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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 3.12.2018
+ **OMP (ENF.) (COMM.) 71/2017 & I.A. No. 12890/2017**
SUNAGRO SEED PVT. LTD. Decree Holder
Through: Mr. Jasbir Bidhuri, Adv

versus

NATIONAL SEEDS CORPORATION LTD..... Judgment Debtor
Through: Mr. Chirag Joshi with Mr. G. Joshi,
Adv

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

Backdrop:

1. This is a petition seeking, in effect, the execution of the award dated 16.2.2015, as modified by judgment dated 1.2.2016 passed by the Division Bench.

1.1 Interestingly, the learned Arbitrator while passing the award dated 16.2.2015 had granted certain amounts both in favour of the Decree Holder and the Judgment Debtor.

1.2 The amount awarded in favour of the Judgment Debtor was a sum of Rs.1,38,58,650/-

1.3 Insofar as the Decree Holder was concerned, the amount awarded in its favour was a sum of Rs.23,90,898/-.

1.4 Therefore, the net amount which was payable as per the award then obtaining by the present Decree Holder to the Judgment Debtor was a sum

of Rs.1,14,67,752/-.

2. Since the Decree Holder was aggrieved, a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') was filed. This petition, however, was dismissed by the learned Single Judge vide judgment dated 6.5.2015.

3. The Decree Holder, consequently, carried the matter in appeal to the Division Bench.

3.1 The Division Bench vide judgment dated 1.2.2016 modified the award dated 16.2.2015.

3.2 The impact of the modification was that the amount awarded in favour of the Judgment Debtor which was, as indicated above, a sum of Rs.1,38,58,650/- was scaled down to Rs.6,12,900/-.

4. Insofar as the amount awarded in favour of the Decree Holder by the learned Arbitrator was concerned, which was a sum of Rs.23,90,898/-, the same was sustained. Consequently, a role reversal happened.

5. The present Judgment Debtor was required to pay a net sum of Rs.17,77,998/- to the Decree Holder.

6. I may also indicate that the Judgment Debtor carried the matter to the Supreme Court. The Special Leave Petition filed was dismissed in limine on 16.1.2017.

7. Continuing with the narrative, it would be relevant to note that the Judgment Debtor has paid a sum of Rs.17,77,998/- to the Decree Holder.

7.1 Furthermore, the Judgment Debtor has also paid interest at the Prime Lending Rate (PLR) plus 2% to the Decree Holder for the period commencing from 1.2.2016 till 31.5.2018. The amount paid towards interest is a sum of Rs.3,59,440/-. This amount, I am told, was paid on 6.6.2018.

8. It appears that after the 34 petition was dismissed, the Judgment Debtor filed an Execution Petition bearing no.376/2015.

8.1 This execution petition was dismissed as withdrawn after the Division Bench had delivered its judgment on 1.2.2016.

8.2 According to learned counsel for the parties, the two issues which this Court is required to decide in the captioned petition are:

(i) What would be the date from which interest will be payable by the Judgment Debtor?

(ii) What would be the rate at which interest would be payable by the Judgment Debtor?

Submissions of Counsel:

8.3 Incidentally, this Court in its order dated 6.8.2018, more or less captured these very issues for consideration.

9. Mr. Joshi, who, appears for the Judgment Debtor says that insofar as the first issue is concerned, interest would be payable by the Judgment Debtor from the date when the Division Bench passed its judgment i.e., 1.2.2016.

10. In support of this contention, Mr. Joshi relies upon the constitution bench judgment rendered in the matter of: *Gurpreet Singh vs. Union of India*, (2006) 8 SCC 457.

11. Reliance is also placed by Mr. Joshi on another judgment of the Supreme Court titled: *Kunhayammed & Ors. vs. State of Kerala and Anr.*, (2000) 6 SC 359.

12. As regards the second issue, that is, the rate at which interest is payable, Mr. Joshi says that since the matter was in play in Court on 23.10.2015, when the 1996 Act was amended, interest in terms of amended Section 31(7)(b)¹ would be payable.

13. In other words, the argument is that interest was payable at the rate of PLR plus 2%; PLR being the current rate of interest. As noted hereinabove, interest at this rate has already been paid by the judgment debtor.

14. In support of his contention that the amended provision would apply, Mr. Joshi seeks to place reliance on the judgment of the Supreme Court in *BCCI vs. Kochi Cricket (P) Ltd.*, (2018) 6 SCC 287.

15. On the other hand, Mr. Jasbir Bidhuri, who, appears on behalf of the Decree Holder contends that since the Division Bench modified, *albeit*, by a reasoned judgment the award dated 16.2.2015, the same merged in the judgment of the Division Bench and, therefore, interest would be payable from the date of the award and not from the date of the judgment passed by the Division Bench.

16. As regards the other issue, that is, the rate at which interest is payable,

¹31. 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.

¹[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two percent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment. Explanation.—The expression “current rate of interest” shall have the same meaning as assigned to it

learned counsel for the Decree Holder says that since the award is silent, interest will have to be paid at the rate of 18 per cent. In other words, what would be applicable will be the unamended provision of Section 31(7)(b) of the 1996 Act.

17. I have heard the learned counsel for the parties and perused the record.

Reasons:

18. In my view, insofar as the first issue is concerned, the counsel for the Decree Holder is right. The record shows that after the award was passed on 16.2.2015, a challenge was laid by the Decree Holder by way of a Section 34 petition which was rejected by a Single Judge of this Court on 6.5.2015.

18.1 The grievance of the Decree Holder, however, was, in a sense, addressed when the Division Bench modified the award by way of a reasoned judgment on 1.2.2016.

18.2 Therefore, in effect, what the Division Bench did was to correct the award on the date when it was passed. The decision of the Division Bench will, thus, to my mind, relate back to the date of the award as if the award always had to be framed in the manner in which the Division Bench passed the judgment.

18.3 This view is based on the doctrine of merger which the Supreme Court has applied in several judgments including in *Kunhayammed's* case.

18.4 *Kunhayammed's* case was followed by a judgement of a Division Bench of the Supreme Court in the matter of: *Chandi Prasad and Ors. vs. Jagdish Prasad and Ors.*, (2004) 8 SCC 724.

under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]

18.5 Therefore, on the aspect of the doctrine of merger, it would be appropriate, in my view, to advert to the following observations of the Supreme Court in *Chandi Prasad's* case which notices, as indicated above, the earlier view taken in *Kunhayammed's* case:

“...21. It is axiomatic true that when a judgment is pronounced by a High Court in exercise of its appellate power upon entertaining the appeal and a full hearing in the presence of both parties, the same would replace the judgment of the lower court and only the judgment of the High Court would be treated as final. (See U.J.S. Chopra v. State of Bombay [AIR 1955 SC 633 : (1955) 2 SCR 94 : 1955 Cri LJ 1410]

22. When an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intent and purport, the suit continues.

23. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time.

24. It is trite that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See V.M. Salgaocar and Bros. (P) Ltd. v. CIT [(2000) 5 SCC 373 : AIR 2000 SC 1623].

25. The concept of doctrine of merger and the right of review came up for consideration recently before this Court in Kunhayammed v. State of Kerala [(2000) 6 SCC 359] wherein this Court inter alia held that when a special leave petition is disposed of by a speaking order, the doctrine of merger shall apply stating: (SCC p. 383, paras 41-43)

“41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42. ‘To merge’ means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-68.)

43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned

before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.”

26. In *Kunhayammed* [(2000) 6 SCC 359] it was observed: (SCC p. 370, para 12)

“12. ... Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.”

27. The said decision has been followed by this Court in a large number of decisions including *Union of India v. West Coast Paper Mills Ltd.* [(2004) 2 SCC 747] ...”

(emphasis is mine)

19. Thus, while the aforementioned judgements of the Supreme Court referred to in paragraphs 18.3 to 18.5 on merger apply on all fours, the judgment rendered by the Supreme Court in the case of *Gurpreet Singh*, in my opinion, would have no application, as it relates to the execution of an award-decree under the Land Acquisition Act, 1894 (as amended by Act 68 of 1984) and not under Section 36 of the 1996 Act.

19.1 Given the aforesaid position, I have no hesitation in saying that the interest will be payable to the Decree Holder from the date of the award and not from the date of the judgment of the Supreme Court.

19.2 Accordingly, issue no.(i) is decided against the Judgment Debtor.

20. Insofar as the second issue is concerned, which is as to what ought to be the rate of interest, in my view, the counsel for the Judgment Debtor is right in the stand taken by him.

20.1 The reason I have come to this conclusion is that Section 26² of the Arbitration and Conciliation (Amendment) Act, 2015 (in short “Amendment Act”) is bifurcated in two parts. The first part pertains to arbitral proceedings whose commencement is linked to the provisions of Section 21 of the 1996 Act. Section 21 of the 1996 Act provides that unless otherwise agreed to by the parties, the arbitral proceedings in respect of a particular dispute would commence on the date on which a request made in that behalf is received by the opposite party i.e. the respondent. This, of course, is subject to a caveat, which is that, the parties have the autonomy to agree otherwise. In other words, parties could agree that notwithstanding the request for referring the dispute to arbitration in terms of Section 21 of the 1996 Act being served prior to the commencement of the Amendment Act, the Amendment Act would apply to the arbitration proceedings.

20.2 The second part of Section 26 of the Amendment Act relates to arbitral proceedings, which are conducted in Court. The clue qua the same is available in the expression “in relation to” used in the second part of Section 26 of the Amendment Act. Therefore insofar as conduct of arbitration proceedings in Court is concerned the Amendment Act would apply. [See Board of Control for Cricket in India vs. Kochi Cricket Private Limited and Others, (2018) 6 SCC 287 at Pg.313, Para 37 to 39.]

² 26. Act not to apply to pending arbitral proceedings.— Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings

“...37. What will be noticed, so far as the first part is concerned, which states—

“26. Act not to apply to pending arbitral proceedings.— Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree....”

is that: (1) “the arbitral proceedings” and their commencement is mentioned in the context of Section 21 of the principal Act; (2) the expression used is “to” and not “in relation to”; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, “... but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act” makes it clear that the expression “in relation to” is used; and the expression “the” arbitral proceedings and “in accordance with the provisions of Section 21 of the principal Act” is conspicuous by its absence.

38. That the expression “the arbitral proceedings” refers to proceedings before an Arbitral Tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:

“Conduct of arbitral proceedings”

The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an Arbitral Tribunal. What is also important to notice is that these proceedings alone are referred to, the expression “to” as contrasted with the expression “in relation to” making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no others, that form the subject-matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may “otherwise agree” and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force. [Section 29-A of

commenced on or after the date of commencement of this Act.

the Amendment Act provides for time-limits within which an arbitral award is to be made. In *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 SCC 602 at p. 633 : 1994 SCC (Cri) 1087, this Court stated: (SCC p. 633, para 26) “26. ... (iii) Every litigant has a vested right in substantive law but no such right exists in procedural law. (iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished. (footnote 17 contd.) (v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.” It is, *inter alia*, because timelines for the making of an arbitral award have been laid down for the first time in Section 29-A of the Amendment Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act. This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into force.] In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable “in relation to” arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an Arbitral Tribunal, the second part refers to court proceedings “in relation to” arbitral proceedings, and it is the commencement of these court proceedings that is referred to in the second part of Section 26, as the words “in relation to the arbitral proceedings” in the second part are not controlled by the application of Section 21 of the 1996 Act.

39. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings — arbitral proceedings themselves, and court proceedings in relation thereto. The reason why the first part of

Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, “arbitral proceedings” having been subsumed in the first part cannot re-appear in the second part, and the expression “in relation to arbitral proceedings” would, therefore, apply only to court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force...”
(emphasis is mine)

20.3 If this construction is to be placed on Section 26 of the Amendment Act, which as indicated above, has received the imprimatur of the Supreme Court in *Board of Control for Cricket in India (BCCI)*, then, in my view, the amended Section 31(7)(b) of the 1996 Act would be applicable in this case. Pertinently both amended and unamended provisions of Section 31(7)(b) are *pari materia* to a large extent save an except with regard to the rate of interest. Section 31(7)(b) both before and after the amendment enables grant of interest (for the post award period) on the sum directed to be paid by an arbitral award, where the award is either silent or directs payment of interest at the rate different from that, which is provided in the provision itself.

20.4 It would be relevant to note at this stage the issue which often arises in such situations, that is, whether or not grant of interest for the post award period is a matter concerning substantive law or procedural law. This aspect has now been settled in a series of judgments, including the judgment of the Supreme Court in *MSK Projects (I) (JV) Ltd. vs. State of Rajasthan*, (2011) 10 SCC 573. In fact, this was a case in which the District Court while exercising power under Section 34 of the 1996 Act, reduced the rate of interest from 18% to 10%. The argument advanced in the Supreme Court was that this was contrary to the provisions of (unamended) Section 31(7)(b) of the 1996 Act. The Supreme Court, though, not only held that grant of interest for the post award period was a matter of procedure but also ruled after taking into account the provisions of Section 3 of the Interest Act, 1978 that there was an implied power vested in the Court to vary the rate of interest. The relevant observation made in this behalf are extracted hereafter:

“...24. Furthermore, it is a settled legal proposition that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure.

25. So far as the rate of interest is concerned, it may be necessary to refer to the provisions of Section 3 of the Interest Act, 1978, the relevant part of which reads as under:

“3. Power of court to allow interest.—(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the

court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest....”

(emphasis added)

Thus, it is evident that the aforesaid provisions empower the court to award interest at the rate prevailing in the banking transactions. Thus, impliedly, the court has a power to vary the rate of interest agreed by the parties...”

(emphasis is mine)

20.5 Furthermore, the Supreme Court cited with approval the following observations in the matter of *Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy*, (2007) 2 SCC 720:

“11. ... after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%...”

20.6 Therefore, as held in BCCI case, procedural laws are always to be held to operate retrospectively, as no party has any vested right in procedure. (See paragraph 64-65 at page.329-330).

20.7 In this case, as noted above, while narrating the facts, the parties were agreed (and desired a ruling in that regard) that while interest had to be granted, since the award was silent on the aspect of post award interest, what was required to be determined by the executing court was the period and the rate at which interest had to be awarded. In this case, complexity arose on

account of the fact that amendment to the 1996 Act was brought into force, while the matter was still in play before the Division Bench.

20.8 Therefore, the next question which crops up for consideration is whether the executing Court can vary the rate of interest based on equitable principles by taking into account the change in law.

20.9 That the executing court, in certain circumstances, can consider both change in law³ and give relief by applying equitable principles⁴ as embodied in existing statutes is backed by good authority.

20.10 Given the fact that Section 31(7)(b) of the Act relates to arbitration proceedings conducted in Court by virtue of Section 26 of the Amendment Act, it is the amended version which would apply. As per the amended version of Section 31(7)(b), the sum directed to be paid under the arbitral award is to carry interest at the rate which is 2% higher than the current rate of interest prevalent on the date of award. The explanation to this Section defines the expression “current rate of interest” as one which has the same meaning as assigned to it under Clause (b) of Section 2 the Interest Act, 1978. It has not been disputed before me that PLR does not represent the current rate of interest.

20.11 Furthermore, another aspect of the matter which is required to be noticed is that when the Amendment Act kicked in, the matter was still pending adjudication before the Division Bench. The Amendment Act was brought into force on 23.10.2015, while the judgment of the Division Bench was rendered on 1.2.2016. The Amendment Act thus, even otherwise, can be read retrospectively as it aims to bring interest rates payable on awards,

³ Sri Vidya Sagar vs. Smt. Sudesh Kumari and Others (1976) 1SCC 115.

⁴ Mohi-uddin vs. Kashmiro Bibi, AIR 1933 All 25 2 (FB); Allavarapu Subbayya vs. Jakka Peddayya and Ors., AIR 1973 Mad 234.

for the post award period, in public interest, in line with the current rate of interest. The rule against retrospectivity will not apply in this case.

21. The contrary submission made by the learned counsel for the Decree Holder that the award was silent on the aspect of Post award interest and, therefore, the unamended provision of Section 31(7)(b) should apply and, therefore, the interest should be paid at the rate of 18 per cent per annum, in my opinion, is untenable in the facts and circumstances of this case.

22. The facts obtaining in this case show that the judgment debtor voluntarily paid interest to the decree holder on the sum awarded at PLR plus 2%. The interest was, however, paid by the judgment debtor not from the date of the award, but from the date of the judgment of the Division Bench i.e. 1.2.2016.

23. If, as indicated above, the amended version of Section 31(7)(b) is to apply, then, interest had to be paid from the date of award i.e. 16.2.2015.

24. Consequently, the Judgment Debtor will pay a further interest at PLR plus 2% for the period commencing from the date of the award i.e., 16.2.2015 till the date of the Division Bench judgment i.e. 1.2.2016.

24.1 The needful will be done within two weeks from today.

25. The execution petition is disposed of.

27. Interest will be paid on or before 20.12.2018.

28. List the matter for compliance on 20.12.2018.

RAJIV SHAKDHER, J

DECEMBER 03, 2018

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