

**THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA
AND
THE HON'BLE JUSTICE M.G.PRIYADARSINI**

C.M.A.No.857 OF 2016

JUDGMENT: *(Per Hon'ble Justice Moushumi Bhattacharya)*

The appeal arises out of an impugned order dated 22.04.2016 passed by the Trial Court dismissing the appellants' application for setting aside of the Award dated 14.09.2007 under section 34 of The Arbitration and Conciliation Act, 1996.

2. The appellants herein were the respondents in the arbitration initiated by the respondents in the appeal for various claims in relation to the work done by the respondents in terms of a contract executed between the parties. The work related to construction of a bridge across the Godavari River. The claims included extra work, price escalation, interest and overhead charges. The contract was in accordance with the General Conditions of Contract, 1998 (G.C.C).

3. The Arbitral Tribunal consisting of 3 Senior Officials of the South Central Railways made the Award on 14.09.2007.

The Award allowed most of the claims in favour of the respondent No.1/claimant and refused/partly allowed the other claims.

4. The impugned order dated 22.04.2016 dismissed the appellants' (respondents in the arbitration) application for setting aside the Award on the ground that the appellants (petitioners) before the Trial Court failed to establish that the findings of the Arbitral Tribunal were opposed to public policy. The Trial Court was of the view that the award of interest in favour of the respondent No.1/claimant was correct and in accordance with the power conferred on the Arbitral Tribunal in the Act of 1996. The Trial Court refused to interfere with the findings of the Arbitral Tribunal relying on the limited supervisory powers of the Court under section 34 of the said Act.

5. Learned counsel appearing for the appellants prays for setting aside of the impugned order dismissing the appellants' section 34 application primarily on the award of interest to the respondent No.1/claimant. Counsel relies on section 31(7)(a)(b) of the Act to say that the Arbitral Tribunal could not have awarded *pendente lite* interest contrary to the

arbitration agreement. Counsel relies on Clauses 16(3) and 64.5 of the G.C.C which provides *inter alia* that no interest will be payable on the amounts payable to the Contractor and that no interest shall also be payable on the whole or in part of the money for any period till the date on which the Award is made where the Arbitral Award is for payment of money. Counsel assails the finding that Clauses 16(3) and 64.5 of the G.C.C do not prohibit the Arbitrator from awarding interest.

6. Learned counsel appearing for the respondents, including the respondent No.1/claimant, relies on the findings of the Arbitral Tribunal, particularly with regard to attributing the delay of 28 months in completing the work of the appellants/Railways. Counsel submits that the claimant/Contractor was unable to complete the work within the agreed timelines due to the laches on the part of the Railways. Counsel relies on *K.N. Sthyapalan Vs. State of Kerala*¹ which held that the Arbitrator is vested with the authority to compensate the party with extra costs incurred by it as a result of the failure of the other party to live up to its obligations.

¹ (2007) 13 SCC 43

The law with regard to award of Interest under The Arbitration and Conciliation Act, 1996:

7. Section 31(7) of the Act draws the boundaries within which an Arbitral Tribunal can award interest including the rate at which the interest should be awarded. While section 31(7)(a) of the Act gives exclusive authority to the parties to the arbitration to decide the inclusion of interest, section 31(7)(b) of the Act shifts the focus of that decision to the Award.

8. The 2 clauses of sub-section (7) of section 31 of the Act are however not as easily-severable as appears from the above. The finer nuances are inlaid in the provision itself; which is set out below:

“31. Form and contents of arbitral award.—

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

7 [(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of

interest prevalent on the date of award, from the date of award to the date of payment.”

9. Section 31(7)(b) was inserted into the Act w.e.f. 23.10.2015 substituting the earlier clause (b) which stood as under:

“(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment”.

The only change which was brought to the clause (b) in 2015 is restricted to the rate of interest.

Breaking down Section 31(7)(a) and (b) in terms of Time-frame, Embargo and Discretion.

10. The following points would emerge from a conjoint reading of section 31(7)(a) and (b):

- I. The award of interest pertains to 3 distinct periods for arbitral awards for payment of money.
 - i. Pre-reference i.e., from the date on which the cause of action arose to the date of commencement of the reference.
 - ii. *Pendente lite* i.e., from the date of commencement of the reference to the date of making of the award.

iii. Post-award i.e., from the date of the award to the date of payment.

II. If the parties do not expressly refuse to pay interest or the arbitration agreement is silent on the payment of interest for the pre-reference and *pendente lite* stages, the Arbitral Tribunal can assume jurisdiction to award interest for the aforesaid period on the principal sum and also decide on a reasonable rate of interest on the whole or any part of the principal amount or for the whole or any part of the pre-reference and *pendente lite* periods.

11. The discretion pertaining to the award of interest is as follows:

11.1 Section 31(7)(a) of the Act is completely subject to the agreement between the parties. The parties are fully-entitled to agree or disagree on the inclusion of interest as well as the quantum of interest which is to be paid on the whole or part of the money (being the principal amount). The Arbitral Tribunal has no discretion either with regard to the amount or the rate for the pre-reference/*pendente lite* period with regard to payment of interest. The only restriction in section

31(7)(a) pertains to the time-frame i.e., pre-reference + *pendente lite* which becomes relevant subject to the parties agreeing to payment of interest on the 'sum' i.e., the principal amount.

11.2 On the other hand, section 31(7)(b) of the Act does not rest on any agreement and focuses only on the Award. Thus, the decision of the Arbitral Tribunal on the award of interest on the sum is independent of any decision taken by the parties which is inconsistent with the Award.

11.3 There are however 2 qualifiers in clause (b) of section 31(7) of the Act. The first is that the principal amount/sum will carry an interest of 2% higher than the current rate of interest prevalent on the date of the Award if the Award is silent on the rate or where the Award decides in the affirmative on the payment of interest but does not specify the rate. The rate of 2% interest at a rate higher than the prevalent rate of interest as on the date of the Award will however not apply if the Award fixes a rate of interest.

11.4 The second qualifier is the time-frame. This means that in the case of an Award which is silent on the rate of interest,

the award-holder will be entitled to 2% higher than the prevalent rate of interest as on the date of the Award but only for the post-award period. Moreover, if the Award fixes the rate of interest, that rate will also be limited to the post-award period i.e., from the date of the award to the date of payment.

11.5 In essence, the Arbitral Tribunal has full authority to award interest from the date of the Award till the date of payment, including the rate thereof regardless of any decision to the contrary taken by the parties. The award holder's entitlement to interest at 2% higher than the market rate is also independent of an Award which is silent on the rate of interest.

12. The statutory position which would thus emerge for the stages of pre-reference and pendente lite is solely determined by the parties and the arbitration agreement. The Arbitral Award, however, becomes the guiding document with regard to post-award interest where the Award determines the rate of interest to be awarded and the award holder is entitled to a

rate, which is 2% higher than the prevalent rate if the Award does not fix the rate of post-award interest.

13. The Supreme Court has pronounced several decisions on the import of Section 31(7) of the Act. In *Hyder Consulting (UK) Vs. State of Orissa*² the Supreme Court considered whether post-award interest could be granted on the aggregate of the principal and pre-award interest. The Supreme Court held that the Arbitrator may grant post-award interest on the aggregate of the principal and pre-award interest.

14. In *Union of India Vs. Manraj Enterprises*³, the Supreme Court considered the import of Clause 16(2) of the G.C.C, which stipulated *inter alia* that no interest will be payable on the amounts payable to the Contractor under the contract, and held against the award of interest, *pendente lite* or future interest. *Delhi Airport Metro Express Vs. Delhi Metro Rail Corporation*⁴ dwelt on the words “*unless otherwise agreed by the parties*” under section 31(7)(a) of the Act and relied on

² (2015) 2 SCC (Civ) 38

³ 2022 (2) SCC 331

⁴ 2022 9 SCC 286

*N.S. Nayak Vs. State of Goa*⁵ and paragraph 19 of *Sree Kamatchi Amman Constructions Vs. Railways*⁶ to hold that the discretion with regard to the grant of interest would be available to the Arbitral Tribunal only when there is no agreement to the contrary between the parties.

15. *Morgan Securities vs. Videocon Industries Limited*⁷ clarified the import of section 31(7)(b) of the Act and held that the arbitrator has discretion to award post-award interest on a part of the 'sum' and further that '*unless the award otherwise directs*' in section 31(7)(b) of the Act, only qualifies the rate of interest.

The undisputed facts in the present case:

16. Clause 16 (3) of the G.C.C. under which the agreement dated 06.09.1999 was executed provides that no interest will be payable upon the earnest money and security deposit or amounts payable to the Contractor under the contract save and except Government securities deposited in terms of clause 16(1) of the G.C.C.

⁵ 2003 6 SCC 56

⁶ 2010 8 SCC 767

⁷ 2023 1 SCC 602

17. Clause 64.5 of the G.C.C. provides that no interest shall be payable on the whole or any part of the money, where the Arbitral Award is for payment of money, for any period till the date on which the Award is made.

18. The Award was made on 14.09.2007. The Arbitral Tribunal awarded 12% simple interest from 30.06.2005 i.e., the date of entering the reference, till the date of the Award, i.e., 14.09.2007.

19. The claimant (respondent No.1 in the appeal) claimed interest at 24 % p.a. on all payments from the due dates up to 30.06.2003 amounting to Rs.1,16,89,885/- + future interest on the crystallized amount as on 30.06.2003 up to the date of payment. The Arbitral Tribunal however awarded *pendente lite* interest at 12% p.a. amounting to Rs.17,26,231/-. The amount was hence calculated on the basis of *pendente lite* interest.

20. It appears from the relevant paragraphs of the Award that the Arbitral Tribunal was of the view that Clauses 16(3) and 64.5 of the G.C.C. do not contain a specific bar on the arbitrator from awarding interest where the claimant/

respondent No.1 had suffered trials and tribulations on account of the delays caused by the appellant (respondent before the Tribunal). The Award also records that the delay spanned 40 months as against the agreed 12 months for execution of the work and that the claimant was accordingly entitled to 12% interest from the date of entering into the reference till the date of the Award.

21. The primary factor for award of *pendente lite* interest at 12% is the '*play of natural justice*' (words used in the Award) and the majority view that the claimant must be compensated for the loss suffered on account of the appellants. It is clear from the decision of the Arbitral Tribunal that the Award is silent on post-award interest.

22. Therefore, the questions to be answered by this Court are:

1. Whether the award of *pendente lite* interest at 12% is in accordance with law; and
2. Whether the claimant/respondent No.1 is entitled to post-award interest.

The First Question:

23. Clauses 16(3) and 64.5 of the G.C.C. contain a specific bar in respect of an Arbitral Award directing payment of interest on the whole or any part of the money payable to a Contractor. The embargo is however limited to the pre-reference and *pendente lite* stages (underlined for emphasis). There is no clause in the G.C.C. and the appellant has also not relied on any clause containing a prohibition in the matter of post-award interest. This would mean that the award of *pendente lite* interest at 12% p.a. is contrary to Clauses 16(3) and 64.5 of the G.C.C and would thus be hit by section 31 (7)(a) of the Act, which gives primacy to the parties' intention in the arbitration agreement.

24. The first question is therefore answered in favour of the appellant.

25. In essence, the Arbitral Tribunal was bound by the clauses of the G.C.C. which formed the substratum of the agreement between the parties and consequently, could not award *pendente lite* interest at the rate of 12% p.a. in favour of the respondent No.1/claimant.

26. The award of interest at 12% p.a. from 30.06.2005 till 14.09.2007 is hence contrary to law and is liable to be set aside.

The Second Question:

27. The G.C.C. is silent on post-award interest. The Award also does not provide for post-award interest. The claimant/respondent No.1 would hence be entitled to the statutory benefit of section 31(7)(b) of the Act which provides for interest from the date of the Award to the date of payment on the sum directed to be paid by the Arbitral Tribunal subject to the Award, at 2% higher than the prevalent date. Since the agreement does not prohibit post-award interest and the Award is silent on that issue, the claimant/respondent No.1 would be entitled to an interest at a rate which is 2% higher than the rate of interest prevalent on the date of the Award i.e., on 14.09.2007.

28. To reiterate, the respondent No.1 is statutorily-entitled to claim a rate of interest which is 2% higher than the prevalent rate as on 14.09.2007 for the period commencing from 14.09.2007 till the date on which the appellants actually

pay the calculated amount to the respondent No.1. The second question is hence answered in favour of the respondent for the reason as stated above.

29. The impugned order of the Trial Court dated 22.04.2016 is based on the principle of compensation to a party who had suffered loss on account of the other party. The Trial Court also did not agree with the appellant who sought to make out a case for setting aside of the Award.

30. We do not find any discussion on the issue of interest. The discretion of the Trial Court was broadly on section 34 of the Act and the limited supervisory powers of a Court under that section. The Trial Court was of the view that the Arbitral Tribunal had acted within its power in the matter of award of interest and on equitable grounds.

31. We thus deem it fit to qualify the impugned order in terms of the discussion in the foregoing paragraphs of this judgment.

32. Counsel have also argued on the issue of escalation in prices in respect of the work carried out by the respondent No.1 beyond the original period of contract. This argument

was made in passing without the vigour of the argument on award of interest. The Arbitral Tribunal awarded Rs.25,06,390/- against the respondent No.1's claim of Rs.59,43,379/-. The Trial Court agreed with the award of escalation of price on the principle of compensation.

33. The findings of the Trial Court do not warrant interference as the Arbitral Tribunal is indeed the master of facts and has complete discretion to award amounts in favour of a party and the Court will not substitute its view with that taken by the Arbitrator unless the view is assailable under the grounds available under section 34 of the Act. We also agree that the award on price-escalation and overhead charges is not against public policy and the award on this score was on equitable considerations including on the principle of compensation to a party on account of the loss caused by the action of the other: *K.N. Sathyapalan* (supra).

34. C.M.A.No.857 of 2016, along with all other connected applications, is accordingly disposed of by setting aside the impugned order dated 22.04.2016 but only to the extent of award of interest @ 12% p.a. from 30.06.2005 till 14.09.2007.

35. We hold that the respondent is entitled to post-award interest from the date of the Award i.e., 14.09.2007 till the date of payment of the amount by the appellants to the respondent at a rate which is 2% higher than the prevalent rate of interest on 14.09.2007 in terms of section 31(7)(b) of the Act.

36. Counsel for the respondent has shared a calculation of the post-award interest payable to the respondent with counsel appearing for the appellants.

There shall be no order as to costs.

MOUSHUMI BHATTACHARYA, J

M.G.PRIYADARSINI, J

July 23, 2024

Note: L.R. Copy to be marked
VA/BMS