(2015) 08 MAD CK 0008

In the Madras High Court

Case No : Original Side Appeal No. 86 of 2015

Jan De Nul N.V. — APPELLANT

Vs

Ennore Port Limited — RESPONDENT

Date of Decision : 04-08-2015

Acts Referred:

Citation : (2015) 3 MadWN(Civil) 715

Hon'ble Judges : Mr. Sanjay Kishan Kaul, CJ. and T.S. Sivagnanam, J.

Bench : Division Bench

Advocate : Ms. Malini Ganesh for M/s. Rugan and Arya, Advocates, for the Appellant; Mr. K. Manoj Menen for M/s.Menon, Karthik, Mukundan & Nelakantan, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Mr. Sanjay Kishan Kaul, C.J.—An arbitration clause contained in the Agreement inter se the parties resulted in a referral to an Arbitral Tribunal of Three Arbitrators, who made and published their Award dated 07.04.2014. The Award was accepted by both the parties.

2. In the execution proceedings filed by the respondent, it is the say of the appellant that all amounts stand paid, while according to the respondent, the part of compounded rate of interest remains unpaid. This controversy has arisen on account of the fact that the interest payable as per the Contract inter se the parties was compound interest, while the say of the respondent is that this was limited in terms of the Award to simple interest, while the appellant urges to the contrary. The Master of the Court in Execution Petition No.33 of 2007 in respect of the aforesaid controversy accepted the plea of the respondent that only compounded interest is liable to be paid. The respondent being aggrieved by this order preferred applications before the learned Single Judge being Application Nos.1142 and 1143 of 2008, urging to the contrary. Learned Single Judge accepted the plea of the respondent predicated on a reasoning that while specifying the rate of interest at 5.5% for the Rupee component and 5% for the

NLG component for the late payments, the absence of the word ''compound'' implied that simple interest alone had been awarded by the Tribunal. The conscious omission to refer to contractual rate by the Arbitral Tribunal was held to imply that only simple interest was granted and that if the Award had really intended payment at compounded rate, the wording of the Award would have been made different.

3. The appellant being aggrieved by the aforesaid order of the learned Single Judge dated 14.07.2008 has preferred the present appeal.

4. We have heard the learned counsel for the parties.

5. In order to appreciate the crux of the controversy, we consider it necessary to reproduce the relevant portion of the Award as under:

"12.13 Claim Relating to Interest:

The provision relating to time of payment and interest is governed under Sub-Clause 60.8 of CPA, which is reproduced below:

"The amount due to the Contractor under any IPC issued by the Engineer pursuant to this clause, or to any other term of contract, shall, subject to Clause 47, for local currency payments be paid by the Employer to the Contractor and for foreign currency payments, be notified to the State Bank of India by the Employer for transfer to the Contractor''s overseas bank within 56 days after the Contractor''s monthly statement has been submitted to the Engineer for certification, or in the case of the Final Certificate pursuant to Sub-Clause 60.13, within 84 days after the agreed Final Statement and written discharge have been submitted to the Engineer for certification. In the event of the failure of the Employer to make or notify payment within the time stated, the Employer shall pay to the Contractor interest compounded monthly at the rate(s) stated in the Appendix to Bid upon all sums unpaid or not notified from the date upon which the same should have been paid or notified in the currencies in which payments are due".

The Appendix to Bid reads as under:

"Rate of interest upon Unpaid sum''s

Sub-Clause 60.8

Current annual rate on 46 day deposit paid by SBI on due date of payment for payments in local currency: for other currencies, refer to table below:

Currency (as per Sub-Clause 60.1)

Rate of commercial interest for Daily Borrowing in Country of Origin

NLG

5%

The contention of the Claimant is that there has been delay in the payment by the Employer as per the terms of the Contract and that they should be paid interest at the rate of 5.5% (for Rupee payments) and 5% (for NLG payments), in respect of late payments and reduced certified amounts. The amount claimed is Rs.7,945,432. The claimants have also claimed financing charges for acceptance of Rupees in lieu of NLG''s amounting to Rs.41,221. The contention of the Respondent is that any claim for interest prior to issuance of Final Statement/ Final Certificate, the same not having been included, the Claimant is not entitled to interest to any alleged delay in payment upto the date of payment of Final Certificate. It has also been stated that the Claimant has incorrectly claimed the interest. Further, the Claimant has not supported any evidence towards the claim of financing charges.

The Arbitral Tribunal after perusing the submissions made by the Claimant and the Respondent, and the provisions of the Contract, award that the Claimant is entitled to payment of interest by the Respondent at 5.5% for the Rupee component and 5% for the NLG component for the late payments as well as the reduced certified amounts from the due dates as specified in the contract up to the date of payment of the award as directed by the Arbitral Tribunal under this award.

(emphasis supplied)

6. We may notice here that the appellant had moved for clarification of the Award which was acceded to by the Tribunal by stating what the Tribunal had awarded was compound interest. In fact, what the Tribunal stated was "The above clarifications merely restate the decisions of the Tribunal in its Award and in its letter of 12th August, 2004 on the relevant items."

7. Learned counsel for the respondent stated that this aforesaid clarification cannot be read with the Award, as it was beyond the period of thirty days and the Tribunal was not entitled to do so. The statement of the learned counsel for the appellant is that she is not relying on that clarification, but is confining her submission only to the Award as it reads.

8. Learned counsel for the appellant sought to draw an adverse inference against the respondent and for that matter the Tribunal, by contending that if the Award was so clear in its terms, there was no need for the clarification. We are afraid that such an inference cannot be drawn by us, as if a party moves the Tribunal to clarify whether what it is stated was ''A'' and the Tribunal in turn clarified that it was in fact ''A'', that does not mean that if this clarification ought not to be read, it would necessarily imply that what the Award means is ''B''. To interpret the Award, only the Award as written would have to be seen.

9. We have also noted that if the expression ''as specified in the Contract'' was not used, the absence of the use of the word ''compound'' would have meant that it is only simple interest.

10. If the relevant portion is perused, the controversy is whether ''payment of interest by the respondent at 5.5% for the Rupee component and 5% for the NLG component for the late payments as well as the reduced certified amounts from the due dates'' is qualified by the expression ''as specified in the contract'' or as the respondent canvasses that only the expression ''amounts due from due dates'' would be qualified by the expression ''as specified in the contract''. When we read the aforesaid portion, we are of the view that ''as specified in the contract'' qualifies whole part of it and is not confined to only ''amounts from the due dates''. We say so as after ''payment of interest by the respondent at 5.5% for the Rupee component and 5% for the NLG component for the late payments'', there is no comma before the next portion of the sentence, so that the latter portion only gets qualified by the expression ''as specified in the contract''. A plain reading of the sentence means that all the aspects referred to earlier i.e. (a) payment of interest by the respondent at 5.5% for the Rupee component, (b) 5% for the NLG component for the late payments and (c) reduced certified amounts from the due dates are qualified by the expression ''as specified in the contract''. Thus, if the contract undisputedly provides for payment of compound interest, then qua the first two aspects, it is clear that the rate of interest would have to be compounded.

11. Learned counsel for the respondent also urges that the period had not been specified and that is why the latter portion referred to it under reference to the contract, while on the other hand rate of interest was already specified in the earlier portion. It is true that the rate of interest had been specified in the earlier portion without saying whether it is simple or compound interest, but for all other matters other than the rate (including simple or compounding) the contract was thus liable to be referred to. In such a situation, since the contract provides for compound interest and the contract has to be referred to, it would only imply that it would be compound interest as specified in the contract.

12. We are, thus, of the view that this is the plain reading of the Arbitral Tribunal''s Award without the need to refer to the clarification which is not entitled of being relied upon by either parties in view of the same being made beyond the period of thirty days.

13. The result is that the impugned order of the learned Single Judge is set aside and that of the learned Master dated 06.02.2008 is restored. There are no other aspects urged before us.

14. The appeal is accordingly allowed to the aforesaid extent, leaving the parties to bear their own costs.

15. List the Execution Petition on 08.09.2015 before the Master for payment of the balance amount.