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

Date of Decision: 16.10.2018

+ O.M.P. (COMM) 431/2018 & I.A. No.14161/2018
BHARAT HEAVY ELECTRICALS LIMITED

..... Petitioner

Through Mr. Lalit Kumar Jha and Mr. C.B.
Singh, Advs.

versus

SIMPLEX INFRASTRUCTURES LIMITED

..... Respondent

Through Mr. Ankit Raj, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1 This is a petition which seeks to challenge the Award dated 11.06.2018 on a singular ground, which is the award of interest by the learned Arbitrator for the pre-award period. This aspect of the matter was noticed by me on the previous date i.e. on 11.10.2018. On that date, notice was issued in the petition which was accepted by Mr. Ankit Raj and opportunity was given to the respondent to file a reply, confined to the aforesaid aspect. However, no reply has been filed on behalf of the respondent. To my mind, no further opportunity can be given to file a reply.

2 The parties before the Arbitrator, basically, advanced arguments on the interpretation of a clause incorporated in the contract obtaining between them. The said clause, which is Clause

17, reads as follows:

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

3 Despite the prohibition on payment of interest under Clause 17, the learned Arbitrator for the reasons furnished by him in paragraph 83 to 100 of the impugned Award, has come to the conclusion that the said clause does not bar payment of interest to the respondent for the pre-award period. Accordingly, the learned Arbitrator has gone on to grant interest for the pre-award period at the rate of 6% per annum on the amount retained by the petitioner. Consequently, a sum of Rs.1,95,31,608/- has been awarded in favour of the respondent for the period commencing from 25.02.2015 and ending on 14.11.2016.

4 In support of his submission that interest could not have been awarded by the learned Arbitrator for the pre-award period, reliance is placed by the learned counsel for the petitioner on the provisions of Section 31(7)(a) of the Arbitration and Conciliation Act, 1996 (in short ‘1996 Act’).

4.1 Thus, the submission of the learned counsel is that since there is a contract to the contrary, the learned Arbitrator could not have granted interest to the respondent for the pre-award period. This submission learned counsel seeks to back by relying upon the following judgments: (i) ***Bharat Heavy Electricals Limited Vs. Globe Hi-Fabs Limited***, (2015) 5 SCC 718; (ii) ***Bharat Heavy Electricals***

Limited Vs. Tata Projects Limited, (2015) 5 SCC 682; (iii) judgment dated 02.07.2015, passed in Civil Appeal No.2404 of 2008, in the matter of: ***Union of India Vs. M/s Bright Power Projects (I) P. Ltd.,;*** and (iv) judgment dated 03.08.2017, passed in Civil Appeal No.2099 of 2007, in the matter of: ***Union of India Vs. M/s Pradeep Vinod Constructions Co..***

5 Learned counsel for the respondent, on the other hand, says that the reasoning given by the learned Arbitrator in support of its decision to award interest for the pre-award period ought to be sustained. It is the learned counsel's submission that the interest was accorded by the learned Arbitrator on account of gross illegality on the part of the petitioner in retaining the final payment, which was the amount equivalent to 2.5% of the contract value. Learned counsel, in support of this submission, relies upon the judgment in ***Union of India Vs. M/s Pradeep Vinod Constructions Co.***

6 Having heard the learned counsel for the parties, the only issue which arises for consideration, which, in my view, is a pure question of law is: whether the learned Arbitrator was right in directing payment of interest on the retained amount in favour of the respondent in view of the provisions of Clause 17 of the contract obtaining between the parties?

7 The first thing to be noted in respect of Clause 17 is that it is a stand alone clause and not a sub-clause to another clause obtaining in the contract.

7.1 Second, both, learned counsel for the respondent as well the learned Arbitrator, have, *inter alia*, relied upon the judgment of the Supreme Court in ***Union of India Vs. M/s Pradeep Vinod Constructions Co.*** to support the reasoning that Clause 17 should be confined to payments relating to earnest money deposit and security deposit. At first blush, this argument seems to have some merit, especially, in the context of the judgment of the Supreme Court in the matter of ***Union of India Vs. M/s Pradeep Vinod Constructions Co.*** However, on a closer scrutiny of the ratio of the said judgment, it is clear that the clause which obtained in that case is somewhat different from the clause obtaining in the instant case. The clause, which barred payment of interest to the contractor, was a sub-clause, which was preceded by another sub-clause, which dealt, essentially, with earnest money deposit and security deposit.

7.2 Given these circumstances, the two Judge Bench of the Supreme Court in the said case came to the conclusion that the bar on payment of interest provided in sub-clause (2) of Clause 16 of that contract was confined only to earnest money deposit and security deposit. As indicated hereinabove, that position does not obtain in the subject contract. The said clause is extracted hereafter:

“16. Earnest-money and security deposit – (1) The earnest-money deposited by the Contractor with his tender will be retained by the Railway as part of security for the due and faithful fulfillment of the contract by the Contractor. The balance to make up this security deposit which will be 10 per cent of the total value of the contract, unless otherwise specified in the special

conditions, if any, may be deposited by the contractor in cash or in the form of Government Securities or may be recovered by percentage deduction from the Contractor's "on account" bills, provided also that in case of a defaulting contractor the Railway may retain any amount due for payment to the contractor on the spending 'on account bills' so that the amount or amounts so retained may not exceed 10% of the total value of the contract.

(2) Interest on amounts – 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 deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon”

7.3 At this stage, I may point out that the Supreme Court in ***Union of India Vs. M/s Bright Power Projects (I) P. Ltd.*** has taken a different position than that which obtains in its judgment in ***Union of India Vs. M/s Pradeep Vinod Constructions Co.*** The judgment of the Supreme Court in ***Union of India Vs. M/s Bright Power Projects (I) P. Ltd.*** is a three Judge Bench judgment, which, it appears, was not brought to the notice of the Bench, which passed the judgment in ***Union of India Vs. M/s Pradeep Vinod Constructions Co.***

7.4 The other judgment which is a Division Bench judgment which also takes a position, which is in line with the decision of the Supreme Court in ***Union of India Vs. M/s Bright Power Projects (I) P. Ltd*** is the judgment rendered in ***Shri Chittaranjan Maity v Union of India***, dated 3.10.2017, passed in Civil Appeal No. 15545/2017. This decision, however, is a decision which was rendered at a point in time after the pronouncement of the judgment in ***Union of India Vs. M/s***

Pradeep Vinod Constructions Co.

7.5 In ***Bharat Heavy Electricals Limited Vs. Globe Hi-Fabs Limited***, the Supreme Court agreed with the petitioner and, accordingly, excised the interest granted by the learned Arbitrator in that case for the pre-award period. The clause, which was considered by the Supreme Court, was *pari materia* with Clause 17, which obtains in the instant case. The clause obtaining in that case is extracted hereafter:

“No interest shall be payable by the employer on earnest money, security deposit or on any money due to the contractor by the employer”

7.6 While interpreting the clause, the Supreme Court made the following observations in paragraphs 16 & 17. The same are extracted hereafter:

“...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.”

17. On the facts of the case we agree with the submission of Mr Gourab Banerji that interest is only payable from the date of the award. However, we do not agree with him that the interest should be reduced because of Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 which clearly states that rate of interest will be 18% p.a. Shri Gourab Banerji submitted that in some decisions, a lesser interest has been awarded. We cannot see how a lesser interest can be

awarded when the statute specifically provides that the rate of interest will be 18% p.a. and the arbitrator has accepted and awarded this rate of interest. Judges cannot legislate or amend the law by judicial decisions. They have to maintain judicial discipline and give their decisions in accordance with law. Hence the lesser rate of interest cannot be awarded because that would be amending the law which is not within the powers of the judiciary...”

(emphasis is mine)

7.7 Likewise, in another case involving the petitioner i.e. ***Bharat Heavy Electricals Limited Vs. Tata Projects Limited*** (2015) 5 SCC 682, the Supreme Court had ruled in favour of the petitioner. The clause involved in this case as well was *pari materia* to Clause 17, obtaining in the instant case. For the sake of convenience, the clause obtaining in that case is extracted hereafter:

“no interest shall be payable by BHEL on earnest money/security deposit or any money due to the contractor by BHEL.”

7.8 This judgment was delivered by a Division Bench which was different from the one which had rendered the decision in the earlier case involving the petitioner, to which I have made a reference above. The view of the Court is articulated in the following extract of the judgment:

“3[.].....On behalf of the respondent, the grant of pre-award interest could not be successfully defended in view of Clause 1.15.5 of the agreement which provides that “no interest shall be payable by BHEL on earnest money/security deposit or any money due to the contractor

by BHEL". The ambit and scope of the aforesaid clause was the subject-matter in Civil Appeal No. 7423 of 2005 between the appellant and M/s Globe HI-Fabs Ltd. decided on 12-11-2009 wherein this Court accepted and held that in view of such a provision in the agreement, interest is payable only from the date of the award. The aforesaid legal position ought to have been accepted by the Division Bench of the High Court in view of law settled by judgments of this Court in Sayeed Ahmed & Co. v. State of U.P. and several other cases including Union of India v. Concrete Products & Construction Co.

4. On the issue of award of interest, the learned Senior Counsel for the respondent tried to persuade us to enhance the post-award interest granted by the Arbitral Tribunal @ 10.5% to 18% p.a. in the light of provisions in Section 31(7)(b) of the Act. We are unable to accept this contention because the Arbitral Tribunal has already granted post-award interest @ 10.5%. Only if the award had not made such a direction, the statutory rate of interest @ 18% p.a. would have been payable from the date of the award to the date of payment as per statutory provision noted above.

5. In the light of the aforesaid discussion, we are constrained to hold that the order under appeal ought not to have approved grant of any pre-award interest."

(emphasis is mine)

8 Therefore, as has been correctly argued by the learned counsel for the petitioner, the Supreme Court has consistently sustained the submission advanced on behalf of the petitioner that no interest is payable for the pre-award period in view of the contract obtaining between parties barring payment of interest on amounts retained. Thus, in these circumstances, in my view, the contention of the

petitioner will have to be accepted.

9 The petition is allowed. The award of interest for the pre-award period is set aside.

10 The petition is disposed of in the aforesaid terms.

11 Pending application shall, accordingly, stand closed.

RAJIV SHAKDHER, J

OCTOBER 16, 2018

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