



PLEA THAT CONTRACT BARS AWARD OF INTEREST NOT RAISED BEFORE THE ARBITRAL TRIBUNAL. SC RULES THAT THE PLEA IS WAIVED.

Union of India (“UOI”) v. Susaka Pvt. Ltd. and Ors¹. (“Susaka”) (December 8, 2017)

- 1) In our earlier update, we analyzed the Supreme Court (“SC”) decision in *Sri Chittaranjan Maity v. Union of India*² (“*Maity*”). The SC considered whether the arbitral tribunal was justified in awarding interest on delayed payments, when the contract prohibited awarding interest. The SC clarified that Section 31 (7) (a)³ of the Arbitration and Conciliation Act, 1996 (“*Act*”) which provides for payment of interest, begins with the words “*unless otherwise agreed by the parties*” and therefore bars an arbitrator from awarding interest when the contract itself prohibits the award of interest for the pre-award period i.e. pre-reference and pendente lite period. The SC ruled that when the terms of the agreement prohibits award of interest, the arbitrator cannot award interest for the pendente lite period.
- 2) In the present case, the SC added to this ruling and held that if a party does not raise the plea that the contract prohibits awarding interest before the arbitral tribunal, the party shall be hit by the principle of waiver and precluded from raising such plea at a later stage i.e. at the time of appeal.

BACKGROUND

- 3) The parties entered into a works contract for repair works. Disputes arose between the parties and Susaka invoked the arbitration clause in the General Conditions of Contract (“*Contract*”).
- 4) Susaka filed an application under Section 11(5) of the Act, before the Bombay High Court (“*HC*”) for the appointment of an arbitrator. The HC constituted an arbitral tribunal comprising of three railway officials with the consent of both parties under an order dated 27 July 2001. In its order making reference to the tribunal, the HC stated that the tribunal “*..shall also be free to decide pre-reference interest, Pendente lite interest, further interest and costs considering the agreement*”.
- 5) The arbitral tribunal passed an Award on 11 September 2002 and partly allowed Susaka’s claims against UOI (“*Award*”). The tribunal awarded interest for the pre-reference period, pendent lite period and post reference period (“*Award of Interest*”). UOI filed an application to set aside the Award under Section 34 of the Act (“*Section 34 Application*”), before the Ld. Single Judge of the HC. By and under an Order dated 21 April 2003, the HC partly modified the Award with respect to the Award of Interest (applicable on the claim for damages and on the claim for a purchase item) and held that interest would only be payable from the date of the Award till realization. (“*Order*”).
- 6) Susaka filed an appeal before the Division Bench of the HC (“*DB*”) and the DB held that the ground for setting aside the Award (i.e. modification of an award with respect to the award of interest) is not a ground available under Section 34 of the Act. The DB held that the Order was legally unsustainable and set aside the Order of the HC. Thus, the entire Award was upheld and the Section 34 Application was rejected in its entirety.
- 7) UOI filed an appeal against the order of the DB by way of a Special Leave Petition under Section 136 of the Constitution (“*SLP*”), before the SC.

OBSERVATIONS

- 8) Referring to Clause 13(3) of the Contract (“*Clause 13*”), UOI put it to the SC’s notice that the Contract barred the applicability of interest on earnest money, security deposit or amounts payable to the contractor under the contract (except government securities). UOI contended that (i) Susaka is not entitled to claim interest; (ii) the tribunal misconducted itself by awarding

¹ 2017 SCC OnLine SC 1436

² 2017 (9) SCC 611

³Section 31. Form and contents of arbitral award. “..(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 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)]...”

interest to Susaka when Clause 13 (3) of the Contract prohibits the same; and that (iii) the award to the said extent is legally unsustainable and liable to be set aside.

- 9) The issue which arose for consideration before the SC was whether it could allow the plea that the contract prohibits awarding interest, when the said plea had not been raised before the arbitral tribunal.
- 10) The SC observed that (i) UOI did not raise the plea with respect to Clause 13 before the HC during the proceedings under Section 11 of the Act; (ii) UOI did not object to the order making reference to the tribunal by pointing out to Clause 13; (iii) UOI allowed the arbitral tribunal to adjudicate the claims for Award of Interest on merits; (iv) UOI did not raise the plea in their reply filed before the arbitral tribunal; (iv) While UOI raised the plea in the Section 34 Application, the ground was not pressed at the time of arguments before the Ld. Single judge or even before the DB.
- 11) Based on the above observations, the SC held that *“If a plea is available-whether on facts or law, it has to be raised by the party at appropriate stage in accordance with law. If not raised or/and given up with consent, the party would be precluded from raising such plea at a later stage of the proceedings on the principle of waiver. If permitted to raise, it causes prejudice to other party. In our opinion, this principle applies to this case.”*
- 12) The SC noted that Section 31(7)(a) and (b) of the Act, empowers the arbitral tribunal to award interest on the awarded sum and it is always subject to the agreement between the parties. However, in the present circumstances, the SC held that UOI shall be precluded from raising the plea with respect to Award of Interest, despite the bar to an Award of Interest in the Contract. The SC held that UOI shall be precluded from raising this plea as the same shall be hit by the principle of waiver.

ANALYSIS

- 13) While the SC recognizes the law laid down in Section 31 (7) (a) of the Act, in Maity and in the present case, the SC has deviated from its position and refrained from a blanket application of Section 31(7)(a) in view of the factual matrix. By precluding UOI from raising a plea which is otherwise legally tenable, the SC has supplemented its interpretation to Section 31(7)(a) and added a somewhat rider to the provision i.e. a plea with respect to Section 31(7) that award of interest is prohibited by the contract, must be raised before the arbitral tribunal and if raised at the time of appeal, the same shall be considered hit by the principle of waiver.

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