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

\+ FAO(OS) (COMM) 120/2017

GARG BUILDERS ..... Appellant

Through : Sh. Sanjay Bansal, Advocate.

versus

BHARAT HEAVY ELECTRICALS LIMITED ..... Respondent

Through :Sh. Sandeep Sethi, Sr. Advocate with Sh. Pallav Kumar, Sh. Dibya Nishant and Sh. Gautam Mann, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SUNIL GAUR

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

% 19.09.2017

The appellant is aggrieved by the judgment of the learned Single Judge who modified the award which had granted the *pendente lite* interest. The learned Single Judge had relied upon clause 17 of the contract which *inter alia* reads as follows:

> *"17. No interest shall be payable by BHEL on Earnest Money Deposit, Security Deposit or on any moneys due to the contractor."*

The relevant discussion with respect to the appellant's grievance in the impugned order is extracted below:

> *"41. The question whether the aforesaid clause proscribes grant of pendente lite interest is no longer res integra. The Supreme Court in the case of Bharat Heavy Electricals Limited v. Globe Hi-Fabs Limited (supra) while considering an identically worded clause had observed as under:-*

"16. In the present case we noticed that the clause barring interest is very widely worded. It uses the words "any amount due to the contractor by the employer". In our opinion, these words cannot be read as ejusdem generis along with the earlier words "earnest money" or "security deposit". "

42. The Supreme Court accepted the appellant's contention that in terms of the aforementioned clause, interest could be payable only from the date of the award. And, accordingly, modified the arbitral award. The aforesaid decision of the Supreme Court in Bharat Heavy Electricals Limited v. Globe Hi-Fabs Limited (supra) is also reiterated by the Supreme Court in a later decision in Bharat Heavy Electricals Limited v. Tata Projects Ltd (supra).

43. In view of the above, it cannot be disputed that clause 17 of the Agreement expressly proscribed payment of interest prior to passing of the award. This is also the ratio of the decision of the Supreme Court in Union of India v Bright Power Projects (India) Pvt. Ltd.: (2015) 9 SCC 695.

44. The reliance placed by Garg Builders on a decision of a coordinate bench of this court in Union of India v. M/s N.K. Garg (supra) is of little assistance to it since the same has been stayed by the Division Bench of this court by an order dated 09.03.2016 in FAO (OS) 73/2016.

45. The Arbitrator fell in error in holding that the aforesaid clause only proscribed pre-reference interest and not pendente lite interest. As stated earlier, in terms of Section 31(7)(a) of the Act, the power of the arbitral tribunal to award pre award interest is contingent to the parties not agreeing to the contrary. Pre-award interest includes both pre-reference interest as well as pendente *lite interest. Thus, the conclusion of the Arbitrator that award of pendente lite interest was not proscribed by clause 17 of the Agreement is not sustainable.”*

The appellant urges that the learned Single Judge’s reasoning is valid in that the prohibition for grant of interest exists only for the duration of the contract and not beyond. This Court notices that an identical aspect was considered in the judgment reported as *BHEL v. Globe Hi-Fabs Limited* 2015 (5) SCC 718.

The appellant had relied upon a judgment of the learned Single Judge in *North Delhi Municipal Corporation v. Prem Chand Gupta* [RFA 623/2017, decided on 17.07.2017], for a broad statement to say that the conditions, such as clause 17 are unenforceable and are contrary to “public policy” under Section 23 of the *Indian Contract Act, 1872*. Whilst in that case, the learned Single Judge expressed the view that he did, this Court is of the opinion that a broad proposition that *pendente lite* interest cannot be contracted out at all and that it would be contrary to “public policy” is a difficult one to sustain. Each instance would have to be examined on a case-by-case basis, having regard to the circumstances and the position taken at the time of entering into the contract or immediately thereafter, contemporaneously.

The question of unenforceability *per se* would have to be seen from the perspective of the fact as to whether the benefit of the other provisions of the contract have been resorted by the party complaining of unfairness.

For the purposes of this case, it is sufficient to hold that even though the appellant urged the plea of unenforceability, the Tribunal did not hold in his favour but in fact interpreted the bar in clause 17 in favour of the contractor and against the respondents. Learned Single Judge merely enforced the condition, i.e. clause 17 having regard to the mandate of Section 28(3) of the *Arbitration and Conciliation Act, 1996* that awards cannot be contrary to the express terms of the contract.

For the foregoing discussion, there is no infirmity with the impugned judgment. The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

SUNIL GAUR, J

SEPTEMBER 19, 2017/ajk