

# Dispute

July 20, 2009

## IS ARBITRATOR EMPOWERED TO AWARD INTEREST UP TO DATE OF THE AWARD?

### 'INTEREST'ING JUDGMENT

Arbitrator is not empowered to award interest up to date of arbitral award where parties have contractually so agreed

In *Sayed Ahmed & Co. v. State of U.P.*<sup>1</sup>, the Hon'ble Supreme Court of India ("Court") has held that where parties to arbitration have agreed to the contrary, an arbitrator does not have the power to grant interest from the date of the cause of action till the date of the arbitral award. The Court has also *inter alia* examined the law governing the manner in which interest can be granted by an arbitrator in an arbitral award passed under the Arbitration and Conciliation Act, 1996 ("the Act").

### FACTS OF THE CASE

The *State of Uttar Pradesh* ("Respondent") had entrusted certain construction work to *M/s. Sayeed Ahmad and Company* ("Appellant") under an agreement dated March 30, 1990 ("Agreement"). The said work was completed by the Appellant on March 31, 1996. Later, disputes arose between the parties over rejection of certain claims of the Appellant by the Respondent. The disputes were referred to arbitration on March 13, 1997. The arbitrator passed an award dated July 31, 2001, directing the Respondent to pay the Appellant as under:

- Rs. 24,18,586/- with interest at 18 % p.a. from April 01, 1996, till date of payment;
- The amount if any, due to the appellant on finalizing the final bill with interest at 14 % p.a. from May 01, 1996, till date of payment; and
- The security deposit amount due with interest at 12% p.a. from October 01, 1996, till date of payment.

The Respondent filed an application in the civil court to set aside the award under Section 34 of the Act which was dismissed. The Respondent filed an appeal in the High Court which was partly allowed.

The High Court also held that the arbitrator had no power to award interest in view of Clause G 1.09 of the Agreement. The said Clause G 1.09 is reproduced hereunder:

*"No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be lying with the Government or any that may become due owing to any dispute, difference or misunderstanding between the Engineer – in – Charge on the one hand and the contractor on the other hand or with respect to any delay on the part of the Engineer – in – charge in making periodical or final payment or any other respect whatsoever."*

Consequently, the High Court *inter alia* set aside the part of the award granting interest from the date of the cause of action till the date of award. The High Court, however, granted interest at 6% p.a. from the date of award till the date of payment.

Aggrieved by the deletion of interest upto the date of award and reduction of interest from the date of award till payment to 6% p.a., the Appellant filed an appeal in the Court.

### JUDGMENT

The Court noted the provisions of the Interest Act, 1978 ("Interest Act"). Under Section 3<sup>2</sup> of the Interest Act, in a proceeding for recovery of debt or damages, a court (as also an arbitrator) has the power to allow interest, at a rate not exceeding the current rate of interest, for the whole or part of the following periods:

- if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;
- if the proceedings do not relate to any such debt, then from the date mentioned in this regard in a written notice given by the person entitled to the person making the claim to the person liable, that interest will be claimed, to the date of institution of the proceedings

Significantly, the court noted that (under sub section (3) of Section 3) Section 3 of the Interest Act would not apply to:

- any debt or damages upon which interest is payable as of right, by virtue of any agreement; or
- any debt or damages upon which payment of interest is barred, by virtue of an express agreement;

While discussing the law dealing with the manner of grant of interest by an arbitrator, the Court appreciated the fact that the now-repealed Arbitration Act, 1940, did not contain any specific provision relating to the power of an arbitrator to grant interest. The Court in its earlier decisions had held that the arbitrator did indeed have the power, subject to there being no bar in the contract between the parties, to grant interest for three specific periods being:

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- a) from the date of the cause of action until the date of reference (to arbitration);
- b) from the date of reference till the date of arbitral award (also known as *interest pendent lite*);
- c) from the date of award till the date of payment.

Thereafter, the Court noted that the Section 31(7)<sup>3</sup> of the Arbitration and Conciliation Act, 1996 (“**the Act**”) specifically dealt with the award of interest by the arbitral tribunal.

Relying on the above provisions of the Interest Act and the Act as also its earlier decisions, the Court held that that no interest could be granted till the date of award as the parties had agreed otherwise. However, the Court proceeded to differ with the decision of the High court in regard to the percentage of interest granted as the High court had not assigned any reasons for its decision (of reducing the rate of interest) and the Court directed that the interest to be paid from the date of the award would be at the rate of interest as awarded by the arbitrator. The Court held that no bar could operate for payment of such interest for the period starting from the date of the award till the date of payment.

#### ANALYSIS

By this decision, the Court has stated that parties can, if they so desire, contractually agree that there would be no interest claimed and in such cases, the arbitrator will not be empowered to award interest for any period prior to date of the arbitral award. However, nothing prevents the arbitrator from awarding interest from the date of the arbitral award to the date of payment.

- **Gautam Dembla, Sahil Kanuga & Vyapak Desai**

1 Civil appeal No. 4197 of 2009 arising out of SLP (C) No. 15980 of 2008 decided on July 9, 2009.

**2 3. Power of court to allow interest.**—(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,

(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment.

(2) Where, in any such proceedings as are mentioned in sub-section (1),—

(a) judgment, order or award is given for a sum which, apart from interest on damages, exceeds four thousand rupees, and

(b) the sum represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death,

then, the power conferred by that sub-section shall be exercised so as to include in that sum interest on those damages or on such part of them as the court considers appropriate for the whole or part of the period from the date mentioned in the notice to the date of institution of the proceedings, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(3) Nothing in this section,—

(a) shall apply in relation to—

(i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or

(ii) any debt or damages upon which payment of interest is barred, by virtue of an express agreement;

(b) shall effect—

(i) the compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881); or

(ii) the provisions of Rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908);

(c) shall empower the court to award interest upon interest.

3 Section 31(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 eighteen per centum per annum from the date of the award to the date of payment.

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