HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on : 31.08.2023.

Pronounced on : 15.12.2023.

Case:- AA No. 4/2022

J&K Economic Reconstruction Agency
through its Authorized Signatory,
Project Manager (Transport),
2nd Floor, JKPCC Building, Rail Head Complex,
Panama Chowk, Jammu.

…..Appellant

Through: Mr. Amit Gupta, AAG

Vs

International Consultants Technocrats Pvt. Limited (ICT),
A-8, Green Park, New Delhi – 110018.

….. Respondent

Through: Mr. R. K. Gupta, Sr. Advocate with
Mr. Udhay Baskar, Advocate
Mr. Ashwini Kumar Singh, Advocate

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE RAHUL BHARTI, JUDGE

JUDGEMENT

Per Rahul Bharti-J:

01. The appellant herein – J&K Economic Reconstruction Agency (***"JKERA"*** in short) came to engage the respondent as a consultant with respect to two contracts namely:-

(i) Contract for Design and Supervision Consultancy Services for Srinagar Urban Package (DSC II) dated 26.12.2005 &

(ii) Contract for Design and Supervision Consultancy Services for Jammu Transport Package (DSC III) dated 20.01.2006.

02. For the services to be rendered by the respondent in favour of the appellant in relation to the aforesaid two contracts the monetary payment was to be made under two heads. First head to be in the form of remuneration based on the monthly rate provided in the contract and the man months spent by the experts and support staff of the respondent and the second head in the form of payment towards out of pocket expenses in the nature of –

a. Per diem &

b. Domestic Travels and other office operations as provided under clause 6.03 of GCU which found integral part of the said two contracts.

03. A state of dispute came to obtain between the appellant and the respondent with respect to second head in the matter of payment due per diem for local support staff of the respondent engaged in working in Jammu and in the Srinagar for the respective contracts. This dispute arose in the year 2011 when the appellant disallowed payments of per diem allowance for the local support staff of the respondents as billed in the invoices for the month of March, 2010 to December, 2011. Before this period, the requisite per diem allowances to local support staff of the respondent was getting paid from the petitioner's end.

04. It was reckoned by the appellant that the said allowance was, actually, not admissible to the local support staff and, therefore, the payment in that regard was not claimable. This led to meeting of the representatives of the appellant and the respondent which did not materialize to find an amicable settlement on the issue which resulted in reference of the matter by mutual consent to an arbitral tribunal which came to be constituted in 2012 resulting in start of arbitration proceedings to adjudicate the dispute.

05. The grievance of the respondent was that right from the beginning of the very contract work, the appellant had been releasing per diem allowance to the respondent's support staff but later on the appellant took a U-turn by effecting recovery of amount of per diem allowance against the respondent from its bills/invoices.

06. The payment in this regard originally made by the appellant was accounted to be an inadvertent one only to be rectified later. The appellant sought to deny the respondent the allowance payment per diem to local staff on the plea that for the purpose of earning the said allowance the local staff of the respondent has to be a staff travelling from Delhi to Jammu or Srinagar to render services in relation to the said two contracts and further the allowance is admissible only when the local support staff is absent from the home office of the respondent. Thus on the twin grounds the appellant reckoned that the respondent's claim for per diem

allowance payment was not admissible and, therefore, not to be payable.

07. The clause which was the focal point of the dispute is 6.03(i) of General Conditions & Undertakings (***"GCU"*** in short) read with Appendix C to the said two respective contracts. The respondent had claimed that for five years of working on the contract the per diem allowance was being paid to the local support staff of the respondent only to suffer halt from March, 2010 onwards.

08. The appellant's position was that the home office of the respondent was in Delhi and it is only the home office based support staff of the respondent who in case was coming to render services, as such, for the contract work in Jammu & Srinagar that the per diem allowance was admissible whereas the support staff engaged by the respondent was a local staff and, therefore, the said local staff was not admissible to earn per diem allowance for their services at the contract work place.

09. The adjudication before the arbitral tribunal generated following questions for determination as formulated by the arbitral tribunal:-

a. What is meant by the term 'home office' occurring in Section 6.03 (i) of GCU?

b. Whether the local support staff is absent from the home office with the meaning of Section 6.03 (i) of GCU?

c. Whether the expression 'expert' occurring in Note 4 to Appendix C-II or Exhibits C-9 and C-10 includes local-support staff also?

d. Whether per diem allowance to local support staff was paid by inadvertence/mistake?

e. Whether claimant is entitled to the amount claimed in Para 3 of the statement of claims with interest at the rate of 12 percent per annum as per Exhibit C-11 P 1/7 and Exhibit C-11 2/7 and a direction for future payment of the same as per the invoices of the claimant.

10. The arbitral tribunal discerned the moot question in the case centering around the meaning of term "home office" used in clause 6.03 (i) of GCU and the said clause needs to be reproduced hereunder for the sake of its reference and perspective:-

> "Out-of-Pocket expenses shall consist of the following types of expenses, reasonably incurred by the consultant in performance of the Services and as specified in Appendix C:
>
> (i) "A per diem allowance in respect of personnel of the Consultant for every day in which the personnel shall be absent from the home office and, as applicable, outside place of home office for purposes of the Services, at the applicable rates set forth in Appendix C."

11. The arbitral tribunal took due cognizance of the fact that the appellant itself had been making payment to the local support staff of the respondent for a run of five years without any objection

or reservation, as such, the appellant could not take a U-turn at the fag end of the contract period by resort to plea of mistake to deny payment to the respondent. Clause 6.03(i) of GCU in clear and in most unambiguous terms provides that simple absence of the home office for service at the work place entitles the personnel staff of the respondent to per diem allowance.

12. The arbitral tribunal, thus, came to a finding that the appellant committed breach of contract while disallowing the per diem allowance since March, 2010 onwards and acted illegally by resorting to recovery of Rs. 30 lacs in respect of the contract for Design and Supervision Consultancy Services for Jammu Transport Package (DSC III) and also for Design and Supervision Consultancy Services for Srinagar Urban Package (DSC II). The arbitral tribunal came to allow the claims of the respondent of Rs. 17,09,198.64 as being the amount payable in favour of the respondent with effect from March, 2010 to December, 2010 and also for a return of Rs. 30 lacs which was wrongly deducted by the appellant from the invoices with effect from January, 2011 to June, 2011 @ Rs. 5 lacs per invoice. For the Srinagar contract the respondent was held entitled to payment of Rs.9,90,346.82 from the appellant.

13. Thus, an award dated 20.09.2012 for an amount of Rs.56,99,545.00 came to be passed in favour of the respondent against the appellant with a further command to the appellant to

pay per diem in respect of pending invoices as well as for the future invoices during the currency of the contract period. The amount awarded was to bear interest payment @ 12% from the date of reference.

14. Against this award, the appellant came forward with a challenge under section 34 of the J&K Arbitration & Conciliation Act, 1997 preferred before the Single Bench of this Court on file no. AA. No. 37/2012. This challenge of the appellant against the arbitral tribunal award dated 20.09.2012 came to be negated by the Single Judge vide judgment dated 17.11.2021.

15. It is this judgment dated 17.11.2021 of the learned Single Bench adjudicating the challenge of the appellant made under section 34 of the J&K Arbitration & Conciliation Act, 1997, which is impugned in the present appeal under section 37 of the J&K Arbitration & Conciliation Act, 1997.

16. Thus, we are coming across with a situation whereby the arbitral tribunal and the learned Single Bench are on the same page in making understanding of the clause 6.03(i) of GCU. A very salient aspect of the award of the arbitral tribunal is that the appellant, as being a principal party to the contract, had omitted to define 'home office' in the contract for which clause 6.03(i) of GCU was meant for. In absence of an express definition of 'home office' given in the agreement, the parties to the contract, i.e. the appellant and the

respondent right from the inception of the contract work had no issue with the working understanding of “home office” and entitlement of the respondent to earn per diem allowance in respect of its personnel’s absent for each day from the home office for the purposes of services for which the respondent was engaged by the appellant. Thus, for a period of five years, an expression which was understood and acted upon in unison by the parties to the contract came to be reversed by the appellant on its own dictate without any due understanding with the respondent and, therefore, the arbitral tribunal could not be persuaded by the appellant to acknowledge and hold that the import of expression ‘home office’ was to be the one in which the appellant after five years of working of the contract came to realize by saying that what was being done for the five years in running of the contract was a mistake.

17. The appellant in its petition under section 34 of the J&K Arbitration & Conciliation Act, 1997 did not improve its position and kept itself at the same level of plea as was made before the arbitral tribunal which had failed to earn approval in return from the arbitral tribunal. The learned Single Bench was not served with any basis, factual or legal, by the appellant to get persuaded that the findings of the arbitral tribunal are perverse and against the contract so obtaining between the appellant and the respondent.

18. It is trite law that an arbitral award can only be set aside on the grounds enumerated in Section 34 of the Arbitration and Conciliation Act, 1996 [" the Act of 1996"], and on no other grounds. It is equally well settled that where two views are possible on the interpretation of a particular clause of the contract, the Court would not intervene or interfere if the view taken by the arbitrator is plausible and possible view. In the instant case what fell for interpretation was the meaning and connotation of the term 'home office' and the same has been interpreted by the arbitrator to mean and include performance of duties by the personal of the consultant out of their office whether situated in Jammu and Kashmir or Delhi. This interpretation given by the arbitrator to the term 'home office' has been accepted by the learned single Judge.

19. Having regard to the settled legal position on the issue, we do not wish to take a view on the interpretation and meaning of term 'home office' different from the one taken by the learned arbitrator. The arbitrator is a judge of the choice of the parties and its decisions are not to be normally interfered with unless the same suffer from a grave perversity. There should be no doubt that the interpretation put by the arbitrator on the term 'home office' is a plausible interpretation and, therefore, there is no occasion for the Court considering application under Section 34 or an appeal under Section 37 of the Act of 1996 to interfere with such interpretation. The view which we have taken is supported by a judgment of

Hon'ble Supreme Court in case titled "***M/S Dyna Technolgies (P) Ltd Vs. Crompton Greaves Limited"*, 2019 (20) SCC 1**. Para 24 and 25 of the judgment is relevant and are, therefore, set out below:

> *"24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated."*
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> *25. "Moreover, umpteen number of judgments of this Court have categorically held that the Courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is*

implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

(Emphasis Supplied)

20. In the present appeal, the appellant is expecting a judgment of reversal in appeal to upset the arbitral award on the ground that the learned arbitrator as also the learned Single Bench has not construed the term 'home office' as per the true intention of the parties of the contract. In view of the discussion made above, we reiterate that we have not found any legal or factual foundation laid in the appeal so as to persuade us to conclude that the interpretation of the term 'home office' made by the learned arbitrator and upheld by the learned Single Bench suffers from any perversity. Both the parties have understood the term 'home office' and acted upon it all along leaving no scope for this Court to take a view contrary to the one taken by the learned arbitrator and confirmed by the learned Single Bench.

21. We, therefore, ***dismiss*** the appeal filed by the appellant.

(RAHUL BHARTI)
JUDGE

(SANJEEV KUMAR)
JUDGE

JAMMU
15.12.2023
Muneesh

Whether the order is speaking : **Yes**

Whether the order is reportable : **Yes**