

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

**Reserved on : 28.10.2021
Pronounced on : 17.11.2021**

AA No.37/2012

J&K Economic Reconstruction Agency

.....Petitioner/Appellant

Through: Mr. Aseem Sawhney, AAG

versus

Intercontinental Consultants Technocrats
Pvt. Ltd.

....Respondent(s)

Through: Mr. R.K. Gupta, Sr. Advocate with Mr.
Udhay Bhaskar and Mr. Ratish Mahajan,
Advocates.

Coram: HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE

JUDGMENT

1. This arbitration application, filed by the J&K Economic Reconstruction Agency (ERA), is directed against the award dated 20.09.2012 passed by the learned arbitrators, whereby the learned arbitrators have awarded an amount of Rs.56,99,545/- in favour of claimant-respondent and against the petitioner-ERA, with a further direction to pay per diem in respect of pending invoices and claimed in future invoices during the currency of the contract period. It has also been directed to pay the award amount within a period of two months, failing which the amount shall be payable with 12% interest from the date of reference.

2. The facts-in-short, as gathered from the file, are that the petitioner-ERA and respondent-claimant entered into an agreement in respect of two contracts, i.e., contract for design and supervision consultancy services for Srinagar

urban package (DSC II) and contract for design and supervision consultancy services for Jammu Transport Package (DSC III). As per the agreement, the fieldwork was to commence by the respondent-claimant not later than 31.01.2006 and was to be completed by 31.12.2009. Thereafter, the time for completion of the contract was extended upto 2011 and again further extended upto December, 2012. However, somewhere in 2011 that the differences appear to have arisen between the parties regarding payment of per diem allowance to local support staff which the respondent-ERA disallowed from the invoices from the month of March, 2010 to December, 2011. Accordingly, a meeting under the Chairmanship of Chief Executive Officer was held on 01.08.2011 and it was decided that the dispute regarding payment of per diem allowance to local support staff be settled through arbitration and that the decision of arbitration shall be acceptable to both the parties. Accordingly, the parties participated in the arbitration proceedings, respondent-claimant filed the statement of claims and the petitioner-ERA countered the same. The learned arbitrators after completion of arbitration proceedings passed the award dated 20.09.2012 in favour of respondent-claimant and against the petitioner-ERA. Against the said award, the petitioner-ERA has filed the present arbitration application seeking setting aside of the award.

3. The main ground of challenge to the impugned award is that while returning its findings in the award impugned, the arbitral Tribunal did not consider Clause 6.03 of General Conditions and Undertakings (GCU) of the contract agreement, thus has committed patent illegality. It is pleaded that the payments made against invoices were in the nature of interim payments. Further, it is pleaded that the respondent-claimant had been claiming per diem payment for support staff though they were locals which was in gross violation

of the aforesaid clause. Thus, it is pleaded that the arbitral Tribunal has fell in gross error by not considering Section 72 of J&K Contract Act, which provides to repay or return the money, paid by mistake. It is also pleaded that the upper limit of interest under J&K Arbitration and Conciliation Act is 6%, thus awarding interest @ 12% is unenforceable. Lastly, it is pleaded that the award is in conflict with the public policy of the State. In support of his arguments, learned counsel for respondents has relied upon two judgments of the Apex Court, i.e., Associate Builders vs DDA, (2015) 3 SCC 49 and MMTC Ltd. Vs M/s. Vedanta Ltd., 2019 (4) SCC 163.

4. I have heard learned counsel appearing for the parties, considered their respective contentions, gone through the file as well as the award dated 20.09.2012 passed by the learned arbitrator as also the record of arbitration proceedings.

5. A perusal of the application filed under Section 34 of the J&K Arbitration and Conciliation Act reveals that the petitioner-ERA nowhere in the application has objected to the passing of award amounting to Rs.56,99,545/- or that the amount awarded by the learned arbitrator is exorbitant except for rate of interest being on higher side; meaning thereby the petitioner-ERA has actually accepted the amount of award.

6. However, a perusal of the instant application/petition reveals that the main ground of challenge to the impugned award is that since the support staffs were locals, as such were not entitled to be allowed per diem allowance. Therefore, awarding of per diem allowance by the arbitral tribunal is required to be set aside.

7. Now the question arises for consideration is: whether the arbitral tribunal was justified in allowing per diem allowance for the support staffs, who, as claimed by the petitioner-ERA, were locally employed.

8. The stand of petitioner-ERA is that per diem allowance becomes payable only when support staff goes out of home office at Delhi for rendering services at Jammu/Srinagar; therefore, the respondent-claimant has to show and furnish proof that the support staffs were actually deputed from its home office to the project offices of respondent-ERA for rendering services at Srinagar and Jammu in terms of Clause 6.03 (supra); meaning thereby the petitioner-ERA has not denied that the support staffs from home office at Delhi have been rendering their services in the project offices of respondent-ERA at Srinagar and Jammu.

9. Admittedly, it is also not in dispute that the petitioner-ERA had been regularly making payment of per diem allowance in respect of local support staffs for more than four years before it was disallowed from the month of March, 2010 onwards. Further, as per Note 1 to Exhibits C-9 and C-10 of Appendix C-2, payment of per diem has to be made without proof or receipt. This note came to be inserted by the parties after contract negotiations, which reads as “per diem to be paid without any receipt of proof.”

10. Since in terms of the said note the parties to the contract have agreed that no proof would be required for payment of per diem allowance, the question of furnishing proof of deputation from one home office of the claimant to the two offices of the projects does not arise at all. Further, as per the record of arbitration proceedings, the respondents have not questioned the genuineness of Note 1 to Exhibits C-9 and C-10 of Appendix C-2.

11. So far as awarding interest @ 12% is concerned, the Apex Court in Punjab State Civil Supplies Corporation Limited vs Ganpati Rice Mills, SLP (C) No.36655/2016, decided on 20.10.2021, while observing that the High Court was not justified and correct in reducing the rate of interest to 9% per annum has held that Section 31(7) of the Arbitration Act, 1996 grants substantial discretion to the arbitrator in awarding interest.

12. The learned Arbitrators have rightly appreciated the documents on record; terms and conditions of the contract in a perspective manner and provisions of the Arbitration and Conciliation Act. In the absence of any patent illegality being pointed out there is no scope for interference. There is no material on record to hold that by granting the claim as made, the award as passed was against the public policy of India.

13. Viewed thus, I do not find any merit in the present application and the same is, accordingly, dismissed along with CM, if any.

14. Registry to send back the record against proper receipt.

Jammu:
17.11.2021
(Anil Sanhotra)

(Tashi Rabstan)
Judge

Whether the order is reportable ?

Yes

Whether the order is speaking ?

Yes