

Sr. No.1
Regular Cause List

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR
Arb P No.25/2021

Bashir Ahmad Malik (Senior Citizen)

...Appellant(s)/Petitioner(s)

Through: Mr. Aatir Javed Kawoosa, Advocate

Vs.

Union Territory of J&K and others

...Respondent(s)

Through: Mr. Illyas Nazir Laway, GA

CORAM:

HON'BLE THE CHIEF JUSTICE

O R D E R
12-05-2023

01. Heard Mr. Aatir Javed Kawoosa, learned counsel for the petitioner as also Mr. Illiyas Laway, learned GA, appearing for the respondents.
02. The instant petition has been filed by the petitioner under Section 11(6) of Jammu and Kashmir Arbitration and Conciliation Act, 1996 (for short, the Act') seeking appointment of an independent arbitrator to resolve the dispute which has arisen between the petitioner and the respondents, more particularly respondent No.3-Deputy Director Tourism Department, (M&W), Srinagar.
03. The agreement between the parties pertains to execution of certain works, i.e., construction of 48 units of public convenience with Wazzu Khana at Ziyarat Sharief, Chararisharief, Budgam, which was executed on 04-05-2019. The said agreement contains an arbitration clause in the form of Clause 29 which reads as follows:-

“29: Arbitration: - The arbitration shall be conducted in accordance with the arbitration procedure stated in the J&K Conciliation and Arbitration Act No.-xxxv of 1997 issued vide

SRO No.403 vide Notification of J&K Govt., "Law Department" 11th December-1997".

04. Learned counsel for the petitioner submits that the petitioner submitted his bid to the e-tender floated for the aforesaid work on 04-05-2019, and on the basis of credentials and conditions put forth by the respondent authorities, he was declared the successful bidder and an allotment order came to be issued in his favour on 04.06.2019 which was issued by respondent No.3-Deputy Director Tourism Department, (M&W), Srinagar. There was a stipulation in the e-tender that the said work was to be completed within a period of 120 days regarding which there is no dispute.

05. According to the petitioner, because of various contingencies which had arisen out of lockdown due to Covid-19 pandemic and abrogation of Article 370 of the Constitution, execution of the work was hampered which consequently led to escalation of prices and the petitioner accordingly, approached the respondent authorities for enhancement of the prices earlier quoted to meet the requirements of the increased costs in execution of the work by submitting various representations which unfortunately were not considered by the authority and in spite of recommendation made by respondent No.5-Assistant Director Tourism Department, (M&W), Srinagar to respondent No.3-Deputy Director Tourism, Department, (M&W), Srinagar to favorably consider the plea for enhancement of the rates vide communication dated 29-07-2020. The petitioner requested the authorities to decide this matter so that he could execute the work within time. Unfortunately, as mentioned above, there was no positive response, which compelled the petitioner to approach this Court for determining the said dispute by appointing an arbitrator in terms of Clause 29 of the e-tender notice which forms part of the

transaction between the petitioner and the respondents, so that he could complete the work properly.

06. As regards the provision for resolution of dispute by arbitration as per the Clause 29 of the e-tender notice dated 04-05-2019, the same is not disputed by the respondents. However, it has been submitted by the learned counsel for the respondents that all disputes are not referable to arbitration and some of the disputes can be excluded from the arbitration as provided under Section 7 of the Arbitration and Conciliation Act, 1996 and the issue relating to escalation of price is out of purview of arbitration as can be seen from Clause 11 of the e-tender notice and as such, it has been submitted by the learned counsel for the respondents that the present petition may not be entertained.

07. I have heard the learned counsel for the parties and perused the materials on record. Since there is no dispute about the existence of arbitration clause, I will proceed to consider as to whether the issue/dispute raised by the petitioner is arbitrable or not.

08. As mentioned above, as the learned counsel for the respondents submits that the dispute relating to price escalation is out of purview of arbitration based on Clause 11 of the e-tender notice, I will examine as to the scope of Clause 11 of the e-tender. Clause 11 of the e-tender reads as follows:-

“11. Price Escalation and Taxes: - The unit rates and prices shall be quoted by the bidder entirely in Indian Rupees and the rates quoted shall be deemed to include price escalation and all taxes upto completion of the work, unless otherwise specified. Deduction on account of taxes shall be made from the bills of the contractor on gross amount of the bill as per the rates prevailing at the time of recovery”.

09. On reading of the said Clause 11 of the e-tender notice, what one finds is that the unit rates and the prices quoted by the bidder will also include price escalation and all taxes upto the completion of work unless otherwise specified. There is nothing to indicate that the issue of price escalation does not form part of the contract, rather price has been defined to include price escalation.

10. Apart from the aforesaid Clause 11, learned counsel for the respondents has not been able to show any specific clause under the e-tender or in the work order which specifically provides that any dispute relating to price escalation will be out of purview of arbitration. If there is a specific provision which excludes price escalation as out of purview arbitration, which is permissible under the law as provided under Section 7 of the Arbitration and Conciliation Act, 1996, such dispute cannot be arbitrable. But in the present case, the learned counsel for the respondents has not been able to show any provision except the aforesaid Clause 11 of the e-tender notice to support his contention that dispute relating to price escalation is out of purview of arbitration.

11. On the contrary, a careful reading of Clause 11 of the e-tender notice would indicate that the unit prices and prices quoted by the bidder also include price escalation and these are inseparable. There is nothing else in which it has been mentioned that issues related to price escalation will be out of purview of arbitration. If dispute relating to unit rates and prices is arbitrable, price rates quoted includes price escalation, naturally any disputed relating to price escalation can be attributable.

12. Under the circumstances, this Court is satisfied that the petitioner has been able to make out a case for appointment of an arbitration in view of non-action by the respondents after he requested the respondents for appointment of an arbitration under Clause 29 of the e-tender notice.

13. Accordingly, I appoint, Mr. Syed Faisal Qadri, learned Senior Counsel of High Court of J&K and Ladakh, as the sole arbitrator, who shall proceed in the matter in accordance with the provisions of the Act, after affording opportunity of hearing to both the parties, who are at liberty to raise all the preliminary objections before the arbitrator. The arbitrator shall, thereafter, make an award within the time provided in the Act after charging the prescribed fee along with incidental expenses to be shared by the parties.

14. Registry to inform the above said officer and the parties about the appointment of the arbitrator in this matter.

15. Arbitration petition stands *closed*.

(N. KOTISWAR SINGH)
CHIEF JUSTICE

SRINAGAR
12-05-2023
Shameem H.