

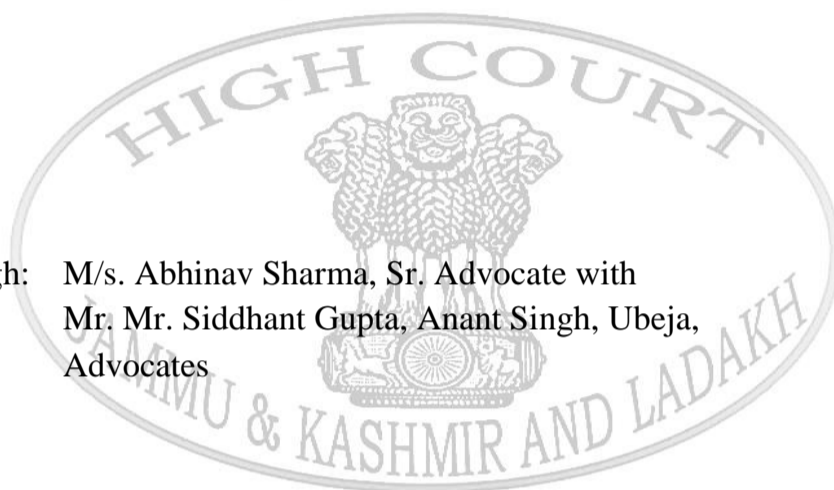
IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU
(Through VC)
Arb P No. 36/2023

Reserved on 02.03.2024
Pronounced on 16.07.2024

M/s Tata Power Solar

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

Through: M/s. Abhinav Sharma, Sr. Advocate with
Mr. Mr. Siddhant Gupta, Anant Singh, Ubeja,
Advocates



Vs.

UT of J&K and Ors.

...Respondent(s)

Through: Mr. S. S. Nanda, Sr. AAG

CORAM:

HON'BLE THE CHIEF JUSTICE

ORDER
16.07.2024

1. The present petition has been filed under Section 11 of Arbitration and Conciliation Act, 1996 for appointment of Arbitrator to resolve the dispute between the parties.
2. It is the case of the petitioner that the petitioner being successful in the E-tender floated by the respondents vide E-NIT No. SPSA/RDD/SLPG/2021-1019 for the purpose of Design, Supply, Installation, Testing and Commissioning of 1000 Nos system of 3.5 KWP Capacity, Off-Grid Solar PV

Power Plants with 5 years Comprehensive Maintenance Contract (CMC) and 2 yeas extended maintenance contract including imparting basic vocational training at J&K Panchayat Ghars.

3. Accordingly, letter of intent was issued on 03.092021 wherein the petitioner was required to undertake the project for the aggregate value of Rs. 44,17,57,000/- which the petitioner duly accepted.

4. Consequently, agreement dated 16.09.2021 was executed between the petitioner and the respondent No.2 which contains various terms and conditions of the contract. The said contract also contains the contract agreement under clause 2.1

5. According to petitioner, the NIT forms part of the contract agreement between the parties and the para 28.5 of the NIT provides that in case of any doubt, dispute or differences arising out of the contract, the same shall be referred to the Arbitrator for arbitration to be appointed by Administrative Secretary Department of Rural Development whose decision shall be final.

6. According to petitioner, as per clause 2.1 (b) and (c) of the contract agreement 40% of the total contract price has to be disbursed by the respondents upon supply of materials by the petitioner at the divisional stores of RDD, J&K subject to the inspection and further 30% of the total contract price on the successful commissioning and handing over of the said systems to the in-charge of Panchayat Gharas subject to authentication by the J&K Energy Development Agency (JAKEDA).

7. According to the petitioner, the petitioner duly accepted the contract and complied with terms and conditions. However, the respondent did not make the full payment for the work executed and, accordingly, requested the respondent No. 2 to disburse the contractual dues on various occasions including on 11.05.202, 17.05.2022, 02.06.2022, 23.06.2022, 08.07.2022,

17.07.2022 and 01.09.2022. However, there was no positive response from the respondents, the petitioner was compelled to issue the legal notice on 12.12.2022 to the respondent No. 2 seeking payment of the contractual dues which at that time amounted to Rs. 19,96,74,164/-. Unfortunately, the respondent No. 2 did not also respond to the said legal notice i.e., 12.12.2022. As there was no positive response from the respondent No. 2 because of the inaction and non-cooperation of the respondent No. 2, the petitioner issued a termination notice on 08.06.2023 and also seeking detailed accounts in respect of the dues claimed by the petitioner.

8. Accordingly, the petitioner issued a notice to the respondent on 26.06.2023 for commencement of Arbitration under Section 21 read with Clause 28.5 of the Tender Document. It was in the said notice specifically mentioned that since the Administrative Secretary of the Rural Development who cannot be neutral to the dispute cannot appoint the Arbitrator in view of Para 1 of Schedule VII read with Section 12 (5) of the Act, nominated a Retired High Court Judge of NCT of Delhi to act as the sole Arbitrator. However, there has been no response from the respondents to the aforesaid notice for initiating arbitration proceedings, the petitioner has been compelled to approach this Court for filing this application.

9. The petition has been contested by the respondents by filing objection in which following pleas have been taken.

10. Firstly, it has been submitted that petitioner has not approached this Court with clean hands and, as such, the petition suffers from *suppersio veri* and *suggestio falsi*. It has been contended by the respondents that the matter relating to the said tender involved inflated price for the solar panels is now subject matter to investigation by the Anti-Corruption Bureau, Jammu & Kashmir which has never been disclosed before this Court. In fact the

investigation launched by Anti-Corruption Bureau, Jammu and Kashmir, pursuant to the allegations leveled by the Sarpanch of Flora RS Pora in a press conference held on 05.03.2020 who sought for an enquiry into the inflated price of solar panels of such huge quantity of the solar panels and, as such, since the matter is now subject to criminal investigation, it would not be appropriate to refer the matter to Arbitration.

11. It is contended by the respondents that the Anti-Corruption Bureau, Jammu & Kashmir, in consultation with the District Vigilance Officer of the Rural Development Department had started fact finding investigation in the matter and in fact has raised the following observations:-

- a. No itemized rate in the bill of quantities in tender.
- b. Manipulation of the rates of items to save GST by the firm.
- c. Restrictive conditions placed in the tender.
- d. Restrictive conditions to advantage of the bidder.
- e. Tender floated with inflated rates on lump sum basis.
- f. Misinterpretation of Goods and works contract.
- g. Quantification of loss based on Bench Mark rates of MNRE.
- h. Additional 130 units purchased without tenders.
- i. Absence of Panchayat Ghar
- j. Approval for placement without approval of Administrative Counsel.
- k. No Allocation of funds for purchase of solar lights.
- l. Advance given to the firm

12. Further, it has been submitted as regards the validity of Clause 25 of the Tender Document which is the arbitration clause, the petitioner had willingly accepted that the arbitrator can be appointed by the Administrative Secretary, Rural Development Department whose decision shall be final and, as such, the petitioner cannot make a U turn and deny the right of the Administrative Secretary, Department of Rural Development to appoint the arbitrator to settle this dispute.

13. The petitioner has sought to rebut the aforesaid objections raised by the respondents by contending inter-alia that the petitioner had not received any communication from the respondent No. 3 or any person relating to the alleged pending investigation pending before the Anti-Corruption Bureau and, as such, the petitioner was not kept in lieu or inform of any such investigation carried out by the ACB, the question of disclosing the same and hence suppressing the material facts does not arise.

14. On the other hand, respondents are seeking to frustrate the present petition seeking arbitration of the dispute between the parties by taking shelter behind the alleged investigation conducted by the ACB. It has been submitted that the dispute between the petitioner and the respondent No. 3 is simple that after having executed the work the respondent has not paid the dues, which is required to be paid. It can be resolved only by the arbitration in terms of the tender notice which forms part of the contract agreement.

15. Further, as regards the capacity of the Administrative Secretary, Department of Rural Development Department, Government of J&K to appoint the arbitration in view of the Specific Provision of the Section 12(5) read with Schedule V and VII of the Arbitration and Conciliation Act, he shall be disabled from appointing any Arbitrator he being an employee of the Government with whom the dispute has arisen, the main being not a neutral party and can be said to interested party and, as such, it has been submitted that no irregularity, nor illegality approaching this Court for appointment of Arbitrator under Section 11 of the Arbitration and Conciliation Act.

16. Heard learned counsel for the parties and perused the material on record.

17. The Scope of the Court in exercise of powers under Section 11 of the Arbitration and Conciliation Act, for appointment of arbitrator is admitted.

The focus of the Court would be only whether the dispute exists between the parties and whether the contract between the parties provides for resolution of dispute between them by way of arbitration and in other words whether any arbitration clause exist for resolution of the dispute between the parties. Thirdly, whether the dispute even if amenable to arbitration cannot be referred to arbitration on the ground that the claim is hopelessly time barred or the same is not amenable to the arbitration as there is criminal investigation or matters which cannot be arbitrable viz; family disputes, as held by the Hon'ble Supreme Court in *Vidya Drolia and Ors. Vs. Durga Trading Corporation 2021 2 SCC 1*

18. Thus, the Court while exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act is primarily concerned with a settlement as to whether there exist any dispute between the parties and whether there is any arbitration clause which would enable the Court to appoint arbitrator to resolve the dispute and whether such dispute cannot be referred for reasons like stale claims etc. While undertaking the aforesaid exercises the Court obviously will not enter into detailed examination of these issues and would ordinarily refer to arbitration if the necessary conditions are fulfilled and if there been any doubt on any of these aspects it would be better left to be decided by the arbitrator as the Hon'ble Supreme Court has observed "when in doubt refer to arbitrator" as held by Hon'ble Supreme Court in para No. 244.4 in *Vidya Drolia and Ors. Vs. Durga Trading Corporation 2021 2 SCC 1*.

19. Keeping the aforesaid broad legal parameters in mind this Court will proceed to examine the issues at hand.

20. As regards the existence of dispute though the respondents have contended that there is no dispute by denying the allegations made by the

petitioner about alleged non-payment of dues for the work executed, the petitioner is insisting that he has not been paid for the work executed and the respondents had not responded to his various legal notices for payment of dues, it itself indicates that there is a dispute between the parties as to whether the allegations and the demands made by the petitioner is authentic/genuine is a matter which can be looked into by this Court in exercise of the powers under Section 11. It may also happen that the petitioner may be raising false demands and the respondent has no liability to discharge, yet these are the issues which is to be considered by the adjudicating forum upon hearing the parties and appreciation of the evidence that may be laid by the respective parties. This court cannot obviously enter into these disputed questions of fact in exercise of the powers conferred under Section 11 of the Arbitration and Conciliation Act unless the documents and materials clearly indicates the non-existence of any dispute. In the present case, there is nothing clearly demonstrable that no dispute exists between the parties. In view of the specific claim made by the petitioner and which has been denied by the respondents, despite that there is a dispute between the parties.

21. Having held that there is dispute between the parties, the next consideration will be to examine as to whether there is any clause in the agreement between the parties which provides of any such dispute by arbitration.

22. As the petitioner has drawn attention of this Court to clause 28(5) of the tender document which appears to form part of the agreement between the parties. The clause 28(5) reads as follows:

28.5 in case of any doubt, dispute or differences arising out of the contract, the same shall be referred to the Arbitrator for arbitration to be appointed by Administrative Secretary

Department of Rural Development whose decision shall be final.

23. Respondents have not specifically denied the existence of the aforesaid clause, hence this Court will hold that there is an arbitration clause in the agreement which provides for the resolution of the dispute between the parties by the arbitration. Having held that there is a dispute and there is an arbitration clause this Court will proceed to examine whether the terms of the arbitration clause has been fulfilled in the present case so as to refer the dispute to arbitration. In this regard the arbitration clause specifically provides that the disputes, if any, arising of the contract shall be referred to a sole arbitrator to be appointed by the Administrative Secretary of the RDD. Thus, as per the aforesaid arbitration clause the sole arbitrator has been appointed by the Administrative Secretary of the concerned department. As regards this, the law is well settled that as also provided under Section 12(5) of the Arbitration and Conciliation Act that Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the seventh schedule shall be ineligible to be appointed as an arbitrator provided that the party being, subsequent to the dispute having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

24. The principle of independence and impartiality of the neutral arbitrator to decide dispute between the parties is embedded in the aforesaid sub clause 5 of Section 15 of the Arbitration and Conciliation Act which has been incorporated by amendment made in the Act by Act 3 of 2016 which came into force from 23.10.2015. Thus, neutrality of the arbitrator being core to the fairness of the proceeding arbitration is not only a legally requirement but also a statutory requirement and, as such, if any person has a direct relationship with the subject matter of dispute as specially provided under VII schedule of

the Act would be debarred from acting as an arbitrator. As a corollary the neutral and independent arbitrator has to be appointed by a person who has no nexus with the subject matter of the dispute. In the present case even if the Administrative Secretary of the Rural Development Department may not be identified as an arbitrator to resolve the dispute, yet he be an interested party and having relation with the subject matter of the dispute cannot also appoint an arbitrator. Therefore, this Court is of the view that even if the dispute arises between the parties and the same has to be resolved by an arbitrator to be appointed by the Administrative Secretary of the Department of Rural Development, in view of the specific bar placed under the Section 12(5) of the Act he is will also disabled from appointing Arbitrator in which event unless it is agreed between the parties by an express agreement in writing which is not present in this case, the Administrative Secretary of the Department of Rural Development Department cannot appoint a sole Arbitrator as it would be contrary to Section 12(5) of the Arbitration and Conciliation Act. However, the other issue remains is to be decided by this Court as to whether in view of the specific claim made by the respondent that the said contract is being investigated into by the ACB of the Union Territory of the J&K, in view of the alleged inflated price of the solar panels, the dispute between the parties will not be amenable to Arbitration.

25. It has been held by the Hon'ble Supreme Court in *Vidya Drolia and Ors. Vs. Durga Trading Corporation 2021 2 SCC 1*. Any mater which is a subject matter of criminal proceeding the same would not be amenable to arbitration proceeding. But in the present case if we examine closely it is to be seen that the dispute between the petitioner and the respondent No. 2 is primarily civil in nature, however, an element of criminality has been introduced because of certain allegations made by Sarpanch, as contended by

the respondents in their objections. Even if it is assumed that the ACB has started investigation in the matter, it is to be kept in mind that the said allegation primarily pertains to alleged inflated price of the solar panels. However, it is to be mentioned that the petitioner was a bidder amongst other bidders who responded to the tender floated by the respondent No. 2. As to the price of the solar panels it is something which has been determined by the respondent No. 2 on the basis of which the respondent No. 2 has earmarked the specific amounts to be paid to the successful bidder on completion of the execution of the work. Obviously when a tender is floated and inviting bids from the public contractor, the contractor does not have any role to play in the fixation of the price. It is for the tenderer or the employer to fix the price and accept the tender based on as to how they respond to the tendered amount and, as such it is alleged the price of the solar panels is exorbitant or inflated it is something to which the tenderer cannot have any role to play and it is also not the case of the respondents that the price of the solar panels have been subsequently determined beholds the initial tender documents and the estimated cost determined by the department. Thus even if there is any investigation by the ACB as alleged by the respondent, in the opinion of the Court the successful bidder cannot be attributed with any criminal liability.

26. Be that as it may, for the reason that the bidder has successfully responded to the terms of the contract and the terms of the contract are basically set by the employer and not by the bidders. Even if it is assumed that there is inflated amount for the solar panels it may be subject matter before the ACT. This Court fails to understand how the investigation will come in the way of the claim made by the petitioner for payment of dues for the work executed in terms of the tender unless there is specific allegations that the bidders or tenderers had colluded the employer or the authority in determining

the estimated cost mentioned in the tender document. In the event, these are aspects which can be also looked into by the arbitrator as these will require proper leading of evidence. Unless there is specific allegation that the petitioner as a tenderer had entered into an agreement with the employer which would amount to a criminal conspiracy in any event perhaps referring the dispute may not be permissible or admissible as held by the Hon'ble Supreme Court in *Vidya Drolia and Ors. Vs. Durga Trading Corporation 2021 2 SCC 1*. The present situation does not appear to be so.

27. Be that as it may, this Court is of the view that even if there is criminal proceedings against the petitioner regarding the inflated price of the solar panels certainly the arbitrator can look into the same and pass appropriate award in this regard. Hence this Court is of the view that the aforesaid contentions raised by respondent No. 2 that since the certain aspects of the tender being investigated by the ACB, in the opinion of this Court, this will not debar resolution of the dispute between the petitioner and the respondent No. 2 by invoking the Arbitration clause under clause 28(5) of the tender as mentioned above. However, the respondents may raise the issue before the arbitrator and the arbitrator may consider all the issues while making the award.

28. In view of above position, I am of the considered opinion that it is a fit case where this Court ought to appoint an Arbitrator to resolve the dispute between the parties in connection with the contract in question.

29. Accordingly, this Court proceeds to appoint Mr. Ali Mohammad Magray, Retd. Chief Justice, to act as an independent Arbitrator, who will proceed in the matter 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 an award

within the time provided in the Act after charging the prescribed fee along with the incidental expenses to be shared by the parties.

30. Learned Arbitrator be accordingly informed.

31. The petition is disposed of accordingly.

(N. KOTISWAR SINGH)
CHIEF JUSTICE

SRINAGAR
16.07.2024
Aadil

