

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

AA no. 11/2012

Date of order: 21.04.2013

M/s Avinash Kumar & Asso. v. Union of India and ors

**Coram:**

**Hon’ble Mr. Justice M. M. Kumar, Chief Justice**

**Appearing counsel:**

For the Petitioner(s) : Mr. R. K. Guapta, Sr. Advocate with  
Mr. Prem Sadotra, Advocate.

For the respondent(s) : Mr. Baldev Singh, Advocate.

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| i)  | Whether to be reported in<br>Press, Journal/Media | : | Yes    |
| ii/ | Whether to be reported in<br>Digest/ Journal      | : | Yes/No |

M. M. Kumar, CJ

1. The petitioner firm is engaged as Contractors, Engineers and Land Escapers. It is duly registered with the Railway Department-respondents. It responded to tender notice invited from eligible contractors by the Deputy Chief Engineer, Survey and Construction-III, Northern Railway Udhampur for execution of earth work in cutting/ filling in Zone E-12 from KM 29/280 to KM 30/000 including protection works and other ancillary work. The petitioner succeeded in securing the contract as is evident from letter dated 13.09.2006 sent by the tendering authority vide communication No. 74-W/Acceptance/UDM-KAT/WA (Annexure A). It is appropriate to mention that the petitioner had already furnished a sum of Rs. 4,60,370/- in the shape of CDR which was retained by the department towards the initial

security for due and faithful fulfilment of the contract. After the acceptance of the contract the petitioner firm also furnished a Performance Bank Guarantee amounting to Rs. 13,01,947.20 being 5% of the contract value as per the requirement of the allotment letter.

2. After completion of the aforesaid formalities the stage was set for execution of the agreement between the petitioner-firm and the department. Accordingly an agreement was executed and a copy of the agreement No. S&C/3/W/E-12/P.W/Katra/Pt-II dated 28.07.2007 (Annexure-B) has been placed on the record. The work was required to be executed within a period of 15 months from the date of issuance of letter of acceptance.

3. There are allegations made in the petition for delayed receipt of drawings of a portion of land which necessitated an application for extension of time made on 04.12.2007 by the petitioner-firm (Annexure-E). A similar request was also made on 27.12.2008 (Annexure-F). The petitioner firm also claims that it was asked to stop the execution of the work on account of change of project alignment being contemplated at higher level. As a result the petitioner-firm was forced to keep its labour and machinery idle which caused huge over head expenditure without any productivity. All the aforesaid aspects have been highlighted in letter addressed by the petitioner- firm

on 19.11.2008 (Annexure- G). In paras 11,12, 13 and 14 similar disputes have been raised which refer to the issue of non-availability of the earth which was neither made available by the respondents nor the department allowed the petitioner to arrange the same on its own from private sources. Likewise, changes in the slope and consequent changes in the design of work resulted in additional and extra work which was not provided for in the original contract agreement. It is claimed that the petitioner has been able to complete more than 85% of the work. Eventually a request was made for extension of time in execution and completion of the contract work and the time for execution was extended by respondents till 30.09.2010. The balance work could not be executed because of the omissions and commissions on the part of the department as respondents failed to handover the hindrance free full site to the petitioner and also failed to release the payment on account of additional/extra work executed by the petitioner firm.

4. The petitioner has claimed that despite execution of more than 85% of the work, it has been paid a sum of Rs. 1.78 crore. A huge amount is still outstanding and payable by the respondents to the petitioner firm on account of balance work and additional/extra work. However, respondent no. 4- Deputy Chief Engineer (Construction) Northern Railway, Jammu Tawi

issued an order dated 29.09.2010 whereby the contract awarded to the petitioner firm has been rescinded with immediate effect (Annexure-J).

5. On receipt of the letter rescinding the contract, the petitioner-firm vide its letter dated 12.10.2010 submitted a detailed reply and refuted the allegations made in the letter and highlighted the omissions made by the respondents hindering the completion of the contract work on time. The letter also pointed out various items of the contract works which had been completed by the petitioner (Annexure-K). However, no action was taken.

6. The petitioner has alleged that due to the illegal rescinding of the contract by respondent no.4 vide letter dated 29.09.2010, a dispute having arisen, the petitioner firm invoked clause 64 of the General Conditions of Contract governing the parties. In a letter sent by the petitioner and addressed to respondent no.2- Chief Engineer, Northern Railway a request was made for referring the dispute between the parties to arbitration. The letter has been received on 27.01.2011 by respondent no.4 (Annexure-L). Having failed to appoint the arbitrator in terms of Clause 64 of the General Conditions of Contract, the petitioner has approached this Court on 05.05.2012.

7. In response to notice, objections have been filed by the Deputy Chief Engineer (Construction) Northern Railway, Jammu. A principal objection raised is that the petition is premature because no demand for appointment of arbitrator has been made by the petitioner by sending a notice to the competent authority. Referring to the general conditions of the contract governing the parties under the contract agreement, the demand of arbitration has to be made to the General Manager of the concerned Railway, which is Northern Railway in the present case. In other words the respondents have not shown any aversion to the appointment of arbitrator as per the demand raised by the petitioner.

8. In order to overcome the objection raised by the respondents, the petitioner sent a letter dated 26.08.2013 to the General Manager, Northern Railways, Baroda House New Delhi, seeking reference of the dispute to the arbitration. A copy of the letter has been placed on record along with application (Annexure-A) and the same has been received by the General Manager concerned on 02.09.2013. A receipt proving the same is also placed on record (Annexure-B).

9. A perusal of the aforesaid facts would show that even after raising the demand for arbitration before the General Manager, Northern Railways, New Delhi on 02.09.2013, no

arbitrator has been appointed so far. It is well settled that once there is an arbitration clause and dispute exists between the parties then the matter is required to be referred to the arbitration. In the present case it is evident that arbitration clause 64 is part of the contract agreement and admittedly dispute exists between the parties, therefore, there is no impediment to appoint an Arbitral Tribunal. Learned counsel for the parties have also conceded that Arbitral Tribunal may be appointed.

10. Mr. Baldev Singh, learned counsel for the respondents states that the Court may appoint an Arbitral Tribunal in accordance with the provisions of Clause 64 of the General Conditions of Contract. A panel of officers has also been submitted by the petitioner in this regard.

11. Accordingly the following Arbitral Tribunal is appointed:-

- a) Mr. B.L.Safaya (Retd.)  
IDAS (Indian Defence Accounts Services)  
H.No.55-Santokh Vihar.
- b) Mr. S.C.Tukhral,  
B.E./MBA  
Empanelled Arbitrator,  
Indian Council of Arbitration, New Delhi  
88-B.C.Road, Opposite Rehari Chungi, Jammu.
- c) Mr. S.K.Gupta,  
Additional Director General (Retd.) MES  
Indra Niwas, Wazarat Road, Jammu.

It is, however, made clear that Sh. S.K.Gupta, Additional Director General (Retd.), MES shall function as Presiding

Arbitrator. The Arbitral Tribunal shall enter upon reference at the earliest and pass the award in accordance with law. A copy of this order along photocopy of the paper book be sent to all the members of the Arbitral Tribunal under registered post.

12. The arbitration petition stands disposed of.

**(M. M. Kumar)**  
**Chief Justice**

**Jammu,**  
**21.04.2013**  
Anil Raina, Secy.