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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 07th March, 2024

+ O.M.P. (COMM) 56/2019 & I.A. 15760/2019

BITES LTD Petitioner

Through: Mr. Udit Seth, Advocate.

versus

AHUWALIA CONTRACT
(INDIA) LTD. & ANR. Respondents

Through: Mr. Dhruv Rohatagi, Advocate for
R-1.

Ms. Aakanksha Kaul and Mr.
Aman Sahani, Advocates for Delhi
University.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

1. The petitioner assails an Arbitral Award dated 20.09.2018, to the extent that the learned Arbitrator has awarded interest on the respondent's claim for recovery against outstanding bills [claim No.3].

2. The arbitral proceedings arose out of a contract agreement dated 24.03.2009 ["the contract"], by which the petitioner - Rites Ltd. ["Rites"], as the constituted attorney of respondent No. 2, Delhi University ["the University"], entrusted respondent No.1 - Ahluwalia Contract (India) Ltd. ["Ahluwalia"], with the task of construction of hostels and flats in the North Campus of the University.

3. Before the learned Arbitrator, Ahluwalia was the claimant. Ahluwalia's case before the learned arbitrator was that it raised its final



bill of Rs. 7,84,66,808/- on 20.02.2013. Although the bill was certified by Rites on 19.07.2014 for a net payable amount of Rs.2,48,27,105/-, Ahluwalia was paid only Rs. 1,02,90,000/- on 21.07.2014. As payment was made partially and belatedly, it claimed recovery of the balance principal amount of the bill and interest for delayed payment, both on the unpaid amount and the amount already paid.

4. Ahluwalia raised four claims, tabulated below:

Claim No.1	Balance amount due in respect of the final bill raised by Ahluwalia.	Rs. 1,52,18,073/-
Claim No.2	Interest at the rate of 18% p.a., for the period 21.08.2013 to 21.07.2014, on a payment of Rs.1,02,90,000/-, made by Rites.	Rs. 26,34,679/-
Claim No.3	Interest at the rate of 18% p.a., from 21.08.2013 until the date of actual payment, on the outstanding payment due to Ahluwalia.	Unquantified.
Claim No.4	Costs	Rs.4,00,000/-

5. By the impugned Award, the learned Arbitrator has awarded claim Nos.1 and 3 in favour of Ahluwalia, alongwith post-award interest and costs. There is no challenge as far as claim No.1 is concerned, but it is urged by Rites that claim No.3 could not have been awarded in view of a specific bar contained in the contract.

6. Mr. Udit Seth, learned counsel for Rites, draws my attention to two clauses of the contract to submit that the claim for interest was beyond the provisions of the contract:

A. Clause 9 of the contract reads as follows:

“CLAUSE 9



Payment of Final Bill

The final bill shall be submitted by the Contractor in the same manner as specified in interim bills within three months of physical completion of work or within one month of the date of the final certificate of completion furnished by the Engineer-in-Charge whichever is earlier. No further claims shall be made by the Contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payments of those items of the bill in respect of which there is no dispute and of items in dispute, for quantities and rates as approved by Engineer-in-Charge, will, as far as possible be made within the period specified herein under, the period being reckoned from the date of, receipt of the bill by the Engineer-in-Charge or his authorized Engineer, complete with account of materials issued by the Employer and dismantled materials.

(i) If the Tendered value of work is upto Rs.1 Crore : 3 months

(ii) If the Tendered value of work exceeds Rs.1 Crore : 6 months

*The Contractor will not however be entitled to any compensation or claims or damages by way of interest etc. in case of delay in payment.*¹

B. The provision for settlement of disputes is contained in clause 25 of the contract. Sub- clause 9 thereof reads as follows:

“CLAUSE 25

Settlement of Disputes & Arbitration

xxx

xxx

xxx

9) It is also a term of the Contract that where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.”

7. Mr. Seth states that the said clauses were specifically brought to the attention of the learned Arbitrator, and points out that reference to these clauses is included in the written submissions filed by the petitioner before the learned Arbitrator. He submits that the learned Arbitrator has failed to consider this submission at all. He further cites the judgments of

¹ Emphasis in the original.



the Supreme Court in *Garg Builders v. BHEL*² and *Union of India v. Manraj Enterprises*,³ to submit that interest cannot be awarded by an arbitrator in the face of express stipulations to the contrary.

8. Ms. Aakanksha Kaul, learned counsel for the University, supports the submissions made by Mr. Seth.

9. Mr. Dhruv Rohatagi, learned counsel for Ahluwalia, however, submits that interest has been awarded in the present case as a form of compensation for delayed payment. He states that the learned Arbitrator has held that delay of respondent No.1 in payment of the amount of Rs.1.52 crores was not justified in any manner and, therefore, compensated Ahluwalia. He has drawn my attention to a judgment of a Coordinate Bench of this Court in *Mahesh Construction v. MCD*,⁴ to submit that no fault can be found with such an interpretation of the contract.

10. I am of the view that the matter is covered in favour of Rites by the judgments of the Supreme Court cited above.

11. In *Garg Builders*,⁵ the Court was concerned with a contractual provision which excluded payment of interest on earnest money deposit, security deposit or any monies due to the contractor. The learned Arbitrator awarded interest, which was set aside by this Court. The Supreme Court upheld the decision of this Court with the following observations:

² (2022) 11 SCC 697.

³ (2022) 2 SCC 331.

⁴ 2023 SCC OnLine Del 3192.

⁵ *Supra* (note 2).



“10. We have carefully considered the submissions of the learned counsel for both the parties made at the Bar. The law relating to award of *pendente lite* interest by arbitrator under the 1996 Act is no longer *res integra*. **The provisions of the 1996 Act give paramount importance to the contract entered into between the parties and categorically restricts the power of an arbitrator to award pre-reference and *pendente lite* interest when the parties themselves have agreed to the contrary.**

11. Section 31(7)(a) of the 1996 Act which deals with the payment of interest is as under:

“31. (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.”

12. It is clear from the above provision that **if the contract prohibits pre-reference and *pendente lite* interest, the arbitrator cannot award interest for the said period.** In the present case, clause barring interest is very clear and categorical. It uses the expression “any moneys due to the contractor” by the employer which includes the amount awarded by the arbitrator.”⁶

12. The Court went on to hold that judgments to the contrary, rendered under the Arbitration Act, 1940 would not be applicable to disputes adjudicated under the Act of 1996. It then analysed the provisions of the Interest Act, 1978, thus:

“22. It is pertinent to note that interest payments are governed in general by the Interest Act, 1978 in addition to the specific statutes that govern an impugned matter. Section 2(a) of the Interest Act defines a “Court” which includes both a tribunal and an arbitrator. In turn, Section 3 allows a “Court” to grant interest at prevailing interest rates in various cases. The provisions of Section 3(3) of the Interest Act, 1978 explicitly allow the parties to waive their claim to an interest by virtue of an agreement. Section 3(3)(a)(ii) states that the Interest Act will not apply to situations where the payment of interest is “barred by virtue of an express agreement”.

⁶ Emphasis supplied.



23. Thus, when there is an express statutory permission for the parties to contract out of receiving interest and they have done so without any vitiation of free consent, it is not open for the arbitrator to grant pendente lite interest. We are of the considered opinion that Clause 17 of the contract is not ultra vires in terms of Section 28 of the Contract Act, 1872.⁷

13. The same view has been taken in *Manraj Enterprises*.⁸ The Court followed its decisions in *Garg Builders*,⁹ and *Union of India v. Bright Power Projects (India) (P) Ltd.*,¹⁰ and observed as follows:

10. In Bright Power Projects, while considering pari materia clause with Clause 16(2) of the GCC, a three-Judge Bench of this Court has held that when the parties to the contract agree to the fact that interest would not be awarded on the amount payable to the contractor under the contract, they are bound by their understanding and having once agreed that the contractor would not claim any interest on the amount to be paid under the contract, he could not have claimed interest either before a civil court or before an Arbitral Tribunal. In the aforesaid case, this Court considered Clause 13(3) of the contract, which reads as under: (SCC p. 698, para 9)

“9. ... ‘13. (3) No interest will be payable upon the earnest money and 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.’ ”

11. In the said decision in Bright Power Projects, this Court also considered Section 31(7)(a) of the 1996 Act. It is specifically observed and held that Section 31(7) of the 1996 Act, by using the words “unless otherwise agreed by the parties” categorically specifies that the arbitrator is bound by the terms of the contract insofar as award of interest from the date of cause of action to date of the award is concerned. It is further observed and held that where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest. Thus, the aforesaid decision of a three-Judge Bench of this Court is the answer to the submission

⁷ *Supra* (note 2). Emphasis supplied.

⁸ *Supra* (note 3).

⁹ *Supra* (note 2).

¹⁰ (2015) 9 SCC 695.



*made on behalf of the respondent that despite the bar under Clause 16(2) which is applicable to the parties, the Arbitral Tribunal is not bound by the same. **Therefore, the contention raised on behalf of the respondent that dehors the bar under Clause 16(2), the Arbitral Tribunal independently and on equitable ground and/or to do justice can award interest pendente lite or future interest has no substance and cannot be accepted. Once the contractor agrees that he shall not be entitled to interest on the amounts payable under the contract, including the interest upon the earnest money and the security deposit as mentioned in Clause 16(2) of the agreement/contract between the parties herein, the arbitrator in the arbitration proceedings being the creature of the contract has no power to award interest,** contrary to the terms of the agreement/contract between the parties and contrary to Clause 16(2) of the agreement/contract in question in this case.”¹¹*

14. Clauses 9 and 25 (9) of the contract, reproduced above, are unambiguous. They specifically deal with the situations contemplated in Ahluwalia’s claim. Clause 9 provides that the contractor would not be entitled to “*any compensation or claims or damages by way of interest etc. in case of delay in payment*”. Clause 25(9) further restricts the power of the arbitrator to grant interest for the pre-reference or *pendente-lite* period on any amount found payable.

15. The judgment of this Court in *M/s Mahesh Constructions*,¹² cited by Mr. Rohatagi, is in my view distinguishable. Mr. Rohatagi drew my attention to paragraph 14 and 15 of the said judgment, which read as follows:

“14. The power of Arbitral Tribunal to award interest for all the three periods namely, pre-reference, pendentelite and post award, is settled, after all. It has been held by Supreme Court, in Reliance Cellulose Products Ltd. v. ONGC reported as (2018) 9 SCC 266, that interest is compensatory in nature and is parasitic on the principal amount. Following the “Reliance” ratio, it is seen that arbitrator is empowered

¹¹ Emphasis supplied.

¹² *Supra* (note 4).



under Section 31(7) of the Act to grant interest for all the three periods, unless the contract in so many words prohibits the “arbitrator” from granting interest under Section 31(7) of the Act. A clause in a contract that prohibits payment of interest on delayed payments, does not restrict the “arbitrator” to grant interest since it does not prohibit the “arbitrator” from granting interest under Section 31(7) of the Act and is a restriction on the contracting party to claim interest on delayed payments. As stated above, since interest is compensatory in nature, the arbitrator's powers are not curtailed by such narrow clauses in the contract.

15. In view thereof, the award of interest by the Arbitral Tribunal for pre-award, pendentite and post award periods, is neither contrary to the terms of contract nor is it in breach of Section 31(7) of the Act.”¹³

The aforesaid paragraphs reveal that, in the case of *M/s Mahesh Constructions*,¹⁴ the Arbitrator's powers were not curtailed by any contractual clause prohibiting the awarding of interest. Clause 25 (9) of the contract in the present case, to the contrary, specifically curtails the Arbitrator's powers.

16. I am also unable to accept Mr. Rohatagi's contention that the Award was in the nature of compensation, and not of interest. However, in a case of this nature, interest is nothing but compensation for the use of money during the period that payment was delayed. In the statement of claim also, claim No.3 is specifically treated as a claim for interest. The Award of the learned Arbitrator, on this claim, although couched as an award of compensation, is in the following terms:

“Part final bill of Rs. 1,52,18.073/- duly certified, still unpaid for no fault of claimant doe already more than 5 years, the AT is of the firm view that the claimant needs to be compensated for the injury caused to the claimant by way of payment of reasonable interest @ 12% from the date it was passed and certified i.e. 17/7/2014 to the date till this was not paid i.e. the date of publishing the award

¹³ Emphasis supplied.

¹⁴ *Supra* (note 4).



(19/9/2018). So, the claim is allowed in favour of the claimant to the extent as mentioned above.”¹⁵

At the highest, it can be said that compensation has thus been awarded by payment of interest, but this is exactly what the contract expressly prohibits.

17. Having regard to the judgments of the Supreme Court cited above, and a reading of the contractual terms, the inescapable conclusion is that the award of interest, in the present case, was beyond the powers of the Arbitrator. It is made clear that the grant of post award interest is neither challenged, nor set aside.

18. The Award on claim No. 3 is, therefore, set aside. The petition is allowed to the aforesaid extent. There will be no order as to costs.

PRATEEK JALAN, J

MARCH 7, 2024
SS/

¹⁵ Emphasis supplied.