

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Arb P No. 68/2024

CM No. 4022/2024

Reserved on:08.11.2024.

Pronounced on:14.11.2024

**M/s Mir Associates Construction Company,
Government Contractor and General
Suppliers, Base Camp Office Kandi Canal
Project, Thathri, District Doda through its
Partners**

...Petitioner(s)

- 1. Mohd. Iqbal Mir, Age 60 years**
- 2. Ahmad Mir Age 62 years**
**Both Sons of Late Abdul Rashid Mir,
Both R/O Batote Tehsil and District
Ramban.**

Through: Mr. I H Bhat, Advocate
Mr. Mohd. Akeel Wani,, Advocate.

Vs.

- 1. Superintending Engineer Hydraulic
Circle Doda.**
- 2. Executive Engineer, I&FC Division,
Bhaderwah.**

...Respondent(s)

Through: Mrs. Monika Kohli, Sr. AAG.

CORAM:

HON'BLE THE CHIEF JUSTICE

ORDER

1. The present petition has been filed by the petitioner under Sections 14 and 15 of J&K Arbitration and Conciliation Act, 1997 for appointment of an Independent Arbitrator in substitution of the Sole Arbitrator Mr. Manoj Gupta, Chief Engineer, Jal Shakti (I&FC) Department, Jammu.

2. Brief facts, which lead to the filing of the present petition, are that the NIT No.27 dated 27.11.2006 was issued by Executive Engineer, Irrigation and Food Control Department, Division Bhaderwah for construction of Kandi Canal RD 0/00 to RD 10/00 kilometers.

3. No response from any contractor necessitated issuance of a fresh NIT No.29 of 2006-07 on 14.02.2007 for construction of Kandi Canal RD 0/00 to RD 10/00 kilometers by the department.
4. On 17.04.2007, the State Level Contract Committee approved the bid and allotted tender work for the Construction of Kandi Canal RD 0/00 to RD 10/00 kilometers in favour of petitioner firm for an amount of Rs.23.68 Crore on turnkey basis vide Chief Engineer Irrigation and Flood Control Department Jammu's Letter No.IFCJ/Works/4657-60 dated 30.06.2007.
5. That after the allotment of work to the petitioner firm, the work got delayed on one predicament or the other, which include flow of perennial stream, militancy prone area and the Amar Nath Land row and other lapses on the part of the respondents.
6. On 28.10.2010, the respondents, all of a sudden, issued a notice dated 28.10.2010 asking for deposit of the balance amount of Rs.3,74,52,923.00 to the petitioner firm. Aggrieved of the said notice, the petitioner firm challenged the said notice by way of filing petition before this court. On 18.12.2016, this Court finally dispose of writ petition bearing OWP No. 1291/2010 along with OWP No.1750/2010 on 18.12.2016 and set aside the impugned notice dated 28.10.2010.
7. An application under Section 12 of the Arbitration and Conciliation Act, 1997 was filed by the petitioner firm before the Sole Arbitrator to refer dispute before a new Independent Arbitrator who vide his order dated 26.08.2023 dismissed the application without giving any fair opportunity of hearing to the petitioner firm.
8. It is averred in the petition that an independent arbitrator is required to be appointed in this case as the continuation of Chief Engineer, Irrigation

as Arbitrator in this case is against prohibition contained in Section 12(5) of Arbitration and Conciliation Act, 1996 read with Schedule 7 thereof.

9. In support of his contentions, learned counsel for the petitioners has produced before this court a judgment of this court passed in **Arb P No.50/2019** titled '*M/s R K Gupta and Co. v. University of Jammu and others*', on 23.02.2023, in which this court while allowing the petition has terminated the mandate of the earlier arbitrator in view of amended Section 12(5) of the Arbitration and Conciliation Act, 1996 read with the Seventh Schedule, and the learned counsel further submitted that the above referred judgment applies in all fours in his case and prays for the same relief.

10. On the other hand, Mrs. Monika Kohli, learned Sr. AAG appearing for the respondents submitted that she has filed objections to the petition on 31.10.2024. In the objections filed by her, inter alia it is averred that the present petition is not maintainable as the Arbitrator appointed is willing to proceed with arbitration. It is also stated in the objections that as per clause 15 of NIT No.29, it is clearly mentioned that all the terms and conditions of agreement executed by contractor with the department shall be binding upon the contractor and in the same NIT, Arbitration cases and their conditions are specified wherein it is specifically mentioned that for any dispute between the contractor and department, the decision of Chief Engineer, I&FC Department, Jammu shall be final and binding upon the contractor as such in the present circumstances when the arbitration is between the petitioners and the respondents which is already going on and the same is at the stage of framing of issues as per the proceedings before the Arbitrator, the present petition is required to be dismissed out-rightly.

11. Heard Mr. I H Bhat, learned counsel for the petitioners and Mrs. Monika Kohli, learned Sr. AAG appearing for the respondents at length and perused the record.

12. The Supreme Court in the case titled “*Haryana Space Application Centre (HARSAC) & Anr. Vs. M/s Pan India Consultants Pvt. Ltd.*” reported as *2021 AIR (Supreme Court) 653* has observed in para 17, as under:-

“17. We are of the view that the appointment of the Principal Secretary, Government of Haryana as the nominee arbitrator of HARSAC which is a Nodal Agency of the Government of Haryana, would be invalid under Section 12(5) of the Arbitration and Conciliation Act, 1996 read with the Seventh Schedule. Section 12(5) of the Arbitration Act, 1996 (as amended by the 2015 Amendment Act) provides that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties, or counsel, falls within any of the categories specified in the Seventh Schedule, shall be ineligible to be appointed as an arbitrator.

Item 5 of the Seventh Schedule of the Act reads as under:

“Arbitrator’s relationship with the parties or counsel

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.” (emphasis supplied)

Section 12(5) read with the Seventh Schedule is a mandatory and non-derogable provision of the Act. In the facts of the present case, the Principal Secretary to the Government of Haryana would be ineligible to be appointed as an arbitrator, since he would have a controlling influence on the Appellant Company being a nodal agency of the State.”

13. The Supreme Court in **Civil Appeal No. 7697 of 2021** titled as *“Ellora Paper Mills Limited vs. The State of Madhya Pradesh”* decided on 04.01.2022, has observed in para 3.1 as under:-

“3.1 It is submitted that in the aforesaid decision, this Court negated the submission that once the contractor participated in the arbitration proceedings before the Arbitral Tribunal by filing a statement of claim, thereafter it would not be open for him to approach the Court invoking sub-section (5) to Section 12 and pray for appointment of a fresh Arbitral Tribunal. It is submitted that unless and until there is an express agreement in writing to continue with the arbitration proceedings by the earlier Arbitral Tribunal, such an application to terminate the mandate of the earlier Arbitral Tribunal and to appoint a fresh arbitrator would be maintainable.”

14. In view of the facts and circumstances of the case and the above referred judgments passed by the Supreme Court and in view of amended Section 12(5) of the Arbitration and Conciliation Act, 1996 read with the Seventh Schedule, I am of the considered opinion that continuation of earlier arbitrator in this case would be against the law governing the field. Resultantly, this petition is allowed. The mandate of the earlier Arbitrator as well as the proceedings before him is terminated. Further, I, appoint **Justice (Retd.) Bansi Lal Bhat**, C/o H. No.G-91, Shanti Nagar, Toph Sher Khanian, P.O. Paloura, Jammu (Tawi), PIN-181121, Mobile 9119138755, as sole Arbitrator in this case, who shall proceed in the matter in accordance with the provisions of the Act to make an award within the time provided in the Act itself, after charging the prescribed fee along with incidental expenses to be shared by the parties.

15. The earlier arbitrator is requested to transmit the entire record of arbitration proceedings to the newly appointed arbitrator.

16. Parties may raise their claims and counter claims before the new Arbitrator.

17. Registry shall send the copy of this order to the earlier arbitrator as well as the new sole arbitrator for information.

18. With the above observation and direction, the petition stands disposed of.

(TASHI RABSTAN)
CHIEF JUSTICE

JAMMU
14.11.2024
Raj Kumar

