

M/S Oriental Structural Engineers Pvt. ... vs State Of Kerala on 22 April, 2021

Equivalent citations: AIR 2021 SUPREME COURT 2031, AIRONLINE 2021 SC 218

Author: Aniruddha Bose

Bench: Aniruddha Bose, Surya Kant

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3454 OF 2011

M/s. Oriental Structural Engineers Pvt. Ltd. ...Appellant(s)

Versus

State of Kerala

...Respondent(s)

JUDGMENT

ANIRUDDHA BOSE, J.

The appellants were awarded a contract by the State of Kerala for upgradation of a State Highway for two stretches, from Muvattupuzha–Thodupuzha and Muvattupuzha–Angamaly. The agreement in this regard was executed on 7 th November, 2002. This appeal originates from disputes on certain issues arising between the parties primarily relating to making payment to the appellants under certain heads. In the present proceeding, however, the only point of dispute on which arguments have been advanced before us is over entitlement of the appellants to receive 18:26:01 IST Reason:

interest on delayed payment on the subject–heads, which were to be paid by the employer in local currency as per the stipulations in the said agreement. The agreement had provision for resolution of disputes by a Disputes Review Board (DRB) which was to make recommendations at the first instance. If the recommendations were not acceptable to any of the parties, such disagreeing party was required to give notice to commence arbitration within a specified time and thereafter the dispute was to be settled through arbitration. So far as the

controversies out of which this appeal arises are concerned, disputes on three counts arose between the parties, which could not be resolved at the stage of DRB recommendations. Those disputes were referred to a three-member Arbitral Tribunal (the 'Tribunal' in short). We have already referred to the scope of controversy involved in this appeal. This controversy shall be henceforth referred to in this judgment as dispute on delayed payment. We shall address that issue only in this judgment.

2. The Tribunal passed the award in favour of the appellants on this point and interest was directed to be paid on delayed payment in relation to local currency component payable under the agreement. This was, however, a majority award and not a unanimous one as one of the members of the Tribunal gave a dissenting view. In the succeeding paragraphs of this judgment, whenever we refer to the expression 'award', it shall mean the majority award only. The award of the Tribunal was assailed by the State of Kerala before the District Court at Ernakulam (the Arbitration Court) by taking out an application under Section 34 of the Arbitration and Conciliation Act, 1996 (the 1996 Act). This application was allowed in part. Award of the Tribunal in favour of the appellants on the point of interest on delayed payment was set aside. The Arbitration Court also adjudicated upon two other points, but as these points have not been urged before us, we do not consider it necessary to deal with them here in this judgment. The decision of the Arbitration Court was sustained in appeal by a Division Bench of the Kerala High Court. This appeal is against the said Bench decision of the High Court delivered on 17 th September, 2009. The appellants want the award of the Tribunal allowing their claim for interest on delayed payment to be restored.

3. Entitlement of the contractor to interest was provided for in sub-clause 60.8 of the agreement on delayed interim payment. This clause has been reproduced in page 38 of the paperbook and reads: " Time of Payment and Interest

(a) The amount due to the Contractor under any Interim Payment Certificate issued by the Engineer pursuant to this Clause or to any other term of the Contract shall subject to Clauses be paid by the Employer to the Contractor as follows.

(i) (A) In the case of Interim Payment Certificates within 42 days after the Contractor's monthly statement has been submitted to the Engineer for certification pursuant to sub-clause 60.1. Provided that if the Engineer's Interim Certificate has not yet been issued within said 42 days, the Employer shall pay the amount shown in the Contractor's monthly statement and that any discrepancy shall be added to or deducted from the next payment to the Contractor and (B) in the case of any monthly statement submitted by the Contractor at a time when the Bank's loan or credit (from which part of the payment to the Contractor are being made) is suspended within 14 days after such monthly statement is submitted. Provided that if the Engineer's Interim Certificate has not yet been issued within said 14 days the Employer shall pay the amount shown in the Contractor's monthly statement and that any discrepancy shall be added to or deducted from the next payment to the Contractor.

(ii) (A) In the case of the Final Payment Certificate pursuant to Sub Clause 60.13 within 84 days after the Final statement and written discharge have been submitted to the Engineer for certification and (B) In the case of the Final Statement submitted by the Contractor at a time when the Bank's loan or credit from which part of the payments to the Contractor are being made is suspended or for which payment under (ii) (A) becomes due after 63 days of the date of notification of the suspension notice payment will be made within 63 days after the date of notification of the suspension pursuant to Sub Clause 69.6(d) provided that if the Engineer's Final Payment Certificate has not been issued within the said 63 days, the Employer shall pay the undisputed amounts shown in the Final Statement.

(b) In the event of the failure of the Employer to make payments within the time stated the Employer shall pay to the Contractor interest compounded monthly at the rate(s) stated in the Appendix to Bid upon all sums unpaid from the date upon which the same should have been paid in the currencies in which the payment are due. The provisions of the Sub Clause are without prejudice to the Contractor's entitlement under Clause 69 or otherwise."

4. The relevant provision of the appendix to the bid, the content of which came for interpretation before the Tribunal and thereafter before the two judicial fora stipulated: "ANNEXURE- P-3 Kerala State Transport Project Volume III Section 6: Appendix to Bid Page 7.8 Origin of materials 60.3(a) (v) item Origin Currency And Plants 60.3 (d) Plant, USA Machinery & Germany, or Spares any other US Dollars Bitumen & Iran, Thermoplastic Singapore or US Dollars Paint any other Bidder to complete Rates of Interest upon 60.8 _____ percent of payments in local Unpaid Sums currency. For other countries, refer to the table below.

Currency (as per Sub-Clause 60.1)

London Inter-Bank On-
Lending Rate
(LIBOR) Plus 2 percent

US\$

-do-

The above of interest for foreign currencies shall be supplied by the Bidder, and these rates are subject to clarification/negotiation before formalizing the Contract.

5. In their bid document, the appellants had left the space for recording the rate of interest for payment to be made in local currency blank. The agreement contemplated payment to the contractor in foreign currency as also in local currency. So far as payment by foreign currency was concerned, as would be evident from the appendix to the bid quoted in the preceding paragraph, the London Interbank On-Lending Rate (LIBOR) plus two per cent was the specified norm. It was on this basis the State's stand has been that the rate of interest on delayed payment (as contemplated in Clause 60.8) in local currency had to be treated as "zero" or "nil". It has also been the position of the State, referring to certain communications made by the appellants that there was waiver of the claim

of interest by the appellants. In the award, the Tribunal had repelled the argument of the State that the words “zero” or “nil” could be read into the said column of the “appendix to bid”. Relying on the Constitution Bench judgment of this Court in the case of Secretary, Irrigation Department, Government of Orissa & Ors. vs. G.C. Roy [(1992) 1 SCC 508], the Tribunal held that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated and such compensation may be called interest, compensation or damages. Two documents originating from the appellants in the form of written communications were relied upon by the State before the Tribunal to contend that claim for interest, in any event, stood waived by claimants on delayed payment of the sum which was to be made in local currency. First of these two documents was a letter of the appellant dated 14th July, 2004 (Exhibit R□ before the Tribunal) and the next was another written communication dated 3rd August, 2004 (Exhibit C□72 before the Tribunal). The first letter issued by the appellants addressed to the Chief Executive Officer, Kerala State Transport Project reads : □“Dear Madam, As discussed on the above subject we confirm that there is no provision of interest on delayed payment in the Contract and hence interest will not be claimed.” (quoted verbatim)

6. The next communication dated 3rd August, 2004 was addressed to the same officer of the respondents. The text of this communication is: □“Dear Sir, We wish to invite your kind attention to the issue of release of payment against IPC□ General Items as recommended by DRB. As a pre□ condition for release of the said payment, we were made to issue the above referred letter dated 14.7.2004. Our commitment not to claim any interest on the said amount released by you be treated purely as a goodwill gesture so that our future payments are released to us without any delay. The said letter is restricted to the subject claim/item only.” (quoted verbatim)

7. Before the Tribunal, the appellants had taken a point that the said letter of 14th July, 2004 was issued under coercion or duress. Their second plea on this count was that the content of the first letter was restricted to release of withheld amount recommended by the Review Board in respect of Interim Payment Certificate□ (IPC□). The Tribunal accepted the stand of the appellants (claimants before it). It was, inter□alia, observed in the award: □“The essential element of waiver is intentional relinquishment of known right. The claimant has stated that the said letter was given by them under coercion. This holds goods in view of the fact and circumstances of the case. It is also noted that the said letter dated 14.7.04 (ext. R1) is not even mentioned in the defence statement dated 29.1.05. Nor has this issue been raised before the DRB. So the argument of the respondent that the letter dated 14.7.04 (ext. R1) is a waiver of the rights of the claimant does not stand. The fact that this letter was issued at the time of receiving payment in respect of IPC. I suggests that this was given under coercion. The waiver does not apply to the instant case. This is corroborated by the fact that the claimant has been continually agitating for the payment of interest before and after the issuance of the said letter. As discussed earlier, payment of interest on unpaid sums was due under the terms of the contract and under the law. The recommendation of the DRB made after due deliberations and discussions with the parties has relevance in the matter.” (quoted verbatim) The Tribunal directed interest on delayed payment in paragraphs 1.6 to 1.8 of the award. Extract from the award containing these paragraphs would appear later in this judgment.

8. The majority view of the Tribunal was that the contract itself provided for payment of interest with regard to local currency and foreign currency. The plea of the appellants has been that there was no waiver and in any event the communication of 14 th July, 2004 followed by that of 3rd August, 2004 related to IPC□ only. This stand had been broadly accepted by the Tribunal. The Tribunal had also accepted the appellants/claimants' stand that there was no waiver on claim of interest in respect of all sums due for which Interim Payment Certificates had been issued. The Tribunal's finding on that aspect was buttressed by the fact that the appellants/claimants had continued to raise demand for interest subsequent to the issue of those two communications. These were essentially findings on facts.

9. The Arbitration Court and the Appellate Court in sustaining the State's application for setting aside the award were of the view that the contract could not be construed to contain provisions for interest on delay in payment with regard to the local currency component contained in the agreement, as the appellants did not fill up the blank space with the rate of interest. Opinion of the Appellate Bench was that in the event it was intention of the claimants to retain their entitlement to interest on delayed payment under that head, they ought to have had filled in the blank space in the "appendix to bid". Another facet of the High Court's reasoning was that the respondents might have had been persuaded to accept the appellants' bid on the basis that the appellants would claim no interest on delayed payment in such situation, as this factor could have made their bid more competitive.

10. This appeal, in substance, is an extension of a proceeding under Section 34 of the 1996 Act. To go into the question of legality of the decisions made by the two judicial fora, we need to test first if the grounds of challenge to the award met the test laid down by this Court in the case of Oil Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. [(2003) 5 SCC 705]. Contention of the respondents has been that the Arbitral Tribunal's order stood vitiated under the "patent illegality" principle spelt out in that judgment. This principle came under the broad heading of "Public Policy" test, applying which an arbitral award could be set aside. What would constitute patent illegality has been elaborated by this Court in a later judgment, Associate Builders vs. Delhi Development Authority [(2015) 3 SCC 49]. An award would be invalidated, as per this authority, if the same was in contravention of substantive law of the country or contravention of the "Arbitration Act itself". In paragraph 42.3 of the Report (in the case of Associate Builders), it has been held:□"42.3 (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of
dispute.-(1)-(2)* * *

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground.

Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.”

11. The High Court in the appeal concurred with the Arbitration Court and concluded that omission to include the rate of interest in the bid document, the “appendix to bid” to be specific, had resulted in creation of contractual term that there would not be any claim for interest on delayed payment (as per Clause 60.8) so far as payment in local currency component contained in the agreement is concerned. In our opinion, however, the interference with the award by the Arbitration Court on this ground was unwarranted. The underlying reasoning of the Appellate Court and earlier, the Arbitration Court on this point is that the Tribunal went beyond the contractual term in awarding interest. The case of G.C. Roy (supra) and a later decision of this Court, Reliance Cellulose Products Ltd. vs. ONGC Ltd. [(2018) 9 SCC 266], were relied upon before us by the appellants to sustain the Tribunal’s findings. These decisions are sought to be distinguished on behalf of the respondents on the ground that the former decision related to interest pendente lite and both these cases were under the Arbitration Act, 1940. Under the said statute, an arbitrator had power or jurisdiction to grant pre-reference interest under the Interest Act, 1978 as also pendente lite and future interest. Such jurisdiction stood curbed only if express terms of the contract precluded payment of interest. Referring to another authority, the Union of India vs. Bright Power Projects (India) (P) Ltd. [(2015) 9 SCC 695], this Court highlighted the position of law on grant of interest under Section 31(7) of the 1996 Act. In the case of Bright Power Projects (supra), it has been opined by this Court that unless otherwise agreed by the parties, the Arbitral Tribunal can award interest at reasonable rate for a period commencing from that date when the cause of action arises till the date of the award. In the dispute which forms the subject-matter of this appeal, being the agreement, there was no specific exclusion of payment of interest on delayed payment in relation to the local currency component.

12. On the other hand, the specific term of the agreement entered into by and between the parties provided for payment of interest on delayed payment as terms of the contract. What was not specifically agreed upon was the rate at which such interest would be paid. The blank space in the “appendix to the bid”, in our opinion, cannot be construed as cancellation of the clause providing for payment of interest of delayed release of funds. We do not think the Appellate Court or the Arbitration Court was right in adopting the approach that by not specifying the blank space provided for filling in the interest rate. We are of the view that to come to such an inference, active exclusion of payment of interest under that head was necessary to have been incorporated in the agreement. Though the case of G.C. Roy (supra) was delivered in a dispute to which the 1940 Act was applicable, the Constitution Bench of this Court has laid down certain general proposition or principle on the aspect of grant of interest. This general proposition was referred to by the Tribunal. It has been held in paragraph 43.1 of the Report (in the case of G.C. Roy): “43. The question still remains whether arbitrator has the power to award interest pendent lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.....”

13. The underlying principle guiding award of interest is that interest payment is essentially compensatory in nature. But as we have already observed, in the case before us, interest on delayed payment formed part of the contract itself. The agreement did not contain any express exclusion clause on payment of interest on delayed payment whether on component of payment in foreign currency or local currency. We accept the reasoning of the Tribunal on the basis of which it rejected the respondents’ plea of waiver. This was a finding of fact on appreciation of materials placed before the Tribunal. One of the reasons behind the decisions of the Appellate Court and Arbitration Court was that the appellants, while bidding, had given up their claims for interest. In substance, the respondents’ assertion is that the Tribunal went beyond the contractual terms, and the said two fora sought to invoke the principle of law contained in the third sub-head of the “patent illegality” principle elaborated in the case of Associate Builders (supra).

14. The Appeal Court accepted reasoning of the Arbitration Court that the blank portion in the appendix to the bid would imply “zero” or “nil”. This reasoning, in our opinion, is flawed and such an interpretation of the agreement would actually be contrary to and beyond the terms of the contract. The Tribunal in this case had already come to a factual finding on appreciation of evidence that there was no such implication. Such an exercise on the part of the Arbitration Court and the Appellate Court would constitute rewriting the contract, which is impermissible. The Tribunal rejected the plea of waiver and we have reproduced its reasoning on that point. We cannot hold such reasoning to be perverse or improbable in the factual background of the present case. The Tribunal in this case could have had awarded interest as a compensatory or equitable measure, as there was no clause providing for exclusion or ouster of interest payment on delayed payment. The Tribunal determined the rate thereof in sub-paragraphs 1.6 to 1.8 of the award. This part of the award specifies: “1.6 It is, therefore, held that the Claimants are entitled to interest on the amount as due under any IPCs issued by the Engineer or failing which, on the amounts as shown in the Claimants monthly statements submitted to the Engineer for certification and when were not paid or had been withheld by the Respondents and such interest shall be paid by the Respondents for the period as 42 days after the claimants’ respective monthly statements had been submitted to the Engineer for certification to the date of payment thereof in full. The arbitral tribunal further holds that on the unpaid sums and for the period of delay in the payment thereof as stated hereinabove, the Respondents shall pay to the claimants interest at the rate of 1% per month compounded monthly such rate being representative of the prevalent rate of access to money that the claimants were deprived of. 1.7 The Arbitral Tribunal therefore directs that the Respondents shall pay to the claimants interest on the unpaid sum of Rs. 2,15,72,150/ for the period of the due dates of payment till the actual dates of full payment of such amount at the rate stated in para 1.6 above in respect of IPCs No. 2 & IPC No. 4.

1.8 The Respondents shall further pay to the claimants such interest on the unpaid issued by the Engineer or the Claimants monthly statements submitted to the Engineer for certification for the period from the due dates of payment till the actual dates of full payment at the rate as stated in hereinabove.

The respondents are also directed to pay further interest at the rate of 12% per annum on the interest amount determined pursuant to para 1.7 and 1.8 hereinabove from such dates of payment of the principal amount to the date of award.”

15. The Appellate Court’s rationale that such blank interest column might have had resulted in acceptance of the bid of the appellants as their bid could have been more competitive on the assumption that the other bidders might have had pressed for interest in that column is not acceptable to us. We do not find any material from which such a conclusion could be reached. No material has been shown to us from which it can be inferred that omission to fill in the blank space gave the appellants some kind of competitive edge in the bid process. We also do not know if other bidders had left the space blank or filled the same with specified rate. The Arbitration Court’s view, sustained by the High Court is tainted with an element of speculation on this point.

16. We do not find any flaw in the reasoning of the Arbitral Tribunal that the contract did not prohibit the award of interest in respect of delayed payment in local currency component specified therein. This being the position, in our opinion, the contrary view expressed by the Arbitration Court in a proceeding under Section 34 of the Act, which view was upheld by the Appellate forum, breaches the permissible boundaries for encroaching upon an award as laid down in *Saw Pipes case* (supra).

17. In our opinion, the view taken by the Tribunal on consideration of the contract was both reasonable and possible view. We, however, are of the opinion that the rate at which interest has been directed to be paid as contained in paragraphs 1.6 and 1.8 of the award, which we have reproduced above, are rather excessive. As the agreement is silent on the point of rate of interest but provides for payment of interest on delayed payment, the Tribunal’s exercise of fixing the rate should have been on the basis of applying the principle laid down in paragraph 43.1. in the case of *G.C. Roy* (supra). The said principle is applicable in a proceeding under the 1996 Act as well. This principle has been broadly incorporated in Section 31(7) (a) of the 1996 Act. The only difference between the situation contemplated in the aforesaid provision and the facts of this case is that the agreement involved is not silent on interest entitlement of the appellants on delayed payment but the agreement contains provision for such payment. Only the rate at which interest would be payable remained unspecified. In our view, simple interest at the rate of 8% would be just and equitable on the sum left unpaid, calculated otherwise on the basis of sub-paragraphs 1.6. to 1.8 of the award. We, accordingly, set aside the judgment of the Division Bench of the High Court of Kerala impugned in this appeal on the point of entitlement of the appellants to receive interest on delayed payment in relation to local currency component of the contract. As a consequence, judgment of the Sixth Additional District Judge, Ernakulam, shall also stand invalidated. The award of the Tribunal shall stand sustained so far as direction to pay interest on delayed payment of the local currency component of the agreement is concerned, but the rate of interest on the sum shall be computed in

the manner prescribed in paragraphs 1.6, 1.7 and 1.8 and shall be at 8% simple interest per annum.

18. The appeal is allowed in the above terms.

19. There shall be no order as to costs.

.....J. (SURYA KANT)J. (ANIRUDDHA BOSE) NEW DELHI
APRIL 22, 2021