

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

**LPA No. 252/2024
CM No. 6081/2024
CM No. 6082/2024**

Dated: 7th of October, 2024.

Union Territory of Jammu & Kashmir and Ors.

... Appellant(s)

Through: -

Mr Bikramdeep Singh, Dy. AG with
Ms Nowbahar Khan, Assisting Counsel.

V/s

M/S JK Water Mission Zewan & Anr.

... Respondent(s)

CORAM:

**Hon'ble Mr Justice Atul Sreedharan, Judge
Hon'ble Mr Justice Rajesh Sekhri, Judge**

(JUDGMENT)

Atul Sreedharan-J (Oral):

01. The present Letters Patent Appeal has been filed by the UT-Government, which is aggrieved by the Order and Judgment dated 5th of July, 2022 passed by the learned Single Judge in the Writ Petition filed by the Petitioners/ Respondents herein bearing OWP No. 393/2018 (attached as Annexure-I to the appeal). Besides, an application for condonation of delay of 756 days has also been filed, which is CM No. 6081/2024.

02. The present case is identical to another case which was decided by a Coordinate Bench of this Court in LPA No. 121/2023 (Union Territory of Jammu & Kashmir and Ors. v. Mohammad Afzal Reshi). In that case, after the contractor had completed his liability under the contract, an amount running into Rs. 20.97 lacs along with interest @ 6% from the date on which the payment became due to be paid within a period of two months

from the date of the Order was appealed against by the Union Territory-Government. While dismissing that LPA and imposing a costs of Rs.9.00 lacs upon the Union Territory-Government to be paid to the Respondent of that case, this Court had held that the contractor in that case indisputably completed the work assigned to him and before the learned Single Judge, the only objection that was taken by the Union Territory was that it did not have funds to pay the contractor. The contention of the Union Territory was dismissed by the learned Single Judge and the Petition was allowed. *Inter alia*, the learned Single Judge in that case had observed that the case of Mohammad Afzal Reshi (Petitioner in OWP No. 1641/2016) was not a solitary case but that the learned Single Judge had come across several other cases where contractors were approaching the High Court only for the payment of their rightful dues and there before the High Court, the Union Territory's only contention would be that they did not have funds to pay the contractor. After the Order was passed by the learned Single Judge in that case, a Review Petition was also preferred, which was also dismissed and a Contempt case was still pending against the Union Territory.

03. In this particular case, the facts are similar. Before the learned Single Judge in this case, the Petitioners-M/S JK Water Mission, Zewan and Anr. had approached the Writ Court for a 'Writ of Mandamus' against the Union Territory for payment of admitted outstanding amount of Rs. 12.55 lacs along with interest @ 12.5 % from the date the amount became due to the Petitioners on account of construction of machine drilled hand pump wells and other allied works at different places at the instance of the Respondents. The learned Single Judge referred to the Objections filed by the Union Territory and reproduced Paragraph No.2 of the Objections in his Order, which, for the sake of convenience, is also being reproduced hereinbelow and the same reads as:

"It is a fact that an amount of Rs.42.81 lacs in respect of the petitioner No.01 and Rs.78.74 lacs in respect of petitioner No.02 was pending due to shortfall of funds, but an amount of Rs.66.00 lacs were released in favour of the petitioner No.02 during the year 2017".

04. Thereafter, the learned Single Judge also reproduced the averment made by the Union Territory in Paragraph No.3 of their Objections which reads as hereunder:

“It is further submitted that rest outstanding payments of the petitioners would be released to the petitioners on availability of funds under the proper head of account”.

05. The learned Single Judge arrived at the finding that from the Objections filed by the Union Territory, it was explicit and clear cut that the Union Territory had admitted the liability towards the Petitioners and, therefore, on the instance of the Petitioners’ Counsel, took up the Petition for disposal at the initial stage by way of a direction to the Respondents to release the outstanding amount without any further delay, along with interest at the current bank rate. The learned Single Judge recorded that the Respondents were not averse to the disposal of the Petition, but had submitted that the outstanding amount would be released in favour of the Petitioners as and when funds are available with the Respondents. Thereafter, the learned Single Judge, on the basis of the admission by the Union Territory towards the admitted liability in favour of the Petitioners, directed the Respondents/ Appellants herein to release the outstanding amount of liability to the Petitioners within a period of two months from the date a copy of the Order was served upon the Respondents, along with an interest @ 6% from the date it accrued to the Petitioners till the amount is actually released/ paid. This Order was passed by the learned Single Judge on 5th of July, 2022. The Order was passed on Board, in the presence of the then learned Deputy Advocate General for the Union Territory, thus, the Union Territory was in knowledge of the said Order having been passed against them and also their liability to act in accordance with the said Order.

06. Before this Court, in the application for condonation of delay, the UT-Appellants have stated in Paragraph No.2 that the Department did not receive a copy of the impugned Order dated 5th of July, 2022, but received a copy of the Contempt Petition on 20th of December, 2023, wherein the allegation of disobedience of the Order passed by the learned

Single Judge was alleged. Thus, from the averments made in Paragraph No.2 of the application seeking condonation of delay, it is clear that no action was taken by the UT-Appellants for one year and five months after the Order was passed by the learned Single Judge and that they sprang into action only after they received the notice in the Contempt Petition on 20th of December, 2023, being CPOWP No. 497/2023. In Paragraph No.3 of the application for condonation of delay, the Union Territory-Appellants have stated that the file was, accordingly, processed and records were sought from the Division concerned, who initially submitted a report on 23rd of February, 2024, whereafter, the file was subsequently processed through e-office on 26th of February, 2024 and forwarded to the Administrative Department. Without giving any precise reasons for the delay of 756 days, the Union Territory has desired that the delay be condoned because the Order and Judgment passed by the learned Single Judge was arrived on the basis of fraudulent admissions made by the then Officers concerned, who have now been charge sheeted after the discovery/ knowledge of the fraud committed by the said Officers with *malafide* intentions. It has been stated that the Department, immediately, got the necessary sanction from the Department of Law, Justice and Parliamentary Affairs for availing appropriate legal remedy. Thus, the learned Counsel appearing on behalf of the Union Territory has submitted that the Order and Judgment passed by the learned Single Judge was on the basis of fraudulent admissions made by the then officers concerned. However, it is an admitted position of the Union Territory that no FIR has been registered till date for the offence under Section 420 and that only administrative action has been initiated against the officers concerned.

07. In order to comment upon the conduct of the Union Territory, this Court feels it essential to allow the application for condonation of delay and reflect upon the merits of the appeal itself to see whether any interference is called for by this Court against the Order passed by the learned Single Judge. Therefore, the application seeking condonation of

delay in filing the main appeal is **allowed** and the delay is condoned. CM No. 6081/2024 shall stand **disposed** of, accordingly.

08. Coming to the merits of the main appeal, the learned Counsel appearing for the Union Territory has referred to Page No.35, which is the articles of charge, whereby the charges have been framed against Mr Imtiyaz Kirmani, the then Executive Engineer, PHE, Ground Water Division, Srinagar, vide articles of charge dated 25th of September, 2024 on the ground that the Respondents herein have approached the High Court for seeking their claim of Rs.33,44,852/- and Rs. 66,23,046/- for the execution of various works. The charge was to the effect that the tenders for the work were floated without following codal procedure, i.e., without administrative approval, technical sanction and without availability of funds, thus, violating Rule 93 of the Financial Code and Rule 136(1) of the GFR, which amounted to dereliction of duty and causing loss to the State exchequer. Similarly, the articles of charge have also been placed on Mr Javaid Ahmad Khan, the then Executive Engineer, PHE, Ground Water Division, Srinagar, Mr Rashid Ahmad Dar, the then Superintending Engineer, PHE, Mech. Circle (North), Srinagar, Mr Gh. Rasool Zargar, who was the then Chief Engineer, PHE Department, Kashmir and lastly, on Mr Abdul Wahid, the then Chief Engineer of the PHE Department, Kashmir. All these persons have since retired. They, in fact, had already retired on the date when the articles of charge were placed on them.

09. Learned Counsel for the Union Territory submits that there was fraud which was perpetrated by these officers on account of which the contract was given to the Respondents herein and, therefore, there is no liability on the State to pay anything to the Respondents herein, as for fraud vitiates everything. He does not dispute that on the date the learned Single Judge passed the Order and Judgment, the same was passed on Board in the presence of the then Deputy Advocate General and that the only reason given by the Union Territory before the learned Single Judge was that there was paucity of funds and, therefore, the dues of the contractor could not be paid. The Order and Judgment passed by the learned Single Judge was also

passed with the consent of the then learned Deputy Advocate General representing the Union Territory. There was no submission or any kind of averment made in the Objections filed by the Union Territory that there was any kind of fraud played by any of these officers mentioned hereinabove, on account of which there was undue benefit caused to the Respondents.

10. This is a second case of similar nature that this Court has witnessed. The earlier case was Union Territory of Jammu & Kashmir and Ors. v. Mohammad Afzal Reshi, which has already been referred to with reasonable elaboration hereinabove. That was a case of similar nature, where the only argument before the learned Single Judge initially was of paucity of funds on account of which the contractor could not be paid. In the Review Petition, the State had brought up a fresh ground of non-adherence to procedure and formalities required by the State and, thereby challenged the Order passed in the original Writ Petition, which was also dismissed by the learned Single Judge holding that the contractor cannot be penalized for the errors of the State officials.

11. In this case also, the submission put forth by the learned Counsel for the Union Territory/ Appellants is that fraud was played by the officers of the State on account of which there was loss caused to the public exchequer. He further submits that on account of the same, the Union Territory is not bound to pay the remaining amount to the contractor. If the submissions of the learned Counsel for the Union Territory are to be taken as correct, several inferences can be adduced.

12. Inference No.1 is that the bureaucracy in the Union Territory of Jammu & Kashmir is either incompetent, indolent or corrupt. This kind of an inference is supported by the fact that the initiation of proceedings against the Officers of the Government has been commenced after the notice in the Contempt Petition has been given to the Union Territory-Government. The imputations allege that codal formalities and certain sanctions/ permissions were not taken before the bid was advertised and, therefore, the Officers, who were responsible for advertising the bid, are guilty of misconduct. If this is to be accepted as correct, the question arises

what of the superiors who were sitting above the persons who are now being charge sheeted. Did they have no responsibility to assess whether the bids which were proposed to be placed are in accordance with the procedures and the law? The senior bureaucracy is expected to vet and ascertain whether the proposed bid was in accordance with the formalities/codal requirements and whether the sanction/ permissions required from the requisite authorities were taken before placing the bid. Once the bid is advertised, prospective contractors would bid for the same and the person whose bid is found to be the lowest would be awarded the work and, if he completes the work, it is beyond the powers of the State to take an objection subsequently that the work was carried out without appropriate sanction or fulfilment of codal formalities. If the contention of the State is upheld, in every contract that is awarded, the State can literally get its work done for free. It would not have to pay a single penny to the contractor and, when the time for payment comes, take up the excuse of violation of codal formalities and non-adherence to rules and procedures. In such a situation, would it be proper for the Courts to direct that the work carried out by the contractor be destroyed so that the State cannot make use of the said work or benefit from the same. Analysis of the argument of the learned Counsel for the Union Territory would give rise to several absurd situations, which are unthinkable.

13. The inference No.2 is that the bureaucracy demanded a bribe from the contractor and the contractor, not wanting to pay the bribe, at the same time, did not prefer a complaint against the bribe seekers because his main work was getting the contract from the State, executing that contract and getting paid for the same. The fear that the State could be vindictive if the contractor makes a complaint of corruption against the bureaucracy is not unreasonable and neither is it fanciful, however, this does not mean that in this particular case, the bureaucracy, whether it be the senior or junior bureaucracy, has demanded a bribe from the contractor as the contractor has never made a complaint and neither is there any material to take such a view.

14. The third inference that can be drawn is that if the contention of the Union Territory-Appellants is upheld and payment denied to the contractor, public works would suffer a paralysis and work could come to a standstill with contractors refusing to participate in bids fearing that they would be put to a loss ultimately with the State taking *ex post-facto* objections relating to the work.

15. Lastly, if the State does not have the funds to execute public works, it must refrain from issuing advertisements for the execution of those works. After the completion of the works, the non-availability of funds can only grant the State a reasonable time to make the payments. However, grounds of non-adherence to procedure or bureaucratic red tape or seeking permission from the appropriate authority before advertising the bid are grounds that are impermissible and untenable in law for the State to take.

16. This appeal has been filed as a dilatory measure, where the Union Territory has come forward after it has received the notice in the Contempt Petition filed by the Respondents herein in an Order passed by the learned Single Judge, where the liability has been admitted by the Union Territory.

17. Under the circumstances, this Court is of the view that the present LPA does not have any merit. The same fails and is, accordingly, **dismissed**. Besides, a cost of Rs.1.00 lac is imposed upon the Union Territory-Appellants for wasting the time of this Court by filing this frivolous appeal. As there was no notice issued to the Respondents herein and the Respondents were never put to any kind of hardship, this cost shall be deposited into the account of the J&K Yateem Khaanah bearing No. 0372040100020529 maintained with the Jammu & Kashmir Bank, Branch Office Bemina, Srinagar within a period of four weeks from today and the State shall recover this amount from the Officer who advised for filing of the LPA after identifying him/ her.

18. Letters Patent Appeal shall stand **dismissed** in the above terms, along with the application seeking interim relief (CM No. 6082/2024).

(Rajesh Sekhri)
Judge

(Atul Sreedharan)
Judge

SRINAGAR

October 7th, 2024

"TAHIR"

i. Whether the Judgment is approved for reporting? Yes/No.

