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

\+ **<u>EX.P. 68/2015</u>**

BUMIHIWAY(M)SDN,BHD ..... Decree Holder

Through: Mr Debasish Moitra, Advocate.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Judgement Debtor

Through

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **17.11.2016**

<u>VIBHU BAKHRU, J</u>

1. The above captioned petition has been filed for enforcement of an arbitral award dated 10.04.2012. According to the Judgement Debtor (hereafter 'NHAI'), it has duly satisfied the award as it has paid all sums awarded to the Decree Holder (hereafter 'BMS'). However, BMS claims that it is also entitled to future interest on the pre-award interest awarded by the arbitral tribunal. Thus, the only question that remains to be considered in this petition is whether the BMS is entitled to future interests on the pre-award interest awarded by the arbitral tribunal, in terms of Section 31 (7) (b) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act').

2. BMS had raised various claims before the arbitral tribunal which were considered under seven broad heads - Claim Nos. 1 to 7. Claim No. 6 was

for pre-award interest - both pre arbitration and *pendente lite* interest. Claim No.7 consisted of BMS's claims on two counts; first, on account of future interest and second, on account of costs. BMS had claimed future interest on all claims (Claim Nos. 1 to 6) at the rate of 18% per annum. The arbitral tribunal considered the aforesaid claim and awarded future interest at the rate of 12% per annum from the date of award to the date of receipt of payment on the amounts awarded against Claim Nos. 1 to 5; it did not award any future interest on pre-award interest, that is, amounts awarded against claim no.6.

3. The relevant extracts of the arbitral award indicating the rival submissions and the arbitral tribunal's conclusion in respect of Claim No. 7 are set out below:-

> "**Claim No.7 : Future interest on the claims 1 to 6 @ 18% p.a. from the date of award till the date of realization and Cost of Arbitration.**
>
> **<u>Claimant's Submissions</u>**:
>
> 7.1.1 The claimant claims future interest on the aforesaid amounts of Claim Nos. 1 to 6 @ 18% p.a.
>
> 7.1.2. It is for the various neglect and breaches on the part of the Respondent and the Engineer that the Claimant has been unnecessarily dragged into Arbitration and had to incur huge expenditure on counsel, Consultant and ongoing arbitration proceedings. At present the costs have been tentatively valued at Rs. 1,00,00,000/- (Rupees one crore only).
>
> The Claimant crave leave to reassess and revalue the costs during the Arbitral Proceedings.

Respondent's Submissions:

7.2.1 In the light of submissions made in reply to each claim from claim 1 to 5, it is submitted that when the Claimant is not entitled to the claim raised, the question of any interest thereupon does not arise. It is denied that the for the various neglect and breaches on the part of the Respondent and the Engineer, the Claimant has been unnecessarily dragged into arbitration and has incurred huge expenditure on counsels, consultants and on ongoing arbitration proceedings. It is further denied that Claimant is entitled to any cost.

AT's Analysis and Findings on claim No.7:

7.3.1 The Respondent is given 60 days time to make payment of the awarded amount failing which the Claimant will be entitled to interest on the awarded amounts against claim Nos. 1 to 5 @ 12% from the date of the award to the date of receipt of payment by the Claimant from the Respondent.

7.3.2 Each party to bear its own costs. "

4. The arbitral tribunal has also summarized the award as under:-

"**SUMMARY OF AWARD**

S.No.	Claim No.	Claim Amount (Rs.)	Award Amount (Rs.)
1	2	3	4
1	1	48,80,000/-	48,80,000/-
2.	2(i)	30,74,220/-	10,43,313/-
3.	2(ii)	6,06,633/-	6,06,633/-
4.	2(iii)	29,81,439/-	20,19,637/-
5.	2(iv)	6,81,756/-	NIL
6.	2(v)	14,13,561/-	11,08,232/-
7.	3	32,61,761/-	11,67,157/-
8.	4(i)	95,41,021/-	NIL
9.	4(ii)	48,89,137/-	NIL
10.	4(iii)	1,09,57,640/-	31,78,878/-
11.	4(iv)	33,38,956/-	33,38,956/-
12.	4(v)	41,70,338/-	NIL
13.	4(vi)	9,11,974/-	8,83,593/-

14.	4(vii)	9,21,943/-	NIL
15.	5(i)	43,86,201/-	8,56,467/-
16.	5(ii)	9,40,525/-	NIL
17.	5(iii)	14,74,836/-	5,39,390/-
18.	6	Interest @12% p.a.	Pendente lite Interest @ 12% p.a.
19.	7(i)	Future Interest on claims 1 to 6 18% p.am.	Future Interest @ 12% p.a. on the amount of awards against Claims No.1 to 5.
20.	7(ii)	Cost	Both Parties to bear their own cost

We, the members of the Arbitral Tribunal, after hearing, examining and considering the statement of facts of claims, counterstatement of facts, rejoinder, oral and documentary evidence produced before us and having applied our minds, considered the facts, documents and other evidence with care, do hereby make and publish this award.

This Award is made on Non-Judicial stamp Paper of Rs.500/- at New Delhi on this 10th day of April, 2012. The cost of this Stamp Paper was borne by the Claimant Contractor."

5. After the award was made, BMS applied to the arbitral tribunal for certain corrections under Section 33 of the Act. And, by an order dated 16.07.2012, the arbitral tribunal enhanced the award in respect of claim No.6 by awarding additional interest.

6. The learned counsel for BMS has contended that since the arbitral tribunal is silent as to the future interest on the amount of pre-award interest (claim No.6), the petitioner would be entitled to future interest on the pre award interest in terms of Section 31 (7) (b) of the Act. He relied on the decision of the Supreme Court in ***Hyder Consulting (UK) Limited v. Governor, State of Orissa***: **(2015) 2 SCC 189** in support of his contention

that future interest under Section 31 (7) (b) of the Act would also be payable on pre-suit and *pendente lite* interest which is included in the award.

7. I have heard the learned counsel for the parties.

8. At the outset, it is necessary to refer to Section 31(7) of the Act as in force on the date of the award. The same is set out below:

> "31(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 the payment.
>
> *Explanation*.- The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978)."

9. A plain reading of section 31(7)(b) of the Act indicates that interest is payable in terms of the said provision only if the award does not indicate to the contrary; this is the clear import of the words in the parenthesis: *"unless the award otherwise directs"*.

10. In ***State of Haryana and others vs. S.L. Arora and Company:*** **(2010) 3 SCC 690**, the Supreme Court had observed as under:-

> "23. ....In a nutshell, in regard to pre-award period, interest has to be awarded as specified in the contract and in the

absence of contract, as per discretion of the Arbitral Tribunal. On the other hand, in regard to the post-award period, interest is payable as per the discretion of the Arbitral Tribunal and in the absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum.

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24.6 Clause (b) of Section 31(7) is intended to ensure prompt payment by the award-debtor once the award is made. The said clause provides that the "sum directed to be paid by an arbitral award" shall carry interest at the rate of 18% per annum from the date of award to the date of payment if the award does not provide otherwise in regard to the interest from the date of the award. This makes it clear that if the award grants interest at a specified rate up to the date of payment, or specifies the rate of interest payable from the date of award till the date of payment, or if the award specifically refused interest, clause (b) of Section 31 will not come into play. But if the award is silent in regard to the interest from the date of award, or does not specify the rate of interest from the date of award, then the party in whose favour an award for money has been made, will be entitled to interest at 18% per annum from the date of award. He may claim the said amount in execution even though there is no reference to any post-award interest in the award. Even if the pre-award interest is at much lower rate, if the award is silent in regard to post-award interest, the claimant will be entitled to post-award interest at the higher rate of 18% per annum. The higher rate of interest is provided in clause (b) with the deliberate intent of discouraging award-debtors from adopting dilatory tactics and to persuade them to comply with the award."

11. Although, the Supreme Court has differed from the aforesaid decision in its later decision in ***Hyder Consulting (UK) Limited*** *(Supra)*, the same is only to the extent that word "sum" as used in Section 31(7)(a) would also include any pre-award interest that may be awarded by the arbitrator.

Consequently, future interest would also be payable, by virtue of Section 31(7) (b) of the Act, on pre-award interest as it also forms a part of the "*sum for which the award is made*". This is clear from the following passage from the said decision:

> "21. In the result, I am of the view that S.L. Arora's case is wrongly decided in that it holds that a sum directed to be paid by an Arbitral Tribunal and the reference to the Award on the substantive claim does not refer to interest pendente lite awarded on the "sum directed to be paid upon Award" and that in the absence of any provision of interest upon interest in the contract, the Arbitral Tribunal does not have the power to award interest upon interest, or compound interest either for the pre-award period or for the post-award period".

12. Thus, if an award is silent as to future interest, it would nonetheless be payable by virtue of Section 31 (7) (b) of the Act on the sums awarded which would also include pre-award interest if so awarded by the arbitral tribunal. However the law as laid down in ***State of Haryana and others vs. S.L. Arora and Company*** (*supra*) that Section 31(7)(b) would have no application where the arbitral tribunal awards future interest which is at variance with the quantum as indicated in Section 31(7) (b) of the Act is still good law. ***Hyder Consulting (UK) Limited*** (*supra*) is not an authority for the proposition that even in cases where the arbitral tribunal has indicated otherwise, future interests on pre-award interest would, nonetheless, be payable under Section 31 (7) (b) of the Act.

13. In my view, the contentions advanced by the leaned counsel for the BMS are unmerited and the reliance placed on the decision of the Supreme Court in ***Hyder Consulting (UK) Limited*** *(supra)* is also misplaced. This is

so for the principal reason that this is not a case where the arbitral tribunal has not awarded future interests. The award is not silent as to the future interests payable; the arbitral tribunal has awarded future interest @ 12% per annum in respect of the amounts awarded under claim Nos. 1 to 5. In other words, although, the arbitral tribunal has awarded future interest, it has consciously restricted it only to the aggregate amount awarded against claim Nos. 1 to 5 and no future interest has been awarded on pre-award interest.

14. It is well settled that the provisions of Section 31 (7) (b) of the Act would be attracted only if the arbitral award is silent or does not otherwise indicate the arbitral tribunal's decision as to future interest. In the present case, the arbitral tribunal has awarded future interest, *albeit*, on all sums except pre-award interest. This clearly indicates the arbitral tribunal's decision to reject the claim of BMS for interest on pre-award interest and, therefore, the respondent cannot be compelled to pay the sum.

15. It cannot be disputed that an arbitral tribunal has the discretion to award future interest, which is in variance with the interest as specified under Section 31(7)(b) of the Act. In ***Sayeed Ahmed and Co. v. State of U.P. and Ors.***: **(2009) 12 SCC 26**, the Supreme Court considered a case where the arbitral tribunal had awarded future interests on different sums at different rates. In that context the Supreme Court observed as under:-

> "25. The arbitrator awarded interest at the rate of 18% per annum on Rs. 24,18,586/-, 14% per annum on amount found due on finalisation the final bill and 12% per annum on the security deposit amount if any that has to be refunded. As noticed above, Clause (b) of Sub-section (7) of Section 31 of the Act provides that if the award does not otherwise direct, the

amount awarded shall carry interest as directed by the award and in the absence of any provision of 18% per annum. Any provision in the contract barring interest, will therefore operate only till the date of award and not thereafter.

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."

16. In ***Bharat Heavy Electricals Ltd. v. Tata Projects Ltd.***: **(2015) 5 SCC 682**, the Supreme Court rejected the plea that the rate of future interest be enhanced from 10.5% to 18% (i.e., as provided under Section 31(7)(b) of the Act). The relevant passage from the said decision is set out below:

"4. On the issue of award of interest, the learned Senior Counsel for the respondent tried to persuade us to enhance the post-award interest granted by the Arbitral Tribunal @ 10.5% to 18% p.a. in the light of provisions in Section 31(7)(b) of the Act. We are unable to accept this contention because the Arbitral Tribunal has already granted post-award interest @ 10.5%. Only if the award had not made such a direction, the statutory rate of interest @ 18% p.a. would have been payable from the date of the award to the date of payment as per statutory provision noted above."

17. The above principle - that an arbitral tribunal can in its discretion award future interest in variance with the interest as provided under Section 31(7)(b) of the Act - would not only apply to awarding future interest at a

different rate but also equally apply to specify the awarded amounts on which such interest would be payable. In the present case, the arbitral tribunal, in its wisdom has declined to award future interest on pre award interest; this is plainly evident from the fact that it has restricted the award of future interest only on substantive claims (i.e, Claims nos. 1 to 5). In this view, BMS's claim for future interest on pre-award interest in terms of Section 31(7)(b) of the Act cannot be accepted.

18. Since, it is not disputed that NHAI has paid all sums due under the award except future interest on pre-award interest, the award is fully satisfied and no further orders are required to be passed in this petition.

19. The petition is, accordingly, disposed of.

VIBHU BAKHRU, J

NOVEMBER 17, 2016
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