**SUPREME COURT OF INDIA**

Leela Hotels Ltd.

Vs.

Housing & Urban Dev.Corp.Ltd.

C.A.No.9763 of 2011

(Altamas Kabir,J., Cyriac Joseph and Surinder Singh Nijjar,JJ.,)

15.11.2011

**JUDGMENT**

**Altamas Kabir,J.,**

SLP(Civil)No.18509 of 2009

1. Leave granted.

2. This Appeal has been filed by Leela Hotels Ltd. against the judgment and order dated 20th July, 2009, passed by the Division Bench of the Delhi High Court in EFA(OS) No.4 of 2009, heard along with several Miscellaneous Applications setting aside the order dated 19th November, 2008, passed by the learned Single Judge, who had directed payment to the Appellant herein as per its calculations. It is the common case of the parties that on 17th October, 1996, the Housing and Urban Development Corporation Ltd. (HUDCO) invited offers for grant of sub-lease of land measuring 11,480 sq. meters in HUDCO Place situated in Andrews Ganj, New Delhi, for construction of a Five-Star Hotel thereupon. The Appellant herein being the highest bidder, a letter of allotment of the said land was issued to it on 31st March, 1997, which was followed by a perpetual sub-lease dated 4th July, 1997. Out of the total consideration, the first instalment comprising 40% of the consideration amount was paid by the Appellant herein on 10th April, 1997. The second and third instalments, each amounting to Rs.65,38,29,000/-, were payable by 31st March, 1998, and 31st March, 1999, respectively. It was stipulated in the sub-lease that in case of default in payment of the second and third instalments, the same could be paid along with interest at the rate of 20% per annum within three months of the due date. It was further stipulated that in default of payment even in terms of the said relaxation, the allotment would automatically stand cancelled and in such event 50% of the amount paid upto that date would stand forfeited and the balance 50% would be refunded without interest. Admittedly, the second instalment was paid by the Appellant herein along with interest for the delayed payment and ground rent was also paid till 31st March, 1998. Since, however, the Appellant defaulted in payment of the third installment, the lease agreement was cancelled and as per the terms of the agreement

50% of the total amount paid by the Appellant amounting to Rs.76,28,00,500/- was refunded by the Corporation to the Appellant, while forfeiting the balance 50%.

3. Being aggrieved by the steps taken by the Respondent Corporation, the Appellant filed a Petition before the Chief Justice of the Delhi High Court to appoint an Arbitrator in terms of the arbitration clause, which was registered as Arbitration Application No.193 of 1999. On 23rd June, 1999, an Arbitrator was appointed by the Delhi High Court before whom the Appellant herein claimed a sum of Rs.142,16,08,896/- from the Respondent Corporation along with interest at the rate of 20% per annum along with a further sum of Rs.19,24,45,800/- comprising the ground rent paid along with interest thereon at the rate of 25% per annum along with a sum of Rs.5,98,22,058/- towards refund of property tax. A sum of Rs.5,62,27,715/-was also claimed by way of damages.

4. The learned Arbitrator allowed the claims of Leela Hotels and rejected the counter-claim made by HUDCO. In his Award, the learned Arbitrator held that Leela Hotels was entitled to recover and HUDCO was obliged to pay damages computed with regard to the amounts paid as the first and second instalments of the premium, together with interest paid with the second instalment, less the amount refunded by HUDCO to Leela Hotels under letter dated 8th July, 1999, and as further reduced by the amount of property tax paid by HUDCO on behalf of Leela Hotels to the Municipal Corporation of Delhi. It was also directed that the interest at the rate of 20% per annum would be paid by HUDCO to Leela Hotels on the amount representing property tax for the period during which the amount remained with HUDCO until payment to MCD and also on the amount refunded by HUDCO under its letter dated 8th July, 1999, for the period for which that amount remained with HUDCO until repayment to Leela Hotels. Leela Hotels was also held to be entitled to such interest on the balance of the amount from the date of the respective payments made initially by Leela Hotels to HUDCO till the date of the Award.

5. The Appellant filed its objections under Section 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the "1996 Act", before the High Court. The same was dismissed by the High Court by its order dated 21st January, 2003. Before the said petition was dismissed, the Respondent herein undertook to deposit the principal sum awarded by the Arbitrator on or before 21st October, 2002. The said sum of Rs.89,78,84,930/-, was allowed to be deposited without prejudice to the rights and contentions of the Respondent herein. When the cheque for the aforesaid amount was brought to Court on 21st October, 2002, the said Respondent got it recorded that it represented the net principal amount due and payable to the Appellant herein under the Award and that the said deposit was without liability on its part to pay future interest thereupon.

6. The first appeal from the said order dated 20th January, 2003, having been dismissed by the High Court on 9th November, 2004, the Respondent filed a Special Leave Petition before this Court, which was dismissed on 12th February, 2008. Although, the Special Leave Petition was dismissed, the rate of interest for the pre-Award period was reduced from 20% to 18% per annum. Furthermore, since this Court had directed the Appellant to pay or deposit 50% of the balance decretal amount, the Respondent paid a sum of Rs.59.61 crores to the

Appellant herein on 23rd March, 2006. The Respondent paid a further sum of Rs.48.09 crores to the Appellant herein on 16th April, 2008, which, according to the Respondent, satisfied the decree. This, in fact, was the genesis of the dispute between the parties.

7. As far as the Appellant herein was concerned, in its calculation sheet the sum of Rs.89,78,84,930/- was shown to be appropriated towards the interest due under the Award. A claim was also made for interest on the interest. On the other hand, in the calculation sheet filed by the Respondent herein it was indicated that the aforesaid amount deposited should be appropriated towards the principal sum payable to the Appellant herein under the Award and had calculated simple interest at the rate awarded by the Arbitrator as modified by this Court. Consequently, as was noted by the Division Bench of the Delhi High Court, the controversy which surfaced on account of the contesting claims of the parties was whether the aforesaid amount could be adjusted, as claimed by the Appellant herein, towards the interest, or was the Appellant obliged to appropriate the said sum towards the principal sum due to it under the Award. A further question which surfaced was whether the Appellant herein was entitled to charge interest on interest or compound interest in accordance with the method indicated in the calculation sheet filed by it.

8. In dealing with the first question as to whether the payment made by the judgment-debtor is to be appropriated first towards discharge of the principal or towards discharge of the interest, the Division Bench noted the decision of this court in *M/s I.C.D.S. Ltd. Vs. Smithaben H. Patel & Ors.*[1] wherein, this Court had held that Sections 59 and 60 of the Contract Act, 1872, would only be applicable at the pre-decretal stage and not thereafter and that post-decretal payments would have to be made either in terms of the decree or in accordance with the agreement arrived at between the parties, though, on the genuine principles indicated in Sections 59 and 60 of the aforesaid Act. After referring to various other decisions of this Court and the Lahore High Court, the Division Bench of the High Court referred to the decision in *Meghraj Vs. Mst. Bayabai & others*[2], wherein the law in this regard was laid down by this Court that the general rule of appropriation of payment towards a decretal amount is that such an amount is to be adjusted firstly strictly in accordance with the directions contained in the decree and in the absence of such direction, adjustments would have to be made firstly towards payment of interest and costs and, thereafter, in payment of the principal amount. It was, however, indicated that such a principle would be subject to an exception when the parties might agree to the adjustment of the payment in any manner despite the decree. It was, accordingly, held that unless the Respondent herein was able to show that the parties had either impliedly or expressly agreed to adjustment of the said sum of Rs.89,78,84,930/- towards the principal amount, the Appellant herein would be entitled to appropriate the said amount fully towards the payment of interest.

9. It may be indicated that on 11th October, 2002, the Respondent herein undertook to deposit the principal amount awarded by the Arbitrator on or before 21st October, 2002. Such deposit was allowed to be made without prejudice to the rights and contentions of HUDCO in the proceedings before the High Court. Subsequently, by order dated 21st October, 2002, the said position was reiterated and it was recorded that the deposit made by the Respondent would be without prejudice to the rights and contentions of the parties in the

pending proceedings and without any liability on the part of the Respondent to make payment of further interest on the above-mentioned amount. The Division Bench took the view that having regard to the submissions made on behalf of the Respondent herein that the said amount of Rs.89,78,84,930/-was on account of the principal sum due and payable to the Appellant herein under the Award, and since no objection had been raised by the Appellant herein to such contention, it would have to be held that the said sum had, in fact, been adjusted towards the principal sum. After observing that before withdrawing the amount, the Appellant herein had neither sought permission of the Court to appropriate the sum towards interest nor given any intimation regarding withdrawal of the said amount, the Division Bench made it clear that the said amount would be appropriated towards the principal amount due and not towards interest. The Division Bench noted that the amount being withdrawn was without prejudice to the Appellant's rights towards payment of interest. The Division Bench took the view that since the Respondent herein was keen to avoid the possibility of paying further interest on the principal sum, in the event of its objections being dismissed, it offered to deposit the principal sum payable under the Award. The Division Bench observed that it made good business sense on the part of the Appellant, at that time, to accept the aforesaid amount towards the principal sum payable to it under the Award and to utilize the said sum for its business, instead of waiting for the final outcome of the litigation between the parties. The Division Bench came to the conclusion that it was in such circumstances that the Respondent had agreed to deposit the said sum of Rs.89,78,84,930/- specifically, towards the principal amount under the Award.

10. The Division Bench further observed that both the parties were duly represented by their respective counsel, when the Respondent herein offered and undertook to deposit the principal amount awarded by the Arbitrator and also insisted that it be recorded as part of the proceedings that the said payment was to be appropriated towards the principal amount awarded by the learned Arbitrator and was without any further liability on the part of the Respondent to make payment of further interest on the said amount. The Division Bench based its judgment, to a large extent, on the assumption that since the Appellant had remained silent to the said stipulation made on behalf of the Respondent, it would have to be presumed that the Appellant herein had consented to the said proposal.

11. On such reasoning, the Division Bench set aside the order passed by the learned Single Judge on 19th November, 2008, and after noting that a sum of Rs.50.54 crores had been deposited by the Respondent No.1 herein during the pendency of the Appeal, directed him to decide in the light of the judgment rendered by the Division Bench as to whether any further amount was payable by the Respondent No.1 herein to the Appellant in terms of the judgment. Consequential directions were also given on the outcome of such findings.

12. As mentioned hereinbefore, this Appeal is directed against the said judgment of the Division Bench dated 20th July, 2009.

13. Appearing for the Appellant, Mr. Ashok Desai, learned Senior Advocate, submitted that the crucial question to be considered and decided in this case was whether the amounts deposited or paid by HUDCO from time to time were to be appropriated first towards the

interest payable on the principal amount, following the decision in Smithaben's case (supra), or towards the principal, having regard to the provision in the Award relating to future interest which states that Leela Hotels is entitled to interest at the rate of 15% per annum from the date of the Award to the date of recovery. Mr. Desai submitted that the language of the Award is clear that the amount on which future interest has to be calculated includes interest awarded by the Arbitrator till the date of the Award. Mr. Desai submitted that it was not a case of compound interest, but a case of calculating simple interest on the amount as remained unpaid each year. Mr. Desai also submitted that after the Award had been passed, Leela Hotels had calculated interest on the basis of yearly rests, but subsequently gave up its claim on the basis of compound interest and limited its claim to simple interest after appropriating the amount received from HUDCO first towards interest and then towards principal, in accordance with the decision in Smithaben's case (supra). Mr. Desai submitted that the High Court had erred in accepting the calculation made by HUDCO which had not computed the amount awarded by the Arbitrator and had not computed future interest in terms of the Award.

14. On the second issue as to how the money paid by HUDCO is to be appropriated, Mr. Desai urged that in Smithaben's case (supra), it had been very clearly explained that in view of the consistent view taken first by the Privy Council and then by this Court, the general rule of appropriation of payment towards a decretal amount is that such an amount is to be adjusted firstly in accordance with the directions contained in the decree and in the absence of such directions, adjustment should firstly be made in payment of interest and costs and thereafter towards payment of the principal amount. Mr. Desai urged that the Division Bench had misapplied the ratio in Smithaben's case (supra) in assuming that the unilateral and voluntary deposit offered to be made by HUDCO in Court amounted to such deposit being made upon an implied acceptance that the same would be appropriated towards the principal amount. It was urged that the issue of implied agreement had never been raised or argued before the learned Single Judge and there is no pleading in support thereof. Mr. Desai also urged that the provisions of Sections 59 and 60 of the Indian Contract Act would also have no application to the facts of this case since they only applied in regard to distinct debts and not for enforcing a decree or what is regarded as a decree by legal fiction.

15. Mr. Desai submitted that the judgments of both the learned Single Judge and the Division Bench were centered around the payment of Rs.89.78 crores and the manner in which the same was to be appropriated. It was urged that since the same was paid after the passing of the decree, Leela Hotels is entitled to appropriate the said amount first towards the interest and costs and then towards the principal. Mr. Desai urged that on account of the wrong assumptions made by the Division Bench, its judgment under appeal was liable to be set aside.

16. On the other hand, appearing for HUDCO, Mr. Parag P. Tripathi, learned Additional Solicitor General, firstly urged that the issue regarding charging of compound interest did not survive, since the parties had agreed that no compound interest was payable in terms of the Award. As to the other question as to whether the sums deposited by HUDCO were to be appropriated first against the interest and then against the principal, it was contended that the

same was no longer res integra since the Award had made it clear that the first payment of Rs.76.28 crores had to be reduced from the principal amount which was due. The learned ASG submitted that it was for the first time before this Court that the Appellant has contended that the sum of Rs.76.28 crores would be appropriated first towards the interest and then towards the principal amount. The learned ASG pointed out that the refund had been made even prior to the making of a Reference to the Arbitrator or pronouncing of the Award i.e. at the pre-decretal stage and, accordingly, when the refund was made, there was no determination as to whether any payment was due from HUDCO to the Appellant. Accordingly, the contention of Leela Hotels that the said refund of Rs.76.28 crores was to be first appropriated towards the interest does not even arise. It was also submitted that the first payment of 50% of the awarded amount amounting to Rs.76.28 crores was, therefore, treated by the Award to be payment appropriated towards the principal and since the Award had not been challenged by the Appellant herein, the objections to the Award underSection 34 of the Act filed by the Respondent also stood concluded by the decision of this Court in Civil Appeal No.1094 of 2006.

17. As regards the second amount of Rs.89.78 crores tendered by HUDCO in the Delhi High Court on 21st October, 2002, during the pendency of the proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, it was submitted by the learned ASG that the same has to be appropriated towards the principal amount due from HUDCO to Leela Hotels. It was submitted that the said amount was in the nature of a pre-decretal payment and that the appropriation of the amount will have to be in the manner indicated by the Respondent to which there had been no demur.

18. It was next submitted by the learned ASG that analogy of a post-decretal payment cannot be applied to an Arbitration Award under the 1996 Act for the simple reason that the Arbitration Award under the 1996 Act does not attain the status or character of a decree within the meaning of the Code of Civil Procedure. It is to be executed "as if it were a decree", which means that it is not a decree.

19. It was thirdly urged by the learned ASG that assuming that the Award could be treated as a decree and the second payment is a post-decretal payment, even then the said payment will have to be treated as appropriation towards the principal sum, since Leela Hotels had been duly intimated of the nature of the deposit and by way of an implied contract, Leela Hotels had appropriated the said sum towards the principal.

20. The learned ASG referred to the decision of this Court in *NALCO Vs. Presteel & Fabrication Pvt.Ltd*[3]. wherein it had been held that there is no question of any decree being honoured pursuant to the passing of an Award and unlike a judgment within the meaning of the Civil Procedure Code, an Award remains unenforceable during the period available for challenging the Award, and, thereafter, till such time as the Petition under Section 34 is disposed of by the appropriate Court. Reference was also made to the decision of this Court in (1*) Paramjeet Singh Patheja Vs. ICDS Ltd*[4]. wherein it was explained that the Arbitrator is not a Court and accordingly an arbitration is not an adjudication and an Award is not a decree, (2) *Morgan Securities and Credit Pvt. Ltd. Vs. Modi Rubber Ltd*[5]*.and (3) West*

*Bengal Essential Commodities Supply Corporation Vs. Swadesh Agro Farming & Storage Pvt. Ltd. & Anr*[6]. where similar views have been expressed. Reference was also made to the decision of the Privy Council in the case of *Rai Bahadur Seth Nemichand Vs. Seth Radha Kishen*[7] wherein it was, inter alia, held that a creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor towards the payment of interest. However, a debtor might in making a payment stipulate that it was to be applied only towards the principal. If such a stipulation was made, the creditor was at liberty to refuse the payment on such terms, but then he would have to give back the money or the cheque by which the money was offered. If the amount was accepted then the creditor would be bound by the appropriation as proposed by the debtor.

21. As to the decision of this Court in Smithaben's case (supra), the learned ASG submitted that the payment was unilaterally made out of Court by the debtor with a covering letter, which was immediately responded to by the decree-holder who made it clear that he had appropriated the amount towards interest alone. This Court, therefore, held that the creditor was not bound by the appropriation so made by the debtor. The learned ASG submitted that in the instant case the Respondent had tendered a sum of Rs.89.78 crores in Court as payment towards the principal amount and the same had been accepted by Leela Hotels without objection and accordingly the decision in Smithaben's case (supra) would have no application to the facts of this case. The learned ASG submitted that there being little or no substance in the Appeal, the same was liable to be dismissed with costs.

22. Of the two issues involved in this matter, it appears that the issue relating to charging of compound interest did not survive since the parties had agreed that no compound interest would be payable in terms of the Award. In fact, although such an assertion had been made by the learned ASG, the same was not seriously opposed by Mr. Desai who had taken the stand that this was not a case of compound interest, but a case of calculating simple interest on the amount as remained unpaid. Mr. Desai also accepted the position that after the Award had been passed by the learned Arbitrator, Leela Hotels had calculated the interest on the basis of yearly rests, but had subsequently given up its claim of compound interest and limited its claim to simple interest after appropriating the amount received from HUDCO, first towards interest and then towards the principal in accordance with the decision in Smithaben's case (supra).

23. Consequently, the only issue which remains for decision is whether the amounts deposited and/or paid by HUDCO to M/s Leela Hotels in terms of the Award of the learned Arbitrator, was first to be appropriated towards payment of the interest due on the principal sum or whether the same was to be appropriated against the principal sum itself.

24. From the submissions made on behalf of the respective parties, the following payments appear to have been made by HUDCO to the Appellant herein:-

"(i) 12.07.1999 - Rs.76.28 crores

(ii) 21.10.2002 - Rs.89.78 crores

(iii) March 2006 - Rs.59.61 crores

(iv) May 2008 - Rs.48.09

crores and

(v) May 2009 - Rs.50.54 crores.

It has been contended by the learned ASG that the amount of Rs.89.78 crores having been paid towards the principal amount, the other payments made subsequently were towards interest and, accordingly, there was no amount due and payable to the Appellant. On the other hand, it has been claimed on behalf of the Appellant that the said sum of Rs.89.78 crores had been appropriated against the interest as per the decision in Smithaben's case (supra), and, accordingly, the stand taken on behalf of HUDCO was erroneous.

25. As indicated hereinbefore, the submissions made by the learned ASG on behalf of HUDCO was based on the proposition as contained in Sections 59 and 60 of the Indian Contract Act, 1872, on account of the stipulation recorded on behalf of HUDCO that the amount of Rs.89.78 crores was being tendered towards the principal sum, to which there was no objection from the Appellant and, accordingly, it must be held that that since the amount had been received without demur, such payment fell within the provisions of Section 59 of the aforesaid Act. In fact, the Division Bench of the High Court proceeded to consider such payment and acceptance to be a voluntary acceptance by the Appellant of the aforesaid amount as appropriation towards the principal as it made good business sense to accept the same and to utilise the same in spite of waiting for something indefinite in the future. Such a submission, though legal and correct, is not supported by the materials on record.

26. Admittedly, there was no agreement between the parties as to how the amounts to be paid in terms of the Award were to be appropriated by the Appellant. Accordingly, in terms of the well settled principle that in such cases it was for the creditor to appropriate such payment firstly against the interest payable, would, in our view, be squarely attracted to the facts of this case.

As was laid down by the Privy Council in *Meka Venkatadri Appa Rao Bahadur Zamindar Garu & Ors. Vs. Raja Parthasarathy Appa Rao Bahadur Zamindar Garu*[8] and later reiterated in Rai Bahadur Seth Nemichand's case (supra), when monies are received without a definite appropriation on the one side or the other, the rule which is well established in ordinary cases is that in those circumstances, the money is first applied in payment of interest and when that is satisfied, in payment of the capital. In the latter case, the said principal was restated and it was indicated that a creditor to whom principal and interest are owed is entitled to appropriate any indefinite payment which he gets from a debtor to the payment of interest. It was also indicated that a debtor might in making a payment stipulate that it was to be applied only towards the principal. If he did so, the creditor was at liberty to refuse payment on such terms, but then he would have to give back the money or the cheque by which the money is proffered and if the same is accepted, the creditor would then be bound by the appropriation as proposed by the debtor.

27. In the instant case, a unilateral assertion had been made by HUDCO as the debtor that the sum of Rs.89.78 crores was being tendered as payment towards the principal amount and that there was, therefore, no other amounts due and payable to the creditor Leela Hotels Ltd. The principle as laid down in the two aforesaid decisions, and as subsequently followed in Smithaben's case (supra) will not apply in the facts of the instant case, since the amount as deposited was accepted by the Appellant without prejudice to its rights and contentions in the appeal. Since the amount had been accepted on protest, the principle laid down in Rai Bahadur Seth Nemichand's case (supra) will have no application.

28. The philosophy behind the principle set out in Meka Venkatadri's case (supra) and as reiterated in Rai Bahadur Seth Nemichand's case (supra) and also in Smithaben's case (supra) and then consistently followed by this Court, is that a debtor cannot be allowed to take advantage of his default to deny to the creditor the amount to which he would be entitled on account of such default, by way of elimination of the principal amount due itself, unless, of course, the provisions of Section 59 of the Indian Contract Act, 1872, were attracted or there was a separate agreement between the parties in that regard. That is not so in the instant case and, accordingly, the creditor cannot be denied its dues on a unilateral stipulation that the amount of Rs.89.78 crores was being deposited as against the principal sum due in terms of the Award. Since the said amount was accepted by the Appellant on protest, it would be entitled to appropriate the same against the interest which was due and payable till that date on the principal amount, as has been asserted by it.

29. In our view, the Division Bench of the Delhi High Court erred in presuming that the said amount had been accepted by the Appellant on account of good business sense in view of the uncertainty of the final outcome of the case. In our view, the Division Bench of the High Court should have proceeded on the basis of the principles of law as laid down by this Court in Smithaben's case (supra), keeping in mind the earlier decisions of the Privy Council in both Meka Venkatadri's case (supra) and Rai Bahadur Seth Nemichand's case (supra) in interfering with the judgment of the learned Single Judge. The Division Bench seems to have erroneously taken the presence of the learned counsel for the Appellant, when the aforesaid undertaking of the Respondent was recorded, in coming to the conclusion that since

no objection had been raised with regard to the said deposit, it must be presumed that it had the consent of the Appellant and hence was covered by the provisions of Sections 59 and 60 of the Indian Contract Act, 1872.

30. Regarding the question as to whether the Award of the learned Arbitrator tantamounts to a decree or not, the language used in Section 36 of the Arbitration and Conciliation Act, 1996, makes it very clear that such an Award has to be enforced under the Code of Civil Procedure in the same manner as it were a decree of the Court. The said language leaves no room for doubt as to the manner in which the Award of the learned Arbitrator was to be accepted.

31. Hence, the submissions made by the learned ASG on behalf of HUDCO cannot be accepted and are, therefore, rejected. Consequently, the Appeal succeeds and the judgment and order of the Division Bench of the High Court is set aside and that of the learned Single Judge is restored.

32. Having regard to the nature of the issues involved in this case, the parties will bear their own costs.

Judgment Referred.

[1]*(1999) 3 SCC 0080*
[2]*AIR 1970 SC 0161*
[3]*(2004) 1 SCC 0540*
[4]*(2006) 13 SCC 0322*
[5]*(2006) 12 SCC 0642*
[6]*(1999) 8 SCC 0315*
[7]*AIR 1922 PC 0026*
[8]*AIR 1922 PC 0233*