

(2014) 11 DEL CK 0242

In the Delhi High Court

Case No : R.P. Nos. 419/2012 and 200/2013 in FAO(OS) 55/2012

National Highways Authority of India

APPELLANT

Vs

Prakash Atlanta JV

RESPONDENT

Date of Decision : 17-11-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31, 31(7), 34
Central Excises and Salt Act, 1944 — Section 11A
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Interest Act, 1978 — Section 3(3)(c)

Citation : (2014) 4 ARBLR 512 : (2015) 216 DLT 326 : (2014) 146 DRJ 82

Hon'ble Judges : S. Ravindra Bhat, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Vikas Goel, Kunal Dutta and Medhashah, Advocate for the Appellant;
Amar Dave, Chirag M. Shroff and Priyanka Rai, Advocate for the Respondent

Judgement

Rajiv Shakdher, J.

Review Petition Nos. 419/2012 And 200/2013.

1. We may note at the outset that the captioned review petitions are confined to a single issue, which is that, the grant of compound interest vide the award dated 26.04.2004, was against the mandate of law. Since the petition filed by the review petitioner under Section 34 of the Arbitration & Conciliation Act, 1996 (in short the 1996 Act) , which was numbered as OMP No. 339/2004, was dismissed by the learned Single Judge vide judgement dated 15.12.2011, and, thereafter, the appeal filed before the Division Bench met the same fate, the captioned review petitions have been preferred. The judgement of the Division Bench was delivered on 03.02.2012. It would be, however, relevant to note that, the review petitioner had, in fact, assailed the judgment of the Division Bench before the Supreme Court. The said Special Leave Petition (SLP) was, however, dismissed as withdrawn vide order dated 05.07.2012. The order of the Supreme Court reads as follows:

"After arguing the matter for some time, Mr. Chetan Kumar Sharma, learned senior counsel for the petitioner, seeks withdrawal of the Special Leave Petition since the petitioner intends to apply to the Division Bench of the High Court for review of the impugned order.

Special Leave Petition is dismissed as withdrawn."

1.1 The aforementioned petitions have thus been filed to seek review of judgement dated 03.02.2012 passed by the Division Bench.

2. While penning down the judgement dated 03.02.2012 this court had specifically noted that no other argument had been raised by the review petitioner except that, which was dealt with in the judgement. In the first round the only point which was argued by the review petitioner was that the respondent herein was not entitled to additional amounts as the item of work, which pertained to provision of "foundation beam", was part of item no. 5.41(a) of the Bill Of Quantities (BOQ) .

2.1 Despite the said position obtaining, in the SLP filed to assail the judgement dated 03.02.2012, it had been averred that the ground pertaining to the award of compound interest, though raised, was not decided by the court.

2.2 In the review petition, as originally filed, it was sought to be conveyed that the SLP was dismissed as withdrawn on the ground that there was no finding returned in the said judgment of the Division Bench, with respect to award of compound interest, by the arbitral tribunal, and that, liberty was granted on this account to approach the Division Bench of this court.

3. The review petition for the first time came up for hearing before the Division Bench on 31.08.2012 along with an application for condonation of delay. The delay was condoned and notice was taken of the ground on which review was sought, which, as stated above, was confined to grant of compound interest. The matter was posted for 12.11.2012, on which date, notice was issued in the original review petition.

3.1 Upon reply being filed, at the hearing held on 15.02.2013, the misleading and incorrect averments made in the review petition were noticed. The counsel for the review petitioner, having realized that the averments made were inaccurate and misleading, sought leave to move an appropriate application to amend the review petition. The amendment was allowed vide order dated 15.03.2013. An opportunity was granted to the respondent to file a reply to the amended petition, with liberty to the review petitioner to file a rejoinder.

3.2 Upon completion of pleadings, arguments have been heard in the review petition.

4. Mr. Goel, who advanced arguments on behalf of the review petitioner, submitted that the directions contained in paragraph 7.5.3 and paragraph 9 of the award would have to be set aside on the ground that pre-award interest

granted at the rate of 12% per annum from 22.10.2002, which is the date when the respondent, i.e., the original claimant, invoked arbitration, was included in the total amount of the award; and furthermore, post-award interest at the rate of 12% per annum had been awarded to the respondent on the cumulative amount which included the principal as well as the interest, save and except for the fact that, for the post-award period, a leeway of forty-five (45) days had been given.

4.1 Mr. Goel's contention was that the direction to compound interest was contrary to the judgement of the Supreme Court in the case of State of Haryana and Others Vs. S.L. Arora and Company, .

5. Mr. Dave, who appeared on behalf of the respondent, opposed the relief sought for in the review petition. Briefly, his submissions were that there was no error apparent on the face of the record which required correction. It was submitted that the submission not having been advanced before the court in the first instance, it cannot form the basis for a review, as asserted. In other words, it was contended that the ground with regard to grant of compound interest was abandoned. Mr. Dave submitted that the power of the court was confined to correction of mistakes, if any, in the judgement of which review is sought, and not to substitute one view for another. To buttress this submission Mr. Dave relied upon the order of this court dated 15.02.2013, to which we have already made a reference above. In support of this submission Mr. Dave relied upon the judgement of this court in Aizaz Alam Vs. Union of India (UOI) and Others, and judgement of the Supreme Court in the case of S.N.S. (Minerals) Ltd. and Another Vs. Union of India (UOI) and Others, .

5.1 In the alternative it was submitted that the payment terms envisaged compounding of interest. For this purpose, Mr. Dave relied upon clause 43.1 and 43.2 of the contract obtaining between the parties.

6. We have heard the learned counsel for the parties and perused the record. What emerges is clearly, that the review petitioner, had not pressed the ground pertaining to compound interest before the Division Bench. The fact that it was so, is discernible upon a bare perusal of the judgement dated 03.02.2012. If there was any lingering doubt in the mind of the court, (as one of us, Rajiv Shakti J., was the member of the earlier Division Bench) , the same was set at rest at the hearing held on 15.02.2013. It is consequent to the acceptance of the fact that the ground with regard to award of compound interest by the arbitrator was not urged before us, that the amended review petition was filed. This is in so far as the conduct of the review petitioner's counsel is concerned. In so far as his client is concerned, the ground was embedded in the appeal filed before this court. The question, therefore, which arises is: could the counsel for the review petitioner have given, the respondent, a concession in law by not urging and / or virtually abandoning a sustainable ground.

7. In our view, the power of review, which is confined to errors apparent in law

would take into account, an error whereby a lawyer engaged by his client wrongly fails to urge a tenable objection pivoted on a settled principle of law. To our minds, the failure to urge such grounds would tantamount to the lawyer extending a concession in law, which cannot bind his client. That lawyers' concessions, whether on account of a mistake, inadvertent or otherwise or, by way of an admission, cannot bind his client; is a principle enunciated by the Supreme Court in the case of *Uptron India Limited Vs. Shammi Bhan and Another*, and *The Central Council for Research in Ayurveda and Siddha and Another Vs. Dr. K. Santhakumari*, .

7.1 In *Uptron* case, the Supreme Court was dealing with a situation whereby observations in its own judgment in another case were used to contend that the provision of automatic termination of service for over staying leave in the standing order, was legal. The Supreme Court, while explaining its judgment held that even otherwise a wrong concession on a question of law made by counsel is not binding on his client. Such concession cannot constitute a just ground for a binding precedent.

7.2 In the other case, i.e., *Central Council for Research in Ayurveda & Siddha*, the circumstances were even more involved, as in that, the employer had come up in appeal against the judgment of the High Court whereby the High Court had sustained the submission of the respondent-employer that the promotion to the post of Assistant Research Officers, was required to be accorded, based on the principle of seniority-cum-fitness. The Single Judge in the High Court had relied upon the counter affidavit filed before him by the appellant-department affirming the said position. In the appeal filed with the Supreme Court, the record revealed that the post of the Research Officer (Ayurveda) was a selection post and as per the amended Recruitment Rules, promotion could have been made only on the basis of the principle of merit-cum-seniority. Despite, the concession made by the appellant- department before the High Court, the Supreme Court reversed the judgment of the High Court by applying the principle that neither an admission nor an inadvertent concession made under a mistaken impression of law, can bind the client. The Supreme Court went on to observe that such concession cannot enure to the benefit of "any party".

7.3 While applying this principle, one would have to bear in mind that review jurisdiction in such like cases will have to be confined only to those cases, which involve a pure question of law, and not those requiring forensic appreciation of material on record; in other words, a question of law which emerges from the facts as found on record. In other words, it would include only those cases, where in law there is no other view possible. The cases of a possible view would clearly stand excluded.

7.4 The aforesaid principle also finds resonance in the provisions of order 47 Rule 1 of the Code of Civil Procedure, 1908 (in short CPC) . The said provision, inter alia, provides a remedy by way of review qua an order or decree on the ground that the party seeking review discovered new or important matter or evidence

which despite due diligence was not within his knowledge or could not be produced by him when a decree in the matter was passed or order made or even on account of some mistake or error apparent on the face of the record or for any other sufficient reason. It is the latter part which would cover the situation of the sort, which has arisen, in the present case. Therefore, according to us, on a principle of law where there are no two views possible, the court could review its judgment. See *Nathu Yeshwantrao Bhusari since deceased by L.Rs. and Others Vs. Sonabai Ganar and Others*, . Though *stricto sensu*, the provisions of order 47 Rule 1 of the CPC may not apply to matters falling under the Act, the principles analogous thereto can certainly be relied upon by the court.

8. The facts on record show that arbitrators have in their award directed compounding of interest. This is evident on a bare perusal of paragraph 7.5.3 and paragraph 9 of the award which read as follows:

"7.5.3 Under the above circumstances, we award interest to the respondents as per serial no. 25 of the contract at 12% p.a. from 22.10.2002, the date on which the claimants invoked the arbitration clause. Interest will have to be separately calculated with reference to the work done monthly under the two counterclaims and delayed payments if any in light of considerable Contract Data Si. N. 25 amounts due to be paid, as worked out on the basis of rate awarded as above. This rate of interest shall be valid upto the date of the award and the amount of interest due shall be included in the total amount of the award.

9. We, hereby, award that the claimants shall pay to the respondents, the amounts awarded towards the four counter claims together with the amounts due to the Respondents in view of para 7.3.3 and 7.4.4 above within a period of 45 days from the date of the Award, failing which, simple interest at 12% p.a. shall be payable on the total amount of the Award, from the date of the award to the date of the payment..."

(emphasis is ours)

9. The aforesaid direction contained in the award, when read alongwith with the payment terms which are contained in paragraph 43.1, clearly establish that there is no such power contained in the contract, which could have enabled the arbitral tribunal to issue the directions of the kind made in the award, leading to compounding of interest. The relevant extract of the contract reads as follows

"Payments

43.1 Payments shall be adjusted for deductions for advance payments, retention, other recoveries in terms of the contract and taxes, at source, as applicable under the law. The Employer shall pay the Contractor the amounts certified by the Engineer within 28 days of the date of each certificate. If the Employer makes a late payment, the Contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date by which the payment should have been made upto the date when the payment is made at 12% per

annum."

10. The fact that the arbitrator could not have awarded compound interest is clear upon a bare reading of the provisions of Section 31(7) of the 1996 Act. The said provision, only confers, a power upon the arbitrator, to grant interest from the date on which the cause of action arose till the date of payment. The Section does not vest in the arbitrator the power to award compound interest or direct the payment of interest on interest. The observation of the Supreme Court in paragraph 18 of the judgement in S.L. Arora's case wherein it construes the scope and ambit of provisions of Section 31(7) of the Act, being apposite are extracted hereinbelow:

"....18. Section 31(7) makes no reference to payment of compound interest or payment of interest upon interest. Nor does it require the interest which accrues till the date of the award, to be treated as part of the principal from the date of award for calculating the post-award interest. The use of the words "where and in so far as an arbitral award is for the payment of money" and use of the words "the arbitral tribunal may include in the sum for which the award is made, interest..... on the whole or any part of the money" in clause (a) and use of the words "a sum directed to be paid by an arbitral award shall carry interest" in clause (b) of sub-section (7) of section 31 clearly indicate that the section contemplates award of only simple interest and not compound interest or interest upon interest. "A sum directed to be paid by an arbitral award" refers to the award of sums on the substantive claims and does not refer to interest awarded on the "sum directed to be paid by the award". In the absence of any provision for interest upon interest in the contract, the arbitral tribunals do not have the power to award interest upon interest, or compound interest, either for the pre-award period or for the post- award period...."

10.1 As a matter of fact, Section 3(3)(c) of the Interest Act, 1978 (in short the 1978 Act) , also prohibits grant of interest upon interest. The 1978 Act, however, does not deal with pendente lite and post award interest. The said provision empowers both a court and an arbitrator to award interest from the date of cause of action till the date of institution of legal proceedings or initiation of proceedings before an arbitrator.

11. The point to be considered in these circumstances is: could such a ground which is a pure question of law, having not been urged, and by that act of the counsel, in a sense, resulted in extension of an unintended concession in favour of the respondent, be considered by the court, while exercising its review jurisdiction.

11.1 After deep deliberation, we have come to a conclusion that in a given case, the court can correct such like errors which take the colour of a palpable concession by a lawyer, contrary to the clear and settled position in law. Having noticed the concession made, albeit contrary to law, it would be a travesty of justice if this court were to refuse such a plea on the ground advanced by the

respondent. The court can neither fold its hands nor shut its eyes to such an error. The submission of the respondent that this court could not exercise its review jurisdiction because it has another view in the matter, is clearly misconceived as in the given circumstances there cannot be any other view given that clause 43.1 of the payment terms, while conferring the right on the respondent to collect interest on payment delayed beyond twenty eight (28) days, does not provide for compounding of interest with the principal. In other words, the payment terms do not contemplate award of interest on interest. The arbitral tribunal, thus, was required to calculate the interest on delayed payment separately, along with, its decision on claims other than those pertaining to interest. There was no power, in law, vested in the arbitral tribunal to direct inclusion of interest with other claims awarded by it in favour of the respondent.

12. Before we conclude, we need to discuss the two judgments cited by Mr. Dave.

12.1 A careful perusal of the judgment of the Division Bench of this court, in Aizaz Alam's case, would show that review was sought on number of grounds which, inter alia, also involved issues of fact. The Division Bench in that case, while dismissing the review petitions noticed the judgment of the Supreme Court in Parsion Devi and Others Vs. Sumitri Devi and Others, . The Supreme Court in that case explained what would constitute a mistake or an error apparent on the face of the record. As observed by the Supreme Court, an error which is not self-evident and is to be detected by process of elaborate reasoning is not an error apparent on the face of the record. Clearly, the present case does not fall in that category.

12.2 In S.N.S (Minerals) Ltd. case, the facts were briefly as follows :-

(i) The matter had travelled to the Supreme Court twice; in the first instance when the High Court had quashed the orders relatable to imposition of penalty. The second time when, bar of limitation qua demand of duty based on provisions of Section 11A of the Central Excise Act, 1944 (in short the C.E. Act) was sought to be brought into play. The Supreme Court, while dismissing the appeal in the first round had made an observation to the effect that if the issue with regard to the demand of duty based on provisions of Section 11A of the C.E. Act had not been answered by the High Court, the appellants ought to have approached the High Court by way of review. Accordingly, a review petition was filed which was rejected by the High Court by observing that no such ground was taken in the writ petition. Upon the matter reaching the Supreme Court, while perusing the record, the court noted that though in the original writ petition, there was no such ground, in the amended writ petition, some vague reference had been made qua the issue of limitation. It is in these circumstances that the Supreme Court refused to entertain the appeal against the order of the High Court dismissing the review as it came to the conclusion, based on the counter affidavit of the opposite side that no argument was advanced. Notably, the Supreme court quoted its own precedents in Haridas Das Vs. Smt. Usha Rani Banik and Others, and Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh, which

enunciated the principle that manifest errors in which no two views are possible can be corrected. In our view, the facts as set out above, qua the instant case, are distinguishable from those which obtain in the judgments of the Supreme Court cited before us.

13. Mr. Dave's argument that the review petitioner had abandoned the ground pertaining to compound interest and hence, no review would lie of the judgment is, in our view unsustainable, in the facts obtaining in the present case. An act of abandonment would generally include relinquishment or giving up of right or interest in property with an intent of never again seeking resumption of such right or interest. While time may not be an essential element in construing the contours of an act of abandonment, lapse of time may provide evidence of intention to abandon especially, where it is accompanied by acts manifesting such an intention. (See Black's Law Dictionary, 6th Edition pages 2-3) .

13.1 In the instant case, the review petitioner had not only taken the ground in the appeal filed before the Division Bench but had taken the ground as well, in the petition filed before the Supreme court. Therefore, the intent, if at all, at least that of the review petitioner was always to press home the issue. The glitch which occurred was solely attributable to the lawyer of review petitioner, which resulted in an unintended concession being extended to respondent. There was in our view no abandonment of the issue.

14. Therefore, on both grounds, we are unable to agree with the counsel for the respondent. The review petition is allowed to the limited extent it directs inclusion of interest in paragraphs 7.5.3 and 9 of the award in the principal amount. The other directions contained in the judgement dated 03.02.2012, shall remain unaltered.

15. For aforementioned reasons, the captioned petition is allowed. There shall, however, be no orders as to costs.