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

Date of decision: 31st May, 2018

+ O.M.P. (COMM) 250/2018, I.A. 7782-7783/2018
EMAAR MGF LAND LTD Petitioner
Through Ms. Manmeet Arora, Ms. Sanam
Tripathi and Mr. Arjun Jain, Advs.
versus
SUNITA Respondent
Through None.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA (ORAL)

ORDER

% **31.05.2018**

I.A. 7782/2018 (Exemption)

Allowed, subject to all just exceptions.

O.M.P. (COMM) 250/2018 & I.A.7783/2018(STAY)

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 02nd April, 2018 passed by the Sole Arbitrator adjudicating the disputes that had arisen between the parties in relation to Buyer's Agreement dated 08th May, 2012.

2. The abovementioned Agreement had been executed between the parties whereunder the respondent had sought allotment of Unit No.EFS-B-C-SF-060A, Second Floor, Coral Building, Emerald Hills, Gurgaon, Haryana. The respondent at the time of booking of aforesaid flat had made payment of Rs.15,00,000/- to the petitioner on 13th April, 2012. After the execution of the aforementioned Agreement, the respondent admittedly made a further payment of Rs.1,00,00,000/- to the petitioner on 26th May,

2012. The total consideration payable in terms of the Buyer's Agreement included the Basic Price of Rs. 1,36,88,000/-.

3. As the petitioner did not carry out any construction or offer the flat to the respondent, disputes arose between the parties with the respondent seeking interest on the amount paid to the petitioner as also damages. The arbitration proceeding resulted in the Impugned Award by which the Sole Arbitrator has directed as under:

"27. CONCLUSION/AWARD :

A. It is held that the principal amount payable by the claimant to the respondent is Rs.1.15 crores (Rupees one crore and fifteen lakhs only);

B. It is held that that the respondent is in breach of the Builders' Buyer Agreement dated 8th May, 2012 and in the circumstances the respondent is not entitled to enforce clauses 15, 19(2)(a)(ii) and 19(2)(a)(iii) of the Builders' Buyer Agreement against the claimant;

C. The claimant is entitled to refund of the principal amount along with interest from the date of receipt of the said amount till the date of refund @ 18% per annum. Thus, in respect of Rs.15,00,000/- the claimant would be entitled to interest commencing from 13th April, 2012 and with respect to Rs.1,00,00,000/- the claimant would be entitled to interest commencing from 25th May, 2012;

D. The claimant is not entitled to any damages over and above the interest awarded; and

E. The clamant will be entitled to cost of the proceedings which is quantified at Rs.5,50,000/- (Rupees five lakhs and fifty thousand only.)"

4. Learned counsel for the petitioner submits that at the very initiation

of the arbitration proceedings, the petitioner had offered to refund an amount of Rs. 1,15,00,000/- to the respondent alongwith interest at the rate of 7 % per annum, however, the said offer was refused by the respondent as at that stage, respondent had contended that it had paid an amount of Rs.1,34,53,778/- to the petitioner. She submits that the Arbitrator, upon appreciation of evidence, has found that the respondent has not been able to prove the cash payment of Rs.19,53,789/-. Learned counsel for the petitioner, relying upon the above, submits that Arbitrator has erred in granting interest @ 18% per annum in favour of the respondent. She further submits that though in the initial Agreement between the parties, it had been stipulated that in case of any delay in payment of any instalment by the respondent, the petitioner would charge interest at the rate of 24% per annum, this stipulation was later amended by email dated 16th January, 2017 reducing the rate of interest to 12 % per annum. She submits that the Arbitrator, while awarding interest has taken into account the pre-amended rate of interest of 24% and therefore, has committed an error apparent on the face of the record.

5. I have considered the submissions made by the learned counsel for the petitioner, however I am unable to agree with the same. Section 31(7) of the Act is reproduced as under:-

“31. Form and contents of arbitral award.....

(7)(a) Unless otherwise agreed by the parties, where and in so far 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.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent

higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.”

6. Under Section 31(7) of the Act, the discretion to award interest as also the rate at which it is to be awarded lies with the Arbitrator. Of course, such discretion cannot be exercised in a whimsical manner, however, once the same is found to have been exercised in a reasonable manner, this Court under Section 34 of the Act cannot interfere with the same only because it finds the rate of interest awarded to be harsh.

7. In ***Hyder Consulting (UK) Ltd. v. Governor, State of Orissa*** (2015) 2 SCC 189, the Supreme Court has discussed the power of the Arbitral Tribunal to award interest as follows:

“8. Thus, sub-section (7) of Section 31 of the Act provides, firstly, vide clause (a) that the Arbitral Tribunal may include interest while making an award for payment of money in the sum for which the award is made and further, vide clause (b) that the sum so directed to be made by the award shall carry interest at a certain rate for the post-award period.

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14. In fact this is a case where the language of sub-section (7) clauses (a) and (b) is so plain and unambiguous that no question of construction of a statutory provision arises. The language itself provides that in the sum for which an award is made, interest may be included for the pre-award period and that for the post-award period interest up to the rate of eighteen per cent annum may be awarded on such sum directed to be to be paid by the arbitral award.

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21. In the result, I am of the view that S.L. Arora case is wrongly decided in that it holds that a sum directed to be paid by an Arbitral Tribunal and the reference to the award on the substantive claim does not refer to interest pendent

lite awarded on the “sum directed to be paid upon award” and that in the absence of any provision of interest upon interest in the contract, the Arbitral Tribunal does not have the power to award interest upon interest, or compound interest either for the pre-award period or for the post-award period. Parliament has the undoubted power to legislate on the subject and provide that the Arbitral Tribunal may award interest on the sum directed to be paid by the award, meaning a sum inclusive of principal sum adjudged and the interest, and this has been done by Parliament in plain language.

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26. Section 31(7)(a) of the Act deals with grant of pre-award interest while clause (b) of Section 31(7) of the Act deals with grant of post-award interest. Pre-award interest is to ensure that arbitral proceedings are concluded without unnecessary delay. Longer the proceedings, the longer would be the period attracting interest. Similarly, post-award interest is to ensure speedy payment in compliance with the award. Pre-award interest is at the discretion of the Arbitral Tribunal, while the post-award interest on the awarded sum is mandate of the statute – the only difference being that of rate of interest to be awarded by the Arbitral Tribunal. In other words, if the Arbitral Tribunal has awarded post-award interest payable from the date of award to the date of payment at a particular rate in its discretion then it will prevail else the party will be entitled to claim post-award interest on the awarded sum at the statutory rate specified in clause (b) of Section 31(7) of the Act i.e. 18%. Thus, there is a clear distinction in time period and the intended purpose of grant of interest.”

8. In ***Hyder Consulting (UK) Limited v. State of Orissa***, (2016) 6 SCC 362, the Supreme Court had allowed the appeal and set aside the directions of the High Court reducing the interest awarded by the Arbitrator from 16% with quarterly rest from the date of the cause of action till the date of the

award and thereafter at the rate of 18% with quarterly rest from the date of the award till its final payment, to 15% simple interest from the date of the cause of action till the date of the award and 18% simple interest from date of the award till the final payment. The Supreme Court held that, as the rate of interest granted by the Arbitrator was in consonance with *M/s Hyder (Supra)*, there was no justification on the part of the High Court hearing the appeal to have modified the interest component applying equitable principle.

9. In the present case, the Arbitrator, while considering the issue of interest has given cogent reasons which are reproduced hereinbelow:

“C. Issue No.3) Whether the claimant is entitled to refund of the principal amount paid along with interest; if so, at what rate and for what period ? OPC

(a) That in light of my finding with respect to Issue No.2 hereinabove, I find that the claimant is entitled to refund of the principal amount paid, i.e. Rs.1.15 crores along with interest. Thus, the question that needs further adjudication is what should be the rate of interest and the period for which the interest is liable to be levied.

(b) That in view of the fact that there has been no progress whatsoever with respect to construction at site I hold that the claimant is entitled to interest from the date of payment till the date of refund. Thus, with respect to the sum of Rs.15 lakhs the claimant would be entitled to interest commencing from 13th April, 2012 and with respect to payment of Rs.1,00,00,000/- the claimant would be entitled to interest commencing from 25th May, 2012.

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(i) That dealing with the aforestated rival contentions of the parties, I am of the opinion that reliance by the respondent on Section 31-A(3) would not come to the aid of the respondent as the said Section deals with amounts to be

awarded as cost. Award of interest is subject-matter of Section 31 (7). Therefore, the contention of the Ld. Counsel for the respondent on Section 31-A to contend that a lower interest rate or no interest should be awarded, in my opinion is misplaced.

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k).....A reading of Section 31 (7)(a) makes it clear that an arbitral award may include in the sum for which the award is made, plus interest, at such rate as it deems reasonable. Thus, the rate of interest that can be awarded by a Tribunal is not circumscribed by Section 31 (7)(b) which only deals with a situation where the Tribunal does not specifically quantify or award interest for the post-award period till the date of payment. The interest that may be awarded by a tribunal, is a discretion that lies solely with the tribunal, albeit the same has to be reasonable in the facts and circumstances of the case.

l) That the Hon'ble Supreme Court of India in the case of K.A. Nagamani Vs. Housing Commissioner, Karnataka Housing Board (supra) while agreeing with the ratio of Ghaziabad Development Authority Vs. Balbir Singh – 2004 (5) SCC 65, has held that in case the moneys are simply returned, the party is suffering loss inasmuch as it has deposited the money in the hope of getting a flat / plot. The parties also deprived of the benefit of escalation of the price of that flat / plot. Thus, the Hon'ble Supreme Court held that compensation in such cases would necessarily have to be higher. The Hon'ble Court found that award of 18% interest would to some extent re-compensate for the harassment, injury-both mental and physical, as well as the loss of rent etc. if the possession had been give.

(m)The facts of the present case are also similar to the facts that were being considered by the Hon'ble Supreme Court. I am, thus, of the considered opinion that the claimant would be entitled to refund of Rs.1.15 crores (Rupees one crore and fifteen lakhs only) along with interest @ 18% per

annum from the date of deposit till the date of repayment.

(n) That in fact in the present case clause 12 of the Buyers' Agreement provides that a company shall be entitled to charge interest @ 24% per annum for delay in payment from the date when instalment is due till the date of such payment. Thus, simply applying the said interest rate to the respondent as well was my first instinct in the facts of the present case; however, the only reason for reducing the interest from 24% to 18% per annum is on account of the fact that the respondent has, in fact, made an attempt to settle the dispute right at the inception of these proceedings and the fact that the claimant did raise an inflated claim which is unsubstantiated by any evidence."

10. As the Arbitrator has considered the issue of rate of interest at great length, it is not open to this court to re-appreciate the same as if it is sitting as the Court of appeal and modify rate of interest only on the ground that it appears to be a little harsh on the petitioner. It is to be noted that in the present case, the payment had been received by the petitioner from the respondent in April/ May 2012. Admittedly, no construction work was carried out by the petitioner even after receipt of this amount. It is not the case of the petitioner that the respondent was a mere financier of the project. It is only after the respondent had initiated the arbitration proceedings that the petitioner for the first time offered to refund this amount with interest at the rate of 7% per annum, which was promptly rejected by the respondent. I therefore do not find any equity in favour of the petitioner to reduce the interest rate that has been awarded by the Sole Arbitrator in favour of the respondent.

11. As far as the contention of the petitioner with regard to

amendment to the Agreement is concerned, the same, in my opinion, cannot be of any assistance to the petitioner. The Agreement as noted above, was executed in 2012. The Arbitrator entered upon the reference vide his notice dated 19th October, 2016. By a unilateral email dated 16th January, 2017, after the disputes had arisen between the parties and the Arbitrator had entered upon reference, the petitioner as if doing charity, offered to reduce the rate of interest from 24% to 12%. Even if this amendment can be said to be *bona fide*, the amendment can take effect only from the date when it is made. This amendment being made only after disputes had arisen, therefore, could not have altered or affected the rate of interest to be awarded by the Arbitrator against the petitioner. In any case, as noted above, in the facts of the present case, interest awarded in favour of the respondent and against the petitioner cannot be said to be unreasonable so as to warrant any interference by this Court.

12. The learned counsel for the petitioner has relied upon the judgment of the Division Bench of this Court in ***Bharat Sanchar Nigam Limited and Ors. v. BWL Limited***, reported as MANU/DE/3257/2017 to contend that the Division Bench had reduced the rate of interest in that case from 18% awarded by the Single Judge to 12%. I do not find the said judgment to be of any assistance to the petitioner. The Court, while reducing the rate of interest in this case had given the following reasons:

“33. In these circumstances, the direction given by the single Judge modifying the award and thereafter issuing direction that interest @ 18% per annum would be automatically attracted for pre-reference, pendente lite, and future period cannot be

sustained. In the present case, the arbitration proceedings have taken unduly long largely on account of the fact that the first Arbitrator after concluding the hearing had not pronounced the award for nearly six years from 6th October, 2004 till 21st September, 2010. The Award was partly upheld to the extent refund of liquidated damages by the single Judge of this Court by order dated 4th July, 2012. The Award was, however, completely set aside with the direction to appoint fresh arbitrator by the Division Bench in FAO (OS) No. 398/2012, decided on 26th November, 2012. The first Arbitrator was the departmental nominee. Yet the appellants could not have issued any directions to the arbitrator. There was, as noticed, some delay in invoking the arbitration clause. We cannot also lose sight of the fact that interest is paid to compensate the party, which has been deprived of the said money. It should neither be very high or very low, when it is not fixed by a statute or by the terms of the contract.”

13. It was in the peculiar facts of that case that the Division Bench of this Court thought it fit to reduce the rate of interest to 12%. However, that cannot be said to be a rule to be followed in each and every case. In the present case, the Arbitrator has given cogent reasons for awarding the rate of interest and this Court has not found the same to be unreasonable.

14. The second objection raised by the counsel for the petitioner is to the award of cost of arbitration proceedings quantified as Rs.5,50,000/- in favour of the respondent. The counsel for the petitioner submits that the Arbitrator has found the claim of the respondent for the additional amount of Rs.19,53,789/- to be not proved. The Arbitrator has further rejected the claim of the respondent for damages. Relying upon Section 31A(3) of the Act, the learned counsel for the petitioner submits that in the present case, the

Arbitrator should not have awarded any cost in favour of the respondent and the parties should have been made to pay their own cost of the arbitration proceedings. I have considered this submission made by counsel for the petitioner however, I am unable to agree with the same.

15. Section 31A(3) of the Act is reproduced herein below:-

“31A. Regime for costs.....

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including—

- (a) the conduct of all the parties;*
- (b) whether a party has succeeded partly in the case;*
- (c) whether the party had made a frivolous counter-claim leading to delay in the disposal of the arbitral proceedings; and*
- (d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.”*

16. As noted above, offer of the petitioner at the initiation of arbitration proceedings was of refund of Rs.1,15,00,000/- along with interest at the rate of 7% per annum. The same cannot be said to be reasonable in the peculiar facts of the case. Even as per the unilateral amendment to the Agreement carried out by the petitioner vide its email dated 16.01.2017, the rate of interest petitioner would have charged from the respondent for any delay in payment of instalments would have been 12% per annum. It may be correct that the respondent had raised a further claim on basis of cash payment having made by the respondent to petitioner, which respondent ultimately failed to prove, however, the petitioner could have refunded Rs. 1,15,00,000/- alongwith agreed rate of interest while contesting the

additional claim of the respondent. This was not done by the petitioner. As far as claim of damages is concerned, the Arbitrator does not reject the same but only states that as he has awarded interest at the rate of 18% per annum, no further amount is liable to be awarded in favour of the respondent towards damages. The same cannot be said to be a denial of the claim for damages made by the respondent.

17. In the facts of the case, I do not find the award of cost of proceedings to be exorbitant or unreasonable warranting any interference from this court.

18. In view of the above, I do not find any merit in this petition and the same is dismissed with no order as to cost.

NAVIN CHAWLA, J

MAY 31, 2018

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