

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

% Judgment delivered on: 10.03.2017

+ **O.M.P. (COMM) 28/2017**

BHARAT HEAVY ELECTRICALS LIMITED Petitioner

Versus

GARG BUILDERS Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Sanjeev Anand, Mr Pallav Kumar,
Mr Gautam Manu and Mr Akshay Kapoor.
For the Respondent : Mr Sanjay Bansal.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Bharat Heavy Electricals Limited (hereafter 'BHEL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') assailing the arbitral award dated 15.07.2016 (hereafter 'the impugned award').

2. The impugned award was rendered by the sole arbitrator in respect of disputes that had arisen between the parties in relation to an agreement dated 24.10.2008 (hereafter the 'Agreement').

3. BHEL floated a tender for construction of "Complete Plant Boundary Wall including Gates at 2X750 MW Pragati III Combined Cycle Power at Bawana, Delhi" (hereafter 'the works'). Garg Builders submitted its bid which was accepted by issuance of the Letter of Intent dated 09.09.2008 (hereafter 'the LOI'). Thereafter, on 24.10.2008, the parties entered into an

Agreement. The stipulated period of completion of the works was seven months; the date of commencement of the works being 24.09.2008 and date of completion being 23.04.2009. Garg Builders furnished a bank guarantee towards security deposit for a sum of ₹11,13,550/- dated 01.10.2008 (hereafter 'the BG') issued by the Axis Bank.

4. It is the case of BHEL that Garg Builders did not adhere to the timelines and failed to fulfil its obligations under the Agreement. BHEL sent letters dated 09.03.2009 and 21.03.2009 to Garg Builders highlighting the delays on its part. In the meanwhile, Garg Builders, by letter dated 24.09.2009 requested for short closure of the Agreement.

5. The construction of the boundary wall (except minor plastering work) were finally completed by 30.10.2009; however, the work relating to the gates had not commenced till then. Thereafter, Garg Builders demobilized from the site in February 2010. On 22.04.2010, a meeting took place between the parties wherein the pending works were discussed.

6. As the works were delayed, therefore the Agreement was extended from time to time, lastly upto 31.10.2010. In view of the disputes, Garg Builders invoked the arbitration clause under the Agreement. Subsequently, Garg Builders filed a petition under Section 11 of the Act in this Court. This court by an order dated 16.09.2011, appointed Justice M A Khan (ret'd.) as the sole Arbitrator to adjudicate the disputes between the parties.

7. Before the Arbitrator, Garg Builders made the following claims:-

Claim no. 1:	Release of Security Deposit	₹22,27,100/-
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Claim no. 1A:	Bank charges toward renewal of BG	₹55,678/-
Claim no. 1B:	Interest on Security Deposit	₹2,67,252/-
Claim no. 2:	Wrongful withholding of amount	₹3,50,000/-
Claim no. 3:	Release of retention money and interest thereupon	₹13,52,395/-
Claim no. 4:	Back filling of earth	₹2,48,379/-
Claim no. 5:	Release of service tax	₹4,17,888/-
Claim no. 6:	Idle establishment charges	₹5,48,000/-
Claim no. 7:	Compensation for increase in market rates for prolongation	₹5,34,650/-
Claim no. 8:	Interest	24% p.a.
Claim no. 9:	Costs of Arbitration	

8. The Arbitrator considered the evidence on record and held that the works could not be completed by 23.04.2009 as the RFC drawings of the gates were not provided to Garg Builders before 30.10.2009. BHEL also failed to release the payment of 8th and 9th running account (RA) bills which was a condition precedent put forth by Garg Builders for completing the remaining work.

9. With regard to the claim of Garg Builders for refund of the security deposit, a sum of ₹11,13,550/- was awarded which had been deducted from the RA bills. However, the claim for interest on security deposit for the pre-reference period was refused as being prohibited by clause 17 of the Agreement.

10. The claim for reimbursement of bank charges for keeping the BG alive beyond 23.04.2009 for two and a half years stood rejected as in terms of the LOI, the BG had to be kept alive upto one year from the date of completion of work, that is, upto 30.10.2010.

11. Further, the claim for release of the amount of ₹ 3,50,000/- deducted from the 9th RA bill on account of final coat of painting on boundary wall being pending also stood rejected as admittedly, the said work was not performed by Garg Builders.

12. The Arbitrator accepted the claim for release of retention money for ₹13,52,395/- as in terms of clause 42.18 of the Agreement, a portion of the contract value was stipulated to be released on completion of pending works and submission and passing of final bill; however, as BHEL was found responsible for non-completion of works, therefore, the question of submission of final bill did not arise.

13. Further, the Arbitrator rejected the claim raised for back filling of earth.

14. The Arbitrator accepted the claim for reimbursement of service tax for a sum of ₹4,17,888/- as it was observed that clause 52.2 of the Agreement provided for reimbursement of the service tax paid by the contractor on submission of the proof of deposit of tax which was duly done and there was no dispute to the same. It was further held that the said clause did not confer power on BHEL to reimburse service tax liability in accordance with the option which it unilaterally considered as prudent.

15. With regard to the claim for idle establishment charges, a sum of ₹1,86,000/- was awarded for November 2009 to January 2010.

16. The claim for compensation for increase in market rates for prolongation of the Agreement was also dismissed as the Agreement was a fixed rate contract.

17. The counter claims filed by BHEL for differential cost on account of construction of entrance gateway nos. 1, 2 and 3 by other agency at the risk and cost of Garg Builders and overhead costs also stood rejected as Garg Builders were not held to be in breach of the Agreement after 22.04.2010 for not completing the balance work.

18. Further, the counter claim of ₹1,00,00,000/- for loss of goodwill was also dismissed for being beyond the subject matter of the dispute referred to the Arbitrator.

19. BHEL's counter claim for liquidated damages also stood dismissed as delays in the completion of the works was found attributable to BHEL.

20. With regard to the counter claim for non-renewal of BG beyond 30.12.2010, it was held that BHEL was not entitled to the same.

21. BHEL's counter claim for cost of balance issued materials not returned to it by Garg Builders was also rejected as the minutes of meeting dated 22.04.2010 clearly recorded that the balance unused reinforcement steel was returned to the stores. No notice was also served on Garg Builders to return any material after it demobilized from the site.

22. Similarly, the counter claim filed for final painting at the risk and cost of Garg Builders was also not accepted.

23. In addition, both Garg Builders and BHEL claimed pre-reference, *pendente lite* and future interest at the rate of 24% p.a. on their respective claims and counter claims. The Arbitrator held that there was no prohibition in the Agreement or in the LOI for payment of *pendente lite* and future interest. In view of the findings made, Garg Builders was awarded interest at the rate of 10 % p.a. on the claims accepted, from the filing of the claim petition, that is, 02.12.2011 till the date of realization.

24. In the light of this background, Garg Builders was awarded a total sum of ₹30,69,833/- along with *pendente lite* and future interest at the rate of 10% p.a. Costs of ₹50,000/- was also awarded in the favour of Garg Builders.

25. The only controversy that survives in this petition relates to the award of *pendente lite* interest. BHEL claims that award of pre-award interest is contrary to the express terms of the Agreement and therefore without jurisdiction.

26. Garg Builders disputes BHEL's contention that the Arbitrator lacked the jurisdiction to award *pendente lite* interest. Garg Builders also opposes the present petition as being barred by limitation.

27. The impugned award was published on 15.07.2016 and the present petition was filed on 21.12.2016. Thus, apparently the present petition is beyond the period of three months from the date of the impugned award.

However, Garg Builders had filed an application before the Arbitrator under Section 33 of the Act which was disposed of by the Arbitrator on 23.09.2016. BHEL claims that since the present petition was filed within the period of three months from the said date, the petition is within the time as specified under Section 34(3) of the Act.

Submissions

28. Mr Gautam Manu, learned counsel appearing for Garg Builders submitted that Garg Builder's application under Section 33 of the Act was limited to the part of the award that was adjudicated against it and, therefore, the time available to BHEL for filing a petition under Section 34 of the Act could not be extended on the ground of Garg Builder's application under Section 33 of the Act. He earnestly contended that extension of time for assailing the arbitral award would be available only to the party making such application, in the event the application was rejected. The extended time would also be available to the other party provided that the party making that application under Section 33 of the Act had succeeded. He contended that in such circumstances, the party aggrieved by the order passed under Section 33 of the Act would have a cause of action to file a petition under Section 34 of the Act. However, a party being aggrieved by the original award cannot claim that the time for filing a petition under Section 34 of the Act would stand extended on account of the other party filing an application under Section 33 of the Act. In support of his contention, he relied upon the decision of the Division Bench of this Court in **D.M. Jawhar Merican v. Engineers India Limited**: (2009) ILR 4 Del 571.

29. Insofar as the question of the award of interest being contrary to the express terms of the Agreement is concerned, Mr Manu made submissions broadly on two fronts. First, he submitted that any clause in the Agreement which prohibited the Arbitrator from granting *pendente lite* interest would fall foul of Section 23 of the Indian Contract Act, 1872 and would be void. He relied upon the decision of a Coordinate Bench of this Court in **Union of India v. M/s N.K. Garg and Co.:** (OMP No. 327/2002) dated 02.11.2015 in support of his contention.

30. Second, he submitted that the terms of the Agreement does not prohibit grant of *pendente lite* interest. He referred to clause 17 of the Agreement and submitted that the contractual term not to grant interest would only be operative for the tenure of the Agreement and not after the Agreement was terminated. He submitted that the present claim was filed after termination of the Agreement and, therefore, Garg Builders would be entitled to *pendente lite* interest.

31. Mr Anand Bansal, learned counsel appearing for BHEL contended that the issue whether the arbitrator has the power to levy *pendente lite* interest in cases where the agreement between the parties prohibited grant of interest, was well settled by the Supreme Court in several decisions. He relied upon the decisions of the Supreme Court in **Union of India v. Ambica Construction:** (2016) 6 SCC 36; **Sharma and Associates Contractors Pvt. Ltd. v. Progress Constructions Ltd.:** (2017) 2 Scale 326; **State of Haryana and Others v. S.L. Arora and Company:** (2010) 3 SCC 690; **Bharat Heavy Electricals Ltd. v. Globe Hi-Fabs Limited:** (2015) 5 SCC 718 and **Bharat Heavy Electricals Ltd. v. Tata Projects Ltd.:** (2015) 5 SCC 682, in support

of his contention.

Reasoning and Conclusion

32. The first and foremost question to be addressed is whether the present petition is beyond the period of limitation as prescribed under Section 34(3) of the Act. Section 34(3) of Act is set out below:-

“An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.”

33. The opening words of Section 34 (3) of the Act indicate that the provision is couched in negative terms. The provision proscribes making of an application after a period of three months have elapsed from the date on which the party making the application had received the award or from the date on which the request made under Section 33 of the Act had been disposed of by the arbitral tribunal.

34. In the present case, it is not disputed that Garg Builders had made an application under Section 33 of the Act, which was disposed of by the Arbitrator on 23.09.2016. Admittedly, the present petition is within the period of three months from the date of disposal of the said application.

35. It was contended on behalf of Garg Builders that since the application filed by Garg Builders under Section 33 of the Act was only for seeking return of a lapsed BG and was not concerned with the award made against BHEL, BHEL was not entitled to the benefit of the time taken by the Arbitrator for disposing the application. The said contention is unpersuasive; the time available under section 34 of the Act to apply for setting aside an award is not contingent on the contents of the application made under Section 33 of the Act. The grounds on which an application under Section 33 of the Act has been filed would be irrelevant to consider whether the time available under Section 34(3) of the Act would count from the date of the award or the date of disposal of the application. It is also relevant to note that an application under Section 33(1) of the Act can be made only for limited purposes. Such application can either be made for correcting computational errors, clerical or typographical errors or any other errors of similar nature. An application under Section 33(1) of the Act can also be made to request the arbitral tribunal to give an interpretation on a specific point or part of the award. Thus, by its very nature, an application under Section 33(1) of the Act would have little effect on the substratum of the award. In this view, the contention that the application filed by Garg Builders was only on a limited issue and therefore did not result in enlargement of the time available for filing the petition under Section 34 of the Act, is unmerited.

36. It is also important to mention that the time for making an application under Section 34 of the Act is enlarged for all parties to the arbitral proceedings and is not limited to only the party making the application

under Section 33 of the act. Thus, any party who is aggrieved by an award is entitled to await the decision of the arbitral tribunal to the application, if any, filed under Section 33 of the Act before applying for setting aside the arbitral award.

37. The reliance placed by Mr Manu on the decision of the Division Bench of this court in ***D.M. Jawhar Merican v. Engineers Limited*** (*supra*) also does not further the case of Garg Builders. In that case, the court held that the application filed by the appellant was in the nature of seeking a review of the arbitral award and thus could not be considered as an application under Section 33 of the Act at all. In the said circumstances, the court - following the decision of the Supreme Court in ***M. Anasuya Devi & Another v. M. Manik Reddy and Others*: 2003 8 SCC 565** - reasoned that the time for filing an application under Section 34 of the Act would run from the date of the arbitral award as there existed no application under Section 33 of the Act.

38. In the present case, having filed an application under Section 33 of the Act, it is not open for Garg Builders to contend to the contrary. Garg Builders, cannot approbate and reprobate.

39. The next question to be examined is whether the award of *pendente lite* interest is contrary to the express terms of the Agreement and thus falls foul of Section 31(7)(a) of the Act. The opening words of Section 31(7)(a) of the Act - “*unless otherwise agreed by the parties*” - expressly qualify the power of the arbitral tribunal to award pre-award interest.

40. In the present case, clause 17 of the Agreement reads as under:-

“No interest shall be payable by BHEL on Earnest Money Deposit, Security Deposit or on any moneys due to the contractor.”

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.

46. Accordingly, the impugned award to the extent of award of *pendente lite* interest is set aside. The petition is disposed of. No orders as to costs.

MARCH 10, 2017
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VIBHU BAKHRU, J