

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

Reserved on: 13.09.2024
Pronounced on: 26.09.2024

**WP(C) No.1828/2024
WP(C) No.2050/2024**

M/S POTENTIAL ENGEERING ...PETITIONER(S)

Through: - Mr. Syed Sajad Geelani, Advocate.

Vs.

UT OF J&K AND OTHERS ...RESPONDENT(S)

*Through: - Mr. Hakeem Aman Ali, Dy. AG.
Mr. Salih Pirzada, Advocate, with
Mr. Bhat Shafi, Advocate.*

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

JUDGMENT

1) By this common judgment, the above numbered two writ petitions filed by the petitioner are proposed to be disposed of. Vide WP(C) No.1828/2024, the petitioner has challenged order bearing No.SE/LCMA/298-307 dated 29.07.2024, whereby the contract awarded to the petitioner to the extent of supply of three Weed Harvesters-cum-Skimmers, has been terminated and the contract has been restricted to deployment of five machines only. Vide WP(C) No.2050/2024, the petitioner has challenged letter of intent bearing No.SE/LCMA/360-65 dated 09.08.2024 issued by

respondent No.3 in favour of respondent No.6 for hiring three number of Weed Harvesters-cum-Skimmers.

2) The facts giving rise to filing of present writ petitions by the petitioner herein are that an NIT bearing No.MD/LCMA/TS/2024-25/01/e-tendering dated 03.05.2023, was issued by respondent No.5 for hiring of Weed Harvesters-cum-Skimmers (hereinafter referred to as “the machines”) including operation and maintenance for Dal Nigeen Lake with estimated cost of Rs.704.00 lacs. The last date of bidding was mentioned as 24.05.2024 and the time for opening of the technical bids was fixed as 25.05.2025. As per the terms and conditions annexed to the tender notice, mobilization period was fixed as 25 days from the date of issuance of allotment order/letter of intent for first batch of three machines and 50 days for second batch of five machines. However, vide corrigendum dated 03.06.2024, the mobilization period was reduced to 15 days only and last date for uploading the bids was extended to 5th June, 2024.

3) It seems that the petitioner as also private respondent No.6 participated in the bidding process and the petitioner was declared as lowest tenderer (L1) and, accordingly, letter of intent dated 15.06.2024 was issued in its favour. The petitioner was asked to furnish a bank guarantee which was

submitted by the petitioner on 21.06.2024. On 26.06.2024, allotment order was issued in favour of the petitioner. In the said allotment order, it was clearly indicated that mobilization period would be 15 days from the date of issuance of letter of intent i.e. 15.06.2024.

4) It seems that the petitioner could not mobilize all the eight machines within the stipulated time of 15 days from the date of issuance of letter of intent, as a result of which, a number of communications were exchanged between the petitioner and the official respondents on the subject. It also appears that the petitioner could mobilize only five machines and the official respondents issued several notices including the notices dated 04.07.2024, 15.07.2024 and the final show cause notice dated 20.07.2024, which were received by the petitioner. Ultimately, vide impugned order dated 29.07.2024 contract of the petitioner for supply of machines to the extent of three machines was terminated and the contract was limited to the deployment of only five machines. It also appears that the official respondents decided to hire remaining three machines at the risk and cost of the petitioner, in consequence whereof, they issued impugned letter of intent dated 09.08.2024 in favour of respondent No.6 for hiring of three machines. It is pertinent to mention

that respondent No.6 had emerged as L-2 during the bidding process.

5) The petitioner has challenged the impugned action of the official respondents by contending that initially the period of mobilization was fixed as 25 days but later on it was reduced to 15 days. It has also been contended that there were issues with regard to transportation of the machines from Bombay to Srinagar as due to Amarnath Yatra, the trucks loaded with machines were being stopped at several places on National Highway from Jammu towards Srinagar. It has also been contended that the petitioner company was receiving unknown calls seeking consignment details, which fact was made known to the official respondents through various emails and communications. According to the petitioner, the official respondents despite, having been conveyed all these difficulties which were not attributable to the petitioner, have proceeded to terminate contract of the petitioner to the extent of hiring three machines which is highly irrational and illegal.

6) The official respondents as well as private respondent have taken a stand that the petitioner violated the terms and conditions of the contract, inasmuch as it failed to supply all the eight machines within the stipulated time of fifteen days from the date of issuance of letter of intent. It has been

contended that there is an arbitration clause in the contract between the petitioner and the official respondents and, therefore, the writ petition is not maintainable. The official respondents have submitted that the corrigendum restricting the period of mobilization from 25 days to 15 days was issued before the last date of submission of bids, whereafter the last date for submission of bids was also extended up to 05.06.2024. Therefore, the petitioner was having prior knowledge about the period of mobilization of the machines before the contract between the parties came into being. It has been contended that the petitioner had to supply all the eight machines by 30.06.2024 but even on the date of issuance of the impugned letter dated 29.07.2024, the petitioner had failed to mobilize all the eight machines. According to the respondents, the petitioner had deployed only two machines by that time. It has been further contended that as on the date of filing of the reply by the official respondents, only five machines are in operation, therefore, the official respondents are justified in terminating the contract of the petitioner to the extent of three machines.

7) I have heard learned counsel for the parties and perused record of the case.

8) Learned counsels for the respondents have raised a preliminary objection with regard to maintainability of the

writ petition on the ground that in presence of an arbitration clause with regard to settlement of the disputes between the petitioner and the official respondents, it is not open to this Court to exercise its writ jurisdiction for determining the dispute between the petitioner and the official respondents arising out of the contract. *Per contra*, learned counsel appearing for the petitioner has, while relying upon the judgment of the Supreme Court in the case of **Union of India & Ors vs. Tantia Construction Pvt. Ltd**, AIR 2011 Online SC 530, contended that there is no absolute bar to the invocation of writ jurisdiction of the High Court without exhausting alternate remedy of arbitration. It has been contended that in appropriate cases, the High Court would entertain a writ petition in spite of there being an arbitration clause in the contract.

9) Before determining the merits of the rival contentions of the parties, it would be apt to understand the position of law as regards maintainability of a writ petition in contractual matters.

10) In **ABL International Ltd Vs. Export Credit Guarantee Corporation of India**, (2004) 3 SCC 553, the Supreme Court, after analysing the precedents, concluded that in an appropriate case, a writ petition against the State or an instrumentality of the State arising out of a contractual

matter, is maintainable. In the same case, while recognizing the principle that jurisdiction under Article 226 of the Constitution is not excluded in contractual matters, the Supreme Court observed as under:

“However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors. [1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.”

11) From the foregoing analysis of law on the subject, it is clear that jurisdiction under Article 226 of the Constitution in contractual matters can be exercised by the High Court only to enquire whether the action of the State or its instrumentality is arbitrary or unfair. The Writ Court, however, cannot adjudicate upon a contractual dispute which would depend upon determination of a disputed question of fact. This position of law has been consistently

followed by the Supreme Court and various High Courts of the Country.

12) Thus, if it shown that the official respondents in the instant case have acted arbitrarily while terminating contract of the petitioner to the extent of supply of three machines, this Court would be justified in stepping in despite presence of an arbitration clause in the agreement between the petitioner and the official respondents.

13) Adverting to the facts of the present case, it is not in dispute that the period for mobilization of eight machines, regarding which supply order was issued in favour of the petitioner, was 15 days from the date of issuance of letter of intent. It is also not in dispute that the petitioner could not supply all the eight machines within the stipulated time. In fact, the stipulated period had ended on 30.06.2024 and even on the date of issuance of impugned termination letter dated 29.07.2024, all the eight machines had not been mobilized by the petitioner. It is an admitted case of the parties, that the petitioner had received notices dated 04.07.2024 and 15.07.2024 as also the final show cause notice dated 20.07.2024, whereby it was called upon to supply all the eight machines to the official respondents.

14) From the aforesaid admitted facts, it is clear that it is not a case where the official respondents have acted arbitrarily without adhering to the principles of natural justice before terminating the contract of the petitioner to the extent of three machines. The question whether the reasons for non-supply of all the machines within the stipulated time are attributable to the petitioner or to the official respondents, is a disputed question of fact, which can be determined only by leading evidence which requires a proper trial. This intricate and disputed question of fact cannot be gone into by this Court in writ jurisdiction. Therefore, the proper forum for determining this question would be a civil court or an arbitration. In the present case, admittedly there is an arbitration clause in the agreement between the petitioner and the official respondents. Therefore, there is an alternative, efficacious and effective remedy available to the petitioner for seeking the relief of damages from the official respondents to which it may be entitled, if it succeeds in showing that the contract has been terminated by the official respondents in an illegal manner.

15) There is yet another aspect of the matter which is required to be considered. The contract between the petitioner and the official respondents is determinable in nature. This is clear from Clause (3) of the general terms and

conditions of the contract (Annexure-B) as also Clause (16) of the terms and conditions for operation (Annexure-C). These clauses provide that the authority reserves the right to cancel the order and also reserves the right to terminate the contract at any time during the contract period for any deficient progress/service. Thus, the contract between the petitioner and the official respondents is determinable in nature. Clause (d) of Section 14 of Specific Relief Act provides that a contract, which is in its nature determinable, cannot be specifically enforced. Therefore, no injunction can be granted for enforcement of the contract between the petitioner and the official respondents. These principles are to be taken into account while issuing a writ of Certiorari, for quashing the termination of a determinable contract.

16) Apart from the above, the contract which is subject matter of present writ petitions relates to hiring of Weed Harvesters-cum-Skimmers, which are used for cleansing of Dal Lake, which is an infrastructure project. In terms of Section 41 (ha) of Specific Relief Act, no injunction can be granted if such an injunction impedes or delays the progress or completion of infrastructure project. The Supreme Court has, in the case of **M/S N.G. Projects Limited Vs. M/S Vinod Kumar Jain & Ors** (Civil Appeal No. 1846 of 2022, Decided on March 21, 2022), clearly held that a Writ Court

shall keep in view the provisions contained in Section 41 (ha) of the Specific Relief Act while exercising its jurisdiction under Article 226 of the Constitution of India.

17) For all the foregoing reasons this Court finds that in the instant case, it would not be appropriate to exercise extraordinary writ jurisdiction for interfering with the impugned actions of the official respondents. The writ petitions are, therefore, held to be not maintainable and are, accordingly, **dismissed**, leaving it open to the petitioner to invoke the arbitration clause or any other appropriate remedy, if so advised.

Srinagar
26.09.2024
“Bhat Altaf-Secy”

Whether the order is speaking:
Whether the order is reportable:

Yes/No
Yes/No

