

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

- 1. CIMA No. 278/2008**
CMP Nos. 476/2010, 384/2008 & 212/2009
- 2. CIMA No. 147/2009**
CMP No. 207/2009

Date of Decision: 09.11.2011

1. K. K. Gupta and Construction Engineers(JV) v. Union of India and ors.
2. Union of India and ors. v. M/S K. K. Gupta & Constructions Engineers.

Coram:

Mr. Justice J.P.Singh, Judge.

Appearing Counsel:

For the Appellant(s) : Mr. K. S. Johal, Sr. Advocate
with Mr. Amit Gupta, Advocate.

For the Respondent(s) : Mr. Sunil Sethi, Sr. Advocate.
M/s Hari Hartar Singh and
Baldev Singh, Advocates.

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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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M/s. K. K. Gupta and Construction Engineers (JV), for short 'the Contractor', filed a Petition under Section 9 of the Jammu and Kashmir Arbitration and Conciliation Act, 1997 with Principal District Judge, Jammu, seeking Restraint directions against Union of India, Deputy Chief Engineer, Chief Engineer and Chief Administrative Officer, Construction, Northern Railways, New Delhi not to act on Chief Engineer/C/NW's Communication No. 74-W/1/1/349/

WA/JAT/D/Pt.I dated 14.3.2008 giving it seven days' Notice, in terms of Clause 62 of the General Conditions of Contract, to make good the progress in respect of Contract:

Construction of Bridge No. 81 (25x26.20M) (Over all) spans over river UJH consisting of PSC girders with well/open foundations with RCC abutments and piers including earthwork in embankment/cutting and blanketing on approaches and other allied works between Km.34.110 to Km. 35.604 between Budhi-Chhan Arorian in connection with doubling JUC-PTK-JAT Section, And pass orders adverse to its interests including termination of work at its risk and cost, besides refraining from encashing Bank Guarantee valuing Rs. 97.5 Crores. Directions were sought against the Jammu and Kashmir Bank Limited, Residency Road, Srinagar also not to encash the Bank Guarantee.

The Functionaries of Northern Railways contested the Application on various grounds.

Ruling against the Northern Railways on the issue of lack of jurisdiction of the Court to entertain Contractor's Application, besides its right to get the work executed at Contractor's risk and cost, the Learned Principal District Judge, allowed Contractor's Application but in part. The

Restraint directions issued by the learned District Judge, on the Contractor's Application are reproduced hereunder:-

"Viewed thus, I order that respondents are at liberty to terminate the contract, if the work has not been completed even after the second extension and get the work completed through any other agency but the question as to whether it should be done at the risk and cost of the petitioner would be determined by the arbitrator. To make it clearer, thus, the fresh allotment of the contract as on now shall not be at the risk and cost of the petitioner. This direction shall remain in force unless and until modified by the arbitrator. As a corollary to the grant of above relief, relied (C) as sought by the petitioner is also granted and the direction in this regard too shall be operative unless and until modified by the arbitrator. The ad interim directions issued vide order-dated 24.3.2008 now stands vacated."

Dissatisfied with the learned District Judge's order, the Contractor has filed CIMA No. 278/2008 and Union of India, CIMA No. 147/2009, seeking setting aside of order dated December 15, 2008 of the learned District Judge, to the extent appealed against.

At the hearing of these Appeals, the Contractor's learned counsel restricted Appellant's relief in CIMA No. 278/2008 only to the extent of seeking setting aside of learned District Judge's order whereby it stood restrained from participation in the fresh contract which the Northern Railways may go in for pursuant to termination of the appellant's Contract. He, on instructions of the Appellant, however, stated that the Appellant would keep the Bank Guarantee alive during the operation of interim directions

issued by the Court.

Learned counsel appearing for Union of India submitted that the Contractor having failed to complete the work despite having availed two extensions and that too, without penalty, the direction issued by the learned Principal District Judge against the Northern Railways not to encash Bank Guarantee, was unjustified.

Reliance is placed on ***General Electric Technical Services Company Inc. v. Punj Sons (P) Limited***, reported as 1991(3) JT 360 by the learned counsel to support his submission.

Considered the submissions of learned counsel for the parties.

In passing the order impugned in the Appeals, the learned District Judge was of the view that having failed to complete the allotted work despite availing two extensions in the period of contract, which was to be executed within 20 months, the Contractor was not entitled to seek Restraint directions against Union of India not to go in for fresh allotment of the abandoned work. He was, however, of the view that as the issues projected by parties to the Contract, as to whether or not the termination of contract was justified, were to be adjudicated upon by the Arbitrator, the rights of

the parties needed to be protected until the matter would come up for consideration before the Arbitrator. It was in this context that the learned District Judge has issued directions which are impugned in the Appeal.

The directions issued by the learned District Judge are interim in nature and subject to their modification by the Arbitrator, the Forum chosen by parties for resolution of their disputes pertaining to the Contract.

Union of India's right to encash Bank Guarantee, being subject to the findings of the Arbitrator, on the validity or otherwise of its action in terminating the contract, the directions issued by the learned District Judge to Union of India not to encash the Bank Guarantee, until the matter was considered by the Arbitrator, does not, looked from any angle, appear unjustified.

The case law referred to by the Appellant's learned counsel to support its plea that direction of the learned District Judge not to encash the Bank Guarantee, is not attracted in the facts and circumstances of the present case and may not, therefore be of any help to him.

Union of India's plea that the directions issued by the learned District Judge to it not to encash Bank Guarantee, was unjustified, therefore, fails and is, accordingly, rejected.

Union of India's next plea that the Contractor be called upon to keep the Bank Guarantee alive, too does not survive for consideration in view of the Contractor's learned counsel's statement made at the Bar that the Contractor would keep the Bank Guarantee alive during the subsistence of interim directions of the Court.

Coming to the Contractor's plea that the learned District Judge's order restraining its participation in fresh Contract of the abandoned work was unsustainable, suffice would it be to refer to the Northern Railways' Directive conveyed vide No. 74-W/0/7/WA/Pt-1/CP dated 11.1.2008 **prescribing procedure for finalization of Risk and Cost Tenders.** In terms of the Directive, the Failed Contractors too have been permitted participation in Risk and Cost Tenders subject, however, to the conditions indicated in the Directive.

In this view of the matter, the learned Principal District Judge, Jammu's order dated December 15, 2008, needs to be modified permitting Contractor's participation too in the fresh tenders that the Northern Railways may go in for the abandoned work subject, however, to the conditions as prescribed by the Northern Railways for finalization of Risk and Cost Tenders and participation therein of the Failed

Contractors.

Both these Appeals are, therefore, disposed of accordingly, recording Contractor's undertaking to keep the Bank Guarantee alive. The Contractor is permitted participation in the fresh Contract subject to the conditions as prescribed by Northern Railways regarding participation of Failed Contractors in finalization of Risk and Cost Tenders. This shall, however, be subject to Contractor's taking steps to keep the Bank Guarantee alive until further orders from the Arbitrator.

The directions issued by the learned Principal District Judge, Jammu vide his order dated December 15, 2008 shall stand modified accordingly.

With the disposal of these Appeals, the interim directions issued by this Court shall stand vacated.

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

JAMMU
09.11.2011
Tilak, Secy.