(2020) 01 CAL CK 0019

In the Calcutta High Court

Case No : Arbitration Petition (AP) No. 256 Of 2006

Batliboi Limited APPELLANT

Vs

Union Of India RESPONDENT

Date of Decision : 07-01-2020

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 31(7)(a)
Code Of Civil Procedure, 1908 — Section 34
Arbitration Act, 1940 — Section 29

Citation : (2020) 01 CAL CK 0019

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Utpal Bose, Soumya Roy Chowdhuri, Debarsi Mallik, Kumarjyoti Tewari

Final Decision : Disposed Of

Judgement

Moushumi Bhattacharya, J

1. The petitioner prays for setting aside of an Award dated 7th September, 2005 on the sole ground of the Arbitrator refusing to grant interest on the sum awarded on account of liquidated damages which had been imposed by the respondent in pursuance of a supply order placed by the respondent on the petitioner for supply, erection and commissioning of eleven horizontal machinery centres with accessories and fixtures for manufacturing of component Piston Extension. The petitioner filed its statement of claim before the learned sole Arbitrator for refund of the amount withheld on account of liquidated damages with interest at 18% thereon from the due date of payment till the date of realization. The Award dated 16th September, 2003 (the earlier Award) was challenged by the respondent and the petitioner also challenged that portion of the Award whereby interest was not granted for the amount awarded in favour of the petitioner. By a common order and judgment dated 13th April, 2005, the Arbitration Petition filed by the respondent was dismissed and A.P. No.6 of 2004

filed by the Petitioner was allowed in part and the Award was set aside only to the extent of the claim of interest being disallowed by the Arbitrator. The matter was remitted to the Arbitrator for determining the question as to whether the petitioner (the claimant before the Arbitrator) was entitled to interest. The portion of the order in relation to the payment of interest is set out below;

"Once the Arbitrator held that there had some money wrongfully withheld by Union on account of the claimant, he should have awarded interest from the date of deduction until it is actually to the claimant unless he assigned strong reasons for such disallowance on this score. I feel that this part of the Award should be set aside and the matter should be remitted back to the Arbitrator for his decision afresh."

2. Pursuant to the direction, the Arbitrator proceeded to pass the Award dated 7th September, 2005, which is presently under challenge, and held that the petitioner is not entitled to any interest by reason of the fact that the petitioner did not incorporate any condition that it will claim interest for any unpaid amount.

3. Mr. Utpal Bose, learned Senior Counsel appearing for the petitioner relies on two decisions, namely, Secretary, Irrigation Department, Governor of Odisha Vs. G.C. Roy reported in AIR 1992 SC 732 and Hindustan Construction Company Limited Vs. State of Jammu and Kashmir reported in AIR 1992 SC 2192, on the point that where the agreement between the parties does not prohibit grant of interest, the Arbitrator shall have the power to award interest pendent lite as in such a case it must be presumed that interest was an implied term of agreement between the parties. Counsel submits that although these two decisions were under the Arbitration Act, 1940, Section 31(7)(a) of the Arbitration and Conciliation Act, 1996, makes it clear that unless the parties have expressed an intention to the contrary by way of the arbitration agreement or otherwise, the Arbitrator has the power to award interest at such rate as the Arbitrator deems reasonable for the whole or in part of the claim and from the pre-reference period till the date of the Award as well as from the date of the Award to the date of payment of the amount awarded.

4. Mr. Kumarjyoti Tewari, learned counsel appearing for the respondent relies on Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager (Works) Palghat reported in (2010)8 SCC 767 and Union of India Vs. Bright Power Projects (India) Pvt. Ltd. reported in (2015)9 SCC 695 and submits that where the parties had agreed that no interest shall be payable, the arbitral Tribunal cannot award interest for the period between the date when the cause of action arose to the date of the Award. Counsel further submits that the two decisions cited in support of grant of interest were under the 1940 Act and hence are not relevant to the present case. It is also submitted that G.C. Roy (AIR 1992 SC 732) had been noticed in Bright Power Projects as specifically being under the provisions of the 1940 Act which was not operative at the time of later decisions of the Supreme Court.

5. The present dispute revolves solely around the Arbitrator's power to grant interest when the terms of the contract are silent with regard to payment of interest. On a comparison of section 31(7)(a) of the 1996 Act and Section 29 of the 1940 Act, it can be said that the new Act has not only given the Arbitral Tribunal the power to award interest at a rate which it deems to be reasonable for the whole or in part of the money awarded but has also invested the Tribunal with the power to decide whether such interest should be awarded for the whole or in part of the period pre-reference, interest pendent lite as well as for the period post-Award till the date of realization of the amount of interest awarded. The 1996 Act has in effect clothed the Arbitrator with the discretion to decide,

(a) the rate at which interest is to be awarded

(b) the awarding of interest for pre-reference stage, i.e., the period between the date on which the cause of action arose and the date on which the Award is made

(c) awarding of interest for the period from the date of the Award to the date of payment.

6. The power of the Arbitrator under the new Act has been made subject to the intention of the parties to the arbitration agreement, namely, whether the parties have expressed an intention contrary to the grant of interest where the Award is for the payment of money. The qualifier to the Arbitrator's power under Section 31(7)(a) is "unless otherwise agreed by the parties" which means that for the Arbitral Tribunal to be denuded of the power to grant interest, there must be a specific bar to payment of interest contained in the terms of the contract. Any other construction of section 31(7)(a) and (b) would result in a construction inconsistent with the changes brought in by the 1996 Act.

7. What needs to be seen in the facts of the present case is whether the terms and conditions of the supply orders placed by the respondent on the petitioner on 3rd April, 1992 and 18th September, 1992 for supply of the designated materials contain any specific prohibition in relation to grant of interest. On a perusal of the supply orders, it is found that the arbitration agreement between the parties is silent on that score. This factual consideration is significant since in both Kamatchi and Bright Power Projects (cited on behalf of the respondent) the specific clauses in the contracts contained the stipulation that no interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor except for Government securities. The clauses therefore contained a clear bar in relation to payment of interest. Both Kamatchi and Bright Power Projects are, therefore, distinguishable on facts.

8. Seen from an another perspective, even if one were to look beyond the statutory mandate of the 1996 Act, interest can also be seen as a measure for compensating in monetary terms for the period during which money has been wrongfully withheld. Hence, on equitable considerations, once the Arbitrator found that a certain sum of money had wrongfully been imposed on account of liquidated damages by the respondent on the petitioner, the Award of the said

sum should have carried an interest component. A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation. This is also in line with Section 34 of The Code of Civil Procedure, 1908 under which a court may order interest at such rate as the court deems reasonable to be paid on the principal sum in a decree from the date of institution of the suit to the date of the decree or for any period prior to the institution of the suit as well as from the date of the decree to the date of the payment. In the view of this court, where the agreement between the parties does not contain a clear prohibition in relation to grant of interest, it must be presumed that interest is an implied term of such an agreement and the Arbitrator has the power to award the same. The ground on which the Arbitrator refused to grant interest, namely that the supply orders did not contain any clause to that effect, is contrary to the mandate of the 1996 Act.

9. In view of the reasons as stated above, the Award dated 7th September, 2005 is set aside and A.P. No.256 of 2006 is disposed of on that basis. The petitioner will be entitled to interest at the rate of 18 per cent for the amount awarded by the Arbitrator. The interest calculated on the amount shall be intimated by the petitioner to the respondent within a period of three weeks from date and the respondent shall pay the said amount of interest to the petitioner within a further period of six weeks thereafter.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.