ARBITRATORS' POWER TO AWARD INTEREST ON INTEREST OR COMPOUND INTEREST FOR FUTURE PERIOD, IN THE ABSENCE OF CONTRACT BETWEEN THE PARTIES

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Introduction:

Will arbitral tribunal have power to award interest on interest for post award period, in the absence of agreement between the parties, was one of the questions considered by a two judge's bench of the Hon'ble Supreme Court of India in the case of State of Haryana & Others v. S.L. Arora & Company[1]. After detailed scrutiny of the relevant legal provisions as well as judicial precedents, the Hon'ble Apex Court recorded the following conclusion:

> *"Section 31(7) makes no reference to payment of compound interest or payment of interest upon interest. Nor does it require the interest which accrues till the date of the award, to be treated as part of the principal from the date of award for calculating the post-award interest. The use of the words "where and in so far as an arbitral award is for the payment of money" and use of the words "the arbitral tribunal may include in the sum for which the award is made, interest..... on the whole or any part of the money" in clause (a) and use of the words "a sum directed to be paid by an arbitral award shall carry interest" in clause (b) of sub-section (7) of section 31 clearly indicate that the section contemplates award of only simple interest and not compound interest or interest upon interest. `A sum directed to be paid by an arbitral award' refers to the award of sums on the substantive claims and does not refer to interest awarded on the `sum directed to be paid by the award'. In the*

[1] (2010) 3 SCC 690

absence of any provision for interest upon interest in the contract, the arbitral tribunals do not have the power to award interest upon interest, or compound interest, either for the pre-award period or for the post- award period."

The Apex Court came to a conclusion that in the absence of any agreement between the parties providing for payment of compound interest, tribunal shall have power to award simple interest for pre-award and future period.

The correctness of the decisions in the case of S.L. Arora (supra) became the subject matter in a subsequent case being heard by two judges' bench of the Hon'ble Supreme Court in the case of *Hyder Consulting (UK) Ltd. v. Governor, State of Orissa*[2]. As the decision in the case of S.L. Arora was also a two judges' bench judgement, the same could not have been overruled by another bench of co-equal strength. Accordingly, the issue in Hyder Consulting (supra) was placed before a larger bench of three judges vide reference order dated 13.3.2012. The larger bench decided the case by a majority of 2:1 ultimately holding that decision in S.L. Arora was wrong and the arbitrators do have power to award compound interest for post award period. Interestingly, all the three hon'ble judges wrote their own judgments with two hon'ble judges writing the majority decision and the then hon'ble Chief Justice writing the minority decision. Therefore, post Hyder Consulting, the net result was that judgment in S.L. Arora was overruled by a larger bench but by majority decision of two judges. A question that needs to be considered here is as to whether a legal requirement of a two judges' bench decision being overruled only by a larger bench and not by another bench of two judges', stood complied in letter and spirit?

While it is true that in case of difference of opinion between the two judges hearing any matter, the same needs to be placed before a larger bench of three judges and their decision, even if by a majority of 2:1, shall be final and binding. However, can the same logic be applied in a situation where a correctness of an earlier decision of two judges' bench becomes subject matter before a three judges' bench and the said three judges' bench decides the issue by way of a majority? In such a situation, where the earlier decision is affirmed, either by unanimity or majority, one can still arguably state that the issue has attained finality. However, in case where the earlier decision is overruled, as was done in the case of Hyder Consulting (supra), the situation is that of the two judges sitting on different point of time, taking contrary views leading to clear lack of consistency. It is also a settled position in law that there has to be consistency and certainty so as to create confidence, as has been held by

[2] AIR 2015 SC 189

Hon'ble Supreme Court in the case of Government of Andhra Pradesh and Ors. vs. A.P. Jaiswal and Ors.3 :

> *"Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the courts have evolved the rule of precedents, principle or stare decisis etc. These rules and principles are based on public policy and if these are not followed by courts then there will be chaos in the administration of justice…."*

One may arguably state legal requirement stood fulfilled by the judgment of Hyder Consulting, however, on a more pragmatic consideration one finds that the issue still lacks certainty. A legalistic way of looking at the situation created by Hyder Consulting judgement is that three judges' bench has held that the arbitrators have power to grant interest on interest, but it is not a realistic approach in as much as one of the hon'ble judges has taken a completely contrary view and has gone on to hold that decision in SL Arora (supra) was a correct enunciation of law. Therefore, out of total five judges (two in SL Arora and three in Hyder Consulting), all of coordinate jurisdiction, three judges have held that decision in SL Arora is correct while two have held to the contrary. Seen from this angle, the question that arises is should overruling of a decision of the supreme court depend merely and purely on number of judges hearing the later matter regarding correctness of the former?

It appears that the issue regarding power of the arbitrator to award compound interest for future period needs to be decided by yet another bench, may be a five judges' bench of the Hon'ble Supreme Court of India. In addition to deciding the said issue conclusively, the issue that needs deliberation for future is as to whether a concurring/majority decision in the subsequent case must necessarily be of more number of judges than those deciding the earlier case. The one judicial pronouncement highlighting this issue was in the case of Emperor vs. Ningapa Ramappa Kurbar[4] where Bombay High Court appears to have addressed itself to somewhat connected issue while holding under:

> *"Apparently it was considered that five Judges, by a majority of four to one, could overrule a unanimous decision of four Judges, the net result being that the opinion of four Judges prevailed over the opinion of five Judges of co-ordinate jurisdiction. There seems to be very little authority on the powers and constitution of a full bench. There can be no doubt that a full bench can overrule a division bench, and that a full bench must consist of three or more Judges; but it would seem anomalous to hold that a later full bench can*

[3] (2001) SCC(LS) 316.
[4] (1941) 43 BOMLR 864

overrule an earlier full bench, merely because the later bench consists of more Judges than the earlier. If that were the rule, it would mean that a bench of seven Judges, by a majority of four to three, could overrule a unanimous decision of a bench of six Judges, though all the Judges were of co-ordinate jurisdiction."

Conclusion:

The law laid down by the Apex Court in Hyder Consulting is final and binding and accordingly judgment in SL Arora stands overruled, though in view of the issues explained herein above, the legal requirement cannot be said to have been fulfilled in spirit. Hopefully, the Apex Court will revisit its decision in Hyder Consulting, in the near future and settle the issue of arbitrators' power to award compound interest for future period, by a well-considered and authoritative decision.