

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

AA No.10/2014

Date of order:31.05.2018

Cube Construction Engineering Ltd. Vs. Project Manager (T), J&K ERA and others

Coram:

Hon'ble Mr. Justice Tashi Rabstan-Judge

Appearance:

For the petitioner(s) : Mr. Gagan Basotra, Advocate

For the respondent(s) : Mr. Rahul Pant, Advocate

i/	Whether to be reported in Press/Media?	Yes/No
ii/	Whether to be reported in Digest/Journal?	Yes/No

1. Instant petition under Section 11 of the Jammu and Kashmir Arbitration and Conciliation Act, 1997 has been filed by the petitioner-Cube Construction Engineering Ltd. 61-D, D/C, Gandhi Nagar, Jammu through its authorized signatory, Mr. Ajay Gupta, for appointment of Arbitrator on the grounds mentioned in it.
2. Briefly stated the material facts are that petitioner company claims to be a Contractor dealing with the contract works. The basic agreement dated 16.11.2007 was entered into between Chief Engineer, PM(T), Economic Reconstruction Agency, Jammu and M/s Cube Construction Engineering Ltd. H.No.61-D, D/C Gandhi Nagar, Jammu through its authorized signatory, Mr. Ajay Gupta, for the works known as "*Widening and Strengthening of Doda Bharat Road (Doda District) under package no. Transport Jammu/Doda/Road/06*". The contractor-petitioner by letter dated 22.10.2013, while invoking clause 20.05 of GCC, asked Project

Manager (T), ERA, Jammu, for amicable settlement of the total dues/claims up to IPC 13th to the tune of Rs. 11,10,32,704/- which was required to be resolved under such clause. He also requested the employer-respondent to release the said amount within 15 days from the date of issue of the Notice. It is contended that after waiting for more than 15 days, there was no reply on the part of respondent-employer, the applicant-contractor vide another letter dated 20.11.2013 addressed to Chief Executive Officer, J&K ERA, Jammu, brought some grievances before him by stating that even after lapse of one month nothing was heard from the respondent-employer side, to settle pending issues by way of amicable settlement in terms of Clause 20.5 of GCC. It was also brought to the notice of CEO, J&K ERA, that as the matter needed to be adjudicated through arbitration, therefore, petitioner- contractor appointed Mr Amit Gupta, Chartered Accountant, Auqaf Market 1st Floor, Jammu as its Arbitrator and requested for appointment of one more member as Arbitrator so that the arbitration proceedings were initiated. The petitioner-contractor made its best efforts to resolve the dispute in respect of payment upto IPC 13th which in total comes to the tune of Rs.11,10,32,704/- and same can only be adjudicated before the Arbitrator as there is an Arbitration Clause in the Agreement and petitioner-contractor had already appointed the Arbitrator from its end but in-turn other side failed to appoint the Arbitrator despite sending notice and making request for appointment of Arbitrator. According to petitioner-contractor, it is specifically envisaged in the J&K Arbitration and Conciliation Act that if any party fails to appoint the Arbitrator within thirty days of the receipt of notice then other party may seek appointment of Arbitrator. Hence, this application for appointment of an Arbitrator.

3. Objections have been filed by respondents wherein it is contended that present petition is not maintainable as the same has not been filed by the

competent person. It is insisted that Cube Construction Engineering Ltd. is a company registered under the Company's Act, having its registered office at 1-Chanramani Nagar, Vidya Vihar School Lane, Off: High Tension Road, Subhanpura, Baroda (Gujarat). Sh. Ajay Gupta who has signed the present petition for and on behalf of the Company is neither the Secretary nor the Director of the Company. The aforesaid Sh. Ajay Gupta is not even any Principal Officer to the Company, as such, the present petition has not been signed and filed by the competent authority. Otherwise also, neither any Memorandum of Association or any Article of Association of Company has been placed before this Court. Sh. Ajay Gupta has not even placed any resolution passed by the Board of Directors of the Company authorizing him to institute present application. In absence of any power upon Sh. Ajay Gupta in the Articles of Association of the Company and in absence of any resolution passed by the Company authorizing him to file the present application before this Court, the present application is incompetent and has been filed by an unauthorized person with whom the respondents do not have any privity of contract. Otherwise also, at the time of execution of agreement between M/s Cube Construction Engineering Ltd. (company) and respondents, a deed of authorization was given by the one of the Directors of the Company in favour of Sh. Ajay Gupta for the limited purpose specified in the deed of authorization which is limited for the acts mentioned in the deed only and aforesaid authorization does not include any authorization in favour of Sh. Ajay Gupta to file present application before this Court.

4. Heard learned counsel for the parties and perused the record.
5. Disputes appear to have arisen between the parties in connection with and arising out of the contract-in-question allotted to petitioner, details whereof have been elaborately specified in the petition.

6. Petitioner has in terms of Section 11(6) of the J&K Arbitration and Conciliation Act, 1997, sought appointment of Arbitrator with respect to disputes having been arisen in pursuance of agreement dated 16.11.2007 executed between the parties. Respondents have disputed the authorization of petitioner to maintain present petition. It is contended on behalf of the respondents that authorization, given to Sh. Ajay Gupta by Managing Director, was only to the extent of signing the contract agreement for and on behalf of the company and there has not been any other authorization in his favour.
7. To buttress his claim, petitioner has filed copies of resolutions by way of supplementary affidavit wherein he has been authorized by the Board of Directors of the Company to institute the present proceedings, including Arbitration proceedings and other legal proceedings. Even otherwise also the agreement-in-question was admittedly executed between petitioner and respondents and the Arbitration clause forms part of the agreement, as such, the petitioner being authorized signatory, is entitled to invoke the Arbitration Clause and file the present proceedings.
8. Learned counsel for the respondents has placed reliance on *M/s Nibro Limited v. National Insurance Co.Ltd. reported in 1991 AIR (Delhi) 25*, *M/s Rajghria paper Mills Ltd. v. General Manager, Indian Security Press and another reported in 2000 AIR (Delhi) 239*; *Apple Valley Resort v. H.P.State Electricity Board and another reported in 2004(1) CurLJ 189* and *Eimco Elecon (India) Ltd. v. Mahanadi Coal Fields Ltd. and others reported in 2011(1) ILR-Cut-833*, to contend that unless a power to institute an action is specifically conferred on a particular Director, he would have no authority to bring an action on behalf of the company and such a power can only be conferred by the Board of Directors. He further contends that no such power has been conferred on the petitioner. The judgments referred to by the respondents are not

applicable to the case in hand inasmuch as in those cases the persons had not been authorized whereas in the present case the petitioner has been authorized by way of various resolutions by the Board of Directors of the Company to institute the present proceedings, including arbitration proceedings and other legal proceedings.

9. The contract-in-question was signed between the petitioner and respondents, and petitioner has signed the said contract on behalf of the Company. In the contract, there is an arbitration clause 20.6 of GCC which provides that any dispute between the parties shall be arbitral. Admittedly, the petitioner has invoked the said arbitration clause as the dispute is admitted between the parties. Moreover, the petitioner has also placed on record various resolutions by way of supplementary affidavit which show that petitioner is duly authorized by the Board of Directors to institute the legal proceedings including other proceedings also, as such, he is competent to file the present petition. Respondents have, however, not placed on record anything to show that resolutions, which have been placed on record by the petitioner, are fabricated or there is some infirmity or same are against the official records. Respondents in the supplementary affidavit stated that said resolutions are required to be filed before the Registrar Companies within a period of thirty days of the passing of the same along with requisite fee. In reply thereto counsel representing the petitioner submitted that two types of resolutions have been provided under Section 2(63) of the Companies Act 2013 viz. "Ordinary or special resolution" means an ordinary resolution, or as the case may be, special resolution referred to in Section 114 of the Companies Act. In accordance with the provisions of the Companies Act, 2013 as stated in Section 114 of it, Special Resolution is to be registered with the Registrar Companies whereas Ordinary Resolution is not required to be registered. The authorization by way of resolution to any

person authorizing to file arbitration proceedings or legal proceedings is only Ordinary Resolution, as such, it was not required to be registered before the Registrar Companies.

10. Now the question which remains for adjudication is for appointment of Arbitrator in terms of the arbitration clause. It appears that the respondents entered into an agreement with the petitioner in the year 2007 with regard to works known as **“Widening and Strengthening of Doda-Bharat Road (Doda District) Contract Package No. Transport Jammu/Doda/Road/06”**. Disputes having arisen between the parties in connection with and arising out of the aforementioned Contract Agreement, details whereof are given in the petition. It is stated that a request was made to the respondents for referring the disputes for arbitration in terms of the Contract Agreement. It is stated that despite repeated requests, the respondents had failed to refer the disputes, which forced the petitioner to serve notices requesting therein that the disputes be referred for arbitration under clause 20.6 of the General Conditions of Contract, failing which procedure as prescribed under the Jammu and Kashmir Arbitration and Conciliation Act, 1997 would be adopted by approaching the High Court. In the objections filed by the respondents existence of an arbitration clause for referring the dispute to the Arbitrator is not denied. However, the reply filed by the respondents in regard to service of the notices, requesting for reference of disputes for arbitration, has not been specifically denied, yet, it is contended that request for appointment of Arbitrator under Clause 20.6(b) of GCC has not been received from the Contractor and answering respondents are under no obligation to respond to the requests of the unauthorized persons, with whom there is no privity of contract. In the absence of any specific reply, it can only be presumed that notice as asserted by the petitioner had been duly served upon the respondents.

11. Failure on the part of the official respondents to appoint an Arbitrator in accordance with the prescribed procedure within thirty days from the date of Notice filed by the petitioner entitles the petitioner to seek the appointment of an independent Arbitrator in accordance with law as has been laid down in **Datar Switchgears Ltd. vs. Tata Finance Ltd and anr, (2000) 8 SCC 151** and subsequently followed in **M/s Deep Trading Company vs. M/s Indian Oil Corporation& ors, AIR 2013 SC 1479** decided on 22.03.2013.

12. In view of the above, this petition is allowed. The disputes as mentioned in the body of the petition are referred for adjudication to Hon'ble Shri Justice Muzaffar Hussain Attar, Former Judge of High Court of Jammu and Kashmir, who is appointed as an Arbitrator, who shall enter upon the reference and adjudicate upon the disputes between the parties within the prescribed statutory period. The parties shall be at liberty to file detailed claims and counter claims before the learned Arbitrator. The learned Arbitrator shall render his award within the prescribed statutory period, and shall be entitled to fix his own fee, to be borne by the parties in equal proportion.

13. **Disposed** of as above.

(Tashi Rabstan)
Judge

Jammu
31.05.2018
'Madan'