

(2014) 09 DEL CK 0047
In the Delhi High Court
Case No : OMP No. 518/2013

National Highways Authority of India

APPELLANT

Vs

BSC-RBM-PATI Joint Venture

RESPONDENT

Date of Decision : 22-09-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 28(3), 31(7), 31(7)(a), 31(7)(b), 34
Civil Procedure Code, 1908 (CPC) — Section 34
Interest Act, 1978 — Section 3, 3(3)(c)

Citation : (2014) 09 DEL CK 0047

Hon'ble Judges : Deepa Sharma, J

Bench : Single Bench

Advocate : Ravi Gupta, Sr. Advocate and Tanu Priya, Advocate for the Appellant;
Pravin H. Parekh, Senior Advocate, Vishal Prasad, Pallavi Sharma, Abhinay and
Aakansha Nehra, Advocate for the Respondent

Judgement

Deepa Sharma, J.—Vide this petition, the petitioner has challenged an Interim Award dated 19th December, 2012.

2. It is submitted that the petitioner had entered into a contract with the respondent vide Agreement dated 26th March, 2002 for the execution of the work of "Four Laning including strengthening of existing two lane pavement from Barwa Adda (km. 398.750) to Barakar (km. 441.440) in the State of Jharkhand.

3. During the execution of the work, certain disputes arose between the parties which could not be settled and the matter was referred to the panel of three arbitrators under Clause 67.3 of the Contract pursuant to the arbitration clause having been invoked by the respondent therein.

4. The respondent raised the following Statement of Claims:-

"Claim No. 1 Payment due on account of non-payment of the amounts certified by the Engineer in Statement at completion and Final statement by the Respondent NHAI-Rs. 12,17,42,012/-.

Claim No. 2 Payment due on account of Additional Costs/Expenses incurred by way of BG commission for BG No. 179/96-94 furnished by JV as performance security due to non-discharge/return of Original BGs by NHA after issue of Defect Liability Certificate-Rs. 84,97,034/-."

5. In reply, the petitioner/non-claimant admitted certain amount, payable to the respondent/claimant.

6. On the basis of the said admission by petitioner/non-claimant, the learned Arbitral Tribunal passed the following interim award:-

"1. The Respondent shall make payment of Rs. 22,56,352/- under the Statement at Completion dated 11.02.2003 along with the interest @ 12% p.a. compounded monthly from the due date, which was 56 days after the date of Statement at Completion i.e. w.e.f. 08.04.2003 till date of payment.

2. The Respondent shall make payment of Rs. 2,11,33,653/- under the Final Statement dated 25.12.2003 along with interest @12 p.a. compounded monthly from the due date, which was 84 days after the date of receipt of Final Statement by the Engineer, i.e., w.e.f. 19.02.2004 till date of payment.

3. Thus the total amount of Rs. 2,33,90,005/- under both Statement at Completion and Final Statement shall be paid by the Respondent to the Claimant along with interest as stated above."

7. The said award has been challenged by the petitioner on the ground that the learned Arbitrator has awarded interest on interest which is impermissible in law being violative of Section 31(7) of the Act and Section 3(3)(c) of Interest Act. It is argued that Tribunal had wrongly accorded interest at the rate of 12 per cent per annum compounded monthly from the due date till its realisation and that it is highly excessive.

8. Reliance has been placed on the findings of the Hon"ble Supreme Court in the case of State of Haryana and Others Vs. S.L. Arora and Company, .

9. It is further contended that the interim award is also against the "Public Policy" as held by the Supreme Court in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., and patently illegal being against the law. It is prayed that the court may set aside the impugned award.

10. On the other hand, it is argued by the respondent that the interest had been awarded by the learned tribunal in terms of Clause 60.8 of Conditions of the Particular Application (in short "COPA") read with the Appendix to the Bid.

11. It is further contended that the petitioner had filed its reply dated 21st August, 2012 before the learned arbitrator and has admitted his liability of payment of sum of Rs. 22,56,352/- and Rs. 2,11,33,653.10/- In the meeting of the learned arbitrator held on 21st August, 2012, the counsel for the petitioner further admitted that the said amount was payable and the learned arbitrator had duly recorded this fact in its proceedings. Accordingly, on 19th December,

2012, the learned arbitrator passed the interim award of the said admitted sum alongwith interest at the rate of 12% per annum compounded monthly. It is submitted that since the arbitrator had awarded the interest in terms of Clause 60.8 of COPA, the award does not suffer with any illegality. It is submitted that learned arbitrator had acted according to the terms and conditions binding the parties. It is submitted that the petition has no merit and the same be dismissed.

12. Heard the arguments of the learned counsels for the parties and have given due consideration to the various case laws relied upon by them.

13. The petitioner has contended that since the learned Arbitrator has awarded the interest at the rate of 12% per annum compounded monthly, it is in a way amount to granting interest upon interest and thus the award is against the public policy and has relied on the findings in the case of Oil & Natural Gas Corporation Ltd. (supra), wherein the meaning of expression "public policy" used in Section 34 (ii)(b) of the Act, has been discussed and explained.

14. It is apparent that an award, whether final or interim, can be challenged only on the grounds enumerated in Section 34(2) of the Arbitration and Conciliation Act. One of the grounds is that the award is against the "public policy". In the case of Oil & Natural Gas Corporation Ltd. (supra), the Supreme Court has defined the phrase "public policy" as under:-

"Therefore, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. The concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in addition to the narrower meaning given to the term "public policy" in Renusagar Power Co. Ltd. Vs. General Electric Co., it has to be held that the award could be set aside if it is patently illegal. The result would be that an award could be set aside if it is contrary to:

- (a) fundamental policy of Indian Law; or
- (b) the interest of India; or
- (c) justice or morality; or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such an award is opposed to public policy and is required to be adjudged void."

15. From the above findings of the Supreme Court, it is apparent that an award

can be said to be against the public policy if it is unfair or unreasonable or shocks the conscience of the court and suffers with illegality which goes to the root of the matter.

16. In the present case, it is argued on behalf of the petitioner that the award shocks the conscience and is unfair and unreasonable. It is also against public policy since grant of interest upon interest is against public policy. The first question therefore is, whether order of arbitrator amounts to granting interest upon interest. What the learned Arbitrator has awarded is "interest @ 12% per annum compounded monthly. So, the second question is whether the Arbitrator can award compound interest.

17. There is no dispute to the legal proposition that Section 31(7) of the Act empowers the Arbitrator to grant interest from the date on which the cause of action had accrued till its realisation.

18. The Supreme Court in the case of State of Haryana (supra) has clearly held that both the Clauses of Section 31(7) are independent of each other.

The court has held as under:-

" 17. 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 a nutshell, in 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. The findings clearly contemplate that the Arbitral Tribunal has the power to award interest in terms of the Contract for pre-award period.

Discussing Clause 31(7)(b), the Supreme Court in case of State of Haryana (supra) has further observed as under:-

" 16. Some Arbitral Tribunals have misconstrued clause (b) of section 31(7) of the Act and assumed that the said provision requires the rate of post-award interest in all arbitral awards should be 18% per annum, and that they do not have any discretion in regard to post-award interest. Some have misconstrued it further to infer the rate of interest mentioned therein is an indication that invariably the rate of interest in arbitrations, either pre-award or post-award, should be 18% per annum. Both these assumptions are baseless and erroneous. If that was the legislative intention, there would have been no need for vesting discretion in Arbitral Tribunals, in the matter of interest, under Section 31(7)(a). The principles relating to award of interest, in general, are not different for courts and arbitral tribunals, except to the extent indicated in section 31(7) of the Act and CPC. A comparatively high rate of post-award interest is provided in section 31(7)(b) of the Act, not because 18% is the normal rate of interest to be awarded in arbitrations, but purely as a deterrent to award-debtors from avoiding payment or using delaying tactics. In fact a provision similar to section 31(7)(b) of the Act, if provided in section 34 of the Code of Civil Procedure, will considerably reduce the travails of plaintiffs in executing their decree in civil cases. Be that as it may."

20. The Supreme Court has clearly held that Clause (a) of Section 31(7) gives discretion to the Arbitral Tribunal to fix rate of interest for pre-award period but such discretion is also subject to the agreement between the parties. If the agreement between the parties provides a rate of interest, certainly the arbitrator is bound by such covenant in the agreement. In such situation, the arbitrator hardly has the discretion to grant any other rate of interest than the agreed rate as the clause 31 (1) (a) of the Act starts with the expression unless otherwise agreed between the parties.

In the present case, Sub-clause 60.8 of the agreement deals with the time of payment and the rate of interest and is reproduced as under:-

"Clause 60.8 Time of Payment and Interest

The amount due to the Contractor under any interim payment Certificate issued by the Engineer pursuant to this Clause, or to any other term of the Contract, shall subject to Clause 47, be paid by the Employer to the Contractor within 56 days after the Contractor's monthly statement has been submitted to the Engineer for certification or, in the case of 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 shall pay to the Contractor interest compounded monthly at the rates (s) stated in the Appendix to Bid upon all sums unpaid from the date upon which the same should have been paid, in the currencies in which the payments are due."

Appendix "A" attached to the said bid clearly provides the rate of interest as 12% per annum compounded monthly.

21. It is clear that the parties have agreed to payment of 12% per annum interest compounded monthly in case of default in payment.

22. The learned arbitrator has only awarded this interest on the admitted principal amount for pre-award period since the interest is awarded as principle sum, it cannot be said that interest upon interest was awarded. This part of the award therefore does not suffer with any illegality.

23. The petitioner has disputed the illegality of amount of interest at the rate of 12% per annum compounded monthly for the post-award period also. It is argued that the Supreme Court in the case of State of Haryana (supra) has clearly held that the discretion of the tribunal to award interest for the post-award period is not subject to any contract and the arbitrator is required to exercise this discretion independently and that grant of 12% interest compounded monthly amounts to grant of interest upon interest and therefore, the award is illegal and is against the public policy.

24. From reading of the award, it is clear that the interest at the rate of 12% per annum compounded monthly for post-award period also has been awarded only on the principal sum that is the admitted amount payable by the petitioner.

25. Since this interest has been granted by the arbitrator only on the principal amount, the sole question is whether the arbitrator has the discretion under Section 31(7)(b) of the Act to grant compound interest on the principal amount for the post-award period, that is, does the grant of compound interest under Section 31(7)(b) of Act is against the public policy. There is no dispute to the fact that learned arbitrator has the discretion to grant interest during post-award period and if it does not award any interest for the post-award period, the legislature steps in and 31(7) (b) prescribed a mandatory statutory rate of 18% per annum payable during the post-award period.

26. The Supreme Court has discussed the wisdom of legislature while fixing the statutory mandatory higher rate of interest in the case of State of Haryana (supra) and has held as under.

"..... if the award is silent in regard to post-award interest, the claimant will be entitled to post-award interest at the higher rate of 18% per annum. The higher rate of interest is provided in clause (b) with the deliberate intent of discouraging award-debtors from adopting dilatory tactics and to persuade them to comply with the award."

27. It is argued on behalf of the respondents that the parties, while entering into the contract had intended a prompt payment by the petitioners and that is why the clause 60.8 was incorporated which is binding on the parties and which makes it clear that the employer i.e. the petitioner would pay to the contractor i.e. the respondent, the interest compounded monthly and it was intended that

this interest shall continue to be paid by the petitioner till the payment was made.

28. On the other hand, it is argued by petitioner that the Supreme Court has clearly held in State of Haryana case (supra) that for grant of the interest during post-award period, the contract between the parties is not binding on the arbitrator and the arbitrator can exercise its discretion.

29. Well settled principle of law is that Arbitrator is empowered under Section (31)(7)(b) to grant interest for the post-award period. It is also true that he is not bound by the terms of agreement between parties while exercising this discretion. Even if there is no agreement for grant of interest in the agreement, the Arbitrator has the jurisdiction to grant interest for post-award period and on its discretion, fix any amount of interest for post-award period.

30. However, the discretion of the arbitrator has to be guided by some principal of law and if while exercising the said discretion, he takes cue from the agreed terms between the parties, it cannot be said he has improperly exercised his jurisdiction.

31. While the Id. Counsel of the petitioner has argued that the arbitrator cannot award compound interest and has placed reliance on Section 3 of the Interest Act, 1978, and argued that the rate of interest cannot exceed the current rate of interest and that Section (3) sub Clause (3) prohibits the courts to award interest upon interest i.e. compound interest, it is argued on behalf of the respondent that this argument of the learned counsel for the petitioner has no merit for the simple reason that clause (a) of Sub-Section (3) of Section 3 of Interest Act, 1978 clearly stipulates that it is not applicable in the cases where the interest is payable as of right, by virtue of an agreement. It is argued that when the compound interest is payable under an agreement, this clause is not applicable.

32. I have given careful consideration to these arguments.

33. There is no dispute to the fact that Section 3 of Interest Act deals with the grant of interest for the period from the date of cause of action to the date of institution of the proceedings and it does not deal with the period for grant of interest during post-award period.

34. Section 28(3) of the Arbitration and Conciliation Centre Act requires that the arbitral tribunal shall decide the dispute in accordance with the terms of the contract and shall also take into account the usages of the trade applicable to the transaction which clearly stipulates that arbitrators while passing an award is to give due credence to the terms of the agreement as well as the usage of the trade.

35. In the present case as per terms of agreement, parties have agreed to the payment of interest at the rate of 12% per annum compounded monthly.

36. As regards, the usage of the trade is concerned, Section 34 of the Civil Procedure Code deals with the power of courts to grant of interest in any

adjudication where the decree is for payment of money and the proviso to same deals with powers of court to grant interest in relation to the commercial transactions.

It reads as under:-

"Section 34(1)..... (with further interest at such rate not exceeding six per cent, per annum as the Court deems reasonable on such principal sum), from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit:

[provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent, per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions."

37. This provision clearly lays down the principle to be followed for grant of interest post decree of money when the decree relates to a commercial transaction. The Supreme Court in the case of State of Haryana (supra) has clearly observed "that the principles relating to award of interest in general are not different for courts and arbitral tribunals."

38. The proviso of this Section was added by the Act of amendment 104 of 1976. This proviso clearly stipulates that where the liability of payment of money has arisen from any commercial transaction in that case the grant of post decree interest may exceed 6% per annum but shall not exceed the contractual rate of interest or in the absence of contractual rate of interest, the rates set out by nationalised banks in relation to commercial transactions..

39. This provision clearly stipulates that while awarding the interest for post-decree period, the courts can grant the interest as per the contractual rate. This provision puts the prohibition on the courts for grant of rate of interest exceeding the contractual rate of interest.

40. The arbitral award is also a decree under amended Arbitration Act of 1996. The learned Arbitrator therefore while exercising its discretion for grant of interest from the date of passing of the award till its realisation, had based its discretion on the contractual obligation regarding rate of interest, and thus this exercise of discretion is in consonance of provisions of Section 34 of the Civil Procedure Code. Therefore, there is no prohibition under the law upon Arbitrator to grant post-award interest on the basis of agreed contractual rate of interest.

41. The next question that has arisen during arguments of Id. Counsel is whether grant of compound interest is against the public policy.

42. In Central Bank of India Vs. Ravindra and Others, , the Constitution Bench of the Supreme Court, after exhaustive consideration of the case law, summarised the legal position regarding compound interest as under:-

"The English decisions and the decisions of this Court and almost all the High courts of the country have noticed and approved long established banking practice of charging interest at reasonable rates on periodical rests and capitalising the same or remaining unpaid. Such a practice is prevalent and also recognised in non-banking money lending transactions. Legislature has stepped in from time to time to relieve the debtors from hardship whenever it has found the practice of charging compound interest and its capitalization to be oppressive and hence needing to be curbed. The practice is permissible, legal and judicially upheld excepting when superseded by legislation. There is nothing wrong in the parties voluntarily entering into transactions, evidenced by deeds incorporating covenant or stipulation for payment of compound interest at reasonable rates, and authorising the creditor to capitalise the interest on remaining unpaid so as to enable interest being charged at the agreed rate on the interest component of the capitalised sum for the succeeding period. Interest once capitalised sheds its colour of being interest and becomes a part of principal so as to bind the debtor/borrower."

43. In view of above, it is clear that the contract between the parties for compound interest is not against public policy. From the above discussion it follows that the interim award dated 19.12.12 does not suffers from any illegality. The objections raised under Section 34 by the petitioner have no merit.

Petition is hereby dismissed.