

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision : 20.10.2011

EFA (OS) No. 44/2009

K.R.BUILDERS PVT.LTD APPELLANT

Through : Mr.Raman Kapur, Sr.Adv. with
Mr.Aviral Tiwari, Advocate.

- V E R S U S -

DDA ... RESPONDENT

Through : Mr.Arjun Pant, Advocate.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | NO |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | NO |

SANJAY KISHAN KAUL, J. (ORAL)

1. Admit.
2. Learned counsel for the respondent accepts notice.
3. At request of learned counsel for the parties, the appeal is taken up for final disposal.
4. The appellant is aggrieved by the unsuccessful endeavour of the respondent to re-open a closed chapter of a satisfied decree by the impugned order dated 25.09.2009.
5. The disputes between the parties which were governed by the arbitration clause resulted in an award in favour of the appellant dated 12.08.1996. The amount awarded was with simple interest at the rate of 16 % per annum from the *date of the award till the date of payment or date of decree, whichever was earlier, on the awarded amount*. Both the parties understood that the award was governed by the Indian Arbitration Act, 1940 ('the old Act' for short) as the reference was made on 01.01.1993 i.e. prior to The Arbitration and Conciliation Act, 1996 ('the new Act') coming into force. Thus, the appellant as a decree holder filed an application under Sections 14 & 17

of the old Act for filing the award in court and making it rule of the court. On the filing of the said application, the award was filed in the court and notice was issued to the respondent who filed objections under Sections 30 & 33 of the old Act. The application filed by the appellant and the objections filed by the respondent were disposed of by the learned single Judge (as he then was) vide the order dated 27.05.2002 holding that the provisions of the old Act would not apply and that the award was governed by the provisions of the new Act. On the basis of this finding, a conclusion was reached that the exercise of filing an application under Sections 14 & 17 of the old Act was futile as the award was enforceable as a decree of the court and since no application had been filed by the respondent under Section 34 of the new Act within the statutory period, there was no valid challenge to the award and the objections were consequently dismissed. This was in view of the legal principles enunciated in Thyssen Stahlunion GMBH v. Steel Authority of India; (1999) 9 SCC 334.

6. The appellant thereafter proceeded to seek execution of the decree in terms of the award dated 12.08.1996 as none of the parties filed an appeal against the order dated 27.05.2002 which became final. The respondent sought to satisfy the decree by making a payment of a sum of Rs.12,21,856.53/- after deducting the TDS thereon.
7. This payment was made on 12.06.2003 calculating interest at the rate of 16 % per annum on the awarded amount from the date of the award till the order was passed on 27.05.2002. The payment was, thus, made assuming that the order dated 27.05.2002 amounted to a decree as if the award dated 12.08.1996 was made rule of the court and a decree had been passed. The aforesaid should have put quietus to the issue, but the appellant sought to execute the decree for the remaining amount with interest payable from 27.05.2002 to date of payment. The appellant, however, gave up this endeavour and withdrew the application for the said purpose, but in the bargain kindled some thoughts in the

minds of the competent authority of the respondent, who re-examined the issue.

8. The respondent felt that since the award provided for payment of interest up to the date of the decree or date of payment whichever is earlier, interest was liable to be paid only till the expiry of 90 days from the date of the award in view of the provisions of the new Act. This was in view of the stipulation in the award itself as worded.
9. The other development which took place was re-thought given to the legal position by the Supreme Court in Milkfood Ltd.v. GMC Icecream (P) Ltd.; JT 2004 (4) SC 393 in terms whereof if a reference was made prior to the new Act coming into force, the award was to be governed by the old Act unless the parties specifically agreed to have the proceedings under the new Act (which was not so in the present case)
10. The effect was, thus, that the award in question was liable to be governed by the old Act, but then the order dated 27.05.2002 had already become final as none of the parties had challenged the same.

11. The respondent sought to re-open the chapter by filing EA No.417/2005 setting out the aforesaid facts and claiming that the interest paid for the period beyond 90 days from the date of the award till 27.05.2002 was the excess amount paid which was liable to be refunded amounting to Rs.5,27,308/-. This application has been allowed vide the impugned order.
12. A perusal of the impugned order shows that the learned single Judge appears to have proceeded on the principle of 'double jeopardy'. Learned single Judge has opined that the respondent suffered on account of the application moved under Sections 30 & 33 of the old Act being dismissed as per the then prevalent law which subsequently changed by pronouncements of the Supreme Court. This was stated to be the "first jeopardy" to the respondent. The "second jeopardy" was payment made by the respondent assuming the award to be under the new Act, but simultaneously making payment of interest up to the date of payment contrary to the terms of the award. The learned single Judge, thus, directed refund of the excess payment made.

13. On hearing learned counsel for the parties, we are unable to agree with the conclusion of the learned single Judge.
14. Insofar as the question as to which of the Acts would govern the parties, the opinion rendered in the judgment dated 27.05.2002 was as per the then prevalent position. If the respondent was of the view that it laid down an incorrect principle of law, nothing prevented the respondent from filing an appeal. After all, some other parties did contest the matter and took the matter right till the Supreme Court which resulted in the judgment in Milkfood Ltd.v. GMC Icecream (P) Ltd's (supra).
15. The respondent, thus, cannot make a grievance in this behalf as to accept such a plea would amount to re-opening closed litigations where both the parties accepted the same, as in the present case.
16. The second aspect arises from the award itself and as to what nature of direction qua the issue of interest was passed in the award. The arbitrator had granted interest from the date of the award till date of payment

or date of decree, whichever was earlier. This pre-supposed that the award was liable to be filed in the court to be made rule of the court and thus a subsequent date would arise when the decree would be passed. The arbitrator thus fixed interest to an earlier date assuming that the court would fix the rate of interest post the decree period. The fact remains that the award was treated as an award under the new Act. As to how such an expression has to be understood has been dealt by the learned single Judge in S.Kumar v. Delhi Development Authority; (103) 2003 DLT 502 where it was observed in para 7 as under:

“ 7. In view of the fact that award itself is a decree, the *directions of the Arbitrator* that the *pendente lite interest shall be paid from 8.4.1998 to the date of payment or date of decree whichever is earlier actually meant that interest was payable upto date of payment*. Filing of objections by a party under Section 34 and refusal thereof is of non relevance so far as payment of future interest is concerned. The application under Section 34 is only relevant for the purpose of enforcement of the decree. The moment this application is refused, the decree becomes enforceable and the date of decree remains the same as that of the award.”

17. A similar view has been taken by another learned single Judge in Shankar Construction Company v. National Building Construction Corporation Ltd.; 2003 (3) Arb.L.R.333.

18. We find that there appears to be some misconception about the date of the decree. The date of the decree remains the same as the date of the award. The decree is not enforceable for a period of 90 days in view of the provisions of Section 36 of the new Act, which reads as under:

“36. Enforcement – Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court.”

19. It is this window which was given to the judgment debtor to make the payment or to challenge the award failing which the rigours of enforcement would arise. Any other construction would make it illogical and thus the interest is liable to be paid till the decree is satisfied.

20. We may also note that even otherwise, the respondent detained the money payable under the decree and utilized the same and is thus liable to pay interest.
21. We are of the view that the learned single Judge applied principle of “double jeopardy” which has no application to the jurisprudence applicable to such matters.
22. We also cannot lose sight of the fact that not only did the parties accept the order dated 27.05.2002, but even made payments in terms thereof and when the appellant sought to enforce the award for the balance amount from the date of the judgment of 27.05.2002 till date of payment, it was persuaded to give up the said claim to put a quietus to the issue. It was, thus, impermissible for the respondent to re-agitate the issue predicated on the plea that it became wiser after having seen the application filed by the appellant which he had withdrawn for payment of such balance interest.
23. We see no reason why this closed chapter ought to have been permitted to be re-opened by the learned

single Judge in execution proceedings through the process of an application filed under Section 151 of CPC.

24. The impugned order is accordingly set aside and EA No.417/2005 stands dismissed.

25. The appeal is accordingly allowed leaving the parties to bear their own costs.

CM No.17947/2009

No directions are required in this application.

The application stands disposed of.

SANJAY KISHAN KAUL, J.

OCTOBER 20, 2011
dm

RAJIV SHAKDHER, J.