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

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Date of Order: 01st July, 2019

+ EFA(OS) 17/2017 & C.M.20662/2017

NORTH DELHI MUNICIPAL CORPORATION Appellant

Through: Mr. Sunil Goel Standing Counsel,
North MCD with Ms. Supreet Bimbura,
Advocate and Mr. Mayank Goel,
Advocate alongwith Mr. Kamal
Kishore Sharma, EE (M2), KP Zone
and Mr. B.K. Garg, AE.

versus

M/S S A BUILDERS LTD

..... Respondent

Through: Mr. Tarun Gupta, Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

1. The present appeal arises out of an order dated 19.04.2017 passed by a learned Single Judge of this court on an application being E.A. (OS) No. 34/2016 filed in a decided execution petition.
2. Some necessary facts required to be noticed for disposal of this appeal are that work was awarded to the respondent for construction of a flyover at the level crossing at New Rohtak Road on 11.11.1983. The respondent filed an application under Section 20 of the Arbitration & Conciliation Act, 1940 for appointment of an Arbitrator. Based on the directions of the High Court on 19.04.1996, the Commissioner, MCD,

appointed a Sole Arbitrator, who rendered his award on 16.12.1997. A Corrigendum was issued by the Arbitrator on 18.12.1997. Thereafter, the MCD filed objections to the Award under Section 34 of the Arbitration & Conciliation Act, 1996, registered as OMP No.2/1998. The objections to the Award were dismissed which led to the filing of FAO (OS) 89/2002, which was also dismissed on 14.03.2002 and SLP filed by the MCD met with the same fate and was dismissed.

3. In the execution petition, the amounts were paid and on 08.10.2010, the following order was passed by the learned Single Judge based on the statement made by learned senior counsel for the decree holder that the decree stands satisfied :

“It is stated by learned senior counsel for the Decree Holder that the interest component has been paid by Judgment Debtor and the decree stands satisfied.”

4. Post the decree being satisfied, the Auditor of the MCD pointed out that the MCD has, in fact, paid an amount of Rs.1,69,13,867/- in excess to the respondent. A notice was issued to the respondent informing that due to calculation error, excess amount was paid.
5. In response to the legal notice, while denying the excess amount was paid, the respondent pointed out that the amount received was short by Rs.7,45,397.40. The following letter was addressed:

“Ref : SAB/Zhakhira/2009-10/1141
Dated 14th September 2010

Mr. S K Singhal
Executive Engineer
Municipal Corporation of Delhi,
Office of the Ex. Engineer (M-II) RZ.
Shakti Nagar Exten.

Delhi-110052.

Subject :- Balance payment of arbitration award dated 16.12.1997 in respect of Zakhira Fly over passed by Sh. S.P. Rai, Sole Arbitrator in respect of the “work of construction of approaches to Fly-over at the level of crossing of New Rohtak Road with clover leaf, slip Road and service Road etc”.

Reference. Your letter. EE (M-II)RZ/2009-10-747. Dated 09.09.10.

Dear Sir,

This has reference to your above referred letter wherein you had sent a cheque no.420833 dated 09.09.10 amounting to Rs.3,77,87,508/- through registered AD.

However, it is submitted that your office has calculated an amount of Rs.3,77,87,508/- payable in respect of the above award upto 31.07.2010, whereas you have issued the aforesaid cheque only on 09.09.10. Therefore the interest on the above amount as per the Arbitration Award works out to Rs.7,45,397.40 i.e. from 31st July 2010 to 9th September 2010.

You are, therefore requested to release the above amount immediately along with the interest beyond 09.09.2010 till date of actual payment.

Thanking you

Yours faithfully
For SAB Industries Limited.

Sd/-
(Avinash Sharma)
Executive Director”

6. In order to seek refund of the excess amount paid, the MCD filed EA

No. 364/2013 in a disposed of execution petition. The notice was issued. Respondent also filed a reply claiming that they were entitled to Rs.2,90,319/- as they were entitled to compound interest.

7. On 26.08.2004, prior to filing of this application by MCD, the learned Single Judge formulated the following questions and placed the matter before the Division Bench:

“Whether post award interest under Section 31(7) of the Arbitration and Conciliation Act, 1996 would be calculated on the principal sum adjudged’ or would it be calculated on the principal sum plus interest on the principal sum which has accrued from the date of cause of action to date of passing of award, as under the new 1996 Act, award is enforced as a decree of the Court.”

8. The Division Bench without deciding the question framed before it, permitted the contractor to seek clarification from the Arbitrator as to whether the Arbitrator intended the pre-award interest to be included as a part of the sum awarded for the purposes of computing the post award interest. SLP filed by MCD against the order dated 03.01.2005 passed by the Division Bench was dismissed by Supreme Court on 09.07.2007. The Arbitrator issued the clarification on 15.03.2005, which we reproduce below:

"While awarding the interest, I have held in my award that "contractor has been deprived of the use of blocked money arrived at in the above said award resulting in financial sufferings towards his business." Therefore, I have no doubt and clarify that post-award interest in the said award shall be payable on the awarded sums i.e. the amounts of claims awarded plus -the interest for the/pre-reference period and pendente lite upto the date of award at the rate mentioned therein till it is paid."

9. After the clarification was received, objections were filed by the MCD in Execution Petition with the prayer that the Arbitrator could not have rendered the clarification. The learned Single Judge allowed the application of the MCD, which led to the filing of an appeal by the respondent which was dismissed by the Division Bench. The operative portion of the order dated 23.02.2012 is reproduced as under:-

“Learned counsel for the appellant cannot dispute before us that the settled legal position which now prevails, is that, compound interest under the said Act cannot be granted in view of the judgment in State of Haryana and Ors. Vs. S.L. Arora and Company (2010) 3 SCC 690. The result is that this amount is not payable.

We are thus of the considered view that the appeal is an academic exercise, as the appellant is not entitled to the compound interest on the short ground that such compound interest would not be payable in the absence of any provision for such interest in the contract in view of the judgment in S.L. Arora and Company (supra). We are thus not called upon to go into the reasoning of the learned Single Judge.

The appeal is accordingly dismissed for the reasons set out in our order and not on the basis of the reasons contained in the impugned order.”

10. Thereafter the matter was carried to the Supreme Court by the Contractor. The SLP was allowed and the following order was passed:

“Leave granted.

The present appeal is preferred against the judgment and order dated 23rd February, 2012, passed by the Division Bench of the High Court of Delhi, in E.F.A. (OS) No. 16 of 2008, wherein it has been held thus:

“Learned counsel for the appellant cannot dispute before us that the settled legal position which now prevails, is that, compound interest under the said Act cannot be granted in view of the Judgment in *State of Haryana Ors. vs. S.L. Arora and Company* (2010) 3 SCC 690. The result is that this amount is not payable.

We are thus of the considered view that the appeal is an academic exercise, as the appellant is not entitled to the compound interest on the short ground that such compound interest would not be payable in the short ground that such compound interest would not be payable in the absence of any provision for such interest in the contract in view of the judgment in *S.L. Arora and Company* (supra). We are thus not called upon to go into the reasoning of the learned Single Judge.”

Recently, the decision in *S.L. Arora* (supra) has been overruled by majority view in *M/s. Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa* (2015) 2 SCC 189.

In view of the aforesaid, the interest component payable to the appellant shall be computed in accordance with law laid down in *M/s. Hyder Consulting (UK) Ltd.* (supra) not in accordance with *S.L. Arora* (supra) as that has been declared not good law.

In the result, the conclusions by the learned Single Judge that has been affirmed by the Division Bench are set aside. It is open to the appellant to seek execution as per the law pronounced by this Court.

The appeal is, accordingly, allowed. There shall be no order as to costs.”

11. Thereafter the respondent filed a fresh application in a disposed of execution petition, seeking interest based on *Hyder Consulting (UK) Limited* (supra) which has been allowed. Mr. Goel, has raised the following arguments:

- (i) Once the satisfaction stood recorded on 08.10.2010, the second execution application would not be maintainable. However, he could not show that this ground was ever pressed earlier before

any court.

- (ii) The Contractor could not have sought clarification as the Arbitration & Conciliation Act, 1996 does not allow any clarification to be granted except as provided under Section 33 of the Arbitration & Conciliation Act, as it is contended that in case the Arbitrator was inclined to grant compound interest, he would not have granted 18% simple interest.
 - (iii) The learned Arbitrator in the garb of so called clarification could not have effected substantial change in the award inasmuch as in the award he granted simple interest whereas by way of said clarification, he changed it to compound interest in a dishonest manner, which is impermissible by law.
12. Mr. Goel further points out that the order dated 19.02.2008 passed by the learned Single Judge was neither tested before the Division Bench nor before the Supreme Court for the reason that Division Bench observed that in view of the decision in S.L. Arora deciding the appeal is only to be an academic exercise and when the matter reached to the Supreme Court, the Supreme Court decided the matter based on the subsequent view taken in *Hyder Consulting (UK) Limited (supra)*. In this backdrop, it is contended that the MCD which is a statutory body will suffer irreparable financial loss in case the order of the learned Single Judge is not modified for the reason that the respondent did not file objection to the award and in fact received the amount in terms of the original award and the execution petition was dismissed as the decree stood satisfied.
13. It is further contended that after a gap of about 3 years, the appellant

filed an application seeking refund of excess amount paid. Even at that stage, it was not the stand of the respondent that they were entitled to compound interest. Mr. Goel, also submits that in case, this ground was raised at the initial stage, the MCD would not have saddled with interest of over 10 years and the respondent cannot be allowed for illegal enrichment.

14. Learned counsel for the respondent has opposed this appeal on the ground that the Apex Court has finally decided the matter and directed the High Court to apply the law laid down in the case of ***Hyder Consulting (UK) Limited*** (*supra*) and the learned Single Judge has duly complied with the direction of the Supreme Court.
15. At this stage, Mr. Goel submits that the calculations filed by the respondent alongwith respondent's application are factually incorrect and the learned Single Judge has erred in observing that the counsel for MCD has been unable to point out any flaw in the computation of the amount payable, which in fact was objected to in a substantive application being EA (OS) 166/2017. He submits that the order be set aside and the Single Judge be directed to decide EA (OS) 166/2017 which has been disposed of afresh. Counsel for the respondent submits that the MCD's applications objecting to the calculations are still pending before the learned Single Judge. Mr. Goel submits that his calculations are already on record vide EA 364/2013, EA 25/2015 and affidavit dated 07.01.2016 and his objections to the calculations filed by the respondent are already on record vide EA (OS) 166/2017. He submits that in fact refund of amount is to be received by the appellant from the respondent.

16. Learned counsel appearing for the appellant submits that the observations made by the learned Single Judge in paras 20 and 21 are factually incorrect as the appellant had furnished the calculations and the appellant had also filed objections to the calculations furnished by the respondent herein. He submits that this part of the order should be set aside and one opportunity should be granted to the appellant to show the correct calculations, to which, learned counsel for the respondent has no objection.
17. We, thus, reject the contentions of the learned counsel for the appellant for the reason that in the order dated 12.03.2015, the Supreme Court has directed that the High Court would decide the issue of interest component payable to the respondent in accordance with law laid down in *M/s Hyder Consulting (UK) Ltd.* (*supra*) and not in accordance with law laid down in *S.L. Arora* (*supra*). The other reason for rejecting the contentions of the appellant is that the grounds, which are sought to be urged before us, are not available to the appellant at this stage in these proceedings, which are execution proceedings. The matter had attained finality upto the Apex Court and we cannot interfere on the merits of the case at this stage.
18. However, in view of the submissions of the parties with respect to the quantity, with the consent of the parties, we set aside the operative part of the order dated 19.04.2017 pertaining only to the calculations and permit both the parties to make submissions restricted to the quantum of the amount payable to the respondent.
19. The learned Single Judge would decide the amount payable after hearing both sides and based on the calculations submitted by the

parties, on 03.09.2019, the date already fixed before the learned Single Judge.

20. With these observations, the appeal and C.M.20662/2017 are disposed of.

G.S. SISTANI, J

JYOTI SINGH, J

JULY 01, 2019/ck

