

(2014) 03 J&K CK 0028
In the Jammu And Kashmir High Court
Case No : A.A. No. 24 of 2007

Shivalya Construction Co. Pvt. Ltd.	Vs	APPELLANT
State of Jammu & Kashmir and Others		RESPONDENT

Date of Decision : 07-03-2014

Acts Referred:

Citation : (2014) 2 JKJ 574

Hon'ble Judges : M.M. Kumar, C.J

Bench : Single Bench

Advocate : Parag Sharma, for the Appellant; D.S. Jamwal, Dy AG and Mr. Arun Kumar, for the Respondent

Final Decision : Allowed

Judgement

M.M. Kumar, C.J.—The petitioner is a registered private limited company having its head office at 359, Sector 14, Rohtak 124-1,

Haryana. It is engaged in construction of civil works throughout the country. The project coordinator State project Implementation Unit-

respondent No. 3 engaged the services of the petitioner-contractor to carry out civil works of various nature such as buildings/blocks etc at

Government Women Polytechnic Jammu under a World Bank Scheme. An agreement between the parties was duly executed (Annexure-A)

which contains an arbitration clause. However, there is a pre-arbitration mechanism provided by Clause 24. According to Clause 24.1, if the

contractor believes that a decision taken by the engineer, namely, Deputy General Manager, JKPCC Ltd., was either outside the authority given to

him by the contract agreement or the decision was wrongly taken then the same was to be referred to the Adjudicator within 14 days of the

notification of the Engineer's decision. On the reference made, the Adjudicator is obliged to decide the issue in writing within 28 days of

receipt of notification of a dispute. According to Clause 25.2, if the decision of the Adjudicator is not acceptable to either of the parties then within

a period of 28 days of the Adjudicator's decision the matter could be referred to the arbitrator at the instance of either party. It has come on

record that in the present case the petitioner-contractor doubted the decision taken by the Engineer within the meaning of Clause 24.1 of the

arbitration agreement under heading contract data (page 9). At the request of the contractor under Clause 24 of the agreement, reference was

made to the Adjudicators. In pursuance of the contract data (page 9), respondent No. 3 and the petitioner-contractor appointed one Shri N.K.

Kohli, retired Chief Engineer, as Adjudicator in pursuance to Clauses 24 and 25 of the agreement. The petitioner-contractor presented his claims

on 03.11.2004 but the Adjudicator gave delayed ex-parte decision on 27.07.2005 (Annexure B). The aforesaid decision of the Adjudicator was

much beyond the period of 28 days. The petitioner-contractor exercised his right under Clause 25.2 of the arbitration agreement seeking reference

to the arbitrator in respect of the decision of the Adjudicator rendered ex-parte on 27.07.2005 vide letter dated 13.08.2005. A request in that

regard was sent to respondent No. 3 through registered post, proposing two arbitrators, namely, Hon'ble Mr. Justice (Retd) T.S. Doabia and

Hon'ble Mr. Justice (Retd) S.K. Gupta of the Jammu and Kashmir High Court (Annexure C) but there was no response. As per the procedure

unfolded by Clause 25.3 of the arbitration agreement the petitioner approached the Chairman, Institute of Engineers Jammu-respondent No. 2 by

a written request dated 26.09.2005 sent by registered A/D post requesting for appointment of arbitrator, suggesting the aforesaid two names of

Hon'ble Mr. Justice (Retd) T.S. Doabia and Hon'ble Mr. Justice (Retd) S.K. Gupta.

2. Objections have been filed. In the preliminary objection filed by respondent No. 3 it has been asserted that the petition was liable to be

dismissed because the Adjudicator dealt with respective claims of the parties and passed an award on 27.07.2005. On account of the fact that the

petitioner has approached this Court after one year, the decision of the Adjudicator's has attained finality. It has further been asserted that

JKPCC is not the employer and only a Project Management Consultant and its scope of work was limited to provide Engineers.

3. I have heard the learned counsel for the parties and have perused the record with their able assistance.

4. It has remained undisputed that pre-adjudicatory procedure, as provided by Clause 24.1 of the arbitration agreement has been complied with.

The Adjudicator did not render his decision within a period of 28 days as required by Clause 25.1 of the arbitration agreement. The petitioner-

contractor presented his claim before the Adjudicator on 30.11.2004 who decided the same belatedly by an ex-parte decision on 27.07.2005.

Admittedly there was a gap of more than seven months whereas the period stipulated for deciding a dispute by the Adjudicator as per Clause 25.1

of the arbitration agreement was 28 days. Moreover the contractor, within 28 days of the decision, was entitled to seek reference by objecting to

the decision of the Adjudicator as per the provisions of Clause 25.2 of the arbitration agreement. On 13.08.2005 he made a written request to the

respondent No. 3 by sending a registered letter to make a reference to the two former Judges of this Court. Obviously the petitioner-contractor

had sent a written request for reference to the respondents within a period of 28 days. The aforesaid fact can be ascertained by referring to the

acknowledgement receipt of the registered post which has been placed on record by the petitioner-contractor (Annexure C page 116). A copy of

the notice sent under registered post dated 13.08.2005 has also been placed on record (Annexure C page 114). Despite the reminder sent on

26.09.2005 the arbitrator has not been appointed which resulted in filing of the instant petition on 18.08.2006.

5. It is conceded position that there is an arbitration clause in the contract agreement between the parties as is evident from perusal of Clause 25.2

and 25.3 of the contract agreement. The arbitration has to be conducted in accordance with the procedure provided under Clause 4 of the Special

Conditions of Contract (at page 67) which provides that the dispute between the employer and the contractor relating to any matter out of or

connected with the agreement shall be settled in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The aforesaid clause

is set out below in extenso along with Clauses 25.2 and 25.3:-

25. Procedure for Disputes.

25.1

25.2. The Adjudicator shall be paid daily at the rate specified in the Contract Data and the cost shall be divided equally between the Employer and

the Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28

days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's

decision will be final and binding. 25.3. The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special

Conditions of Contract. 4. ARBITRATION (GCC CLAUSE 25.3) The procedure for arbitration will be as follows:

25.3. (a) In case of Dispute or difference between the Employer and a domestic contractor relating to any matter arising out of or connected with

this agreement, such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall

consist of 3 arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators

so appointed by the parties and shall act as presiding arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon a

consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by

the Chairman, Institution of Engineers Jammu, Chapter (J&K), Jammu. (b). (c) If one of the parties fails to appoint its arbitrator in pursuance of

sub-clause (a) and (b) above within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the Indian

Council of Arbitration/President of the Institution of Engineers (India)/The International Centre for Alternative Dispute Resolution (India), both in

cases of the Foreign Contractor as well as Indian Contractor shall appoint the arbitrator. A certified copy of the order of the Chairman, Institution

of Engineers, Jammu. Chapter (J&K), Jammu, making such an appointment, shall be furnished to each of the parties. (d) Arbitration proceedings

shall be held at J&K, Jammu, India & the language of the arbitration proceedings and that of all documents and communications between the

parties shall be English. (e) The decision of the majority of arbitrators shall be

final and binding upon both parties. The cost and expenses of

Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the

preparation presentation etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall

be borne by each party itself.

(f) Where the value of the contract is Rs. 50 millions and below, the disputes or differences arising shall be referred to the Sole Arbitrator. The

Sole Arbitrator should be appointed by agreement between the parties failing such agreement, by the appointing authority, namely, the Chairman,

Institution of Engineers, Jammu, Chapter (J&K), Jammu.

6. A perusal of the aforesaid provision would show that arbitrator has to be appointed if the decision of the Adjudicator is not acceptable to either

of the parties, provided such a demand has been raised within 28 days of the decision rendered by the Adjudicator. The procedure for conducting

the arbitration has been provided in the special conditions of the contract. As per Clause 4, the arbitral tribunal of three persons has to be

appointed within a period of 30 days from the notice. The respondents have lost the right to appoint the arbitrator in accordance with the

provisions of the standard conditions because the period of 30 days has elapsed. It is well settled principle of law that in such like cases an

independent arbitrator has to be appointed. In that regard reliance may be placed on the judgments rendered Datar Switchgears Ltd. Vs. Tata

Finance Ltd. and Another, Punj Lloyd Ltd. v. Petronet MHB Ltd. (2006) 2 SCC 638, Indian Oil Corporation Ltd. and Others Vs. Raja

Transport (P) Ltd., and Deep Trading Company Vs. Indian Oil Corporation and Others, Accordingly, the prayer for appointment of an

independent arbitrator deserves to be accepted. As a sequel to the above discussion this petition succeeds. Mr. Justice Permod Kohli, former

Chief Justice of Sikkim High Court and a former Judge of this High Court is appointed as arbitrator. He may also associate any person well versed

with civil engineering or in accounts for the effective disposal of the dispute between the parties. A copy of this order along with a photocopy of the

paper book be sent to Mr. Justice Permod Kohli at his Lordship's local address.