



The Single Bench of Madras High Court comprising Ms. Justice P.T. Asha in the matter of M/s. J.K. Fenner (India) Limited Vs. M/s. Neyveli Lignite Corporation & Ors. and made an important observation regarding the scope of Court Interference On Modification of Arbitral Awards. And also observed, the authority of arbitral tribunals to award interest on the payment of awards in the absence of an agreement to that effect.

As per the observations made by the Hon'ble Court, there were limits on how much a court can interfere under Section 34 of the Arbitration and Conciliation Act, 1996 concerning the modification of an arbitral award.

**FACTS - Court Interference On Modification of Arbitral Awards**

The claimant had set up a lignite handling and storage system (LHS) for a thermal plant as per contract assigned by the respondent. The disputes arose between the parties when the claimant sought payment for the work done under various heads. As per the agreement between the parties for the payment terms, *"After successful completion of performance test for equipment and Certification of results by the purchases/Consultant - 10% to be paid."*

After some delay, the claimant had completed the setup and trial operation of the LHS. On 01<sup>st</sup> March 2004, the respondent had taken over the entire system and started operating and maintaining. Further, the Respondents had stopped the 10% refund of Rs.3,42,89,930 and alleged that the claimant had not completed the performance guarantee test on the scheduled date as per the contract. The Claimant had submitted, that the holding amount should be payable from the period since the respondent had taken over the entire LHS system in March 2004.

While dealing with the issue, the Arbitral Tribunal ruled in favor of the claimant and acknowledged that the equipment had functioned satisfactorily since March 2003. It also stated that the respondent's mere failure to issue a certificate could not stand in the way of reimbursing the retention money. The Arbitral Tribunal, therefore, directed that refund be paid to the claimant.

The tribunal did not, however, award interest from the date of the respondent's takeover of the LHS, i.e. from 1 March 2004 until the payment date. The tribunal refused to grant interest on the ground that the amount had only become payable on the award date.

## ISSUES

1. Can a court modify the Award of the Arbitrator under Section 34 of the Arbitration and Conciliation Act, 1996?
2. Whether an Arbitral Tribunal has the power to refuse to grant the interest for the pre reference period and pendente lite interest on retention money on the basis that it is owed by the claimant?

## JUDGMENT

ISSUE No.1: Can a court modify the Award of the Arbitrator under Section 34 of the Arbitration and Conciliation Act, 1996?

While dealing with the issue Justice P.T. Asha considered her judgment authored in the matter of *Sterlite Technologies Limited vs BSNL*[1] wherein it was found that the court only has a supervisory position to test the fairness of the award and should not be called upon to correct the Arbitrator's errors.

Further, the Hon'ble Court also relied on the judgment of division bench of Madras High Court in the matter of *ISG Novasoft Technologies Limited v. Gayathri Balusamy*[2] wherein it held, "A reasonable interpretation to Section 34 would only lead to an irresistible conclusion that the Court can modify or vary the Award of the Arbitrator if it is contrary to the material evidence adduced by the parties."

ISSUE No.2: Whether an Arbitral Tribunal has the power to refuse to grant interest for the pre-reference period and pendente lite interest on retention money on the basis that it is owed by the claimant?

The Court found that there were grounds to change portions of the arbitral award before it under appeal. This relates concerning the decision of the arbitral tribunal not to grant interest on an sum that it considers to be owed to the original claimant.

The Hon'ble High Court found that the arbitral tribunal's finding on this account was patent illegality and the court observed that "*The denial of interest post 01.03.2004 to the claimant on the ground that the retention amount became payable only on account of the award is a patently erroneous observation and contrary to the payment terms stipulated in the contract.*" The Court contemplated that the arbitral tribunal couldn't have denied the award from claiming interest when it had discovered that the maintenance sum was owed to the Claimant. The sum, it brought up, was payable on the day the respondent assumed control over the LHS, and not on the day the arbitral tribunal settled the case.

The Hon'ble Court observed that "*the respondent had taken over the LHS and started operating and maintaining the same ever since 01.04.2003. The respondent had therefore reaped the benefits therefrom the above date. Not only has the respondent retained 10% of the final dues but has also been utilizing the LHS to its capacity thereby enriching itself.*"

The Court proceeded to point out that arbitral tribunals are empowered to issue pre-reference and pendent lite interests on awards awarded, even though the arbitral agreement on this dimension was silent. The Hon'ble Court had made references on these cases of *Secretary Irrigation Department, Government of Orissa and others v. G.C. Roy*[3], *Executive Engineer, Dhenkanal vs N.C.Budharaj (Dead)*[4], *Bhagawathi Oxygen Limited vs. Hindustan Copper Limited*[5], *Indian Hume Pipe Co. Limited vs. State of Rajasthan*[6], *Union of India vs Saraswat Trading Agency and others*[7] and *Hyder Consulting (UK) Limited Vs. Governor, State of Orissa*[8].

The Hon'ble Court also observed that *"The underlying principle conferring power on the arbitrator to grant interest for a pre-reference period in cases where there is no prohibition in the arbitration agreement is since the forum of arbitration is created by the consent of parties and is a substitute for a conventional civil court. Therefore by implication the Arbitrator would have the same power to award interest in the same way and same manner as a court."* While going through the case the Hon'ble Court has established the arbitral tribunal's power to grant interests on the award. The Hon'ble Court proceeded to find that there was no legal basis in the arbitral tribunal's decision for not grant interest on the award which was passed in the claimant's favour. The Hon'ble Court said that *"In the case on hand the contract is silent about the grant of interest. The learned Arbitrators have refused to grant interest not only for the pre reference period but also the pendente lite interest as well as the post award interest on the ground that the claimant became entitled to the payment of the retention money only with effect from the date of the award. This finding lacks a legal basis since the amount falls due on the commissioning of the LHS"*.

The Hon'ble Court relied on the Supreme Court judgment of *Hyder Consulting (UK) Limited Vs. Governor, State of Orissa (Supra)* regarding payment of interests wherein the Apex Court held that *"particularly in the light of the learned Arbitrators after examining the evidence on record concluding that the retention was wrong. Therefore, this Court is not called upon to once again appreciate the evidence."*

Finally, the Original Petition was partly allowed and the Award of Arbitral Tribunal for denying interest was set aside. The respondent was directed to pay interest on the retention money awarded @9% p.a from 01.03.2004 till the date of award and thereafter, @18% p.a payable till the date of payment of the retention money.

#### CONCLUSION

In the present case, with relation to both issues, we note that the Hon'ble Court has very well dealt with issues and clearly explained the scope of the court regarding modification of arbitral awards. The court observed that fair interpretation of Section 34 would lead to an unreasonable inference leading to the Arbitrator's Award being changed or adjusted by the Court if it is contradictory to the factual evidence adduced by the parties.

Further, the Hon'ble court also established the role of Arbitral Tribunal regarding grant of interest on retention money and found that the arbitral tribunal cannot deny grant of interest on award without any legal basis. It can be opined, that the Hon'ble Court has done justice to the claimant while allowing his claim regarding interest on the award.

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- [1] OP Nos.200 of 2011 and 774 of 2012 dated 11.12.2019
  - [2] 2019 (5) L.W. 409
  - [3] AIR 1992 SC 732
  - [4] AIR 2001 SC 626 = 2001 (3) SCC 721
  - [5] 2005(6) SCC page 462
  - [6] 2009 (10) SCC page 187
  - [7] 2009 (16) SCC 504
  - [8] AIR 2015 SC page 856

Contributed By - Mirza Aslam Beg, Partner  
& Praveen Pandey, Associate

King Stubb & Kasiva,

Advocates & Attorneys

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New Delhi | Mumbai | Bangalore | Chennai | Hyderabad | Kochi

Tel: +91 11 41032969 | Email: info@ksandk.com