

Sr. No. 03
Regular List.

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Arb P No.38/2022

M/S SRM RAJINDER PROJECTS ...Petitioner(s)/appellant(s)

Through: Mr. Manik Dutt, Advocate (**through VC from Jammu**)

Vs.

UNION TERRITORY OF J AND K AND ORS. ...Respondent(s)
(ECONOMIC RECONSTRUCTION AGENCY)

Through: Mr. Illyas Nazir Laway, GA

CORAM:

HON'BLE THE CHIEF JUSTICE

ORDER
22.12.2023 (ORAL)

N.Kotiswar Singh, CJ

01. Heard Mr. Manik Dutt, learned counsel appearing for the petitioner as also Mr. Illyas Nazir Laway, learned GA, appearing on behalf of respondents.
02. The present application has been filed for appointment of an arbitrator under Section 11 (6) of the Arbitration and Conciliation Act, 1996 for resolving the dispute that has arisen between the parties.
03. The factual background for approaching this Court under Section 11 (6) of the Arbitration and Conciliation Act, according to the petitioner, is that the petitioner was allotted a work for up-gradation of Sidhra/Surnishar Road (LOT-1), in connection with which, a contract came to be executed between the parties on 13.03.2020. The said work was completed on 30.06.2022, in connection with which, the work completion certification was issued by the respondents on the same date. However, according to the petitioner, the respondents did not pay certain amounts towards the extra carriage undertaken by the contractor and also regarding non-payment for soft rock (sandy rock) used, as well as non-payment for walling in connection with which, the petitioner wrote a letter to the respondents on 22.03.2022 and sought payment vide

notice dated 22.03.2022. However, the respondents' replied to the said notice by saying that respondents are not liable for payment on account of any of the claims raised by the petitioner.

04. According to the petitioner, by denying the claims raised by the petitioner for the works he claims to have executed, a dispute has arisen, which would require adjudication.
05. According to the petitioner all his attempts to get the matter resolved was a futile exercise and accordingly, having no any other alternative remedy, he invoked the Arbitration Clause as provided under Clause 24 of the PCC (Particular Conditions of Contract) which provides for resolution of disputes by appointing of an arbitrator.
06. This petition, however, has been contested by the respondents primarily, on the ground that though there is an Arbitration Clause as provided under Clause 24 of the GCC (General Conditions of Contract), read with Clause 24.4 of the PCC, the said Clause can be invoked only on when there is a failure of the pre-arbitration mechanism which is provided under Clause 24.4 of the PCC (Particular Conditions of Contract).
07. In other words, according to the respondents, till the aforesaid condition provided under Clause 24 has been exhausted, the Arbitration Clause provided under GCC 24 read with Clause 24.4 cannot be invoked.
08. Mr. Illyas Nazir Laway, learned GA, submits that as per the said Clause 24 of the GCC, if the contractor believes that the decision taken by the Project Manager was wrong, the decision shall be referred to the Adjudicator within 14 days of the notification by the Project Manager of the decision and the Adjudicator shall give a decision in writing within 28 days on receipt of the notification of the dispute, and on failure of the Adjudicator to decide the dispute within 28 days then the Arbitration Clause can be invoked.
09. In the present case, according to Mr. Illyas Nazir Laway, learned GA, the dispute raised by the petitioner on the ground of alleged non-payment, for three works referred to above, was referred to Adjudicator on 11.10.2022. However, before awaiting for 28 days period given to the Adjudicator to make a decision, the petitioner issued a notice for appointment of an arbitrator by invoking GCC 24.4 on 13.10.2022 and accordingly, approached this Court, which is not permissible.

10. According to Mr. Illyas Nazir, GA, invoking the Arbitration Clause under GCC 24 read with Clause 24.4 at this stage is pre-mature, inasmuch as, the petitioner ought to have waited for the decision by the Adjudicator which the Adjudicator was supposed to give within 28 days. Hence, the present petition is pre-mature and liable to be dismissed and the petitioner may be directed to exhaust the remedy available under Clause 24 of the contract which provides for resolution of such disputes by referring to the Adjudicator first before the Arbitration Clause is invoked.
11. Mr. Manik Dutt, learned counsel for the petitioner, however, submits that perusal of Clause 24 of PCC would show that if a wrong decision is made by the Project Manager, the same was to be referred to the Adjudicator by the Project Manager but in the present case the Project Manager never referred the dispute to the Adjudicator. Though the petitioner referred the dispute to the Adjudicator, the same is not in conformity with the Clause 24 inasmuch as, it was the Project Manager who was to refer the dispute to the Adjudicator.
12. Mr. Illyas Nazir, learned counsel however, submits that there is no requirement that whenever a dispute has arisen on account of a wrong decision by the Project Manager, it is the employer only who has to refer the dispute to the Adjudicator. It can be either of the parties in the dispute and in the present case the petitioner himself had referred the matter to Adjudicator as can be seen from the letter dated 11.10.2022 wherein the petitioner himself had written a letter to the Adjudicator namely Rajesh Gandotra, Retired Superintending Engineer, that since he has been appointed as Adjudicator for the subject contract, the issue is raised relating non-payment for three works, as mentioned above. As such, since the petitioner has himself referred the dispute to the Arbitrator vide his letter dated 11.10.2022, the petitioner ought to have waited for adjudicator to make a decision within 28 days which however, has not been done.
13. Heard learned counsel for the parties and perused the material on record.
14. The issue before this Court revolves round the interpretation of Clause 24 of the PCC, as there appears to be a dispute relating to non-payment for the works executed by the petitioner on three counts, *firstly*, the demand for payment of extra carriage, *secondly*, the demand for

payment of soft rocks used by the petitioner-contractor and *thirdly*, the demand for payment for construction of walls constructed by the contractor-petitioner which was being denied by the respondent-employer and as such, the dispute appears to have arisen. However, the question is how to resolve the dispute.

15. It is seen from the terms of the contract referred to above that there should be an Adjudicator appointed jointly by the employer in the contract as provided under Clause 23 of the agreement.
16. As regards the appointment of Adjudicator it is on record that Shri. Rajesh Gandotra appears to have been appointed as an Adjudicator by the parties.
17. As to the role of the Adjudicator for resolution of dispute, it is provided under Clause 24 which reads as under:-

24. Procedure for Disputes

- 24.1 *If the Contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Project Manager's decision.*
- 24.2 *The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.*
- 24.3 *The Adjudicator shall be paid daily at the rate specified in the PCC, together with reimbursable expenses of the types specified in the PCC, and the cost shall be divided equally between the Employer and the Contractor. Whatever decision is reached by the Adjudicator, either party may refer that decision 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 shall be final and binding.*
- 24.4 *The arbitration shall be conducted in accordance with the arbitration procedures published by the institution named and in the place specified in the PCC.*
The Arbitrator(s) shall give a decision in writing within 120 days of start of the proceedings unless otherwise agreed to by the Parties. The Arbitrators shall entertain only those issues which have been earlier referred to the Adjudicator and either party is dissatisfied with the decision given by the Adjudicator.

18. Thus, from the above, it appears that only when there is a failure on the part of Adjudicator to resolve the dispute in the manner provided under Clause 24 that the Arbitration Clause as provided under (Particular Conditions of Contract) PCC 24.4 can be invoked. The aforesaid Clause 24 reads as follows:

GCC 24.4 The procedure for adhoc arbitration will be as follows:

- (a) *In case of Dispute or difference arising between the Employer and a 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 true 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 of the Institution of Engineers (Srinagar Chapter. If one of the parties fails to appoint its Arbitrator in pursuance of sub-Clause (a) above within 30 days after receipt of the notice of the appointment of its Arbitrator by the other party, Chairman of the Institution of Engineers (Srinagar Chapter), shall appoint the Arbitrator. A certified copy of the order of the Chairman of the Institution of Engineers (Srinagar Chapter, making such an appointment shall be furnished to each of the parties.*
- (b) *Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Project Manager, the Contractor and the Adjudicator shall not be altered by reason of the arbitration being conducted during the progress of the Works.*
- (c) *Arbitration proceedings shall be held at Srinagar, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.*
- (d) *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.*
- (e) *Where the value of the contract is Rs.50 million and the Sole Arbitrator. The Sole Arbitrator should be appointed by agreement between the parties; failing such agreement, by the appointing authority, namely the Chairman of the Institution of Engineers (Srinagar Chapter)*
- (f) *The Arbitrator should give final award within 180 days of starting of the proceedings.*
- (g) *Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the Employer shall not be withheld, unless they are the subject matter of the arbitration proceedings.*

"Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Domestic Commercial Arbitration of the Indian Council of Arbitration and the

award made in pursuance thereof shall be binding on the parties.

The arbitral tribunal shall consist of 3 Arbitrators, arbitration proceedings shall be held at Srinagar, India and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English".

As laid down in Arbitration and Conciliation Act 1996, with amendments from time to time and rules thereof.

19. The aforesaid Clause provides that if the Contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Project Manager's decision.
20. From the above, it is clear that if the decision by the Project Manager is considered to be wrong it ought to have been referred to Adjudicator. In the present case, it is the plea of the petitioner that the decision taken by the Project Manager in denying the claims for payment of three works as mentioned above is a wrong decision. Accordingly, that decision was to be referred to the Adjudicator. However, the issue is as to who shall refer the dispute to the Adjudicator, as the said adjudication Clause is silent about it. In other words, it can be either the contractor himself or the employer. In the present case what can be seen is that the petitioner-contractor himself had referred the decision of the Project Manager in denying the claim, to the Adjudicator, as can be seen from the letter dated 11.10.2022. This reference by the contractor to the Adjudicator cannot be said to be not in conformity with the aforesaid Clause 24.1 and it is also not the case of the respondents that only the employer can refer the dispute.
21. Be that as it may, in view of the ambiguity in Clause 24.1 as to who shall refer the dispute to the Adjudicator, this Court is of the opinion that reference of such dispute by the contractor himself cannot be said to be illegal or not in accordance with Clause 24.1. If that is so, this Court cannot accept the plea of the petitioner that it is the only employer who has to refer the dispute to the Adjudicator and if the contractor refers, it is of no consequence.

22. This Court is of the view that either the contractor or employer can refer the dispute to the Adjudicator in view of the silence in the Clause as to the referring authority or person under Clause 24.1 of the aforesaid PCC.
23. Under the circumstances, this Court is of the opinion that the petitioner ought to have waited for 28 days as provided under Clause 24.2 which requires the Adjudicator to give a decision in writing within 28 days on receipt of notification of dispute i.e., after 11.10.2022. This Court is of the opinion that since the notice was given by the petitioner on 13.10.2022 which is before the lapse of 28 days of reference of dispute by the petitioner to the Adjudicator, the subsequent filing of this petition is pre-mature.
24. Accordingly, this petition is dismissed as pre-mature. However, the petitioner shall be at liberty to approach this Court under Section 11 on fulfillment of the terms and conditions referred to in the agreement as mentioned above.

(N.KOTISWAR SINGH)
CHIEF JUSTICE

SRINAGAR
22.12.2023
Shameem H