

**(2023) 02 J&K CK 0065**

**In the Jammu And Kashmir High Court**

**Case No : Arbitration Petition No. 50, 51 Of 2019**

M/S R.K. Gupta And Co

APPELLANT

Vs

University Of Jammu And Others

RESPONDENT

**Date of Decision : 23-02-2023**

**Acts Referred:**

Jammu And Kashmir Arbitration And Conciliation Act, 1997 — Section 11(6), 12  
Arbitration And Conciliation Act, 1996 — Section 12(5)

**Citation : (2023) 02 J&K CK 0065**

**Hon'ble Judges : Tashi Rabstan, J**

**Bench : Single Bench**

**Advocate : R.K. Jain, Gowhar Amin, Ajay Abrol**

**Final Decision : Disposed Of**

## Judgement

Tashi Rabstan, J

1. The petitioner has filed the instant petition under Section 11(6) of the J&K Arbitration and Conciliation Act, 1997 (hereinafter referred to as "Act") seeking a direction for reference of dispute arising out of Agreement No. 3 having Allotment No. UWD/13-14/192-201 dated 1st May, 2013, inter se the parties to an independent Arbitrator, on the strength of averments made and grounds taken in the petition.

2. The brief facts of the case are as under:

The respondents-University of Jammu allotted a contract by way of Agreement No. 3 having Allotment No. UWD/13-14/192-201 dated 01.05.2013 to the petitioner firm, for construction of boys hostel at Poonch Campus of Jammu University, Poonch (Civil and Sanitary Work) for an amount of Rs.5,62,86,678.00/-. As per the terms and conditions of the Contract Agreement the date of commencement of work was seventh day from the date of allotment of work and the period of contract agreement and its completion was up to fifteen months. After the issuance of the contract, the petitioner firm mobilized

its men and machinery to start work at site, however, the petitioner was not permitted to start work at site in view of existence of some land dispute between the department and locals of the area. Thereafter, the petitioner firm time and again made requests to the respondents for permission to start the work. The petitioner firm apprised the respondents that due to stoppage of work the petitioner company has faced huge financial loss on account of plant and machinery as well as the manpower remained idle and material dumped at the site, however, the respondents dilly dallied the matter on one pretext or the other, causing severe financial loss to the petitioner, which resulted into dispute inter se the petitioner and the respondents. Thereafter, the petitioner vide notice dated 15.07.2019 called upon the respondent No. 2 to appoint an Arbitrator in terms of Clause (26) of the General Conditions of the Contract and also submitted the list of claims, however, the respondent No. 2 failed to take steps for appointment of an Arbitrator within thirty days, which has given cause of action to the petitioner to approach this Court.

3. The respondents have filed objections contending therein that as per the terms and conditions of the agreement, the petitioner was supposed to complete the allotted work within 15 months from the date of allotment of work, however, the petitioner could not conclude the contract and left the same midway and thereafter issued a notice for reference of dispute to the named Arbitrator. It is further contended that the notice was received on 31.07.2019 and the named Arbitrator entered upon the reference on 30.08.2019 and the petitioner was informed accordingly. The Arbitrator fixed the date for appearance of the parties on 01.10.2019, on which date the Arbitrator conducted the preliminary proceedings wherein the officials of the University were present, however, none represented the petitioner and as such, proceedings were adjourned. It is further contended that the petition is misconceived and misdirected as the same has been filed after the Arbitrator entered upon the reference and conducted proceedings.

4. Heard learned counsel appearing for the parties and considered their submissions.

5. The precise and only argument put forth by Mr. Ajay Abrol, learned counsel for the respondents is that the present petition has been filed by the petitioner after the Arbitrator entered upon the reference and conducted proceedings on 01.10.2019 and the petitioner instead of appearing before the learned Arbitrator on 01.10.2019 has filed this petition, therefore, the present petition under Section 11(6) of the J&K Arbitration and Conciliation Act, 1997 is not maintainable.

6. Learned counsel for the petitioner has vehemently argued that in view of the amendment of Section 12 of the Act, the proceedings conducted by the Arbitrator on 01.10.2019, who has entered upon the reference, is required to be set aside. In support of his contention he has relied upon the judgments passed by the Supreme Court reported as AIR 2017 (Supreme Court) 939, AIR 2017 (Supreme

Court) 3889 and 2021 AIR (Supreme Court) 653. Learned counsel for the respondents in support of his contention has also relied upon the judgment passed by the Supreme Court reported as 2013 AIR (SCW) 2781.

7. As per Clause 26 of the Contract Agreement if any dispute/doubt or difference / question of any kind, except these on which the decision of any authority hereto forestated to be final and binding whatsoever other arised between the Engineer-in-Charge or the officer of the University other than the Vice Chancellor who is authorised competent to accept and allot the work and the contractor in connection with or arising out of the contract, the same shall be referred to the Vice Chancellor who shall act as arbitrator. It is averred that the respondents have failed to exercise Clause 26 of the Agreement, despite the petitioner approached the respondents for referring the disputes to an Arbitrator to resolve and settle the same in accordance with law, therefore, the petitioner was left with no other option but to file the present petition.

8. The parties admitted that the dispute is there. The only objection raised by the respondents is that whether this Court can adjudicate the present petition under Section 11(6) of the J&K Arbitration and Conciliation Act, 1997, as the same has been filed after the Arbitrator entered upon the reference and conducted proceedings. The Supreme Court in the case titled "Haryana Space Application Centre (HARSAC) & Anr. Vs. M/s Pan India Consultants Pvt. Ltd." reported as 2021 AIR (Supreme Court) 653 has observed in para 17, as under:-

"17. We are of the view that the appointment of the Principal Secretary, Government of Haryana as the nominee arbitrator of HARSAC which is a Nodal Agency of the Government of Haryana, would be invalid under Section 12(5) of the Arbitration and Conciliation Act, 1996 read with the Seventh Schedule. Section 12(5) of the Arbitration Act, 1996 (as amended by the 2015 Amendment Act) provides that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties, or counsel, falls within any of the categories specified in the Seventh Schedule, shall be ineligible to be appointed as an arbitrator.

Item 5 of the Seventh Schedule of the Act reads as under :

"Arbitrator's relationship with the parties or counsel

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration."

(emphasis supplied)

Section 12(5) read with the Seventh Schedule is a mandatory and nonderogable provision of the Act. In the facts of the present case, the Principal Secretary to the Government of Haryana would be ineligible to be appointed as an arbitrator, since he would have a controlling influence on the Appellant Company being a nodal agency of the State."

The Supreme Court in Civil Appeal No. 7697 of 2021 titled as "Ellora Paper Mills Limited vs. The State of Madhya Pradesh" decided on 04.01.2022, has observed in para 3.1 as under:-

"3.1 It is submitted that in the aforesaid decision, this Court negated the submission that once the contractor participated in the arbitration proceedings before the Arbitral Tribunal by filing a statement of claim, thereafter it would not be open for him to approach the Court invoking sub-section (5) to Section 12 and pray for appointment of a fresh Arbitral Tribunal. It is submitted that unless and until there is an express agreement in writing to continue with the arbitration proceedings by the earlier Arbitral Tribunal, such an application to terminate the mandate of the earlier Arbitral Tribunal and to appoint a fresh arbitrator would be maintainable."

9. In the present case, admittedly, the petitioner/applicant approached the respondent No. 4 by issuing notice dated 15.07.2019 for appointment of arbitrator, in terms of Clause (26) of the General Conditions of the Contract, for reference of disputes and also submitted the list of claims, however, the respondents have failed to do the same within thirty days. Though, subsequently the respondents had appointed arbitrator on 30.08.2019, but the petitioner did not participated in the proceedings of the arbitrator on the date fixed, i.e., 01.10.2019, because the petitioner had already approached this Court.

10. Also, the Vice Chancellor of the University, being head of management of the institution who controls the administration as well as day to day affairs of the University and directly involved in the disputes, cannot be appointed as a sole arbitrator.

11. In view of the facts and circumstances of the case and on perusal of the above referred judgments passed by the Supreme Court, this petition is allowed. The earlier Arbitrator as well as the proceedings conducted by him on 01.10.2019 is terminated. Ms. Mandeep Reen, Advocate is appointed as sole Arbitrator, who shall proceed in the matter in accordance with the provisions of the Act to make an award within the time provided in the Act itself, after charging the prescribed fee along with incidental expenses to be shared by the parties.

12. The petition stands disposed of, accordingly.

13. Registry to communicate a copy of this order to Ms. Mandeep Reen, learned Arbitrator.