REPORTABLE

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELATE JURISDICTION**

**CIVIL APPEAL No. 3682 OF 2007**

**Tehri Hydro Dev. Corpn. Ltd.& Anr. ... Appellants**

**Versus**

**Jai Prakash Asso. Ltd. ... Respondent**

# J U D G M E N T



**RANJAN GOGOI, J**

This appeal is directed against the judgment and order dated 20th July, 2006 passed by the High Court of Uttaranchal at Nainital whereby the decree passed by the learned trial court under the Arbitration Act, 1940 (hereinafter referred to as 'the Act') has been modified. The

terms of award as passed by the learned Arbitrator and the decree passed by the learned trial court as well as the modification thereof by the High Court will now have to be noticed :

2. The appellants and the respondent herein had entered into a contract for execution of certain works in connection with the Tehri Hydro Dam Project. The agreement between the parties was executed on 29th March, 1978 and the works in question were completed on 31st December, 1985. The completion certificate was issued by the competent authority of the appellant-Corporation on 27th April, 1986. As the final bill of the respondent-contractor had not been prepared and security money, furnished by way of bank guarantee was not released, the parties went to arbitration in accordance with the Arbitration clause under the contract/agreement. In the course of the aforesaid Arbitration proceeding the appellant-Corporation submitted a final bill which according to the respondent-Contractor

entitled it to receive a sum of Rs.10,17,461.09 on account of work done besides a sum of Rs. 12..50 lakhs that was lying in deposit with the Corporation. As the amounts due. according to the respondent-contractor, had become crystallized, another arbitration proceeding between the parties for the aforesaid specific claims commenced in accordance with the arbitration clause of the agreement.

3. The award in the aforesaid arbitration proceeding was passed on 29th January, 1996 holding the respondent – contractor to be entitled to the sum of Rs. 10,17,461/- with the interest at the rate of 6% per annum from the date of invocation of the claim till the date of the award and at the rate of 12% per annum from the date of the award till payment or till the award is made Rule of court, whichever is earlier. Insofar as the claim of the respondent – contractor to the sum of Rs. 12.50 lakhs lying in deposit with the Corporation, the Arbitrators held the said amount to be beyond the scope of the dispute raised in the

arbitration proceeding. Accordingly, the respondent – contractor was left with the option of settling the said claim in an amicable manner or by resorting to a civil suit for recovery of the same.

4. Objections against the specific parts of the award by which the respective parties felt aggrieved were filed before the learned District Judge, Tehri, Garhwal. The learned District Judge by his order dated 15th October, 1997 upheld the claim of the respondent – contractor to the sum of Rs.10,17,461/- lakhs as awarded. In so far as the claim of Rs.12.50 lakhs is concerned, the learned trial court, notwithstanding the fact that the arbitrator did not decide the said claim, went into the issue and held the respondent – contractor to be entitled to the said amount also. Thereafter, a decree was passed in respect of the two amounts alongwith interest thereon at the rate of 12% *pendente lite* and 6% for the post award period. Aggrieved by the aforesaid order passed by the learned District Judge,

Tehri Garhwal, the appellant moved the High Court of Uttaranchal by filing an appeal under the provisions of the Act. The High Court by its order dated 20th July, 2006 allowed the appeal in part. While the claim of Rs.10,17,461/- awarded in favour of the respondent-contractor was maintained in so far as the claim of Rs. 12.50 lakhs is concerned, the High Court took the view that the aforesaid amount could not have been awarded by the learned trial court as the said entitlement was not gone into by the learned Arbitrators. Accordingly, the High Court remanded the aforesaid claim to be settled by an Arbitrator appointed by it. Insofar as the question of interest is concerned, the High Court did not deal with the said aspect of the matter at all. Aggrieved, the Corporation is before this court challenging the judgment and order dated 20th July, 2006 passed by the High Court of Uttaranchal.

5. We have heard Mr. Puneet Taneja, learned counsel for the appellants and Mr. S.B. Upadhyay, learned senior counsel for the respondent.

6. Learned counsel for the appellants has contended that the claims of the respondent - contractor for the unpaid amounts under the final bill as well as for return/refund of security deposit, including amounts furnished by way of bank guarantee, was the subject matter of an earlier arbitration between the parties. In the course of the said arbitration the final bill was placed before the arbitrators by the Corporation. On scrutiny of the aforesaid final bill the respondent-contractor claimed the two specific amounts in question and resorted to another process of arbitration without seeking leave in the first arbitration proceeding to have recourse to a second round of arbitration. The arbitration proceeding leading to the award is, therefore, without any authority of law. Specifically, insofar as the amount of Rs.12.50 lakhs is concerned, according to the learned counsel for the appellants, the said amount was not

adjudicated upon by the Arbitrators and the same was to be recovered by an amicable process or by resorting to a civil suit. In such a situation it was clearly beyond the power of the learned trial court to hold the said claim in favour of the respondent-contractor. Though the High Court was justified in setting aside the said claim of Rs.12.50 lakhs for the aforesaid reason, it could not have directed adjudication of the said issue by an Arbitrator nominated by it as has been done by the impugned order of the High Court. According to the learned counsel, the adjudication of the said claim of the respondent – contractor, if at all, should have been directed by a process contemplated by the specific provisions of the Arbitration agreement between the parties.



Insofar as the grant of interest is concerned, learned counsel for the appellants has relied on Clauses 1.2.14 and 1.2.15 of Part II of the contract agreement between the parties to contend that under the aforesaid clauses of the agreement governing the parties there was a specific bar to

grant of interest. Relying on several judgments of this court, details of which will be noticed in the discussions that will follow, learned counsel has contended that the award of interest in favour of the respondent-contractor being clearly contrary to the terms of the agreement between the parties is wholly untenable and therefore needs to be interfered with by this court.

7. Controverting the submissions advanced on behalf of the appellants, learned counsel for the respondent – contractor has contended that the appellants had actively participated in the proceeding before the Arbitrators and therefore, cannot, at this stage, question the jurisdiction of the Arbitrators to make the award in question. It is contended that the claim of the respondent to the amount of Rs.10,17,461/- having been held in its favour all along, the same does not disclose any basis for interference. In so far as the amount of Rs.12.50 lakhs is concerned the only issue that will require deterimination is the manner in which the de novo adjudication is required to be carried out. So far as

the question of interest is concerned, learned counsel has placed before the court the UP Civil Laws (Reforms and Amendment) Act, 1976 by which certain provisions of the Arbitration Act of 1940 have been amended in its application to the State of UP. The attention of the court has been drawn to Paragraph 7A which has been added after Para 7 of the First Schedule to the Act. According to the learned counsel, Paragraph 7A authorized and empowered the arbitrator as well as the courts below to grant interest. Learned counsel has also relied on the decisions of this court *in* *Indian oil Corporation Ltd.* vs. *Amritsar Gas service and others*[1], *State of Orissa* vs. *B.N. Agarwalla*[2] and *Asian Techs Limited vs . Union of India and others*[3] 2009 10 SCC 354 (para 21) in support of the contentions advanced.



1 **[(1991) 1 SCC 533**
2 **[(1997) 2 SCC 469]**
3 **2009 10 SCC 354 (para 21).**

8. Para 7A of the U.P. Civil Laws (Reforms and Amendment) Act, 1976 referred to above may now be reproduced :

> "7A. Where and in so far as an award is for the payment of money, the arbitrators of the umpire may, in the award, order interest at such rate as the arbitrators or umpire may deem reasonable to be paid on the principal sum awarded, from the date of the commencement of the arbitration as defined in sub-section (3) of section 37, to the date of award, in addition to any interest awarded on such principal sum for any period prior to such commencement, with further interest at such rate not exceeding six per cent per annum as the arbitrators or umpire may deem reasonable on such principal sum from the date of the award to the date of payment or to such earlier date as the arbitrators or umpire may think fit, but in no case beyond the date of the decree to be passed on the award."

9. Insofar as the jurisdiction of the Arbitrator to adjudicate on the two claims of Rs.10,17,461/- and Rs.12.50 lakhs are concerned, the dispute is capable of resolution within a short compass. The entitlement of the respondent – contractor to the aforesaid two amounts was not the subject matter of the earlier proceeding before the Arbitrators which arose out of the grievance of the

respondent – contractor that though the execution of the work had been completed, the final bill had not been prepared and further that certain amounts lying in deposit as security had not been refunded. Once the final bill was prepared and placed before the Arbitrators the claim of the respondent-contractor got crystallized. It is these specific claims, after quantification, that had been referred to the Arbitrators in the proceeding in which the award has been passed. It will, therefore, not be correct to say that the arbitration proceeding in respect of the specific claims of the contractor stood barred in view of the earlier arbitration proceeding between the parties. That apart, from an order passed by the Arbitrators on 15th January, 1994, which is available on record as an enclosure to the counter affidavit of the respondent, it appears that the arbitrators in the aforesaid order dated 15th January, 1994 had clearly recorded that the ". . . .both the parties agree that we should adjudicate both the disputes relating to refund of

deposit of Rs.12.5 lakhs and payment of final bill to the tune of Rs.10.00 lakhs and odd . . . .”

In these circumstances, the award insofar as the claim of Rs.10,17,461/- made by the learned Arbitrator and affirmed by the learned courts below will not require any further scrutiny by us.

10. Insofar as the claim in respect of the sum of Rs.12.50 lakhs is concerned, it has already been noticed that the entitlement of the respondent – contractor to the said amount had not been adjudicated upon by the Arbitrators on the ground that the said issue was not an arbitrable issue and the same ought be resolved either by an amicable process or by way of a suit for recovery. If the aforesaid claim was not adjudicated upon by the Arbitrators the learned trial court was patently wrong in decreeing the said claim. Therefore, the High Court was perfectly justified in reversing the said part of the decree. However, we do not

find any reasonable basis for the view taken by the High Court that the entitlement of the respondent-contractor to the said amount should now be determined by the Arbitrator nominated by it. Rather, according to us, the aforesaid issue should have been left for determination in accordance with the procedure agreed upon by the parties, if the parties are, at all, inclined to go into a further round of adjudication at this stage. We, therefore, interfere with the aforesaid part of the order of the High Court and, subject to our observations above, we leave the parties to work out their remedies as may be considered best and most appropriate in the facts and circumstances of the case.



11. This will lead the court to a consideration of what is the principal bone of contention between the parties in the present case, namely, the issue with regard to payment of interest. Clauses 1.2.14 and 1.2.15 on which much arguments have been advanced by learned counsel for both sides may now be extracted below :

" PART – II

CONDITIONS OF CONTRACT

□□□□□□ NO CLAIM FOR DELAYED PAYMENT DUE TO DISPUTE ETC.

The contractor agrees that no claim for interest of damages will be entertained or payable by the Government in respect of any money or balances which may be lying with Government owing to any disputes, differences or misunderstandings between the parties or in respect of any delay or omission on the part of the Engineer-in-charge in making immediate or final payments or in any other respect whatsoever.

□□□□□□ INTEREST ON MONEY DUE TO THE CONTRACTOR :

No omission on the part of the Engineer-in-charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his accounts be due to him."

12. A reading of the aforesaid two Clauses of the contract agreement between the parties clearly reveal that despite

some overlapping of the circumstances contemplated by the two Clauses, no interest is payable to the contractor for delay in payment, either, interim or final, for the works done or on any amount lying in deposit by way of guarantee. The aforesaid contemplated consequence would be applicable both to a situation where withholding of payment is on account of some dispute or difference between the parties or even otherwise.

13. Of the several decisions of this Court referred to by the learned counsel for the appellant the judgments of the Constitution Bench of this Court in *Secretary, Irrigation Department, Government of Orissa and others vs. G.C. Roy and anr.*[4] and *Executive Engineer, Dhenkalal Minor Irrigation Division, Orissa and others vs. N.C. Budhraj (deceased) By lrs. And others*[5] will require specific notice. The true ratio laid down in the aforesaid two judgments have been elaborately considered in a more recent

[4] **(1992) 1 SCC 508**
[5] **(2001) 2 SCC 721**

pronouncement of this court in the case of *Union of India* vs *Krafters Engineers and Leasing Private Limited*[6]. In *Krafters Engineers's* case (supra) the ratio of the decision in *G.C. Roy's* case (supra) was identified to mean that if the agreement between the parties does not prohibit grant of interest and the claim of a party to interest is referred to the arbitrator, the arbitrator would have the power to award the interest. This is on the basis that in such a case of silence (where the agreement is silent) it must be presumed that interest was an implied term of the agreement and, therefore, whether such a claim is tenable can be examined by the arbitrator in the reference made to him. The aforesaid view, specifically, is with regard to *pendente lite* interest. In the subsequent decision of the Constitution Bench in *N.C. Budhraj's* case (supra) a similar view has been taken with regard to interest for the pre reference period.



[6] **(2011) 7 SCC 279**

14. In *Krafters Engineers'* case (supra) the somewhat discordant note struck by the decisions of this court in *Board of Trustees for the Port of Calcutta* vs. *Engineers-De-Space-Age*[7] and *Madnani Construction Corporation Private Limited* vs. *Union of India and others*[8] were also taken note of. Thereafter, it was also noticed that the decision in *Engineers-De-Space-Age's case (supra)* was considered in *Sayeed Ahmed & Co.* vs. *State of Uttar Pradesh & Ors.* [9] and the decision in *Madnani Construction* case (supra*)* was considered in *Sree Kamatchi Amman Constructions* vs. *Divisional, Railway manager (Works), Palghat and others*[10]. In *Sayeed Ahmed's* case (supra) (para 24) it was held that in the light of the decision of the Constitution bench in *GC Roy's* case and N*C Budhraj's* case it is doubtful whether the observations in *Engineers-de-Space-Age's case* (supra) to the effect that the Arbitrator could award interest *pendente lite, i*gnoring the express bar in the contract, is good law. In

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7 **(1996) 1 SCC 516**
8 **(2010) 1 SCC 549**
9 **(2009) 12 SCC 26**
10 **(2010) 8 SCC 767.**

*Sree Kamatchi Amman Constructions's* case(Supra) while considering Madnani's case (supra) this court noted that the decision in Madnani's case follows the decision in *Engineers-de-Space-Age's case* (supra).

15. From the above discussions, it is crystal clear that insofar as *pendente lite* interest is concerned, the observations contained in Para 43 and 44 of the judgment in *GC Roy's case (supra)* will hold the field. Though the gist of the said principle has been noticed earlier it would still be appropriate to set out para 44 of the judgment in *G.C. Roy's* case (supra) which is in the following terms :

> " 44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf.
>
> Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendent elite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes – or refer

> the dispute as to interest as such – to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendent elite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."

16. The provisions of the UP Civil (Reforms and Amendment) Act amending the First Schedule to the Arbitration Act, 1940 does not assist the respondent - contractor in any manner to sustain the claim of award of interest *pendente lite,* inasmuch, as paragraph 7A to the First Schedule, as amended, is only an enabling provision which will have no application to a situation where there is an express bar to the entertainment or payment of interest on the delayed payment either of an amount due for the work done or of an amount lying in deposit as security. The decision in *BN Agarwalla's* case *(*supra*)* on which reliance has been placed by the learned counsel for the respondent, once again, does not assist the claim of the respondent to interest *pendente lite* inasmuch as in *BN Agarwalla's* case

(supra) the views of the Constitution Bench in *GC Roy's* case (supra) with regard to interest *pendente lite* could not have been and, infact, were not even remotely doubted. The observation of the bench in *B.N. Agarwalla's* case that in *G.C.Roy's* case (supra) the decision in *Executive Eningeer (Irrigation), Balimela and others vs . Abhaduta Jena and others* [11] was not overruled was only in the context of the issue of award of interest for the pre reference period. The decision in *Asian Techs Limited case (supra)* also relied on by the respondent takes note of the decision in *Engineers-De-Space-Age* case (supra) to come to the conclusion the prohibition on payment of interest contained in clause 11 of the agreement between the parties was qua the department and did not bar the Arbitrator from entertaining the claim. It has already been noticed that the correctness of the propositions laid down in *Engineers-De-Space-Age* case (supra) have been doubted in the subsequent decisions of this court, reference to which has already been made.

[11] **(1988) 1 SCC 418**

17. Clauses 1.2.14 and 1.2.15, already extracted and analysed, imposed a clear bar on either entertainment or payment of interest in any situation of non payment or delayed payment of either the amounts due for work done or lying in security deposit. On the basis of the discussions that have preceded we, therefore, take the view that the grant of *pendente lite* interest on the claim of Rs.10,17,461/- is not justified. The award as well as the orders of the courts below are accordingly modified to the aforesaid extent.

18. However, the grant of interest for the post-award period would stand on a somewhat different footing. This very issue has been elaborately considered by this Court in *B.N. Agarwalla (supra)* in the light of the provisions of Section 29 of the Arbitration Act, 1940. Eventually this Court took the view that in a situation where the award passed by the arbitrator granting interest from the date of the award

till the date of payment is not modified by the Court ".....the effect would be as if the Court itself had granted interest from the date of the decree till the date of payment..." In view of the above, the grant of interest on the amount of Rs.10,17,461/-from the date of the award till the date of the decree or date of payment, whichever is earlier, is upheld. In the facts of the case we are of the view that the rate of interest should be 12% per annum as determined in the arbitration proceeding between the parties.

19. In view of the foregoing discussions we allow this appeal in part



and modify the order of the High Court dated 20th July, 2006 as indicated above.

.....J.
[R.M.LODHA]

.....J.
[ANIL R. DAVE]

.....J.
[RANJAN GOGOI]

New Delhi,
September 25, 2012.