

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

LPAOW No. 61/2014
MP No. 81/2014

Date of Order: 01.06.2015

M/s Rakesh Kumar and Co.	vs.	U.O.I and ors.
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Coram:

**Hon'ble Mr. Justice Muzaffar Hussain Attar, Judge.
Hon'ble Mr. Justice Janak Raj Kotwal, Judge.**

Appearing Counsel:

For appellant/petitioner(s): Mr. Sunil Sethi, Sr. Advocate with
Mr. Ravi Abrol, Advocate.

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

i. Whether to be reported in Digest/Journal	:	Yes
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(Muzaffar Hussain Attar) (Oral)

A Notice was issued on 23rd May, 2007 whereunder the tenders were invited from eligible tenderers for undertaking construction work of RCC/MCC sub-structure on well/open foundations along with miscellaneous protection works with Contractor's own cement and steel for Major Bridge Nos. 98, 99, 118, 120, 125, 128, 133, 141, 152 and 163 between Budhi-Samba and erection of PSCS Slabs 9.15/12.20 Mtr. and steel plate girders of 12.20/18.30 Mtr. Spans and casting of PSC Slabs 12.20 Mtr. PSC Girder 18.30 Mtr. at the approximate cost of Rs. 11.49 Crores. The parties entered into detailed correspondence.

On 3rd March, 2008, the appellant/writ petitioner sent a communication to respondent No.2/Chief Administrator Officer (Const), Northern Railway, Kashmere Gate Delhi,

Which is taken note of:-

“To

The Chief Administrator Officer (Const)
Northern Railway, Kashmere Gate Delhi.

Sub: Const of RCC/MCC sub-structure on well/open foundation along with misc. protection work with contractor's own cement & steel for major bridges Nos. 98, 99, 118, 120, 125, 128, 133, 141, 152 and 163 between Budhi-Samba and erection of PSC slab 9.15/12.2 mtr and steel Plate girders of 12.20/18.03 mtrs span & casting of PSC slab 12.20 mtr. , PSC girders 18.30 Mtrs on various bridges in between Budhi-Samba section in connection with JUC-PTK-JAT section (Tender opened on 15.06.2007 and negotiation held on 18.09.07 and 16.10.07).

Ref: Your letter No. 74-W/1/1/367WA/PTK/Dt.
27.02.2008

Dear Sir,

With reference to above referred letter, we hereby convey our acceptance to counter offer dated 23.01.2008 but we would like to point out regarding point No. 4 whereby proposal of skin plate has been ignored that our Company will not be liable to bear any cost/loss on account of damage to the well curb as sinking is to be carried out in heavy boulder strata. In case of any damage to the well Railway Deptt. will be responsible and payment of work done/security/bank guarantee etc. shall not be held up a/c damage to well as stated above.

For M/s Rakesh Kumar & Co.
Sd/-
Partner”

Thereafter appellant/writ petitioner send one more communication dated 9th March, 2008 in which he raised certain issues which included the issue of expiry of the

validity period which was extended up to 31st January, 2008. The appellant/writ petitioner through this communication joined issue about the validity of entire proceedings from 1st February, 2008. He also joined issue about the 'skin plate' with the respondents. The said communication is concluded as under:

"This letter shall be deemed as part and parcel of our last letter written to you on 03.03.2008 and in case, it is not acceptable to your goodself, your counter offer is not acceptable to us and we are not bound to accept final acceptance if signed by Administration which till date has not been issued unless it is ante dated. Incidentally almost 9 months from date of opening are expiring during which there have abrupt changes in the circumstances."

The Deputy Chief Engineer/Const./D&NW For Chief Administrative Officer/Const. sent a communication dated 14th March, 2008 to the appellant/writ petitioner. In this communication, the appellant/writ petitioner was informed that the counter offer for the work, which is subject matter of the writ petition was issued vide office letter of even number dated 23.01.2008 which stands accepted by you vide communication dated 3rd March, 2008. It is also mentioned in the said communication that provision of skin plate was not in the purview of the counter offer. The appellant/writ petitioner was also informed that "since you have accepted counter offer, there is no sanctity of validity of tender". It is also mentioned in the said

communication that the acceptance stands issued and you are required to take action on the terms & conditions mentioned in the said letter.

In sequel to communication dated 14th March, 2008, communication dated 17th April, 2008 was also sent to the appellant/writ petitioner asking him to submit performance bank guarantee. He was also informed that in default further action as provided in Clause 62 of General Conditions of Contract would be taken for completion of the work at petitioner's risk and cost.

The communication dated 14th March, 2008 as also communication dated 17th April, 2008 were called in question by the writ petitioner, which stands dismissed in terms of the impugned judgment.

We have heard learned counsel for the parties at great length. The material placed on record was also considered.

In terms of communication dated 1st January, 2008, the subject matter work was offered to the appellant/writ petitioner with counter offer. The appellant/writ petitioner vide communication dated 10th January, 2008 responded by stating that counter offer is not acceptable until such time the negotiated rates are accepted.

The validity of the contract was mutually extended by the parties up to 31st January, 2008 on the negotiated rates. In terms of communication dated 6th February, 2008, the appellant/writ petitioner conveyed a conditional acceptance

of the offer of the respondents. Deputy Chief Engineer/Const/D&NW for Chief Administrative Officer/Const. vide communication dated 27th February, 2008 addressed to appellant/writ petitioner asked him to convey his acceptance to the counter offer of the department projected in communication dated 23rd January, 2008. The appellant/writ petitioner in its reply to the aforesaid communication informed the department that since the proposal of skin plate has been ignored thus the company will not be liable to bear any cost/loss on account of damage to the well curb as sinking is to be carried out in heavy boulder strata. It is also informed that in case damage to the well, Railway Department will be responsible and payment of work done/security/bank guarantee shall not be held up on account of damage to the well. This communication was sent on 3rd March, 2008.

The communication dated 3rd March, 2008 is followed by communication dated 9th March, 2008. The said communication was concluded by informing the respondents that the letter dated 9th March, 2008 shall be deemed to be part of letter dated 3rd March, 2008. It was specifically informed that in case the issue raised in communication dated 9th March, 2008 would not be acceptable to respondents then the appellant/writ petitioner would not be bound to accept, the final acceptance if signed by the administrator.

The respondent vide communication dated 14th March, 2008 conveyed the acceptance and asked the appellant/writ petitioner to take action as per the terms and conditions mentioned in the acceptance letter.

The appellant/writ petitioner raised some specific issues which include the issues raised in communication dated 9th March, 2008.

The correspondence which has taken place between the parties, whether in law would constitute a concluded contract would require to be looked into and ascertained from the pleadings of the parties and material placed on the writ record. Besides this, the issue raised in communication dated 9th March, 2008 which has been specifically pleaded in the writ petition has escaped the notice of the learned writ Court and no finding has been either recorded or returned thereon.

Section 2 of the Jammu and Kashmir Contract Act, 1988 (1920 AD) provides complete mechanism and scheme for arriving at a conclusion as to when and in which manner a lawful agreement comes into acceptance and takes the shape of enforceable contract. The correspondence between the parties in this case has to be considered in the backdrop of sections 2 to 9 of the Contract Act to arrive at a lawful conclusion and to record a finding whether a lawful contract has come into existence or not.

Faced with situation, more particularly in the light of communication dated 9th March, 2008, Mr. Baldev Singh, learned counsel for the respondents, submitted that he be given some time to file additional affidavit along with documents to indicate to the Court that a lawful contract has come into existence between the parties.

This submission of the learned counsel is in itself sufficient to show that the entire material has not been produced before the learned writ Court which obviously has resulted in handing down the judgment which has impacted the legal rights of the appellant/writ petitioner. Besides this, learned writ Court has not dealt with the pleadings in respect of communication dated 9th March, 2008 in the impugned judgment. The non-consideration of the aforesaid communication supported by pleadings does bring the impugned judgment under legal cloud.

For the aforestated reasons, we are inclined to interfere with the impugned judgment.

This appeal is disposed of in the following manner:-

- a) The impugned judgment dated 26.08.2014 passed in OWP No. 353/2008 is set aside.
- b) The matter is remanded to the learned writ Court.
- c) The respondents shall within four weeks file additional pleadings along with the documents

before the writ Court with advance copy to appellant/writ petitioner who shall have three weeks thereafter to file response.

Registry to list the writ petition before the writ Court having the Roster in the week commencing 20th July, 2015.

Till the matter is decided by the writ Court, the interim direction passed by the Writ Court in the Writ Petition shall remain in operation.

(Janak Raj Kotwal)
Judge

(Muzaffar Hussain Attar)
Judge

Jammu

01.06.2015

Pawan Chopra