

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

**OWP No.1082/2010
CMP No.1483/2010**

Date of Decision: 31.03.2011

Khursheed Ahmed Zaz vs. Union of India & others

Coram:

Mr. Justice J.P.Singh, Judge.

Appearing Counsel:

For the Petitioner(s) : Mr. C.M.Koul, Advocate with Kapil Gupta, Advocate.
For the Respondent(s) : Mr. S.D.Sharma, Advocate with Sunil Sharma, Advocate.

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- i) Whether approved for reporting in Press/Journal/Media : **Yes/No**
- ii) Whether to be reported in Digest/Journal : **Yes/No**
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IRCON INTERNATIONAL LIMITED, a Government of India undertaking, allotted the work of *J&K Rail Link Project-Dharam-Qazigund Section, Construction of RCC Overhead Water Tank at Banihal Station Yard (Package OHT-I)* to the petitioner-M/S Khursheed Ahmed Zaz, accepting its negotiated revised offer dated 06.05.2010 in connection with the Tender floated therefor.

The Contract allotted to the petitioner for the aforesaid work was later terminated vide Ircon International Limited's No.IRCON/1014/J&K-DQ/RCC OHT Tank-Banihal/OHT-1/1098 dated 07.09.2010.

The petitioner-Khursheed Ahmed Zaz has approached this Court by his Writ Petition seeking quashing of the termination of the Contract, besides the Notice issued by Ircon International Limited inviting tenders in two packet system from reputed firms and Companies for the construction of the balance work of RCC Overhead Water Tank at Banihal Station yard. He seeks a further command to the respondents to allow him to complete the remaining work of the construction of RCC Overhead Water Tank at Banihal Station yard.

The case set up by the petitioner to seek the reliefs, referred to hereinabove, is that having already completed substantial work by investing huge amount of money therein, the termination of the Contract by Ircon International Limited was violative of the principles of Natural Justice and otherwise arbitrary being malafide and a result of undue haste on the part of Ircon International Limited.

Ircon International Limited has controverted the petitioner's case, both on facts and in law, additionally urging that the petitioner was disentitled to invoke the Extra-ordinary Civil Writ Jurisdiction of the Court when the dispute raised by him in the Writ Petition was essentially contractual in nature requiring its adjudication only by a competent Court of civil jurisdiction.

Placing the photographs of the work executed by the

petitioner pursuant to the allotment of Contract, to demonstrate that the work executed by him was minimal, it is stated that despite handing over the encumbrance free site to him, the petitioner had failed to submit *detailed work programme methodology statement for execution of work and mobilize sufficient manpower, plant and machinery* and thus taking things lightly, he had not acted in requisite manner to complete the work within a period of six months that he was required so to do in terms of the Contract. The Tentative programme bar chart requiring him to submit Labour License, Insurance and PF accounts was not fulfilled by the petitioner. Not only this, he is stated not to have submitted the Irrevocable Performance Bank Guarantee, which was required to be submitted within 15 days of the Award of the Contract.

Pleading that barring putting up a temporary tin shed with two small doors and spending about Rs.1.00 lac on the site, the petitioner had done practically nothing towards the completion of the work allotted to him.

The respondents informed the petitioner of the lapses several times requiring him to comply with the terms and conditions of the Contract but to no effect. Ultimately, as required by the terms and conditions of the Contract incorporated in the Notice inviting tender, the petitioner was served **7 days** and later **48 hours** notice to report compliance

of the essential requirements. He, however, failed to do the needful and, as already cautioned that non compliance would result in termination of the Contract, the respondents terminated the petitioner's Contract issuing another Notice inviting Tenders for the work, which had earlier been allotted to the petitioner, which in the circumstances, is stated, a compelling necessity.

I have heard learned counsel for the parties, considered their submissions and gone through the judgments cited at the Bar.

The documents, which the petitioner has placed on records reveal that though the petitioner has denied the receipt of respondents' communications dated 11.08.2010 and 23.08.2010 giving him seven days' and forty eight hours' notice respectively **to show adequate progress, execute Contract Agreement, commence the work and submit Irrevocable Performance Bank Guarantee**, yet, on going through its Response dated 01.09.2010, a copy whereof has been placed on records, indicating that he had not received the 7 days and 48 hours notices and a duplicate copy thereof was obtained by him only from the Project Office Banihal, it comes out that the petitioner had given his own justification to the respondents for not submitting the Irrevocable Performance Bank Guarantee and had rather submitted his **own Schedule** for the progress of

the work.

It would be advantageous to refer to what was stated by the petitioner in his communication of September 01, 2010 addressed to the Ircon International Limited. It reads thus:-

“ The general manager(J&K)
Ircon International Limited
New Delhi 110066. 01.09.2010

Sub: J&K Rail Link Project-Dharam-Qazigund section. Construction of RCC Overhead tank at Banihal station yard (Package OHT-I)
LOA No.IRCON/1014/J&K-DQ/RCC OHT Tank-Banihal/OHT-1/284,
date:10.5.2010

Dear Sir,

In reference to your letter (No.IRCON/1014/J&K-DQ/RCC OHT Tank-Banihal/OHT-1) we have not received the seven days notice as mentioned in your letter dated 11.08.2010 and we were not in knowledge of the 48 hour notice as well, however we have received a duplicate copy of the same notice from the project office Banihal.

The delay in the work is mainly because of the prevailing situation in the valley as your good self may be aware of it and the weather was also a main hindrance as it continued to rain for several days last month and even before that. The banks in the valley open after a fortnight's time and do the normal cash transactions only this is the main reason behind not submitting the bank guarantee on time, however we assure you that the same will be submitted as soon as the banks are fully functional.

Regarding the progress of the work we have already dumped all the reinforcement material of which the foundation is ready for binding. We assure you that the work shall be completed on time however we are in anticipation of your cooperation in this hour of need.

Below is the schedule on the basis of which the work will progress:

S.No.	Date	Progress of work
1.	05.09-05.10	Raft foundation and staging heights
2.	06.10-06.11	All staging heights.
3.	07.11.07.12	Dome and RCC tank.

Rest we assure you of our best cooperation. Thanking you in anticipation and we always remain.

Yours sincerely
Sd/-
M/S Khursheed Ahmed Zaz.”

While questioning Ircon International Limited's Communication No. IRCON/1014/J&K-DQ/RCC OHT Tank-Banihal/OHT-1/1092 dated 07.09.2010, whereby the petitioner's Contract was terminated, the petitioner has made significant omission to refer to Ircon's Communications to the petitioner appearing at serial Nos. 1 to 5 of the References indicated in the Communication, referred to hereinabove. Some

of these communications have, however, been placed on records by the respondents, perusal whereof reveals that Ircon International Limited had been insisting the petitioner to submit the Irrevocable Performance Bank Guarantee in the prescribed format for a sum of Rs.4,24,011/- before signing the Contract Agreement in compliance to Clause 9.0 of the General Conditions of Contract and Clauses 5.0 and 5.1 of the "Instructions to Tender/s" (Technical Bid) and Clause 13.4.5 of SCC since May, 2010 but the Bank Guarantee does not appear to have been so furnished and the petitioner had assigned his own reasons for not doing the needful.

The respondent's plea that the petitioner had violated the terms and conditions of the Contract and requisite progress in execution of the Contract could not be achieved because of the petitioner's lapse, necessitating the termination of Contract for violation of the terms and conditions appearing in the instructions to tenderer/s, the General/Special Conditions of Contract, which the petitioner-tenderer had signed at the time of submitting his tender, has been dealt with by the petitioner in his Supplementary Affidavit, denying on facts, the case set up by the respondents in response to the petitioner's Writ Petition.

The parties were not at variance as to the applicability of the terms and conditions of the Contract, referred to in the instructions to tenderer/s, the General/Special Condition of

Contract, which governed their relationship in respect of the Contract in question regardless of the non-execution of Formal Contract Agreement by the petitioner.

It is also not disputed that the parties had agreed for resolution of their *inter se* disputes in respect of the Contract, by arbitration as is otherwise evident from Clause 49.1 of the General Conditions of Contract.

The terms and conditions governing the Contract, do vest power in Ircon International Limited to terminate the Contract on finding the Contractor to have committed default(s) of the terms and conditions of the Contract.

From the material placed on records, it is apparent that six months' period was fixed for completion of the Contract allotted to the petitioner on May 10, 2010. He was required to submit unconditional and Irrevocable Performance Bank Guarantee for an amount representing five percent of the contract value within fifteen days, which, however, he did not do. Despite Ircon's letter of May 14, 2010 requiring the petitioner to sign the contract document and before doing that to furnishing the Performance Bank Guarantee, the needful was not done. Another communication was addressed by the respondent to the petitioner on 01.06.2010 to do the needful but to no effect. It was on June 28, 2010 that while reminding the petitioner of the slow progress of the work, he was again called

upon to furnish the Performance Bank Guarantee. Thereafter the petitioner was served seven days' Notice to comply with the terms and conditions of the contract and additionally submit Irrevocable Performance Bank Guarantee.

On failure of the petitioner to furnish the Bank Guarantee and accelerate the progress of work, 48 hours Notice was issued to him on 23.08.2010.

Taking into account the respondents' Response to the Writ Petition, the documents placed on records in support thereof, the fact that the work was not completed within the agreed period of six months and the petitioner's act of submitting his own Schedule for completion of work in the year 2012, the dispute between the parties, can safely be viewed, essentially a dispute of civil nature, adjudication and settlement whereof is dependant on the proof or otherwise of the facts pleaded by the contesting parties.

The terms and conditions governing the relationship of the parties to the Contract, provide for resolution of such disputes by arbitration.

The respondents having exercised their option of terminating the Contract for violation of the terms and conditions thereof by the petitioner; there may not be any public law element in the petitioner's case warranting invoking of this

Court's Extra-ordinary Civil Writ Jurisdiction.

The facts placed on records by the respondents, though disputed on facts by the petitioner, do not hint at any undue haste or violation of the principles of Natural Justice by the respondents warranting interference by this Court, when the petitioner has equally efficacious remedies available to him to seek redressal of his grievances through arbitration or by other modes available to him under law.

In the circumstances, the petitioner's challenge to the termination of his Contract cannot, therefore, be entertained for its adjudication by the Court. His challenge to the fresh NIT for completion of the unfinished work, issued by the respondents, too is not sustainable unless his challenge to the termination of his Contract would succeed, in that, the issuance of fresh Tender has not been questioned on any such ground which may be entertained by the Court exercising its Extra-ordinary Writ Jurisdiction.

Sawalkote Projektutvikling vs. State and another, reported as 2010 (1) JKJ 737 and other similar judgments on the issue referred to by the petitioner's learned counsel, are not attracted to the facts of the present case and the petitioner cannot, thus, derive any benefit from the law laid down therein, in that, its Contract has been terminated for violation of specific terms and conditions governing the Contract in question.

Therefore, relying on *Orissa Agro Industrial Corporation Limited and others vs. Bharti Industries and others*, reported as AIR 2006 SC 198 and finding that the disputes raised by the petitioner in this Petition revolve around the questions of fact requiring its resolution by arbitration or other modes available to the petitioner under Law, this Writ Petition is found non-maintainable.

This Writ Petition is, therefore, dismissed.

**(J.P. SINGH)
JUDGE**

JAMMU
31.03.2010.
Vinod