(2020) 01 DEL CK 0459

In the Delhi High Court

Case No : Execution Petition No. 102 Of 2017

BBEL-MIPL Joint Venture APPELLANT

Vs

National Highways Authority Of India RESPONDENT

Date of Decision : 28-01-2020

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(7), 31(7)(a), 31(7)(b)

Citation : (2020) 01 DEL CK 0459

Hon'ble Judges : Rekha Palli, J

Bench : Single Bench

Advocate : Kiran Suri, Hitendra Nath Rath, Aishwarya Kumar, Dr.Maurya Vijay Chandra

Final Decision : Disposed Of

Judgement

Rekha Palli, J

1. The present petition filed by BBEL-MIPL Joint Venture seeks execution of the award dated 27.02.2015 passed by the learned Arbitral Tribunal.

2. The facts in brief are that the parties entered into a contract on 11.11.2008 for the purpose of strengthening and widening the 2-lane carriage way of select portions of NH-5 falling in the state of Odisha. Upon disputes arising on the issue of price adjustment for bill of quantity (BOQ) items and terms of reimbursement of building and construction workers' welfare cess, the parties were referred to arbitration before an arbitral Tribunal comprising three members. The Decree Holder raised three primary claims before the Tribunal;

Claim-1 related to price adjustment of BOQ items, Claim-2 related to reimbursement of building and construction workers' welfare cess and Claim-3 related to the payment of interest arising therefrom.

3. The Tribunal after considering the effect of Clause 60.1 and 70.1 of the Conditions of Particular Application (COPA) allowed Claim 1 as preferred by the

Decree Holder by observing as under:-

"Question 3. If the Claimant has the entitlement to the Claim-1 based on the above questions whether the Claimant is entitled for the claim as based on the certified IPC's during the contemporaneous period?

68. The AT has decided the Question-2 holding that the Claimant is entitled to the price adjustment on BOQ items. Now as regards the quantification of the claim is concerned the AT has examined the quantification details submitted by the Claimant along with the various IPC's. The consolidated statement showing the value of work done in each of the IPC's from IPC-1 to IPC-25 was submitted in Pgs.5 to 11 of the Quantification details. The Respondent's Engineer also verified these IPC's 1 to 25 covering the period from Feb-2009 to Dec-2012. The claim as set out in the ASOC towards the amount of price adjustment is Rs.25,89,33,475/- inclusive of interest. We deal with the interest part separately. The total price adjustment amount as per the quantification details is Rs.25,36,28,188/- this includes an amount of Rs.3,25,12,777/- as price adjustment towards variations only which has been certified and paid by the respondent.

The balance amount payable therefore is Rs.22,11,15,411/-. After verification of all the IPC's and the price adjustment computation by the Respondent's Engineer it was confirmed by the respondent at the argument stage that the amount payable is Rs.22,12,61,540/-. Since the amount Claimed is verified and found to be a little higher than the Claimed amount, we find that the Claimant is entitled for payment of an amount of Rs.22,11,15,411/- as claimed and also the Claimant has restricted his claim to the claimed amount.

69. Further, the Arbitral Tribunal by virtue of the provisions in the Arbitration Clause 67.3 of COPA has full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any recommendations of the Board related to the Dispute. Accordingly, the Arbitral Tribunal having found that the decision of the Engineer and the Dispute Resolution Board requires to be revised in view of the Answers to Questions 1 & 2 above finds it appropriate to award an amount of Rs.22,11,15,411/- as the principal amount payable under the Contract towards price adjustment of BOQ items based on the certification of IPC's and verification of the Quantification Details."

4. The Tribunal however rejected Claim 2 and therefore proceeded to award interest only qua Claim 1 by directing that post award interest would be payable at the rate of 18% simple interest per annum on the principal amount of Rs.22,11,15,411/-. While awarding interest, the Tribunal specifically directed that post award interest would be payable only on the principal claim amount of Rs.22,11,15,411/- . The relevant extract of the award reads as under:-

"105. The Claim-2 is rejected by the AT hence the question of Award of Interest does not arise. In so far as Claim-1 is concerned the AT has awarded an amount of Rs.22,11,15,411/- towards the principal amount of the claim and the Interest thereon for Rs. 10,74,07,622/- from the date of accrual upto the date of Award. We have already observed that there are only two periods that should be considered for award in consonance with the provisions under Sec.31(7)(a) and 31(7)(b) of the Arbitration and Conciliation Act, 1996. Further, keeping in view the Provisions of the Contract under Clause-60.8 of COPA and also the decision of the Apex Court in case of State of Haryana Vs. S.L. Arora cited earlier, the interest has been awarded till the date of award in the Claim-1. Therefore the Question of considering the 1interest from the date of claim statement to the date of award does not arise.

106. The post-award interest that is to be examined is only on Claim-1. We award an interest at 18% simple interest per annum for the post award period from the date of award till the date of payment only in respect of the principal amount of Rs.2,11,15,411/-. It is made clear that no interest on interest is awarded for the Post-Award Period. Further, in the event the total amount awarded for Claim-1 is paid within four months from the date of award, we award an interest at 15% simple interest per annum on principal amount of Claim-1. Upon failure? to make the payments within four months from the date of award we award the post-award interest at 18% till the date of payment on the principal amount awarded under the Claims."

5. It is the admitted case of the parties that the aforesaid award was unsuccessfully challenged by the Judgment Debtor and the same has attained finality. Even after the objections against the award had been rejected, the Judgment Debtor did not pay the awarded amount to the Decree Holder leading to the filing of the present execution petition on 07.12.2017, wherein the Decree Holder while describing the amount payable by the Judgment Debtor specifically stated as under:-

"In terms of the award dated 27.02.2015 the judgment debtor is required to pay a sum of Rs.22,11,15,411/- towards the principal amount of the claim and the Interest thereon for Rs.10,74,07,622/- from the date of accrual upto the date of Award and 18% simple interest per annum for the post award period i.e. from the date of award till the date of payment only in respect of the principal amount i.e. Rs.22,11,15,411/-."

6. It is also the admitted case of the parties that during the pendency of the present petition, the Judgment Debtor has already paid the principal amount of Rs.22,11,15,411/- due to the Decree Holder from the date of the award till 31.07.2018. It, however, transpires that the actual payments were made to the decree holder only on 20.08.2018. The present petition, therefore, has remained pending on two issues, viz. the payment of interest by the Judgment Debtor for the period between 01.08.2018 to 19.08.2018 and as to whether the Decree Holder was entitled to receive post award interest on the sum of Rs.10,74,07,622/-, which was admittedly the quantum of interest accruing upto the date of the award (pre-award interest).

7. Since the disputes arose on the aspect of the interest accruing to the Decree Holder, this Court had directed both parties to file their respective calculations, which have been filed.

8. By relying on the calculations filed by the Decree Holder, Ms.Kiran Suri, learned senior counsel for the Decree Holder urges that once the Supreme Court, after considering the effect of Section 31(7)(b) of the Arbitration and Conciliation Act, 1996, has in its decision in Hyder Consulting (UK) Ltd. vs. State of Orissa through Chief Engineer (2015) 2 SCC 189 clarified that the pre-award interest is to be considered as a part of the 'sum' payable under the award and, therefore, post award interest can be granted on the amount quantified as pre award interest and the same cannot be held to be a claim for 'interest on interest'. She, therefore, contends that merely because the Tribunal observed that grant of interest on the sum of Rs.10,74,07,622/-, being the quantum of pre-award interest, would amount to levying interest on interest, the Decree Holder cannot be deprived of interest on this amount of Rs. 10,74,07,622/-, when the Supreme Court has specifically clarified that this amount of pre-award interest would be treated as the sum awarded under the arbitral award and, therefore, in the light of Section 31(7) of the Act, there was no bar on awarding interest on the said amount.

9. By further relying on the decisions of the Supreme Court in Sri Vidya Sagar vs. Smt. Sudesh Kumari & Ors. (1976) 1 SCC 115 and a decision of this Court in Sunagro Seed Pvt. Ltd. vs. National Seeds Corporation Ltd., MANU/DE/4695/2018, Ms.Suri further contends that once the Tribunal had failed to consider the correct legal position, this Court can correct this direction and is not precluded from taking cognizance of the present position of law on this aspect, and lend an interpretation to the award so as to render it consonant with the present legal position. She, therefore, prays that the post award interest accruing to the Decree Holder be calculated on the aggregate of the principal sum and pre-award interest and, resultantly, the Judgment Debtor be directed to pay post award interest at the rate of 18% by also including the aforesaid sum of Rs.10,74,07,622/-, instead of calculating the same solely on the principal sum of the award.

10. On the other hand, Dr.Maurya Vijay Chandra, learned counsel appearing for the Judgment Debtor submits that all directions made under the award have been fully complied with and any interest payable to the Decree Holder under the award has been duly paid in terms of the specific directions given therein. He submits that merely because it may be permissible in law to grant post interest on the pre-award interest, cannot imply that the Arbitral Tribunal in fact granted post interest on the pre-award interest as well. He submits that there is no ambiguity in the award which may require this Court to step in and exercise its powers to read the award in the manner urged by the Decree Holder.

11. Dr.Maurya, however, submits that even though post interest has accrued in favour of the Decree Holder on the principal sum of Rs.22,11,15,411/- from the

period between 01.08.2018 to 19.08.2018 when the awarded amount remained unpaid, the Decree Holder had verbally assured the Judgement Debtor of its decision to waive the same. He, therefore, prays that this verbal assurance of the Decree Holder be honoured and that, since the award was fully implemented in its letter and spirit by the Judgment Debtor, the present petition be dismissed.

12. I have considered the submissions of the learned counsel for the parties and find no merit in any of the contentions of the Decree Holder. While there is merit in Ms.Suri's contention that the decision of the Supreme Court in Hyder Consulting (UK) Ltd. (supra) leaves no manner of doubt that when an award for payment of money provides that post award interest shall be calculated on the awarded amount, interest would be payable not only on the principal claim amount, but also on the quantum of interest accruing thereon till the date of the award; the fact remains that in the present case, the award specifically directs payment of interest at the rate of 18% or 15% only on the principal amount of Rs.22,11,15,411/-. In my view merely because a statutory provision or the decision of the Supreme Court permits grant of post award interest on the quantum of pre-award interest does not imply that this Court should substitute the plain words employed by the Tribunal in its award and grant interest on the amount, which the Tribunal never intended to grant. The very fact that the Tribunal specifically directed grant of post award interest only on a sum of Rs. 22,11,15,411/- is a clear indicator that the Tribunal did no intend to grant any post award interest on the sum of Rs. 10,74,07,622/-. If the Tribunal intended grant of post award interest on the aggregate of pre-award and principal sum, it would have made an express stipulation to that effect in the award itself. In these circumstances, there is absolutely no scope for this Court in the course of execution proceedings to embark on such an exercise, when the sum on which post award interest is payable has been specified by the Tribunal in unambiguous terms.

13. Reliance placed by the Decree Holder on the decisions in Sunagro Seed Pvt. Ltd. (supra) and Vidya Sagar (supra) is, in my view, wholly misplaced. The decision in Vidya Sagar (supra) has been relied upon to contend that this Court can take cognizance of the change in law and other equitable considerations at the time of executing the decree, which contention is completely inapplicable here as this precedent holds ground only in circumstances wherein the award is silent or ambiguous on the amount on which the post award interest is directed to be paid. Whereas in Sunagro (supra), this Court was confronted with a dispute regarding the date and rate of interest payable by the Judgment Debtor in an award for payment of money, when the award was silent in this regard, which is not applicable in the present case for the reason that the award provides express directions in this regard.

14. Before I conclude I may notice that, in fact, even the Decree Holder while filing the present execution petition had correctly read the award to mean that post award interest was payable only on the principal claim amount and not on

the pre-award interest of Rs. 10,74,07,622/-. The averments made by the Decree Holder in this regard have already been noted in para 5 hereinabove. It appears that after receiving the amount in accordance with the award, the Decree Holder is now making an attempt to claim an amount, which it was always aware was not payable under the award.

15. However, there is merit in the Decree Holder's claim that the payment of the awarded amount having been actually made on 20.08.2018 by calculating interest till 31.07.2018, the Judgment Debtor is liable to pay further interest at the rate of 18% on the sum of Rs.22,11,15,411/- for the period between 01.08.2018 and 19.08.2018.

16. For the aforesaid reasons, the Decree Holder's claim for post award interest on the sum of Rs.10,74,07,622/- is rejected. The Judgment Debtor is, however, held liable to pay interest at the rate of 18% on Rs.22,11,15,411/- for the period between 01.08.2018 and 19.08.2018, when the award amount remained paid. The Judgment Debtor is directed to make payment in terms of this order within a period of four weeks, failing which the said amount shall carry interest at the rate of 18% reckoned from today.

17. The execution petition is disposed of in the aforesaid terms.