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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.95 OF 2019

M/s. United Sales Corporation

...Petitioner

Versus

Union of India & Ors.

...Respondents

Mr. Mihir Raje for the Petitioner.

Ms. Shilpa Kapil for the Respondent No.1.

CORAM : R.I. CHAGLA J.

DATE : 12 October 2021

ORDER :

1. Heard learned Advocate for the parties.
2. By this application the Applicant is seeking appointment of a Sole Arbitrator to adjudicate the dispute with respect to the contract bearing C A No.CWE/PNA/S/93 of 2017-18 between the Petitioner and Respondents.
3. The Petitioner is a registered partnership firm and the contractor registered with Military Engineering Services.

Respondent No.1 is Union of India and Respondent No.2 is a Chief Engineer Pune Zone. The Respondent No.2 is the designated authority to appoint the Arbitrator as per the terms and conditions of the said contract.

4. It is the case of the Petitioner that the said contract was allotted to the Petitioner for “Special Repair to O7X Ceiling Mounted OT Lights for Operation Theatre Complex of CH (SC) Under GE Sought”. The Petitioner claims that contract has been successfully completed on 28th April, 2018 and the fact has been confirmed by GE vide the completion certificate bearing No.8961/81/E8, dated 2nd May, 2018. The Petitioner had submitted final bill on 30th April, 2018. The Respondents had disallowed certain claims of the Petitioner which are as under:-

i) Making arrangement for enabling camera provision to LED OT light for OT Lights.

ii) Consequence of difference in exchange rate for EURO were not payable.

5. In view of the rejection of their claims, the Petitioner addressed letter dated 30th June, 2018 to Respondent No.3 that there was a dispute pertaining to the contract and that the Petitioner is invoking arbitration clause as per Condition 70 of the IAFW 2249. The Petitioner called upon the Respondent No.2 to appoint Arbitrator in view of the dispute between parties. The Petitioner in their letter dated 23rd July, 2018 mentioned the entire list of claims of the Petitioner and requested the Respondent No.2 to appoint sole arbitrator. In the response letter of Respondent No.3 dated 11th August, 2018, the claims of the Petitioner were rejected by stating that the claims were not admissible and the same were not contractual.

6. The Respondent No.2 did not appoint the Arbitrator inspite of Petitioner requesting for Respondent No.2 to appoint Arbitrator vide letter dated 23rd July, 2018 and the subsequent letter dated 4th September, 2018. Hence the Arbitration Petition under Section 11 of the Arbitration and Conciliation Act, 1966 ("the Act") has been filed.

7. The learned Advocate for the Petitioner has

submitted that the dispute between the Petitioner and Respondents is an arbitrable dispute. He has referred to the General Conditions of the Contract (IAFW 2249) wherein it is provided that it is agreeable and declared that by the General Conditions of the Contracts (included Condition 70) thereof pertaining to settlement of disputes by Arbitrator form the part of tender documents. In Condition 70, it is expressly provided that the dispute 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 Sole Arbitration. He has submitted that as per the amendment to the said Act, the Sole Arbitrator cannot be a service officer but could as an engineer or equivalent or person having passed final / direct final examination of subdivision of Institution of Surveyor (India) recognized by the Govt. of India be appointed as sole arbitrator. The additional work involved was taken by the Petitioner as deviation in terms of condition 7 of IAFW 2249. He has further submitted the decision had been taken by the Accepting Officer Mr. Vikas Jain dated 24th November, 2018 which is re-pronounced as final and binding decision of the Accepting Officer in terms of

condition 7 of BOQ that no extra claim can be raised by you against Ser Item no.2 of BOQ as the item is catered scope of work very similar to Ser item No.1 but except camera, does not amount to a decision which is final and binding decision as contemplated in Condition 70 read with condition 7 of the IAFW 2249 for the arbitration agreement to be ousted.

8. Condition 7 expressly provides that in the event of disagreement between the Contractor and Accepting Officer as to the additional work taken as deviation in terms of Condition 7, the decision of the next higher authority or the Chief Engineer in case of contracts accepted by them shall be final and binding on the contractor. In the present case, there is no decision taken of the next higher authority or the Chief Engineer with regard to this dispute and thus the decision of the Accepting Officer or by the Garison Engineer Mr. Sunil Kumar cannot be final and binding on the Petitioner as per condition 7.

9. The learned Advocate appearing for the Respondent states that in Clause 70 of the General Conditions (IAFW 2249) it is expressly provided that the decision of the C.W.E. or any

other person is by contract expressed is final and binding shall not be an arbitrable dispute. She has referred to Condition 7 and has stated that a decision had been taken with regard to the dispute as to the deviation taken by the Petitioner in terms of condition 7. She has referred to the decisions taken by the Garison Engineer Mr. Sunil Kumar as well as by the Accepting Officer Mr. Vikas Jain and has submitted that this decision is final and binding on the Petitioner. It is submitted that the decision is not arbitrable.

10. Having considered the submissions it appears from Condition 70 of the General Conditions of Contract (IAFW 2249) that all dispute 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 the either party to the contract would be referred to sole arbitrator as provided in the said condition. A dispute had arisen between the Petitioner and Respondents in respect of the deviation claimed by the Petitioner as per Condition 7 of IAFW-2249. This was sought to be referred to arbitration by the Petitioner vide letter invoking arbitration dated 30th June, 2018 and by further letter dated

23rd July, 2018 by which the disputed claims have been expressly mentioned. The Respondent No.2 was requested to appoint the sole arbitrator in terms of condition 70 (IAFW - 2249). It has been expressly mentioned in the letter dated 23rd July, 2018 that a claim is made for arrangements for enabling camera provisions to OT light fittings of a sum of Rs.22,35,000/-. This was expressly sought to be referred to arbitration and which pertains to the deviation claimed by the Petitioner in terms of Condition 7 of IAFW-2249. It is expressly provided in Condition 7 that in the event of a disagreement between the contractor and Accepting Officer, the decision taken by the next higher authority or the Chief Engineer in case of contract accepted by him shall be final and binding on the contractor.

11. In the present case, the decision was taken by the Accepting Officer on 24th November, 2018 and prior thereto by the Garison Engineer on 8th January, 2018. Thus, the decision had not been taken by the next higher authority or Chief Engineer in case of contract accepted by him which is stated to be final and binding on the Contractor as per condition 7. Thus from condition 70 there is clearly an arbitrable dispute

with respect to the deviation claimed by the Petitioner in terms of Condition 70 of IAFW 2249 and that the exception mentioned in Condition 70 that (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) will not to apply in the present case. Further, the contract does not provide for a decision taken by the Accepting Officer or by Garison Engineer to be final and binding on the parties.

12. In view of the arbitration agreement under Condition 70 of the IAFW 2249, the disputes raised by the Petitioner requires to be referred to arbitration. It is expressly made clear that in the event of any application filed by the Respondent challenging the jurisdiction of the Arbitrator before the Arbitrator, the observations in this order shall not come in the way of Arbitrator deciding the said application as to his jurisdiction.

13. Hence the following order:-

(i) Mr. S.S. Rao, F.I.E. (I), LLB, Retired Chief Engineer

(Civil), Wcl from the panel of Arbitrators of this Court is appointed as Arbitrator to adjudicate the dispute with respect to the contract bearing No. CWE/PNA/S/93 of 2017-18 between the Petitioner and Respondents.

(ii) The Arbitration Petition is accordingly disposed of in the above terms.

[R.I. CHAGLA J.]