

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4197 OF 2009
(Arising out of SLP [C] No.15980 of 2008)

M/s. Sayeed Ahmed & Co.

... Appellant

Vs.

State of U P & Ors.

... Respondents

J U D G M E N T**R. V. Raveendran J.**

Leave granted. The issue in this appeal is whether the Arbitrator can award interest for pre-reference period and *pendente lite*, when the contract prohibits the employer from entertaining any claim for interest.

2. The respondents entrusted a construction work to appellant under an agreement dated 30.3.1990. The work was completed by the appellant on 31.3.1996. Disputes arose between the parties by reason by rejection of claims of appellant and they were referred to Arbitration on 13.3.1997. Before the Arbitrator, the appellant made 11 claims aggregating to Rs.133.43 lakhs. The

Arbitrator made an award dated 31.7.2001 directing the respondents to pay to the appellant the following:-

- (i) Rs.24,18,586/- with interest at 18% PA from 1.4.1996 till date of payment.
- (ii) The amount if any, due to appellant on finalizing the final bill with interest at 14% PA from 1.5.1996 till date of payment; and
- (iii) The security deposit amount due with interest at 12% PA from 1.10.1996 till date of payment.

3. The civil court by its judgment dated 7.12.2005 dismissed the application to set aside the award, filed by the respondents under section 34 of the Arbitration and Conciliation Act, 1996 ('Act' for short). The appeal filed by the respondents was allowed in part by the High Court by impugned judgment dated 27.2.2008. The High Court held that having regard to the bar contained in clause G 1.09 of the contract, the arbitrator had no power to award interest and consequently, set aside that part of the award granting interest till date of award. The High Court however granted interest at 6% PA 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 to 6% per annum, the appellant has filed this appeal.

4. At the outset, it is necessary to refer to an erroneous assumption made by the High Court in para 31 of the impugned judgment. It has proceeded on the

basis that the sum of Rs.24,18,586/- awarded by the Arbitrator includes the amount due in regard to the final bill as also the amount of security deposit and that interest has been awarded from different dates, on different parts of the said sum of Rs.24,18,586/-. But the award of Rs.24,18,586/- did not include the amount due in regard to the final bill or security deposit . In fact the arbitrator did not quantify the amount due in regard to the final bill or the security deposit, but directed the respondents to calculate and pay the same with interest as indicated in the award. We give below the break up of Rs.24,18,586/- awarded by the arbitrator, to show that the said amount did not include the final bill dues or security deposit :

<u>Sl. No.</u>	<u>Claim No.</u>	<u>Description of claim</u>	<u>Amount awarded</u>
(i)	(1)	For non-availability of site	Rs.6,30,130/-
(ii)	(2)	For non-payment for 20,000 cubic meters of earth work	Rs.3,90,000/-
(iii)	(3)	For non-availability of drawings & design	Rs. 20,000/-
(iv)	(4)	For variations in quantity of different items of work	Rs.1,03,500/-
(v)	(5)	For extra items	Rs. 72,956/-
(vi)	(8)	For stoppage of work	Rs. 31,500/-
(vii)	(9)	For non-availability of cement	Rs. 84,000/-
(viii)	(10)	For delay in completion of work	Rs. 1,55,000/-

Re : Interest from the date of cause of action to date of award

6. The issue regarding interest as noticed above revolves around clause G1.09 of Technical Provisions forming part of the contract extracted below :

“G 1.09 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 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.”

7. Sub-section (i) of Section 3 of the Interest Act 1978 provides that a court (as also an arbitrator) can in any proceedings for recovery of any debt or damages, allow interest to the person entitled to the debt or damages 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 related 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 proceedings; (b) if the proceedings did 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. Sub-section (3) of section 3 provides that nothing in section 3 shall apply to any debt or damages upon which interest is payable as of right by virtue of any

agreement; or to any debt *or damages upon which payment of interest is barred by virtue of an express agreement.*

8. The Arbitration Act, 1940 did not contain any specific provision relating to power of Arbitrator to award interest. That led to considerable confusion about the power of Arbitrators in regard of award of interest from the date of cause of action to date of award, that is pre-reference period (from the date of cause of action upto the date of reference) and pendente lite (from the date of reference to date of award). Ultimately, this Court made it clear that the Arbitrator had the jurisdiction and authority to award interest for the three periods namely pre-reference period, pendente lite and future period (from the date of award) if there was no express bar in the contract regarding award of interest – vide *Secretary, Irrigation Department, Govt. of Orissa vs. G.C. Roy* – 1992 (1) SCC 508, *Executive Engineer, Dhenkanal Minor Irrigation Division vs. N.C. Budharaj* – 2001 (2) SCC 721 as also the decision in *Bhagawati Oxygen Ltd. vs. Hindustan Copper Ltd.* - 2005 (6) SCC 462.

9. Two more decisions dealing with cases arising under Arbitration Act, 1940 requires to be noticed. In *Superintending Engineer v. Subba Reddy* [1999 (4) SCC 423] this Court held that interest for pre-reference period can be awarded only if there was an agreement to that effect or if it was allowable under the Interest Act, 1978. Therefore, claim for interest for pre-reference

period, which is barred as per the agreement or under the Interest Act, 1978 could not be allowed. This Court however held that Arbitrator can award interest *pendente lite* and future interest. The principles relating to interest were summarized by this court in *State of Rajasthan v. Ferro Concrete Construction Pvt. Ltd.* (CA No.2764 of 2009 decided on 22.4.2009) thus:

- (a) where a provision for interest is made on any debt or damages, in any agreement, interest shall be paid in accordance with the such agreement.
- (b) Where payment of interest on any debt or damages is barred by express provision in the contract, no interest shall be awarded.
- (c) Where there is no express bar in the contract and where there is also no provision for payment of interest then the principles of section 3 of Interest Act will apply and consequently interest will be payable:

where the proceedings relate to a debt (ascertained sum) 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;

(ii) where the proceedings is for recovery of damages or for recovery of a debt which is not payable at a certain time, then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed.

- (d) Payment of interest *pendente lite* and future interest shall not be governed by provisions of Interest Act, 1978, but by provisions of section 34 of Code of Civil Procedure 1908 or the provisions of law governing Arbitration as the case may be.

10. The Legislature while enacting the Arbitration and Conciliation Act, 1996, incorporated a specific provision in regard to award of interest by Arbitrators. Sub-section(7) of section 31 of the Act deals with the Arbitrator's

power to award interest. Clause (a) relates to the period between the date on which the cause of action arose and the date on which the award is made. Clause (b) relates to the period from the date of award to date of payment. The said sub-section (7) is extracted below :

“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.

Having regard to sub-section (7) of section 31 of the Act, the difference between pre-reference period and pendente lite period has disappeared in so far as award of interest by arbitrator. The said section recognises only two periods and makes the following provisions :

(a) In regard to the period between the date on which the cause of action arose and the date on which the award is made (pre-reference period plus pendente lite), the arbitral tribunal may award interest at such rate as it deems reasonable, for the whole or any part of the period, *unless otherwise agreed by the parties*.

(b) For the period from the date of award to the date of payment the interest shall be 18% per annum if no specific order is made in regard to interest. The arbitrator may however award interest at a different rate for the period between the date of award and date of payment.

The decisions of this Court with reference to the awards under the old Arbitration Act making a distinction between the pre-reference period and *pendente lite* period and the observation therein that arbitrator has the discretion to award interest during *pendente lite* period inspite of any bar against interest contained in the contract between the parties are not applicable to arbitrations governed by the Arbitration and Conciliation Act 1996.

11. Clause G-1.09 makes it clear that no interest or damages will be paid by Government, in regard to : (i) any money or balance which may be lying with the Government; (ii) any money which 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; (iii) any delay on the part of the Engineer-in-Charge in making periodical or final payment; or (iv) any other respect whatsoever. The clause is comprehensive and bars interest under any head in clear and categorical terms. In view of clause (a) of sub-section (7) of section 31 of the Act, it is clear that the Arbitrator could not have awarded interest upto the date of the award, as the agreement between the parties barred payment of interest. The bar against award of interest would operate not only during the pre-reference period that is up to 13.3.1997 but also during the *pendente lite* period that is from 14.3.1997 to 31.7.2001.

12. The appellant strongly relied upon the decision of this Court in *State of U.P. v. Harish Chandra & Co.* [1999 (1) SCC 63], to contend that clause 1.09 of the contract did not bar the award of interest. The clause barring interest that fell for consideration in that decision was as under :

“1.9 No claim for delayed payment due to dispute etc.—No claim for interest or damages will be entertained by the Government with respect to any moneys or balances which may be lying with the Government owing to any dispute, difference; or misunderstanding between the Engineer-in-Charge in marking periodical or final payments or in any other respect whatsoever.”

This Court held that the said clause did not bar award of interest on any claim for damages or for claim for payment for work done. We extract below the reasoning for such decision :

“A mere look at the clause shows that the claim for interest by way of damages was not to be entertained against the Government with respect to only a specified type of amount, namely, any moneys or balances which may be lying with the Government owing to any dispute, difference between the Engineer-in-Charge and the contractor; or misunderstanding between the Engineer-in-Charge and the contractor in marking periodical or finally payments or in any other respect whatsoever. The words ‘or in any other respect whatsoever’ also referred to the dispute pertaining to the moneys or balances which may be lying with the Government pursuant to the agreement meaning thereby security deposit or retention money or any other amount which might have been with the Government and refund of which might have been withheld by the Government. *The claim for damages or claim for payment for the work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government.* Consequently, on the express language of this clause, there is no prohibition which could be culled out against the respondent-contractor that he could not raise the claim for interest by way of damages before the arbitrator on the relevant items placed for adjudication.”

In *Harish Chandra (supra)* a different version of clause 1.09 was considered. Having regard to the restrictive wording of that clause, this Court held that it did not bar award of interest on a claim for damages or a claim for payments for work done and which was not paid. This Court held that the said clause barred award of interest only on amounts which may be lying with the Government by way of security deposit/retention money or any other amount refund of which was withheld by the government. But in this case, clause G-1.09 is significantly different. It specifically provides that no interest shall be payable in respect of any money that may become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge and contractor or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or in respect of any other respect whatsoever. The bar under clause G-1.09 in this case being absolute, the decision in *Harish Chandra* will not assist the appellant in any manner.

JUDGMENT

13. The appellant next relied upon the judgment of this Court in *State of Orissa vs. B.N. Agarwalla* [1997 (2) SCC 469]. In that case, this Court held that Arbitrator has jurisdiction to award (i) interest for pre-reference period, (ii) interest for *pendente lite* and (iii) future interest. This Court also held that the following part of clause (4) of the contract dealing with “Rates, materials and

workmanship” did not bar award of interest by the arbitrator on the claims of the contractor :

“No interest is payable on amount withheld under the item of the agreement”.

Interpreting the said clause (which provided that interest was not payable on the amount which was withheld), this Court held that it referred only to the amount withheld by the employer State towards retention money for the defect liability period. This Court in fact clarified that the position that if the terms of contract expressly stipulated that no interest would be payable, then arbitrator would not get the jurisdiction to award interest. As clause G-1.09 in the present case contains an express bar and is different from the clause considered in *B.N. Agarwalla (supra)*, the said decision is also of no assistance.

14. The learned counsel for the appellant submitted that even though the bar in clause G-1.09 may prohibit the employer from paying interest, it does not bar the Arbitrator from awarding interest. For this purpose, he relied upon the decision of this Court in *Board of Trustees for Port of Calcutta vs. Engineers-De-Space-Age* [1996 (1) SCC 516]. In that case, this Court considered the validity of award of interest pendente lite by the Arbitrator notwithstanding the prohibition contained in the contract against payment of interest on delayed payments. The following clause fell for consideration of this Court in that case :

“No claim for interest will be entertained by the Commissioners with respect to any money or balance which may be in their hands owing to any dispute

between themselves and the Contractor or with respect to any delay on the part of the Commissioners in making interim or final payment or otherwise.”

After referring to the Constitution Bench decision in *G. C. Roy (supra)* this Court held :

“We are not dealing with a case in regard to award of interest for the period prior to the reference. We are dealing with a case in regard to award of interest by the arbitrator post reference. The short question, therefore, is whether in view of sub-clause (g) of clause 13 of the contract extracted earlier the arbitrator was prohibited from granting interest under the contract. Now the term in sub-clause (g) merely prohibits the Commissioner from entertaining any claim for interest and does not prohibit the arbitrator from awarding interest. The opening words ‘no claim for interest will be entertained by the Commissioner’ clearly establishes that the intention was to prohibit the Commissioner from granting interest on account of delayed payment to the contractor. Clause has to be strictly construed for the simple reason that as pointed out by the Constitution Bench, ordinarily, a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been delayed beyond reasonable time he can legitimately claim to be compensated for that delay whatever nomenclature one may give to his claim in that behalf. If that be so, we would be justified in placing a strict construction on the term of the contract on which reliance has been placed. Strictly construed the terms of the contract merely prohibits the Commissioner from paying interest to the contractor for delayed payment but once the matter goes to arbitration the discretion of the arbitrator is not, in any manner, stifled by this term of the contract and the arbitrator would be entitled to consider the question of grant of interest pendente lite and award interest if he finds the claim to be justified. We are, therefore, of the opinion that under the clause of the contract the arbitrator was in no manner prohibited from awarding interest pendente lite.”

This Court held that the bar in the contract operated only for the pre-reference period and that the Arbitrator had the power and authority to award interest pendente lite at his discretion, without reference to the bar in the contract. The observation in *Engineers-De-Space-Age (supra)* that the term of the contract merely prohibits the department/employer from paying interest to the contractor

for delayed payment but once the matter goes to arbitrator, the discretion of the arbitrator is not in any manner stifled by the terms of the contract and the arbitrator will be entitled to consider and grant the interest *pendente lite*, cannot be used to support an outlandish argument that bar on the Government or department paying interest is not a bar on the arbitrator awarding interest. Whether the provision in the contract bars the employer from entertaining any claim for interest or bars the contractor from making any claim for interest, it amounts to a clear prohibition regarding interest. The provision need not contain another bar prohibiting Arbitrator from awarding interest. The observations made in the context of interest *pendente lite* cannot be used out of contract.

15. The learned counsel for appellant next contended on the basis of the above observations in *Engineers-De-Space-Age*, that even if clause G-1.09 is held to bar interest in the pre-reference period, it should be held not to apply to the *pendente lite* period that is from 14.3.1997 to 31.7.2001. He contended that the award of interest during the pendency of the reference was within the discretion of the arbitrator and therefore, the award of interest for that period could not have been interfered by the High Court. In view of the Constitution Bench decisions in *G.C. Roy* and *N.C. Budharaj* (supra) rendered before and after the decision in *Engineers-De-Space-Age*, it is doubtful whether the observation in *Engineers-De-Space-Age* in a case arising under Arbitration Act,

1940 that Arbitrator could award interest *pendente lite*, ignoring the express bar in the contract, is good law. But that need not be considered further as this is a case under the new Act where there is a specific provision regarding award of interest by Arbitrator.

Re : interest from the date of award

18. The arbitrator awarded interest at the rate of 18% per annum on Rs.24,18,586/-, 14% per annum on amount found due on finalisation the final bill and 12% per annum on the security deposit amount if any that has to be refunded. As noticed above, clause (b) of sub-section (7) of section 31 of the Act provides that if the award does not otherwise direct, the amount awarded shall carry interest as directed by the award and in the absence of any provision of 18% per annum. Any provision in the contract barring interest, will therefore operate only till the date of award and not thereafter. The arbitrator has awarded interest at three different rates on three different amounts which are all less than 18% per annum. The said award of interest by the arbitrator is not contrary to section 31(7)(b) of the Act. Unless the award of interest is found to be unwarranted for reasons to be recorded, the court should not alter the rate of interest awarded by the Arbitrator. The High Court has not assigned any reasons for reducing the rate of interest to 6% per annum. Therefore, such reduction cannot be sustained.

19. In view of the above, we allow this appeal in part and modify the judgment of the High Court as follows :

- (a) The Judgment of the High Court setting aside the award of interest upto the date of award is affirmed.
- (b) The decision of the High Court reducing the rate of interest to 6% per annum from the date of award is set aside. The rate of interest on the amounts due and payable under the award, from the date of award till date of payment shall be in terms of the award of the Arbitrator.
- (c) Parties to bear their respective costs.

New Delhi;
July 9, 2009.

.....J.
(R V Raveendran)

.....J.
(P. Sathasivam)

JUDGMENT