
(2018) 07 SHI CK 0040
In the High Court Of Himachal Pradesh
Case No : Arb. Appeal No. 10 of 2017

Kapil Dev Bansal	Vs	APPELLANT
Himachal Pradesh Urban Development Authority		RESPONDENT

Date of Decision : 27-07-2018

Acts Referred:

Citation : (2018) 07 SHI CK 0040

Hon'ble Judges : VIVEK SINGH THAKUR, J

Bench : Single Bench

Advocate : Suneet Goel, C.N Singh

Final Decision : Allowed

Judgement

Vivek Singh Thakur J.

1. Present appeal has been filed against the judgment dated 31.8.2017 passed by learned District Judge, Shimla in Arbitration Case No. 28-S/2 of

2014, whereby, after holding that the arbitrator has granted relief of pre-pendente lite and post pendent lite interest in violation of terms and conditions

of the agreement, has been remanded the matter to the Arbitrator to decide afresh in accordance with law.

2. Brief facts of the case are that respondent had awarded work of construction of Social Housing Colony at Shoghi vide award letter dated 12.6.1997

to the appellant herein. On arising a dispute between the parties, matter was referred to Arbitrator for adjudication, wherein the Arbitrator besides

awarding other reliefs has also awarded pre-pendent lite and post pendent lite interest on the amount awarded in favour of appellant, as detailed

under:-

â??(I) Pre-pendentelite and pendentelite interest @8% on Rs.7,59,072/- for the

period 10/2004 to 3/2014 minus the pendente lite period lengthened due to non attendance of hearings by claimant/contractor. As per record of this tribunal the contractor did not attend 5 of the total 24 hearings resulting in lengthening of pendente lite period by 3 years and one month. Thus the period qualifying for interest works out to 6 years and 5 months.

(II) Post pendente lite interest @ 18% P.A. on the total sum of claim(s) for the period three months from date of award to the actual date of payment

as per clause 31 (7) (b) of Arbitration and Reconciliation Act, 1996.â??

3. Respondent had preferred objections before learned District Judge on the main ground of award of pre-pendente lite and post pendente lite interest by

the Arbitrator in favour of appellant inter-alia amongst other grounds as reproduced in the impugned judgment by learned District Judge. Relying upon

clause 33 of the agreement between the parties learned District Judge has held that the interest awarded by the Arbitrator was in violation of terms

and conditions of the agreement and thus has remanded the matter to the Arbitrator to decide afresh in accordance with law.

4. I have heard learned counsel for the parties and also peruse the documents placed on record.

5. Clause 33 of the agreement between the parties, as reproduced in the judgment passed by learned District Judge, undisputedly reads as under:-

â??The contractor shall not be entitled to any interest in case of non-payment of bills/in any manner.â??

6. The issue with regard to competence of the Arbitrator to award interest is no longer res-integra. Considering similar clause in the agreement,

prohibiting award of interest, the Apex Court in Ambica Construction Vs. Union of India, reported in (2017) 14 SCC 323 has held as under:-

â??5. The impugned order passed by the High Court dated 17-6-2005, limited to the determination with reference to pendente lite interest, has been

assailed by the appellant, through the instant civil appeal. During the course of hearing It was not disputed, that the contractual obligation between the

parties expressly provided, that interest could not be claimed, either on earnest money or on the Security deposit, and even on amounts payable to the

claimant. The relevant Clause affirming the above position is extracted hereinbelow:

â??(2) Interest on amounts.-No interest will be payable upon the earnest money

or the security deposit or amounts payable to the contractor under the contract, but government securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon.â??

The aforesaid clause has been relied upon by the learned counsel representing the Union of India to contend, that when interest was not payable even

on the principal amount, there was no question of the same being payable during the period the matter remained pending for adjudication. It is

therefore apparent that the learned counsel for the respondent, relied upon the contractual obligation contained in the clause, extracted hereinabove, to

counter the claim of pendente lite interest and to support the impugned order passed by the High Court.

6. The only contention advanced at the hands of the learned counsel for the appellant, was based on the judgment of this Court in Union of India vs.

Ambica Construction, (2016) 6 SCC 36, wherein, having examined the legal position declared by this Court by a Constitution Bench in Irrigation

Deptt., State of Orissa Vs. G. C. Roy, (1992) 1 SCC 508, it was held as under: (Ambica Construction case, SCC p. 59, para 34)

â??34. Thus, our answer to the reference is that if the contract expressly bars the award of interest pendente lite, the same cannot be awarded by the

arbitrator. We also make it clear that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award

interest pendente lite by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the

decisions of this Court, it would be for the Division Bench to consider the case on merits.â??

A perusal of the conclusions drawn by this Court in the above judgment, rendered by a three- Judge Division Bench, leaves no room for any doubt,

that the bar to award interest on the amounts payable under the contract, would not be sufficient to deny payment of pendente lite interest. In the

above view of the matter, we are satisfied, that the clause relied upon by the learned counsel for the Union of India, to substantiate his contention, that

pendente lite interest could not be awarded to the appellant, was not a valid consideration, for the proposition being canvassed. We are therefore

satisfied, that the arbitrator, while passing his award dated 28-6-1999, was fully justified in granting interest a pendente lite to the appellant.â??

7. Similarly in a recent decision rendered on 3rd July, 2018, the Apex Court in case Raveechee and Co. Vs. Union of India, 2018 SCC online SC 654

has held as under:-

11. On behalf of the Union of India, it is contended that the Arbitrators by reason of Clause 16(3) could not have awarded interest pendente lite.

This contention is incorrect. Ex facie the clause does not deal with interest pendente lite. In terms, the clause only bars interest upon earnest money

and security deposits or amounts payable to the contractor under the contract. The above mentioned amounts are amounts which in a sense belong to

the contractor. They are amounts voluntarily deposited with the other contracting party in order to be refunded or forfeited depending on performance

of the contract. As such they are not amounts of which the contractor is deprived the use of against his wishes, so as to attract interest.

12. ..

13. ..

14. A claimant becomes entitled to interest not as compensation for any damage done but for being kept out of the money due to him. Obviously, in a

case of unascertained damages such as this, the question of interest would arise upon the ascertainment of the damages in the course of the lis. Such

damages could attract interest pendente lite for the period from the commencement of the arbitration to the award.

15. Thus, the liability for interest pendente lite does not arise from any term of the contract, or during the terms of the contract, but in the course of

determination by the Arbitrators of the losses or damages that are due to the claimant. Specifically, the liability to pay interest pendente lite arises

because the claimant has been found entitled to the damages and has been kept out from those dues due to the pendency of the arbitration i.e. pendente

lite.

16. We are, therefore, of the view that the Arbitrators rightly awarded interest pendente lite for the period from 26.09.1988 to 23.03.2001 which is the

date of the award, on the amounts found due to the claimant. Undoubtedly, such a power must be considered inherent in an Arbitrator who also

exercises the power to do equity, unless the agreement expressly bars an Arbitrator from awarding interest pendente lite. An agreement which bars

interest is essentially an agreement that the parties will not claim interest on

specified amounts. It does not bar an Arbitrator, who is never a party to the agreement from awarding it.â??

7. In present case, undisputedly, Arbitrator has awarded interest on the amount payable on account of difference of rates, amounts deducted by respondent and damages for prolongation of work. Respondent is banking upon clause 33 of the agreement, wherein it is provided that the contractor shall not be entitled to any interest in case of non-payment of bills/in any manner. In the light of exposition of such condition, the Apex Court has held that the said condition applies to the parties to the agreement, but not to the Arbitrator. This clause has relevance with respect to routine transaction during execution of work before arising of dispute and reference thereof to the Arbitrator.

8. It is not a case of respondent that there is another clause in the agreement expressly barring the Arbitrator from awarding interest, as awarded by him. In absence of expressed ouster of inherent power of the Arbitrator by incorporating specific clause/condition in the agreement to that effect, it cannot be said that the Arbitrator has committed any mistake, error or illegality by awarding pre-pendente lite and post pendente lite interest on the awarded amount.

9. Mr. C.N. Singh, learned counsel for respondent-HIMUDA has further contended that the objections before learned District Judge were not limited to the issue of awarding pre-pendent lite and post pendent lite interest only, but the award of the Arbitrator had been challenged on other grounds also which were re-iterated by learned District Judge in paras 2 to 6 of impugned judgment.

10. In paras 2 to 6 in impugned judgment, it is not those issues which were argued/agitated at the time of arguments, but it is reproduction of grounds including grounds related to pendente lite interest which were stated in memorandum of objections preferred by respondent as immediately thereafter in para 7 of the judgment preliminary objection raised by petitioner in reply to objection have been reiterated and in para 8, reply on merits has been referred. Thereafter, points for determination has been framed in para 9. In reasons, after relying various judgments of the Apex Court dealing with scope of interference in award of Arbitrator, awarding of pre-pendente lite and post-pendente lite interest has been held to be contrary to clause 33 of

the agreement. There is no discussion on other issues which have been reiterated in paras 2, 3 and 6 of the judgment. In this regard, learned counsel for the appellant has submitted forcefully that he has clear instructions from the counsel conducting the case for appellant in the Court of learned

District Judge that no arguments on other issues/objections were advanced before learned District Judge. His plea is substantiated from para 18 of the judgment, wherein after discussion on the issue of pendente lite (pre and post) interest, after relying upon the judgment of Apex Court, it is observed

that award of Arbitrator can be interfered partly and thus after holding that award of pre and post pendente lite interest is contrary to clause 33 of the

agreement, it is observed that entire award is to be set aside. Further learned District Judge in para 20 has categorically stated that no other point has

been urged or argued. Respondent has not expressed any grievance against such observation till date, even after receiving notice in present appeal.

Respondent has not assailed judgment for not remanding/deciding the objections on other issues, which indicates that respondent was not aggrieved by

not returning findings on other issues which fortifies the submission of appellant that other grounds were neither argued nor agitated before learned

District Judge. Therefore, plea of learned counsel for respondent-HIMUDA is not sustainable, as now it is not open to respondent to raise other issues

which were neither urged nor argued before learned District Judge.

10. In view of above discussion, this appeal is allowed and impugned judgment passed by learned District Judge is set aside and award passed by

Arbitrator is upheld.