
(2009) 07 DEL CK 0149

In the Delhi High Court

Case No : E.F.A. (OS) No. 4 of 2009 and CMs 1078-79 and 5245-5246 of 2009

Housing and Urban Development Corporation Limited

APPELLANT

Vs

Leela Hotels Ltd.

RESPONDENT

Date of Decision : 20-07-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 1
Contract Act, 1872 — Section 59, 60, 61

Citation : (2010) 1 ILR Delhi 76 : (2010) 7 RCR(Civil) 2883

Hon'ble Judges : Vikramajit Sen, J; V.K. Jain, J

Bench : Division Bench

Advocate : A.S. Chandhiok, ASG, S. Kumar, Ayush Aggarwal and Ritesh Kumar, for the Appellant; Rajiv Nayyar and Mukul Rohatgi, Abhimanhu Mahajan and Kanika Agnihotri, for the Respondent

Judgement

This Judgment has been overruled by : Leela Hotels Ltd. Vs. Housing and Urban Development Corporation Ltd., AIR 2012 SC 903 : (2011) 12 SCALE 573 : (2012) 1 SCC 302

V.K. Jain, J.—This is an Appeal against the Order dated 19.11.2008 passed by the learned Single Judge, in execution of an Award dated 25.6.2002, directing payment to the respondent in terms of the calculations made by it.

2. The facts in brief, giving rise to the passing of the impugned order are, as follows:

On 17.10.1996, the appellant HUDCO invited offers for grant of sub-lease of lands measuring 11,480 sq.m. in HUDCO Place, situated in Andrews Ganj, New Delhi, for construction of a Five Star Hotel thereon. The respondent being the highest bidder, a Letter of Allotment of the said land was issued to it on 31.3.1997 which was followed by a Perpetual Sub-Lease dated 4.7.1997. Out of the total consideration, first instalment representing 40% of the consideration was paid by the respondent on 10.4.1997. The second and third instalment of

Rs. 65,38,29,000/- each were payable by 31.3.1998 and 31.3.1999 respectively. It was stipulated in the sub-lease that in the event of second and third instalment not being paid by due date, the respondent could pay the same along with interest of 20% per annum, within three months of the due date. It further stipulated that if payment was not made within three months of the due date, the allotment would automatically stand cancelled and in that event 50% of the amount paid upto that date would stand forfeited and the balance 50% would be refunded without interest. The second instalment was paid by the respondent along with the interest for the delayed payment. Ground rent for the period upto 31.3.1998 was also paid by it.

3. Since there was default by the respondent in payment of third instalment, the lease Agreement was cancelled and consequently the appellant, as per terms and conditions of the Agreement, refunded 50% of the total amount paid by the Respondent, amounting to Rs. 76,28,00,500/- while forfeiting the balance 50% amount. Being aggrieved, the respondent filed a petition in this Court praying for appointment of an arbitrator in terms of arbitration clause which was registered as Arbitration Application No. 193/1999. On 23.6.1999, an arbitrator was appointed by this Court. Before the arbitrator, the respondent claimed a sum of Rs 142,16,08,896/- from the appellant along with interest at the rate of 20% per annum besides the amount of Rs. 19,24,45,800/- being the ground rent paid by it along with interest thereon at the rate of 25% per annum and a sum of Rs. 5,98,22,058/- towards refund of Property Tax. Damages amounting to Rs 5,62,27,715/- were also claimed by the respondent. Counter claims were also filed by the appellant before the Arbitrator.

4. While rejecting the Counter Claim, the learned Arbitrator granted the claims of the appellant in the following terms:

Leela Hotels is entitled to recover, and HUDCO is obliged to pay, damages computed with reference to the amounts paid as the first and second instalments of the premium together with interest paid with the second instalment less amount refunded by HUDCO to Leela Hotels under letter dated 8th July, 1999 and as further reduced by the amount of property tax paid by HUDCO on behalf of Leela Hotels to MCD. Interest at 20% per annum shall be payable by HUDCO to Leela Hotels as follows:

On the amount representing property tax:

For the period during which that amount remained with HUDCO until payment to MCD. On the amount refunded by HUDCO under its letter dated 8th July, 1999 :

For the period for which that amount remained with HUDCO until repayment to Leela Hotels. On the balance of the amount:

From the date of the respective payments made initially by Leela Hotels to HUDCO to the date of the Award.

5. Objections u/s 34 of the Arbitration and Conciliation Act, 1996 were filed by

the appellant before the Court. During pendency of the objections, the appellant tendered an Undertaking to deposit "Principal Sum awarded by the arbitrator" on or before 21.10.2002. The deposit was allowed without prejudice to the rights and contentions of the appellant. This order was passed in the presence of learned Counsels for both the parties. When the cheque of Rs 89,78,84,930/- was brought to the court on 21st October, 2002, the appellant, got recorded in the presence of the Ld. Counsel for the respondent, that it represented the net principal amount due and payable to the respondent under the award and was the amount which had been deposited with it by the respondent, in terms of the agreement between the parties. It was also made clear by the appellant that deposit was being made without liability on its part, to pay future interest on that amount. The petition filed by the appellant u/s 34 of the Arbitration and Conciliation Act, 1996 was dismissed by this Court vide order dated 20.1.2003. The FAO filed by the appellant against that order having been dismissed by this Court on 9.11.2004, SLP was filed before the Hon''ble Supreme Court against that order. After granting Leave to Appeal, the Hon''ble Supreme Court dismissed the Appeal filed by the appellant vide its order dated 12.2.2008, but, reduced the rate of interest, for the pre-award period, from 20% to 18% per annum. Earlier, while granting leave, the Hon''ble Supreme Court had directed the appellant to pay or deposit 50% of the balance decretal amount. Vide order dated 16.9.2006, the Hon''ble Supreme Court clarified that vide its order dated 12.2.2006, it had not allowed the respondent to charge compound interest. In compliance of the order of the Hon''ble Supreme Court dated 12.2.2006, the appellant paid a sum of Rs. 59,61,12,3606.50 on 23.3.2006. The appellant paid an amount of Rs. 48,09,2638.08 on 16.4.2008 and, according to the appellant, that payment satisfied the decree.

6. A perusal of the calculation-sheet filed by the respondent shows that it wants to appropriate amount of Rs. 89,78,84,930/- towards the interest due to it under the award and has also claimed interest on interest. On the other hand, the calculation sheet filed by the appellant shows that it wants appropriation of the aforesaid sum of Rs. 89,78,84,930/- towards the principal sum payable to the respondent under the award and has calculated simple interest at the rate awarded by the Arbitrator, as modified by the Hon''ble Supreme Court. Therefore, the issues in this appeal are (1) Whether the respondent could have adjusted the aforesaid amount of Rs. 89,78,84,930/- towards the interest or was obliged to appropriate it only towards the principal sum due to it under the award and (2) whether the respondent is entitled to charge interest on interest/compound interest as per the method applied in the calculation sheet filed by it.

7. The question as to whether the payment made by a Judgment Debtor is to be appropriated first towards discharge of the Principal or towards discharge of the interest came up for consideration before the Hon''ble Supreme Court in M/s. Industrial Credit and Development Syndicate Now Called I.C.D.S. Ltd. Vs. Smt. Smithaben H. Patel and Others, , a judgment relied upon by the Ld. Counsel for the respondent. During the course of judgment, the Hon''ble Supreme Court,

inter-alia, held as under:

We are of the opinion that Sections 59 and 60, Contract Act, would be applicable only in pre decretal stage and not thereafter. Post-decretal payments have to be made either in terms of the decree or in accordance with the agreement arrived at between the parties though on the general principles as mentioned in Sections 59 and 60 of the Contract Act. As and when such an agreement either express or implied is relied upon, the burden of proving it would always be upon its propounder.

8. After considering the case law on the subject, including the decision of Lahore High Court in *Jia Ram v. Sulakhan Mal* AIR 1941 Lah 386, and its own decision in *Mathunni Mathai Vs. Hindustan Organic Chemicals Limited* and another, and *Meghraj and Others Vs. Mst. Bayabai and Others*, , the Hon''ble Supreme Court summarised the legal principles on the subject as under:

In view of what has been noticed hereinabove, we hold that the general rule of appropriation of payment towards a decretal amount is that such an amount is to be adjusted firstly strictly in accordance with the directions contained in the decree and in the absence of such direction, adjustments, be made firstly in payment of interest and costs and thereafter in payment of the principal amount. Such a principle is, however, subject to one exception, i.e. that the parties may agree to the adjustment of the payment in any other manner despite the decree. As and when such an agreement is pleaded, the onus of proving is always upon the persons pleading the agreement contrary to the general rule of the terms of the decree schedule. The provisions of Sections 59 and 61 of the Contract Act are applicable in cases where a debtor owes several distinct debts to one person and do not deal with cases in which the principal and interest are due on a single debt.

9. Thus, unless the appellant is able to show that the parties in this case had, either expressly or by implication, agreed to adjustment of the amount of Rs 89,78,84,930/- towards Principal Sum, the respondent would be entitled to adjust the same towards the payment of interest. If, however, the appellant is able to satisfy the court that there was an express or implied agreement for adjustment of aforesaid amount of Rs. 89,78,84,930/- towards Principal Sum, the respondent would be precluded from appropriating the same towards interest.

10. A perusal of the order of the court dated 11.10.2002 in OMP No. 308 of 2002 would show that on that date, the appellant herein was represented by Mr. R.N. Trivedi, Additional Solicitor General along with briefing counsels, whereas the respondent herein was represented by Mr. Arun Jaitley and Shri Rajiv Nayyar, Senior Advocates, assisted by the briefing counsels. The order further shows that in the presence of the learned Counsel for the respondent, the learned Counsel for the appellant gave an undertaking to deposit the "principal amount awarded by the Arbitrator" on or before 21st October, 2002. When the matter came up again on 21.10.2002, the parties were represented by the same counsels. The

court specifically recorded that the petitioner (Appellant herein) had brought to the court a cheque for a sum of Rs. 89,78,84,930/- being the alleged net principal amount due and payable to the respondent in terms of the award and which was deposited by the respondent with the petitioner in terms of their agreement. It was further recorded by the court that the deposit made by the appellant (Petitioner in OMP) was without any liability on the part of the appellant to make payment of further interest on the aforesaid amount. The proceedings which took place before the court on 11.10.2002 and 21.10.2002 leave no doubt that what the appellant had undertaken to deposit on 11.10.2002 and then deposited on 20.10.2002 was the "principal sum due and payable to the respondent under the award." The appellant also made it clear that this was the amount which was deposited by the respondent with it in terms of the agreement between the parties. It further made it clear that the deposit was being made without any liability on its part to make payment of further interest on the aforesaid amount. The respondent did not raise any objection, in the court, to the deposit of sum of Rs 89,78,84,930/- towards the principal sum. Admittedly, before withdrawing the aforesaid amount of Rs. 89,78,84,930/-, the respondent did not seek permission of the court to appropriate the sum towards interest. Admittedly, before withdrawing this amount, the respondent did not even intimate either the court or the appellant that it would be appropriating the same towards interest and not towards the principal amount due and payable to it in terms of the award. While withdrawing the amount, the respondent did not even say that it was withdrawing the same without prejudice to its right to appropriate the same towards payment of interest.

11. It has to be kept in mind that on 11.10.2002 when the appellant (Petitioner in OMP) undertook to deposit the principal sum awarded by the Arbitrator as also on 21.10.2002 when it brought to the court a cheque of Rs. 89,78,84,930/- towards payment of principal amount due and payable to the respondent in terms of the award, the objections filed by the appellant against the award were still pending. The Arbitrator had not granted compound interest to the respondent, though, he had awarded heavy interest on the principal sum held payable to the respondent. The award could not have been executed till the final decision of the OMP. Therefore, there was no compulsion on the appellant to pay to the respondent at that point of time.

12. Since compound interest was not awarded, there was no incentive for the appellant to make payment of the interest component of the award to the respondent on that point of time. However, since the principal sum awarded to the respondent carried heavy interest, the appellant obviously was keen to avoid the possibility of paying further interest on the principal sum in the event of its objections being dismissed and that is why it offered to deposit the principal sum payable to the respondent under the award. It made perfect sense on the part of the appellant to deposit the principal sum, while holding back the interest component of the award pending adjudication of the objections filed by it. The logic behind the respondent not objecting to deposit of Rs 89,78,84,930/-

specifically towards principal sum payable to it under the award and withdrawing the same without any reservation or any liberty to appropriate it towards interest could be that the respondent did not know how long the objections would take to decide. Since the stakes of the parties were quite high, the respondent could anticipate the Appeal and then SLP to the Supreme Court, by the losing party. All this could have taken considerable time. Moreover, the respondent could not have been sure of the fate of the objections filed by the appellant. It could not have been sure whether the objections would ultimately be dismissed or would be upheld. Therefore, it made a good business sense on the part of the respondent, at that time, to accept the amount of Rs. 89,78,84,930/- towards principal sum payable to it under the award and utilise the sum for its business, instead of waiting for the final outcome of the litigation between the parties. Had the respondent insisted on the application of the amount brought by the appellant firstly towards interest, the appellant in all probability would not have deposited the sum pending adjudication of its objections and in that case, the respondent would not have been able to use that amount for a long period.

13. This is not a case where amount of Rs. 89,78,84,930/- was sent to the respondent by post or was remitted in its absence. Here, both the parties were represented by their respective counsels when the appellant undertook to deposit the "Principal amount awarded by the Arbitrator". They continued to be represented by their respective lawyers on 21.10.2002, when the appellant brought in the court a cheque for a sum of Rs. 89,78,84,930/- and got it recorded in the proceedings that it was brought towards principal amount due and payable to the respondent in terms of the award and that this was the amount which was deposited by the respondent with it in terms of their agreement. The court specifically recorded that the deposit made by the appellant was without any liability on the part of the appellant to make payment of further interest on the aforesaid amount. When one party takes such an unequivocal stand, while depositing the amount in the court, and this happens in the presence of learned Counsels for the other party, without any protest or reservation by them and is followed by withdrawal of that amount by the respondent, without any permission from the court to appropriate the same towards interest and without even reserving its right to appropriate the same towards interest, it cannot be denied that there was any implied agreement between the parties in the court on 11.10.2002 and 21.10.2002 for deposit of the sum of Rs. 89,78,84,930/-, by the appellant, towards principal sum and its application, by the respondent, towards the principal sum due and payable to the respondent under the award. If the terms on which the deposit was proposed to be made by the respondent i.e. deposit towards the principal sum due to the respondent under the award was not acceptable to the respondent, its lawyers would definitely have objected to the deposit being made towards principal sum and would have insisted on its application towards payment of interest. In any case, had the respondent not agreed to apply the aforesaid amount of Rs. 89,78,84,930/- towards the principal sum due and payable to it under the award,

it would not have withdrawn the aforesaid amount without permission of the court to apply it towards interest. We would also note that even after withdrawing the aforesaid amount of Rs 89,78,84,930/-, the respondent did not write to the appellant nor did they inform the court that the amount withdrawn by it would be appropriated by it towards payment of interest and not towards payment of principal sum due and payable to it under the award. It has also to be kept in mind that the amount deposited by the appellant was not a round figure but was a specific sum calculated by it as the amount due and payable by it to the respondent under the award. When deposit of such a specific amount is made by the appellant and then the same is withdrawn by the respondent in the above noted circumstances, there is no escape from the conclusion that there was an implied agreement between the parties that the appellant would deposit the aforesaid amount towards principal sum payable to it under the award so that it could avoid liability of payment of interest on that amount and the respondent had agreed to the offer made by the appellant in this regard.

14. In any case, having allowed the deposit of Rs. 89,78,84,930/- to be made by the respondent towards principal sum due and payable to it under the award, without any protest or even a reservation and then having withdrawn that amount without seeking permission of the court to appropriate the same towards payment of interest, the respondent is now estopped from claiming that it is entitled to appropriate the aforesaid amount towards payment of interest.

15. The Ld. Single Judge has directed payment to the respondent in terms of the calculation made by the respondent. The calculation made by the respondent is available on page 227 of the appeal file. We find that not only the calculation is based on appropriation of the amount of Rs. 89,78,84,930/- towards interest, the respondent has also claimed compound interest/interest on interest, though the Arbitrator has not granted compound interest to the respondent. In fact the order of Hon"ble Supreme Court dated 15.09.2006 leaves no doubt that compound interest has not been allowed to the respondent. We therefore are of the view that the calculation made by the respondent is not correct and the appellant cannot be directed to make payment as per this calculation. We have also perused the calculation of the appellant which is available on page 217 of the appeal file. Though we have not gone into the figures arrived at by the appellant, we are in agreement with the basis on which the calculation has been made by the appellant, as we find that the amount of Rs. 89,78,84,930/- has been debited towards the principal sum payable to the respondent and thereafter interest has been calculated firstly from the date of payment by the respondent till the date of award @ 18 per cent per annum and then from the date of award till the date of payment of the principal sum @ 15 per cent per annum.

16. In Meghraj and Others Vs. Mst. Bayabai and Others, , the Hon"ble Supreme Court inter-alia held as under:

4. Under the preliminary decree an amount of Rs. 42,430-2-6 was declared due upto June 23, 1941 towards principal and interest. The mortgagors made no

payments under the decree directly to the mortgagees. But from time to time they claim to have made deposits in the Court under Order 21 Rule 1 of the CPC, and in depositing some of the amounts they stated that the payments were towards the principal due. But there is no evidence on the record that the mortgagees were informed that the amounts were deposited towards the principal due, nor is there evidence that the mortgagees accepted the amounts towards the principal. For quite a long time the mortgagees did not withdraw the amount lying in Court. Unless the mortgagees were informed that the mortgagors had deposited the amount only towards the principal and not towards the interest, and the mortgagees agreed to withdraw the money from the Court accepting the conditional deposit, the normal rule that the amounts deposited in Court should first be applied towards satisfaction of the interest and costs and thereafter towards the principal would apply.

In the present case, not only the appellant deposited the amount of Rs. 89,78,84,930/- specifically towards the principal sum due and payable to the respondent under the award, this offer was made and the deposit was allowed to be made in the presence of Ld. Counsels for the respondent and without any protest and reservation by them. Thus, applying to decision in Meghraj's Case (Supra), coupled with withdrawal of that deposit by the respondent without any reservation would take this case out of the purview of the normal rule of application of payment made by a judgment debtor to a Decree Holder and would disentitle the respondent from adjusting the aforesaid amount towards satisfaction of interest.

In the case of ICDS Ltd. (Supra), immediately after the first payment was made, the Decree Holder had furnished the statement of account to the Judgement Debtor wherein it was specifically indicated that the payment had been adjusted towards cost and interest and not the principal amount. As against this, in the present case, the respondent did not intimate either the court or the respondent that it would apply the amount deposited by the appellant towards the satisfaction of the interest. Moreover, in the case of ICDS Ltd., the payment was sent by the Judgement Debtor in the absence of the Decree Holder and therefore the Decree Holder had no occasion to object to the payment being made towards discharge of principal sum. On the other hand, in the present case, the deposit was made in the presence of Ld. Counsels for the respondent, without any reservation or objection from them and even while withdrawing the aforesaid amount, the respondent did not intimate either the appellant or the court that it would be applying the same towards payment of interest.

17. For the reasons given in the preceding paragraphs, we set aside the order dated 19.11.2008 passed by Learned Single Judge. A sum of Rs. 50.54 crores has been deposited by the appellant during the pendency of this appeal. The Ld. Single Judge will decide in the light of this judgment, whether any further amount is payable by the appellant to the respondent in terms of this judgment or not. If he finds any amount payable to the respondent, that amount would be

paid to the respondent out of the amount deposited by the appellant during the pendency of the appeal and the remaining amount, if any, shall be refunded to the appellant. If no amount is found due to the respondent, the entire amount deposited by the appellant during the pendency of the appeal will be refunded to it.