**(2012) 11 DEL CK 0030**

**In the Delhi High Court**

**Case No :** FAO (OS) 192 of 2012

Zenith Ropes Pvt. Ltd. — APPELLANT

Vs

Union of India — RESPONDENT

**Date of Decision :** 20-11-2012

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 20, 31, 31(7)(b), 34
Civil Procedure Code, 1908 (CPC) — Section 34
Interest Act, 1978 — Section 3, 5

**Citation :** (2013) 1 ARBLR 27 : (2013) 133 DRJ 404 : (2013) 169 PLR 30

**Hon'ble Judges :** Vipin Sanghi, J;Sanjay Kishan Kaul, J

**Bench :** Division Bench

**Advocate :** Suhail Dutt with Mr. Saran Suri and Mr. Gunjan Kumar, for the Appellant; R.V. Sinha, for the Respondent

**Final Decision :** Allowed

## Judgement

Sanjay Kishan Kaul, J.—Admit. Learned counsel for the respondent accepts notice.

2. At request of learned counsel for the parties, the appeal is taken up for final disposal.

3. An open tender was floated by the Railway Board bearing no. CS-110/1994 in which the appellant participated and was declared successful resulting in a letter of acceptance dated 03.02.1995 written by the appellant which finally culminated in a contract inter se the parties dated 09.02.1995 for supply of 5124 metric ton of high tensile wires. The total value of the contract was Rs. 9,99,18,000/-. The rates and value was subject to price variation in terms of clause 13 of the Special Conditions of the Contract. A second contract was entered into on 05.05.1995 for supply of 8741 metric ton of high tensile wires with an associate company of the appellant M/s Hind Wire Industries Ltd.

4. The appellant under the first contract supplied 98.61 per cent of the total

contracted quantity and the bank guarantee furnished for performance was discharged by the respondent/Railways. However, in respect of the second contract, in view of labour problems being faced by the associate company of the appellant, a request was made on 20.09.1995 to transfer the ordered quantity to the appellant which ultimately resulted in a tripartite agreement on 30.04.1996.

5. Railways claim that the entire quantity ordered could not be supplied under the second contract and the appellant applied for extension of delivery period which was extended by six months with the stipulation that the payment would be made at a lower rate on account of price variation clause. This aspect was disputed by the appellant and was the cause of dispute which culminated in the arbitration proceedings in view of the arbitration clause.

6. The award was made and published on 15.07.2008 by Justice Satpal (Retd.) as the sole arbitrator. The arbitrator negatived the plea of the Railways that there was amalgamation of the two contracts and thus opined that the second contract remained an independent contract. Qua the first contract, supplies less being to the extent of 1.39 per cent which was within permissible limits of the contract, it was held that there was no breach. The short supplies of 758 metric tons under the second contract was held not to be attributable factor for which the blame could be laid at the door of the appellant. The arbitrator awarded various claims to the appellant amounting to Rs. 1,51,78,644/- along with simple interest at the rate of 7 1/2 per cent from 01.01.1999 to 30.06.2008. We may note that the date of 01.01.1999 has been treated as the date of cause of action. Future interest was granted at 12 per cent per annum both on the component of the principal amount as well as interest quantified till date of award of Rs. 1,08,14,784/-. This is apart from the cost of litigation.

7. The respondent being aggrieved with this award filed objections u/s 34 of the Arbitration and Conciliation Act, 1996 (''the said Act'' for short) being OMP No. 646/2008. The OMP has been partly allowed by the impugned order dated 29.02.2012 of the learned single Judge, which is sought to be assailed by the appellant on the aspect that the learned single Judge has interfered with the award. There is no appeal by the respondent. The discussion on the question of award of pendente lite and future interest is contained in para nos. 21 to 25 of the impugned judgment. The plea advanced on behalf of the Railways was that interest on claim for damages could only be awarded in certain circumstances as enunciated by the Supreme Court in State of Rajasthan and Another Vs. Ferro Concrete Construction Pvt. Ltd., . These circumstances are set out in para 66 of the judgment.

8. It was pleaded by learned counsel for the Railways that the contract did not provide for payment from any date interest on damages nor was such a specific claim raised. The legal notice dated 15.06.2000 issued on behalf of the appellant was examined in which no specific claim had been made towards interest on damages. Such a plea was raised only before the arbitrator and thus the learned single Judge opined that pendente lite interest on damages was not justified and

 

it could have been only awarded for the post award period. However, not only was the interest for the pre award period set aside but even for the post award period it was reduced to 7.5 per cent simple interest instead of 12 per cent as awarded by the arbitrator. It is these two aspects which are assailed by the learned senior counsel for the appellant.

9. We may notice that learned counsel for the respondent on 09.10.2012 had sought to raise a plea based on clause 2403 of the General Conditions of Contract, which reads as under:

2403. Lien in respect of Claims in other Contracts.-Any sum of money due and payable to the Contractor (including the security deposit returnable to him) under the contract may withhold or retain by way of lien by the Purchaser or Government against any claim of the Purchaser or Government in respect of payment of a sum of money arising out of or under any other contract made by the Contract with the Purchaser or Government.

10. It was the submission of the learned counsel for the respondent that amounts were withheld on account of amounts due from the appellant under other contracts. However, learned counsel fairly states today that on verification of record for which he had taken time he has found that there is no such notice for exercise of lien. Thus, this plea would have no force.

11. It is the submission of learned senior counsel for the appellant that the opinion of the learned single Judge in the impugned order is based on misconception of the ratio of the judgment of the Supreme Court in State of Rajasthan''s case (supra). Learned counsel has emphasized that in para 32 of the said judgment it has been opined that no doubt the position of law earlier was that interest on damages became payable only on quantification and would not be payable for the earlier period as there was no liability till ascertainment of the quantum of damages. However, this position has been observed to have undergone a change after the enactment of the Interest Act, 1978 where sub-section (1) of Section 3 of that Act provided that a court or for that matter an arbitrator can in any proceedings for recovery of any debt or damages allow interest to a person entitled to debt or damages at rates not exceeding the current rate of interest for certain periods. It would be useful to reproduce the discussion in para Nos. 63 to 66, which reads as under:

63. The legal position, however, underwent a change after the enactment of the Interest Act, 1978. Sub-section (1) of Section 3 of the said Act provided that a court (as also an arbitrator) can in any proceedings for recovery of any debt or damages, if it thinks fit, allow interest to the person entitled to the debt or damages at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,--

3. (1) a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

 

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:

64. Sub-section (3) of Section 3 made it clear that nothing in that section shall apply to any debt or damages upon which interest is payable as of right, by virtue of any agreement; or to any debt or damages upon which payment of interest is barred, by virtue of an express agreement. The said sub-section also made it clear that nothing in that section shall empower the court to award interest upon interest. Section 5 of the said Act provides that nothing in the said Act shall affect the provisions of Section 34 of the Code of Civil Procedure, 1908.

65. The position regarding award of interest after the Interest Act, 1978 came into force, can be stated thus:

(a) Where a provision has been made in any contract, for interest on any debt or damages, interest shall be paid in accordance with such contract.

(b) Where payment of interest on any debt or damages is expressly barred by the contract, no interest shall be awarded.

(c) Where there is no express bar in the contract and where there is also no provision for payment of interest then the principles of Section 3 of the Interest Act will apply in regard to the pre-suit or pre-reference period and consequently interest will be payable:

(i) where the proceedings relate to a debt (ascertained sum) payable by virtue of a written instrument at a certain time, then from the date when the debt is payable to the date of institution of the proceedings;

(ii) where the proceedings is for recovery of damages or for recovery of a debt which is not payable at a certain time, then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed, to date of institution of proceedings.

(d) Payment of interest pendente lite (date of institution of proceedings to date of decree) and future interest (from the date of decree to date of payment) shall not be governed by the provisions of the Interest Act, 1978 but by the provisions of Section 34 of the Code of Civil Procedure, 1908 or the provisions of the law governing arbitration as the case may be.

66. Therefore, even in regard to the claims for damages, interest can be awarded for a (sic period) prior to the date of ascertainment or quantification thereof if (a) the contract specifically provides for such payment from the date provided in the contract; or (b) a written demand had been made for payment of interest on the amount claimed as damages before initiation of action, from the date mentioned in the notice of demand (that is from the date of demand or any future date mentioned therein). In regard to claims for ascertained sums due, interest will be

 

due from the date when they became due. In the present case, interest has been awarded only from 3-9-1990, the date of the petition u/s 20 of the Act for appointment of arbitrator. We find no reason to alter the date of commencement of interest.

12. The second limb of the submission of the learned senior counsel for the appellant is that this judgment is in the context of the Arbitration Act, 1940 and the position has undergone a change under the said Act. This change is reflected inter alia from the observations made in Sayeed Ahmed and Co. Vs. State of U.P. and Others, . The Supreme Court made reference to the aforesaid judgment of State of Rajasthan''s case (supra) in para 12 while summarizing the position which emerged from that judgment and set out its conclusion in para 14. The said paragraph reads as under:

14. The decisions of this Court with reference to the awards under the old Arbitration Act making a distinction between the pre-reference period and pendente lite period and the observation therein that the arbitrator has the discretion to award interest during pendente lite period in spite of any bar against interest contained in the contract between the parties are not applicable to arbitrations governed by the Arbitration and Conciliation Act, 1996.

13. It is thus submitted that distinction contained in the Arbitration Act, 1940 between the pre-reference period and the pendente lite period stands extinguished and there are only two periods to be reckoned - one from the date of cause of action and the other the post award period. The aforesaid judgment Sayeed Ahmed''s case (supra) has also been relied upon by the learned counsel for the appellant to assail the reduction of interest in the post award period. In this behalf, learned counsel has pointed out that a similar situation the grievance was that interest granted up to date of the award had been set aside while 6 per cent interest had been granted for the post award period by the High Court as against the arbitrator having awarded 12 per cent interest. In this context, it was observed by the Supreme Court in para 26 as under:

26. The arbitrator has awarded interest at three different rates on three different amounts which are all less than 18% per annum. The said award of interest by the arbitrator is not contrary to Section 31(7)(b) of the Act. Unless the award of interest is found to be unwarranted for reasons to be recorded, the Court should not alter the rate of interest awarded by the arbitrator. The High Court has not assigned any reasons for reducing the rate of interest to 6% per annum. Therefore, such reduction cannot be sustained.

14. Learned counsel also seeks to rely upon the judgment of the Supreme Court in Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager (Works), Palghat and Others, which once again after noticing the earlier judgments including in Sayeed Ahmed''s case (supra) has emphasized the change in the legal position qua award of interest under the new Act as compared to the Arbitration Act, 1940. In that context it was observed that

 

having regard to subsection (7) of Section 31 of the said Act, the difference between the pre reference period and the pendente lite period had disappeared insofar as the award of interest by the arbitrator recognizing only two periods of interest as we have set out aforesaid. This distinction of pre-reference period and pendente lite period became irrelevant under the said Act.

15. We are in agreement with the submission of the learned senior counsel for the appellant. In fact the exposition of law by the Supreme Court in the aforesaid judgments leaves no manner of doubt that the interest would be payable on the quantified damages in view of the provisions of the Interest Act, 1978. Not only that, the distinction under the Arbitration Act, 1940 between the pre-reference period and the pendente lite period stands extinguished with interest being made available from the date of cause of action in view of the provisions of the said Act. No doubt in the notice invoking the arbitration clause dated 15.06.2000, there has been no specific claim of interest, but then that would not preclude the arbitrator from granting interest from the date of cause of action which is undisputedly 01.01.1999. In view of the aforesaid, the interference with the grant of interest at the rate of 7.5 per cent per annum from the date of cause of action i.e. 01.01.1999 till date of award dated 15.07.2008 was not called for by the learned single Judge.

16. Insofar as future interest is concerned, once again the plea of the learned senior counsel for the appellant finds support from the observations in Sayeed Ahmed''s case (supra) that once the rate of interest is contrary to Section 31(7)(b) of the said Act, the court should not interfere with the grant of interest unless the award of interest is found to be unwarranted for the reasons to be recorded. There is certainly no such reasons recorded by the learned single Judge and we find that no such reasons exist why the future interest of 12 per cent per annum should be reduced to 7.5 per cent per annum simple interest.

17. We have, however, posed a court question to learned senior counsel for the appellant as to how would he justify grant of future interest at the rate of 12 per cent per annum on the interest component under the award as has been done by the learned arbitrator. This is so as it would amount to compound interest which would not be payable unless there is a clause in the contract for payment of compound interest in view of the observations of the Supreme Court in State of Haryana and Others Vs. S.L. Arora and Company, . Learned counsel fairly states that there is no clause in the contract providing for compound interest and thus in view of the judgment in State of Haryana''s case (supra), interest post award would not be payable on the interest component under the award. The interest would thus be payable post award at the rate of 12 per cent per annum on the principal sum of Rs. 1,51,78,644/- and not on the interest component from the date of cause of action till date of award which has been quantified under the award at Rs. 1,08,14,784/-. To that extent, the award dated 15.07.2008 stands modified. The appeal is accordingly allowed in the aforesaid terms leaving the parties to bear their own costs.

 