

Ram Nath International

Vs

State of U.P.

(Sujata V. Manohar, D. P. Wadhwa JJ.)

21.10.1997

JUDGEMENT

MRS.SUJATA V.MANOHAR, J.

1.Delay in filing S.L.P.(C) No 20055/97 (cc 6248) is condoned.

2.Leave in both the petitions is granted.

3.These cross appeals arise from a common judgment of the Allahabad High Court.For the sake of convenience, the appellant, M/s.Ram Nath International Construction Pvt.Ltd.in the appeal arising from S.L.P.(C) No.4328 of 1997 is referred to as the appellant while the State of U.P.is referred to as the respondent.

4.The appellant entered into an agreement with the respondent dated 17.2.1989 for the work of lining of the Upper Ganga Canal from kilometers 189.50 to 197.00 at Gesupur in Bulandshahr.The total amount payable to the appellant under the agreement was Rs.48,14,312.Clause 32 of the tender which related to "Extra Items" stated, "Extra terms of work shall not vitiate the contract.The contractor shall be bound to execute extra items of work as directed by the Engineer Incharge.The rates of extra items are to be mutually agreed." Clause 51 which provides for arbitration is as follows:

"ARBITRATION:

All the disputes in respect of which the decision has not been final and conclusive shall be referred for arbitration to a sole arbitrator appointed as follows:

The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof.The decision of the arbitrator shall be final and binding on the parties thereto.The arbitrator shall determine the amount of costs of arbitration to be awarded to either parties.Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the owner shall not be withheld unless they are the subject matter of the arbitration proceedings.All award shall be in writing and in case of awards amounting to Rs.100 lakhs above, such awards shall state reasons for the amounts awarded.Neither party is entitled to bring a claim to arbitration if the arbitrator has not been appointed before the expiration of thirty days after defect liability period."

5. Disputes arose between the appellant and the respondent in connection with the execution of the work specified in the tender as also in relation to payment for extra items of work. Ultimately by an Office Memorandum dated October 4, 1992 disputes between the parties were referred to the sole arbitration of Shri Thakur Das, Chief Engineer, Design and Research, I.D.U.P., Lucknow. The terms of reference as recorded in the Office Memorandum are as follows :

"As such Shri Thakur Das, Chief Engineer, Design and Research, I.D.,U.P., Lucknow is hereby appointed as Arbitrator for the following claims as raised by the contractor vide his letter dated 13.12.1991 against the agreement No.B2-02A-033 dated 17.2.1989 according to para 51 of the Agreement.

i) Rate for extra item of earth work beyond lip cutting in reach km.189.50 to km.190.70.

ii) Bailing out of standing water.

iii) Earth work beyond lip cutting in reach km.190.70 to km.197.00.

iv) Claims of idle labour due to non supply of cement."

6. The arbitrator has given a detailed speaking award dated 23.5.1994 under which inter alia in respect of the extra item of earth work beyond lip cutting in reach km.189.50 to km.190.70, the arbitrator has awarded a sum of Rs.72,22,740/-. The Arbitrator has also awarded to the appellant interest at the rate of 18% per annum on the total amount of claim.(Rs.1,71,11,208) with effect from 1.1.1991 to the date of the award and further interest at the rate of 6% per annum on the said amount from the date of the award till the date of the decree or payment whichever is earlier.

7. The appellant applied for a decree in terms of the award while the respondent filed objections. The District Judge granted decree in terms of the award. In the appeal which was filed before the High Court. the High Court has, inter alia, disallowed the claim for extra earth work beyond lip cutting in the reach 189.50 to 190.70 kms on the ground that the arbitrator travelled beyond the scope of his reference in granting the said amount. The appeal of the appellant before us challenges this finding of the High Court. The respondent in its cross appeal has challenged the award of interest by the arbitrator at the rate of 18% per annum from 1.1.1991 to the date of the award.

8. The first item of dispute relates to the work of excavating the canal section from kms.189.50 to kms.190.70 in addition to the earth work involved in lip cutting for this section and lining it. According to the respondent, in the Technical Specifications annexed to the contract, paragraph 2.09.01 stated that from kms.190.70 to kms.197 earth work involved is in lip cutting; and from kms.189.5 to kms.190.7 whole of the canal section is to be excavated. In the pre-bid conference which was held, the minutes of the meeting record that departmental machines will be working from kms.190.7 to kms.197. The canal cross section available will be irregular and the contractor will have to excavate the remaining quantity to the dimensions shown. between kms.189.5 and kms.190.7 whole of the canal cross section is to be excavated below ground level by the contractor. The respondent contends that excavating the canal is not extra work. But the rate for this work is not specified anywhere. Bill of Quantity, which is also annexed to the contract specifies the rates for different kinds of work which the contractor has to carry out. Item at S.No 1 provides for payment at the rate of Rs.19/- per cubic metre of earth for "the earth work in lip cutting, transportation in embankment or spoil bank including all lead lifts mechanical compaction, dressing, de-watering as

per specification. The rate for the work of excavation of the canal does not appear to be specified. The respondent contended before the arbitrator that payment at the rate of Rs. 19/- per cubic metre covered every kind of earth work and not just the earth work involved in lip cutting. While according to the appellant this was extra work for which payment had not been specified and had to be agreed upon. There was clearly a dispute on the issue and the reference to arbitration clearly covers this dispute. The first item of Office Memorandum referring the dispute to arbitration relates to rate for extra work of earth work beyond lip cutting in the reach Kms. 189.50 to Kms. 190.70. In view of the fact that this dispute was expressly referred to arbitration, we fail to see how it can be said that the decision on this dispute by the arbitrator is beyond the scope of the reference. Both parties argued this question before the arbitrator. The arbitrator has given a speaking award giving detailed reasons why he considers this work as extra work for which payment is required to be made to the contractor. We are not examining the correctness or otherwise of the conclusion reached by the arbitrator. It is a matter of interpretation of the contract and was referred by the parties to arbitration. The High Court was not right in coming to the conclusion that this dispute was beyond the scope of the reference to arbitration.

9. The other dispute between the parties relates to the award by the arbitrator of interest for the period 1.1.1991 till the date of the award. The appellant has very fairly conceded that the arbitrator has no jurisdiction to grant any interest for the preference period. Clause 1.18 of the Technical Specifications annexed to the contract provides as follows:

"No claim for interest or damage will be entertained by the Government with respect to any money or balance which may be lying with the Government or 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 or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or in any other respect whatsoever."

10. Clause 51 of the contract which deals with arbitration provides that all the disputes or differences in respect of which the decision has not been final shall be referred for arbitration to a Sole arbitrator as specified therein. Neither Clause 1.18 of the Technical Specification nor clause 51 excludes the jurisdiction of the arbitrator to award interest pendente lite. As far back as in 1992 a Constitution Bench of this Court in the case of Secretary, Irrigation Department, Government of Orissa & Ors. Vs. G.C. Roy {1992 1 SCC 508}, considered an arbitrator's power to award interest pendente lite. It held that when the terms of the arbitration agreement did not exclude the jurisdiction of the arbitrator to entertain a claim for interest the arbitrator was competent to award interest pendente lite. His power was analogous to the power of the court under Section 34 of the Civil Procedure Code to award interest in order to do complete justice between the parties. In paragraph 43 of the said judgment, the Constitution Bench has enumerated the principles for grant of interest pendente lite by the arbitrator. Interest pendente lite is not a matter of substantive law like interest for the period anterior to reference (preference period). The power to award interest pendente lite has to be inferred on the analogy of Section 34 of the Civil Procedure Code for doing complete justice between the parties. This decision has been followed in many subsequent case. One such decision shown to us is Sudhir Brothers Vs. Delhi Development Authority & Anr. (1996 1 SCC 32), where this Court observed that the decision in G.C. Roy's case (supra) holds the field as far as interest pendente lite is concerned. The respondent, however, relied upon a decision of this Court in Durga Ram Parsad Vs. Government of Andhra Pradesh (1995 1 SCC 418). The substantial body of the judgment deals with the power of the arbitrator to grant interest for the pre-reference period. The judgment has also relied upon G.C. ROY'S Case (supra) for interest pendente lite. However, in the

last paragraph of the judgment the Court has declined to grant interest for the pre-reference period as also interest pendente lite. Presumably, this is because of clause 69 of the contract which is set out in paragraph 3 of the judgment although no reasons are given in the judgment for excluding interest pendente lite. In the present case, however, we have reproduced clause 1.18 on which the respondent is relying. In our view this clause does not debar an arbitrator from granting interest during the pendency of the reference if, in his discretion, he considers it appropriate to award it. As is held by the Constitution Bench in the case of G.C ROY (supra), the power of the arbitrator to grant interest pendente lite is based on principles analogous to Section 34 of the Civil Procedure Code. Such interest is granted by the arbitrator in order to do complete justice between the parties. This is not a matter of substantive law as is the case regarding the arbitrator's power to grant interest for the pre-reference period. Whether interest should be awarded pendente lite or not is a matter of discretion, or the court or the arbitrator. When parties go before an arbitrator, they expect that the disputes will be decided in accordance with law as they would have been decided had the decision been of a court of law. Hence the arbitrator can exercise a power analogous to the power given to the courts under Section 34 of the Civil Procedure Code. The appellant is, therefore, entitled to interest on the principal amount awarded by the arbitrator from the date of the reference till the date of the award. The appellant, is, however, not entitled to any interest for the pre-reference period.

11. In the premises the appeal arising out of S.L.P.(C) No.4328/1997 is allowed save and except that the appellant will not be entitled to any interest on the principal amount awarded prior to the arbitrator entering upon the reference. The appeal of the respondent is dismissed with the above modification. There will, however, be no order as to costs.