
(2014) 02 DEL CK 0285

In the Delhi High Court

Case No : FAO No. 278/2011 and CM No. 11647/11

Delhi Development Authority

APPELLANT

Vs

M.L. Mahajan

RESPONDENT

Date of Decision : 24-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, Order 47 Rule 47, 114, 144, 151

Citation : (2014) 02 DEL CK 0285

Hon'ble Judges : Valmiki J. Mehta, J

Bench : Single Bench

Advocate : Ajay Verma, Advocates for the Appellant; Sandeep Sharma, Advocates for the Respondent

Judgement

Valmiki J. Mehta, J.—This first appeal is filed against the order of the execution court dated 23.3.2011. Though the appeal is titled as FAO, really the appeal will be an EFA in view of the fact that the impugned decision would have been passed under Order 47 CPC. Registry to re-number this appeal as an EFA.

2. The execution court by the impugned order has interpreted the order passed in FAO(OS) 298/1998 by the Division Bench of this Court on 9.10.2009. The Division Bench had reduced interest to 9% per annum simple from 15% per annum simple on the claims which were allowed by the Award and additionally for Claim no.4 which was allowed by the Division Bench in the FAO(OS) No. 298/98 filed by the respondent herein. FAO(OS) 298/1998 was filed by the respondent herein (appellant in the appeal) against the judgment of the learned Single Judge of this Court dated 23.9.1998 accepting the objections of the appellant herein (objector before the learned Single Judge) and by judgment the learned Single Judge had set aside the Award to the extent of Claim no.4 which was allowed by the arbitrator.

3. Since there are many facts and many orders, let me state them herein chronologically and in seriatim so that the issue before this Court can be

appreciated. Respondent herein was the claimant in the arbitration proceedings. Arbitration proceedings concluded by the arbitrator passing the Award dated 10.4.1991. Most of the claims of the respondent herein (claimant in the arbitration) were allowed including the claim for pre- arbitration period and pendente lite arbitration period interest. Claim no.4 before the arbitrator pertained to claim of Rs.3,94,737/- on account of the work done beyond stipulated period due to prolongation of the contract by the appellant herein. In effect, claim was for damages on account of delay caused by the appellant herein in the performance of the contract. Arbitrator awarded a sum of Rs.2,64,688/- under this claim. Arbitrator with respect to Claim no.8, which was for interest, allowed the same by granting interest at 18% per annum on the claims allowed till the date of the Award and thereafter till the decree of the Court by which Award was to be made rule of the Court. Appellant herein filed objections to the Award which were disposed of by the judgment of the learned Single Judge of this Court dated 23.9.1998. Learned Single Judge set aside the Award only limited to the extent of arbitrator awarding the Claim no.4 in favour of the respondent herein. Respondent herein therefore filed an appeal against the judgment of the learned Single Judge dated 23.9.1998 and which appeal was registered as FAO (OS) 298/1998. This appeal was allowed by a Division Bench of this Court and Claim No. 4 granted by the Award was restored in favour of the respondent herein. While allowing the appeal from the judgment dated 23.9.1998, the Division Bench of this Court observed that the appeal is allowed to the extent of Claim no.4, and which was the operative portion of the judgment. Appellant herein, and which was the respondent before the Division Bench, filed a review petition claiming reduction in rate of interest. Since there is dispute as to the interpretation of the language of that application, I reproduce the said application in totality and which reads as under:-

"APPLICATION ON BEHALF OF THE RESPONDENT DELHI DEVELOPMENT AUTHORITY UNDER SECTION 114 FOR REVIEW OF THE ORDER AND SECTION 151 OF CPC FOR CLARIFICATION OF THE ORDER DATED 25.5.2009.

MOST RESPECTFULLY SHOWETH:

1. That the Petitioner had filed the above noted appeal only with respect to Claim No. 4 by virtue of which the Arbitrator had awarded a sum of Rs.264688/- which was set aside by the Ld. Single Judge. The said appeal was argued and by order dated 25.5.2009 this Hon''ble Court was pleased to set aside the judgment qua Claim No. 4 and held that the Appellant was entitled to the said amount in Claim No. 4.

2. The award is dated 10.4.2992 and the decision of the Learned Single Judge whereby the award was set qua Claim No. 4 is dated 23.9.1998. The Learned Arbitrator had awarded interest @ 18% per annum w.e.f. 11.04.1985 to 14.02.1990 and further interest @ 18% per annum from date of award till date of payment. Interest @ 15% per annum was awarded by the Ld. Single Judge from date of decree till realization.

3. That the Hon"ble Court is silent with respect to the grant of interest. However, the Appellant is claiming interest on the said claim w.e.f. 1985 till date of decree @ 18% per annum and thereafter from the date of decree at 15% p.a. Copy of the letter dated 5.6.2009 is annexed as Annexure R-1 to the application.

4. It is humbly submitted that the Appellant is not entitled to any interest on the said amount as the award had earlier been set aside by the Ld. Single Judge and grant of interest for the entire period @ 18% p.a. would cause loss to the respondent authority.

5. That the claim for damages of Rs.254688/- under Claim No. 4 has been worked out as Rs.30,19,109/- if interest is added to the entire period.

6. That the application is bonafide and the Respondent would suffer irreparably in case the Hon"ble Court does not clarify the judgment with respect to interest.

Moreover, the interest is not liable to be granted from the date of decree till the disposal of the present appeal as the award qua this Claim had been set aside.

It is, therefore, most respectfully prayed that this Hon"ble Court may be clarify the order dated 25.5.2009 and to direct that the Appellant is not entitled to any interest on Claim No. 4 w.e.f. 1985 till date of decree.

Any other order or relief as this Hon"ble Court deems fit and proper may be passed in the facts and circumstances of the present case.

Respondent"

4. All I can say that the pleading as reproduced above in the review application is symptomatic of the competence of few of the advocates who represent governmental authorities such as the Delhi Development Authority and who take very little pain in properly drafting of pleadings. However, a review petition as a whole, and especially para-4 thereof, leaves no manner of doubt that the interest for the entire period at 18% per annum simple was also questioned by the review petitioner (appellant herein) though in the relief clause reference is only to Claim no.4. In any case, this aspect as to whether there existed a specific prayer with respect to reduction of interest to 9% qua all the claims, or was only with respect to Claim no.4, the same will become clear that it was for all claims and not only for Claim no.4 from the order passed in the review petition by the Division Bench on 9.10.2009 and which reads as under:-

"While disposing of the appeal against the judgment of the learned Single Judge dated 23rd September, 1998, this Court had set aside the impugned judgment qua Claim No. 4 and held that the appellant is entitled to claim No. 4 and the amount ordered therein in the sum of Rs.2,64,688/-. The learned Single Judge had awarded interest @ 15% per annum to the appellant. Consequently, the review application was filed by the respondent on the issue of award of interest and quantum of interest.

In so far as award of interest is concerned, the fact that we reversed the

judgment of the learned Single Judge, would not enure to the benefit of the respondent/review petitioner as in law it is settled position of law and which has also been declared by the Division Bench in various cases. Thus, the reversal or affirmation makes no difference. However, in so far as quantum of interest is concerned, this Court has been awarding reduced interest in various cases in accordance with the position of law as held by the Hon"ble Supreme Court in the recent cases of Rajendra Construction Company Vs. Maharashtra Housing and Area Development Authority and Others, , McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, , Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd., and Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, .

Shri Amit Mahajan, the learned counsel for the appellant states that the respondent DDA could not have challenged the award on the quantum of interest. We are of the view that on principle this Court acting as an appellate court has ample power to modify the judgment under appeal as also the Award by virtue of the provisions of Order 41, Rule 33 of the CPC, which reads as follows:

"33. Power of Court of Appeal ? The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

[Provided that the Appellate shall not make any order under section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order]"

Taking into account the fact that the DDA funds are public funds and also the position as held by the Hon"ble Supreme Court in the above cases, this Court is satisfied that the judgment dated 25th May 2009 deserves to be modified to the extent that the appeal is allowed but the quantum of interest payable by the respondent is reduced to 9% per annum from 15% per annum on the claims allowed by the Award and for the claim No. 4 as allowed by us.

With the aforesaid observations and modifications, the review application along with CM 14061/2009 stands disposed of."

5. There are three significant aspects which bear note in the above order dated 9.10.2009 and which are:-

(i) The appellant in the appeal, and the non-applicant in the review petition,

objected that the review petitioner/appellant herein could not challenge the quantum of interest awarded.

(ii) The Division Bench of this Court while referring to argument urged on behalf of the non-applicant in the review petition, respondent herein, dealt with the same by reference to the exhaustive and wide powers of the appellate court provided by Order 41 Rule 33 CPC.

(iii) In the second last para of the order, the Division Bench has categorically stated that interest is reduced to 9% on the claims and not on claim i.e. the expression is found in plural and not singular. Any doubt in this regard that the expression is used in plural and not singular becomes clear from the fact that the last line of this second last para ends by stating that the interest is not only for the claims of the Award but also for Claim no. 4 as allowed by the judgment dated 25.5.2009.

6. For the completion of narration I must note that in the second last line of the second last para of the order in the review petition dated 9.10.2009; reduction of interest is wrongly mentioned from 15% to 9% whereas it should be from 18% to 9%, however, that the interest is talked with respect to all claims including claim no.4 becomes clear from the words of the said paragraph which immediately follows mentioning of the rate of interest.

7. By the impugned order the executing court has held that reduction of interest to 9% is only for Claim no. 4 and not for all other claims and this is what is challenged before this Court in this EFA. The question is did the Division Bench by the order dated 9.10.2009 reduce the interest for all claims or did so only for Claim no.4.

8. In my opinion, the language of the order dated 9.10.2009; notwithstanding the typing mistake of stating reduction is to 9% from 15% instead of 18%; leaves no manner of doubt that interest was reduced to 9% with respect to all claims as also for claim no.4 which was allowed by the judgment dated 25.5.2009 in FAO (OS) 298/1998 which was in favour of the respondent herein. I cannot agree with the argument urged on behalf of the respondent made before me that the very fact that the order of the Division Bench dated 9.10.2009 uses the expression 15%, therefore, the Division Bench was only dealing with interest of Claim no.4 inasmuch as that the Division Bench was dealing with all claims including Claim no.4 becomes clear from the next few words appearing immediately after mentioning of interest wrongly at 15%. Also, as already noted above, respondent herein and the appellant in the appeal, and the non-applicant in the review petition, argued specifically with respect to disentitlement of the review petitioner to challenge the Award on the quantum of interest, however, this Court exercised the powers in terms of the provision of Order 41 Rule 33 CPC, and the object of which is to ensure that appellate court while passing a judgment in appeal has complete entitlement to bring about modifications of the judgment which is in appeal, so as to bring about complete justice.

9. If the court was not dealing with claims other than claim no.4, then there was no need in the order to invoke and apply the provision of Order 41 Rule 33 CPC while allowing the review petition by the order dated 9.10.2009.

10. Learned counsel for the respondent before me also sought to argue that this Court could not have exercised the powers under Order 41 Rule 33 CPC as the object of Order 41 Rule 33 CPC as per the respondent does not entitle changing of the rate of interest granted by the Award in facts of the case such as the present, however, I do not find any merit whatsoever in the argument not only for the reason that Order 41 Rule 33 CPC squarely applies, but also because if according to the respondent, the Division Bench wrongly relied upon the provision of Order 41 Rule 33 CPC, then, the respondent herein being aggrieved by that order dated 9.10.2009 ought to have challenged the order dated 9.10.2009 further, but which was not done.

11. In view of the above, the appeal is allowed. The impugned order is set aside. Respondent will be entitled to interest only at 9% per annum simple for pre-arbitration period and pendente lite till passing of the Award, and thereafter, at the same rate till making the Award rule of the Court and also further till payment. If as a result of allowing of this appeal, appellant is found to have paid excess amount to the respondent, in the execution proceedings the appellant can invoke and seek restitution as per Section 144 CPC. Parties are left to bear their own costs.