

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

A. A no. 6/2007
CMA no. 6/2007

Date of order 19.02.2013

Jalaluddin v NHPC Ltd.

Coram:

Hon'ble Mr. Justice M. M. Kumar, Chief Justice

Appearing counsel:

For the appellant(s) : Mr. Vishal Sharma, Advocate.
For the respondent(s) : Mr. R. K. Gupta, Sr. Advocate with
Mr. Prem Nath Sadotra, Advocate.

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| i) Whether to be reported
Press, Journal/Media | |
| ii) Whether to be reported in
Digest/Journal | Yes |
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1. The instant petition filed under Section 11 (5) of the J&K Arbitration and Conciliation Act, 1997 (for brevity the Act) prays for appointment of an independent Arbitrator in respect of dispute emerging from the contract concerning allotment of work vide letter dated 05.05.2004. The petitioner was allotted work of shifting of 2 Nos. prefabricated structure size 19.52 m x 4.88 m with 1.52 m wide verandah from Patimahala to Dumhai vide allotment letter no. NH/BHEP/DB/04/152 dated 05.05.2004 at negotiated rates of Rs.6.00 lacs. The case of the

petitioner further is that within a period of 15 days commencing from 15.05.2004, he shifted the material as was stipulated in the allotment order in perfect conditions to the satisfaction of the Engineer Incharge. The satisfaction was recorded by him after inspection which followed the recommendation for release of 90% payment in his favour. Even the payment of Rs.4,82,560/- was released in his favour. The responsibility of watch and ward of the material till its erection at site was also on the petitioner as per the provisions of Clause 4 of the allotment letter. Accordingly, he had employed full time watchman. However, despite lapse of six months the prefabricated material was not erected at the site and he withdrew the watchman as the engagement of the watchman was not for infinite period. The material has not been erected at site even till the date of filing of petition in 2007, as the prefabricated material remained on the site under the open sky unattended by the staff of the respondent. The petitioner has asserted that after shifting of the material, the respondent has even changed its mind and have changed the site

where the prefabricated is to be erected. The material has already been shifted to the site by some other contractor which is about 8 kilometers away.

2. The officers/officials working under the respondent have been making effort to fastening the liability on the petitioner for their own omissions and commissions which has resulted in damage to the prefabricated structure. Accordingly, a notice was issued to the petitioner on 11.01.2007 claiming that the material suffered damages at site on account of lack of proper care and by not deputing watch and ward. The damages have been assessed at Rs.1,64,144/-. After adjusting the 10% amount of Rs.80,000/- recovery of Rs.84,144/- is sought to be made. According to the petitioner, a dispute has arisen which is covered by Clause 55 of the 'Conditions of Contract for Civil Works' and the matter is required to be referred to Arbitration for adjudication. The petitioner issued a notice to the respondent requesting them for forwarding him a panel of Arbitrator in terms of Clause 55. He also requested that the recovery of

Rs.84,144/- be kept in abeyance till the adjudication of the dispute by Arbitrator. But no panel of proposed arbitrator has been sent to the petitioner and on 09.02.2007 the respondent has refused to appoint any arbitrator. On the contrary a legal action is sought to be taken against the petitioner for recovery of the amount.

3. In the objections filed by the respondent, there is no serious dispute on facts. It has, however, been asserted that as per terms and conditions it was the responsibility of the petitioner to employ a watchman for watch and ward of the material till it was erected on the site. On account of withdrawal of the watchman, the material at the site was damaged and has also been stolen. The letter no. NH/BHEP/CE/05/892 dated 21.09.2005 was issued to the contractor intimating him that the material was found missing and damaged from the site. Accordingly, the value of such material was assessed at Rs.1,64,144/-. The request of the petitioner is stated to have been declined in terms of Clause 34 of the general conditions of the contract which imposes an obligation on the

contractor to take full responsibility of the material to prevent any loss or damage to it. Therefore, the unilateral act of withdrawing the watch and ward is breach of obligation on the part of the petitioner and he must pay for the same.

4. I have heard learned counsel for the parties and have perused the record with their able assistance. In order to appreciate the controversy, it would be necessary to examine the nature of the contract. It was obviously a transportation contract. The contract was for shifting of 2 Nos. of prefabricated structure size 19.52 m x 4.88 m with 1.52 m wide verandah from Patimahala to Dumhai. The rate was fixed at Rs.3.00 lacs per structure and the total amount came to be Rs.6.00 lacs. Some of the material terms and conditions of contract are set out below which read thus:-

“Terms and Conditions”

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2. Materials should be shifted as per the direction given by the project authority. Material should be transported safely in good condition at destination as per instruction given from time to time.

3. The contractor shall be responsible for any loss or damage of the materials during transportation and will be made good at his cost to the corporation.

4. The carriage contractor will give proper receipt of the material to be shifted from Patimahala to Dumhai. The watch and ward of the material shall also be the responsibility of the contractor till erection at site.

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7. The contractor shall have group/individual insurance of their labour deployed for shifting of materials at their own cost.

8. Delivery Period: The time allowed for shifting of materials shall be 15 days commencing from 15.05.2004.

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12. In addition to the above, the conditions laid down in general condition of contract for civil works of NHPC shall be applicable except Clause 21, 24, & 46.”

5. A perusal of the aforesaid terms and conditions would show that the contract necessarily related to transportation of prefabricated structure from Patimahala to Dumhai. The contractor was responsible for any loss or damage to the materials during transportation and in case of any damage he was to pay the cost thereof to the respondent. The delivery period for shifting the material was 15 days. The shifting was in order and to the

satisfaction of the Engineer Incharge of the work who inspected the material and recommended release of 90% payment in his favour. In fact, the 90% of the payment was also released in favour of the petitioner. However, there is a serious dispute with regard to the damage suffered by the material after shifting. According to Clause 12 of the terms and conditions given in allotment letter, the general conditions of contract for civil works of National Hydro Power Corporation would stand incorporated and have been made applicable to the transportation contract except three clauses.

6. Mr. Sharma, learned counsel for the petitioner has placed reliance on Clause 55 by contending that there is a dispute which is referable to the Arbitrator and despite notice a panel of three persons has not been furnished to the petitioner by the Chief Engineer, Incharge of work. In support of his submission, Mr. Sharma has placed reliance on the provisions of Section 56 of the Contract Act, 1872 and has argued that there is complete frustration of contract and, therefore, petitioner was not under obligation to

provide watchman after reasonable period. According to Mr. Sharma performance of contract to the extent of petitioner's obligation stood accomplished on shifting of prefabricated material at the site. The petitioner has also retained watch and ward for six months and the non-erection of the material at site till 2007 is a factor which results in frustration of that part of the contract. Therefore, he claims entitlement to appoint of an arbitrator by this Court. In support of his submission, learned counsel has placed reliance on a judgment of Hon'ble the Supreme Court in the case of ***Union of India v. M/s C. Damani and Co. AIR 1980 SC 1149.***

7. Mr. Gupta, learned Senior counsel for the respondent, however, has vehemently argued that in the face of Clause 34 the contractor is obliged to take full care of the material to prevent any loss or damage. On account of negligence of the petitioner, the Corporation suffered loss of material and it has suffered damage on account of his negligence.

8. I am of the considered view that there is a serious dispute between the parties which is covered by virtue of Clause 12 of the terms and conditions of allotment letter read with Clauses 34 & 55 of the General Conditions of Contract for Civil Works of NHPC. Therefore, the dispute should have been referred for arbitration and a panel of three persons should have been supplied in terms of Clause 55 (1) (ii) after the petitioner had given notice in writing. The view taken by the respondent to the contrary in reply dated 09.02.2007 (Annexure-D) cannot be accepted because there is a dispute between the parties which needs to be determined in the arbitration proceedings. The Arbitrators are required to be appointed in accordance with the procedure contemplated by Clause 55 of the General Conditions of Contract for Civil Works of NHPC.

09. As a sequel to the above discussion, this petition succeeds. The respondent is directed to supply a list of three persons as stipulated in Clause 55 (1) (ii) within 30 days from the date of receipt of a copy of this order. If the needful is

not done within 30 days then the petitioner shall be at liberty to file appropriate application for appointment of an independent Arbitrator, if so advised.

10. The petition stands disposed of.

(M. M. Kumar)
Chief Justice

Jammu
19.02.2013
Parshant