REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8373 OF 2014
[Arising out of S.L.P.(C)No.35021 of 2013]

Bharat Heavy Electricals Ltd. …..**Appellant**

Versus

Tata Projects Ltd. …..**Respondent**

J U D G M E N T

SHIVA KIRTI SINGH, J.

1. Leave granted.

2. Heard Mr. Gourab Banerji, Senior Advocate for the appellant and Mr. Gopal Jain, Senior Advocate for the respondent. The appellant was required to set up some plant or boiler units. For completing that work, appellant issued a notice inviting tender for engaging a sub-contractor to erect, test and commission two 120 MW boilers (Unit II and Unit III) on behalf of the appellant. The value of the contract awarded in favour of the respondent was Rs.6,99,40,000/-. Pursuant to disputes and differences, an Arbitral Tribunal consisting of three arbitrators came to be constituted. The Arbitral Tribunal awarded Rs.69.22 lac on various heads and Rs.25.39 lac on account of interest. The appellant instituted proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 (for brevity, 'the Act'). That proceeding bearing A.P.

No.213 of 2006 was finally decided by a learned Single Judge of the High Court of Calcutta on 04.01.2013. The objections of the appellant were allowed in part in respect of only three counts relating to over-run charges, crane hire charges and interest.

3. The respondent filed an appeal being A.P.O. No.60 of 2013. The Division Bench, by the order under appeal dated 12.06.2013, allowed the appeal in part in respect of charges, namely, crane hire charges and interest. In the present appeal only those two issues have been raised on behalf of the appellant. According to learned senior counsel for the appellant, the Division Bench has wrongly reversed the order of learned Single Judge on the issue of crane hire charges inasmuch as the claim of the appellant asking for payment of crane hire charges by the respondent for Unit III was based upon clause 12.2.2 of the Work Order read with clauses 2.8.11, 3.38.3 and 3.38.14 of the Agreement/Tender Document. In respect of second issue relating to interest, learned senior counsel has confined the claim of the appellant only against grant of pre-Award interest on the basis of clause 1.15.5 of the Tender Document/Agreement.

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4. On the other hand, learned senior counsel for the respondent has submitted that the Award in respect of crane hire charges is based on an overall view of entire material available before the Arbitral Tribunal and, therefore, although the Tribunal finally concluded that "there is nothing on record of the Arbitral Tribunal to substantiate the 'understanding' between the parties regarding swapping of crane usage days between Units II and III as has been

pleaded by the claimant", it only allowed Rs.8.25 lac in favour of appellant's claim for such charges. According to him, for the same very reason, taking a holistic view of the whole matter, the Division Bench in the impugned order took the same view. On behalf of respondent, the grant of pre-Award interest could not be successfully defended in view of clause 1.15.5 of the Agreement which provides that "no interest shall be payable by BHEL on earnest money/security deposit or any money due to the contractor by BHEL". The ambit and scope of aforesaid clause was subject matter in Civil Appeal No.7423 of 2005 between the appellant and M/s. Globe HI-Fabs Ltd. decided on 12.11.2009 wherein this Court accepted and held that in view of such a provision in the Agreement, interest is only payable from the date of the Award. The aforesaid legal position ought to have been accepted by the Division Bench of the High Court in view of law settled by judgments of this Court in the case of **Sayeed Ahmed & Co.** v. **State of U.P. & Ors.** (2009) 12 SCC 26 and several other cases including the case of **Union of India** v. **Concrete Products & Construction Co. & Ors.** (2014) 4 SCC 416.

5. On the issue of award of interest, learned senior counsel for the respondent tried to persuade us to enhance the post-Award interest granted by the Arbitral Tribunal @ 10.5% to 18% p.a. in the light of provisions in Section 31(7)(b) of the Act. We are unable to accept this contention because the Arbitral Tribunal has already granted post-Award interest @ 10.5%. Only if the Award had not made such a direction, the statutory rate of interest @ 18%

p.a. would have been payable from the date of the Award to the date of payment as per statutory provision noted above.

6. In the light of aforesaid discussion, we are constrained to hold that the order under appeal ought not to have approved grant of any pre-Award interest.

7. So far as the issue relating to crane hire charges is concerned, before expressing our views we think it proper to extract the relevant clauses of the Work Order, i.e., clause 12, 12.2, 12.2.1 and 12.2.2 as well as the relevant clauses of the Tender Document/Agreement :

"Relevant extract of Work Order dated 16.03.1999
Terms and conditions

12.0 TOOLS & PLANTS AND CONSUMABLES

You shall provide all necessary consumables and T & Ps (other than those specified below), measuring instruments, handling equipments as per provision of contract for timely completion of the total job as per contract within the accepted rates.

12.2 Following T & Ps will be provided by BHEL to you free of charge as per provision of contract on availability.

Sl.	Description	Capacity	Quantity
01.	Electric winches	10 MT	2 nos.
02.	10 Sheave pulley block	100 MT	4 nos.
03.	Hydro test pump		1 no.
04.	High Capacity crane (250 T)*		1 no.

12.2.1 The above T & Ps will be made available for the project. You may make use of the T & Ps as per the provision of tender document.

12.2.2 * In case of 250 T capacity crane, operator and consumable shall be provided by BHEL. However, the fuel for operation of this crane shall have to be arranged by you. 250 T Crane shall be available only upto 'drum lifting of Unit-2'."

"RELEVANT EXTRACT OF TENDER DOCUMENT NO.PSER:SCT:JBA:B2

2.8.11 It is not obligatory on the part of BHEL to supply any tools and tackles or other materials other than those specifically agreed to do so by BHEL, however, depending upon the availability, BHEL's customer's handling equipment and other plants may be made available to the contractor on payment of the hire charge as fixed, subject to the conditions laid down by BHEL/ customer from time to time. Unless paid to advance such hire charges, if applicable shall be recovered from contractor's bill/ security deposit in one instalment.

3.38.3 The operation of all BHEL equipment (except 250 T Crane) will be in the scope of the contractor. BHEL will provide free of cost (including operator and consumables) one number 250 T Crane only upto the Drum Lifting Milestone of Unit II only. However the Fuel for operating this 250 T Crane shall have to be arranged by the contractor.

3.38.14 BHEL will provide free of cost (including operator, fuel and consumables) 250 MT Crane only for the first unit (Unit-2)."

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8. Clause 12 and other sub-clauses thereunder as extracted above show that a high capacity crane (250 T) is included in the Tools and Plants which will be provided by BHEL to the respondent free of charge as per provisions of contract on availability but only upto "drum lifting of Unit II" as specified in clause 12.2.2. There is no provision either in the Work Order or in the Agreement/Tender Document to entitle the respondent to claim that it was not obliged to pay the higher charges as fixed, subject to the conditions laid down

by BHEL from time to time in respect of user of crane for Unit No.III. To the contrary, the extracts from the Tender Document contain a clear stipulation for recovery of such charges from the contractor's bill/security deposit in one instalment.

9. On going through the order under appeal, we find that the learned Division Bench has not kept in mind the aforesaid provisions in the Work Order and the Tender Document. BHEL was neither required to issue any notice for exercising its right to recover crane hire charges for Unit III, nor was it required to deduct such charges from the running bills of the respondent. There is no dispute or issue as regards quantum of such charges claimed by the appellant but the Arbitral Tribunal allowed it only to the extent of Rs.8.25 lac although the Tribunal itself found that the respondent had failed to produce any material in support of its defence that because the crane was out of order for a number of days when Unit No.II was under erection/instalment and, therefore, the respondent became entitled to use the crane without hire charges for Unit No.III. In such circumstances, we find that the crane hire charges claimed by the appellant were wrongly disallowed by the order under appeal passed by the Division Bench.

10. As a result, it is held that appellant is entitled for crane hire charges and, therefore, that amount needs to be deducted from the amount payable to the respondent under the Award on other heads. It is also held that the appellant is not liable to pay any pre-Award interest and the interest @ 10.5% p.a. shall be payable by the appellant only from the date of Award till the date

of payment on the Award amount now found payable, if any. We order accordingly. The order under appeal is set aside to the aforesaid extent. The appeal is allowed accordingly. No costs.

…………………………..............................…….J.
[FAKKIR MOHAMED IBRAHIM KALIFULLA]

…………………………..............................…….J.
[SHIVA KIRTI SINGH]

New Delhi.
September 01, 2014.

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