

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

Reserved on: 09.03.2022

Pronounced on: 23.03.2022

OWP No.860/2007

M/S AMIRA ENGINEERS

...PETITIONER(S)

Through: Mr. M. Y. Bhat, Sr. Advocate
with Mr. R. A. Bhat, Advocate

Vs.

**TELECOMMUNICATIONS CONSULTANTSRESPONDENT(S)
INDIA AND ORS.**

Through: Mr. N. A. Beigh, Sr. Adv.
Mr. Sofi Manzoor, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1. The petitioner has filed the instant petition seeking a direction upon the respondents to release an amount of Rs.12,49,517/- along with CDR of Rs.20,000/- in respect of the work/contract executed by him for laying telephone cables in Sanatnagar Srinagar in the year 1998. A further direction upon the respondents to pay an amount of Rs.28,07,975/- to the petitioner for the work executed and completed by him for laying telephone cables at Kulgam in the year 2003 has also been sought. The petitioner has also claimed interest @ 24% per annum.

2. The case set up by the petitioner is that in the year 1998, respondent No.1 allotted a contract for laying telephone cables at Sanat

Nagar, Srinagar, in favour of the petitioner and the contract was completed by him within the stipulated time. It is averred that the final bill was prepared and furnished by the respondent No.1 for an amount of Rs.10,27,423/ and the same was submitted to the respondent No.3 for release of payment in favour of the petitioner. It is alleged that respondent No.3 released the payment in favour of respondent No.1 but the same in turn was not released by the said respondent to the petitioner. According to the petitioner, a further sum of Rs.4.00 lacs is also outstanding against the respondents.

3. The other part of the claim that has been projected by the petitioner is that in the year 2003, he was allotted contract for laying telephone cables at Kulgam by respondent No.1. However, during execution of the said work, the petitioner was asked to stop the work at site because of the directions given by respondent No.3. At the time when the execution of the work was stopped, the petitioner had completed the work for an amount of Rs.28,07,975/ and the final bill in respect of the same was raised which was processed by the respondents. It is alleged that R&B Department of the State Government had caused some damage to the completed work, as a result of which a dispute arose between respondents and R&B Department and the respondents asked the R&B Department of the State Government to pay the amount of damages and compensation directly to them and the petitioner was asked to wait for some time for payment of his dues.

4. According to the petitioner, the amounts incurred by him in executing the works allotted to him in the year 1998 and 2003 are

admitted the by respondents but in spite of this, they are illegally withholding the admitted dues merely on the pretext that the completed works have been damaged by R&B Department of the State Government. It is contended by the petitioner that the dispute between the respondents and the R&B Department of the State Government has nothing to do with his claim for payment of his dues and the same cannot be made a pretext to deny him the dues.

5. Reply on behalf of respondents No.1, 2 and 4 has been filed and the said reply has been adopted by respondent No.3 as well. It is contended in the reply that the writ petition involves disputed questions of fact which arise out of a civil contract, as such, the same cannot be adjudicated upon in the writ proceedings. It is further averred that so far as the contract of 1998 is concerned, only a sum of Rs.7,27,945/ is payable whereas nothing is due to the petitioner in respect of contract allotted in the year 2003. At the same time it has been contended by the respondents that respondent No.1 is entitled to recover a sum of Rs.10.6 lacs from the petitioner. The respondents have based the said contention on Clause 68(3) of the contract proposal, according to which a sum or money due and payable to a contractor can be appropriated by the respondents and set off against any claim of the respondents for due payment of sum of money arising out of and under any other contract. Thus, according to the respondents, respondent No.1 is entitled to set off an amount of Rs.10.6 lacs from the contractor towards the cost of the material that has not been returned by the petitioner to the BSNL. The respondents have referred to letters dated 11.09.2007, 25.09.2007 and

04.10.2007 whereby respondents are alleged to have made demand of Rs.10.6 lacs from the petitioner for the material which has not been returned by him. However, copies of these letters have not been placed on record.

6. The respondents have admitted that the contract for laying telephone cables at Sanat Nagar as well as at Kulgam was allotted in favour of the petitioner. It is also admitted that the contract for laying cables allotted in 1998 was completed by the petitioner. It is the case of the respondents that because they are entitled to recover an amount of Rs.10.6 lacs from the petitioner in respect of the contract of the work of laying of telephone cables at Kulgam, the said amount is liable to be set off against the amount due to the petitioner.

7. Regarding the contract relating to laying of telephone cables at Kulgam, it has been admitted by respondents that the petitioner has partly executed the allotted work. It has been submitted by respondents that underground cable work was damaged during the execution of work by R&B Department, as a result of which BSNL stopped the payment in view of the damage caused to the executed work. Respondents have reiterated that the petitioner has retained part of the material costing Rs.10.6 lacs and unless he returns the same, he cannot be paid the dues.

8. I have heard learned counsel for the parties and perused the pleadings as well as the record produced by respondent No.3.

9. Certain admitted facts which emerge from the pleadings of the parties are that the petitioner was allotted the contract for laying of

telephone cables at Sanat Nagar in the year 1998 and at Kulgam in the year 2003 by the respondent No.1, the contractor who had an agreement with respondent No.3 for the aforesaid purpose. It is also an admitted fact that the petitioner has completed the work allotted to him in the year 1998. According to the petitioner an amount of Rs.10,27,423/ is due to him on account of the aforesaid executed work. However, respondents admit that only an amount of Rs.7,27,945/ is due to the petitioner on account of this contract. So far as the work allotted to the petitioner in the year 2003 is concerned, there is no dispute to the fact that the petitioner has partly executed the said work. The petitioner has placed on record copies of final bill prepared by respondent No.1 as also the communication addressed by respondent No.1 to respondent No.3 wherein it is clearly stated that the petitioner has executed work for an amount of Rs.28,07,975/ in connection with laying of cables at Kulgam. The authenticity and veracity of these documents has not been disputed by the respondents in their reply.

10. The contention of the respondents is that they have not released the admitted amount of Rs.7,27,945/ in favour of the petitioner because in the contract allotted to him in the year 2003, the petitioner retained the material costing an amount of Rs.10.6 lacs and as per Clause 68(3) of the contract, the respondents are entitled to set off the amount due against their aforesaid claim. The respondents may be justified in their submission that they are entitled to withhold the payment of Rs.7,27,945/ but the question arises as to whether they are justified in withholding the amount which is much more than their claim. As already

stated, the authenticity and veracity of final bills raised by respondent No.1 upon respondent No.3 in respect of the contract executed at Kulgam amounting to Rs.28,07,975/ has not been disputed. The only ground on which the said amount has not been paid to the petitioner is that the work executed on spot has suffered damage due to the acts of R&B Department of State Government, regarding which respondent No.3 has already raised claim of damages and compensation upon the aforesaid department. The petitioner cannot be penalised for the acts of an agency over which he has no control and his payment cannot be stopped just because the works executed by him have been damaged by a third agency.

11. It is not a case where the damage has been caused to the works during their execution when the site was under the charge of the petitioner but it is a case where the petitioner was stopped to execute the further work and thereafter damage to the work executed by him was caused by a third agency. Thus, respondents are not justified in withholding the whole amount due under the contract allotted to him in the year 2003. There is no justification for the respondents to withhold the balance payment after setting off their claim with regard to cost of material alleged to have been retained by the petitioner.

12. It has been vehemently contended by the learned counsel for the respondents that the petition involves disputed questions of fact which cannot be determined in the writ proceedings. It is correct that in the proceedings under the writ jurisdiction complicated questions of fact which require leading of oral evidence cannot be determined but the

Writ Court will be well within its jurisdiction to issue a direction upon a public authority to release the portion of the claim which from the pleadings of the parties and the documents on record appears to be admitted amount.

13. The Supreme Court has, in the case of **ABL International Ltd. And another vs. Export Credit Guarantee Corporation of India Ltd. and others, (2004) 3 SCC 553**, held that writs under Article 226 are maintainable for asserting contractual rights against the State or its instrumentalities as defined under Article 12 of the Indian Constitution. The Court laid down the following principles as to maintainability of a writ petition:

“(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.”

14. From the above enunciation of law, it is clear that jurisdiction under Article 226 is not excluded in contractual matters.

15. In **Unitech Limited and others vs. Telengana State Industrial Infrastructure Corporation (TSIIC) and others, 2021 SCC Online SC 99**, the Supreme Court has held that the presence of an arbitration

clause does not oust the jurisdiction under Article 226 in all cases though it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked. The Court further observed that jurisdiction under Article 226 was rightly invoked by the Single Judge and Division Bench of the Andhra Pradesh High Court, as TIIC, a State instrumentality, has reneged on its contractual obligation arising out of the contract entered by Unitech and TSIIC. The Court further found that TSIIC arbitrarily hoarded the refund of the principal and interests amount on the consideration that was paid by Unitech in advance over a decade ago.

16. Applying the aforesaid principles to the facts of the instant case, it can safely be stated that in the case at hand, the respondents have not only withheld the amount of Rs.10.6 lacs, which according to them is the cost of material retained by petitioner with him but they have also withheld the admitted claim of the petitioner over and above the aforesaid amount which cannot be justified in any manner. Even from the record that has been produced by respondent No.3, this Court could not find any document that would support the contention of learned counsel for the respondents that any disputed questions of fact are involved in the instant case, at least to the aforesaid extent.

17. Learned counsel for the respondents has made a feeble effort to contend that there is an arbitration clause in the agreement between respondent No.1 and the petitioner and, as such, the petitioner should have availed the remedy of arbitration and that he could not file the instant petition. From the record I could not find any arbitration clause in

the agreement executed between respondent No.1 and the petitioner. Though there is an arbitration clause contained in the agreement executed between respondent No.1 and respondent No.3, but the same cannot be made applicable to a dispute between petitioner and respondent No.1 because the petitioner is not a party to the agreement containing the arbitration clause.

18. For the foregoing reasons, the writ petition is partly allowed and the respondents are directed to release an amount of Rs.24,75,920/ which constitutes the differential amount between the amount due in respect of contract of the year 2003 i.e. Rs.28,07,975/ plus Rs.7,27,945/, the amount due in respect of contract of the year 1998 less by the amount of Rs.10,60000/ which constitutes the cost of material allegedly retained by the petitioner. The petitioner is also held entitled to interest @ 9% per annum on the aforesaid amount from the date it has become due till the date of its realization. It shall, however, be open to the petitioner to agitate his claim for release of rest of the amount by filing a civil suit against the respondents.

(Sanjay Dhar)
Judge

Srinagar,
23.03.2022
“Bhat Altaf, PS”

<i>Whether the order is speaking:</i>	<i>Yes/No</i>
<i>Whether the order is reportable:</i>	<i>Yes/No</i>