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

% *Date of Judgment: 11th April, 2018*

\+ FAO(OS) (COMM) 61/2018

SOUTH DELHI MUNICIPAL CORPORATION ..... Appellant

Through: Mr. Sandeep Bajaj, Mr. Soayib Qureshi and Mr. Naveen Advocates

versus

M/S PRITHVI ASSOCIATES ..... Respondent

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE REKHA PALLI

G.S.SISTANI, J. (ORAL)

C.M.13915/2018 (delay)

1. This is an application seeking condonation of 38 days delay in filing the present appeal.

2. Heard. For the reasons stated in the application, delay in filing the present appeal is condoned.

3. The application stands disposed of.

C.M.13916/2018 (exemption)

4. Exemption is allowed subject to all just exceptions.

5. The application stands disposed of.

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6. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act read with Section 13 of the Commercial Courts Act for setting aside the impugned judgment dated 28.11.2017 passed by the Learned Single Judge by which the objections to the additional award stand dismissed.

7. Brief facts of the case are that the parties entered into an agreement dated 04.09.2006, whereby the respondents were granted the rights for illuminated display of advertisements through unipoles on selected sites qua 12 Municipal Zones for the period of three years, extendable upto 5 years with an increment of 10% each year. As per the terms and conditions of the agreement, the respondent deposited security amount of Rs. 1,04,62,500/-. As per the appellant, the respondent committed various defaults in the monthly payment of the licence fee leading to the present dispute.

8. It may be noted that the Arbitrator had rendered his Award dated 05.10.2016 (hereinafter referred to as 'the Award') awarding pendentelite and post award interest at the rate of 10% per annum on the amounts of Rs. 83,99,759/-, which include Rs. 2,50,000/- of the caution money as a relief to the respondent. The respondent herein had filed objections being OMP (COMM) No.5/2017. Four grounds were raised at the time of hearing of the objections. Learned Single Judge by an order dated 09.01.2017 had declined to interfere in the award except with regard to issue No.6 which related to interest for the pre-reference period. Para 4 of the order dated 09.01.2017 reads as under:

> "4.Having heard learned counsel for the parties, the Court finds that indeed under Issue No. 6 concerning relief, the learned Arbitrator awards the interest @ 10% pa in the impugned Award under Claim Nos. 1 and 2 for pendente lite and post award period and makes no mention of the claim of interest for the pre-reference period. Under Section 31(3) of the Act, the learned Arbitrator is mandated to give reasons, unless otherwise agreed to by the parties. In that view of the matter, the Court holds that the Arbitrator ought

> to have given reasons if he was going to decline the relief of interest for the pre-reference period. It will now be open to the Petitioner to seek arbitration on this issue in accordance with law."

9. In this backdrop the Arbitrator has rendered his additional award dated 11.08.2017 whereby the Arbitrator has awarded 10% of pre-reference interest on the security deposit and the caution money which was paid by the respondent at the time of execution of the agreement in the year 2006. The relevant portion of the award reads as under:-

> "While deciding Issue No. 4 i.e. whether claimant is entitled for interest as prayed or not, I have already held that the claimant is entitled for interest @10% per annum under the provisions of Section 31 (7) of the Arbitration and Conciliation Act, 1996 for the reasons mentioned in the award. Reiterating the same reasons i.e. taking into consideration that respondent had retained security amount and caution money and also earned interest upon the same, I have no hesitation to hold that claimant is entitled for interest @10% per annum for the pre reference period i.e. from 15.09.2011 to 30.06.2014, in view of the provisions under Section 31 (7) of the Arbitration and Conciliation Act, 1996. "

10. The objections filed by the appellant herein stand dismissed by the learned Single Judge, which has led to the filing of the present appeal. It may also be noted that the appellant was proceeded ex-parte at the time, when the Arbitrator had entered upon reference and an *ex-parte* award was rendered wherein while deciding Issue no.6 (Relief), the learned Arbitrator has held as under:

> 1. "Claimant is entitled to recover a sum of Rs.81,49,759/- from the Respondent as held while deciding Claim No.1
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> 2. Claimant is entitled to recover a sum of Rs.2,50,00/- from the Respondent as held while deciding Claim No.2.

3. On the aforesaid amount of Rs.83,99,759/- (Rs.81,49,759/- + Rs.2,50,000/-) Claimant is entitled for pendentelite interest @ 10% per annum.

4. Claimant is entitled for a sum of Rs.1,00,000/- towards cost of litigation.

5. The aforesaid amount shall be paid by the Respondent within 30 days from the date of the receipt of copy of the Award failing which, on the amount so arrived at, Respondent shall be liable to pay interest @ 10% per annum from the date of award till payment."

11. After the matter was remanded back by this court, the appellant had participated in the proceedings before the Arbitrator. Learned counsel for the appellant submits that the learned Arbitrator has exceeded his jurisdiction and failed to take into account the express provision of the agreement between the parties. Learned counsel for the appellant submits that in view of the express bar contained in Clause 4 and 7 of the agreement, the learned Arbitrator could not have awarded interest on the security amount and the caution money. It is also contended that there was no occasion for the appellant to refund the security deposit and the caution money till the accounts were settled and at no stage did the respondent seek refund of the amounts and, thus, the appellant could not have settled with the pre-reference interest.

12. Learned counsel has placed reliance on a judgment rendered by the Apex Court in the case of ***Chittaranjan Maity v. Union of India*** reported in (2017) 9 SCC 611, more particularly, paragraphs 14 to 20, which we reproduce below:

"**14.** The total interest awarded by the Arbitral Tribunal is Rs 12,44,546 which includes interest for the pre-reference period and also pendente lite interest. Section 31(7)(*a*) of the 1996 Act provides for payment of interest, as under:

> "**31. (7)(*a*)** Unless otherwise agreed by the parties, where and insofar 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."

In this section, a specific provision has been created, whereby if the agreement prohibits award of interest for the pre-award period (i.e. pre-reference and pendente lite period), the arbitrator cannot award interest for the said period.

15. Admittedly, GCC governing the contract between the parties, contains a clause which bars the payment of interest, which is as under:

> "16. (2) No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract, but government securities deposit in terms of sub-clause (1) of this clause will be repayable (with) interest accrued thereon."

16. Relying on a decision of this Court in *Ambica Construction* v. *Union of India* [*Ambica Construction* v. *Union of India*, (2017) 14 SCC 323] , the learned Senior Counsel for the appellant submits that mere bar to award interest on the amounts payable under the contract would not be sufficient to deny payment on pendente lite interest. Therefore, the arbitrator was justified in awarding the pendente lite interest. However, it is not clear from *Ambica Construction* [*Ambica Construction* v. *Union of India*, (2017) 14 SCC 323] as to whether it was decided under the Arbitration Act, 1940 (for short "the 1940 Act") or under the 1996 Act. It has relied on a judgment of Constitution Bench in *State of Orissa* v. *G.C. Roy* [*State of Orissa* v. *G.C. Roy*, (1992) 1 SCC 508] . This judgment was with reference to the 1940 Act. In the 1940 Act, there was no provision which prohibited the arbitrator from awarding interest for the pre-reference, pendente lite or post-award period, whereas the 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the arbitrator cannot award interest for the said period. Therefore, the decision in *Ambica Construction* [*Ambica Construction* v. *Union of India*, (2017) 14 SCC 323] cannot be made applicable to the instant case.

17. The learned Additional Solicitor General appearing for the respondent submits that the position of law for cases covered under the 1996 Act i.e. if agreement prohibits award of interest then the grant of pre-award interest is impermissible for the arbitrator, has been reiterated by this Court in various judgments.

18. In *Sayeed Ahmed and Co.* v. *State of U.P.* [*Sayeed Ahmed and Co.* v. *State of U.P.*, (2009) 12 SCC 26 : (2009) 4 SCC (Civ) 629] , this Court noted that the 1940 Act did not contain any provision relating to the power of the arbitrator to award interest. However, now a specific provision has been created under Section 31(7)(*a*) of the 1996 Act. As per this section, if the agreement bars payment of interest, the arbitrator cannot award interest from the date of cause of action till the date of award. The Court has observed that in regard to the provision in the 1996 Act, the difference between pre-reference period and the pendente lite interest has disappeared insofar as award of interest by the arbitrator is concerned. Section 31(7)(*a*) recognises only two periods i.e. pre-award and post-award period.

19. In *Sree Kamatchi Amman Constructions* v. *Railways* [*Sree Kamatchi Amman Constructions* v. *Railways*, (2010) 8 SCC 767 : (2010) 3 SCC (Civ) 575] , this Court was dealing with an identical case wherein Clause 16 of the GCC of Railways had required interpretation. This is the same Clause 16(2) of GCC prohibiting grant of interest which is also applicable in the facts of the present case. The Court held that where the parties had agreed that the interest shall not be payable, the Arbitral

> Tribunal cannot award interest between the date on which the cause of action arose to the date of the award.
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> **20.** In *Union of India* v. *Bright Power Projects (India) (P) Ltd.* [*Union of India* v. *Bright Power Projects (India) (P) Ltd.*, (2015) 9 SCC 695 : (2015) 4 SCC (Civ) 702] , a three-Judge Bench of this Court, after referring to the provisions of Section 31(7)(*a*) of the 1996 Act, held that when the terms of the agreement had prohibited award of interest, the arbitrator could not award interest for the pendente lite period. It has been held thus: (SCC p. 698, paras 10-11)
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> > "*10.* Thus, it had been specifically understood between the parties that no interest was to be paid on the earnest money, security deposit and the amount payable to the contractor under the contract. So far as payment of interest on government securities, which had been deposited by the respondent contractor with the appellant is concerned, it was specifically stated that the said amount was to be returned to the contractor along with interest accrued thereon, but so far as payment of interest on the amount payable to the contractor under the contract was concerned, there was a specific term that no interest was to be paid thereon.
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> > *11.* When parties to the contract had agreed to the fact that interest would not be awarded on the amount payable to the contractor under the contract, in our opinion, they were bound by their understanding. Having once agreed that the contractor would not claim any interest on the amount to be paid under the contract, he could not have claimed interest either before a civil court or before an Arbitral Tribunal."
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> Therefore, it is clear that the appellant is not entitled for any interest on the amount awarded by the Arbitral Tribunal."

13. Counsel for the appellant submits that the case of the appellant is no different from the case in which, the Supreme Court has given a

categorical finding that wherever, there is any interest, no interest could have been awarded by the Arbitrator.

14. We have heard learned counsel for the appellant. The Arbitrator has considered the grant of pre-reference interest in the following paragraphs:

> "So far as the other pleas of the Respondent that (i) the claimant remained silent for the period from 15.09.2011 to 18.06.2013 as a result of which, it [Claimant] is not entitled for interest for the said period during which it [Claimant] slept over its rights and (ii) Claimant did not invoke arbitration earlier than 30.06.2014 and chose to act in a delayed manner are concerned, the same have no force because during the intervening period i.e. from 15.09.2011 till the time arbitration was invoked, claimant made efforts for recovery of the amount due and also wrote numerous reminders to the Respondent vide communications dated 01.07.2013, 08.07.2013, 15.07.2013, 23.07.2013, 07.10.2013, 11.11.2013, 24.01.2014, 13.03.2014, 31.03.2014, 02.04.2014, 09.04.2014 and 26.05.2014 besides holding meetings with the different officials of the Respondent Corporation, and, when there was no response from the Respondent, claimant was left with no alternative except to invoke the arbitration clause. In my considered opinion, on the other hand, it is a case where the Respondent is at fault because of its conduct.
> Now I come to the question whether Claimant is entitled for interest for the pre-reference period i.e. from 15.09.2011 to 30.06.2014 on the amount due.
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> While deciding Issue No.4 i.e. whether claimant is entitled for interest as prayed or not, I have already held that the Claimant is entitled for interest @ 10% per annum under the provisions of Section 31 (7) of the Arbitration and Conciliation Act, 1996 for the reasons mentioned in the Award. Reiterating the same reasons i.e. taking into consideration that Respondent had retained security amount and caution money and also earned interest upon the same, I have no hesitation to hold that Claimant is entitled for interest @ 10% per annum for the pre-

> reference period i.e. from 15.09.2011 to 30.06.2014, in view of the provisions under Section 31 (7) of the Arbitration and Conciliation Act, 1996."

15. The purpose for reproducing the aforesaid paras is to show that the learned Arbitrator has taken into account that the claimant i.e. respondent herein made efforts for recovery of the amounts and various reminders were issued by the respondent herein to the appellant for recovery of amounts due which include letters dated 01.07.2013, 08.07.2013, 15.07.2013, 23.07.2013, 07.10.2013, 11.11.2013, 24.01.2014, 13.03.2014, 31.03.2014, 02.04.2014, 09.04.2014 and 26.05.2014 besides various meetings were held between the officials of the appellant and the respondent herein. We may note that the agreement was entered into between the parties in the year 2006. Admittedly, the agreement came to an end in the year 2011. A communication addressed by the respondent to the appellant herein has been filed by the appellant which shows that there were several rounds of meetings with the officials of the appellant and a final amount was settled. Learned counsel for the appellant has strongly urged before us that this final amount was crystallized only in the year 2013 and thus, the appellant should not be saddled with interest at least for the two years period starting from 2011 to 2013. We are unable to accept the submission of learned counsel for the appellant, for the reason that no doubt security deposit and the caution money was not to carry any interest but that was only till the time the agreement was in force. It is the stand of the appellant herein that out of Rs.1,04,62,500/- (security deposit) and Rs.2,50,000/- (caution money), the appellant was entitled to deduct certain amounts, in case,

it is the stand of the appellant that certain amounts were to be deducted than the balance amount should have been paid to the respondent forthwith without dragging the respondent to Court.

16. In this backdrop, we are of the view that the judgment sought to be relied upon by learned counsel for the appellant would not be applicable, having regard to the facts of the case where security deposit and cautious money were illegally withheld by the appellant. Even otherwise, the law is well settled that scope of interference of courts under section 34 is very minimal and even more so under section 37 of the Arbitration and Conciliation Act 1996.

17. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted, while deciding a petition under Section 34 of the Act. The Court cannot correct the error of the arbitrators. The Arbitrator has taken a plausible view in the matter, that the respondent is entitled to interest as the amounts were illegally withheld. The award is neither perverse nor irrational.

18. Resultantly, we find no merit in the appeal. The appeal is, therefore, dismissed.

G.S.SISTANI, J

REKHA PALLI, J

APRIL 11, 2018
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