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HIGH COURT OF CHHATTISGARH, BILASPUR

ARBA No. 22 of 2017

Judgment Reserved On : 15/03/2018
Judgment Delivered On : 06/07/2018

- M/s Kaytin Transport Pvt. Ltd. Ktp 54, Rakshak Society, Aundh Camp Pune Maharashtra, 411027

---- Appellant

Versus

- M/s South Eastern Coal Fields Limited SECL Gevra And Sohagpur Areas Through Hod Legal, Secl Hqrs Seepat Raod, Bilaspur, Chhattisgarh 495006,

---- Respondent

ARBA No. 24 of 2017

- M/s Kaytin Transport Pvt. Ltd. Ktp 54, Rakshak Society, Aundh Camp, Pune Maharashtra, 411027

---- Appellant

Versus

- M/s South Eastern Coal Fields Limited SECL Gevra And Sohagpur Areas Through Hod Legal, Secl Hqrs Seepat Raod, Bilaspur, Chhattisgarh 495006

---- Respondent

ARBA No. 25 of 2017

- South Eastern Coalfields Ltd. SECL Gevera , Sohagpur Areas, Through Hod Legal, SECL HQRS. Seepat Raod, Bilaspur- 495006, Chhattisgarh,

---- Appellant

Versus

- M/s Kaytin Transport Pvt. Ltd Ktp, 54, Rakeshak Society, Aundh Camp, Pune (MS) 411027

---- Respondent

<u>ARBA No. 26 of 2017</u>

- South Eastern Coalfields Ltd. S E C L Gevera , Sohagpur Areas, Through H O D Legal, S E C L Hqrs. Seepat Raod, Bilaspur-495006, Chhattisgarh,

---- Appellant

Versus

- M/s Kaytin Transport Pvt. Ltd KTP, 54, Rakeshak Society, Aundh Camp, Pune M S 411027

---- Respondent

<u>ARBA No. 30 of 2017</u>

- South Eastern Coalfields Ltd. Gevra And Sohagpur Areas Through Hod Legal, S E C L, H Q R S, Seepat Road, Bilaspur, 495006 Chhattisgarh.

---- Appellant

Versus

- M/s Kaytin Transport Pvt. Ltd. Ktp 54, Rakeshak Society, Aundh Camp, Pune, Maharashtra, 411027

---- Respondent

<u>ARBA No. 31 of 2017</u>

- South Eastern Coalfields Ltd. Gevra And Sohagpur Areas Through

HOD Legal, Secl Hqrs, Seepat Road, Bilaspur- 495006 Chhattisgarh

---- Appellant

Versus

- M/s Kaytin Transport Pvt. Ltd. Ktp 54, Rakeshak Society, Aundh Camp, Pune (MS) 411027

---- Respondent

For Appellant/KTP : Shri Ali Asgar, Advocate.
For Respondent/SECL: Shri Vivek Chopda, Advocate.

Hon'ble Shri Prashant Kumar Mishra &
Hon'ble Shri Ram Prasanna Sharma, JJ

C A V JUDGMENT

The following judgment of the Court was delivered by **Prashant Kumar Mishra, J.**

1. Arbitration Appeal No.22/2017 filed by M/s Kaytin Transport Private Limited (for short 'KTP') and Arbitration Appeals No.25/2017 & 26/2017 filed by the South Eastern Coalfields Limited (for short 'SECL') pertain to dispute arising out of contract for transportation of coal for Gevra area, whereas Arbitration Appeal No.24/2017 preferred by the KTP and Arbitration Appeal Nos.30/2017 & 31/2017 filed by the SECL pertain to dispute arising out of contract for transportation of coal for Sohagpur area.

The nature of dispute being similar, the arguments in both the bunch were heard analogously, therefore, this common judgment is being delivered for the first three appeals pertaining to Gevra area and the other 3 appeals pertaining to Sohagpur area. However, they are segregated in two separate portion.

Arbitration Appeal Nos.22, 25 and 26 of 2017

(Appeals relating to Gevra area)

2. Briefly stated facts giving rise to these appeals are that M/s KTP was awarded contract for work of transportation of coal by the Western Coalfields Limited (now M/s SECL) as per the scheme of rehabilitation of ex-servicemen sponsored by the Director General of Resettlement (DGR), Ministry of Defence, Government of India. The agreement was entered between the parties on 16.1.87 for the period December, 1985 to February, 1988 for transportation of coal from various pit heads of SECL to various railway siding/ dumps of SECL as per the terms and conditions mentioned in the agreement. The agreement contained an escalation clause for which formula was also provided in clause 15 of the agreement. The parties also entered into hire purchase agreement on 17.12.83, according to which the KTP was to be provided 20 tipping trucks by the SECL on 100% finance basis. Initially the KTP was provided only 12 tipping trucks, out of which 8 tipping trucks were

old (as claimed by the KTP). The loan including interest was to be recovered in installments from the bills raised by the KTP for execution of the transportation work. In the beginning, the KTP worked in Sohagpur area between 1.3.83 to December, 1985 and thereafter from December, 1985 to February, 1988, the KTP worked at Gevra area.

3. After execution of the contract, the KTP raised bills on different occasions, which were paid in parts and thereafter the KTP raised a dispute and requested the SECL for appointment of Arbitrator in the year 1996. Shri S.P. Mathur was appointed as Arbitrator in the year 2002. The said arbitrator passed an award on 9.11.2003 holding that the claim is barred by limitation. On KTP's application under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act, 1996') before the District Judge, Bilaspur, an order was passed on 23.1.2006 setting aside the award and remitting the matter back to the Arbitrator for deciding the issue on merits. When the arbitration proceeding resumed, an effort was made to settle the issue for which the SECL formed a Committee but the Committee did not pass any order or recommendation, therefore, the arbitration proceeding again resumed at the request of the KTP. The Arbitrator again desired to take up the issue of limitation, which was already decided in KTP's

favour by the District Judge, therefore, the KTP objected to the continuation of Shri S.P. Mathur as Arbitrator. Thereafter, the CMD of SECL appointed one Shri L.K. Shrivastava as substitute Arbitrator on 8.6.2012.

4. The claim raised by the KTP was for non payment of security deposit, escalation in respect of diesel/lubes and spare parts, as also for some miscellaneous items. The arbitration proceeding was completed by recording evidence of the parties and hearing their arguments. Thereafter an award was passed on 21.8.2014 allowing the escalation claim in respect of diesel/lubricants amounting to Rs.46,75,142.565/- inclusive of principal amount of Rs.16,69,693.775/- and interest @ 12%. The Arbitrator also allowed claim towards security deposit of Rs.1,50,000/-, however, no interest was allowed on this amount. In respect of escalation in the price of spare parts, the KTP claimed Rs.5,63,808.13/-, which was allowed by the Arbitrator but found that the same has already been paid. The Arbitrator has rejected miscellaneous claim of Rs.1,27,00,000/-.

5. Assailing the award, both the parties preferred separate application under Section 34 of the Act, 1996 before the Commercial Court, which has dismissed the application preferred by the SECL,

however, the application preferred by the KTP was partly allowed by granting *pendente lite* interest @ 12% for the period 11.1.2002 to 15.4.2014 on the amount under the head of escalation of diesel/ lubricants amounting to Rs.16,69,693.775/-. Rest of the relief claimed by the KTP has also been dismissed by the Commercial Court. Thus, in this appeal, the KTP is praying for interest @ 18% instead of 12% on the amount of escalation in diesel and lubes, interest @ 18% on security deposit, escalation in respect of spare parts along with interest @ 18% and miscellaneous claims. At the same time, the SECL would challenge allowance of claim by the Arbitrator and the Commercial Court in favour of KTP in one of its appeal whereas in other appeal, the SECL is challenging the order passed by the Commercial Court allowing *pendente lite* interest to the KTP on escalation in the price of diesel and lubes.

6. Shri Ali Asgar, learned counsel for the KTP, would submit that in the hire purchase agreement, which is part of the transaction between the parties, the SECL is charging interest @ 18%, therefore, the KTP is also entitled for interest @ 18% on all the claims. For claim in respect of escalation in spare parts, it is argued that the amount of Rs.5,63,808.12/- has not been paid to the claimant and the finding in this regard recorded by the Arbitrator, affirmed by the Commercial Court, is perverse. He would submit

that the claimant is also entitled to interest @ 18% and other miscellaneous claims like cost of litigation before the District Judge and the Arbitrator, as also exemplary damages to the tune of Rs.1 crore, total amounting to Rs.1.27 crore.

7. Per contra, Shri Vivek Chopda, learned counsel for the SECL, would submit that amount towards escalation for diesel/lubes and spare parts has already been paid to the claimant, therefore, this claim should not have been allowed. He would submit that the award is not a reasoned award, therefore, it has to be set aside. According to him, the appellant was informed vide Ex.-P/16 dated 9.9.93 for preparation of final bill, therefore, there is no delay on the part of SECL and interest should not have been awarded on any head. He would submit that the Arbitrator and the Commercial Court have rightly refused the claims towards escalation in the price of spare parts and interest on security deposit in terms of clause 34 of the contract.

8. We have heard learned counsel for the parties at length and perused the record.

9. In respect of claim towards increase in the cost of diesel and lubricants, the claimant is dissatisfied only to the extent of grant of interest which has been allowed @ 12%, which, according to the

KTP, should have been awarded @ 18%. The basis of this argument of KTP is that in the hire purchase agreement, the SECL is charging interest @ 18%, therefore, the KTP is entitled for interest @ 18%. However, the nature of agreement for hire purchase of vehicle is different than the nature of agreement for transportation of coal. Even otherwise, both are separate agreements and award of interest is to be considered on the basis of agreement which has given rise to a dispute before the Arbitrator. In its appeal, the SECL has argued that interest should not have been awarded at all to KTP in view of clause 34 of the agreement, which says that no interest shall be payable on the security money deposited or deducted for the work and/or on the amount due and payable, if payment is delayed on any reasonable ground. Thus, interest is not payable on security deposit but for other amount it can be paid if payment is unreasonably delayed. The Arbitrator, who has allowed claim, has gone through the nature of dispute, correspondences between the parties from 1988 to 2003, evidence adduced by both the parties and other necessary documents to award interest @ 12%. Clause 36A of the agreement provides that payment shall be made within 2 weeks of fortnightly bills. The SECL's witness Laxmi Pathak admitted in his evidence that no final bill was ever prepared, therefore, security deposit was not refunded. When the arbitration began and the matter was remitted from the Court of District Judge for decision on merits, the SECL formed a committee for resolving dispute. Therefore, it cannot be said that there was no substance in the claim raised by the KTP because otherwise effort for settlement would not have been initiated by the parties during the pendency of arbitration proceeding. On the basis of material on record, the SECL's failure in preparation of final bill would point towards unreasonably delaying the decision on the claim raised by the KTP/claimant after 1998, which is proved by plethora of documents submitted by the KTP before the Arbitrator and which are part of the paper book presented before this Court in the form of correspondence made between the parties vide Ex.-P/2 to Ex.-P/42. Thus award of interest @ 12% is neither on the lower side nor exorbitant. Therefore, we refuse to interfere with the award of interest @ 12% to KTP. Similarly, in view of clause 34 of the agreement, no interest is admissible to the KTP on the amount of security deposit. The claim towards interest on this head has rightly been rejected by the Arbitrator and the Commercial Court.

10. In respect of claim for escalation in respect of spare parts, the Arbitrator has elaborately dealt with the issue on the basis of clause 15 (e) of the General Terms and Conditions of the Transport

Agreement. The Arbitrator has observed that as per the material on record presented by both the parties, the claimant is entitled to Rs.5,63,808.13/-, out of which a sum of Rs.3 lakhs has already been paid for both Gevra and Sohagpur area. It has been noted by the Arbitrator that the claimant has not accounted for this payment of Rs.3 lakhs made to it by the SECL, therefore, it is also noted that a sum of Rs.11,40,467.29/- has been paid to KTP from the SECL headquarters in March, 1986 against escalation of tyres and diesel etc. but this payment has not been clarified by the claimant either by correspondence or submission during the arbitration proceeding despite SECL's letter dated 2.9.89 (Ex.-D/13) seeking such clarification. The Arbitrator concluded that an amount of Rs.3 lakhs has been paid as adhoc advance for spare parts for Gevra area and similarly, an amount of Rs.3.5 lakhs was paid for Sohagpur area, totalling Rs.6.5 lakhs whereas total admissible claim on the head of escalation in price of spare parts has come to Rs.5,63,808.13/-, therefore, excess amount has been paid to KTP but the Arbitrator refused to direct any recovery against the KTP on this count.

11. Having perused the award and the order passed by the Commercial Court, we are satisfied that there is no perversity in the approach of the Arbitrator warranting interference by this Court while hearing

appeal under Section 37 of the Act, 1996. Award on this particular head does not suffer from any non application of mind nor it is contrary to record. Therefore, claim on this head has rightly been rejected.

12. Insofar as interest on delayed payment and miscellaneous claims are concerned, the Arbitrator has already allowed interest on escalation of price of diesel/lubricants and for other heads the claim has been denied, therefore, there is no ground for granting interest on delayed payment. Insofar as miscellaneous claims are concerned, the claimant has prayed for Rs.24,45,000/- towards cost of litigation and Rs.1 crore towards exemplary damages. In view of the nature of proceeding, the claimant is neither entitled for exemplary damages nor cost of pursuing the cases before the District Court, the Arbitrator, the Commercial Court and the High Court, because out of several claims, only one claim has been allowed on which interest has also been awarded by the Arbitrator and the Commercial Court while some other claims have been rejected, therefore, defence raised by the SECL is also found to be sustainable on several counts. In such a situation, both the parties should be left to bear their own cost of litigation.

13. In view of the foregoing, all the Appeals deserve to be and are

hereby dismissed.

ARBA Nos.24, 30 & 31 of 2017

(Appeals relating to Sohagpur Area)

14. The transport agreement for Gevra area was executed between the parties on 8.3.1996 for the period 1.3.1983 to 29.2.1988 containing similar escalation clause No.15 laying down the formula to determine escalation in the price of diesel/lubricants, tyres and spare parts. Separate hire purchase agreement was also entered between the parties on 17.12.1983 wherein the SECL agreed to provide 20 tipping trucks to KTP on 100% finance basis. According to the KTP, only 12 tipping trucks were provided, out of which 8 were old trucks. The loan was to be repaid in similar terms as is mentioned in the preceding paragraphs of this judgment concerning Gevra area. The KTP worked at Sohagpur area between 1.3.1983 and December, 1985. On account of dispute having arisen between the parties, the KTP invoked arbitration clause simultaneously in respect of both the agreements i.e. for Gevra as well as for Sohagpur area. Therefore, to avoid repetition, the events which took place in respect of passing of first award, the order by the District Judge and the final award is not repeated for the sake of brevity.

15. The claim for agreement concerning Sohagpur area shall be

considered in 4 parts, 2 each concerning transport agreement and the hire purchase agreement.

16. For escalation in respect of spare parts, the KTP claimed Rs.1,75,843.73/- with 18% interest throughout, however, the Arbitrator allowed claim but awarded interest @ 12%. The Commercial Court allowed the KTP's appeal on this aspect, further allowing interest @ 12% *pendente lite,* in addition to the pre-reference period. The KTP is claiming interest on this amount for all the period @ 18%. Both the parties have raised their arguments on the question as to whether the KTP is entitled to interest @ 18%. This issue has already been dealt with while dealing with the appeals concerning Gevra area. For the same reason, as is mentioned in the preceding paragraphs concerning Gevra area, the KTP's claim for interest @ 18% instead of awarded interest @ 12% is rejected.

17. The KTP has also claimed interest on delayed payment in respect of agreement for Sohagpur area with further interest @18% *pendente lite* for pre-reference period to the tune of Rs.1,41,28,735.02/-. This has been disallowed by the Arbitrator and the said part of the award has been affirmed by the Commercial Court. The said amount has been claimed for delayed

payment in respect of escalation in the price of diesel/oil, tyres and spare parts. The KTP received payment of Rs.13,57,140/- in March/April, 1986, which, according to the KTP, should have been paid by the SECL by 15.7.1984. On this, compound interest @ 18% has been claimed for about 20 months. Similarly, an amount of Rs.54,39,365.494/- has been claimed as compound interest for 16 years and thereafter further interest during the pendency of arbitration proceeding. However, it is to be seen that there is no clause in the agreement for awarding interest on delayed payment. The claimant has admitted during cross-examination that it did not insist upon inclusion of clause relating to payment of interest against delayed payment.

18. In the matter of **Union of India Vs. Bright Power Projects (India) Private Limited** {(2015) 9 SCC 695}, the Supreme Court has referred to its earlier decision in the matter of **Union of India Vs. Saraswat Trading Agency** {(2009) 16 SCC 504}, wherein it has been observed that if there is bar against payment of interest in the contract, the Arbitrator cannot award any interest for such period. Referring to the provisions contained in Section 31(7)(a) of the Act, 1996, it was further observed by the Supreme Court that the provision gives more respect to the agreement entered into between the parties. If the parties to the agreement agree not to

pay interest to each other, the Arbitral Trubnal has no right to award interest *pendente lite*. Clause 34 of the agreement in hand clearly provides that no interest shall be payable on the security money deposited or deducted for the work and/or on the amount due and payable, if payment is delayed on any reasonable ground. Since the parties were in litigation and there is no finding either by the Arbitrator or by the Commercial Court that the SECL has unreasonably delayed payment of amount, in view of the Supreme Court's decision in the matter of **Bright Power Projects** (Supra), the KTP is not entitled for interest on delayed payment.

19. The next claim of KTP is in respect of damages for breach committed by the SECL in respect of hire purchase agreement by providing only 12 tippers against agreed number of 20 tippers which has caused loss to the company. The amount claimed on this head has been calculated on assumption that had the KTP been provided 20 tippers, the quantity of coal transported would have been 24 lakhs tonnes in 5 years. Therefore, since 8 tippers were not provided, the quantity fell short by 9,60,000 tonnes resulting in loss of earning of Rs.1.46 crores approximately at the rate of Rs.15.27 per tonne and loss of profit of Rs.14,65,920/-at the rate of 10% of earning. Interest @ 18% has also been claimed on this amount. Depreciated cost of 8 tippers has also been claimed.

20. For considering this claim, we are required to search for any clause in the agreement for compensating the claimant in case of SECL's failure to supply the required number of tippers. Despite careful scrutiny we have not found any such agreement in the clause. Moreover, the Arbitrator has recorded a finding that there was some deficiency in the performance of KTP due to which the issue of balance 8 tippers was not considered in favour of the KTP. It has also emerged from the correspondence that due to inadequate work at Sohagpur area, the KTP itself desired change of work place, which was agreed to by the Director (Technical), Bilaspur Division, allowing the KTP to shift to Gevra area in December, 1985. Thus if sufficient work was not available at Sohagpur area and KTP's performance was deficient, there existed reasonable ground for non-issuance of balance 8 tippers to it. In our considered opinion, the Arbitrator has rightly disallowed the claim on this count.

21. The last claim of KTP is in respect of refund of principal-interest deducted in excess as a result of SECL charging higher purchase cost of new tippers whereas the SECL issued 8 old tippers and should have charged depreciated cost. The Arbitrator's finding that the KTP was issued 8 old tippers has been affirmed by the Commercial Court. However, the installments were charged as per

the cost of new tippers with interest @ 18% and @ 17.125% with effect from 1.11.1983. The SECL has refunded Rs.20,573/- on 30.3.90 which was deducted in excess from the account of KTP. The SECL claims that this refund was full and final because it was received by the claimant without any protest. The Arbitrator thereafter calculated the amount and has reached to the figure of Rs.65,766.67/- and excess interest of Rs.1,71,065.26/-, total Rs.2,36,831/-. The Arbitrator eventually allowed a sum of Rs.7,45,621.96/- to the claimant on this head. However, the Arbitrator has not allowed pendente lite interest on this amount for which the claimant is entitled. We therefore allow interest to the appellant @ 17.25% per annum (the same rate which has been applied by the Arbitrator for the period 30.9.90 to August, 2002) on the amount of Rs.7,45,621.96/- during the pendency of arbitration proceeding and thereafter till recovery.

22. For the foregoing, the Appeals preferred by the KTP are partly allowed only to the extent that the KTP is entitled to interest @17.25% on Rs.7,45,621.96/- on the head 'claim for refund of principal cum interest deducted in excess as a result of SECL charging hire purchase cost of new tippers whereas the SECL issued 8 old tippers and should have charged depreciated cost'. All other claims of KTP are rejected. The Appeals preferred by the

SECL deserve to be and are hereby dismissed.

Sd/-	Sd/-
Judge	**Judge**
(Prashant Kumar Mishra)	(Ram Prasanna Sharma)

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