

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

+ FAO(OS)(COMM) 9/2020 and CM APPL. 35917/2019

Date of decision: 26.02.2020

IN THE MATTER OF:

M/S MORGAN SECURITIES & CREDITS PVT LTD Appellant
Through: Mr. Simran Mehta, Mr. Rohit Puri and
Mr. Anshul Masih, Advocates

Versus

VIDEOCON INDUSTRIES LTD (THROUGH) Respondent
Through: Mr. Arjun Pall and Ms. Sadhika Gulati,
Advocates

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

HIMA KOHLI, J.

1. Subject matter of challenge in the present appeal is the judgment dated 7.2.2019, passed by the learned Single Judge in respect of two petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short, 'A&C Act'), one by the appellant herein (OMP No. 972/2013) and the other by the respondent (OMP No.665/2013). Both the petitions were directed against an Award dated 1.3.2013, passed by the learned Sole Arbitrator that was subsequently corrected on 29.4.2013. By the impugned judgment, the learned Single Judge has turned down the challenge laid by the respondent herein, Videocon Industries Ltd. (hereinafter referred to as 'Videocon') to the Arbitral Award on two counts,

firstly, that arbitration was invoked by the appellant herein, Morgan Securities & Credits Pvt. Ltd. (in short, '**Morgan**') against a non-existing company, namely, 'Videocon International' for the reason that as on the date when the demand notice was issued by it i.e. on 10.1.2006, Videocon International had amalgamated with Videocon Industries and secondly, with a grievance against the high rate of interest awarded by the Sole Arbitrator. Both the said pleas have been rejected by the learned Single Judge.

2. As for the appellant/Morgan, it had assailed the impugned Award on the ground that the learned Sole Arbitrator had erred in granting interest @ 18% per annum on the principal amount awarded in its favour from the date of passing of the Award whereas, interest ought to have been granted on the principal sum plus the interest component, taken collectively. It was contended that the learned Sole Arbitrator has awarded interest from the date of the demand notice i.e. 10.1.2006, whereas interest ought to have been awarded from the date the respondent/Videocon had committed a default. Lastly, it was urged that while awarding interest, the learned Sole Arbitrator could not have deviated from the terms of the contract governing the parties whereunder it was agreed that the normal agreed rate of interest for providing bill discounting facility would be 36% per annum.

3. In the impugned judgment, the learned Single Judge has turned down the aforesaid pleas taken by the appellant/Morgan and held that the power of awarding interest was discretionary in nature and stood vested in the learned Sole Arbitrator. In the instant case, since the interest was restricted to 18% per annum on the principal amount, the court opined that it did not deserve

interference. Insofar as pre-reference interest is concerned, noting the fact that the demand notice was issued by the appellant/Morgan after two and a half years reckoned from the date it had extended the facility to the respondent/Videocon, it was held that there were valid and justified reasons for the learned Arbitrator to have restricted the interest on the principal amount to 21% per annum till the date of the demand notice i.e., till 10.1.2006 and to 36% per annum after the date of the demand notice. Observing that the learned Sole Arbitrator could not have assumed that the demand was due on the date when the liability had accrued against the respondent/Videocon unless and until such a demand was raised by the appellant/Morgan, which it did only on 10.1.2006, the learned Single Judge held that the Sole Arbitrator was justified in declining to presume that the amount was outstanding prior thereto.

4. As regards the rate of interest fixed in the Award, the learned Single Judge declined to interfere with the said rate either at the instance of the respondent/Videocon, who claimed that it was on the higher side, or at the instance of the appellant/Morgan whose stand was that the contract stipulated the rate of interest at 36% per annum, which should hold good even for the post Award period.

5. While the respondent/Videocon has not filed an appeal against the impugned judgment, the appellant/Morgan is aggrieved thereby and has filed the present appeal.

6. Mr. Simran Mehta, learned counsel for the appellant/Morgan argued that the learned Single Judge has erred in declining to club the interest

component with the principal amount while awarding interest in favour of Morgan till the date of issuing the demand notice i.e. till 10.1.2006, which runs contrary to the plain and express words of the written contract between the parties. Citing the provisions of Section 31 (7) (a) of the A&C Act, he urged that the learned Sole Arbitrator was under an obligation to grant pre-award interest in terms of the contract. It was his contention that the learned Single Judge has overlooked the fact that the Sole Arbitrator had wrongly placed reliance on the judgment dated 29.1.2010 in State of Haryana and Others Vs. S.L. Arora and Company reported as (2010) 3 SCC 690, decided by a two-Judge Bench of the Supreme Court, as it was no longer a good law in the light of the judgment of a three-Judge Bench of the Supreme court rendered on 25.11.2015, in Hyder Consulting (UK) Limited Vs. Governor, State of Orissa reported as (2015) 2 SCC 189.

7. Learned counsel for the appellant/Morgan has also found fault with the decision of the learned Single Judge of declining to interfere with the impugned Award where the Sole Arbitrator has granted post Award interest @ 18% per annum on the principal sum of the bill discounting facility i.e. a sum of Rs.5,00,32,656/-, without including the pre-award interest. He placed reliance on Hyder Consulting (supra) to urge that post-award interest is required to be granted on the sum directed to be paid under the Arbitral Award, which necessarily includes the pre-award interest. It was lastly argued that there was no reason to decline interest to the appellant/Morgan from the date the respondent/Videocon had committed a default and the direction issued by the Sole Arbitrator that interest be paid from the date of

the demand notice, has unjustifiably caused loss of interest to Morgan for a period spanning over two and a half years.

8. Per contra, Mr. Arjun Pall, learned counsel for the respondent/Videocon defended the findings returned in the impugned judgment wherein the plea taken by the appellant/Morgan to assail the impugned Award on the aspect of the interest awarded, has been repelled. He referred to the bill discounting facility to the tune of Rs.5 crores extended to his client vide letter dated 27.1.2003, to state that Videocon had submitted post dated cheques for the payment of the Bills of Exchange to the appellant/Morgan, which it did not encash and instead, it agreed to extend the timeline for making payment of the amount towards the value of the Bills of Exchange. It was canvassed that having adopted the said course of action, which was not contemplated in the contract, the appellant/Morgan cannot insist on demanding interest @ 36% per annum, as stipulated in para 4 of the contract governing the parties.

9. It was further submitted by learned counsel for the respondent/Videocon that the bill discounting facility was provided by the appellant/Morgan on 27.1.2003, for an amount of Rs.5 crores for 150 days with interest @ 21% per annum and the due dates fell between June to July, 2003 whereas, the demand notice was issued by the appellant/Morgan only on 10.1.2006 and the notice invoking arbitration was issued on 31.1.2006. As for the plea of the other side that reliance could not have been placed on the judgment in S.L. Arora (supra) pronounced on 29.01.2010, he pointed out that when the appellant/Morgan had filed the Section 34 petition to

assail the Award, the said judgment was holding the field and even the appellant had cited the said decision in the grounds of appeal. It was only after one and a half years from the date of filing of the Section 34 petition that Hyder Consulting (supra) was decided by the Supreme Court on 25.11.2015. But the appellant/Morgan did not take any steps to amend its Section 34 petition, which was finally decided by the learned Single Judge on 27.2.2019. Lastly, learned counsel argued that the grounds sought to be urged by learned counsel for the appellant/Morgan in the present appeal are all based on appreciation of facts that cannot be gone into by the court in proceedings initiated under Section 34 or 37 of the A&C Act.

10. To buttress the aforesaid submissions, learned counsel for the respondent/Videocon has cited the decision of a coordinate Bench of this court in Bharat Sanchar Nigam Limited & Anr. Vs. BWL Ltd. reported as **2017 SCC OnLine Del 11101** wherein, after taking note of the view expressed by the Supreme Court in Central Bank of India Vs. Ravindra reported as **(2002) 1 SCC 367**, Mc Dermott International Inc. Vs. Burn Standard Co. Ltd. reported as **(2006) 11 SCC 181** and Hyder Consulting (supra), it was held that only if the Award is silent or did not direct otherwise, would the unamended clause (b) of sub-section (7) of Section 31, that specifies interest @ 18% per annum from the date of the Award till the date of payment, would come into play and not otherwise.

11. We have perused the impugned judgment, heard the arguments advanced by learned counsel for the parties and carefully examined the decisions cited by both sides.

12. Since the focus of the learned counsel for the appellant/Morgan is on the disinclination of the learned Single Judge in interfering in the impugned Award dated 29.04.2013, on the aspect of the interest granted we may extract below para 92 of the Award for ready reference:-

“92. In view of the findings of the Tribunal above, Respondent No.2 is liable to pay a sum of Rs.5,00,32,656/- (Rupees five crores thirty two thousand six hundred and fifty six only) to the Claimant alongwith interest at 21% p.a. till the date of demand notice. After the date of the demand notice, i.e. 10.01.2006, the Claimant is entitled to receive interest at the rate of 36% p.a. with monthly rests. Further, in terms of the aforesaid decision in S.L. Arora, the Claimant is entitled to receive to post-award interest at the rate of 18% p.a. only on the principal amount of Rs.5,00,32,656/-.”

13. A glance at the operative para of the impugned Award as above, shows that the learned Sole Arbitrator has split the period for grant of interest for the pre-reference period into two and held that the respondent/Videocon is liable to pay a sum of Rs.5,00,32,656/- to the appellant/Morgan alongwith interest calculated @ 21% per annum till the date of the issuance of the demand notice, i.e., till 10.01.2006. For the period after the date of issuance of the demand notice, the appellant/Morgan has been granted contractual interest @ 36% per annum with monthly rests. For the post-award period, the appellant/Morgan has been held entitled to interest @ 18% per annum on the principal sum alone.

14. In the impugned judgment, the learned Single Judge has turned down the plea taken by the appellant/Morgan that it is entitled to claim interest @ 36% per annum from the date when the respondent/Videocon had

committed a default in payment, which was over two and a half years prior to issuance of the demand notice as the court was of the opinion that the restriction imposed by the learned Arbitrator was valid and justified. We do not find any force in the submission made by learned counsel for the appellant/Morgan that the respondent/Videocon having committed a default in repayment of the amounts due under the bill discounting facility, was liable to pay interest from the date of the default for the simple reason that it was the appellant/Morgan, who took a decision to extend the time for the respondent/Videocon to repay the amounts due.

15. Admittedly, the respondent/Videocon had handed over post dated cheques to the appellant/Morgan for the amounts due, but vide letter dated 27.01.2003, addressed to the respondent/Videocon, the appellant/Morgan had agreed not to present the said cheques for encashment and further, offered a bill discounting facility to the respondent/Videocon at a concessional rate of 21% per annum. In this context, para 4 of the letter dated 27.01.2003 addressed by the appellant/Morgan to the respondent/Videocon assumes significance and is reproduced hereinbelow:-

“4. The Drawee/Drawer agrees that normal agreed rate for providing Bill Discounting facility is 36% p.a., however as a special case the Discounting Company is providing the Bill Discounting facility at concessional rate of 21% p.a. payable upfront. In case of delay or default in making payment of amount of the Bill of Exchange or overdue bill discounting charges/interest or any part thereof on it's due date, the concessional rate will be withdrawn and the normal rate of bill discounting charges of 36% p.a., monthly rests, shall be payable by the Drawee/Drawer from its due date. Margin @3% p.m. for 3 days shall be deducted at the time of discounting, to

be adjusted against delays in repayment, if any.”

16. It is apparent on a perusal of the aforesaid para that the appellant/Morgan had agreed to extend the bill discounting facility to the respondent/Videocon at a discounted rate of 21% per annum instead of the normal rate of 36% per annum, by treating it as a special case. It was further recorded that in the event of any delay or default in making the payment towards the amount of the bill exchange or the overdue bill discounting charges/interest, the concessional rate would be withdrawn and the normal rate of 36% with monthly rests would become applicable. However, the aforesaid para does not mention the cut-off date whereafter the appellant/Morgan would resume charging the normal rate of bill discounting. In other words, the letter dated 27.01.2003 addressed by the appellant/Morgan to the respondent/Videocon is silent on the period during which the concessional rate of 21% per annum would hold good. It was in this background that the learned Sole Arbitrator has awarded interest on the sum of Rs.5,00,32,656/- @ 21% per annum till the date of issuance of the demand notice, by treating 10.01.2006 as the cut off date whereafter interest has been granted at the contractual rate of 36% per annum.

17. We find merit in the observation made in the impugned judgment that till the date a demand was actually raised by the appellant/Morgan on the respondent/Videocon, there was no reason for the learned Arbitrator to have assumed the amount that had actually become due and payable to the appellant/Morgan. Admittedly, a demand was raised by the appellant/Morgan for the first time only on 10.01.2006. The

respondent/Videocon having availed of the bill discounting facility in terms of the Bill Discounting Facility Agreement dated 27.01.2003, on 14.02.2003 and having issued post dated cheques for securing repayment towards the said facility, which the appellant/Morgan elected not to present for encashment, the inference is that it had agreed to water down the terms of the Agreement and continue charging the concessional rate of 21% per annum on the bill discounting facility, till the date of issuance of the demand notice. For the above reason, the appellant/Morgan cannot claim entitlement to a higher rate of interest for a period of almost three years prior to the date of issuance of the demand notice, i.e., 10.01.2006. We find no reason to take a different view from that taken in the impugned judgment.

18. We are also not inclined to accept the submission made by learned counsel for the appellant/Morgan that the learned Single Judge has failed to appreciate that the Sole Arbitrator had deviated from the terms of contract governing the parties, wherein it was agreed that the rate of interest for providing bill discounting facility would be 36% per annum. Para 4 of the Agreement dated 27.01.2003 is self-explanatory. Once the appellant/Morgan had on its own agreed to apply a concessional rate of interest @ 21% per annum on the bill discounting facility made available to the respondent/Videocon and thereafter, waited for a period of almost three years before issuing a demand notice, the learned Sole Arbitrator was justified in observing that this was not a case where there was any understanding between the parties that on the appellant/Morgan extending the timeline for the repayment, a higher rate of interest @ 36% per annum

would be applicable for that period.

19. Coming to the next submission made by learned counsel for the appellant/Morgan that his client ought to have been granted post-award interest @18% per annum on the principal amount of Rs.5,00,32,656/- clubbed with the pre-award interest, we may usefully refer to the unamended Section 31(7) of the A&C Act, which reads as under:-

“31(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 eighteen per centum per annum from the date of the award to the date of payment.”

20. Post amendment, in terms of Act 3 of 2016 that came into operation on 23.10.2015, the amended clause (b) of sub-section 7 of Section 31 reads as under:-

“31(7)(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.

Explanation – The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978(14 of 1978)”

21. In Hyder Consulting (supra), based on a reference order placed before a three Judge Bench of the Supreme Court, for a clarification as to whether the previous decision in the case of S.L. Arora (supra), wherein it was held that award of interest on interest from the date of the Award, is impermissible under Section 31(7) of the A&C Act, is in consonance with the earlier decisions of the Supreme Court, Hon'ble Justice S.A. Bobde, as he then was, had observed in the majority opinion that sub-section 7(a) contemplates that an award may be passed inclusive of interest for the pre-award period on the entire amount or part amount directed to be paid and the words used, "*sum for which the award is made*" mean the total amount awarded, which may or may not include interest. His Lordship further held that under sub-section 7(b), the sum directed to be paid by the Arbitral Award is inclusive of *pendentelite* interest at a certain rate for the post award period. It has been highlighted that the purpose of enacting the said provision was to encourage early payment of the awarded sum and discourage any delay that accompanies execution of the award, as if it was a decree of the civil court. We may usefully extract below, paras 13 and 21 of the majority judgment:-

"13. Thus, it is apparent that vide clause (a) of sub-section (7) of Section 31 of the Act, Parliament intended that an award for payment of money may be inclusive of interest, and the "sum" of the principal amount plus interest may be directed to be paid by the Arbitral Tribunal for the pre-award period. Thereupon, the Arbitral Tribunal may direct interest to be paid on such "sum" for the post-award period vide clause (b) of sub-section (7) of Section 31 of the Act, at which stage the amount would be the sum arrived at after the merging of interest with the principal; the two

components having lost their separate identities.

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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 pendente 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.*

22. In his concurring judgment in the captioned case, Hon’ble Justice A.M. Sapre held that grant of pre-award interest is at the discretion of the Arbitral Tribunal, while post-award interest on the awarded sum is the mandate of the Statute, the only difference being in respect of the rate of interest to be awarded by the Arbitral Tribunal. It was observed that if the Arbitral Tribunal has awarded post-award interest payable from the date of the award to the date of payment at a particular rate at its discretion, then it will prevail. Otherwise, the parties will be entitled to claim post-award interest on the awarded sum at the rate specified in Section 31(7)(b) of the Act, which was statutorily fixed at 18%, pre amendment. The observations made in paras 27 and 28 summarise the said position as follows:-

“27. Section 31(7)(a) employs the words “... the Arbitral Tribunal may include in the sum for which the award is made interest...”. The words “include in the sum” are of utmost

*importance. This would mean that pre-award interest is not independent of the “sum” awarded. If in case, the Arbitral Tribunal decides to award interest at the time of making the award, the interest component will not be awarded separately but it shall become part and parcel of the award. **An award is thus made in respect of a “sum” which includes within the “sum” component of interest, if awarded.***

*28. Therefore, for the purposes of an award, there is no distinction between a “sum” with interest, and a “sum” without interest. **Once the interest is “included in the sum” for which the award is made, the original sum and the interest component cannot be segregated and be seen independent of each other. The interest component then loses its character of an “interest” and takes the colour of “sum” for which the award is made.*** (emphasis added)

23. In essence, Hyder Consulting (supra) has clarified that even if the award is silent on the future interest payable, the same would remain payable on the 'sum' awarded, which figure will encompass the pre-award interest, if so awarded by the Arbitral Tribunal. Even if the Arbitral Award has directed a sum to be paid without specifying the interest payable post-award, then too future interest would be statutorily payable under the aforesaid provision.

24. In the instant case, the Arbitral Award is not silent on the aspect of the post-award interest for attracting the provisions of Section 31(7)(b) of the Act, as contended by learned counsel for the appellant/Morgan. The learned Sole Arbitrator has held that the appellant/Morgan is entitled to post-award interest @ 18% per annum with a stipulation that interest at the said rate would be payable only on the principal amount of Rs.5,00,32,656/-.

25. Had the Award been silent on the aspect of the post-award interest, it was a different matter but that is not so in the instant case. The learned Arbitrator has not only given plausible reasons for refusing to grant a higher rate of interest on the sum awarded in favour of the appellant/Morgan for the period prior to issuance of the demand notice, but has awarded the contracted rate of interest i.e. 36% per annum in favour of the appellant/Morgan for the period post the demand notice, i.e., after 10.01.2006. However, for the post-award period, interest has been awarded @ 18% on the sum of Rs.5,00,32,656/-. We do not find any infirmity in the said approach of the Arbitral Tribunal of rejecting the claim of the appellant/Morgan for grant of a higher rate of interest prior to 10.1.2006 or for claiming that the pre-award interest be clubbed with the actual amount awarded, while granting post award interest and find no reason to interfere in the impugned judgment, upholding the said view.

26. When the Award has specifically granted interest @ 18% per annum for the post-award period on a sum of Rs.5,00,32,656/- and has confined the rate of interest to 21% per annum for the pre-reference period, prior to the date of the demand notice, it shall have to be assumed that the learned Sole Arbitrator did so with full intent and while doing so, was mindful of the respective claims of the parties, the relevant merits/demerits of the pleas taken before him, the equities required to be balanced between the parties and all other relevant factors for granting the rate of interest, as awarded. Even otherwise, the present appeal is not merited as only questions of law are required to be determined by the court at this stage. Under the garb of

questioning the decision of the learned Single Judge upholding the quantum of interest awarded under the impugned Award, the appellant/Morgan is actually expecting this court to re-appreciate the evidence, which is impermissible. The view taken by the Sole Arbitrator for granting interest at a particular rate for different periods cannot be treated as patently illegal or perverse so as to go to the root of the matter.

27. In view of the aforesaid discussion, we are of the opinion that the discretion vested in the learned Sole Arbitrator for awarding interest has been exercised in a particular manner, for just and valid reasons that do not deserve any interference. As a result, the impugned judgment is upheld and the present appeal is dismissed as meritless.

HIMA KOHLI, J

ASHA MENON, J

FEBRUARY 26, 2020

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