HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU
(Through Virtual Mode)

CJ Court

Arb P No. 13/2022

Reserved on : 04.08.2023
Pronounced on : 01.11.2023

M/s A K Engineers and Contractors Pvt. Ltd. …Petitioner(s)/Appellant(s)

Through: Mr. R K Gupta, Sr. Advocate with
Mr. Udhay Bhaskar, Advocate.

v/s

Union Territory of J&K and ors. …. Respondent(s)

Through: Mr. Raja M. Bucha, Advocate.
Mr. Ravinder Gupta, AAG.

CORAM : HON'BLE THE CHIEF JUSTICE

ORDER

01. Heard Mr. R K Gupta, learned Senior counsel assisted by Mr. Udhay Bhaskar, learned counsel for the petitioner and Mr. Raja M. Bucha, learned counsel for the respondents.

02. The petition has been filed seeking appointment of an arbitrator by invoking Section 11 of the *Arbitration and Conciliation Act, 1996* (for short the '**Act**').

03. It is the case of the petitioner that the petitioner Company was awarded a civil contract by the respondents for design and construction of a Single Lane Bridge of 100 mtr long (4x2.500Mtr C/c of bearings, pre stressed concrete memorable) on Krial-Rehal, for an amount of ₹ 385.00/- Lacsafter being the successful bidder in the NIT dated 11.01.2004.As per the contract, the work

allotted to the petitioner on 26.04.2014 was to be completed within eighteen months.

04. According to the petitioner, after the award of the contract, the foundation stone laying ceremony of the bridge was held on 03.03.2014 on which date the then Union Minister of Health and Family Welfare had laid the foundation on which occasion, a public announcement was made for converting the single lane bridge to a double lane-bridge. It is the case of the petitioner that after such a public announcement, the authorities acted upon the public announcement and a revised Detailed Project Report (DPR)was prepared and administrative approval was accorded by the concerned authority, i.e., the Development Commissioner, Works vide his letter No. PW/DCW/1552/15 dated 20.03.2015.Accordingly, the work was revisedatthe estimated cost of ₹ 752.00 Lacsas per the relevant Code of IRC/BIS/MORD/MORTH Manual/specifications.

05. It has been submitted that at the time of according administrative approval to the aforesaid revised project of double land bridge,the following conditions were specified:

> *"1. That the proposal is strictly devised and designed as per relevant Code of IRC/BIS/MORD/MORTH Manual/specifications.*
> *2. That all the items related to Earth Work conform to authenticated NSLS.*
> *3. That any such item(s) not covered under relevant schedule of Rats shall be paid in accordance with the set Codal Procedure.*
> *4. That the work is executed in conformity with the revised Structural Design vetted/proof checked by IIT Delhi.*
> *5. That the Chief Engineer R&B Department Jammu will ensure that the rates recommended for the increased scope are comparable with the similar nature of work.*
> *6. That there is no Cost overrun or Time overrun involved in the Project."*

06. According to the petitioner, in terms of the revised DPR, the petitioner constructed the DoubleLane Concrete Bridgeas per the drawing approved by the

Department, and on completion of the bridge in the year 2015, it was handed over to the Department. It has been submitted that no dispute had been raised by the authorities as regards the quality of the work or any other aspect.However, when the petitioner raised the bills for payment for the works executed, the authorities released only ₹ 238.00 Lacs and subsequently, ₹ 60,000/- were paid. According to the petitioner, though certain amounts have been paid to him, an amount of ₹ 312.00 lacs remains unpaid.

07. As the said amount was not paid despite repeated requests made by the petitioner, he was compelled to approach this Court by filling a writ petition, being OWP No. 1360/2017, *'M/s A K Engineers versus State of J&K and ors.'* which was disposed of by this Court on 25.08.2017 with the direction to the respondent authorities to consider the claim of petitioner for payment of amount in question by issuing a speaking order within a period of six weeks from the date of order. It has been submitted that inspite of said direction issued by this Court, no payment has been made, leaving the petitioner with no option but to issue a legal notice dated 05.01.2022 for appointment of an arbitrator invoking Clause 24 of the General Conditions of the Contract of Standard Bidding Document for settlement of the disputes/claims within 45 days of the receipt of the notice. However, as the respondents have not responded to the said legal notice, the petitioner has approached this Court invoking Section 11(6) of the Act for appointment of an arbitrator.

08. The present petition has been contested by the respondents primarily on two grounds.

Firstly, it has been submitted that though there may be an initial contract or agreement executed between the petitioner and the respondents in respect of

the design and construction of a Single Lane 100 mts bridge in terms of the NIT dated 11.01.2015, no valid contract was executed between the parties with respect to the works for construction of the Two Lane Bridge. Accordingly, it has been submitted that if no valid contract was executed for the remaining work other than the one mentioned in the NIT, it cannot be said that any valid agreement exists between the petitioner and the respondents by which any dispute which arises can be settled by arbitration between the parties. Accordingly, it has been submitted that as there is no valid contract between the parties, the present application is not maintainable, and the petitioner can seek other alternate remedy available under law.

09. Learned counsel for the respondents in asserting that no valid contract exists between the parties and, hence, there is no valid arbitration agreement, has submitted that mere public announcement does not amount to existence of any contract. He submits that every contract must be executed as provided under Article 299 of Constitution of India and there cannot be any contract by implication. In the present case, the petitioner is not able to show any valid contract entered between the petitioner and authorized person of the Government for execution of construction of a two lane bridge. In this regard learned counsel has relied on a decision rendered in ***K P Chowdhry versus State of M.P. and others :*****AIR 1967 SC 203,** in which, it has been held as follows:

> "*What was said in these cases with respect to S. 175(3) of the Government of India Act, 1935, applies with equal force to Art. 299 (1) of the Constitution. Two consequences follow from these decisions. The first is that in view of Art. 299(1) there can be no implied contract between the Government and another person, the reason being that if such implied contracts between the Government and another person were allowed, they would in effect make Art. 299(1) useless, for then a person who had a contract with Government which was not executed at all in the*

manner provided in Art. 299(1) could get away by saying that an implied contract may be inferred on the facts and circumstances of a particular case. This is of course not to say that if there is a valid contract as envisaged by Art. 299(1), there may not be implications arising out of such a contract. The second consequence which follows from these decisions is that if the contract between Government and another person is not in full compliance with Art. 299(1) it would be no contract at all and could not be enforced either by the Government or by the other person as a contract. In the present case it is not in dispute that there never was a contract as required by Art. 299(1) of the Constitution. Nor can the fact that the appellant bid at the auction and signed the bid-sheet at the close thereof or signed the declaration necessary before he could bid at the auction amount to a contract between him and the Government satisfying all the conditions of Art. 299(1). The position therefore is that there was no contract between the appellant and the Government before he bid at the auction, nor was there any contract between him and the Government after the auction was over as required by Art. 299(1) of the Constitution. Further, in view of the mandatory terms of Art. 299(1), no implied contract could be spelled out between the Government and the appellant at the stage of bidding for Art. 299 in effect rules out all implied contracts between Government and another person. The view taken by the High Court that s. 155 (b) of the Madhya Pradesh Land Revenue Code which provides for recovery of money as arrears of land revenue would therefore ensure in favour of the Government and enable it to recover the deficiency cannot be sustained. That clause provides for recovery of all moneys falling due to the State Government under any grant, lease or contract and says that they shall be recoverable in the same manner as arrears of land revenue. The High Court was of the view that the word "contract" in this clause includes an implied contract. But if there can be no implied contract between the Government and another person in view of the mandatory provision of Art. 299(1) of the Constitution there can be no question of recovery of any money under an implied contract under clause (b) of Section 155. The view therefore taken by the High Court that this amount could be recovered under s. 155(b) is not correct."

10. Learned counsel for the respondents has submitted that it has been clearly provided under Section 7(5) of the Arbitration and Conciliation Act, 1996 that assuming but not admitting that there was some contract in respect of the second work, but since there was no contract-agreement in writing, the petitioner cannot make any reference to the original contract which was made for the construction

of a Single Lane Bridge for invoking the arbitration clause. Thus, it is clearly evident that there was no arbitration clause in respect of the subsequent contract for execution of construction of Two Lane Bridge.

11. Learned counsel for the respondents further submits that it is the eminent duty of the reference Court to examine the existence of a valid contract before any order is passed under Section 11 of the Act for appointment of an arbitrator, and if there is no valid contract, the question of referring the dispute to an arbitrator appointed under Section 11 of the Act does not arise. In this regard learned counsel for the respondents has placed reliance on another decision of the Supreme Court in ***Magic Eye Developers Pvt. Ltd. versus M/s Green Edge Infrastructure Pvt. Ltd. &Ors. : 2023 SCC OnLine SC 620***, wherein, it has been observed in paragraph no.16 as under:

> *"At this stage, it is required to be noted that as per the settled position of law, pre-referral jurisdiction of the court under Section 11(6) of the Arbitration Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. The said matter requires a thorough examination by the referral court. [paragraph 25 of the decision in the case of NTPC Ltd. (supra)]. The Secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute. Both are different and distinct. So far as the first issue with respect to the existence and the validity of an arbitration agreement is concerned, as the same goes to the root of the matter, the same has to be to conclusively decided by the referral court at the referral stage itself. Now, so far as the non- arbitrability of the dispute is concerned, even as per the law laid-down by this Court in the case of Vidya Drolia (supra), the court at pre- referral stage and while examining the jurisdiction under Section 11(6) of the Act may even consider prima facie examining the arbitrability of claims. As observed, the prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. However, so far as the dispute with respect to the existence and validity of an arbitration agreement is concerned and when the same is raised at pre-referral stage, the referral court has to decide the said issue conclusively and*

> *finally and should not leave the said issue to be determined by the arbitral tribunal. The reason is that the issue with respect to the existence and validity of an arbitration agreement goes to the root of the matter. As observed by the Constitution Bench in the case of N.N. Global Mercantile Pvt. Ltd. (supra) Sans an agreement, there cannot be any reference to the arbitration. In the said decision this Court has also specifically observed and held that the intention behind the insertion of Section 11(6A) in the Act was to confine the Court, acting under Section 11, to examine and ascertain about the existence of an arbitration agreement. We are of the opinion that therefore, if the dispute/issue with respect to the existence and validity of an arbitration agreement is not conclusively and finally decided by the referral court while exercising the pre-referral jurisdiction under Section 11(6) and it is left to the arbitral tribunal, it will be contrary to Section 11(6A) of the Arbitration Act. It is the duty of the referral court to decide the said issue first conclusively to protect the parties from being forced to arbitrate when there does not exist any arbitration agreement and/or when there is no valid arbitration agreement at all."*

12. Further, learned counsel for the respondents referred to the case of *'**M.R Engineers & Contracts Pvt. Ltd. versus Som Datt Builders Ltd.: (*2009) 7 SCC 696,** wherein it has been held that there is nothing to indicate that the subsequent work, in absence of any written agreement or contract, can be said to be part of the main contract and any such sub-contract or subsequent contract must be directly relatable to the main contract and must form integral part of the initial contract otherwise, it would not be permissible to act on it. In paragraph no. 32 of the ***Som Datt*** (supra) it has been held as follows.

> *"32. The work order (sub-contract), relevant portions of which have been extracted in para 3 above, shows that the intention of the parties was not to incorporate the main contract (between the PW Department and respondent) in entirety into the sub contract. The use of the words "This sub-contract shall be carried out on the terms and conditions as applicable to main contract" in the work order would indicate an intention that only the terms and conditions in the main contract relating to execution of the work, were adopted as a part of the sub-contract between respondent and appellant, and not the parts of the main contract which did not relate to execution of the work, as for example the terms relating to payment of security deposit, mobilization advance, the*

itemised rates for work done, payment, penalties for breach etc., or the provision for dispute resolution by arbitration".

13. Thus the plea of respondents is that there was no contract as far as the construction of the two lane bridge is concerned, which was based merely on a public announcement. Accordingly, as there was no contract, consequently, there cannot be any arbitration clause, and hence, the question of referring the matter to an arbitrator does not arise.

14. On the other hand, learned Senior counsel for the petitioner submits that it is not a case where the petitioner had executed the work merely on the basis of public announcement at the time of foundation stone lying ceremony by the then Minister as contended by the respondents. In fact, after the public announcement was made, the administrative actions were taken to revise the DPR and, accordingly, design was approved for construction of a two lane bridge and work was executed based on the revised DPR and the work was completed to the satisfaction of the authorities as can be seen from the letter dated 26.02.2015 written by the Chief Engineer to Commissioner /Secretary to Government, PW(R&B) Department, Jammu, to the effect that the construction of 100 mts long bridge over Aik Nallah at Rehal was executed under NABARD Loan Assistance (District Sector RIDF-XVIII) at an estimated cost of ₹ 329.60 Lacs and same was allotted to the petitioner.It was also mentioned that at the time of laying of foundation stone ceremony of the bridge, the then Hon'ble Union Minister for health had directed the Chief Engineer to convert the single lane bridge to double lane specification and, accordingly, the revised AAA was prepared at the cost of ₹ 752.80 Lacs and the approval stood accorded.

It was also mentioned in the said letter that the sub–structure and the 1st span of the bridge was completed and the 2nd span was in progress.

Accordingly, on completion of the bridge, a request was made by the Chief Engineer to the Commissioner/Secretary PW(R&B) Department, Jammu, to release the additional amount.

15. It has been further submitted by the Ld. Senior Counsel for the petitioner that it is not a simple case of construction of a bridge after public announcement was made by an Hon'ble Member, but such an announcement was followed by administrative actions by way of approving the revised DPR etc. which is clearly evident from the various communications referred to hereinabove and as also mentioned in the writ petition. It has been contended that as per the Section 7(4)(b) of the Arbitration and Conciliation Act, 1996 the exchange of communication clearly proves the existence of an agreement in writing and, as such, the respondents cannot invoke Article 299 of the Constitution to claim that no contract exists between the parties.

16. Mr. Gupta, Ld. Senior Counsel for the petitioner submits that there are sufficient material evidences on record to show the existence of an agreement between the parties and, as such, it cannot be said that there was no contract.

17. On the other hand, learned counsel for the respondents submits that even if it is assumed that existence of contract can be said to have been established by these correspondences, yet it does not indicate that these correspondences have a direct reference to the terms of the initial agreement containing arbitration clause.

18. Learned Senior Counsel for the petitioner on the other hand seeks to repudiate the said contention by submitting that the subsequent work is an extension of the original work, and in essence, these works are one and the same.

19. Learned Senior Counsel for the petitioner relies on a decision of the Supreme Court in ***State of West Bengal versus B.K.Mondal and Sons.*** **1962 AIR (SC) 779,** in which it has been held that even if it is assumed that no additional contract exists, yet the respondents cannot take advantage now for alleged non-existence of contract for the reason that they have already acknowledged the completion of work with their consent and approval.Thus, in view of Section 70 of the Contract Act, the respondents cannot escape the liability, inasmuch, as the petitioner was not executing the work pro bono.

Accordingly, it has been submitted that it does not behove of the State authorities to raise this plea after having the work executed by the petitioner without raising any dispute as regard the quality of the work.

20. Having heard the learned counsel for the parties and having perused the materials on records, it is evident that the main thrust of the contention of the respondents is that there is no valid contract between the parties containing an arbitration clause, which would enable the parties to resolve the dispute between the parties by way of arbitration, in which event, appointment of an arbitrator does not arise.

21. There is no doubt that the NIT related to construction of a single lane bridge. There is also no dispute that there is a contract which contains an arbitration clause as regards the said construction of single lane bridge.

22. But subsequently, the said single lane bridge was converted to a double lane bridge at the instance of the authorities.

The petitioner himself did not convert the single lane bridge to a double lane bridge and the same was done with the full knowledge, urging of the authorities and the authorities had accepted the completed double lane bridge.

In other words, as far as the petitioner is concerned, he was made to construct a double lane bridge in lieu of the single lane bridge at the instance of the respondents.

23. The subsequent enhanced work for construction of the double lane bridge though appears to be a different work was not envisaged under the original tender and the resultant contract, yet if this Court examines the matter minutely it appears that the subsequent work cannot be separated from the initial work allotted. It is evident from the facts and circumstances that the double lane bridge was a continuation or extension of the work of the initial single lane bridge awarded to the contractor. Otherwise also, from the acts of the respondents, as can be seen from the correspondences, it is clearly evident that the respondents sought to convert the single lane bridge into a double lane bridge.

24. If there is an additional work which is an integral part of the original contract which cannot be segregated, such a work has to be deemed to be part of that original contract and any dispute arising out of such integrated work would be amenable to arbitration if the original work agreement contains an arbitration clause. In my opinion, the double lane bridge which was constructed by the petitioner can be considered to be an integral part of the initial contract. The double lane bridge was not a separate work allotted to the petitioner or executed after the completion of the single lane bridge. In fact, once the said work of double lane bridge was approved by the respondent authorities, from the very beginning of the work, the work of the single lane bridge of which there is a contract and an arbitration clause gets mixed with the work of the double lane bridge and thus, by implication, the contract for the single lane bridge gets

converted to double lane bridge and any dispute pertaining to any component of the original work of the single lane bridge cannot be separated and any other interpretation would be greatly prejudicial to the petitioner, and not yet detrimental to the interest of the respondents, in as much as it was only because of the urging and approval of the respondents that the petitioner executed the double lane bridge in lieu of a single lane bridge.

25. It may be also noted that it was held in ***Vidya Drolia v. Durga Trading Corpn.: (2021) 2 SCC 1*** that the primary duty of the Court in an application under Section 11 is to give a prima facie opinion on the existence of a valid agreement and of arbitrable disputes and it is only when the Court is certain that no arbitration agreement exists with regard to the subject matter, reference to the arbitrator may be refused. However, it has also been emphasized by the Hon'ble Supreme Court that when there is the slightest doubt about this issue, the rule is to refer the dispute to the arbitrator and the issue shall be decided by the arbitrator, "when in doubt, do refer". In this regard, it may be apposite to refer to some of relevant paragraphs in the judgment of ***Vidya Drolia*** (supra) as follows:

> ***"133.*** *Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the Arbitral Tribunal. It is restricted to the subject-matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, the referral court without getting bogged down would compel the parties to abide unless there are good and substantial reasons to the contrary.*
>
> ***134.*** *Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and*

invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the court and in this context, the observations of B.N. Srikrishna, J. of "plainly arguable" case in Shin-Etsu Chemical Co. Ltd. *[Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234] are of importance and relevance. Similar views are expressed by this Court in Vimal Kishor Shah [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement.*

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153. *Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.*

• ……

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154.4. *Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.*

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238. *At the cost of repetition, we note that Section 8 of the Act mandates that a matter should not (sic) be referred to an arbitration by a court of law unless it finds that prima facie there is no valid arbitration agreement. The negative language used in the section is required to be taken into consideration, while analysing the section. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above. Therefore, the rule for the court is "when in doubt, do refer".*"

26. In the present case though it has been strenuously, contended by the respondents that dispute is not arbitrable, however, the said contention cannot be

accepted with certainty since the construction of the double lane bridge is intrinsically linked to the original work of construction of the single lane bridge regarding which there is an arbitration clause.

27. Accordingly, this Court is of the view that it would be more appropriate leave it open for the arbitrator to decide this issue on the principle of "competence-competence", and, accordingly, this Court proceeds to appoint Mr. Justice M.K. Hanjura, Retired Judge of this High Court to act as the Arbitrator and to resolve the dispute which has arisen between the parties. The parties shall be at liberty to raise all the preliminary objections including arbitrability of the dispute and the learned arbitrator shall, accordingly, proceed with the matter in accordance with law after charging the prescribed fee along with incidental expenses to be shared by the parties.

28. The petition is, accordingly, disposed of and the Registry is directed to inform the learned Arbitrator accordingly.

(N. KOTISWAR SINGH)
CHIEF JUSTICE

SRINAGAR
01.11.2023
SUNITA/PS

Whether the order is speaking. Yes.
Whether the order is reportable. Yes.