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2020-JKLHC-JMU:8202

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

**CJ Court**

Case: AA 23/2017

**Shamusdin Bhat Alias S. Bhat** ...Petitioner(s)/Appellant(s)

Through: Mr. R. P. Sharma, Advocate.

v/s

**The Managing Director and another** .... Respondent(s)

Through: Mr. Achal Sharma, Advocate

**CORAM : HON'BLE THE CHIEF JUSTICE**

**ORDER**  
**02.02.2024**

1. The instant petition has been filed by the petitioner under Section 11 of the Jammu and Kashmir Arbitration and Conciliation Act, 1997, (*hereinafter referred to as the "Act of 1997"*) for appointment of an arbitrator to resolve the dispute, which according to the petitioner has arisen between him and respondent No. 1 on account of contract executed between them vide Work Order No. 8208/40 dated 01.03.2005 for protection work of Main Dam Seva Hydro Electric Project Stage-11, amounting to Rs. 24,36,000/- and 2<sup>nd</sup> Work Order for slope Protection, amounting to Rs. 16,36,620/-, thus, totaling to Rs. 40,72,620/-.
2. According to the learned counsel for the petitioner, the petitioner has satisfactorily completed the work assigned to him and also executed the additional work on the asking of the respondents. However, when the time came for payment of the bills, the respondents did not make the full payment and only some part of the payment was made.
3. Learned counsel for the petitioner submits that there is an arbitration clause being Clause 14 in terms of the conditions of the tender/work order, which provides the mode for resolution of disputes and differences



between the parties, which is through arbitration and the said clause reads

as under:-

***“In the event of any dispute arising out of this subcontract, the parties hereto agree that the matter shall be referred to the sole arbitration of an officer of the company nominated by the Managing Director of the company (other than concerned with this sub-contract). The award of the Arbitrator so nominated shall be final, conclusive and binding on all parties to this sub-contract.*”**

4. It has been submitted by learned counsel for the petitioner that the dispute has arisen between the parties due to non-payment of the due amount for the work executed by the petitioner. It is also submitted that the petitioner submitted a Communication to the respondent-authorities on 14.06.2017 for appointment of an arbitrator in terms of Arbitration Clause 14 of the conditions of the tender/work order. However, instead of appointing an arbitrator, the respondent-authorities while denying any liability also asked the petitioner to furnish certain documents for examining the claim of the petitioner, as mentioned in the reply dated 29.07.2017. Since, there had been no positive response from the respondents, the petitioner has been compelled to approach this Court seeking appointment of an independent arbitrator under Section 11 of the Act of 1997.
5. Though no affidavit has been filed by the respondents, yet learned counsel for the respondents submits that the question of appointment of an arbitrator in this case does not arise, inasmuch as, it is a time barred claim, as also mentioned in the reply dated 29.07.2017. In response to the same, learned counsel for the petitioner submits that if the respondents claim that this is a time barred claim, then there was no reason why they should have asked the petitioner to furnish certain documents as mentioned in reply dated 29.07.2017, which indicates that they are still willing to examine the claim of the petitioner, otherwise they would not have asked the petitioner to furnish certain documents.



6. Heard learned counsel for the parties and perused the record.
7. As far as existence of the arbitration clause in the contract is concerned, the same is not in dispute. Further, though this application was filed under the Jammu and Kashmir Arbitration and Conciliation Act, 1997, it was the prevailing law at that time and now the same has been replaced by the Arbitration and Conciliation Act 1996 which will govern this application for appointment of arbitrator.
8. The main issue to be considered by this Court is whether this petition is hopelessly time barred or not. Though, it appears to be time barred, yet it is also noticed that the respondents have also asked the petitioner to furnish certain documents to examine his claim. Thus, even though, the respondents have taken a stand that the claim of the petitioner is time barred, yet it appears that they are showing some inclination to examine the claim of the petitioner.
9. I have also considered the submissions of learned counsel for the petitioner that the petitioner had approached this Court belatedly in view of the various assurances made by the respondents from time to time for settling the dispute, because of which there had been some delay in approaching this Court which can be condoned.
10. I am of the view that these are the matters, which are based on facts which would be required to be established before the adjudicatory Forum and this Court is not the proper forum to examine it since it involves leading of evidence and as to whether any delay can be condoned or not can certainly be examined by the adjudicatory forum, hence, this Court is unwilling to un-suit this present petition at this stage merely on the plea of time bar taken by the respondents. It will be more prudent to leave it to the adjudicatory forum to decide this issue whether the claim of the



petitioner is time barred or not in view of the response of the respondents in their reply dated 29.07.2017. Yet this Court is also of the view that if the claim is ultimately found to be time barred, the appointment of an arbitrator would saddle the respondents with financial burden which should be avoided.

**11.** Under these circumstances, this Court proceeds to appoint an arbitrator in terms of the aforesaid clause of the conditions of the tender/work order on the following conditions:-

- (i) *The arbitrator so appointed shall first decide the preliminary issue as to whether the claim of the petitioner is time barred or not, for which the petitioner would be liable to incur the expenses required for appointment of the arbitrator and the proceeding;*
- (ii) *However, in the event the arbitrator decides that the claim of the petitioner is not time barred and the arbitration proceeding is continued, the respondents shall be liable to share the costs/expenses of the arbitrator from the initial stage.*

**12.** Accordingly, keeping in mind the aforesaid arbitration clause, I appoint Mr. Justice Mohan Lal (Former Judge of this High Court) to act as the Arbitrator, who shall proceed in the matter in accordance with the provisions of the Arbitration and Conciliation Act, 1996, after affording opportunity of hearing to both the parties, who are at liberty to raise all the preliminary objections before the Arbitrator as mentioned above. The Arbitrator shall, thereafter, make an award within the time provided in the Act only upon finding that the claim is not time barred. It goes without saying that if the learned Arbitrator finds that the claim is time barred, the proceedings will stand concluded on that basis.

**13.** The instant matter is accordingly *disposed of*.

**(N. KOTISWAR SINGH)**  
**CHIEF JUSTICE**

Jammu  
02.02.2024  
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Whether the order is speaking?	Yes/No
Whether the order is reportable?	Yes/No