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* IN THE HIGH COURT OF DELHI AT NEW DELHI
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\+ O.M.P. (COMM) 233/2016

M/S BSC -RBM -PATI JOINT VENTURE ..... Petitioner
Through: Mr. Pravin H. Parekh, Senior Advocate with Mr. Vishal Prasad, Ms. Nandita Bajpai and Ms. Swati Bhardwaj, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ... Respondent
Through: Mr. Mukesh Kumar and Ms. Gunjan Sinha Jain, Advocates.

**CORAM: JUSTICE S. MURALIDHAR**

**ORDER**

% **03.01.2017**

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by BSC-RBM-PATI Joint Venture (hereinafter the 'Contractor') against the National Highways Authority of India ('NHAI') challenging an Award dated 10th October, 2014 passed by the Arbitral Tribunal ('AT') in the disputes between the parties arising of the contract agreement dated 24th July, 1997 for the Four-Laning and strengthening of existing Two Lane pavement from Rani Ganj (km 474.000) to Panagarh (km 515.236) section of National Highway 2 in the State of West Bengal.

2. The challenge as far as the Contractor is concerned is limited to the award of interest by the AT as regards both the claims of NHAI as well as the counter-claims of the Contractor.

3. The relevant clause as regards interest is 60.8 of the Conditions of Particular Application ('COPA') which reads as under:

> "60.8 Time of Payment and Interest
> The amount due to the Contractor under any Interim Payment Certificate issued by the Engineer pursuant to this Clause, or to any other term of the Contact, shall, subject to Clause 47, be paid by the Employer to the Contractor within 56 days after the Contractor's monthly statement has been submitted to the Engineer for certification or, in the case of Final Certificate pursuant to Sub-Clause 60.13, within 84 days after the agreed Final Statement and written discharge have been submitted to the Engineer for certification. In the event of the failure of the Employer to make payment within the time stated, the Employer shall pay to the Contractor interest compounded monthly at the rate(s) stated in the Appendix to Bid upon all sums unpaid from the date upon which the same should have been paid, in the currencies in which the payments are due."

4. In terms of the above clause, the requirement for paying interest "compounded monthly" is at the rate(s) stated in the Appendix. The obligation to pay interest arises where there is a failure by NHAI to make payment within the time as contemplated under Clause 60.8. In case of an Interim Payment Certificate ('IPC'), it begins to run on the expiry of 56 days after the Contractor's monthly statement has been submitted to the Engineer for certification. In the case of a final certificate, it is on the expiry of 84 days after the agreed final statement and written discharge has been submitted to the Engineer for certification.

5. After noticing the above clause, the AT has in the impugned Award, both as regards the claims of NHAI and the counter-claims of the Contractor, noted that "the parties have agreed to the interest rate of 12 % compounded

monthly as per Clause 60.8/Appendix to Bid of the Contract Agreement." There is no dispute on this. However, the grievance of the Contractor stems from the further observation of the AT that “the interest at 12% compounded monthly is applicable only for the period up to the date of completion i.e., the year 2002.” The reason given for this by the AT is that “a long time has elapsed after the completion of the work.” The AT held that “interest of 12% per annum simple is appropriate and reasonable.”

6. Having heard learned counsel for the parties, the Court is of the view that the AT could not have, as far as the period up to the date of the Award is concerned, re-written Clause 60.8 in the manner that it has.

7. Mr. Mukesh Kumar, learned counsel for NHAI submitted that in the instant case there was no certificate issued by the Engineer for either the IPC or the final statement and, therefore, the question of Clause 60.8 applying did not arise. The Court is unable to agree with the above submission. Where there is a failure by the Engineer to give a certificate, the Contractor cannot be worse off than it could have if a certificate had been issued and there was a failure to make payment within the stipulated time in terms of Clause 60.8.

8. To the extent that the AT has granted interest only up to the date of completion i.e., year 2002, it amounts to re-writing Clause 60.8, which is not permissible in law.

9. Mr. P.H. Parekh, learned Senior counsel appearing for the Petitioner has drawn the attention of the Court to an order dated 12th December, 2014

passed by the Division Bench of this Court in FAO (OS) 518/2014 (***M/s National Highways Authority of India v. M/ s BSC-RBM-PATI Joint Venture***) wherein under similar circumstances, the DB made it clear that the "sum payable under the award with interest till the date of the award would be as per the agreement between the parties i.e. 12% per annum compounded monthly on the principal sum adjudicated as per the decision of the Supreme Court reported as **2014 SCC OnLine SC 940** ***M/s Hyder Consulting UK Ltd. v. Governor, State of Orissa Through: Chief Engineer.***"

10. Consequently, the Court sets aside the portion of the impugned Award of the AT which curtails payment of interest at 12% compounded monthly up to the year 2002. The Contractor is entitled to *pendente lite* interest at 12% compounded monthly from the date when the payment became due in terms of Clause 60.8 up to the date of the Award.

11. As regards the interest payable from the date of the Award till the date of payment i.e., future interest, the submission of Mr. Parekh is that Clause 60.8 would apply for this period as well.

12. The Court is unable to agree with the above submission for more than one reason. In the first place, Clause 60.8 itself does not state that such interest is payable "till the date of payment". In fact, Clause 60.8 does not contain any such expression. Secondly, when Section 31(7) of the Act is carefully scrutinised, it is apparent that there is a distinction between interest payable up to the date of the Award i.e., pre-claim plus *pendente lite* interest and interest that is paid after the date of the Award i.e., future interest. While

sub-clause (a) of Section 31(7) governs the former i.e., pre-claim and *pendente lite* interest, sub-clause (b) governs future interest. Interestingly, while sub-clause (a) opens with the words "unless otherwise agreed by the parties", sub-clause (b) does not. It would thus appear that as far as pre-claim and *pendente lite* interest is concerned, the Act respects the agreement between the parties and where there is no such agreement, then the AT will have the discretion to award such interest as it considers appropriate. However, the situation is different as regards future interest. It appears that the legislative intent was to give the discretion to the AT to determine what should be the future interest failing which the rate specified in Section 31(7(b) would apply.

13. At this stage, it is required to be noticed that prior to the amendment with effect from 23rd October, 2015 under Section 31(7)(b), the future interest payable was 18% per annum from the date of the Award till the date of payment, unless the award otherwise directed. After the amendment with effect from 23rd October, 2015, that rate of interest would be 2% higher than the current rate of interest prevalent. Therefore, the Court is of the view that the future interest would be payable in terms of Section 31(7)(b) either in terms of what the AT determines failing which, in terms of the statute.

14. As far as the case on hand is concerned, the AT has awarded future interest at 12% simple interest. Mr. Parekh urged that there was a requirement for the AT to have acted reasonably in fixing the future interest and it ought to have been guided even in that respect by Clause 60.8 of the COPA.

15. The Court is unable to agree with the above submission. There is no fetter on the discretion of the AT as far as the future interest is concerned. The AT was not bound to go only by Clause 60.8 of the COPA. As far as the award of 12% simple interest as future interest is concerned, the Court does not find it to be unreasonable or arbitrary.

16. The further challenge in this petition is to the award of interest in respect of the claims of NHAI. According to Mr. Parekh, Clause 60.8 does not provide for any payment of interest to the Employer i.e NHAI but only to the Contractor. The Court does not view Clause 60.8 as a prohibition against awarding interest to the employer i.e., NHAI. Consequently, there was no fetter on the AT to award interest on the claims of NHAI.

17. Consequently, insofar as the portion of the Award of the AT reducing the *pendente lite* interest for the period up to the date of the year of completion i.e., 2002 is concerned, the Award is set aside and it is held that the Contractor is entitled to interest in terms of Clause 60.8 i.e., 12% compounded monthly up to the date of Award. The portion of the Award that awards future interest at 12% simple interest from the date of the Award till the date of payment is left undisturbed.

18. The petition is disposed of in the above terms but, in the circumstances, with no order as to costs. Order *dasti* under signature of the Court Master.

**S. MURALIDHAR, J**

**JANUARY 03, 2017/**dn