioner) by way of encashment of the bank guarantee furnished by the appellant (original petitioner).

7. It is further submitted by the counsel for the appellant (original petitioner) that there is high degree of variation in the analysis report dated 2nd September, 2015.

8. Now, because of the aforesaid report dated 2nd September, 2015 after encashment of the bank guarantee, a request was made by the appellant (original petitioner) for the analysis of another part of the sample drawn of urea granules. The said sample was sent as per the norms of the respondents to the approved laboratories at Trichy and the report was given on 1st September, 2016, which is a second report in India and the same is also known as “umpire analysis”, as per the terms of agreement or more particularly, as per Clause 10 thereof. The said report is at Annexure P-15.

9. Thus, it is submitted by the counsel for the appellant (original petitioner) that there is a high degree of deviation in the report dated 2nd September, 2015, which is the first report in India and the report dated 1st September, 2016 is the second report in India; hence, a request was made for the analysis of third part of the same sample. Since, this request was not accepted, writ petition was preferred by the appellant (original petitioner) which was dismissed, on the fact that, an application under Section 9 of the Act can be preferred; moreover, there is an arbitration clause also in the agreement entered into between the appellant (original petitioner) and respondent no.3.

10. Counsel for the respondent no. 3 has also taken this Court to the arbitration clause, Clause 20 *supra* and is submitted by the counsel for the respondents that whatever is being argued by the appellant (original petitioner) can always be argued before the learned Arbitrator disputing the second report in India dated 1st September, 2016 (Annexure P-15). Since the disputes between the parties have arisen under the agreement; hence, the disputes will be governed by the arbitration clause and therefore, even if the appellant (original petitioner) is relying upon the amendment of Fertilizer Control Order, which was made effective from 5th July 2018 to be read with the decision rendered by the Hon'ble Supreme Court in ***Commissioner of Income Tax (Central -I), New Delhi v. Vatika Township Pvt. Ltd., 2014 (10) SCALE 510***, can always be agitated before the learned Arbitrator in an application under Section 9 of the Act.

11. Having heard counsel for both the parties and looking to the facts and circumstances of the case, it appears that after the appellant (original petitioner) was awarded the tender, an agreement was entered into between the appellant (original petitioner) and respondent no. 3 for supply of urea granules (fertilizer), the said agreement is at Annexure P-2

and looking to Clause 20 thereof, as stated hereinabove, there is an arbitration clause.

12. Moreover, the appellant (original petitioner) is not ready to accept the umpire analysis report dated 1st September, 2016 for any reason whatsoever, reflecting the fact that a dispute has already been started between the parties under the agreement. Thus, the adjudication of the dispute will now be governed by the arbitration clause. Even the request for a third analysis to be done on the third part from the same sample is governed by the agreement between the parties and thus, even if, the counsel is relying upon the procedural amendment as carried out in the fertilizer control order, which is made effective from 5th July, 2018, which permits third analysis of the sample to be read with *Vatika Township supra*, can always be argued before the learned Arbitrator. This aspect of the matter has been properly appreciated by the learned Single Judge while deciding the writ petition preferred by the appellant (original petitioner). Thus, by not accepting the umpire analysis report dated 1st September, 2016 itself reflects the fact that the dispute has arisen between the parties under the agreement. Hence, such a dispute will be governed under the agreement with a remedy available under Clause 20 thereof. Hence, we see no reason to entertain this Letters Patent Appeal and the same is hereby dismissed.

CM APPL. No. 23391/2019 (stay)

In view of the order passed in this appeal, this civil miscellaneous application is disposed of.

CHIEF JUSTICE

C.HARI SHANKAR, J.

OCTOBER 17, 2019/r.bararia