

(2019) 02 J&K CK 0079

In the Jammu And Kashmir High Court

Case No : Arbitration Petition (AP) No. 27 Of 2018

Fazal Rehman Dar

APPELLANT

Vs

Chief Engineer, PMGSY And Ors

RESPONDENT

Date of Decision : 22-02-2019

Acts Referred:

Jammu And Kashmir Arbitration And Conciliation Act, 1997 — Section 11

Citation : (2019) 02 J&K CK 0079

Hon'ble Judges : Dhiraj Singh Thakur, J

Bench : Single Bench

Advocate : Sheikh Najeeb, Amit Gupta

Final Decision : Dismissed

Judgement

1. This petition is filed under Section 11 of the J&K Arbitration and Conciliation Act, 1997 (for short, the Act of 1997) seeking reference of disputes to an independent Arbitrator.

2. It appears that the petitioner was allotted a contract by the Chief Engineer, PMGSY for construction/maintenance of a road from Balmakote to Bagudass. It appears that the disputes have arisen between the parties which are required to be settled. The allotment of work was also accompanied with execution of an agreement.

3. According to clause 25.1 of the said agreement, the parties agreed that there would be no arbitration for settlement of any dispute between them. Since Clause 25 is relevant, the same is, therefore, being reproduced here-in-below:

"25. Arbitration

25.1 In view of the provision of the clause 24 on Dispute Redressal System, it is the condition of the Contract that there will be no arbitration for the settlement of any dispute between the parties.

B. Time Control."

4. Learned counsel for the petitioner, however, states that clause 25.1 has to be read with clause 24 under the heading Dispute Redressal System. Since a lot of emphasis has been placed by the learned counsel for the petitioner on the aforementioned clause, it would be pertinent to reproduce the same here-in-below:

"24. Dispute Redressal System.

24.1 If any dispute or difference of any kind what-so-ever shall arises in connection with or arising out of this Contract or the execution of Works or maintenance of the Works there under, whether before its commencement or during the progress of Works or after the termination, abandonment or breach of the Contract, it shall, in the first instance, be referred for settlement to the competent authority, described along with their powers in the Contract Data, above the rank of the Engineer. The competent authority within 45 days of arising the dispute or difference after being requested in writing by the Contractor to do so, convey his decision to the Contractor. Such decision in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the Contractor. In case the Works is already in progress, the Contractor shall proceed with the execution of the Works, including maintenance thereof, pending receipt of the decision of the competent authority as aforesaid, will all due diligence.

24.2 Either party will have the right of appeal, against the decision of the competent authority, to the Standing Empowered Committee within 90 days of decision of the competent authority if the amount appealed against exceeds rupees one lakh.

24.3 The composition of the Empowered Standing Committee will be:

- i. One official member, chairman of the Standing Empowered Committee, not below the rank of Additional Secretary to the State Government;
- ii. One official member not below the rank of chief engineer; and
- iii. One non-official member who will be technical expert of

Chief Engineer's level selected by the Contractor from a panel of three persons given to him by the Employer;

24.4 The Contractor and the Employer will be entitled to present their case in writing duly supported by documents. If so requested, the Standing Empowered Committee may allow one opportunity to the Contractor and the Employer for oral arguments for a specified period. The Empowered Committee shall give its decision within a period of ninety days from the date of appeal, failing which the contractor can approach the appropriate court for the resolution of the dispute.

24.5 The decision of the Standing Empowered Committee will be binding on the Employer for payment of claims up to five percent of the Initial Contract Price. The Contractor can accept and receive payment after signing as "in full and final

settlement of all claims". If he does not accept the decision, he is not barred from approaching the courts. Similarly, if the Employer does not accept the decision of the Standing Empowered Committee above the limit of five percent of the Initial Contract Price, he will be free to approach the court applicable under the law."

5. It was stated that the Clause 24 has to be read in conjunction with 25.1, especially the phrase "In view of the provision of the clause 24 on Dispute Redressal System.....". It was urged that the bar of Clause 25 would not apply in a case where the dispute redressal mechanism as envisaged in terms of 24.1 was resorted to. It was urged that since the respondents had not at all fulfilled its commitment to follow the Clause 24.1, despite a representation in that regard made to them vide communication dated 10.09.2017, therefore, the respondents could not be permitted to take a benefit of their own wrong and cannot be, thus, prevented from invoking clause 25.1.

6. Reliance was also placed upon a judgment of Rajasthan High Court in M/s Surya Construction Company v. The State of Rajasthan and another., (2013) 30 RCR (Civ) 40. In the aforementioned judgment the Rajasthan High Court has placed reliance upon the Apex Court judgment in M. K. Shah Engineers and Contractors v. State of M.P., 1999 (2) SCC 594.

7. In the case before the Rajasthan High Court was a clause akin to clauses 24 and 25 as this Court is confronted with in the present case. The basis of the decision appears to be paragraph 17 of the judgment passed in M. K. Shah' s case (supra), which is reproduced hereunder:

"17. No one can be permitted to take advantage of one's own wrong. The respondent-State of M.P. cannot and could not have been heard to plead denial of the two appellants' right to seek reference to arbitration for non-compliance with the earlier part of clause 3.3.29. In the case of M/s. Chabaldas & Sons, the clause was complied with. Alternatively, even if it was not complied with in the case of M/s. Chabaldas & Sons, but certainly in the case of M/s M.K. Shah, the fault for non-compliance lies with the respondent-State of M.P. through its officials. The plea of bar, if any, created by the earlier part of Clause 3.3.29 cannot be permitted to be set up by a party which itself has been responsible for frustrating the operation thereof. It will be travesty of justice if the appellants for the fault of the respondents are denied the right to have recourse to the remedy of arbitration. A closer scrutiny of Clause 3.3.29 clearly suggests that the parties intended to enter into an arbitration agreement for deciding all the questions and disputes arising between them through arbitration and thereby excluding the jurisdiction of ordinary civil courts. Such reference to arbitration is required to be preceded by a decision of the Superintending Engineer and a challenge to such decision within 28 days by the party feeling aggrieved therewith. The steps preceding the coming into operation of the arbitration clause though essential are capable of being waived and if one party has by its own conduct or the conduct of its officials, disabled such preceding steps being taken, it will be deemed that

the procedural prerequisites were waived. The party at fault cannot be permitted to set up the bar of non-performance of prerequisite obligation so as to exclude the applicability and operation of the arbitration clause."

8. Clause 3.3.29 which was considered by the Apex Court in M. K. Shah's case is relevant and is being reproduced here-in-below:

"3.3.29: Decision Of Superintending Engineer to be final except where otherwise specified in the Contract "The decision of the Superintending Engineer of the Circle for the time being in respect of all questions and disputes relating to the meaning of the specifications, designs, drawing and instructions here-in-before mentioned and as to the quality of workmanship or material used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or those conditions or otherwise concerning the work of execution or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof, shall be final. Provided that if any party to the contract is dissatisfied with the final decision of the Superintending Engineer, in respect of any matter, he may, within 28 days after receiving the notice of such decision, give notice in writing to the Superintending Engineer, requiring that the matter may be referred to arbitrator and furnishing detailed particulars of the dispute or difference and specifying clearly the point at issue. If any party fails to give such notice within 28 days as stipulated above, the decision of the Superintending Engineer, already given shall be conclusive, final and binding on the parties. In case an arbitration is to be held it shall be effected by an arbitrator to be appointed by the State Government out of a panel of three names suggested by the State Government to the contractor, who shall give concurrence within a period of one month from the date of the communication. In case the contractor does not communicate the concurrence, the State Government shall appoint an arbitrator whose decision shall be conclusive, final and binding on the parties. If the work under the contract has not been completed when a dispute is referred to an arbitrator, work shall continue during the arbitration proceedings if it is reasonably possible and no payment due to contractor should be withheld on account of arbitration proceedings unless it is required by the arbitrator."

9. On a perusal of the aforementioned clause, it is thus clear that upon failure of the dispute resolution mechanism, parties had in fact agreed to have the matters settled through the arbitration mechanism, which, however, is not true in the present case. In fact, clause 25 of the agreement specifically bars the parties from invoking the mechanism as provided under the Act of 1997.

10. Overwhelming reliance placed upon by the learned counsel for the petitioner on the opening phrase of clause 25.1 is also misplaced. In fact, the clause 25.1 attempts to prohibit the invocation of the arbitration procedure in view of the provisions of clause 24 which prescribes the Dispute Resolution Mechanism. It is clear that the parties had not at all envisaged that failure of the mechanism as

prescribed under clause 24 would automatically enable a party to invoke the arbitration clause. The intention is in fact clearly to the contrary.

11. Reliance placed upon the Apex Court judgment in M. K. Shah's case and the Rajasthan High Court judgment in Ms/ Surya Construction Company's case also have no application to the facts and circumstances of the present case.

12. Be that as it may, the petition is held to be without any merit and is accordingly dismissed along with connected IA(s).