

Sr. No.04

Regular List.

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Arb P. No.7/2023

Reserved on:02.12.2023

Pronounced on:27.02.2024

KHURSHEED AHMAD LONE

...Appellant(s)/Petitioner(s)

Through: Mr. Malik Mushtaq, Advocate

Vs.

DIRECTOR SOCIAL FORESTRY AND
OTHERS

...Respondent(s)

Through: Mr. Syed Musaib, Dy. AG

CORAM:

HON'BLE THE CHIEF JUSTICE

JUDGMENT

01. The present application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator to resolve the dispute which according to the petitioner has arisen between the petitioner and respondents, which however, has been contested by the respondents.
02. Before we go into the merit of rival claims of the parties, it may be apposite to briefly refer to the factual background of the case.
03. According to the petitioner, the Department of Social Forestry, Jammu and Kashmir, Srinagar published a Notice Inviting Tenders for the sale/felling of 2336 number of poplar trees measuring 177281.07 Sqft., at Padgampora Pulwama strip vide tender notice No.DIR/DSF/M&E/900-910 dated 11.01.2021 on the basis of "*as it is where it is*" existing in the Social Forestry Division, Pulwama.
04. The petitioner contends that he took part in the bidding process and was declared the successful bidder by offering the highest rate of 273/Sq.ft to the tune of Rs.4,83,97,732/- (Rupees four crore eighty three lac ninety seven thousand seven hundred and thirty two only). As per the terms of the tender notice, the successful (highest) bidder was to deposit 50% of

the bid amount in the shape of Cash/CDR of any Nationalized/Scheduled Bank of India payable at the Divisional Head Quarter ON SPOT, over and above the earnest money and the successful bidder was to deposit the balance of sale value within 4 days. However, because of certain difficulties faced by the petitioner and considering the fact that he had already deposited Rs.1 Crore to the Department to take part in bidding process, he submitted an application to the authorities for allowing him to pay the balance amount of Rs. 3, 83,97,732/- before completion of the 50% of the allotted work which was duly accepted by the authorities. Accordingly, the petitioner commenced executing the work. However, after he started execution of work in the wake of Covid-19 restrictions there were certain disruptions in the work, because of which, the authority issued the notice on 25.05.2021 informing him that as he had failed to deposit the amount of auction in spite of lapse of more than four months, the work allotted in his favour would be deemed to be cancelled.

05. Being aggrieved by such act of the respondents, the petitioner approached the Principle District Judge, Pulwama and invoked Section 9 of the Arbitration and Conciliation Act, 1996 for interim protection and the District Court, Pulwama was pleased to pass an order on 26.03.2022 to the effect that in case the petitioner deposits the amount in compliance of the earlier order passed by the District Court earlier on 30.06.2021, the respondents shall allow him to lift the timber.
06. Thereafter, the petitioner started execution of the contract and started felling trees under the supervision of officials of the department who were putting separate marks on the trunks of the felled trees which were later on entered in the Registry maintained by the officials of the Department. According to the petitioner while doing so, the officials of the Department manipulated the records and showed that petitioner had felled 2336 number of poplar trees though the petitioner had felled only 2250 poplar trees. The petitioner also claims that he had been depositing the amounts as directed by the Division Forest Officer Pulwama,

pursuant to the direction of the Principal District Judge Pulwama vide order dated 26.03.2022.

07. As per the petitioner though as per the NIT the value of the contract was Rs.4,83,97,732/- (Four crore eighty three lac ninety seven thousand seven hundred and thirty two only), the Divisional Forest Officer Pulwama actually received an amount of Rs. 5,15,97,732/- (Rupees five crore fifteen lacs ninety seven thousand seven hundred thirty two) by manipulating the accounts as the petitioner had been depositing amount of 10% of the stock on the direction of the Principal District Judge Pulwama. Thus, it has been submitted that while complying with the direction of the District Court Pulwama, because of manipulation by the officials of the Social Forestry Department Jammu and Kashmir, he had paid more than the tendered value which is required to be refunded to the petitioner.

08. Accordingly, the petitioner served a notice to the respondent- Director Social Forestry Department of Social Forestry J&K, Jammu to appoint an Arbitrator to resolve the dispute which had arisen in terms of Dispute Redressal Mechanism provided in the agreement, vide legal notice dated 02.01.2023 which was also duly received by the respondents. As there was no response from the authorities, having no other alternative, the petitioner has approached this Court by filing this application for appointment of an Arbitrator to resolve the dispute.

09. The respondents by filing objection have resisted this application and have taken three preliminary objections viz:-

- (i) Firstly, it has been contended that the contract entered between the parties is not governed by the Jammu and Kashmir Arbitration and Conciliation Act, 1997 which has been repealed on 31.10.2019 by the J&K Reorganization Act, 2019.
- (ii) Secondly, the contract was not governed by the Arbitration and Conciliation Act, 1996 as it is a contract simplicitor where the applicability of the Act, 1996 is not attracted.
- (iii) Thirdly, it has been submitted that there is no arbitration agreement/arbitration clause in the contract within the

meaning of Section 7 of the Arbitration and Conciliation Act, 1996.

- (iv) Clause 18 of the contract which has been relied upon by the petitioner as the basis of this application merely reads as under:-

18. In case of any dispute between the department and the purchaser/successful bidder in respect of any sale covered under this auction notice, the decision of the Director, department of Social Forestry J&K shall be final and binding on both the parties.

10. It has been submitted that a bare perusal of the aforesaid clause would show that the clause referred to and relied upon by the petitioner is not an arbitration agreement/clause and it falls foul of Section 7 of the Arbitration and Conciliation Act, 1996.
11. It has been accordingly contended that the dispute raised by the petitioner is not arbitrable, and as such, invocation of Section 11 of the Act of 1996 for appointment of the Arbitrator is totally misconceived and deserves to be dismissed in limine.
12. The respondents also have made detailed pleadings to deny the averments and allegations made by the petitioner of the alleged manipulation of records and the respondent authorities have also denied that they had received extra payment of Rs.3 crore 20 lacs.
13. In support of their claim, the respondents have relied on the decision of this Court in "*Arshad Hussain versus General Officer Commanding (GOC)*", decided on 28th January, 2022.
14. On the other hand, the petitioner has relied on the decision of the Hon'ble Supreme Court in "*Karnataka Power Transmission Corporation Limited and another versus Deepak Cables (India) Limited*", (2014) 11 SCC 148.
15. Heard learned counsel for the parties and perused the materials on record.
16. From the pleadings it is evident that there is a dispute which has arisen between the parties. While the petitioner claims that he has been made to pay more than tender amount by alleging that same was done by

manipulation of records by the official respondents of the Department, the said allegation has been denied by the respondents. The fact that the claim of the petitioner has been denied by the respondents clearly indicates the existence of a dispute.

17. Having held that there is a dispute, the next issue which needs to be decided is, whether there is any arbitration clause in the contract agreement which would enable the parties to resolve the dispute through arbitration and not by the usual legal mode.
18. In this regard, the term of the contract which the petitioner claims to be the arbitration clause is to be found at Clause 18 of the agreement which has been quoted above.
19. A perusal of the said Clause 18, would show that it does not specifically mention that the dispute between the parties shall be referred to an arbitrator. What the aforesaid clause mentions is that the dispute shall be referred to the Director, Social Forestry Department Jammu and Kashmir, Srinagar Kashmir, whose decision shall be final and binding on the parties.
20. The question which arises for consideration is as to whether the aforesaid clause can be deemed to be an arbitration clause within the meaning of Section 7 of the Arbitration and Conciliation Act, 1996.
21. There has been many instances in the past when similar doubts had arisen as to whether any such clause amounts to an Arbitration clause or not, which had been considered by the Hon'ble Supreme Court in a catena of decisions.
22. In this regard, one may refer to the decision in "***Jagdish Chander versus Ramesh Chander and others***, (2007) 5 SCC 719, wherein the Hon'ble Supreme Court had culled out the principles to determine as to what constitutes an arbitration agreement. We may refer to para 8 of the aforesaid decision in **Jagdish Chander** (supra) wherein it was held:-

*8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in **K K Modi v. K N Modi** [1998 (3) SCC 573], **Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd.** [1999 (2) SCC 166] and **Bihar State***

Mineral Development Corporation v. Encon Builders (I)(P) Ltd. [2003 (7) SCC 418]. In State of Orissa v. Damodar Das [1996 (2) SCC 216], this Court held that a clause in a contract can be construed as an 'arbitration agreement' only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement:

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are:

(a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement.

But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement

requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

23. The said decision in **Jagdish Chander** (supra) has been consistently followed by the Hon'ble Supreme Court in the subsequent decisions, including in "**Karnataka Power Transmission Corporation Limited**" (supra) which is also relied upon by the petitioner.
24. In the aforesaid case, the Hon'ble Supreme Court while relying on the decision in **Jagdish Chander** (supra) referred to the decision of the Hon'ble Supreme Court in "*State of U.P. versus Tipper Chand*", (1980) 2 SCC 341. In the case of **Tipper Chand** (supra), the Hon'ble Supreme Court referred to a case arising out of Jammu and Kashmir in "**Dewan Chand versus State of J&K, AIR 1961 J&K 58**". In **Dewan Chand** (supra), the clause which was under consideration was similar to the one in the present case and the same was held to be an arbitration agreement, as evident from para 5 and 6 of the decision in **Dewan Chand** (supra), which reads as follows:

5. I would first take up the question of the validity of the arbitration agreement. The arbitration clause contained in the agreement Ex.D runs as follows:

“ For any dispute between the contractor and the Department the decision of the Chief Engineer PWD Jammu and Kashmir, will be final and binding upon the contractor”.

6. The clause thus contained in the agreement is in writing and is signed by the both parties. There is no dispute on this question. Mr. Prakash appearing for the plaintiff argued that as there are no words in this agreement showing that there has been actual submission or reference to arbitration by any of the parties, hence this is not an arbitration agreement within the meaning of S.2(a) of the Arbitration Act. It is also contended that the word, “Arbitration Act. It is also

contended that the word, “Arbitration.” Has not also been used in the clause.

23. This Court in the aforesaid case of **Dewan Chand** (supra) held that even if the words that reference should be made to the Chief Engineer to act as the arbitrator are not used, it would not be material, as the substance of the agreement has to be looked into, as explained in paragraph 7, 8 of the aforesaid decision which reads as follows:-

“7. Section 2(a) of the Arbitration Act reads as under:

“Arbitration Agreement means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not”.

A perusal of this clause clearly shows that all that the statute requires is that there should be a written agreement to submit a dispute to arbitration. It is not necessary that the words “reference” or “arbitration” should actually be used in the agreement, if the agreement in substance amount to an arbitration agreement within the means of S.2 cl.(a) of the Arbitration Act.

8. The clause of the agreement quoted above, clearly indicates that the parties have agreed that any dispute between the contractor and the department i.e., the plaintiff and the defendant should be referred to the Chief Engineer and that his decision shall be final and binding on the parties. It is true that the word “reference” is not used in this clause nor it has been mentioned that the Chief Engineer should be the arbitrator, but looking to the substance of the clause, there can be no doubt, that the parties agreed that any dispute between them should be settled by the Chief Engineer.

In my opinion, whenever, there is an arbitration clause the Court should look to the substance rather than to the form of it and the mere fact that words like “reference” or “arbitrator” do not find place in the said agreement does not

show that the agreement is not an arbitration agreement within the meaning of S.2(a) of the Arbitration Act. I am fortified in my view by the decision of the Lahore High Court report in Governor-General v. Simla Banking and Industrial Co., AIR 1947 Lah 215, where their Lordships made the following observations:

“It is true that the words ‘arbitration’ ‘arbitrator’ or ‘Arbitration Agreement’ do not appear in the clause but that is, in my view, immaterial as long as the parties can be found to have agreed to allow the matter to be decided by a person of their own selection whose decision was to be final, conclusive, and binding on them”.

Under these circumstances, I am clearly of the view that clause 10 of the agreement between the parties is an agreement which amounts to an arbitration agreement within the meaning of S. 2(a) of the Arbitration Act and, therefore, the application of the defendant on this ground is maintainable.

25. The aforesaid decision in **Dewan Chand** (supra) was approvingly referred to by the Hon’ble Supreme Court in **Tipper Chand** (supra) in which it was held as follows:-

5. Mr. Dixit relied on **Governor-General v. Simla Banking and Industrial Company Ltd. AIR 1947 Lah 215, Dewan Chand v. State of Jammu and Kashmir AIR 1961 J & K 58 and Ram Lal v. Punjab State**. In the first of these authorities the clause appearing in the contract of the parties which was held by Abdur Rahman, J., to amount to an arbitration agreement was practically, word for word, the same with which we are concerned here but we are of the opinion that the interpretation put thereupon was not correct. As pointed out by the High Court such a clause can be interpreted only as one conferring power on the Superintending Engineer to take decisions all by himself and not by reason of any reference" which the parties might to him.

6. In the Jammu and Kashmir case the relevant clause was couched in these terms:

For any dispute between the contractor and the Department the decision of the Chief Engineer PWD Jammu and Kashmir, will be final and binding upon the contractor.

The language of this clause is materially different from the clause in the present case and in our opinion was correctly interpreted as amounting to an arbitration agreement, In this connection the use of the words "any dispute between the contractor and the Department" are significant. The same is true of the clause in Ram Lal's case (supra) which ran thus:

In matter of dispute the case shall be referred to the Superintending Engineer of the Circle, whose order shall be final.

We need hardly say that this clause refers not only to a dispute between the parties to the contract but also specifically mentions a reference to the Superintending Engineer and must therefore be held to have been rightly interpreted as an arbitration agreement.

26. In the present case, the contractual clause which the petitioner claims to be the Arbitration clause is similarly worded as in the said case of **Dewan Chand** (supra). In the said case also there was no mention of the words "arbitration" or the expression "reference to arbitration".
27. This Court is satisfied with that Clause 18 of the contract in the present case amounts to an Arbitration clause, inasmuch as, the intention of parties was to refer the decision to the Director, Social Forestry Department which shall be final and binding on the parties. While arriving at his decision, obviously, the Director would be required to hear the parties and return a finding as regards the correctness or otherwise of the claim and such finding and decision will be final and binding. Thus, even if the aforesaid clause does not mention the words "Arbitration" or "Arbitration Tribunal" the fact that the decision of the Director, Social Forestry Department Jammu and Kashmir will be final and binding on the parties, the ingredients required as to what constitute arbitration are present in as explained in **Jagdish Chander** (supra) case. The Director, certainly, under the circumstances acts as the arbitrator.
28. As regards the contention that the contract in issue is a contract simplicitor devoid of any arbitration agreement so as to attract the Arbitration and Conciliation Act, 1996, it is also without any merit in view of the finding arrived at above.

29. The other argument raised by the learned counsel for the respondents is that Arbitration and Conciliation Act, 1996 is not applicable in the present case is without any merit, inasmuch as, after the implementation of the Jammu and Kashmir Reorganization Act of 2019, it is the Arbitration and Conciliation Act, 1996 which will be applicable to deal with any matter relating to arbitration within the Jammu and Kashmir.
30. Before parting, I would like to deal with the decision of this Court in **Arshad Hussain** (supra) relied upon by the learned counsel for the respondents. A perusal of this decision will show that the “clause of the contract” regarding which the question arose whether it amounts to arbitration clause or not, reads as follows, (as mentioned in para 32 of the judgment):

“25. In case of any dispute in respect of interpretation of this agreement, the decision of the GOC will be final and binding”.

The finding of the Court is recorded in para 45 and 46 which are reproduced herein below:-

“45. The Court held that the aforesaid clauses do not postulate any intention on part of the parties to the agreement to refer their disputes to a private tribunal for arbitration and the said clauses do not provide that the arbitral tribunal has been empowered to adjudicate upon the dispute between the parties.

46. Similar is the position with clause 25 of the agreement, it does not provide that the arbitral tribunal is empowered to adjudicate upon the disputes between the parties. It only provides for the decision on the interpretation of the agreement and as such does not express intention of the parties to refer their disputes to a tribunal.

31. Thus, it is clearly evident that the aforesaid clause merely enables the parties to refer to the GOC for interpretation of the agreement and there was no intention of the parties to refer their “dispute” to the GOC, hence it cannot be said to be arbitration clause/arbitration agreement to settle the dispute between the parties.

In the present case, such is not the case, as it was the intention of the parties to refer to the Director of Social Forestry Department in case

of any dispute arising out of the sale covered under the auction notice, whose decision shall be final and binding on the parties.

Hence, this decision in “**Arshad Hussain**” (supra) is not applicable in the present case.

32. Accordingly, for the reasons discussed above, this Court is satisfied that the petitioner has been able to make out his case for referring the dispute which has arisen between the parties to an Arbitrator. Since the respondents have failed to refer the dispute to the Director, Social Forestry Department Jammu and Kashmir in terms of Clause 18 of the contract agreement, this Court will proceed to appoint an arbitrator to resolve the dispute between the parties.

33. Petition is accordingly, allowed by appointing Mr. Hon'ble Justice Hakim Imtiyaz Hussain, retired High Court Judge to act as the Arbitrator, who will proceed in the matter subject to his consent, in accordance with the provisions of the Act before whom the parties will at liberty to raise all objections. The Ld. Arbitrator, after affording opportunity of hearing to both the parties, shall make the award within the time provided in the Act after charging the prescribed fee along with the incidental expenses to be shared by the parties.

34. Learned Arbitrator be accordingly informed.

35. The petition is disposed of accordingly.

(N. KOTISWAR SINGH)
CHIEF JUSTICE

SRINAGAR
27-02-2024
Shameem H.

Whether the order is reportable: *Yes/No*

Whether the order is speaking: *Yes/No.*