Calcutta High Court

HON'BLE JUDGE(S): **HARISH TANDON, HIRANMAY BHATTACHARYYA, JJ**

BHOWMICK ENTERPRISE (INDIA) V. UNION OF INDIA

GA - 2 of 2020, decided on 16/07/2021

Arbitration and Conciliation Act (26 of 1996) , S.31(7)(a), S.34- Arbitral award - Setting aside of - On ground that method of calculation of interest on sum awarded, not proper - Final award passed by Arbitrator, specifically directed payment of interest on simple interest basis per annum - Simple interest is calculated on principal amount either on daily, monthly, quarterly or annual basis - Principal amount on which interest is calculated, remains constant during entire tenure - Had it been intention of Arbitrator that interest is to be calculated on compound basis, same could have been stipulated in final award - Petitioner failed to point out any statutory provision not taken note of - In absence of any error apparent on face of record, arbitral award cannot be interfered with in exercise of review jurisdiction.
Civil P.C. (5 of 1908), 0.47 R.1-

(Para 10, 14, 24, 28)

Case Referred : **Chronological Paras**

AIROnline 2015 SC 550 (Distg.)

AIR 2000 SC 540 : 2000 AIR sew 73

ATR 1999 SC 3407: 1999 AIR sew 3377

AIR 2000 SC 2587 : 2000 AIR sew 2608

AIR 2005 SC 592 : 2005 AIR sew 230

AIR 2004 SC 4765 : 2004 AIR sew 5434

AIROnline 2005 SC 599

AIROnline 2004 SC 718

AIROnline 2006 SC 174

2000 AIR SCW 4675 (Distg.)

AIR 1999 SC 462 : 1998 AIR sew 3625

AIR 2015 SC 856: 2014 AIR sew 6764

(2018) EC No. 206 of 2018, Dt. 05-12-2018 (Cal) (Affirmed)

AIROnline 2013 SC 578

AIR 1996 SC 11 : 1994 AIR sew 3344

AIR 2009 SC 1204 : 2009 AIR sew 470

Name of Advocates

Tapas Dutta for Petitioner; Rabi Prosad Mookerjee for Respondent.

l .**HARISH TANDON, J.** :-The instant memorandum of review is at the instance of the appellant seeking review of our judgment and order dated August 22, 2019 passed in APO 28 of 2019 arising out of EC No. 206 of 2018.

2.The decree holders preferred the appeal being APO No. 28 of2019 challenging a judgment and

order dated December 5, 2018 passed by the Learned Single Judge in EC No. 206 of 2018 directing the judgment debtor/respondent to pay a sum of Rs. 3,90, 215 by way of demand draft in favour of the appellant/ review applicant.

3 The said appeal was dismissed by the judgment and order under review.

4 The sole arbitrator passed the final award on January 19, 2001 awarding a total sum of Rs. 4, 59, 212 in respect of claim no. 1, 2 and 4 and further granted the interest at the rate of 12% simple interest per annum on and from February 28, 1998 till the date of award. It was further indicated therein that the aforesaid sum should be paid within 90 days from the date of the award and in case of default, it would carry a simply interest at the rate of 13% per annum.

5 In the judgment under review we expressed our view that once the Arbitral Tribunal awarded the simple interest from specified date which constitutes the sum indicated in Section 31 (7) (a) of the Arbitration and Conciliation Act 1996 it has to be calculated on a yearly rate on the principal sum and not otherwise.

6 The learned advocate for the review applicant contended that there is an error apparent on the face of the record in the judgment under review in as much as the method of calculation of interest as laid down in the judgment of the Hon'ble Supreme Court of India in the case of Hayder Consulting (UK) Limited vs. State ofOrissa reported at (2016) 6 SCC 362: **(AIROnline 2015 SC 550)** was not taken into consideration though the same was relied upon by the learned advocate in the course of hearing of the appeal. He, further, contended that when in the award it is directed that the interest is payable at a particular rate per annum then the interest has to be calculated on yearly basis and the interest for the first year is to be added with the principal amount and the

interest for the subsequent period is to be calculated on the total sum i.e. the principal together with the interest of the preceding period/ periods. In other words the contention of the learned advocate is that the interest is to be calculated on compound basis.

7 Mr. Dutta, the learned advocate for the review petitioner relied upon the following judgments of the Hon'ble Supreme Court oflndia on the scope and powers ofreview by a high court.

M.M. Thomas vs. State ofKerala and Another reported at (2000) 1 SCC 666: **(AIR 2000 SC 540),**

Oriental Insurance Co. Ltd. and Anr. vs. Gokulprasad Maniklal Agarwal and Anr. reported at (1999) 7 sec 578: **(AIR 1999 SC 3407),**

Kunhayammed and Ors. vs. State of Kerala and Anr. reported at (2000) 6 SCC 359 : **(AIR 2000 SC 2587),**

Board of Control for Cricket in India and anr. vs. Netaji Cricket Club and Ors. reported at (2005) 4 sec 741 : **(AIR 2005 SC 592**),

Nandi Investments and Enterprises vs. L.M. Saravamangala reported at (2005)9 SCC 754 : **(AIR 2004 SC 4765),**

National Housing Coop. Society Ltd. vs. State of Rajasthan and Ors. reported at (2005)12 SCC 149 : **(AIROnline 2005 SC 599),**

Commissioner of Central Excise, Hyderabad vs. Associated Cement Companies Limited reportedat (2011)11 SCC 420: **(AIROnline 2004 SC 718),**

Commissioner of Central Excise, Mumbai vs. Bharat Bijlee Limited reported at (2011)12 SCC 172 : **(AIROnline 2006 SC 174),**

K.G. Derasari and Anr. vs. Union oflndia and Ors. reported at (2001) 10 SCC 496 : **(2000 AIR** sew 4675),

Srinivasiah vs. Sree Balaji Krishna Hardware Stores reported at (1998) 8 SCC 312. : **(AIR 1999 SC 462).**

8 Mr. Mukherjee, the learned advocate for the respondent seriously disputed the contentions of Mr. Dutta. He contended that the review petitioner could not make out any ground for exercising the powers of review by this Court.

9 We have heard the learned advocates for the parties and have perused the materials on record.

10. The final award passed by the arbitral award directed payment of interest on simple interest

basis per annum. Simple interest is calculated on the principal amount either on daily/ monthly/ quarterly/ annual basis. The principal amount on which the interest is calculated remains constant during the entire tenure on simple interest. Had it been the intention of the arbitral tribunal that interest is to be calculated on compound basis, the arbitral tribunal could have stipulated in the final award that interest is to be calculated on compound basis.

11 In Hyder Consulting (UK) Limited vs. Governor, State of Orissa through Chief Engineer reported at (2015) 2 SCC 189 : **(AIR 2015 SC 856)** held that 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. It was further held that the interest component then losses its character of an "interest" and takes the colour of "sum" for which the award is made. The said judgment, however, is silent with regard to the calculation of interest on simple basis or compound basis.

12 In Hyder Consulting (UK) Limited vs. State of Orissa reported at (2016) 6 SCC 362 : **(AIROnline 2015 SC 550)** the arbitrator directed payment of interest with quarterly rates and the high court modified such rate of interest directing that such interest shall be on simple basis by applying the

equitable principle. On such facts the Hon'ble Supreme Court held that the high court was not justified in modifying the interest component by applying the equitable principle when the rate of interest granted by the arbitrator was in consonance with Hyder Consulting (UK) Limited reported at (2015) 2 SCC 189 : **(AIR 2015 SC 856).** 13 In the instant case the arbitrator awarded simple rate of interest and as such the judgment of the Hon'ble Supreme Court of India in Hyder Consulting (UK) Limited vs. State ofOrissa reported at (2016) 6 SCC 362: **(AIROnline 2015 SC 550)** do not have any manner of application to the facts of the instant case.

14.ln Srinivsiah (supra) the Hon'ble Supreme Court of India exercised the powers of review as the

Hon'ble Supreme Court was of the view that the judgment rendered by the Hon'ble Supreme Court in the civil appeal proceeded on an assumption which the Hon'ble Supreme Court subsequently found to be not correct. It is no gainsaying that the review jurisdiction can be exercised by the Court upon finding the error of fact borne from the record.

15The case of Gokulprasad Maniklal Agarwal (Supra) is not pointer to an issue as to when the Court can exercise the review jurisdiction as the said judgment was based upon the concession of the advocate over the nature of penalty.

16 The moment the mistake appears to be patent and apparent from the face of the record, there is no difficulty in exercising the review jurisdiction as the mistake cannot be allowed to be perpetuated for all time to come. It is no gainsaying that the judgment passed on concession without expounding proposition of law has no binding efficacy under Article 141 of the Constitution of India.

17 Even in case of M.M.Thomas (Supra) the Apex Court has reiterated and reinstated the principles of review having its primary foundation on the

error patent from the record. The moment the court finds the error on perusing the cause papers without making any roving enquiry or the perception to be arrived on assimilation of facts, it is a fit case to exercise the power of review and to correct the mistake instead of making the same to remain on record. It is somewhat settled that the court while exercising a review jurisdiction is not supposed to rewrite the judgment nor revisit the decision already taken on the basis of the facts involved in the case by applying the law applicable in this regard.

18. We are in a fix when the learned Advocate appearing in support of the review application relied upon a decision of the Supreme Court in case ofKunhayammed (Supra) which basically deals with the concept of merger of an order. There is no quarrel to the proposition of law that the dismissal of the special leave petition at the threshold does not tantamount to merger of the order of the High Court into the order of dismissal of the special leave petition. The aforesaid judgment is misplaced for the simple reason that the petitioner of the review application neither applied under Article 136 of the Constitution of India before the Supreme Court nor any other forum was approached except with an application for review before us. The aforesaid judgment is pointer to an issue as to when the order of the High Court would deem to have merged with the order of the Supreme Court and, therefore, can best be applied on a facts compatible with the facts involved in the said judgment. It is a matter of great concern that innumerable judgments are cited at the Bar without realising whether the ratio involved therein has any manner of application to the given case. It is simply making the judgment voluminous as a point may have been taken that the judgment which have been cited are not dealt with by the Judge while passing the final order/judgment. The counsel appearing for the parties has to be cautious and circumspect in citing the judgments and the proposition of law laid

down therein.

19. In case of K.G. Derasari (Supra), the point which fell for consideration was whether the

Tribunal can wish away or do away with the judgment of the Supreme Court having direct impact and implication to the given facts and such order is amenable to be reviewed in exercise of the review jurisdiction. Had it been a case that the judgment having direct bearing on the facts of the case has not been cited, such judgment may have some binding effect but not when the judgment was considered by the court and interpreted in the way as it was understood which may not be palatable to the litigant. If the court considers the judgment and interpreted the same with the categorical findings, it cannot be said unless there is a patent error apparent from the said judgment that review jurisdiction is to be exercised as it would be deemed that such judgment has not been considered by the Judge.

20. We are amazed when the learned Advocate appearmg from the petitioner m the review application cites a judgment rendered in Nandi Investment (Supra) which does not lay down any declaration of law so as to bind the High Court or the subordinate courts under Article 141 of the Constitution of India. The said judgment was passed while entertaining and/or interfering with the judgment of the High Court in a special leave petition and a direction was passed to move the High Court with the review application. The liberty to move the review application before the court does not mean that the application for review has to be allowed as such liberty was granted by the highest court of the country. The application for review is to be decided on merit and, therefore, such judgment does not appear to have any manner of application in the instant case.

21. **The** Hon'ble Supreme Court of India in BCCI (supra) held that the

subsequent event may be taken into consideration by the court for the purpose of rectifying of its own mistake. It was further held therein that the words "sufficient reason" in Order 47 Rule 1 of the Code of Civil Procedure are wide enough to include misconception of fact or law by a court or even an advocate. In the instant case the learned advocate for the review petitioner could not demonstrate any misconception of fact or law committed by us while passing the judgment under review. The documents annexed to the application filed by the review petition being GA No. 2 of 2020 for consideration of additional evidence cannot be said to be a subsequent event with regard to the issue involved in the instant matter.

22. In National Housing Coop. Society Ltd. (supra) the Hon'ble Supreme Court held that when a

special leave petition is dismissed by a non-speaking order the high court could be moved by way of a petition for review. There is no quarrel to the said settled proposition of law but the same have no manner of application to the facts of the instant case.

23. In Associated Cement (supra) the Hon'ble Supreme Court of India held that in review petition the court can take into consideration a statutory provision which was not brought to the notice of the court when the order under review was passed.

24. The learned advocate for the review petitioner failed to point out any statutory provision which

was not taken note of by this court while passing the judgment under review. In view thereof the judgment of the Hon'ble Supreme Court of India in Associated Cement (supra) do not have any manner of application to the facts of the instant case.

25. The Hon'ble Supreme Court of India in Bharat Bijlee (supra) held that failure to take into consideration the material evidence, which is present on

record, would certainly amount to mistake apparent on the face of the record for which the Tribunal would have the jurisdiction to correct its mistake in exercising its powers of rectifying its mistake.

26. The other contention of the learned advocate for the review petitioner is that the judgment and
order under review suffers from error apparent on the face of the record in as much as the judgment of the Hon'ble Supreme Court of India in Hyder Consulting (UK) Limited vs. State of Orissa reported at (2016) 6 SCC 362 : **(AIROnline 2015 SC 550)** was not referred to in the judgment under review in spite of the fact that the same was relied upon by the learned advocate for the review petitioner in course of his submission in the appeal. In this regard reference may be made to the judgment of the Hon'ble Supreme Court of India in the case of Rashmi Metaliks Limited and Anr. vs. Kolkata Metropolitan Development Authority and Ors. reported at (2013)10 SCC 95 : (AIROnline 2013 SC 578) wherein the Hon'ble Supreme Court oflndia held as :

"7. This Court, and even more so the High Court as well as the subordinate courts have to face lengthy arguments in each case because of the practice of citing innumerable decisions on a particular point of law. The correct approach is to predicate arguments on the decision which holds the field, which in the present case is Tata Cellular v. Union oflndia : **(AIR 1996 SC 11)** rendered by a three-Judge Bench. The rule of precedence, which is an integral part of our jurisprudence, mandates that this exposition of law must be followed and applied even by coordinate or co-equal Benches and certainly by all smaller-Benches and subordinate courts. We hasten to clarify that if a coordinate Bench considers the ratio decidendi of the previous Bench to be of doubtful efficacy, it must comply with the discipline of requesting the Hon'ble the Chief Justice to constitute a larger Bench. Furthermore, there are some instances of decisions even of a Single Judge,

which having withstood the onslaughts of time have metamorphosed into high authority demanding reverence and adherence because of its vintage and following in contradistinction of the strength of the Bench. This is a significant characteristic of the doctrine of stare decisis. Tata Cellular has been so ubiquitously followed, over decades, in almost every case concerning government tenders and contracts that it has attained heights which dissuade digression by even a larger Bench. The law of precedence and of stare decisis is predicated on the wisdom and salubrity of providing a firmly founded law, without which uncertainty and ambiguity would cause consternation in society. It garners legal predictability, which simply stated, is an essential. Our research has revealed the existence of only one other three-Judge Bench decision which has dealt with this aspect of the law, namely, Siemens Public Communication Networks (P) Ltd, v. Union of India : **(AIR 2009 SC 1204),** which is in actuality an anthology of all previous decisions including Tata Cellular. The sheer plethora of precedents makes it essential that this Court should abjure from discussing each and every decision which has dealt with a similar question of law. Failure to follow this discipline and regimen inexorably leads to prolixity in judgments which invariably is a consequence of lengthy arguments." 27 Two Hon'ble Judges of the Hon'ble Supreme Court oflndia in the case of the Hyder Consulting (UK) (supra) reported at (2016) 6 SCC 362 : **(AIROnline 2015 SC 550)** relied upon the judgment of the three Hon'ble Judges of the Supreme Court of India in the case of Hyder Consulting (UK) reported at (2015) 2 SCC 189 : **(AIR 2015 SC 856)** while holding that there was no justification on the part of the high court to modify the interest component by applying the equitable principal as the rate of interest granted by the arbitrator was in consonance with the Larger Bench judgment in Hyder Consulting (supra). When the proposition of law laid down by a Larger Bench of the Supreme Court was referred to in the judgment under review and the same was

taken into consideration while passing the said judgment, it was not essential for this court to discuss the subsequent judgment passed by a bench of lesser strength on a similar question oflaw as has been held by the Hon'ble Supreme Court oflndia in Rashmi Metaliks (supra).

28. Thus, for the reasons as aforesaid this court is of the considered view that the judgment and
order under review does not suffer from any error apparent on the face of the record. The application for review being RVW No. 2 of 2020 is accordingly, dismissed without, however, any order as to costs. Accordingly, the applications being GA No. 2 of 2020 and GA 3 of 2020 are also disposed of.

29 Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

30HIRANMAY BHATTACHARYYA, J. :-1 agree.

Order Accordingly