

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8804 OF 2018

M/s S.D. Shinde and Company
Ahmednagar, through its
G.P.A. Holder
Annasaheb S/o Shripati Shinde
R/o Shri Parvati, Savedi Road
Ahmednagar, Dist. Ahmednagar.

Petitioner

Versus

1. The State of Maharashtra
2. Executive Engineer
Upper Penganga Project
Division No. 8
Nanded,
Under Godavari Marathwada
Irrigation Development Corporation
Aurangabad.

Respondents

Mr. P.R. Katneshwarkar, Advocate for the petitioner.
Mr. A.B. Chate, AGP for respondent No. 1.
Mr. B.R. Surwase, Advocate for respondent No. 2.

CORAM : M.G. Sewlikar, J.

RESERVED ON : 20th July, 2021.
PRONOUNCED ON : 12th August, 2021.

JUDGMENT :

1. Rule. Rule made returnable forthwith.

2. By consent of the parties, heard finally at the stage of admission.

3. By this writ petition under Article 227 of the Constitution of India, petitioner is challenging order dated 18th January, 2018, passed below Exhibit 1 in Special Darkhast No. 14/2110 by learned Jt. Civil Judge (S.D.), Nanded.

4. Facts leading to this petition can be succinctly stated as under :-

Petitioner is a Contractor engaged in construction business. He was assigned contract of construction of earth, lining and structure in km No. 82 to 85 of Isapur Right Bank Canal, LCB Contract No. 1987-88. There was breach of terms of contract as a result of which, claims were raised by the petitioner. Dispute was referred to the Arbitrator. The Arbitrator passed an award on 30th April, 1998. The award passed by the Arbitrator reads as under :-

Summary of the Award of Counter claims

I declare award of following sums to the respondents on this day of 30th April, 1998.

1)	Cost of materials issued	Rs. 1,72,433
2)	Hire charges of Machinery	1,56,124
3)	Hire charges for centering material	5,530
4)	Interest of advances	Rejected
5)	M.P.W.A.	27,126
6)	Excess measurements	Rejected
7)	Extra cost of Balance work	Rejected
8)	Interest	3,61,213
	Interest	
	3,61,213 x 18 x 15	

	100 x 12	81,273

	Total	4,42,486
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This award was challenged before the Civil Judge (S.D.), Nanded, to make it a rule of Court, who, by his judgment and award dated 23rd June, 2004, set aside the award passed by the sole Arbitrator. Petitioner preferred Arbitration Appeal No. 16/2009 before this Court. This Court restored the award passed by the Arbitrator by order dated 15th/16th December, 2009. Respondent preferred SLP No. 13876/2010 against the judgment of this Court. The Honourable Supreme Court, by judgment and order dated 22nd August, 2013, modified the award to the extent of rate of interest. Rate of interest was brought down to 6% per annum from 18% per annum. Rest of the order was confirmed. The Honourable Supreme Court modified the award as under :-

“In the totality of these circumstances therefore we are inclined to reduce the rate of interest awarded by the Arbitrator and affirmed by the High Court from 18% to 6% reckoned from 01.02.1993. The award as also the judgment of the High Court shall to that extent stand modified with the condition that in case the amount payable to the respondent contractor is not paid within three months from today, the contractor shall be entitled to claim interest @ 10% on the principal amount of Rs. 31,16,751/- w.e.f. the date the period of three months expire.”

5. Petitioner filed Special Darkhast No. 14/2010 before Jt. Civil Judge (S.D.), Nanded, for execution of the award modified by the Honourable Supreme Court. In terms of the directions of the Honourable Supreme Court, respondent deposited Rs. 35,24,841/- in Executing Court on 22nd November, 2013.

6. According to petitioner, the sole Arbitrator had awarded claims to the tune of Rs. 31,16,751/-. As far as this amount is concerned, neither of the parties has any dispute over it. According to the petitioner, interest at the rate of 18% per annum was granted by the sole Arbitrator which was modified by the Honourable Supreme Court and reduced to 6% per annum. The sole Arbitrator had awarded interest from 1st February, 1993, till the declaration of the award i.e. 30th April, 1998. Therefore, interest component comes

to the tune of Rs. 9,81,776/- (On Rs. 31,16,751/- at the rate of 6% per annum from 1st February, 1993 to 30th April, 2018). The aggregate of principal plus interest comes to Rs. 40,98,527/- (Rs. 31,16,751/- + interest Rs. 9,81,776/-). According to the petitioner, interest at the rate of 6% per annum ought to have been calculated on Rs. 40,98,527/- from 30th April, 1998 till 16th December, 2009 i.e. the date on which this Court had passed the award. Thus, total comes to Rs. 69,59,860/- (Rs. 40,98,527/- + Rs. 28,68,333/-).

7. It is further contended in the petition that the sole Arbitrator had, by allowing counter claim, awarded Rs. 3,61,213/- to the judgment debtor – respondent herein with interest at the rate of 18% per annum. It was also modified by the Honourable Supreme Court and interest rate was reduced to 6% per annum. Future interest on Rs. 3,88,304/- from 1st May, 1998 to 16th December, 2009 comes to Rs. 6,59,393/-. Thus, the amount due to petitioner by the respondent comes to Rs. 3,88,304/-. If this amount is deducted from Rs. 69,59,860/-, the total amount due to petitioner comes to Rs. 63,00,467/- (Rs. 69,59,860/- - Rs. 6,59,393/-).

8. According to petitioner, respondent ought to have

deposited Rs. 63,00,467/- within three months from the date of the order of the Supreme Court i.e. 22nd August, 2013 else, interest at the rate of 10% per annum would begin. Respondent deposited only Rs.55,24,841/-. Thus, interest at the rate of 6% per annum on Rs. 63,00,467/- for the period from 17th December, 2009 to 22nd August, 2013 comes to Rs. 14,87,255/-. Thus, total claim comes to Rs. 77,87,722/- (Rs. 63,00,467/- + Rs. 14,87,255/-). Deducting the amount deposited by the respondent, total amount due from respondent comes to Rs. 22,62,881/- with future interest at the rate of 10% per annum till realisation of the actual amount (Rs.77,87,722/- - Rs. 55,24,841/- = Rs.22,62,881/-).

9. The Arbitrator had awarded refund of the amount of security deposit held by the judgment debtor and the amount of encashment of bank guarantee with interest at the rate of 18% per annum from the date of encashment of bank guarantee till actual payment, but the Executing Court has refused to refund it. It is further contended that the Executing Court has deducted tax at source which is impermissible having regard to Section 194C of the Income Tax Act. On all these grounds, Special Darkhast No. 14/2010 was filed.

10. It is further contended that learned Executing Court did not consider any of the contentions of the petitioner and held that the Honourable Supreme Court has held that principal amount is of Rs. 31,16,751/-. The Honourable Supreme Court has not added interest during trial in the principal amount. The Honourable Supreme Court has kept separate the principal amount and interest thereon. Therefore, in the execution petition, the decree holder is not entitled to interest on interest as prayed. The learned Executing Court directed tax to be deducted at source. Executing Court did not pass any order so far as refund of security deposit and bank guarantee is concerned. Learned Executing Court disposed of the execution petition as fully satisfied.

11. Respondent filed affidavit-in-reply. In the affidavit-in-reply, respondent has contended that it has calculated and worked out interest at the rate of 6% per annum on the principal amount of Rs. 31,16,751/- which comes to Rs. 38,46,668/-. Thus, total amount comes to Rs. 69,63,419/-. By deducting counter claim i.e. Rs. 7,20,402/- and income tax and VAT as per tender clause to the tune of Rs. 7,18,177/-, the net amount of Rs. 55,24,840/- has been deducted. Thus, the award is fully satisfied. So far as bank

guarantee is concerned, it is contended that the bank guarantee and security deposit amount has been forfeited against the outstanding amount given to the contractor apart from the arbitration. Therefore, since the award is fully satisfied, the petition deserves to be dismissed.

12. Heard Shri Katneshwarkar, learned counsel for the petitioner and Shri Survase, learned counsel for the respondent.

13. Shri Katneshwarkar submitted that the expression 'Principal sum adjudged' means principal amount and interest awarded on it. He submitted that in the case of Hyder Consulting (UK) Limited vs. Governor, State of Orissa, reported in **(2015) 2 Supreme Court Cases 189**, the Honourable Supreme Court has held that sum means principal plus interest if it is awarded by the Arbitral Tribunal. In the case at hand, principal amount is Rs. 31,16,751/- plus interest at the rate of 6% per annum (as reduced by the Honourable Supreme Court to 6% per annum) will be the principal sum adjudged. He argued that the Honourable Supreme Court has nowhere stated that petitioner is entitled to interest at the rate of 6% per annum on the principal sum adjudged. It is only observed that

interest is reduced to 6% per annum. Penal interest at the rate of 10% per annum is awarded if the entire amount is not deposited within three months. Therefore, Executing Court ought to have determined principal sum adjudged as principal plus interest from 1st February, 1993 to the date of award i.e. 30th April, 1998. In terms of 29 of Arbitration Act, 1940, petitioner will be entitled to interest on this i.e. principal plus interest from the date of award till the date of actual payment. He submitted that respondent has deposited Rs. 22,62,881/- less. Therefore, petitioner is entitled to receive Rs. 22,62,881/- with penal interest at the rate of 10% per annum. He submitted that respondent should not have deducted tax at source. He further submitted that respondent did not refund bank guarantee and security deposits. He, therefore, prayed for allowing the petition. He placed reliance on the cases of Hyder Consultation (UK) Limited vs. Governor, State of Orissa (supra), Associated Cement Companies Limited vs. Commissioner of Income Tax, Bihar reported in **1993 AIR (SC) 2281** and Madhusudan Shrikrishna vs. M/s Emkay Exports and others in Execution Application No. 187/2004 in Summary Suit No. 3835/2003 decided on 18th January, 2010.

14. Shri Surwase submitted that the Honourable Supreme

Court has held that principal amount is Rs. 31,16,751/- and therefore, interest is to be calculated on Rs. 31,16,751/- only. He submitted that respondent has rightly calculated interest on Rs.31,16,751/-. He submitted that calculation is correctly made and interest could not be calculated against the directions of the Honourable Supreme Court. He submitted that there was a clause in the contract that interest would not be awarded on the amount payable to the contractor. Therefore, the Arbitral Tribunal could not have awarded interest. He further submitted that income tax was deducted at source in terms of Section 194C of Income Tax Act. He submitted that the Executing Court has correctly disposed of the petition as fully satisfied. He, therefore, prayed for dismissal of the petition.

15. Arbitration started by notice dated 3rd December, 1994. Till the year 1996, Arbitration Act, 1940 was in force. Thereafter, Arbitration and Conciliation Act, 1996 came to be promulgated. There is no dispute between the parties that arbitration is governed by Arbitration Act, 1940. Relevant date for commencement of arbitration proceedings is service of notice by one party to the another for appointment of Arbitrator. This has been held in the case

of Milkfood Ltd. vs. M/s GMC Ice Cream (P) Ltd. reported in **2004 AIR SCW 2235**. In the case at hand, notice of arbitration was served on the other party before promulgation of Arbitration and Conciliation Act, 1996. In the award itself it is mentioned by the sole Arbitrator that he was appointed by letter No. IRBC/82 to 85/LCB 11/'Claims dated 26.10.95' dated 26th October, 1995. The Act of 1996 was enforced on 25th January, 1996. Therefore, the arbitration is governed by Arbitration Act, 1940.

16. The seminal issue is "which is the principal adjudged ?" In terms of Section 29 of the Arbitration Act, 1940, the Court is empowered to award interest from the date of decree on the principal sum adjudged. Section 29 of the Act reads thus :-

29. Interest on awards – Where and in so far as an award is for the payment of money the Court may in the decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree.

This provision indicates that Court can award interest from the date of the decree on the principal sum adjudged by the award and confirmed by decree.

17. Learned counsel Shri Katneshwarkar submitted that the principal sum adjudged is amount of Rs. 31,16,751/- with interest awarded by the sole Arbitrator from 1st February, 1993 till the date of award i.e. 30th April, 1998. To buttress his submission, he placed reliance on the case of Hyder Consultation (UK) Limited vs. Governor, State of Orissa (supra). The Honourable Supreme Court held as under :-

“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.

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 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.

29. There may arise a situation where, the Arbitral Tribunal may not award any amount towards principal claim but award only “interest”. This award of interest would itself then become the “sum” for which an award is made under Section 31(7)(a) of the Act. Thus, in a pre-award stage, the legislation seeks to make no distinction between the sum awarded and the interest component in it.

30. Therefore, I am inclined to hold that the amount award under Section 31(7)(a) of the Act, whether with interest or without interest, constitutes a “sum” for which the award is made.

This decision of the Honourable Supreme Court cannot be applied to the facts of this case as this decision is under Arbitration and Conciliation Act, 1996. As already indicated, this case is covered by Arbitration Act, 1940.

18. The question that is to be answered is what is the principal sum adjudged. Admittedly, the matter had gone upto the Honourable Supreme Court. The Honourable Supreme Court has adjudged the principal sum. The Honourable Supreme Court has observed thus :-

“In the totality of these circumstances we do not consider it proper to interfere with the award made by the Arbitrator or the order passed by the High Court affirming the same insofar as the principal amount of Rs. 31,16,751/- is concerned. To that extent the award as also the judgment of the High Court are affirmed leaving the questions raised at the Bar by learned counsel for the appellant as to the procedure that may be followed in making such references and the persons who can be nominated as Arbitrators on a true and correct interpretation of clause 52 open to be determined in an appropriate case. Needless to say that the reasons recorded by the High Court in affirming the award made by the Arbitrator would also not constitute a procedure for the future.

In the totality of these circumstances therefore we are inclined to reduce the rate of interest awarded by the Arbitrator and affirmed by the High Court from 18% to 6% reckoned from 01.02.1993. The award as also the judgment of the High Court shall to that extent stand modified with the condition that in case the amount payable to the respondent contractor is not paid within three months from today, the contractor shall be entitled to claim interest @ 10% on the principal amount of Rs. 31,16,751/- w.e.f. the date the period of three months expire.”

From these observations, it is clear that the Honourable Supreme Court has adjudged principal sum to be Rs. 31,16,751/-. The Honourable Supreme Court has also awarded penal interest at the rate of 10% per annum on the principal sum of Rs. 31,16,751/- with effect from the date the period of three months expires. From these observations it can be seen that principal amount adjudged is Rs. 31,16,751/-. Since the Honourable Supreme Court has crystalised the principal sum adjudged, arguments of learned counsel Shri Katneshwarkar that principal sum adjudged should be amount of Rs.31,16,751/- plus interest from 1st February, 1993 to 30th April, 1998 cannot be accepted. Learned Executing Court, therefore, did not commit any error in holding that the principal sum adjudged is Rs. 31,16,751/-/.

19. The next point raised by the petitioner is that the judgment debtor deducted 2% of the amount due towards tax deducted at source. This deduction was made in terms of provisions of Section 194C of the Income Tax Act.

20. Learned counsel Shri Katneshwarkar submitted that this being a decretal amount, it partakes the character of a judgment

debt. Once it acquires the status of judgment debt, tax cannot be deducted at source on the amount of judgment debt. For this purpose, he placed reliance on a the case of Islamic Investment Company vs. Union of India and another reported in 2002(3) Mh.L.J. 555. Learned Single Judge of this Court held thus :

“9. However, as observed by the Supreme Court when such amounts becomes part of a judgment debt they lose their original character and assume the character of a judgment debt. Once such an amount assumes the character of a judgment debt, the decree passed by the Civil Court must be executed subject only to the deductions and adjustments permissible under the Code of Civil Procedure. The learned Counsel for the Food Corporation of India has not been in a position to point out any provision under the Income-Tax Act or under section 195 in particular or under the Code of Civil Procedure where the amount of the interest payable under a decree is deductible from the decretal amount on the ground that it is an interest component on which tax is liable to be deducted at source.

From this decision, it is clear that once the amount assumes character of judgment debt, deduction under Section 194 of the Income Tax is not permissible.

21. Relying on this judgment, learned Single Judge of this Court in the matter of Madhusudan Shrikrishna vs. M/s Emkay

Exports and others (supra) held as under :-

“5. Therefore, in my view, once a decree is passed, it is a judgment and order of the court which culminates into final decree being passed which has to be discharged only on payment of the amount due under said decree. The judgment debtor, therefore, cannot, in my view, deduct tax at source since it is an order and direction of the court and, as such, would not be liable for penal consequences for non-deduction of the tax due. Tax, if payable, can be decided by the Income-tax Officer after the amount is paid to the decree holder. Defendants, therefore, in my view, are not entitled to withhold the payment on the pretext that it has to be deducted as tax at source. Defendants may, therefore, pay the said amount to the plaintiff and for that purpose they would not be liable for non-deduction of tax at source as that issue has to be decided by the Income-tax authorities and if tax is payable the same may be paid by the plaintiff.”

22. From these two decisions of this Court, it is clear that deduction under Section 194C of Income Tax Act is not permissible as it acquires the status of judgment debt. Once it becomes a judgment debt, it does not fall within the purview of Section 194C of the Income Tax Act. Therefore, the Executing Court has committed error in allowing deduction at source at the rate of 2% per annum. Petitioner is entitled to this amount. Learned Executing Court committed error in recording finding that petitioner can claim refund

from Income Tax Department. In this view of the matter, petitioner is entitled to the amount which was withheld by the judgment debtor.

23. Learned counsel Shri Katneshwarkar submitted that the award of the Arbitrator indicates that the amount of security deposit held by the judgment debtor – respondent shall be refunded to the petitioner after adjudication of its claim and counter claim with interest at the rate of 6% per annum from the date of encashment of bank guarantee till the date of actual payment. There is nothing on record to show that the amount of security deposit and encashed bank guarantee has been refunded to the petitioner by the judgment debtor. In view of this, petitioner is entitled to the same.

24. In view of what is discussed hereinabove, it is clear that the learned Executing Court did not commit any error in rejecting the claim of petitioner so far as principal sum adjudged is concerned. However, it has committed error in granting deduction of tax at source under Section 194C of the Income Tax Act. Petitioner is, therefore, entitled to the same with interest at the rate of 6% per annum till actual payment of the entire amount. Petitioner is also entitled to the amount of security deposit and bank guarantee with

interest at the rate of 6% per annum. In view of this, following order is passed:-

ORDER

- i) Petition is partly allowed.
- ii) Claim of petitioner to the extent of amount of Rs. 22,62,881/- with interest at the rate of 10% per annum from 22nd November, 2013 till actual realisation of the amount is rejected.
- iii) Petitioner is entitled to the amount of tax deducted at source with interest at the rate of 6% per annum from 1st February, 1993 till expiry of three months from the date of judgment of the Honourable Supreme Court and thereafter at the rate of 10% per annum till actual payment of the entire amount.
- iv) Petitioner is also entitled to bank guarantee and security deposit of Rs. 2,08,000/- with interest at the rate of 6% per annum from 1st February, 1993 till expiry of three months from the date of judgment of the Honourable Supreme Court till actual realisation of the amount.
- v) Parties to bear their own costs.
- vi) Rule made absolute in above terms.

(M. G. SEWLIKAR)
Judge