

Ghulam Mohammad Dar Vs. State of J. and K. and ors.

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Court : Jammu and Kashmir

Decided On : May-06-1994

Reported in : AIR1995J& K92

Judge : Abdul Qadir Parray, J.

Acts : [Constitution of India](#) - Article 226; ;Jammu and kashmir Constitution - Section 104; ;Jammu and Kashmir Arbitration Act, 2002 Svt. - Section 20

Appeal No. : O.W.P. No. 441 of 1991

Appellant : Ghulam Mohammad Dar

Respondent : State of J. and K. and ors.

Advocate for Def. : R. Kapoor, GA

Advocate for Pet/Ap. : M.I. Qadri and; G.N. Naqash, Advs.

Disposition : Petition allowed

Judgement :

ORDER

Abdul Qadir Parray, J.

1. The background and short re'sume' of the facts require to be put on record to appreciate the contentions raised in this petition.

2. Way back in the year 1979, in response to the notice of inviting tenders issued under No. EE/500-BH/IV-34/102-37 dated 24-5-1979, the petitioner also tendered for construction of Radio Therapy, Mortuary, Workers facilities, Pump House and Guard Room for 500 Bed Hospital at Soura, Srinagar. The work seems to have been allotted in favour of the petitioner vide Chief Engineer, Project Organization, J. & K. Srinagar's order No. CEP/113 of 1979 dated 25-10-1979 issued vide endorsement No. CEP/3094-3102 dated 25-10-1979 at a contract of Rupees 32,05,787.15 and an agreement was accordingly drawn on 14-12-1979. Besides the conditions of contract, some additional conditions and stipulations seem to have been entered into by the parties, whereunder the Contractor/petitioner was to be given an advance of 10% of the contract value against bank guarantee for total amount @ 12% interest per annum and the amount plus interest was stipulated to be recovered from the running bills of the contractor on pro-ratabasis.

3. The period of completion of work was stipulated ending March 1980. The petitioner could not complete the work by the end of the stipulated period of December 1980 because of the fact that drawings for the work were issued to him in piece-meals and works for which no drawings were issued to him up to the expiry of the date of completion and as such, work could not be completed because of the default of the Department, which caused heavy loss to the petitioner.

4. This is an admitted fact from the records that the delay has been caused in providing drawings and other facilities to the petitioner as per stipulations by the Government. The correspondence resting on the file does make mention of this fact. For example in one of the correspondence on the file produced by the parties, a letter purported to have been addressed to the Chief Engineer, Project Organization, J. & K. Cheshmashahi, Srinagar, wherein at para No. 4 it is stated as under :--

'In this connection it may be submitted here that the contract for construction of Radio Therapy was allotted to M/s. Ghulam Mohammad Dar Contractor and agreement was drawn up with the contractor. The construction could not be completed by the contractor within scheduled period of completion and the delay

cannot be attributed to the contractor. The contractor stopped the work of construction of Hot Area with the reasons that he has to sustain the loss due to delay and fluctuation of market rates.....

5. This fact is further substantiated by the recommendations made by the Executive Engineer of the Project to the Chief Engineer, when extension of time was solicited for completion of the work allotted. In that letter also, the Executive Engineer has in unambiguous terms admitted as under :--

'Since the work has delayed due to the reasons not attributable to the contractor, assuch, it is recommended that extension in completion period may kindly be granted up to the end of November, 1983.'

6. The recommendations seems to have been duly accepted by the Development Commissioner, Public Works Department (Projects), J. & K. under his No. DCP/3952 dated 29-9-1984 by observing as under :--

'In view of the circumstances explained and as also recommended by you, extension in completion period upto end of November, 1983 is hereby granted in favour of the contractor.'

7. It has also been projected by the petitioner before the authorities that the delay has caused great loss to him due to fluctuation of market rates. The petitioner, as such, had put a claim for increasing rates over and above the rates allotted in the original agreement executed for construction of the works allotted to him and made a representation that he should be given increase of 45% rates over and above the rates already approved in the original agreement.

8. The matter was also placed before the meeting of the Standing Council of the Institute of Medical Sciences, Soura, Srinagar and a note was put up before the said committee, of which synopsis have been brought on record, wherein it has been noted as under:--

'The work pertaining to the construction of Research facilities has recently been approved to be awarded by the contracts committee in its meeting held on 15th October, 1981 to the same contractor at the rates finally negotiated with him which

are approximately 13% higher than the rates of Married Doctors Hospital awarded in March, 1981, which are in turn 30% higher than the rates of Radio Therapy Block awarded in Oct., 1979 on a comparable basis to a total escalation of approximately 46%.....'

9. In this noting, which is brought on record, it is admitted that the work pertaining to the construction of Research Facilities which has recently been approved to be awarded to the contractor/petitioner by the Contract Committee in the meeting held on 15-10-1991 to the same contractor i.e. the petitioner on the rates finally negotiated with him which were approximately 13% higher than the rates of Married Doctors Hostel awarded in March, 1981, which are in turn 30% higher than the rates of Radio Therapy, which was awarded to the petitioner in October, 1979 and as per noting of the respondents on a comparable basis to total escalation of rates which have gone up from October, 1979 to March, 1981, there has been an escalation of 46%. On these counts and other counts, the rates seem to have been revised to 42% as per orders and a Government order No. 221 of 1981 dated 28-11-1981 also came to be issued on the subject and revised agreement, came to be executed with the petitioner on 13-1-1982, wherein the preamble clause of the agreement does make a mention of the following facts:--

'Whereas the work pertaining to Construction of Radio-Therapy, Mortuary, Workers facilities, Pump House and Guard Room for 500 Bed Hospital at Soura, Srinagar was allotted in favour of Mr. Ghulam Moham-mad Dar, Contractor and an agreement under No. 31 of 12/79 was executed with him for the said work (hereinafter called in the Principal agreement).

Whereas the said Ghulam Mohd. Dar represented that he was required to complete the works by end of December, 1980 which he has not been able to do due to the fact that drawings for the works were issued to him in piece meals and that the works for which no drawings were issued to him up to the expiry of completion and agreed to do the job and complete the same by ending June, 1982 at a premium of 45% of the rates already allotted in his favour.

Whereas the contention of the Contractor was based on facts, the matter was referred to the Standing Finance Committee of the Institute of Medical Sciences.

Whereas the Standing Finance Committee in its meeting held on 31st October, 1981 approved the escalation to be paid at 42% with the explicit condition that the work shall be completed by end of June, 1982 and whereas the decision of the Standing Finance Committee was conveyed vide Government order No. 221-IMS of 1981 dated November, 28, 1981.'

10. It is also brought on record that the work allotted to the petitioner in October, 1979 was delayed as per reasons detailed above. Finally after drawing the supplementary agreement and revision of rates in the context that some other works were allotted to the petitioner in subsequent orders, as mentioned hereinabove, but works allotted in the contract in question at present have been completed by the petitioner on the following dates :

1. Tube Well Chamber 4/82

2. Pump House 6/82

3. Workers Facility 12/82

4. Mortuary 11/83

5. Cold Area 11/83

11. Against it is brought on record that certain areas were completed by the petitioner/contractor much earlier. However, he could not complete the Mortuary and Cold Area till November, 1983 due to the following reasons :--

'1. From time to time, there had been changes in layout details as also late decisions from Architects in respect of certain things, has resulted partly delay in completing the work in time especially cold area which houses Radiotherapy equipment.

2. In certain areas the work could not be completed due to transportation of equipments by the Institute Authorities which had to be installed in Simulator Room of Cold Area and construction of walls and finishing work was carried only when these equipments were shifted inside the particular area.

3. The main reason which has effected the pace of work was that 1st. and IInd floor of Research facility was to be constructed over the Radiotherapy due to which the external finishing work could only be taken after the Research Facility Blookes were completed.'

12. It may be brought on record that the matter of enhancement of rates to the petitioner at 42% was projected by the petitioner and the Chief Engineer, Project Organization had while replying to be Executive Engineer of 500 Bed Hospital Division, Soura has stated as under :-

'..... While going through the relevant records (Agenda Note for the IX Standing Finance Committee of the Sher-i-Kashmir Institute of Medical Sciences and Government order No. 221-IMS of 1981 dated 28-11-1981, it is clear that the enhancement of 42% (forty two percent) is on the rates of the original contract and therefore will apply to all items. Action may, therefore be taken accordingly.'

13. Finally the petitioner has prayed for writ of mandamus commanding the respondents to pay to the petitioner 42% escalation rates over and above the rates provided in the original agreement in pursuance to the agreement dated 13-1-1991 and Government order dated 28-11-1981 read with letter dated 5-5-1986, and further a writ of mandamus commanding the respondents to make payment 42% escalation over and above the approved rates with respect to the extra items which have been used for the aforesaid construction and for which 15% over and above the rates are being provided under the agreement.

14. Petitioner has further prayed for a writ of mandamus commanding the respondents to pay interest to the petitioner upon the amount which has been illegally retained by the respondents and to pay the further escalation from the date, the bills have become due.

15. Though in the main petition, the petitioner has also claimed damages of Rs. 20 lacs, but in the prayer clause, no such prayer has been projected nor any documentary proof has been brought on record for such purpose.

16. After the petition was filed, respondents were summoned. They had appeared, but did not file any objections/counter to the main petition. In the meantime, the matter was more pressed by the petitioner before different benches in contempt proceedings, regarding payment of his final bills, as presented by him to the authorities, so much so that in one of the contempt petitions, one of the benches of this court had ordered the examination of Assistant Accounts Officer of the Department and he has been examined. The said Assistant Accounts Officer (Mr. Haroon Rashid) Hospital Division Soura, Srinagar has stated that the petitioner's final bill on account of the construction of radiotherapy Department was referred to him for examination as Assistant Accounts Officer. He examined the bill and found 42% over and above the original rates sanctioned in petitioner's favour was applicable on all items of the original contract executed by petitioner with the Government, as revealed by the then Chief Engineer's letter No. CEP/677 dated 5-5-1986. According to his verification, the petitioner claim amounts to Rs. 8.86 lacs approximately, which is payable to him by the Department.

17. A note has also been put on the file, which shows that aggregate value of the contract including 6% increase on 32.06 lacs and escalation value of the contract including 6% increase and 42% over and above as per aggregate, which was being processed. In the meantime, on 19-12-1991, Hon'ble Mr. Justice S. M. Rizvi had directed the respondents to pay to the petitioner at the rate of 42% enhanced rates on the rates of all items of the original contract, within four weeks time.

18. Till date, the respondents did not file any counter affidavit to the petition, so much so right to file counter seems to have been closed by the court on 31-5-1993. Thus the court is left without any counter from the respondents. However, the statement of facts which have been filed by the respondents in contempt proceedings and other written arguments which have been placed on record by the respondents make out the stand which they have to take in the case.

19. Before I am going to venture and analyse the stand taken by the respondents in the written arguments filed by Mr. R. Kapoor, Government Advocate, I think it proper to bring it on record that the statement made by Mr. Kapoor that at the time of arguments he projected that his CMPNo. 3051 of 1991 purported to have been

moved on 8-7-1993 by the respondents under Sections 148 and 151, C.P.C. praying therein that their counter affidavit may be taken on record, be decided, is totally false and incorrect. The respondent's counsel Mr. Kapoor never projected such an argument nor he prayed for any such thing. The written arguments on this score is totally incorrect. In fact when the case was argued by learned counsel for the petitioner, Mr. Kapoor appeared and submitted that he be given time to file written arguments. He ever projected or drew the attention of this court to any CMP pending for admitting their counter affidavit, which was closed long back on 31-5-1993. The stand taken by Mr. Kapoor is regrettable and unbecoming of an Advocate of pleading such irresponsible facts which have neither been projected nor argued. By the time, he had placed the written arguments on record. I am told that he has already resigned from the job of Government Advocate.

20. The other arguments which have been projected by him in the written arguments are to fold;

Firstly that the petitioner's claim is not entertainable under the writ jurisdiction as because it arises out of a contractual obligations; and

Secondly, even if, any claim, the petitioner had, or any dispute has arisen out of these contractual obligations, the same is to be resolved by taking recourse to arbitration clause.

21. It may be noted that the submissions made by learned counsel for the respondents is misconceived. It is a fact that the petitioner had entered into an agreement and a contract with the respondents for doing some works which were allotted to him and which consisted of construction of Radio Therapy, Mortuary, Workers Facilities, Pump House and Guard Room, but the delays which were caused and have been admitted by the respondents themselves, have been brought on record and in the meantime, there has been a tremendous escalation at a galloping speed, so much so that the respondents have themselves allotted one more piece of work of the petitioner in the year 1991, as has been spelt out hereinbefore paras, wherein he has been given additional rates which on a comparable study have been found 46% over and above than the original rates allotted in October, 1979 and in the meantime, the revised agreement was

executed and Government order came to be passed, wherein a special mention has been made of work regarding 'Hot Area', which has been interpreted by the Chief Engineer and other functionaries of the Government namely Assistant Accounts Officer etc. as to include all the items of the original contract and even if it would not have been projected as such, but all equitable grounds do suggest that the petitioner is entitled to such a relief, because his work is only that of a masonary, be it Hot area or Cold area or Radio Therapy or Mortuary etc. etc. It only consists of work of masonary as per designs and architects provided to him by the tendering authority. So his work is basically that of construction. It is immaterial for him whether he has to construct hot area of cold area or Radio Therapy etc. because the labour charges for both skilled and unskilled workers has changed tremendously from the date, the contract was allotted to him in October, 1979 and as has been admitted by the respondents in their correspondence which has been brought on record.

22. Even in the minutes which have been submitted to the Finance Committee, when the rates were projected to be revised that there is a clause in the original agreement that there will be no change due to escalation, but even then circumstances have brought on record that supplementary agreement had to be entered into and the rates which are given in Annexure-F of the original agreement have been revised. So this interpretation is to be solicited by the petitioner before the Court of equity rather than the Court of facts. So the remedy available to the petitioner is not by way of a regular suit, because that is not the efficacious and effective remedy available to the petitioner in view of the circumstances explained hereinabove.

23. In the case in hand; equitable grounds have been projected by the, petitioner and have been admitted by the respondents more than once in their different correspondences and notes leading to the revision of rates and drawing of the supplementary agreement which requires consideration and this consideration can only be exercised by a Court in its extraordinary writ jurisdiction. So the arguments as projected by learned counsel for the respondents that the matter pertains to the contractual obligations does not require to be entertained and considered by the Court in its writ jurisdiction is not well conceived.

24. It may be noted that Courts have shown their indulgence, where it has been projected that efficacious and alternative remedy is not available and if available, it tantamounts to harassment/cumbersome procedure and there the Courts have allowed the redressal of grievances of petitioners by taking resort to writ jurisdiction. I am fortified in my view by AIR 1971 SC 33.

25. It may not be out of place to mention here that existence of an alternative remedy does not deprive the Court of its extraordinary jurisdiction under Article 226 of the Constitution, but as a matter of policy, Courts do not show indulgence and it is only a self imposed limitation and cannot oust the jurisdiction of the Court under Article 226 of the Constitution and the High Courts have granted relief to the petitioners despite the fact that alternative remedies were available to the aggrieved persons. There are number of authorities on the subject wherein the ratio laid down in existence of an alternative remedy is a rule of policy, practice and discretion and not a rule of law. It is self imposed limitation and cannot oust the jurisdiction of the Court. The High Court's have granted the relief under Article 226 of the Constitution even if an alternative remedy was available to the aggrieved person (s).

26. In the present case also, the petitioner claims that he has been put to harassment and his final bills are not being cleared and has been made to suffer for one none of his faults, but due to the delays caused in the execution of the works by delay in the supply of the Architectural plans and supply of drawings in piecemeals and in the meanwhile price escalation and inflation changed the whole market structure of the building material and wages of skilled and un-skilled masons, carpenters etc. etc. in an unimaginable magnitude, of which Court cannot lose sight of and the bills preferred by the petitioner after completion of works from 4/1982 to 11/1983 are still pending payment/clearance and the delaying the payments of the same as per equitable claims of the petitioner for the last over ten years by now is really embarrassing a calculated harassment to the aggrieved petitioner who has been constrained by circumstances to take resort and recourse to these proceedings under the extraordinary writ jurisdiction.

27. Now as regards second argument that in case of any dispute arising out of the contract, same is referable to the arbitrators is also not well founded, as because, firstly there is no dispute between the contractor and the respondents. The petitioner/contractor has projected his claim by submitting his final bill and the same has been entertained by the respondents and even directions have been issued by the Chief Engineer, which has been acted upon by the Accounts section by allowing 42% over and above original rates of contract and other stipulations which have been mentioned in the original contract and the subsequent standing instructions on the subject. So there is no dispute between the petitioner and the respondents which is referable to any arbitration. The dispute has in fact been projected by Executive Engineer and it is a matter of interpretation. The dispute is inter se between the Executive Engineer and the Chief Engineer of the Project Organization. So dispute is not between the contractor and the respondents which is referable to the arbitration and the arbitration clause takes care of disputes which may ensue between the contractor and the Government, but that is not the case here. The dispute which is alleged and projected is distinguishable from the dispute which must have ensued between the contractor and the Government and the dispute which was ensued between the Executive Engineer and the Chief Engineer of the Project Organization.

28. The CMP moved by the respondents for allowing the counter to be taken on record is rejected on the count that the petition was admitted to hearing on 11-5-1992 as because till then despite the fact that the respondents were duly served and provided with the copy, of petition, they did not choose to file any objections and after admission of the petition on 11-5-1992 till final opportunity seems to have been granted on 30-3-1993 to the respondents for filing counter, even then they did not choose to file any counter and the right to file counter was finally closed on 31-3-1993 with the direction that the case shall be processed for hearing after vacations.

29. The pleas taken by the respondents in the C.M.P. as projecter in the written arguments are misconceived. The Courts were functioning even during Hartals and curfews. Had the respondents cared to file any counter well in time even prior to 30-3-1993, they could have done so because prior to 30-3-1993, they do not

plead any such disability which have prevented them from filing any counter affidavit. They did not care to file any objections to the petition from 17-3-1992 till 11-5-1992 and finally from 17-5-1992 till 31-3-1993 i.e. more than one year had passed since the case was admitted. However, whatever pleas the respondents had projected in the written arguments supported by an affidavit, have been considered and taken note by the Court.

30. In light of the matters as discussed hereinabove and the conclusions arrived at, the Court finds that the petitioner is entitled to issuance of writs in the nature of mandamus, commanding the respondent to pay to the petitioner 42% escalation rates over and above the rates provided in the original agreement purported to have been executed by the petitioner/contractor with the Governor of Jammu and Kashmir as the Government on the rates mentioned in Annexure-F of the said agreement on all equitable grounds.

31. Further by a writ of mandamus, the respondents are commanded to make payment of interest at 15% (though the bank rate is higher) upon the amount which has been retained by the respondents from the date when the same had become due as per bills submitted by the petitioner.

32. Thus the petition is allowed to the extent as spelt out hereinabove, The parties shall bear their own costs.