

SUPREME COURT OF INDIA

Sree Kamatchi Amman Constructions

Vs.

Divisional Rly.Manager/Works

C.A.Nos.6815-6816 of 2010

(R.V.Raveendran and H. L. Gokhale JJ.)

20.08.2010

JUDGEMENT

R.V.Raveendran, J.

1. Leave granted.

2. The first respondent entrusted certain construction work to the appellant under a contract in the year 1995. Alleging breach by the first respondent (for short 'Railways') the appellant invoked the arbitration Clause and the disputes were referred to an arbitral tribunal of which respondents 2 to 4 are the members. The arbitral tribunal made a non-speaking award dated 14.5.1999 in favour of the appellant. The High Court by order dated 9.1.2001 set aside the said award and remitted the matter to the arbitral tribunal with a direction to make a reasoned award after fresh consideration. The arbitral tribunal accordingly passed an award dated 5.12.2001 awarding certain amounts with a direction that the award amount should be paid to the appellant by 4.1.2002 and if it failed to do so, the appellant will be entitled to simple interest at 10% per annum on the amounts awarded from 5.12.2002 till date of payment. That is, the arbitral tribunal awarded only future interest and refused to award the interest for pre-reference period and interest pendente lite. It may be mentioned that the award rejected two of the claims of the appellants and rejected all the claims of the Railways.

3. Feeling aggrieved by the award, the Railways filed a petition under section 34 of the Arbitration and Conciliation Act, 1996 ('Act' for short).

“Aggrieved by the rejection of its claims 1 and 2 and the failure to award interest for the pre-reference period and pendente lite, the appellant also filed a petition under section 34 of the Act. A learned Single Judge of the High Court rejected both the challenges to the award. Insofar as the interest is concerned the learned Single Judge held that having regard to the bar contained in Clause 16(2) of the General Conditions of contract. Again both Railways and the appellant filed appeals against the order of the learned Single Judge. The Division Bench of the Madras High Court by the

impugned judgment dated 18.7.2007 dismissed the appeal by the appellant-contractor. It allowed the Railways appeal and set aside the award made on claim No.3 (damages for idle labour) and claim No.5 (damages for overstay). As a result what remained was award of Rs.38,92,455/- under claim No. (4) (erroneous billing with reference to unit of measurement/unit rate of payment for the work covered under the optional item No. 19 of Schedule of Work) and award of Rs.94,100 (refund of security deposit) under claim 6 with interest at 10% per annum from 5.1.2002 till date of payment. The appellant has challenged the said common judgment in these appeals. This court on 7.7.2008 granted leave only in regard to the non- award of interest pendente lite and for pre-reference period. This court refused to interfere with the decision of the division bench, setting aside the award insofar as claim Nos. 3 and 5.”

4. The appellant urged the following contentions : (i) Clause 16(2) of the General conditions of contract did not prohibit or prevent arbitrator to direct payment of interest; and therefore the award insofar as it denied interest for pre-reference period and pendente lite by relying upon Clause 16(2) was liable to be interfered with. (ii) As the arbitrators had recorded a clear finding that the delay in completion of the work was occasioned due to reasons attributable to Railways and not on account of the appellants, the appellant cannot be denied interest for pre-reference period and pendente lite. On the other hand Railways contended that the contract contained a specific bar against award of interest on any amount payable to the contractor under the contract or upon the earnest money or security deposit and therefore the arbitral tribunal was barred from awarding interest for the said periods under section 31(7)(a) of the Act. It was further submitted that if the contract between the parties barred payment of interest, arbitral tribunal cannot award interest for the period between the date on which the cause of action arose and the date on which the award was made and therefore the arbitral tribunal had rightly not awarded the interest for the same period. On the aforesaid contentions the following questions arise for consideration:

“(i) whether the contract between the parties contains an express bar regarding award of interest? (ii) If so whether the arbitral tribunal was justified in refusing interest for the period between the date of cause of action to date of award? Re : Point (i)”

5. Clause 16(2) of the General Conditions of contract governing the contract between the parties bars payment of interest and the same is extracted below:

“16(2). No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the Contract, but Government Securities deposit in terms of sub-Clause (1) of this Clause will be repayable (with) interest accrued thereon”.

(emphasis supplied) The two claims on which amounts are awarded are with reference to claim No. (4) relating to erroneous billing and claim No. (6) relating to security deposit. Clause 16(2) in terms specifically bars payment of interest on

security deposit. Insofar as claim No. (4) is concerned, the question is whether the amount awarded is an "amount payable to the contractor under the contract". Learned counsel for the appellant made a faint attempt to contend that the award relating to claim No. (4) was not in regard to an amount payable to the contractor under the contract. This contention has absolutely no merit as the award itself categorically recorded a finding that under item No.19 "the actual quantity executed by the claimant at the orders of the respondent very much becomes a part and parcel of the original agreement quantity". What was awarded for the "rate per metre of rails to be led to SLY Yard and stacked vide Agreement Schedule Item No. 19" at the rate of Rs.225 per metre. Thus claim No.4 related to a work executed by the contractor as a part and parcel of the work contemplated under the agreement. Payment directed by the arbitral tribunal for such work was also in accordance with the Agreement Schedule Item No.19. Therefore it is evident that the amount awarded in regard to claim No. (4) was an amount payable to the contractor under the contract. Consequently no interest could be paid thereon having regard to the bar under Clause 16(2) of the General conditions of contract."

Re : Point (ii)

6. This court had occasion to consider the jurisdiction and authority of the arbitrator to award interest under the Arbitration Act, 1940 and under the new Act in *Sayeed Ahmed & Co. v. State of U.P.*¹.

Relying upon the earlier decisions of this court in *Irrigation Department, Government of Orissa v. G C Roy*², *Executive Engineer, Dhenkanal Minor Irrigation Division v. N C Budharaj*³ and *Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd.*⁴ and *State of Rajasthan v. Ferro Concrete Construction (P) Ltd.*⁵, this court held that the arbitrator had the jurisdiction and authority to award interest for three distinct periods namely, the pre-reference period (which referred to the period between date of cause of action to date of reference), pendente lite (which referred to the period between date of reference to date of award) and future period (which referred to the period between the date of award to date of payment) if there was no express bar in the contract regarding award of interest. This court then noticed the change under the new Act as follows :

"13. 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:

"31.7(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.

14. 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."

We may also refer to the decision of this court in *Union of India v. Saraswat Trading Agency*⁶ this court reiterated that if there is a bar against payment of interest in the contract, the arbitrator cannot award any interest for the pre-reference period or pendente lite. In view of the specific bar under Clause 16(2), we are of the view that the arbitral tribunal was justified in refusing interest from the date of cause of action to date of awards."

7. We may at this juncture refer to the contention of the appellant that even if the appellant was not entitled to interest for the pre-reference period, that is date of cause of action to date of reference, the appellant will be entitled to interest pendente lite, that is for the period from the date of reference to date of award, having regard to the decisions of this court in *Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age*⁷ and *Madhani Construction Corporation Pvt. Ltd. v. Union of India*⁸.

8. In *Engineers-De-Space-Age* (supra) this court held:

“4. 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.

In *Madnani* (supra) the arbitrator had awarded interest pendente lite, that is from the date of appointment of arbitrator to date of award. The High Court had interfered with the same on the ground that there was a specific prohibition in the contract regarding awarding of interest. This court following the decision in *Engineers-De-Space-Age* reversed the said rejection and held as follows:

“39. In the instant case also the relevant Clauses, which have been quoted above, namely, Clause 16(2) of GCC and Clause 30 of SCC do not contain any prohibition on the arbitrator to grant interest. Therefore, the High Court was not right in interfering with the arbitrator's award on the matter of interest on the basis of the aforesaid Clauses. We, therefore, on a strict construction of those Clauses and relying on the ratio in *Engineers* find that the said Clauses do not impose any bar on the arbitrator in granting interest.”

9. At the outset it should be noticed that *Engineers-De-Space-Age* and *Madnani* arose under the old Arbitration Act, 1940 which did not contain a provision similar to section 31(7) of the new Act. This court, in *Sayeed Ahmed* held that the decisions rendered under the old Act

may not be of assistance to decide the validity of grant of interest under the new Act. The logic in Engineers-De-Space-Age was that while the contract governed the interest from the date of cause of action to date of reference, the arbitrator had the discretion to decide the rate of interest from the date of reference to date of award and he was not bound by any prohibition regarding interest contained in the contract, insofar as pendente lite period is concerned. This Court in Sayeed Ahmed (supra) held that the decision in Engineers-De-Space-Age would not apply to cases arising under the new Act. We extract below, the relevant portion from Sayeed Ahmed:

“23. 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.

24. 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."

The same reasoning applies to the decision in Madnani also as that also relates to a case of under the old Act and did not independently consider the issue but merely relied upon the decision in Engineers-De-Space-Age.”

10. Section 37(1) of the new Act by using the words "unless otherwise agreed by the parties" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the

award of interest from the date of cause of action to date of award. Therefore where the parties had agreed that no interest shall be payable, arbitral tribunal cannot award interest between the date when the cause of action arose to date of award.

11. We are of the view that the decisions in *Engineers-De-Space-Age* and *Madnani* are inapplicable for yet another reason. In *Engineers-De-Space- Age* and *Madnani* the arbitrator had awarded interest for the pendente lite 12 period. This court upheld the award of such interest under the old Act on the ground that the arbitrator had the discretion to decide whether interest should be awarded or not during the pendente lite period and he was not bound by the contractual terms insofar as the interest for the pendente lite period. But in this case the arbitral tribunal has refused to award interest for the pendente lite period. Where the arbitral tribunal has exercised its discretion and refused award of interest for the period pendente lite, even if the principles in those two cases were applicable, the award of the arbitrator could not be interfered with. On this ground also the decisions in *Engineers- De-Space-Age* and *Madnani* are inapplicable. Be that as it may.

12. For the aforesaid reasons, we find no merit in these appeals and they are dismissed. Parties to bear their respective costs.

¹2009 (12) SCC 26

²1992 (1) SCC 508

³2001 (2) SCC 721

⁴2005 (6) SCC 462

⁵2009 (12) SCC 1

⁶2009 (16) SCC 504

⁷1996 (1) SCC 516

⁸2010 (1) SCC 549