

**(2022) 12 BOM CK 0033**

**In the Bombay High Court**

**Case No :** Commercial Arbitration Appeal No. 3 Of 2022

M/S Skoda Auto Volkswagen India

APPELLANT

Vs

M/S Commercial Auto Products Private Limited

RESPONDENT

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**Date of Decision :** 02-12-2022

**Acts Referred:**

Arbitration And Conciliation Act, 1996 — Section 11(6), 21, 34, 31(7)(b), 37  
Arbitration And Conciliation (Amendment) Act, 2016 — Section 26  
Interest Act, 1978 — Section 2(b)

**Citation :** (2022) 12 BOM CK 0033

**Hon'ble Judges :** Mangesh S. Patil, J; Abhay S. Waghware, J

**Bench :** Division Bench

**Advocate :** S.V. Adwant, A.N. Sabnis, Satyajit R. Vakil

**Final Decision :** Partly Allowed

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## **Judgement**

Mangesh S. Patil, J

1. Heard.
2. Admit.
3. Learned advocate for the respondent Mr. Sabnis waives service.
4. At the joint request of the parties, the appeal is being disposed of finally.
5. Facts, as are relevant, may be summarized as under:-

The appellant is an automobile manufacturing company. It had appointed the respondent as a dealer on 19-10-2005. The respondent committed defaults in its performance under the dealership agreement pursuant to which the appellant terminated the contract. The respondent invoked the arbitration clause and this Court appointed an Arbitrator in a proceeding under section 11(6) of the Arbitration and Conciliation Act, 1996 ('The Act of 1996'). The arbitrator allowed the respondent's claim partly. He held the respondent entitled to recover an amount of Rs.12,80,480/- being aggregate of the amount of dues with interest

@ 18% per annum from 31-03-2012.

The appellant challenged the award under section 34 of the Act of 1996 before the Commercial Court and the District Judge, Aurangabad. It dismissed the application by the impugned judgment and order. Hence this appeal under section 37 of the Act of 1996.

6. The learned advocate Mr. Adwant submitted that the appellant is seeking to challenge the award as also the order in the proceeding under section 34 only to the extent of the interest awarded in favour of the respondent @ 18% per annum. It is necessary to note that he did not make any attempt to assail any other part of the award or the finding of the Commercial Court. He would, therefore, endeavour to demonstrate that the interest awarded was contrary to the statutory provision contained in section 31(7)(b) of the Act of 1996. He would submit that there is no stipulation as to the interest to which a party would be entitled in the contract between the parties.

He would, therefore, submit that in the absence of such stipulation in the contract regarding payment of interest, the provision of section 31(7)(b) of the Act of 1996 would regulate the aspect and since it refers to rate of interest to be payable @ 2% higher than the current rate of interest, the respondent was entitled to the pendente lite and future interest only @ 9% per annum and not 18% per annum. He would place reliance on the following decisions:-

- (1) Oriental Structural Engineers Private Limited Vs. State of Kerala; (2021) 6 SCC 150,
- (2) MSK Projects India (JV) Limited Vs. State of Rajasthan and another; (2011) 10 SCC 573,
- (3) State of Rajasthan and another Vs. Ferro Concrete Construction Private Limited; (2009) 12 SCC 1,
- (4) Kranti Associates Private Limited and another Vs. Masood Ahmed Khan and others; (2010) 9 SCC 496,
- (5) Dyna Technologies Private Limited Vs. Crompton Greaves Limited; (2019) 20 SCC 1,
- (6) Vedanta Limited Vs. Shenzhen Shandong Nuclear Power Construction Company Limited; (2019) 11 SCC 465,
- (7) Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and another; (2007) 2 SCC 720,
- (8) Hindustan Construction Company Limited Vs. Union of India and others; (2020) 17 SCC 324.

7. Per contra, learned advocate Mr. Sabnis for the respondent would strenuously submit that clause (b) of sub-section (7) of section 31 of the Act of 1996 was substituted in place of the earlier provision by the Arbitration and Conciliation

(Amendment) Act of 2015 (Act No. 3 of 2016) ('Amendment Act of 2015') with effect from 23-10-2015. He would submit that the clause that existed originally empowered the arbitral tribunal to award interest @ 18% per annum. He would submit that the arbitration proceeding had commenced in the year 2014 as is contemplated under section 21 of the Act of 1996. Therefore, even if the award was passed in the year 2016, after coming into force of the new clause (b), by virtue of section 26 of the Amendment Act of 2016, the amended provision was not applicable to the arbitration proceedings which had commenced prior to the cut off date of 23 October 2015.

He would place reliance on the decision in the matter of Board of Control for Cricket in India Vs. Kochi Cricket Private Limited and others; (2018) 6 SCC 287. He would submit that though section 26 admits of an exception regarding applicability of the substituted clause (b) of sub-section 7 of section 31, inasmuch as it is kept open for the parties to deviate from it, there is no such agreement between the parties and no error or illegality was committed by the arbitrator or the Court in awarding and confirming interest @ 18% per annum as was stipulated in the original clause (b) of sub-section 7 of section 31.

8. In response, Mr. Adwant would point out that though by Arbitration and Conciliation (Amendment) Act, 2019 (Act No. 33 of 2019) ('Amendment Act of 2019') an attempt was made to retrospectively delete section 26 of the Amendment Act of 2015, the attempt has been struck down by the Supreme Court in the matter of Hindustan Construction Company Ltd. Vs. Union of India and others; (2020) 17 SCC 324.

He would also advert our attention to article 29 of the contract to demonstrate that the parties had inter alia agreed that the Act of 1996 would apply to the arbitration proceedings between the parties with all statutory modifications and re-enactments which were to be enforced for the time being. He would also endeavour to demonstrate as to how the phrase 'for the time being in force' will have to be interpreted to mean that all such amendments and modifications to the Act of 1996 as have been from time to time brought into effect pending determination of the rights between the parties.

He would, therefore, submit that in view of the specific wording of section 26, there being in existence a stipulation in the contract demonstrating that the parties had agreed to be abided by all the amendments in the Act of 1996 as were to be made from time to time all such amendments would be applicable while determining the rival claims between the parties. He would submit that though the arbitration proceedings had commenced in the year 2014 prior to the substitution of clause (b) of sub-section 7 of section 31 but the award was passed in the year 2016 after such amendment by virtue of the Amendment Act of 2016. Therefore, the arbitrator had no power and could not have awarded interest except in accordance with the substituted clause (b) of sub-section 7 of section 31.

9. Mr. Sabnis would counter such argument of Mr. Adwant by submitting that article 29 from the contract only addresses the issue regarding the procedure to be followed in the arbitration proceedings and was not meant for affecting the rival substantive claims of the parties. It was merely an understanding regarding the procedure to be followed in the arbitration matter and nothing beyond that. He would, therefore, submit that there was no agreement between the parties as is contemplated under section 26 of the Amendment Act of 2016 and there is no illegality in awarding interest @ 18% per annum in accordance with the original clause (b) of sub-section (7) of section 31 of the Act of 1996.

10. We have given our thoughtful consideration to the arguments advanced by both the sides and perused the papers. In view of the peculiar facts and circumstances, it would be apposite to first of all appreciate the legislative history of the Act of 1996 and the interpretation of various provisions by the Supreme Court but before that it is necessary to point out that there is no dispute about the factual aspect that the arbitration proceedings in the matter in hand had commenced in the year 2014 as contemplated under section 21 of the Act of 1996. There is no dispute that it was concluded in the form of the award by the arbitrator in the year 2016 after coming into force of the Amendment Act of 2016 with effect from 23-10-2015. There is also no dispute that there is no stipulation in the contract regarding payment of any interest.

11. With this, let us revert to the statutory provisions. Section 31(7), as was there originally in the statute book reads as under:-

"ORIGINAL:

31. Form and contents of arbitral award. --

...

(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 award to the date of payment."

By Amendment Act of 2016, it was amended with effect from 23-10-2015 as under:-

"31. Form and contents of arbitral award. –

...

(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 two per cent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.—The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).

12. Section 26 of the Amendment Act of 2016 reads as follows:-

“26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

It is to be noted that by Amendment Act of 2019, section 26 of the Amendment Act of 2016 was retrospectively deleted with effect from 23-10-2015 as if it was never there in the statute book. However, in the matter of Hindustran Construction Company Limited (supra), the Amendment Act of 2016, to the extent of deletion of section 26 of Amendment Act of 2016 has been held to be unconstitutional. Resultantly, section 26 of the Amendment Act of 2016 still continues on the statute book.

13. A bare reading of the afore-mentioned provisions would demonstrate that as per the original clause (b) of sub-section (7) of section 31 of the Act of 1996, an arbitrator had the power to award interest @ 18% per annum. Such power was sought to be curtailed by Amendment Act of 2016 by substituting the clause and laying down that the interest at the rate of 2% above the rate of interest granted by the banks can be awarded to a successful party.

By virtue of section 26 of the Amendment Act of 2016, the provisions of that Act have been made applicable only prospectively, meaning thereby that such substitution of clause (b) of sub-section (7) of section 31 would not affect the pending arbitration proceedings which would be governed by the original clause (b). However, the legislature has also given an option to the parties by using a specific wording in section 26, to mean that the provisions of the Amendment Act of 2016 would be applicable even to the pending arbitrations, if the parties agree therefor.

14. Precisely relying upon those wordings of section 26 giving an option to the parties to invoke the amended provisions, Mr. Adwant heavily relied upon article

29 from the contract which reads thus:-

"Article 29 – Arbitration & Jurisdiction

The Parties shall attempt to resolve any dispute, claims & question whatsoever which shall arise under this Dealer Agreement by mutual agreement within 30 days of the receipt of notice from the concerned Party of any such dispute, claims or questions by the other Party.

Any such disputes, claims & question whatsoever which shall arise either during the continuance of this Agreement or afterwards between the Dealer & the Company touching these presents or as to any other matter in any way relating to these presents or the affairs thereof or mutual rights, duties or liabilities under the present and which cannot be resolved by an agreement acceptable to both Parties as above, may be referred to a single arbitrator to be appointed by both the Parties and such arbitration shall be in accordance with & subject to the provisions of the Arbitration & Conciliation Act 1996 or any statutory modification or re-enactment there-of for the time being in force. The arbitration proceedings shall be conducted in English language and the venue for the same will be at Aurangabad only.

All matters referred to above shall be subject to laws governed in India and exclusive jurisdiction of courts in Aurangabad only.

The Parties are separate and independent legal entities. Nothing contained in this Agreement shall be deemed to constitute the Company or the Dealer as an agent, representative, partner, joint venture or employee of the other Party for any purpose."

The word 'modification', in our considered view clearly indicate an understanding between the parties that the provisions of the Act of 1996 as were to be amended / modified from time to time were agreed to govern the arbitration proceedings that would commence between the parties.

15. The ingenious argument of Mr. Sabnis that the afore-mentioned wordings only demonstrate understanding between the parties as far as procedure to be adopted by the arbitrator, in our considered view, is not correct. When the parties had not agreed for payment of any interest and the Act of 1996 contains the provision regarding payment of interest in the form of section 31 sub-section (7), clause (b), and particularly when there is no stipulation in the contract specifically stipulating that neither party would be entitled to claim any interest, a plain reading of this clause would clearly indicate that the parties had agreed to the applicability of the Act of 1996 as was to be amended from time to time and it was not merely an understanding in respect of the procedural aspects at the arbitration proceedings.

16. Further use of the word's 'for the time being in force' are certainly indicative of the understanding between the parties that the provisions of the Act of 1996 as were to be available to be applied while deciding the dispute between the

parties and had no nexus with the date of commencement of arbitration proceedings.

17. It is thus abundantly clear that article 29 of the contract is nothing but an agreement between the parties as regards applicability of the amendments those were to be effected in the Act of 1996 from time to time. It is clearly in the nature of an agreement between the parties as contemplated under section 26 of the Amendment Act of 2016 which otherwise directs the provisions of the Act to be applicable only prospectively. By virtue of article 29 of the contract, it can certainly be said that all the amendments those were to be effected in the Act of 1996 were agreed to be applicable while determining the rival claims between the parties.

In view of such an interpretation, arbitrator had no power to award interest @ 18% per annum purportedly invoking the predecessor of clause (b) of sub-section (7) of section 31 of the Act of 1996. In-fact, the learned arbitrator has not even assigned any specific reason why he was awarding interest at that rate.

18. For that matter even, the Court while deciding the application under section 34 has nowhere discussed this vital aspect even when the award was silent as to the law on the point of grant of interest.

19. In the normal course, we would have remanded the matter either to the arbitrator or to the Court but that would lead to further delay which would run counter to the legislative intention of expediting the arbitral proceedings.

20. We allow the Appeal partly, by modifying the direction in the award to grant 18% interest per annum by reducing it to 9% per annum.