

# SUPREME COURT OF INDIA

Union of India

Vs.

Saraswat Trading Agency

C.A.No.4427 of 2009

(Tarun Chatterjee and Aftab Alam JJ.)

16.07.2009

## JUDGMENT

**AFTAB ALAM,J.**

1. Leave granted.

This appeal, at the instance of Union of India, arises from an arbitration award dated September 9, 2000 made in favour of the respondent. The appellant challenged the award before the Calcutta High Court by filing an application under section 34 of the Arbitration and Conciliation Act, 1996. A learned Single Judge of the High Court upheld the challenge substantially and by judgment and order dated November 20, 2001 passed in G.A.No.87/01, arising out of AP No.325/98, sustained the award only on one issue and set it aside on two of the three issues under reference. Against the judgment of the Single Judge the respondent preferred an internal court appeal and the Division Bench of the High Court by its judgment and order dated July 4, 2006 passed in G.A.No.87/01: APOT No.792/01 with APO No.362/01 allowed the appeal, set aside the judgment of the Single Judge and fully restored the arbitrator's award in favour of the respondent on all the three issues in dispute. Against the judgment of the Division Bench of the High Court the appellant has come in appeal to this Court. The facts of the case are brief and simple and may be stated thus. For the work of handling of goods, parcels and booked luggage at a group of six stations falling in its Nagpur Division, the South Eastern Railway, Calcutta, invited tenders that were opened on May 16, 1990. The tender submitted by the respondent was the lowest. Hence, after some negotiations and extension of the validity of offer the respondent's tender was accepted on August 2, 1991 and it was given the work for a period of three years commencing from August 3, 1991. The grant of the contract was formalized in an agreement executed by the parties on December 3, 1991. The agreement was deemed to have come into force with effect from August 3, 1991 and it was to

remain in force for a period of three years, till August 2, 1994 unless determined by either of the parties in terms of clause 1(1) (authorizing the appellant to determine the contract by giving three months notice) and its proviso (giving the same right to the contractor, after expiry of the period of one year of the contract). Clause 2 of the agreement dealt with the nature of the work the contractor was required to do. Clause 4 of the agreement along with a detailed schedule mentioned fixed rates for every piece of work covered by the contract. Clause 7 stated that the contractor would not be entitled to any increase in the accepted rates of remuneration or compensation due to fluctuations in the traffic (increase or decrease) due to any reason. Under clause 13 the contractor indemnified the Railway Administration against all claims that might be made under the Workmen's Compensation Act, 1923 in consequence of any accident or injury sustained by any labourer/servant or person in his employment and engaged in the performance of the contract. Clause 14 bound the contractor to pay to the labourers engaged by him not less than the fair wage. It further provided that 'fair wage' would be the wage including the allowances, notified at the time of inviting tenders for the work. Clause 15 made the contractor responsible for compliance with the provisions of the Payment of Wages Act, 1936, and the rules made thereunder in respect of the staff employed by him. Clause 16 similarly made the contractor responsible for compliance with the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 and the rules made thereunder and required him to obtain the statutory license from the licensing authority. Clause 18 made the contractor responsible for compliance with the provision of the Hours of Employment Regulations in respect of the staff employed by him in the manner decided upon by the appropriate authorities. Clause 19 stipulated that no labourer would be unfairly treated or removed from work except for valid reasons and further provided that the porters engaged in the handling of goods, parcels and booked luggage under the terms of the agreement would be deemed as employees of the contractor within the meaning of the Industrial Disputes Act, 1947 or any other enactment that might be applicable. This clause further stated that the contractor would comply with all the laws, regulations and rules for the benefit of labour that were in force or might come into force and he would indemnify and keep the Railway Administration indemnified against all loss, damage, claims and costs arising in any manner whatsoever. Clause 20 reserved the right of the Railway Administration to deduct from the moneys due to the contractor or from his security deposit any sum required or estimated to be required for making good the loss suffered by the labour or labourers or any other person in his employment for the reasons of non-fulfillment of the conditions for the benefit of the labourers, non-payment of wages or deductions made from him or their wages which were unjustified or illegal. Clause 31 stipulated that no interest or damage would be paid to the contractor for delay in payment of the bill 'for any reason whatsoever'. Clause 32 with its various sub-clauses contained the provision for arbitration and provided that the General Manager of the South Eastern Railway or a person appointed by him would be the sole arbitrator in respect of any dispute as to the respective rights, duties and obligations of the parties to the agreement or as to the construction or interpretation of any of the terms and conditions of this agreement or as to its applications.

We next come to what is at the root of the dispute between the parties. It needs to be noted that at the time of submission of tender by the respondent the base fair rate of wages for the casual labour was Rs.31=15 paise as per the Circular dated January 17, 1990. During the period of the contract the Railway authorities are said to have issued circulars/guidelines revising the rates of casual labourers from retrospective dates. The manner in which rates were revised by the circulars/guidelines issued by the Railway authorities is noted in the arbitrator's award as follows:

## PARTICULARS

Circular No. Circular Effect Average dated from rate of unskilled labour

P/EN/C- 17.1.90 1.7.89 Rs.31.15 RAT/1/90

P/EN/NGP/ P/EN/NGP/ 16.4.92 1.7.91 Rs.42.40 Casual Labour 90-91

P/EN/NGP 10.2.93 1.1.92 Rs.47.45

Casual

Labour/MS/92 10.2.93 1.7.92 Rs.50.50

P/EN/NGP 15.2.94 1.1.93 Rs.51.10

Casual Labour

93 15.2.94 1.7.93 Rs.53.50

P/EN/NGP/MS 16.3.95 1.1.94 Rs.57.45/94

1.7.94 Rs.62.0

On August 25, 1992, the respondent wrote a letter to the Railway authorities demanding enhancement of rates under the contract on the ground that the rates stated in the agreement were based on the circular dated January 17, 1990 that had undergone a number of revisions and as a result the contract rates had become unrealistic and unviable. The Railway authorities rejected the respondent's demand for enhancement and/or revision of rates taking the stand that the contract was a fixed price contract and it had no clause for enhancement of rates. Faced with the authorities' refusal to revise the contract rates the respondent terminated the contract by giving three months notice as provided under the proviso to clause 1(1) of the agreement. The Railway authorities accepted the termination of the contract with effect from December 31, 1992 but in order to avoid any dislocation requested the respondent to carry on the work on the same terms and conditions, promising that its claim would receive due consideration. On the appellant's request the respondent continued with the work under the contract, though under protest, till August 1994. At the time of the final settlement of the respondent's claims the Railway authorities offered to it a sum of Rs.6,848=00 as additional payment for the period January 1993 to August 1994. The respondent naturally declined to accept the paltry amount offered by the authorities and requested for a proper consideration of its claim as earlier promised. Finally, the Railway authorities appointed a high level committee to consider the respondent's claim for enhanced payment for the period January 1, 1993 to August 31, 1994. The committee fixed the respondent's claim at Rs.3, 61,058=00 but it was not acceptable to the respondent. A departmental arbitrator was then appointed in order to resolve the disputes and differences arising between the parties. The departmental arbitrator gave his award on June 4, 1998. Not being satisfied with the award the respondent challenged it by filing an application under section 34 of the Act before the High Court. The High Court by its order dated February 12, 1999 upheld the award on items 1 2 but set it aside in respect of items 3, 4 5 and appointed a certain advocate, a member of the bar to decide afresh in regard to the respondent's claim under those three items. On an application made under section 11, the Acting Chief Justice of the High Court, by order dated July 1, 1999, substituted another advocate as arbitrator in place of

the one appointed by the Court on the application under section 34 of the Act. The three issues/claims that came up before the arbitrator appointed by the High Court were as follows:

Claim No.3: Claim for increase in rates from 3.8.91 to 31.12.92 during the Contractual period being sum of Rs.10,74,408/- Claim No.4: Claim for increase in rates from 1.1.93 to 31.8.94 during the extended period being sum of Rs.14, 454,581/- Claim No.5: Payment of 18% interest on Claim of contractor claim No.3 and 4 on the (sic and) from 1.11.94 till the (sic)date. The arbitrator appointed vide order dated July 1, 1999 passed by the Court took up the proceedings on August 3, 1999 and made and published his award on September 9, 2000. The award held the respondent entitled to receive from the appellant the sum of Rs. 32, 71,774=00 along with interest on that amount @ 18% per annum from the date of the award till the date of payment.

The appellant challenged the award by filing an application under section 34 of the Act before the High Court on January 2, 2001. As noted above, a learned Single Judge of the High Court substantially upheld the appellant's challenge and set aside the award on items 1 and 3, upholding it only insofar as the respondent's claim under item 4 was concerned. Against the judgment and order passed by the learned Single Judge the respondent preferred an appeal before the Division Bench of the High Court. Here it is significant to note that the appellant did not prefer any appeal against the judgment of the Single Judge insofar as it upheld the arbitrator's award on item no.4. Thus before the Division Bench of the High Court there was no challenge to the arbitrator's award in regard to the respondent's claim for enhanced payment from January 1, 1993 to August 31, 1994, that is to say, for the period after the parties had agreed on the cancellation of the agreement.

The Division Bench of the High Court after an elaborate consideration of the matter and after referring to a host of decisions of this Court and the Calcutta High Court allowed the appeal, set aside the judgment and order passed by the learned Single Judge and restored the arbitrator's award fully on all the three items.

Mr. S. Wasim Qadri, learned counsel appearing on behalf of the appellant, submitted that in the absence of any escalation clause in the agreement the respondent's claim for enhanced payments for the period August 3, 1991 to December 31, 1992 during which the agreement was in force was quite unfounded and both the arbitrator and the Division Bench of the High Court were in error in granting the claim for that period. The submission made by Mr. Qadri is fully answered by the decision of this Court in *Tarapore Co. vs. State of M.P.*, (1994) 3 SCC 521, (noticed both by the arbitrator and the Division Bench of the High Court). In paragraph 27 of the judgment this Court observed as follows:

27. But then, the terms at hand did require the appellant (who is the contractor) not to pay less than fair wages as would appear from what has been stated in Para 2.10 and Para 1 of Annexure-B. The Explanation to latter Para states that where fair wages have not been notified these wages would be the one prescribed by the PWD (Irrigation Department) for the division in which the work is done. Now these wages were being increased from time to time as would appear from the decisions of the wage committee referred to above; and if the appellant was being required to pay wages as per these decisions, we do read a meeting of mind insofar as the claim of escalated payment on account of increase of fair wages is concerned.

It has to be assumed that when the appellant was required to pay fair wages at increased rates, the authorities did visualize that the appellant would not do so by cutting down its profit. By asking the

appellant to give tender by taking into account the fair wages notified at the time of inviting tenders, the authorities did give an impression that fair wages to be paid would be the one then

notified/prescribed, a la the explanation to para 1. In such a situation, if rates of fair wages were raised afterwards, the tendered sum cannot be taken to be agreed amount for completing the contract, in the face of the directions of the authorities requiring the appellant to pay wages at rates higher than those prescribed or notified at the time of inviting tenders. On this fact situation, we hold that the State had by necessary implication agreed to reimburse this increased payment.

In a more recent decision in Food Corporation of India vs. M/s. A. M. Ahmed Co. Anr., AIR 2007 SC 829, the Court reiterated the same view and in paragraph 32 of the judgment observed as follows:

Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the FCI, the Corporation was liable for the consequences of the delay, namely, increase in statutory wages. Therefore, the arbitrator, in our opinion, had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The Arbitrator by awarding wage revision has not mis-conducted himself. The award was, therefore, made rule of the High Court, rightly so in our opinion.

Mr. Qadri next questioned the grant of interest on the amounts arrived at by allowing the respondent's claim for higher rates for the work done by it. Learned counsel submitted that clause 31 of the agreement expressly barred the claim of any interest by the contractor and hence, the award was clearly unsustainable insofar as the grant of interest was concerned. The arbitrator gave to the respondent pre-reference, pendente lite and post-award interest on both its claims under items 3 & 4 as would be evident from the following passages from the award:

However, I am allowing interest to the claimant at the rate of 16% per annum on and from 1st November, 1994 till 9th September, 2000 the date of award amounting to Rs.15, 85,359.85 on the following basis.

Interest calculated from 1.11.94 to 9.9.2000 as per demand notice dated 19th September, 1994 till the date of award on Rs.16, 85,234.14 being the total amount of claim item Nos.3 and 4.

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Therefore, I, hereby award to the claimant (i) a sum of Rs.6,05,777.34 for the claim item No.3 (ii) a sum of Rs.10,79,456.80 for the claim Item No.4 and (iii) a sum of Rs.15,86,539.85 towards interest on Item No.3 and 4 for the claim Item No.5. The aggregate sum of Rs.32, 71,773.99 (Rupees Thirty two lacs seventy one thousand seven hundred seventy three and ninety nine paise only) rounded to Rs.32, 71,774/-. I further award an interest @ 18% per annum on the aforesaid sum till the date of payment.

It is thus to be seen that the arbitrator allowed interest on the amounts determined under Items Nos.3 and 4 both for the pre-reference period and pendente lite at the rate of 16% per annum. He further

allowed interest on the consolidated amount for the post-award period at the rate of 18% per annum till the date of payment.

The question of interest for the pre-reference period stands settled by the Constitution Bench decision in Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa Ors. Vs. N. C. Budharaj, 2001 (2) SCC 721. The majority judgment (3:2) in that case held in paragraph 26 as follows:

For all the reasons stated above, we answer the reference by holding that the arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in Jena case taking a contra view does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitle any party nor shall it employ any court to reopen proceedings which have already become final, and apply only to any pending proceedings. No costs. (emphasis added)

The legal position in regard to interest for the different periods has been summed up, with reference to the earlier decisions, in the decision in Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd., 2005 (6) SCC 462. In paragraphs 38, 39 and 40 of the judgment it was observed as follows:

38. So far as interest for pre-reference period is concerned, in view of the conflicting decisions of this Court, the matter was referred to a larger Bench in Executive Engineer, Dhenkanal Minor Irrigation Division vs. N.C. Budharaj, 2001 (2) SCC 721. The Court, by majority, held that an arbitrator has power to grant interest for pre-reference period provided there is no prohibition in the arbitration agreement excluding his jurisdiction to grant interest. The forum of arbitration is created by the consent of parties and is a substitute for conventional civil court. It is, therefore, of unavoidable necessity that the parties be deemed to have agreed by implication that the arbitrator would have power to award interest in the same way and same manner as a court.

39. Regarding interest pendent lite also, there was cleavage of opinion. The question was, therefore, referred to a larger Bench in Secy., Irrigation Deptt., Govt. of Orissa vs. G. C. Roy, 1992 (1) SCC 508. The Court considered several cases and laid down the following principles: (pp.532-33, para 43)

43. The question still remains whether arbitrator has the power to award the interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative forum for resolution of disputes arising between the parties. If so,

he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of the Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to on first impression. Until Jena case almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law. (v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre- reference period). For doing complete justice between the parties, such power has always been inferred.

40. As to post-award interest, the point is covered by the decision of this Court in Hindustan Construction Co. Ltd. vs. State of J K , 1992 (4) SCC 217. It was held there that an arbitrator is competent to award interest for the period from the date of the award to the date of decree or date of realization, whichever is earlier. In the case in hand, the respondent's claim was in regard to two periods; one from August 3, 1991 to December 31, 1992 when the agreement was subsisting and the parties were bound by its terms, and the other from January 1, 1993 to August 31, 1994 when the agreement was admittedly terminated and the respondent was carrying on the work on the request of the appellant. In our view the fact that the first period was covered by the agreement while the second fell beyond it is significant and on that score the two periods must receive different treatments. Clause 31 of the agreement provided as follows:

31. No interest or damage for delay in payment - No interest or damage shall be paid to the Contractor for delay in payment of the bill or any other amount due to the contractor for any reason whatsoever. The Railway Administration will, however, make every endeavour for payment of the bills or other amount due to the contractor within a reasonable time. (emphasis added)

The Division Bench of the High Court took the view that Clause 31 of the agreement operated as a bar only between the parties but it would not affect the authority of the arbitrator to grant interest for the pre reference period and pendente lite. In this connection the High Court has referred to the decisions of this Court in Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa (supra), Executive Engineer (Irrigation) vs. Abhaduta Jena, (1988) 1 SCC 418 (which was overruled by Executive Engineer, Dhenkanal) and Secretary, Irrigation Department, Govt. of Orissa vs. G.C. Roy, (1992) 1 SCC 508, (which was referred to in Executive Engineer, Dhenkanal). But in Executive Engineer, Dhenkanal it is not even remotely said that a clause in the agreement like clause 31 (quoted above) would only act as a bar between the parties to the agreement and would not restrict

the powers of the arbitrator to allow interest for pre-reference period and pendente lite. The High Court has then relied upon another decision of this court in *The Board of Trustees for the Port of Calcutta vs. Engineers-De-Space-Age*, AIR 1996 SC 2853. The High Court has observed that in this case a similar clause in the agreement was held not restrictive of the arbitrator's powers to allow interest pendente lite and for pre reference period. We have closely examined the decision in *Engineers-De-Space-Age* and we find that the relevant clause in the agreement in that case was completely differently worded and the view taken by the High Court cannot be supported on the basis of that decision. In *Engineers-De-Space-Age* the court was dealing with a case in regard to award of interest for the post-reference period and clause 13(g), the relevant clause in the agreement, was as follows: 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.

In that context this court held that clause 13(g) of the agreement merely prohibited the Commissioners from entertaining any claim for interest and did not affect the arbitrator's powers to award interest. In the case in hand clause 31 of the agreement is materially different. It bars payment of any interest or damage to the contractor for any reason whatsoever. We are, therefore, clearly of the view that no pre-reference or pendente lite interest was payable to the respondent on the amount under Item No.3 and the arbitrator's award allowing pre-reference and pendente lite interest on that amount was plainly in breach of the express term of the agreement. The order of the High Court insofar as pre-reference and pendente lite interest on the amount under Item No.3 is concerned is, therefore, unsustainable. The position with regard to the claim under Item No.4 is quite different. That relates to the period after the termination of the agreement and hence, the bar of clause 31 would not apply to it in the same way as it would apply to Item No.3. We, therefore, find no infirmity in grant of pre- reference and pendente lite interest on the amount under Item No.4. In light of the discussions made above, the respondent shall be entitled to interest only on the sum of Rs.10, 79,456=80, the amount determined under Item No.4, at the rate of 16% per annum for the period November 1, 1994 to September 9, 2000. The final amount under the award shall be accordingly worked out. The consolidated amount of the award after being re-calculated shall carry, as provided in the award, interest at the rate of 18% from the date of the award till the date of payment. In working out the amount of interest for the post-award period, the period(s) for which the operation of the award was stayed by the court would be excluded. In the result the appeal is allowed to the limited extent indicated above. There shall be no order as to costs.