(2011) 08 J&K CK 0007

In the Jammu And Kashmir High Court

Case No : OWP 806 of 2010

Zeal Construction APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 03-08-2011

Acts Referred:
Constitution of India, 1950 — Article 19

Citation : (2011) 4 JKJ 215

Hon'ble Judges : Muzaffar Hussain Attar, J

Bench : Single Bench

Judgement

Muzaffar Hussain Attar, Judge

1. Contract, for supply and staking of PCC Blocks of size 225 mm x 112 mm x 200 mm in M-50 Grade Cement concrete for surfacing works

between KM 104 and 106 on Srinagar Sonmarg Goomri Road, was awarded to the petitioner for an amount of Rs. 1,38,33,344/- only. The

contract was awarded vide communication dated 24-04-2006 and site was handed over on 01-06-2006. The petitioner was informed that the

date of completion of work would be 29-08-2006. The date was, however, extended upto 31-08-2007 by levying compensation of Rs. 15,000/-

. The respondents, in their reply affidavit/objections, have further pleaded that the work was not completed within the time extended for completion

of the same and that delay was caused because of non submission of mixed design from the reputed laboratory approved by the OC contract.

2. As the contract work could not be executed in full, repeated communications were sent to the petitioner. Since the petitioner, allegedly, failed to

complete the work, the respondents, by invoking clause 28 of the General Conditions of Contract IAFW-1815(R) (GCC for short), terminated the contract at the risk and cost of the petitioner. The work was ordered to be re-tendered and the contract was awarded for balance work in

favour of M/S. Chenab Construction Company at the value of Rs. 2,07,43,056/- . In view of the re-tendering of work and awarding contract for

completion of work to another contractor, the respondents sought to recover the amount of Rs. 69,09,712/- from the petitioner for which a letter

of recovery was also sent to the petitioner. The pleadings of the parties further reveal that the petitioner was awarded another contract CA No.

CE(P)BCN/45/2009-10. The respondents, as per their claim, in order to safeguard the interest of the Government, invoked clause 67 and 70 of

the GCC IAFW-2249 and ordered for deferment of payment of Rs. 69,09,712/- out of the payment due to the petitioner in the 2nd contract.

3. In view of the dispute raised in respect of execution of work allotted to the petitioner vide acceptance letter No. 800653/23/E8 dated 24-04-

2006, the petitioner requested for appointment of an Arbitrator. The competent authority appointed the Arbitrator and arbitration proceedings are

going on.

4. The petitioner has filed this writ petition praying therein that by issuance of writ of certiorari, order dated 05-07-2010, forming annexure P3 to

the writ petition, be quashed and it is further prayed that the respondents be directed to release all the payments in favour of the petitioner for the

work done in pursuance of the contract allotted to him in the year 2009. It is further prayed that the respondents be directed to allow the petitioner

to participate and compete in all the future tendering processes initiated or likely to be initiated by the respondents with further prayer to prohibit

the respondents from withholding payment of the petitioner of any other contract because of pendency of dispute with respect to the contract

allotted vide order dated 24-04-2006.

5. The communication which is sought to be quashed in this writ petition is reproduced hereunder:

Tele:0194-2300984

Headquarters 2300912

32 Boarder Roads Task Force Pin-939932

C/O 56 APO

8512/20/E8 05 Jul 10

M/S Zeal Construction Co.

Pantha Chowk, Srinagar.

Kashmir-191101

PROVIDING, LAYING 9WITH PAVERS AND CONSOLIDATION OF READY MIX GRADING AS PER TABLE 400-11 AND

SATISFYING THE PHYSICAL REQUIREMENT AS PER TABLE NO 400-10 OF MORT&H SPECIFICATIONS FOR WMM 75MM

THICK 9CONSOLIDATED 02 LAYER) AND WMM 100MM THICK (CONSOLIDATED SINGLE LAYER) FOR PAYMENT WORKS

BETWEEN KM 40.00 TO KM 52.00 ON SSG ROAD IN 122 RCC/32BRTF SECTOR PROJECT BEACON IN J7K STATE; CA NO CE

(P) BCNI45/2009-10

Dear Sir,

1 Please refer to:-

(a) HQ Ce (P) Beacon letter No. 800653/65/E8 dated 16th Feb. 10.

(b) Your letter No. ZCC/10/43 dated 18 Jun 10.

2. It is intimated that risk and cost contract has been concluded against CA No CE (P) BCN/03/20906-07 on your default and Rs. 69,09,711,00

is to be recovered from you as advised vide HQ CE (P) Beacon letter quoted under reference at sub para 1 (a) above.

3. In view above, release of payment of 1st RAR in respect of CA No. CE (P) BCN/45/2009-10 for Rs. 32,71,500.00 at this juncture is not

feasible.

Yours sincerely,

Sd/-

(Rajeev Kumar)

Executive Engineer

SW

For Commander.

Copy to:

HQ CE (P) Beacon/E8 For information wrt their letter No. 800134/43/E8 dated C/

o 56 APO 01 Jul 10 please.

6. Heard learned counsel for the parties. Considered the matter.

7. Mr. Haqani, learned counsel for the petitioner, submitted that the dispute which has been raised in respect of earlier contract which was allotted

to the petitioner in the year 2006 and in which arbitration proceedings are pending, cannot become basis in law for withholding the amount to

which the petitioner has been found entitled to in respect of the second work allotted to him in the year 2009. He further submitted that as the sum

which is, allegedly, to be recovered from the petitioner, has neither been ascertained nor found to be due in a properly constituted judicial forum,

the respondents cannot either recover the said amount or withhold the same from the petitioner from his payments which are due to him as per

second contract. Learned counsel, in support of his contention, referred to and relied upon case titled Union of India (UOI) Vs. Raman Iron

Foundry, (for short Raman Iron Foundary case). He further submitted that the petitioner has been, literally, black listed by the respondents and is

not permitted to participate in the process of allotment of other contracts by the respondents. Mr. Haqani further submitted that respondents, in

law, cannot prevent the petitioner from participating in tender process and other allotment of works. It is further submitted that the action of the

responents is illegal and is violative of principles of natural justice.

8. Mr. S.A. Makroo, learned ASGI, while referring to clauses 67, 70, 34 & 37 of the GCC, submitted that the respondents, in terms of the said

clauses, have power to recover the amount, for which claim is made by them, from the due amount of the petitioner which is to be paid to him for

the reason of having executed another work. He also submitted that the writ petition is not maintainable, in as much as, the dispute between the

parties can be settled either in arbitration proceedings or by filing a civil suit and the writ petition, for that matter, is not competent. He, besides,

relying upon the Raman Iron Foundary case, also referred to and relied upon the case titled Prem Nath Gupta v. Union of India and others

reported in 2010 (3) JKJ 843 (HC) and submitted that in identical circumstances, the Court has dismissed the writ petition. Mr. Makroo also

submitted that in view of the conduct of the petitioner, the responents are within their authority not to allow him (petitioner) to participate in any tender process/s and are not under any obligation to allot any contract to him.

9. In order to appreciate the controversy raised, it will be appropriate to reproduce the relevant part of clauses 67, 70, 34 and 37 of the GCC :

67. Recovery from Contractor.-(a) Whenever any claim(s) for payment of sum of money arise(s) out of or under this Contract against same or

agree for effecting adjustment from any amounts due to him by the Government. If, however, he refuses or neglects to make the payment on

demand, or does not agree for effecting adjustment from any amounts due to him, Government shall be entitled to withhold an amount not

exceeding the amount of the claim(s) from any sum when due or which at any time thereafter may become due to the Contractor, under this or any

other Contract with the Government or from any other sum due to the contractor from the Government (which may be available with the

Government) or from the Contractor's Security Deposit or Security Bond amount and retain the same by way of lien till such time payment is made

by the Contractor or till the claims(s) is/are settled or adjudicated upon or till the contractor, at his expense furnishes fixed Deposit Receipt(s) duly

endorsed as directed by the Accepting Officer, or a Guarantee Bond from a Scheduled Bank for an amount equal to the amount of the claim(s) in

the form as directed by the Accepting Officer.

(b) It is an agreed condition of this Contract that the sum of money so withheld or retained as and by way of lien under this condition by the

Government, will be kept withheld or retained as such by the Government, till the claims(s) arising out of or under this Contract is/are settled or

adjudicated upon and that the Contractor will have no claim for interest or damage whatsoever on any account in respect of such sum so withheld.

(c) For the purpose of this condition, where the contractor is a partnership Firm, the Government shall be entitled to withhold in whole or in part as

may be necessary, to cover the amount claimed, any sum found payable to any partner of the Firm, whether in his individual capacity or otherwise.

(d) Any amount due to the Contractor under this contract may be withheld by way of lien against any amount claimed or which may at any time

hereafter be claimed by the Government from the contractor on any account whatsoever, under this or any other contract between them and

retained, till the claim(s) is/are settled or adjudicated upon.

(e) Government reserve the right to carry out post-payment audit and technical examination of the works and Final Bill, including all supporting

voucher, abstracts, etc. Government further reserve the right to carry out the aforesaid examination and enforce recovery when detected,

notwithstanding the fact that the amount of the Final Bill may have been included by one of the parties as an item of dispute before an Arbitrator

appointed under the Arbitration clause of the Contract and notwithstanding the fact that the amount of the Final Bill figures in the Arbitrators

award.

70. Arbitration - All disputes, between the parties to the Contract (other than those for which the decision of the C.W.F. 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 the sole

arbitration of an [serving Officer having degree in Engineering or equivalent or having passed final/direct final examination of sub-Division II of

Institution of Surveyor (India) recognized by the Government of India] to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the works or termination

or determination of the Contract under Condition No's 55, 56 and 57 hereof.

Provided that in the event of abandonment of the works or cancellation of the Contract under Condition No's 52, 53 or 54 hereof, such reference

shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other

Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against

the Government's right of recovery from the contractor as provided in Condition 67 hereof.

34 Recovery from Contractor-(a) Whenever any claim(s) for payment of a sum of money arise(s) out of or under this Contract against the

Contractor, the Contractor shall on demand make the payment of the same or agree for effecting adjustment from any amounts due to him by the

Government. If, however, he refuses or neglects to make the payment on demand or does not agree for effecting adjustment from any amounts due to him, Govt. shall be entitled to withhold an amount not exceeding the amount of the claim(s) from any sum then due or which at any time

thereafter may become due to the Contractor under this or any other contract with the Government or from any other sum due to the Contractor

from the Government or from the Contractors Security Deposit or Security Bond amount and retain the same by way of lien till such time. Payment

is made by the Contractor or till the Contractor at his expense furnishes fixed Deposit receipt(s) duly endorsed as directed by the Accepting officer

or a Guarantee Bond from a Scheduled Bank for an amount equal to the amount of the claim(s) in the form as directed by the Accepting Officer.

(b) it is an agreed condition of this contract that the sum of money so withheld or retained as and by way of lien under this Condition by the

Government will be kept withheld or retained as such by the Government till the claim(s) arising out of or under this contract is/are settled or

adjudicated upon and that the contractor will have no claim for interest or damages whatsoever on any account in respect of such sum so withheld.

(c) For the purpose of this Condition, where the Contractor is a Partnership Firm, the Government shall be entitled to withhold in whole or in part

as may be necessary to cover the amount claimed, any sum found payable to any partner of the firm, whether in his individual capacity or

otherwise.

(d) Any amount due to the Contractor under this contract may be withheld by way of lien against any amount claimed or which may at any time

hereafter be claimed by the Government from the Contractor on any account whatsoever, under this or any other contract between them and

retained till the claim(s) is/are settled/adjudicated upon.

37 Arbitration- All disputes between the parties to the Contract, (other than those for which the decision of the CWE or any other person is by the

Contract expressed to the final and binding) shall after written notice by either party to the contract to the other of them, be referred to the sole

arbitration equivalent or having passed final/direct final examination of sub-division II of Institution of Surveyor (India) recognized by the Govt. of

India to be appointed by the authority mentioned in the tender documents. Unless both parties agree in writing such reference shall not take place

until after the completion or alleged completion of the Supplies or termination or determination of the Contract under Condition numbers 29 30 and

30A hereof.

Provided that in the event of abandonment of the Supplies or cancellation of the Contract under Condition Nos. 26, 27 or 28 hereof, such

reference shall not take place until alternative arrangements have been finalized by the Government to get the Supplies completed by or through any

other Contractor or Contractors or Agency or Agencies.

[Provided always that commencement or continuance of any arbitration proceedings hereunder or otherwise shall not in any manner militate against

the Governments right of recovery from the Contractor as provided in condition 34 thereof].

10. Clauses 18 & 24 of the GCC which were in existence at the time Raman Iron Foundary case was considered and which are reflected in

paragraph 2 of the said judgement are reproduced hereunder:

2/

18. Whenever any claim for the payment of a sum arises out of or under the contract against the contractor, the purchasershall be entitled to

recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor, and for the purpose aforesaid, shall be

entitled to sell and/or, realize securities forming the whole or part of any such security deposit. In the event of the security being insufficient, the

balance and if no security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or

which at any time thereafter may become due to the contractor with the purchaser or the Government or any person, contracting through the

Secretary, if such sum even be not sufficient to cover the full amount recoverable, the contractor shall on demand pay to the purchaser the balance

remaining due.

24. Arbitration:

In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this

contract, (except as to any matters the decision of which is specially provided for by these or the special conditions) the same shall be referred to

the sole arbitration of an Officer in the Ministry of Law, appointed to be the arbitrator by the Director General of Supplies and Disposals. It will be

no objection that the arbitrator is a Government servant, that he had to deal with the matters to which the contract relates or that in the course of

his duties as a Government servant he has expressed views on all or any of the matters in dispute or difference. The award of the arbitrator shall be

final and binding on the parties to this contract.

Work under the contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due to or payable by the

purchaser shall be withheld on account of such proceedings.

11. The Raman Iron Foundary case aforementioned is decided by a bench of Hon'ble two Judges. The said case came under consideration of the

Hon'ble Supreme Court in case titled H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, (for short Ansari's case). The

bench, which heard and decided the said case, comprised of three Hon'ble Judges. Paragraph 3 of the judgement, in which clauses 18 & 24 of the

GCC fell for consideration of the Hon'ble Supreme Court, is reproduced hereunder:

3).

18. Recovery of Sums Due: Whenever any claim for the payment of a sum of money arises out of or under the contract against the contractor, the

purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor, and for the

purpose aforesaid, shall be entitled to sell and/or realize securities forming the whole or part of any such security deposit. In the event of the

security being insufficient, the balance and if no security has been taken from the contractor, the entire sum recoverable shall be recovered by

appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the

purchaser or the Government or any persons contracting through the Secretary. If such sum even be not sufficient to cover the full amount

recoverable, the contractor shall on demand pay to the purchase the balance remaining due.

24. Arbitration : In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in

connection with this contract (except as to any matters the decision of which is specially provided for by these or the special conditions) the same

shall be referred to the sole arbitration of any officer in the Ministry of Law, appointed to be the arbitrator by the Director General of Supplies and

Disposals. It will be no objection that the arbitrator is a Government servant, that he had to deal with the matters to which the contract relates or

that in the course of his duties as a Government servant he has expressed views on all or any of the matters in dispute or difference. The award of

the arbitrator shall be final and binding on the parties to this contract.

12. The Hon'ble Supreme Court, in Raman Iron Foundary case, while interpreting the clause 18 of the GCC, held that recovery of sums presently

due and payable by the contractor to the purchaser does not lay down, substantially, the rights and obligations of the parties under the contract. It

was further held that it merely intended to provide a mode of recovery of ""a claim for payment of sum of money arising out of or under the

contract"". The Hon'ble Supreme Court held that on the interpretation of language of clause 18 of the GCC, a claim for a sum is that which is due

and payable, i.e. presently recoverable and may be recovered by the mode therein provided. It was further held that"" it is difficult to believe that

the contracting parties could have intended that even though sum is due and payable to the contractor from the purchaser under the contract, the

purchaser should be entitled to recover it by adopting the mode set out in clause 18 of the GCC. It is important to note that clause 18 of the GCC

does not create a lien on other sums due to the contractor or due to the purchaser until the claim against the contractor is satisfied. If, to secure

payment of a claim, then even if the claim for a sum not presently due and payable, the purpose of the provision would not have been so startling or

unusual, but the right given to the purchaser, under clause 18 of the GCC, is a right to recover the amount of his claim by appropriating other sums

due to the contractor and on the interpretation of the appellant, this can be done even if the claim is for a sum which is not due or payable in

praesenti and the purchaser is otherwise not entitled to recover it. That would, indeed, be a highly extra ordinary result which we would be loath to

read in absence of clear and compelling language."" The Hon'ble Supreme Court, after referring to the judgements of different Courts too ruled that

a claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in

exercise of the right conferred upon it, under clause 18 of the GCC, to recover the amount of such claim by appropriating other sums due to the

contractor."" It was, ultimately, held in the aforementioned judgement that the Union of India, which was the appellant, had no right and authority

under clause 18 of the GCC to appropriate the amount of other pending bills of the respondents therein or towards satisfaction of its claims for

damages against the respondents.

13. The Supreme Court in Ansari's case ruled that the heading of clause 18 of the GCC which talks of ""recovery of sums due"" will not control

clause 18. The Supreme Court further ruled that the said clause gives vide powers to the Union of India to recover the amount claimed by

appropriating any sum then due or which, at any time thereafter, may become due to the contractor under other contracts (refer paragraph 26 of

the judgement).

14. Reverting back to the facts of this case, it would be appropriate to state that there is a perceptible and marked difference between the language

used in clause 18 of the GCC which became subject matter of consideration of the Hon'ble Supreme Court in the aforementioned two judgements

and clauses 67 & 34 of the GCC, are relevant for purposes of disposal of this case, in as much as, clause 67 of the GCC authorizes the

respondents to withhold the amount not exceeding the amount of claim from any sum then due or which, at any time thereafter, becomes due to the

contractor under the existing contract or in any other contract and the respondents are also authorized to retain the sum by way of lien till such time

payment is made by the contractor. Proviso to clauses 70 & 37 of the GCC does authorize the respondents to retain the said amount

notwithstanding the fact that the matter has been referred to arbitration and that the dispute is to be resolved by the Arbitrator. The judgement

passed in Raman Iron Foundary case, upon which both the learned counsel relied, does not help either of the two, in as much as, the clause which

was under consideration in the said case before the Hon'ble Supreme Court is, materially and substantially, different from the clause which is

applicable to the facts of this case. Under clause 18 of the GCC in Raman Iron Foundary case, the Union of India was given power of recovery of amount, for which claim would be made, from the amount which would be due to the contractor in any other contract. Clause 67 of the GCC,

which is attracted to the facts of this case and which is referred to and relied upon, does not confer power of recovery on the Union of India until

same is determined or adjudicated upon, but authorizes it to withhold the amount and retain the sum by way of lien. The law laid down by the

Hon'ble Supreme Court in Raman Iron Foundary case, would not be applicable to the facts of this case and reliance placed by the learned counsel

for the petitioner is, thus, rendered inconsequential. No reliance can be further placed on the said judgement in view of the observations made by

the Hon'ble Supreme Court in Ansari's case aforementioned, in as much as, it was stated that clause 18 of the GCC gives wide powers to the

Union of India to ""recover the amount claimed by appropriating any sum then due or which, at any time thereafter, may become due to the

contractor or other contractors."" The Hon'ble Supreme Court in Raman Iron Foundary case, at its paragraph 8, has approved the manner and

method of withholding and retaining of a sum as lien when it stated that ""if merely a right of lien or retention was given to secure payment of claim,

where if the sum not presently due and payable, the aforesaid provisions of the GCC would not have been so startling and unusual.

15. In view of clause 67 of the GCC and as observed by the Hon'ble Supreme Court, the respondents have power to withhold and retain the

amount from the amount payment of which has been deferred in terms of the impugned communication. The said action of the respondents does

not call for any interference in view of the aforesaid discussion.

16. This writ petition, to the extent of dispute raised, is not maintainable as the dispute is of pure civil nature and could be settled in arbitration or

by filing appropriate proceedings before a legally constituted judicial forum. There is no breach of contract in view of the language in which clause

67 of the GCC is couched. In absence of any challenge to clause 67 of the GCC, this writ petition is held to be not maintainable.

17. However, the claim of the petitioner that he has been black listed, in as much as, he is not being permitted to participate in future tender

processes, which fact is admitted by the respondents in their reply affidavit/ objections, is held to be illegal. The petitioner has a right to carry on his trade, business/occupation as the same is guaranteed by article 19 of the Constitution of India. The petitioner can be prevented from participating

in the tendering process only when he is put on prior notice and is given opportunity of hearing and thereafter appropriate orders are passed. The

petitioner would, otherwise, be stigmatized and the action of the respondents, besides being unjust, would fall foul of the mandate contained in

article 14 of the Constitution of India. It is, accordingly, held that until such time the petitioner is afforded opportunity of hearing and a reasoned

order is passed, he cannot be prevented from responding to the tender notification/s and from participating in the tendering process.

18. Disposed of along with connected CMPs.

