

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 07.05.2018

+ **O.M.P. (COMM) 12/2016 & IA No. 853/2016**

S.E. INVESTMENTS LTD

.... Petitioner

Versus

**JAY POLYCHEM (INDIA) LTD
& ORS.**

... Respondents

Advocates who appeared in this case:

For the Petitioner :Mr P. Nagesh and Mr Dhruv Gupta.

For the Respondents :Mr P.P. Malhotra, Senior Advocate with Mr
Shubhendu Kaushik.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (SEIL) has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the arbitral award dated 31.07.2015 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted by a sole arbitrator, Mr S.B. Sinha, former Judge of the Supreme Court of India (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes that had arisen between the petitioner and the respondents with respect to the Loan Agreements dated 29.08.2011 (hereafter 'the Loan Agreements').

2. Mr P. Nagesh, the learned counsel appearing for the petitioner had restricted the challenge to the impugned award only on two counts. The first is with regard to the Arbitral Tribunal's decision to hold that the sum of ₹5 crores paid by respondent no. 1 (JPIL) on 30.08.2011 was not as Cash Collateral but ought to be adjusted from the loan. And, the second relates to the award of *pendente lite* interest. The Arbitral Tribunal has awarded *pendente lite* interest at the rate of 15% per annum. It is contended on behalf of SEIL that having accepted the contractual rate of interest to be 23.59% per annum, the Arbitral Tribunal had erred in reducing the rate of *pendente lite* interest to 15% per annum.

3. Briefly stated, the relevant facts necessary to address the controversy are as under:-

3.1 SEIL is a Non-Banking Finance Company and is, *inter alia*, engaged in the business of lending finance to borrowers. Respondent nos. 1 and 2 are companies registered under the Companies Act, 1956. Respondent nos. 3 and 4 are directors of respondent nos. 1 and 2.

3.2 SEIL granted a loan of ₹20,00,00,000/- and the parties entered into Loan Agreements – all dated 29.08.2011 – being LD 2639, LD 2640, LD 2641, LD 2642 and LD 2643 for sum of ₹6 crores, ₹5 crores, ₹4 crores, ₹3 crores and ₹2 crores respectively. In terms of the Loan Agreements, the repayment obligations of JPIL were guaranteed by respondent nos. 2 to 4, *inter alia*, by entering into separate Guarantee Agreements.

3.3 The said loan carried interest at the *flat* rate of 10.75% per annum [equivalent to 23.59% per annum on reducing balance] which was to be repaid in twenty-four monthly installments commencing from 30.08.2011.

3.4 SEIL disbursed a sum of ₹18,56,44,000/- after deducting amount of ₹1,21,50,000/- on account of first installment of EMI and ₹22,06,000/- on account of processing charge. Out of the above amount, ₹6,00,00,000/- was disbursed on 30.08.2011 and the balance ₹12,56,44,000/- was disbursed on 01.09.2011.

3.5 On 30.08.2011, JPIL remitted a sum of ₹5,00,00,000/- to SEIL by RTGS. SEIL claims that the said amount was paid as a Cash Collateral carrying an interest at the rate of 9% per annum; however, JPIL disputes the same and claims that the same was in part repayment of the loan disbursed.

3.6 JPIL paid seven installments but failed to pay further monthly installments due from 30.03.2012.

3.7 Since JPIL defaulted to pay the installments as agreed, SEIL imposed a late fee at the rate of ₹2 per thousand per day, which was increased to ₹6 per thousand per day in terms of Clause 7 of the Loan Agreements.

3.8 JPIL had also issued cheques in favour of SEIL, but all the cheques were returned dishonored. Thereafter, SEIL initiated criminal proceedings against JPIL under Section 138 of the Negotiable

Instruments Act, 1881.

3.9 On default of repayment of the loan amount, SEIL issued a notice dated 04.02.2013 invoking the Guarantee Agreements executed by respondent nos. 2, 3 & 4. Thereafter, on 07.02.2013, SEIL issued a winding up notice to JPIL.

3.10 On 11.02.2013, the respondents responded to SEIL's notice dated 04.02.2013 stating that an amount of ₹5 crores forming part of the loan amount had been remitted to SEIL.

3.11 SEIL filed its Statement of Claims, *inter alia*, claiming sum of ₹40,80,10,376/- on account of the installments due and ₹15,00,000/- towards cost of legal expenses along with *pendente lite* and future interest on sum of ₹40,80,10,376/- and ₹15,00,000/- at the rate of ₹6 per thousand per day as late fee.

3.12 The respondents filed the Statement of Defence contesting the claims made by SEIL. The respondents, *inter alia*, claimed that the high rate of interest reflected in the Loan Agreements was contrary to the Usurious Loans Act, 1918.

4. The principal issues before the Arbitral Tribunal related to the enforceability of the contract as the respondents claimed that the Loan Agreements were not enforceable in terms of various statutes including Usurious Loans Act, 1918 and Punjab Relief of Indebtedness Act 1934. It was also claimed that the late fee charged in terms of Clause 7 of the Loan Agreements, which entitled SEIL to

levy a late fee charge of ₹2 per thousand per day and could be increased to ₹6 per thousand per day, was in the nature of penalty and, therefore, not enforceable. The Arbitral Tribunal was also called upon to decide whether the sum of ₹5 crores paid by JPIL at the outset was a cash collateral carrying interest at the rate of 9% per annum or whether the same amounted to repayment of the loan advanced by SEIL.

5. The Arbitral Tribunal after considering the material and evidence placed on record concluded that the Loan Agreements were enforceable and JPIL was liable to pay the amounts borrowed in terms of the Loan Agreements. However, the Arbitral Tribunal held that the loan advanced by SEIL was only to the extent of ₹15 crores and not ₹20 crores as claimed by SEIL. It accepted the plea of the respondents that the sum of ₹5 crores remitted on 30.08.2011 was to be construed as repayment of the loan and adjusted from the amount disbursed to JPIL. The Arbitral Tribunal held that, in fact, SEIL had advanced only a sum of ₹15 crores out of which it had recovered the first installment of ₹1,21,50,000/- and the processing charges of ₹22,06,000/- in advance.

6. Insofar as late payment charges are concerned, the Arbitral Tribunal held that the same were punitive in nature and, thus, could not be recovered. After accounting for the amounts recovered, the Arbitral Tribunal has made an award against the respondents for the balance amount. The Arbitral Tribunal also awarded *pendente lite* interest at the rate of 15% per annum on the amounts so awarded. In

addition, the Arbitral Tribunal awarded future interest at the rate of 18% per annum.

Submissions

7. At the outset, Mr Nagesh, the learned counsel appearing for SEIL contended that he was not pressing SEIL's challenge in regard to the Arbitral Tribunal's conclusion with respect to the late fee charges. He advanced contentions to assail the impugned award on two fronts: the first, related to the decision of the Arbitral Tribunal regarding the treatment of ₹5 crores remitted by JPIL to SEIL on 30.08.2011 by RTGS and the second related to award of *pendente lite* interest.

8. He submitted that the conclusion of the Arbitral Tribunal that the Cash Collateral of ₹5 crores provided by JPIL was in fact repayment of the loan, was *ex facie* erroneous. He submitted that there could be no dispute that the said amount was deposited by JPIL as a Cash Collateral because the Equated Monthly Installments paid by JPIL were computed on the basis that a sum of ₹20 crores had been advanced to JPIL and not a sum of ₹15 crores. Thus, the conclusion of the Arbitral Tribunal in this regard was patently erroneous. He stated that it was common practice for lenders to secure loans by collateral assets. In this case, JPIL had offered a cash collateral, which would bear interest at the rate of 9% per annum. He stated that the said deposit was a separate transaction, which was duly evidenced by ample material placed before the Arbitral Tribunal.

9. Next, he submitted that the Arbitral Tribunal had erred in

reducing the *pendente lite* interest to only 15% per annum. He submitted that the Arbitral Tribunal had accepted the contractual rate of interest as 23.59% per annum and, therefore, the said rate could not be reduced below that rate. He submitted that in terms of Section 31(7)(a) of the Act, the Arbitral Tribunal could determine the rate of *pendente lite* interest “*unless otherwise agreed*” between the parties. He submitted that the Arbitral Tribunal was bound by the terms of the contract and since the parties had agreed that the loan would bear a flat rate of 10.75% per annum (equivalent to 23.59% per annum on reducing balance), SEIL was also entitled to *pendente lite* interest at the said rate.

Reasons and Conclusions

10. The first and foremost question to be addressed is whether the Arbitral Tribunal had erred in holding that the sum of ₹5 crores paid by JPIL was in repayment of the loan and not as a fresh deposit bearing interest at the rate of 9% per annum. SEIL had relied upon a letter dated 25.08.2011 in support of its contention that the said payment was as a Cash Collateral. However, the respondents had disputed the said letter and claimed that the said letter was forged.

11. The Arbitral Tribunal found that a sum of ₹6 crores was paid to the respondent on 30.08.2011 against the Loan Agreements and on the same date, a sum of ₹5 crores was paid to SEIL through RTGS. Thereafter, on 01.09.2011 a further sum of ₹12,56,44,000/- was paid to JPIL. In the aforesaid view, there was no dispute that the net sum

made available to JPIL was only ₹13,56,44,000/-.

12. In addition, the Arbitral Tribunal also noted that the Loan Agreements did not contain any provision with regard to payment of a Cash Collateral. After considering the rival contentions, the Arbitral Tribunal reasoned that since it was admitted that JPIL had received only a sum of ₹13,56,44,000/-, it would be liable to pay interest only on the amount actually received and not on the sum of ₹5 crores, which JPIL had returned on 30.08.2011. The contention that the said sum had been paid voluntarily as a Cash Collateral and, therefore, JPIL was estopped from claiming otherwise was rejected. The Arbitral Tribunal was also of the view that such a term requiring JPIL to deposit a cash collateral would be *wholly unjust, unfair and unconscionable*.

13. The Arbitral Tribunal held that the transaction between a lender and a borrower should be a clear-cut one and the language must be simple so as to enable the borrower to understand the effect and tenor thereof.

14. The Arbitral Tribunal also found that the letter dated 25.08.2011, which was relied upon by SEIL, was doubtful as the signatory (respondent no. 3) had disputed his signatures on the said document. Further, the said letter was also not on the letter head of JPIL.

15. The Arbitral Tribunal also noticed that whereas SEIL claimed that it was entitled to claim interest at the rate of 23.59%, the cash

collateral, which was returned on the same date would bear an interest of only 9% per annum. This, the Arbitral Tribunal found to be unconscionable.

16. This Court does not find any ground to interfere with the aforesaid conclusions as the same are supported by cogent reasons, which cannot be faulted. First of all, it is not disputed that the Loan Agreements did not provide for any obligation to provide a Cash Collateral. Secondly, it is also not disputed that a sum of ₹5 crores was paid by JPIL immediately – if not simultaneously – on receipt of ₹6 crores on 30.08.2011. Thus, the net sum available to JPIL was only a sum of ₹13,56,44,000/- including the sum of ₹12,56,44,000/- which was disbursed by SEIL on 01.09.2011, after recovering the first installment and processing charges (₹1,21,50,000/- and ₹22,06,000/-). Thus, the amount which could be held to be disbursed to JPIL would be a sum of ₹15 crores.

17. This Court also finds no infirmity with the impugned award insofar as it holds that accounting for ₹5 crores as cash collateral would be unconscionable keeping into account that whereas SEIL was disbursing loan at the rate of 23.59% it was claiming to be entitled to a cash collateral at an interest rate of 9% per annum.

18. In view of the above, the Arbitral Tribunal proceeded on the basis that the loan provided was not of ₹20 crores but only to the extent of ₹15 crores. No interference with the decision is warranted under Section 34 of the Act.

19. Next, the question to be examined is whether the Arbitral Tribunal erred in awarding *pendente lite* interest at the rate of 15% per annum instead of 23.59% per annum as urged on behalf of SEIL.

20. At this stage, it would be necessary to refer to Section 31(7)(a) of the Act, which was relied upon by Mr Nagesh in support of his contention. Section 31(7)(a) of the Act is set out below:-

“Unless otherwise agreed by the parties, where and in so far 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.”

21. A plain reading of Section 31(7)(a) of the Act indicates that an arbitral tribunal has the jurisdiction to include interest, “*at such rate as it deems reasonable*” in the sum for which the award is made. Thus, on a plain reading of Section 31(7)(a) of the Act, the Arbitral Tribunal would have the discretion to determine the rate of *pendente lite* interest. However, the opening words of Section 31(7)(a) of the Act “*unless otherwise agreed by the parties*” plainly, indicate that the discretion of the Arbitral Tribunal to award interest for the pre award interest is subject to the contract between the parties.

22. In *Sayeed Ahmed & Co v. State of U.P. & Ors: (2009) 12 SCC 26*, the Supreme Court had examined the provisions of Section 31(7) of the Act and observed as under:

“13. The legislature while enacting the Arbitration and Conciliation Act, 1996, incorporated a specific provision in regard to award of interest by Arbitrators. Sub-section (7) of Section 31 of the Act deals with the arbitrator’s power to award interest. Clause (a) relates to the period between the date on which the cause of action arose and the date on which the award is made. Clause (b) relates to the period from the date of award to date of payment. The said sub-section (7) is extracted below:

“7(a) Unless otherwise agreed by the parties, where and in so far 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.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.”

Having regard to sub-section (7) of Section 31 of the Act, the difference between pre-reference period and pendente lite period has disappeared in so far as award of interest by arbitrator. The said section recognises only two periods and makes the following provisions:

(a) In regard to the period between the date on which the cause of action arose and the date on which the award is made (pre-reference period plus pendente lite), the arbitral tribunal may award interest at such rate as it deems reasonable, for the whole or any part of the period, unless otherwise agreed by the parties.

(b) For the period from the date of award to the date of payment the interest shall be 18% per annum if no specific order is made in regard to interest. The arbitrator may however award interest at a different rate for the period between the date of award and date of payment.

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 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.”

23. In ***Sree Kamatchi Amman Constructions v. The Divisional Railway Manager (Works), Palghar & Ors: (2010) 8 SCC 767***, the Supreme Court held as under:-

“19. Section 37(1) of the new Act by using the words “unless otherwise agreed by the parties” categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to date of award. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest between the date when the cause of action arose to date of award.”

24. In ***Union Of India v. M/S Bright Power Projects(I) P. Ltd: (2015) 9 SCC 695***, the Supreme Court expressed a similar view in the following words:

“13. Section 31(7) of the Act, by using the words “*unless otherwise agreed by the parties*”, categorically specifies that the arbitrator is bound by the terms of the contract so

far as award of interest from the date of cause of action to date of the award is concerned. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest.”

25. In the present case, the Arbitral Tribunal found that the loan availed of by JPIL carried an interest at the flat rate of 10.75% per annum – that is, without accounting for repayment of installments – which works out to be 23.59% on reducing balance basis (referred to as ‘annualized’ by the Arbitral Tribunal). Having found that the contract between the parties provided for payment of interest at the rate of 23.59% per annum, the Arbitral Tribunal could not have awarded *pendente lite* interest at a rate different from the rate as awarded for the pre-reference period. As noticed above, in ***Sayeed Ahmed & Co v. State Of U.P. & Ors*** (*supra*), the Supreme Court had unequivocally explained that the Act does not recognize any distinction between the pre-reference period and the *pendente lite* period (the period between the reference and making of the award) in so far as award of interest is concerned.

26. Although, the decisions referred to above, were rendered in the context of contractual clauses that prohibited payment of interest, the decisions rest on the principle that, insofar as pre-award interest is concerned, the Arbitral Tribunal is bound by the contractual provisions relating to interest. Thus, where the Arbitral Tribunal finds that the contract between the parties provides for interest, the Arbitral Tribunal is required to award interest for the pre-award period. The interest for the post award period is, of course, at the discretion of the

Arbitral Tribunal. In the present case, the Arbitral Tribunal has awarded interest at the contractual rate for the pre-reference period but reduced the same for the *pendente lite* period. This, in view of the decisions referred above, is impermissible.

27. In view of the above, the contention that the Arbitral Tribunal was required to award *pendente lite* interest at the rate of 23.59% is merited. Thus, the impugned award, to the extent that it provides for *pendente lite* interest at a lower rate, is set aside. SEIL would be at liberty to seek a fresh reference to arbitration with regard to the disputes relating to *pendente lite* interest and the final calculation of the total amount due.

28. The petition is partly allowed in the aforesaid terms. The pending application stands disposed of. The parties are left to bear their own costs.

MAY 07, 2018

pkv

न्यायमेव जयते **VIBHU BAKHRU, J**