

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

A.A.No. 26/2008

Date of Decision:27.04.2011

Shiv Lal v. National Hydroelectric Power Corporation Ltd.

Coram:

Mr. Justice J. P. Singh, Judge.

Appearing Counsel:

For the Petitioners :Mr. Y.P.Kaushal, Advocate.

For the Respondents :Mr. R.S.Thakur, 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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The petitioner-Shiv Lal entered into an Agreement with the respondent-National Hydroelectric Power Corporation Limited to execute the work “*Geological exploration by driving a drift of size 1.52 m (width) x 2.13 m (height) rectangular section, 150 m long to be excavated at EL ± 1740 m at Dranghuran of Bursar HE Project*”, allotted to him by the Corporation.

During the currency of the Contract the Corporation is stated to have neglected to supply Explosives to the petitioner in terms of Condition 24 (3) of the Special Conditions, forming part of the Contract Agreement, as a result whereof the petitioner had to spend extra amount of

Rs.25,85,748/- He, therefore, preferred Claim to the Corporation seeking its settlement.

The Claim was not settled and the petitioner, therefore, served Notice on the Corporation requiring it to suggest its panel for selection of an Arbitrator to adjudicate upon his Claim, invoking Clause 55 of the Contract Agreement.

Responding to the petitioner's Notice seeking Arbitration, the Corporation stated that there was irregularity in supplying the explosives for some early period of the Contract but the petitioner was suitably compensated when he was paid idling charges by the Corporation. The delayed progress of the work was, however, attributed to the petitioner's own fault and insincerity, in that, despite having been given sufficient time to complete the work, the petitioner failed to keep the time schedule for which the Corporation is stated entitled to recover compensation from him.

His request seeking settlement of the disputes raised by him, by Arbitration, was, however, denied.

The petitioner has, therefore, approached this Court seeking appointment of an Arbitrator invoking Section 11 of the Jammu and Kashmir Arbitration and Conciliation Act, 1997.

The Corporation's Response to the Petition, *inter alia*, indicates that the dispute raised by the petitioner was not arbitrable in view of the provisions of Clause 53 of the Contract Agreement, in terms whereof all the decisions taken, *inter alia*, in respect of Clause 23 of the Agreement pertaining to the supply of material, including explosives, was not arbitrable.

According to the petitioner's learned counsel, Mr. Kaushal, as the dispute raised by the petitioner was covered by Special Condition No.1 of the Contract Agreement, so the Corporation's plea that it was outside the purview of Arbitration was untenable.

Per contra, learned counsel for the Corporation, Mr. Thakur submitted that the dispute raised by the petitioner being exclusively covered by Clause 23 of the Contract Agreement, the Special condition cannot be read in isolation as it only explained and not negated what was contained in Clause 23 of the Agreement.

I have considered the submissions of learned counsel for the parties and gone through the terms and conditions of the Contract Agreement including the Special Condition, referred to by the petitioner.

The only dispute that arises for consideration is as to whether or not the dispute raised by the petitioner was arbitrable.

Before dealing with the issue, reference needs to be made to the provisions of Clauses 23.6 (a) and (b) and Special Condition No.1 appearing in the Contract Agreement. These read thus:-

"23.6 (a) If construction material like cement, steel, explosive etc. are required by the contractor for the bonafide use in his preliminary, enabling and ancillary works (relating to the works under the contract) and if such materials are available and can be spared by the corporation, the Engineer-in-charge may issue the same to the Contractor on the issue rates of the corporation prevalent at that time and on such terms and conditions as may be stipulated by the Engineer-in-Charge according to the plans and the phasing as approved by the Engineer-in-charge.

(b) The contractor shall have no claim whatsoever against the corporation for non-issue of the construction materials for preliminary, enabling and ancillary works as mentioned in 23.6 (a) above. The decision of the Engineer-in-Charge in respect of 23.6 (a) & (b) shall be final, conclusive and binding on the Contractor.

Special Condition No.1 :- The rate of drift excavation shall include all type of labour required for drilling, blasting, disposal of muck with all leads and lifts. The lighting ventilation, air and water arrangements as well as misc. supply such as dusters etc. shall be the entire responsibility of the contractor. The machinery and equipments like air compressors, jack hammers, air leg pushers, air lubricators hose pipe along with fittings, drill rod, tip wagons wheel borrow shall be arranged by the contractor at his own risk and cost. The day to day maintenance incl. major/minor repairs of above machinery/equipments shall be contractor's at his own cost. The cost of carriage involved in connection with repairs of above equipment shall be born by the contractor."

Provisions of Clause 23 of the Contract Agreement dealing with the materials which were to be used in execution of the Contract unambiguously refer to the supply and use of Explosives too besides other material like Cement and Steel etc.

Reading of Clause 23 and its various Sub Clauses demonstrates that the Special Conditions only explain what is contained in various Sub Clauses of Clause 23 of the Contract Agreement.

The Special Conditions do not create any such new rights or liabilities of the parties adjudication whereof may be conceived to have been contemplated by the parties through arbitration. There is nothing in the Special Conditions on the basis whereof it be said that the Agreement of the parties to treat the decision of the Engineer-in-Charge on the issues saved by various Clauses of the Contract Agreement indicated in Clause 53, as final and binding on the Contractor, had been done away with.

That apart, the Special Conditions do not in any manner, deface Clause 23.6(b), in terms whereof the parties had agreed that the Contractor shall have no claim whatsoever against the Corporation for non-issue of the construction materials for preliminary, enabling and ancillary works as mentioned in Clause 23.6(a), which includes the Explosives and the decision of the Engineer-in-Charge in respect of Clause 23.6(a) & (b) is final, conclusive and binding on the Contractor.

It, therefore, becomes explicit that the dispute raised by the petitioner is cognizable exclusively by the Engineer-in-Charge and in terms of the agreement between the parties, it is his decision that is final, conclusive and binding on the Contractor.

The dispute raised by the petitioner being specifically excluded for adjudication by arbitration, the petitioner's request for appointment of Arbitrator cannot be entertained.

Therefore, finding no merit in the petitioner's Application, his request for appointment of Arbitrator is declined, dismissing his Application.

**(J. P. Singh)
Judge**

JAMMU
27.04.2011.
Pawan Chopra