

STATE OF JAMMU AND KASHMIR

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v.

GHULAM MOHD. DAR AND ANR.

NOVEMBER 20, 2003

[V.N. KHARE, C.J. AND S.B. SINHA, J.]

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*Constitution of India, 1950 :*

*Article 226—Exercise of jurisdiction in contractual disputes—Work contract between contractor and Government—Agreement containing arbitration clause—However, writ petition filed by contractor before High Court for a direction to Government to pay escalation charges allowed—Objection regarding maintainability not considered by High Court—Held, it is well settled that writ of or in the nature of mandamus would not ordinarily issue for enforcing terms of conditions of a contract qua contract and that High Court would not entertain a writ petition involving disputed questions of fact—Judgment of High Court set aside—On request of parties arbitrator appointed—Arbitration.*

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2712 of 1999.

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From the Judgment and Order dated 14.10.98 of the Jammu and Kashmir High Court in L.P.A. (OWP). No. 239 of 1998.

Anis Suhrawardy for the Appellant.

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P.H. Parekh, Sameer Parekh and Sanand Ramakrishnan for the Respondent No. 1.

The following Order of the Court was delivered :

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The appellant herein issued an advertisement inviting tenders for the works, namely, construction of Radiotherapy Mortuary workers facility, pump house and guard room. Respondent No. 1 herein responded to the said advertisement and submitted his tender, which was accepted by the appellant herein. An agreement was entered into between the parties on

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A 14.12.79. The agreement contained an arbitration clause. It appears that the respondent was able to complete the construction by November, 1983. Under such circumstances, he gave an application to the Chief Engineer wherein it was submitted that the escalation of 42% has not been paid in respect of certain items of which escalation is provided under the principal agreement. However, the Chief Engineer informed the respondent that the escalation was applicable to all the items as per the decision of the standing Finance Committee. On 4.4.1991 the respondent filed a petition in the High Court of Jammu and Kashmir seeking the mandamus that the appellant be directed to pay 42% escalation rates as approved under the supplementary agreement and confirmed by the letter dated 5.5.1986 of the Chief Engineer.

D The learned Single Judge of the High Court allowed the writ petition and issued a direction in terms of the prayer made in the writ petition. A Letters Patent Appeal filed by the appellant was dismissed. It is against the said judgment, the appellant is in appeal before us.

E It is not disputed that the contract agreement entered into by and between the parties contain an arbitration agreement. Furthermore, the respondent herein filed the aforementioned writ petition for enforcing a contract *qua* contract. Although an objection has been taken as regards the maintainability of the writ petition by the appellant herein, the same unfortunately has not been considered by the High Court. It is well settled that writ of or in the nature of mandamus would not ordinarily issue for enforcing the terms and conditions of a contract *qua* contract. A writ of mandamus would issue when a question involving public Law character arises for consideration. It is also well settled that the High Court would not entertain a writ petition involving disputed questions of fact. Keeping in view the aforementioned well settled principles of law, the impugned judgments cannot be sustained. They are set aside accordingly. The appeal is allowed. However, the parties appearing before us proposed that Justice R.P. Sethi, a former Judge of this Court be appointed as a sole Arbitrator in terms of the arbitration agreement. Accordingly, we request Justice R.P. Sethi to act as the sole Arbitrator. Learned counsel appearing for the parties also submitted that no plea as regards limitation would be raised before the learned Arbitrator. The parties would be at liberty to approach Justice H R.P. Sethi for the aforementioned purpose. The remuneration payable to

the Arbitrator shall be decided by the Arbitrator himself. We may make it clear that the fees payable to the learned Arbitrator would be decided by him and the Award, if any, would be filed before the High Court. A

In the aforesaid view of the matter, we set aside the judgment under challenge. The appeal is allowed. B

R.P.

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Appeal allowed.