

(2010) 07 OHC CK 0031

In the Orissa High Court

Case No : Writ Petition (C) No. 5302 of 2009

Governor for the State of Orissa

APPELLANT

Vs

Hyder Consulting Limited

RESPONDENT

Date of Decision : 28-07-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 36
Civil Procedure Code, 1908 (CPC) — Section 11, 151, 47

Citation : (2011) 111 CLT 178 : (2010) 2 OLR 944

Hon'ble Judges : V. Gopala Gowda, C.J;S.C. Parija, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.C. Parija, J.—This writ petition by the State of Orissa is directed against the order dated 19.02.2009 passed by the District Judge, Khurda, Bhubaneswar, in I.A. No. 124 of 2008, arising out of Execution Proceeding No. 17 of 2006, for realization of Rs. 3,81,67,227/- and the order of attachment dated 26.03.2009 issued by the executing Court.

2. The brief facts of the case, as detailed in the writ petition, are that the decree holder-opposite party had filed Execution Case No. 17 of 2006 before the District Judge, Khurda, Bhubaneswar, u/s 36 of the Arbitration and Conciliation Act, 1996 ("the Act" for short), for execution of the award passed by the Arbitral Tribunal dated 26.04.2000. In the said award, the Arbitral Tribunal directed the Petitioner to pay the awarded amount of Rs. 2,30,59,801 = 61. The Arbitral Tribunal also awarded interest " 12% per annum on the aforesaid principal amount of Rs. 2,30,59,801 =61 for the period of arbitration i.e. from 05.07.1999 till 26.04.2000. The Arbitral Tribunal further directed the Petitioner to pay the aforesaid amount within ninety days from the date of receipt of the award, failing which, the Petitioner is liable to pay interest " 18% per annum with effect from the date of award till the date of actual payment. The Arbitral Tribunal also awarded cost of Rs. 9,00,000/- to the opposite party.

3. The opposite party in the execution petition (Execution Case No. 17 of 2006), had claimed Rs. 8,22,15,993/- on different heads. According to the opposite party, the said claimed amount was arrived at by calculating 18% compound interest from 26.04.2000 to 26.07.2006, i.e. six years three months, as per the terms of the award.

4. During the pendency of the execution proceeding, the Petitioner calculated the claim amount " 18% simple interest per annum on the awarded amount as per the award and accordingly paid a sum of Rs. 7,80,62,000/-on 22.2.2008, which was duly acknowledged by the opposite party. After receiving the aforesaid amount, the opposite party filed a memo before the executing Court for further payment of the balance amount of Rs. 3,81,67,227/-. The Petitioner filed its objection to the aforesaid calculation of claim made by the opposite party. The executing Court, after hearing the parties, by order dated 22.4.2008, rejected the objection of the Petitioner on the ground that the Petitioner having not raised any objection to the execution petition earlier and by order dated 20.3.2008, the executing Court having already issued writ of attachment, which is pending execution, the objection raised by the Petitioner is barred by the principles of constructive res judicata.

5. While the matter stood thus, the Petitioner filed an application u/s 47 read with Section 151 Code of CPC before the executing Court, which was registered as I.A. No. 124 of 2008. In the said petition, the Petitioner specifically pleaded that the opposite party has not calculated the interest, as claimed by it in the execution petition, in terms of the award passed by the Arbitral Tribunal and as such, the executing Court may examine the same and calculate the actual amount payable under the said award. The executing Court after hearing the parties, by order dated 19.2.2009, rejected the same on the ground that the earlier objection of the Petitioner on the selfsame ground had been rejected by order 22.4.2008 and therefore, filing of the subsequent application u/s 47 Code of Civil Procedure, is barred by the principles of res judicata and proceeded to issue order of attachment dated 26.4.2008, which are now the subject matter of the present writ petition.

6. Learned Advocate General, appearing for the State submits that the award passed by the Arbitral Tribunal was for Rs. 2,30,59,801.61 with interest " 12% per annum on the said amount, from 05.07.1999 till the date of award i.e. 26.4.2000, which was required to be paid to the opposite party within ninety days from the date of receipt of the award, failing which, the Petitioner was liable to pay interest " 18% per annum, from the date of award till the date of actual payment. Hence, the calculation of the amount claimed by the opposite party in the execution petition, calculated " 18% compound interest per annum on the awarded amount is wholly improper and illegal. It is further submitted that as the interest which accrues till the date of the award cannot be treated as part of the principal awarded amount from the date of award for calculating the post-award interest, the excess payment already made to the opposite party due to

inadvertent oversight under a bona fide mistake of fact is recoverable and the opposite party cannot be permitted to retain the same and enrich itself at the cost of the State exchequer. In this regard, learned Counsel has relied upon a recent decision of the apex Court in the case of State of Haryana and Others Vs. S.L. Arora and Company, .

7. Coming to the rejection of the application filed by the Petitioner u/s 47 Code of CPC on the ground of res judicata, learned Advocate General submits that the question of calculating the actual amount payable under the award could not have been rejected by the executing Court on the ground of res judicata, merely because the executing Court had earlier rejected similar objection or that it has already issued writ of attachment. In this regard, it is submitted that as the opposite party is only entitled to the actual amount payable under the award, the executing Court should have examined the claim of the opposite party made in the execution petition and satisfied itself that the same is inconformity with the award, before directing its execution by way of attachment. Accordingly, it is submitted that the impugned order, rejecting the Petitioner's application on the ground of res judicata suffers from total non-application of mind and is improper and illegal.

8. Shri R.K. Rath, learned senior counsel appearing for the opposite party submits that when an order of attachment is made under Sub-rule (1) or (2) of Order 21 Rule 22 Code of Civil Procedure, it has the effect of determining the preliminary stage before the attachment process is set in motion. As the Petitioner had not filed any objection to the execution petition; the executing Court proceeded with the attachment on the finding that no objection had been raised. In this regard, learned Counsel for the opposite party relies upon a decision of the apex Court in the case of Barkat Ali and Another Vs. Badri Narain (D) by LRs., , and submits that as the orders passed by the executing Court at different stages of execution have attained finality, they bind the parties at the subsequent stage of execution proceeding and operates as res judicata. It is further submitted that since the Petitioner (Judgment Debtor) had an opportunity to raise objection, which it could have raised but had failed to do so and allowed the preliminary stage to come to an end, for taking up the matter to the next stage of attachment and sale of property under Order 21 Rule 23 Code of Civil Procedure, the Petitioner thereafter cannot raise such objection subsequently and revert back to the earlier stage of proceeding, unless the order resulting in termination of the preliminary stage, which amounts to a decree, is appealed against and such order is set aside or modified. Accordingly, it is submitted that the principles of res judicata not only apply in respect of separate proceeding but also apply to the subsequent stages of the same proceeding and therefore, the executing Court was right in rejecting the application of the Petitioner filed u/s 47 Code of Civil Procedure, on the ground of res judicata.

9. As regard the question as to whether future interest is payable from the date of award only on the principal amount found due or on the aggregate of the

principal and interest up to the date of award and whether the future interest calculated " 18% compound interest is permissible or not, learned Counsel for the opposite party has relied upon a decision of the apex Court in the case of McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, , in support of his contention that where the arbitrator has awarded the principal amount and interest thereon up to the date of award and future interest thereupon, the same does not amount to award of interest on interest, as the interest awarded on the principal amount up to the date of award becomes the principal amount, which is permissible in law. In this regard, learned Counsel has also relied upon the decision in U.P. Cooperative Federation Ltd. Vs. Three Circles, in support of his contention that the judgment debtor-Petitioner having retained the awarded amount and utilized it for its own purpose and thereby depriving the decree holder-opposite party of its fruit, the Petitioner is liable to pay compensation/damages on the interest, which it withheld for a considerable length of time and therefore, the opposite party is entitled to interest/damage/ compensation on the interest which was not paid to it, as has been claimed in the execution petition.

10. The doctrine of res judicata as provided u/s 11 Code of CPC belongs to the domain of procedure and applies only if the matter directly and substantially in issue in a suit or a proceeding was directly and substantially in issue in the previous suit or proceeding between the same parties, which had been heard and finally decided by a competent Court. The previous decision on a matter in issue alone is res judicata and not the reasons for such decision. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. When it is said that a previous decision is res judicata, it means that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties (See- Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy,).

11. In the present case, as the Petitioner did not question the executability of the arbitral award and instead, had been consistently pleading before the executing Court to examine the details of the claims made by the opposite party in the execution petition, in order to determine as to whether the same is legally payable to the opposite party under the award, it was obligatory on the part of the executing Court to have examined the claims made by the opposite party vis-a-vis the award passed by the Arbitral Tribunal before directing recovery by way of execution. The executing Court was required to examine the execution petition filed under Order 21 Rule 11(2) Code of CPC and satisfy itself that the amount claimed by the decree holder-opposite party is payable under the decree or award, as provided under Order 21 Rule 17 Code of Civil Procedure.

12. On a perusal of the order sheet of the executing Court in Execution Case No. 17 of 2006, we find that there has been no determination as to the actual amount payable under the award. The Petitioner, after having paid Rs. 7,80,62,000/- to the opposite party, had filed an objection on the ground that

the entire amount payable under the award had been duly paid to the opposite party and nothing remains to be executed. The executing Court without determining the question as to whether any further amount is payable under the award, has mechanically proceeded to pass the order dated 22.4.2008, rejecting the objection of the Petitioner on the ground that the Petitioner has not raised any objection earlier and the writ of attachment has been issued and therefore the objection is barred by the principles of constructive res judicata. The order dated 19.2.2009 impugned in this writ petition also reveals that the executing Court has proceeded to reject the application filed by the Petitioner u/s 47 Code of Civil Procedure, solely on the ground that the same is barred by the principles of res judicata.

13. The said findings of the executing Court is erroneous and misconceived, inasmuch as, the question of calculation and/or determination of the actual amount payable as per the terms of the award, cannot be construed to be a matter directly or substantially in issue earlier in the execution proceeding, which has been adjudicated. Moreover, no such determination of the actual amount payable under the award had been made by the executing Court earlier in the execution proceeding. Hence, rejection of the Petitioner's application filed u/s 47 Code of Civil Procedure, by applying the principles of res judicata is not proper and justified.

14. On a perusal of the award, it is seen that the Arbitral Tribunal had awarded principal amount of Rs. 2,30,59,801=61 and interest on the said amount " 12% per annum from 05.07.1999 till 26.4.2000, being the date of award. The Arbitral Tribunal had directed the Petitioner to pay the amount within ninety days, failing which the Petitioner is liable to pay interest " 18% per annum from the date of the award till the date of actual payment.

15. The operating portion of the award passed by the Arbitral Tribunal, reads as under:-

1. Declaratory relief and directions stated in claim 1 to 3.

2. The monetary claims under the claims 1 to 4 amounting to a total of Rs. 2,30,59,801.61 (rupees two crores thirty lacs fifty nine thousand eight hundred one and sixty one paise only) consisting of:

(i) Rs. 92,89,077/- (rupees ninety two lacs eighty nine thousand seventy seven only) in claim No. 1.

(ii) Rs. 99,73,400/- (rupees ninety nine lacs seventy three thousand four hundred only) in claim No. 2.

(iii) Rs. 53,416/- (rupees fifty three thousand four hundred sixteen only) in claim No. 3, and

(iv) Rs. 37,43,908.61/- (rupees thirty seven lacs forty three thousand nine hundred eight and sixty one paise only) in claim No. 4.

3. We also award interest for the period of the arbitration at the rate of 12% per annum on Rs. 2,30,59,801.61 (rupees two crores thirty lacs fifty nine thousand eight hundred one and sixty one paise only) i.e. from 05.07.99 till 26.04.2000 being the date of award.

4. The Respondents are directed to pay the amount of award within 90 days from the date of receipt of the award. In case of failure the Respondent is liable to pay the interest " 18% w.e.f the date of award till the date of award till the date of actual payment.

5. We had directed the parties to intimate the actual costs incurred by them within three weeks from 30.01.2000 as Rs. 14,79,245.71 (fourteen lacs seventy nine thousand two hundred forty five and seventy one paise). We have however estimated to costs in absence of the communication from the Respondent, which includes the fees, expenses by the Arbitrator including the fees up to 26.04.2000, legal fees and expenses administration of the institution ICADAR and actual travel etc. Rs. 18,00,000/- (Rupees eighteen lacs) only to be shared equally by both the parties. Since the entire expenditure as directed in meeting held on 18.05.1999 has been borne by the claimant, claimant is entitled to be paid the Respondent a sum of Rs. 9,00,000/- (rupees nine lacs) only on this account.

16. Coming to the amount claimed by the opposite party in the execution petition, it is seen that as per the calculation given in the execution petition, the opposite party has calculated the interest awarded by the Arbitral Tribunal " 12% per annum from 5.7.1999 till the date of award, as part of the principal awarded amount, making it Rs. 2,53,03,868/-. Further the opposite party has claimed compound interest " 18% per annum on the said principal awarded amount and interest amounting to Rs. 2,53,03,868/- The opposite party has also claimed interest " 18% per annum on the cost of Rs. 9,00,000/- awarded by the Arbitral Tribunal. The details of the claim made by the opposite party in the execution petition reads as under:

(i)

Principal awarded amount under the award dated 24.6.2000. :

Rs. 2,30,59,802/-

(ii)

Interest " 12% per annum from 5.7.1999 till date of award i.e. 26.04.2000 (9 months and 26 days):

Rs. 22,44,066/-

Sub-total :

Rs. 2,53,03,868/-

(iii)

Interest from 26.04.2000 till filing i.e. 26th July, 2006 " 18% p.a. (for 6 years 3 months on Rs. 25,303,868/- :

Rs. 4,60,70,784/-

2. Cost as awarded by Arbitrator per

(i)

Award dated 26.4.2000 :

Rs. 9,00,000/-

(ii)

Interest from 26.04.2000 till filing i.e. 26th July, 2006 " 18% p.a. for 6 years 3 months on Rs. 9,00,000/-:

Rs. 16,38,631/-

3. Further to date of claims (05.07.1999) in terms of award dated 26.04.2000 under claim Nos. 1, 2 and 4 as per Annexures attached hereto:

(a)

Excess corporate tax withheld Annexure-4.1 (claim item No. 1):

Rs. 23,50,201/-

(b)

Export tax paid to be refunded Annexure-4.2 (claim item No. 2):

Rs. 43,15,155/-

(c)

Interest (claim item No. 4)

(i)

Interest for delays in rupee payment - Annexure 4.1 " 12% :

Rs. 4,47,104/-

(ii)

Interest for delays in GBP payments GBI amounting to GBP 16,496 (at current Exchange rate of 1 GBP=Rs. 85)-Annexure 4.3 " 12%:

Rs. 14,02,190/-

(iii)

Interest " 12% on item 3(a) :

Rs. 23,87,029

(iv)

Interest " 12% on item 3(b) :

Rs. 44,01,031/-

Total :

Rs. 8,92,15,993/-

17. Section 31(7) of the Act deals with form and contents of arbitral award, which reads as under:

31. xxx xxx xxx

(7)(a) Unless otherwise agreed by the parties, where and insofar 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.

(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.

18. 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 short, with 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.

19. In *S.L. Arora* (supra) similar questions arose for consideration: (a) whether Section 31(7) of the Act authorizes and enables the arbitral tribunal to award interest on interest from the date of award and (b) whether the arbitral tribunal granted future interest from the date of the award, only on the principal amount found due or on the aggregate of the principal and interest up to the date of award. The Supreme Court, considering the provisions of Section 31 of the Act, held as follows:

14. Section 31(7) makes no reference to payment of compound interest or payment of interest upon interest. Nor does it require the interest which accrues till the date of the award, to be treated as part of the principal from the date of award for calculating the post-award interest. The use of the words "where and insofar as an arbitral award is for the payment of money" and use of the words "the arbitral tribunal may include in the sum for which the award is made, interest..... On the whole or any part of the money" in Clause (a) and use of the words "a sum directed to be paid by an arbitral award shall Carry interest" in Clause (b) of Sub-section (7) of Section 31 clearly indicate that the section contemplates award of only simple interest and not compound interest or interest upon interest. "A sum directed to be paid by an arbitral award" refers to the award of sums on the substantive claims and does not refer to interest awarded on the "sum directed to be paid by the award". In the absence of any provision for interest upon interest in the contract, the arbitral tribunals do not have the power to award interest upon interest, or compound interest, either for the pre-award period or for the post-award period.

15. There is a tendency among contractors to elevate the claims for interest and costs, to the level of substantive disputes by describing them as separate and independent heads of claim. The long pendency of arbitration matters either due to prolonged arbitration proceedings or due to litigations (both intervening and post-arbitral), has the unfortunate effect of swelling the interest payable on the amount awarded and costs to very substantial amounts. In many arbitral awards for money, the interest awarded often exceeds the amount awarded, by several times. Leisurely arbitrations, avoidable judicial interventions and indecisiveness on the part of decision makers in government and statutory bodies in accepting and settling genuine claims either at the stage when the claim is made or at least at the stage when the award is made have resulted in undue emphasis and importance being bestowed upon interest and costs. However, substantial their quantum may be in a given case, interest, in particular interest from the date of the award, and costs are ancillary issues and are not substantive disputes.

xxx xxx xxx xxx

The provision for interest in the Act is contained in Section 31 dealing with the form and contents of arbitral award. It employs two significant expressions "where the arbitral award is for payment of money" and "the arbitral tribunal may include in the sum for which the award is made, interest..... On the whole or any part of the money". The legislature has thus made it clear that award of interest

under Sub-section (7) of Section 31 (any award of costs under Sub-section (8) of Section 31 of the Act) are ancillary matters to be provided for by the award, when the arbitral tribunal decides the substantive disputes between the parties. The words "sum for which the award is made" and "a sum directed to be paid by an arbitral award" contextually refer to award on the substantive claims and not ancillary or consequential directions relating to interest and costs.

20. The Supreme Court while taking note of its earlier decision in McDermott and the observations made in Three Circles, has come to find as under:

But a careful reading of the decision in McDermott, shows that the portion of McDermott extracted in Three Circles, assuming it to be the law laid down in McDermott, is not a finding or conclusion of this Court, nor the ratio decidendi of the case, but is only a reference to the contention of the Respondent in McDermott. Paras 1 to 27 (of the SCC report) in McDermott state the factual background. Paras 28 and 29 contain the submissions of the learned Counsel for BSCL, the Respondent therein. Paras 30 to 44 contain the submissions made by the learned Counsel for McDermott, the Appellant therein, in reply to the submissions made on behalf of BSCL. The passage that is extracted in Three Circles is part of para 44 of the decision which contains the last submission of the learned Counsel for McDermott on the question of interest. The reasoning in the decision starts from para 45. This Court considered the several questions seriatim in paras 45 to 160. The question relating to interest was considered in paras 154 to 159, relevant portions of which we have extracted above. Therefore, the observation in Three Circles that McDermott held that interest awarded on the principal amount up to the date of award becomes the principal amount and, therefore, award of future interest therein does not amount to award of interest on interest, is per incuriam due to an inadvertent erroneous assumption.

21. Applying the principles of law as detailed above to the facts of the present case, the conclusion is irresistible that the calculation made by the opposite party in the execution petition, clubbing the interest with the principal awarded amount of Rs. 2,30,59,801 =61 up to the date of the award and thereby making the principal amount to be Rs. 8,22,15,993/-and claiming compound interest " 18% per annum thereon is contrary to the award. Further, the claim of compound interest " 18% per annum on the awarded cost of Rs. 9,00,000/- is also not in terms of the said award. On the basis of the award passed by the Arbitral Tribunal, the opposite party is entitled to the principal awarded amount of Rs. 2,30,59,801=61 and simple interest " 12% per annum thereon from 5.7.1999 till 26.04.2000. The opposite party is also entitled to simple interest " 18% per annum on the principal awarded amount of Rs. 2,30,59,801=61 and cost of Rs. 9,00,000/-from the date of the award, i.e. 26.4.2000 till the date of actual payment, i.e. 22.2.2008.

22. In view of the above, the impugned order dated 19.2.2009 and the order of attachment dated 26.3.2008 are quashed. The executing Court is directed to

calculate the amount payable under the award as indicated above, keeping in view the principles laid down by the apex Court in S.L. Arora (supra) and determine as to whether any further amount is payable to the opposite party. In case any amount is found to have been paid in excess to the opposite party, the State-Petitioner is entitled to refund of the same.

The writ petition is accordingly allowed.

V. Gopala Gowda, J.

I agree.