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Discretion with regard to grant of interest only available to Arbitral Tribunal when there is no agreement to contrary between parties

Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation

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| Citation | Civil Appeal No. 3657 of 2022 |
| Date | 05 May 2022 |
| Court | Supreme Court of India |
| Coram | Hon'ble Mr. Justice L. Nageswara Rao Hon'ble Mr. Justice B.R. Gavai |

1. BRIEF FACTS:

- 1.1. The Delhi Metro Airport Express Private Limited ("**Appellant/DAMEPL**") and the Delhi Metro Rail Corporation ("**Respondent/DMRC**"), entered into a Concession Agreement ("**Agreement**") dated 25th August, 2008, as per which the DMRC was supposed to carry out the civil work and DAMEPL would undertake the balance works. The said Agreement also had an Article 29 which stated that, in an event of termination, DMRC is liable to make the termination payment.
- 1.2. On 8th October, 2012, DAMEPL terminated the Agreement through a termination notice on the account that dispute arose between the parties. The same dispute was then referred for Arbitration by the DMRC under Article 36.2 of the Agreement on 23rd October, 2012.
- 1.3. The Arbitral Tribunal ("**Tribunal**") passed an award on 11th May, 2017 for which DAMEPL paid the stamp duty fee of Rs. 4,72,20,000/- on the 12th of May, 2017. DMRC being aggrieved by the award passed by the Tribunal, challenged the same by filing a petition under Section 34 of the Arbitration & Conciliation Act, 1996 ("**Act**") before the Hon'ble Delhi High Court ("**High Court**").
- 1.4. On 6th March, 2018 the learned Single Judge of the Hon'ble Delhi High Court passed a judgment and an order wherein the High Court upheld the award passed by the Tribunal and rejected the petition filed under Section 34 of the Act.
- 1.5. The judgment and order dated 6th March, 2018 was challenged by the DMRC before the Division Bench of the Delhi High Court ("**Division Bench**") through an appeal. On 15th January, 2019 the Division Bench partly allowed the appeal. Aggrieved by this action of the Division Bench, the DAMEPL filed a Civil Appeal arising out of a Special Leave Petition before the Hon'ble Supreme Court of India ("**Supreme Court**"). The said appeal was allowed and by the judgment dated 9th September, 2021, the judgment and order passed by the Division Bench dated 15th January, 2019 was set aside.
- 1.6. Thereafter, on 12th September, 2021, DAMEPL filed an Execution Petition before the High Court to seek the enforcement of the award passed by the Tribunal dated 11th May, 2017.
- 1.7. On 10th March, 2022, an order and judgment was passed by the High Court which contained certain directions on as to how payment has to be made by DMRC towards the satisfaction of the Award. Under this petition, a contention was raised by the DAMEPL that the sum awarded under clause (a) of sub-section (7) Section 31 of the Act would include the interest for a period from the date on which the cause of action arose to the date on which the award was passed. But, this contention was rejected by the High Court leaving the DAMEPL aggrieved.
- 1.8. This resulted in DAMEPL filing an appeal by the way of special leave before the Hon'ble Supreme Court of India.

2. ISSUE RAISED:

- 2.1. Whether the sum awarded under clause (a) of sub-section (7) of Section 31 of the Act would include the interest pendente lite or not?

3. SUBMISSIONS OF THE APPELLANT:

- 3.1. The Appellant relied on the majority judgment of the Supreme Court's case *Hyder Consulting (UK) Limited vs. Governor, State of Orissa through Chief Engineer*¹ and contended that the amount under clause (a) of sub-section (7) of Section 31 of the Act, would include the termination payment of Rs. 2782.33 crores along with the interest awarded

¹ (2015) 2 SCC 189.

by the Arbitral Tribunal which will be calculated from the date of cause of action till the date of the award. Thus, upon the correct construction of the clause (a) of sub-section (7) of Section 31 of the Act the total sum to be paid would be Rs. 4662.59 crores.

- 3.2. It was also argued by the Appellant that the High Court had made a mistake by rejecting the claim of the Appellant.

4. SUBMISSIONS OF THE RESPONDENT:

- 4.1. The Respondent contended that the clause (a) of sub-section (7) of Section 31 of the Act pertinently begins with the phrase “unless otherwise agreed by the parties”. By highlighting this fact, the Respondent argued, that there was a presence of a specific agreement between the parties i.e., under Article 29.8 of the Agreement, the parties had agreed on as to how the interest would be awarded and in accordance of the same the Arbitral Tribunal had passed the award.
- 4.2. The Respondent contended that the computation of interest by the Tribunal was correct and that the High Court had correctly rejected the claim of the Appellant. It was further contended that on basis of these arguments the present appeal deserves to be dismissed.

5. DECISION OF THE SUPREME COURT:

- 5.1. The Hon'ble Supreme Court observed that, if an agreement exists between the parties the Arbitral Tribunal would be devoid of its discretion to award an interest and the agreement between the parties will guide the Tribunal on as to how the interest should be awarded and determined. It was also observed that the provision is very clear on the part that Arbitral Tribunal is not bound to award an interest and merely has discretion to do so or to not do so. To this extent, the Tribunal may use its discretion to award interest at a rate it deems reasonable. Moreover, the Tribunal may also determine whether or not to award interest on the whole of or any part of the money or for the whole period or only for a limited period.
- 5.2. The Hon'ble Supreme Court observed that the phrase “unless otherwise agreed by the parties” emphasized on the fact that *when the parties have agreed with regard to any of the aspects covered under clause (a) of sub-section (7) of Section 31 of the 1996 Act, the Arbitral Tribunal would cease to have any discretion with regard to the aspects mentioned in the said provision*. Further, the Supreme Court was of the view that each and every word along with phrase under the provision has to be given effect. If the contention raised by the Appellant was to be accepted, then the phrase “unless otherwise agreed by the parties” would be rendered redundant and such interpretations have to be avoided as they are wholly impermissible.
- 5.3. The Hon'ble Supreme Court observed that from the facts of *Hyder Consulting (UK) Limited vs. Governor, State of Orissa through Chief Engineer*² it appeared that there was no presence of an agreement with regards to the payment of interest. But this was not the case in the present appeal. Further, the Hon'ble Supreme Court added that between two cases the conclusion would come out different, even if facts are similar and same principles have been applied but there was a presence of one additional or different fact.
- 5.4. The Hon'ble Supreme Court observed that since Article 29.8 of the Agreement deals with payment of interest on termination payment, this shows that an agreement did exist between the parties. The interest prior to the date of award and after the date of award will be governed by Article 29.8 of the Agreement. Therefore, the Court held that Arbitral Tribunal has rightly given effect to the specific agreement between the parties pertaining

² AIR 2015 SC 189.

to the rate of interest and that the Arbitral Award had been passed in consonance with the provisions as contained in clause (a) of sub-section (7) of Section 31 of the Act and is also in consonance with the phrase “unless otherwise agreed by the parties”.

5.5. Thus, the Hon'ble Supreme Court held that there was no error in the observations made by the learned Single Judge of the Delhi High Court in paragraph 30 of the impugned judgment and order dated 10th March, 2022. Accordingly, the appeal was dismissed.

6. PSL OPINION:

6.1. The Supreme Court in this judgement reflected on the importance of presence of an agreement between the parties when it comes to determining the interest on the principal amount. If parties have an agreement which specifies as to how the interest will be calculated, then the Arbitral Tribunal will lose its discretion and it will be determined according to the agreement only.

6.2. This will assist in ensuring that Arbitrators do not go against the spirit of the very agreement which has brought the parties before the Tribunal. Even more importantly, this observation by the Court puts the power back in the hands of the parties to take control of how their agreements and disputes are adjudicated through the mechanism of Arbitration.