

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

% Reserved on: 19.03.2009
Date of decision: 29.05.2009

+ EFA (OS) No.4 of 2008 & CM No.1432 of 2008

M/S. ENGINEERING PROJECTS (INDIA) LTD. ...APPELLANT
Through: Mr. A.S. Chandhiok,
Sr. Adv. with Mr. M.K. Das &
Mr. Ritesh Kumar, Advocates.

Versus

M/S. ARVIND CONSTRUCTION COMPANY LTD. ...RESPONDENT
Through: Mr. U. Hazarika &
Ms. Dhanitry Phookan,
Advocates.

AND

+ EFA (OS) No.6 of 2008

M/S. ARVIND CONSTRUCTION COMPANY LTD. ...APPELLANT
Through: Mr. U. Hazarika &
Ms. Dhanitry Phookan,
Advocates.

Versus

M/S. ENGINEERING PROJECTS (INDIA) LTD. ...RESPONDENT
Through: Mr. A.S. Chandhiok,
Sr. Adv. with Mr. M.K. Das &
Mr. Ritesh Kumar, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. The reference to the appellant herein is being made to M/s. Engineering Projects (India) Limited while to M/s. Arvind Construction Company Private Limited as the respondent as per the cause title in EFA (OS) No.4/2008. The appeals which have been taken up for consideration arise as both the parties are partly aggrieved by the impugned order.
2. The appellant undertook the construction of a building at Baghdad and entered into a contract with the respondent and sub-contracted part of the work. The disputes between the parties were referred to the sole arbitrator late Mr. Justice Prakash Narain (Retd.) in view of the existence of an arbitration clause who made and published an award dated 31.8.1990. The operative portion of the award reads as under:

“a) That the encashment by EPI of Bank Guarantee of Rs.38,25,000.00 submitted by ACCL, was not justified that EPI do pay back to ACCL this amount of Rs.38,25,000.00 and interest thereon @ 15% from 6.12.1986, the date of encashment of Bank Guarantee, upto 23.6.1988, the date of reference, amounting to Rs.8,84,500.00 (Rupees eight lacs eighty four thousand five hundred only).

b) That after taking into consideration the ad hoc advances and other payments made by EPI to ACCL and adjustment of the same EPI does pay to ACCL a further sum of ID 2,10,000.00 (Iraqi Dinars two hundred and ten thousand only) in equivalent Indian Currency, (taking the conversion rate of 1 ID at US \$ 3.377778, this amount of ID 2,10,000.00 held payable by EPI comes to US \$ 7,09,333.38, which in turn converted to Indian Currency works out to Rs.1,23,56,587.00 (Rupees One crore twenty three lakhs fifty six thousand five hundred eighty seven only), as per exchange rate of Rs.17.42 per One Dollar prevailing on the date of the award. Accordingly, EPI do pay Rs.1,23,56,587.00 to ACCL.

- c) EPI shall also further pay interest @ 15% P.A. on Rs.38,25,000.00 and on Rs.1,23,56,587.00 from the date of this award till the date of payment or till the date of decree, whichever is earlier.
 - d) Parties will bear their respective costs of this reference.”
- 3. The award being under the Indian Arbitration Act, 1940, was filed in Court and the respondent prayed for the award to be made rule of the court. The appellant filed objections. The learned single Judge of this Court (as he then was) dismissed the objections and made the award rule of the court directing decree to be drawn up in terms of the award. The respondent was held entitled to interest @ 12 per cent per annum from the date of decree till date of realization.
- 4. The appellant filed FAO (OS) No.69/1995 aggrieved by the order of the learned single Judge along with an application for stay. In terms of order dated 5.12.1996 the execution of the decree under appeal was stayed subject to the appellant depositing an amount of Rs.1.50 crore in two installments in the Court and the amount to be released to the respondent on furnishing a bank guarantee with the Registrar of this Court for restitution with interest in the event of the appeal being allowed. The appellant deposited the amounts on 2.1.1997 and 16.1.1997 and the respondent furnished a bank guarantee and thereupon withdrew the amount on 7.3.1997.

5. The aforesaid appeal was dismissed by the Division Bench on 29.8.2006 and the Special Leave Petition filed by the appellant also met the same fate on 7.8.2007. Thereafter a review petition was also filed against the order dated 7.8.2007 and the same was dismissed on 4.12.2007. The matter, thus, stood concluded insofar as the challenge to the award was concerned.
6. The respondent filed an application for execution on 11.10.2007 seeking recovery of Rs.3,74,05,918.00 after having given credit for the amount of Rs.1.50 crore withdrawn during the pendency of the appeal before the Division Bench. The learned single Judge acting as the executing court in terms of the impugned order dated 17.1.2008 came to the conclusion that a sum of Rs.4,47,58,554.00 was payable by the appellant under the decree. The learned single Judge took note of the fact that the arbitrator had awarded an amount of Rs.1,23,56,587.00 in favour of the decree holder apart from a sum of Rs.38,25,000.00. The interest on the bank guarantee was quantified at Rs.8,84,500.00 and thus the total amount under the award was Rs.1,70,66,087.00. The arbitrator had also awarded interest @ 15 per cent per annum on Rs.1,23,56,587.00 and Rs.38,25,000.00 till date of the decree or realization, whichever was earlier. This amount had not been paid. On the date of the decree the amount, thus, came to Rs.2,76,24,471.00, which was the decretal amount and it is on this amount

that the interest @ 12 per cent per annum from the date of decree till date of realization will be calculated. The amount of Rs.1.50 crore was thereafter adjusted from this amount and future interest would arise. The decree holder had subsequently corrected the amount by filing calculation chart and showing that actually the amount was Rs. 5,71,45,231.00 while as per the judgement debtor it was Rs.1,83,70,503.00.

7. Learned counsels for the parties agreed that there is a three-fold controversy to be examined by this Court:

i. The arbitrator in para (a) of the award had directed that the amount of Rs. 38,25,000.00 of the wrongfully encashed bank guarantee would carry interest @ 15 per cent per annum from 6.12.1986 (date of encashment of bank guarantee) up to 23.6.1988 (date of reference) which amount had been quantified at Rs.8,84,500.00. Future interest was also granted @ 15 per cent per annum on Rs.38,25,000.00. The appellant is, thus aggrieved by the grant of interest on this interest amount quantified at Rs.8,84,500.00.

ii. Sub-para (c) of the award requires the appellant to pay interest @ 15 per cent per annum on Rs.38,25,000.00 and on Rs.1,23,56,587.00. The grievance of the appellant is that this interest will not carry further interest @ 12 per cent per annum while making the award rule of the court as this is the

interest itself and only simple interest had been granted.

iii. The sum of Rs.1.5 crore deposited in January 1997 and withdrawn by the respondent in March 1997 as per the appellant should be adjusted from the amount due as on that date and only any balance principal amount would earn interest. The respondent, however, claims that this amount being a deposit made only as a condition of stay in appeal, cannot be so adjusted.

8. The respondent is aggrieved by the fact that the amount paid of Rs.1.5 crore was for stay of the execution of the decree and it could not have been taken as payment in satisfaction of the decree and the amount of Rs.8,84,500.00 would carry interest. The grievance of the appellant is that interest @ 15 per cent per annum from the date of the award till date of decree is not liable for further interest @ 12 per cent per annum.
9. On examination of the respective pleas of the parties, we may note that learned counsel for the respondent could not advance the case much in appeal on the claim of interest on the amount of Rs.8,84,500.00. This is so since the award dated 31.8.1990 had awarded only two amounts – Rs.38,25,000.00 and Rs.1,23,56,857.00 which amounts were to carry interest. Future interest @ 15 per cent per annum was granted on both the aforesaid amounts till date of decree. The amount of Rs.8,84,500.00 was on account of interest @ 15 per cent

per annum on the amount of Rs.38,25,000.00 from the date of encashment till the date of reference. This was just the quantification of interest and no future interest had been granted on this amount till date of decree (the amount being on account of interest). There is no *pendent lite* interest granted. The award was made rule of the court with the direction to draw up a decree in terms of the award. The only additional relief granted was for the future interest from the date of decree till date of realization as the arbitrator had granted interest only till the date of the award. No interest would, thus, be payable on the sum of Rs.8,84,500.00.

10. The result of the aforesaid is that the amount of Rs.38,25,000.00 would earn interest up to the date of the reference quantified at Rs.8,84,500.00 and thereafter would earn interest @ 15 per cent per annum from the date of the award till the date of decree and @ 12 per cent per annum from the date of decree till date of realization. The amount of Rs.1,23,56,587.00 would earn interest @ 15 per cent per annum from the date of award till date of decree and @ 12 per cent annum from the date of decree till date of realization. This rests the controversy insofar as the first aspect is concerned.
11. Insofar as the issue of interest @ 12 per cent per annum on the interest earned till date of decree is concerned, it could not seriously be contended that such an amount would be payable. The reason is that the executing court

does not go behind the decree and interest has to be calculated in terms of the decree. The decree in turn had made the award rule of the court. Thus, it is the effect of the operative portion of the award which has to be seen to come to a conclusion as to in what manner interest has to be calculated which has already been noticed above that the two principal amounts have specifically been set out by the learned arbitrator of Rs.38,25,000.00 and Rs.1,23,56,587.00. These amounts would earn interest as per the decree and in the manner set out hereinabove while dealing with the first aspect. Thus, nothing more is required to be said in respect of the second plea.

12. The last and most crucial aspect arises from the appellant obtaining a stay of the decree in appeal before the Division Bench on the condition of deposit of Rs.1.5 crore and the amount to be released to the respondent on furnishing a bank guarantee to the satisfaction of the Registrar. It is the submission of the learned senior counsel for the appellant that this amount is liable to be adjusted against the decretal amount payable as on the date when the amount was withdrawn by the respondent while learned counsel for the respondent contends that the amount being deposited as a condition of stay, the same could not be treated as a deposit towards satisfaction of the decree.

13. In our considered view, the issue is no more *res integra* in view of various pronouncements of this Court and the Supreme Court. The payment made for obtaining a stay of the decree before the appellate court cannot be said to be an amount paid under Order 21 Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as the said Code) towards satisfaction of the decree. The observations of the learned single Judge of this Court in Hindustan Construction Corporation Vs. DDA & Ors. 2002 (65) DRJ 43 in paras 5 & 6 have been reproduced hereinbelow:

“5. The only question to be determined in this petition is as to whether the deposit of the decretal amount by the judgment debtor under the orders of the Appellate Court, could be construed as payment to decree Holder or not. According to Rule 1 of Order 21 of the Code of Civil Procedure, the modes of payment of a money decree are (a) by depositing into Court whose duty it is to execute the decree or sent to that Court by postal money order or through a Bank; or (b) out of court to the decree holder by postal money order or through a Bank or by any other mode wherein payment is evidenced in writing; or (c) otherwise as the Court, which made the decree directs. A perusal of the judgments cited by the learned Counsel for the decree holder and particularly the judgment of the Apex Court in the case of PSL Ramanathan Chettiar and Ors v. ORMPRM Ramanathan Chettiar (Supra) make it clear that the deposit of decretal amount by judgment debtor in the Court to purchase peace by way of stay of execution of the decree does not pass title in the deposited money in favour of the decree holder and as such, is not a payment in terms of Order 21 Rule 1 of the Code of Civil Procedure which prescribes specific modes for the satisfaction of a money decree.

6. The payment made to a Decree Holder under Rule 1 of Order 21 CPC and a deposit made by a judgment debtor in Court for obtaining stay of execution of decree against him are altogether different courses adopted by a judgment debtor. Payment under Order 21 Rule 1 CPC satisfies a decree holder whereas a deposit in the Court to avoid execution keeps the amount beyond the reach of Decree holder and leaves him waiting for its release.

The deposit of the decretal amount, therefore, by a judgment debtor as a condition for obtaining stay of the execution of the decree cannot be treated at par with payment to the Decree Holder. As such in spite of such deposit of interest, as ordered in favour of the decree holder by the Court passing the decree continues to run against the judgment debtor till the Decree holder actually receives the money. The rationale behind this view is that a judgment debtor who files an appeal to challenge a Decree and applies for stay of execution pending disposal of his appeal seeks to avoid payment of decretal amount to the Decree holder and as such, upon getting stay of execution, even on deposit of decretal amount, succeeds in preventing payment of decretal amount to decree holder. Therefore, his liability to pay interest to decree holder continues till the amount is actually paid to decree holder. A judgment debtor therefore on whose appeal the execution is stayed subject to deposit of decretal amount in Court must take appropriate steps by way of requesting the court to ensure that the deposited amount is invested fruitfully so that at the end of the day, in case his appeal is dismissed and the amount becomes payable to decree holder, the interest earned on the deposited amount is available for discharging the liability of interest."

14. The aforesaid view has been followed by one of us (Sanjay Kishan Kaul, J.) in A. Tosh & Sons India Ltd. Vs. N.N. Khanna AIR 2006 Delhi 251. We, in a recent decision in EFA (OS) No.1/2007 decided on 22.1.2009, had taken note of the aforesaid two judgements as also judgements of the Apex Court and the Division Bench of this Court in P.S.L. Ramanathan Chettiar & Ors. Vs. O.R.M.P.R.M. Ramanathan Chettiar AIR 1968 SC 1047 and Haryana Engineering & Foundary Works Vs. Union of India 1998 (47) DRJ 172 respectively.
15. Learned senior counsel for the appellant, despite the aforesaid, sought to emphasize that the amendment to the provisions of Order 21 Rule 1 of the said Code carried out in 1976 has some significance and the payment

made in appeal court towards stay of the decree is liable to be taken as satisfaction of the decree. In order to appreciate the said plea, the said provision is reproduced hereinbelow:

**“ORDER XXI
EXECUTION OF DECREES AND ORDERS**

Payment under decree

1. Modes of paying money under decree

- (1) All money, payable under a decree shall be paid as follows, namely:-
 - (a) by deposit into the Court whose duty it is to execute the decree, or sent to that Court by postal money order or through a bank; or
 - (b) out of Court, to the decree-holder by postal money order or through a bank or by any other mode wherein payment is evidenced in writing; or
 - (c) otherwise, as the Court which made the decree, directs.
- (2) Where any payment is made under clause (a) or clause (c) of sub rule (1), the judgment-debtor shall give notice thereof to the decree-holder either through the Court or directly to him by registered post, acknowledgement due.
- (3) Where money is paid by postal money order or through a bank under clause (a) or clause (b) of sub-rule (1), the money order or payment through bank, as the case may be, shall accurately state the following particulars, namely : -
 - (a) the number of the original suit;
 - (b) the names of the parties or where there are more than two plaintiffs or more than two defendants, as the case may be, the names of the first two plaintiffs and the first two defendants;
 - (c) how the money remitted is to be adjusted, that is to say, whether it is towards the principal, interest or costs;
 - (d) the number of the execution case of the Court, where such case is pending; and

(e) the name and address of the payer.

- (4) On any amount paid under clause (a) or clause (c) of sub-rule (1) interest, if any, shall cease to run from the date of service of the notice referred to in sub-rule (2).
- (5) On any amount paid under clause (b) of sub-rule (1) interest, if any, shall cease to run from the date of such payment:

Provided that, where the decree-holder refuses to accept the postal order or payment through a bank, interest shall cease to run from the date on which the money was tendered to him, or where he avoids acceptance of the postal money order or payment through bank, interest shall cease to run from the date on which money would have been tendered to him in the ordinary course of business of the postal authorities or the bank, as the case may be.”

- 16. Learned counsel referred to Clause (b) of Rule 1 of Order 21 of the said Code to contend that the payment made as a condition of stay is covered by the said clause as it should be covered by “any other mode wherein payment is evidenced in writing”. Learned counsel sought to draw strength from sub-rule 5 of Rule 1 of Order 21 of the said Code to contend that the interest would cease to run from the date of such payment.
- 17. In our considered view, the aforesaid is a mis-reading of the provision. Sub-rule 1 of Rule 1 of Order 21 of the said Code provides for payment to be made under the decree and the manner of the same. A deposit in Court has to be before the Court, which has to execute the decree. The executing court is the court which passed the decree and not the appellate court. Clause (b) refers to payment out of court and the latter provision of the said clause cannot be read *de hors* the original provision “out of

court". The object of sub-rule 1 of Rule 1 of Order 21 of the said Code is only where money is paid unconditionally in the manners provided, such payment should be treated towards the decree and that is when interest would stop as per Clauses 4 & 5 of Rule 1 of Order 21 of the said Code. The significant aspect is that these are unconditional payments towards the decree and not payments made partial or in whole for obtaining stay of the decree. We may notice that the amount has been released to the respondent on the condition of furnishing a bank guarantee and the respondent has incurred a large amount as costs towards furnishing bank guarantee in terms of averments made in the application. This is, thus, not payment towards the decree.

18. The respondent cannot charge the bank guarantee charges which bank guarantee was furnished to withdraw the amount but the payment cannot be construed as a payment towards the decree. Thus, the amounts as specified in the decree would continue to earn interest till the decision in the matter and only at the stage of the decision in appeal would the question arise of adjustments of the amount of Rs.1.5 crore towards the amount of principal and interest due thereon since at that stage on dismissal of the appeal, the bank guarantee would be discharged and the amount would be unconditionally available to the respondent.

19. We, thus, decide the third aspect in the aforesaid terms.

20. The impugned order accordingly stands modified in terms of what we have set out hereinbefore and a fresh calculation would have to be done by the Registry in terms of the aforesaid. The balance amount calculated would be payable by the decree holder. The necessary steps in this behalf be taken by the Registry within one (1) month to calculate the balance decretal amount as aforesaid.
21. The appeals are accordingly disposed of leaving the parties to bear their own costs.
22. A copy of this order be placed in Ex. P. No. 265/2007 and the said petition be listed before the Executing Court for further directions on 20.7.2009.

CM No. 1432/2008 in EFA (OS) No. 4/2008

In view of the disposal of the appeal, no further directions are called for on this application.

Application stands disposed of.

SANJAY KISHAN KAUL, J.

MAY 29, 2009
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SUDERSHAN KUMAR MISRA, J.