

# **HIGH COURT OF JAMMU AND KASHMIR AT JAMMU**

AA No. 23/2011

Date of Decision: 31.12.2012

M/s Mohindra Bros.

V.

Union of India & ors.

## CORAM:

**Hon'ble Mr. Justice J. P. SINGH, Judge.**

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**Appearing counsel:**

For Petitioner(s) : Mr. Anil Mahajan, Advocate.

For Respondent(s) : Mr. R. P. Jamwal, CGSC.

The petitioner- M/s Mahindra Bros seeks appointment of Arbitrator on the disputes projected by it in Paragraph No. 31 of the Petition which are stated to have arisen between it and the Union of India in respect of Contract CA No. CEUZ-19/2003-04, Prov. Of OTM Accm for 3<sup>rd</sup> TRD INF BN at Bhadarwah, because Union of India had refused to appoint Arbitrator on the ground that resort to arbitration in terms of Condition 70 of IAF 2249, General Conditions of Contract forming part of the Contract entered into between the parties could be had only if the parties agreed therefor in writing, and in any case not until the Contract was either completed or otherwise terminated.

Union of India contests the petitioner's request for appointment of Arbitrator urging that having completed only 75% of the work, the petitioner was not entitled to seek appointment of Arbitrator unless the work was

completed by it or was otherwise rescinded. The claims of the petitioner are stated false and inflated.

According to Union of India, having failed to complete the work even after six years of the original period of completion indicated in the Contract Agreement and the extension allowed to it from time to time, the petitioner was not granted further extension of the Contract period and was told to first complete the work before its case was considered for extension of Contract.

Heard learned counsel for the parties.

The amount claimed by the petitioner for the works allegedly executed by him, having been disputed by Union of India on various grounds, the dispute regarding payment or otherwise of the claims projected by the petitioner, therefore, exists between the petitioner and Union of India, which in terms of Condition 70 of IAF 2249, forming part of the Contract, is referable to arbitration. The only question that, therefore, needs to be considered is as to whether or not the petitioner was entitled to seek appointment of Arbitrator in view of the objection raised by Union Of India that the Arbitrator cannot be appointed unless it agreed therefor or the work was otherwise rescinded.

To examine the issue, regard needs to be had to Condition 70 of the Contract Agreement, which reads thus:

**“70. Arbitration.-** All disputes, between the parties to the Contract (other than those for which the decision of the C. W. E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to

the other of them, be referred to the sole arbitration of an Engineer officer to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 and 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors of Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, ex parte, if either party, inspite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time upto but not exceeding one year from the date of his entering on the reference, for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract."

Perusal of Condition 70, read as whole, demonstrates its object that arbitration may not be permissible during the period of Contract unless there was agreement between the parties for reference to arbitration or in the event of abandonment of Works or cancellation thereof, until alternate arrangements were finalized by the Government to get the Work completed by or through any

other Contractor or Agency. The completion of Contract referred to in the Condition means the period initially fixed for completion of Contract, of course, including the extended period thereto. After the expiry of the period of Contract or extension allowed therefor, the agreement of the parties and the Proviso appended to Condition 70 thereof may not have any application, in that, after the expiry of period of Contract or extended period thereof, resort to arbitration is permissible for referring the matter to arbitration. Abandonment, cancellation or completion of work by any other Contractor or Agency would also not operate as impediment for appointment of Arbitrator when the period of Contract had otherwise expired.

Union of India has admitted in its response to the petitioner's claim that the petitioner was not granted further extension in Contract but was directed to complete the Contract without extension thereof. This stand of Union of India, clearly demonstrates that the Contract stands expired by efflux of time. Its objection to refer the matter to arbitration when the Proviso to Condition was not applicable and their consent was not otherwise needed, denial of appointment of Arbitrator by them following the procedure agreed to, amounts to its refusal for appointment of Arbitrator.

In view of Union of India's refusal to appoint Arbitrator despite petitioner's request therefor, following the procedure prescribed in Condition 70 of IAF 2249, the

Arbitrator is required to be appointed in terms of Section 11, of the Jammu and Kashmir Arbitration and Conciliation Act, 1997 by the Chief Justice or his designate.

Therefore, in terms of *Section 11 (8) of the Jammu and Kashmir Arbitration and Conciliation Act*, Sh. Satish Chander, JT DG (Contracts) Panel of Arbitrators, Chandigarh, GE Chandimandir Office Complex Chandimandir, PIN 908543 is appointed as Arbitrator to determine the claims that the parties may file before him after he enters upon reference.

Registrar (Judicial) to inform the Arbitrator of his appointment to enter upon reference for his Award on the claims made to him by the parties in terms of the Contract Agreement.

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

**JAMMU:**

*Sunita*

31.12.2012