(2013) 09 MAD CK 0295

In the Madras High Court

Case No : Original Side Appeal No. 279 of 2010 and M.P. No. 1 of 2011

Ennore Port Limited — APPELLANT

Vs

M/s H.C.C. Van Oord ACZ Joint Venture — RESPONDENT

Date of Decision : 20-09-2013

Acts Referred:

Citation : (2013) 3 MadWN(Civil) 727

Hon'ble Judges : Mr. N. Paul Vasanthakumar and Mr. M.M. Sundresh, JJ.

Bench : Division Bench

Advocate : Mr. Ravindran, SC for Mr. Krishna Ravindran, Advocate, for the Appellant; Mr. K. Subramani, SC for Mr. D. Balaraman, Advocate, for the Respondents

Final Decision : Disposed Off

Judgement

Mr. M.M. Sundresh, J.—This Appeal has been preferred against the dismissal order dated 14.8.2009 passed in O.P. No. 487 of 2008, which, in turn, was filed challenging the Award dated 22.5.2008 passed by the Arbitral Tribunal in favour of the First Respondent/Claimant.

2. Facts in brief:-

(a) Pursuant to the proposal of the Appellant to construct two Breakwaters, a contract was entered into between the Chennai Port Trust on behalf of the Appellant and the First Respondent M/s HCC Van Oord ACZ Joint Venture on 22.8.1997. A Memorandum of Understanding was also entered into between the parties on 30.3.2002 subsequent to which, the work was duly completed by the First Respondent. Pursuant to the completion of work, Taking Over Certificates as well as Defect Liability Certificates were issued by the Engineer concerned. While the First Respondent / Claimed due payment, the Appellant contended that already excess payments have been made which resulted in the Respondent invoking the Arbitration Clause and the matter went to the learned Arbitrator.

(b) The learned Arbitrator, after considering the entire materials placed before him, was pleased to pass an Award in favour of the First Respondent with a further direction to the Appellant to pay 12% interest for the prereference period as well as pendente lite period and 15% interest from the date of the Award till the date of actual payment. Challenging the Award passed, the Appellant filed a petition in O.P. No. 487 of 2008.

(c) Before the learned single Judge, two contentions were raised by the learned counsel for the Appellant on the grounds of limitation and percentage of interest awarded. The learned single Judge, by order dated 14.8.2009, was pleased to confirm the Award passed by the learned Arbitrator. Feeling aggrieved, the Appellant has come before us.

(d) During the pendency of the Appeal, the parties were advised by the Co-ordinate Bench to settle the dispute regarding the interest component. Even though there was an agreement on the principal amount awarded, no settlement could be arrived at on the payment of interest. Thereafter, the matter was directed to be posted before this Court for hearing.

3. Even before us, learned Senior Counsel appearing for both sides made submissions only on the percentage of interest payable. Therefore, the only issue to be considered in this Appeal is with regard to the appropriate percentage of interest that the Appellant is liable to pay.

4. Learned Senior Counsel appearing for the Appellant would submit that taking into consideration the fact that the Appellant is a statutory Corporation, the Award passed by the Arbitral Tribunal, as confirmed by the learned single Judge, requires a modification insofar as the interest portion is concerned and awarding of 15% interest per annum during the pendency of the proceedings and thereafter, is excessive. According to the learned Senior Counsel, the learned single Judge did not take into consideration all the relevant materials for fixing the interest payable. He also submitted that on an earlier occasion, between the same parties, this Court has fixed 9% interest per annum on the Award amount payable. In support of his contention, the learned Senior Counsel placed reliance upon the following judgments:-

1. Mcdermott International Inc. v. Burn Standard Co. Ltd. And Others, (2006) 11 SCC 181;

2. Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and Another, (2007) 2 SCC 720;

3. Sayeed Ahmed and Co. v. State of Uttar Pradesh and Others, (2009) 12 SCC 26;

4. MSK Projects India (JV) Ltd. v. State of Rajasthan and Another, (2011) 10 SCC 573;

5. Nand Contractors and Engineers v. Northern Coalfield Limited and Another, (2012) 9 SCC 494.

5. Per contra, learned Senior Counsel appearing for the First Respondent would submit that while considering the issue of fixation of interest, this Court will have to take into account the circumstances surrounding the case. As far the present case is concerned, according to the learned Senior Counsel, the First Respondent has completed the work and there is no bar in the agreement entered into between the parties, to the effect that no interest can be levied on any amount due. The completion of the work was duly certified by the Officers of the Appellant. The learned Arbitrator has taken into consideration all the materials before awarding the interest. He would further submit that even though the First Respondent is entitled for more interest, the learned single Judge, after considering the entire materials and taking into consideration Sub-Clause 60.8 of the Conditions of Particular Application, has rightly fixed the payment of interest. Even for the advances made by the Appellant as against the hypothecation of equipment and machinery, the First Respondent was fixed with liability at 18% per annum and, therefore, it is not open to the Appellant to contend to the contrary. It is also his submission that the order passed by a Hon''ble Division Bench in O.S.A. No. 165 of 2010 is not applicable to the facts of the case on hand and a Review Application, which has been filed as against the same is pending consideration. In support of his contention, learned Senior Counsel appearing for the First Respondent placed reliance on the following judgments:-

1.Secretary, Irrigation Department, Government of Orissa and Others v. Raghunath Mohapatra, (1992) 1 SCC 508;

2. Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd., (2005) 6 SCC 462;

3. Msk Projects India (JV) Ltd. v. State of Rajasthan and Another, (2011) 10 SCC 573;

4. Tehri Hydro Development Corporation Ltd. and Another v. Jai Prakash Associates Ltd., (2012) 12 SCC 10;

5. Huda v. Raj Singh Rana, (2009) 17 SCC 199;

6. State of Rajasthan v. Ferro Concrete Construction Pvt. Ltd., (2009) 12 SCC 1;

7. State of Haryana v. S.L. Arora and Company, (2010) 3 SCC 690;

6. Awarding of interest to a party by the Arbitral Tribunal is governed by Sub-Sections 31(7)(a) and (b) of the Arbitration and Conciliation Act, 1996 [for short, ''the Act'']. While Sub-Section 31(7)(a) deals with pre-award interest as well as pendente lite period, Sub-Section 31(7)(b) deals with post-award interest. While awarding interest under Sub-Section 31(7)(a), the Agreement between the parties would govern the same. In the absence of any agreement, the Arbitral Tribunal will have to exercise its discretion based upon the materials available before it.

7. In the case on hand, both the Arbitral Tribunal and the learned Single Judge have gone into the facts and law in extenso and considered the materials

available before them, before coming to the conclusion that awarding of 12% interest per annum to the pre-reference period as well as pendente lite period is just and reasonable. Both the learned Arbitrator as well as the learned single Judge have considered the applicability of Sub-Clause 60.8 of the Conditions of Particular Application as well as the attending circumstances including the Certification for completion of work by the Engineer concerned. Admittedly, the work was completed by the First Respondent. Furthermore, in respect of the advances made by Appellant as against the hypothecation of equipment and machinery, the First Respondent was made liable to pay interest at the rate of 18% per annum. Therefore, taking into consideration the above said facts, 12% interest per annum was awarded by the learned Arbitrator and the same was confirmed by the learned single Judge. In such view of the matter, we do not find any reason to interfere with the well reasoned orders passed by the learned Arbitrator as well as the learned single Judge.

8. Considering the scope and ambit of Sub- Sections 31(7)(a) and (b) of the Act, the Hon''ble Apex Court in State of Haryana v. S.L. Arora and Company, 2013 (3) MWN (Civil) 309 (SC) : 2010 (3) SCC 690 (cited supra), has held as follows:-

"Para 23: "The difference between clauses (a) and (b) of section 31(7) of the Act may conveniently be noted at this stage. They are :

(i) Clause (a) relates to pre-award period and clause (b) relates to post-award period. The contract binds and prevails in regard to interest during the pre-award period. The contract has no application in regard to interest during the post-award period.

(ii) Clause (a) gives discretion to the Arbitral Tribunal in regard to the rate, the period, the quantum (principal which is to be subjected to interest) when awarding interest. But such discretion is always subject to the contract between the parties. Clause (b) also gives discretion to the Arbitral Tribunal to award interest for the post-award period but that discretion is not subject to any contract; and if that discretion is not exercised by the arbitral Tribunal, then the statute steps in and mandates payment of interest, at the specified rate of 18% per annum for the post- award period.

(iii) While clause (a) gives the parties an option to contract out of interest, no such option is available in regard to the post-award period.

In a nutshell, in regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract as per discretion of the Arbitral Tribunal. On the other hand, in regard to the post-award period, interest is payable as per the discretion of the Arbitral Tribunal and in the absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum.

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Para 24.2: The authority of the arbitral tribunals to award interest under section 31(7)(a) is subject to the contract between the parties and the contract will prevail over the provisions of section 31(7)(a) of the Act. Where the contract between the parties contains a provision relating to, or regulating or prohibiting interest, the entitlement of a party to the contract to interest for the period between the date on which the cause of action arose and the date on which the award is made, will be governed by the provisions of the contract, and the arbitral tribunal will have to grant or refuse interest, strictly in accordance with the contract. The arbitral tribunals cannot ignore the contract between the parties, while dealing with or awarding pre-award interest. Where the contract does not prohibit award of interest, and where the arbitral award is for payment of money, the arbitral tribunal can award interest in accordance with Section 31(7)(a) of the Act, subject to any term regarding interest in the contract.

Para 24.5: The Act does away with the distinction and differentiation among the four interest bearing periods, that is, pre-reference period, pendente lite period, post-award period and post-decree period. Though a dividing line has been maintained between pre-award and post-award periods, the interest bearing period can now be a single continuous period the outer limits being the date on which the cause of action arose and the date of payment, subject however to the discretion of the arbitral tribunal to restrict the interest to such period as it deems fit.

Para 24.6 : Clause (b) of Section 31(7) is intended to ensure prompt payment by the award-debtor once the award is made. The said clause provides that the "sum directed to be paid by an arbitral award" shall carry interest at the rate of 18% per annum from the date of award to the date of payment if the award does not provide otherwise in regard to the interest from the date of the award. This makes it clear that if the award grants interest at a specified rate up to the date of payment, or specifies the rate of interest payable from the date of award till date of payment, or if the award specifically refused interest, clause (b) of Section 31 will not come into play. But if the award is silent in regard to the interest from the date of award, or does not specify the rate of interest from the date of award, then the party in whose favour an award for money has been made, will be entitled to interest at 18% per annum from the date of award. He may claim the said amount in execution even though there is no reference to any post award interest in the award. Even if the pre-award interest is at much lower rate, if the award is silent in regard to postaward interest, the claimant will be entitled to post- award interest at the higher rate of 18% per annum. The higher rate of interest is provided in clause (b) with the deliberate intent of discouraging award-debtors from adopting dilatory tactics and to persuade them to comply with the award."

9. Therefore, in the light of the pronouncement of the Hon''ble Apex Court, we are of the view that the learned Arbitrator has correctly awarded interest by exercising his power under Section 31(7)(a) of the Act. We are also of the view

that the judgment rendered in O.S.A. No. 165 of 2010 dated 18.10.2010 cannot be a bar to confirm the Award passed in the case on hand since the judgment of the Hon''ble Apex Court cited supra has not been taken into account. Furthermore, in the said order, the learned Arbitrator has exercised his power under Section 33 of the Act, which is not the position before us.

10. The only other question to be considered is the appropriate interest that is required to be fastened on the appellant, on the award amount, till the date of actual payment. As discussed earlier, under Section 31(7)(b) of the Act, an Arbitral Award passed shall carry interest at the rate of 18% per annum from the date of such Award till the date of payment. This provision has been enacted so as to make a prompt payment by a party against whom an Award is passed. However, it is not as if in all cases, interest of 18% will have to be awarded automatically. The parameter to be considered for exercising such a power to fix an interest less than 18% has to be based upon the prevailing interest rate.

11. Considering the above said issue, the Hon''ble Apex Court in Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and Another, 2007 (2) SCC 720 (cited supra) has held in paragraph 11 as follows:-

"Para 11: "On the merits of the claims made by the contractor we find from the impugned Award dated 25.6.2000 that it contains several Heads. The Arbitrator has meticulously examined the claims of the contractor under each separate Heads. We do not see any reason to interfere except on the rates of interest and on the quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the Award. Here also we may add that we do not wish to interfere with the Award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the Arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%."

12. The judgment of the Hon''ble Apex Court was quoted with approval in a subsequent pronouncement in MSK Projects India (JV) Ltd. v. State of Rajasthan and Another, 2011 (10) SCC 573 (cited supra). In the said judgment, the Hon''ble Supreme Court, after quoting the earlier decision, was pleased to fix the interest payable at 10% under Section 31(7)(b) of the Act. Therefore, applying the said ratio, we are of the view that the order passed by the Arbitral Tribunal as confirmed by the learned single Judge, would require a modification to the effect that instead of 15% interest awarded, it should be 10% per annum.

13. Accordingly, this Appeal is allowed in respect of interest awarded under Section 31(7)(b) of the Act, covering the period from the date of Award to that of actual payment, by fixing the interest payable at 10% per annum instead of 15%.

14. The Appeal is allowed in part with the above modification and the Award passed is set aside to the extent indicated above. No costs. Consequently, connected Miscellaneous Petition is closed.