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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

F-338B

+ O.M.P. 727/2009 & I.A. Nos. 15955-15957/2009

UNION OF INDIA& ORS. Petitioners
Through: Mr. Jitendra Kumar Singh, Advocate.

versus

M/S. CONBES INDIA PVT. LTD. Respondent
Through: Mr. Vivekanand, Advocate.

AND

F-338A

+ CS(OS) 1527/2009

M/S. CONBES INDIA PVT. LTD. Petitioner
Through: Mr. Vivekanand, Advocate.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Jitendra Kumar Singh, Advocate.

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Date of Decision : APRIL 05, 2010

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

J U D G M E N T

MANMOHAN, J (ORAL)

1. While O.M.P. 727/2009 has been filed by petitioner-Union of India under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) challenging the arbitral Award dated 27th May, 2009, CS(OS) 1527/2009 has been filed under Sections 14 and 17 of the Arbitration Act, 1940 (hereinafter referred to as “Act, 1940”).

2. From the documents on record, it is apparent that the learned Arbitrators have conducted the arbitral proceedings and passed the impugned Award as if it were an award under the Act, 1940. Moreover, in the present case, since the respondent-claimant had issued a notice invoking the arbitration clause on 21st November, 1988, the challenge to the impugned Award would be governed by the Act, 1940 and not by the Act, 1996. Accordingly, with the consent of parties, objections filed under Section 34 of Act, 1996 are treated as having been filed under Sections 30 and 33 of the Act, 1940.

3. Mr. Jitendra Kumar Singh, learned counsel for petitioner-Union of India contends that Claims No. 1, 2, 5 and 6 are meritless and have been erroneously awarded.

4. Mr. Singh submits that the nature of Claim No.8 was

unilaterally changed by the Arbitrators. He points out that initially respondent-claimant had under this claim asked for compensation on account of work done but not paid for, whereas Arbitrators have awarded the said claim solely on the basis of price variation clause—which was not the basis of actual reference.

5. Mr. Singh further submits that the Arbitrators have erroneously disallowed the Union of India's counter claim with regard to liquidated damages on the sole ground that an open tender had not been invited.

6. Mr. Singh lastly submits that Arbitrators could not have awarded any interest on the awarded sum in view of the specific prohibition contained in Clause 16(2) of General Conditions of Contract (hereinafter referred to "GCC") which reads as under:

"16(1).xxx xxx xxx

(2) **Interest on amounts.**—*No interest will be payable on the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited in term of sub-clause (1) of this clause will be repayable with interest accrued thereon.*"

7. In this connection, Mr. Singh relies upon a judgment of the Supreme Court in *Syed Ahmed & Co. vs. State of U.P. & Ors.* reported in **2009 (3) Arb. LR 29 (SC)** and a judgment of Gauhati High Court in *Union of India vs. Major V.P. Ninhawan (Retd.)* passed in **Arbitration Appeal No.4/2001** on 19th June, 2002. He

further points out that the Supreme Court has dismissed a Special Leave Petition filed against the said judgment of the Gauhati High Court.

8. On the other hand, Mr. Vivekanand, learned counsel for respondent-claimant submits that this Court cannot interfere with an arbitral award on merits as this Court exercises limited jurisdiction under Sections 30 and 33 of the Act, 1940. He further states that as long as the view taken by the Arbitrators is a possible view, this Court should not interfere with the same.

9. As far as the challenge to award of Claim No.8 is concerned, Mr. Vivekanand points out that respondent-claimant had subsequently filed before the Arbitral Tribunal a detailed basis for the said claim wherein it had specifically prayed for award of Claim No.8 on account of price variation clause along with the value of work done. Mr. Vivekanand further points out that the Arbitrators had given ample opportunity to the Union of India to not only file additional documents but also to urge its case. He points out that Arbitrators while awarding Claim No.8 have specifically recorded that the petitioner-Union of India had objected to award of the said claim on the ground that price variation clause was not applicable to the contract executed between the parties. Accordingly, he submits that Claim No.8 has been awarded after complying with the principles of natural justice and the same should not be interfered

with by this Court.

10. Mr. Vivekanand also submits that Arbitrators rightly rejected the Union of India's claim for risk purchase on the ground that the terms of the risk purchase were not similar to the initial tender floated by the petitioner-Union of India.

11. Mr. Vivekanand lastly submits that despite the embargo contained in Clause 16(2) of GCC, Arbitrators still have the power to award interest. In this connection, he places reliance upon a judgment of the Supreme Court in *Madnani Construction Corporation (P) Ltd. vs. Union of India & Ors.* reported in **2009 4 Arb. LR. 457 (SC)**.

12. Having heard the parties at length and having perused the impugned Award, I am of the view that before I deal with the rival contentions, it would be appropriate to first outline the scope of interference by this Court with an arbitral award rendered under Act, 1940. The Supreme Court in *Arosan Enterprises Ltd. Vs. Union of India & Another* reported in **(1999) 9 SCC 449** has clearly outlined the scope of interference by this Court in petitions filed under Sections 30 and 33 of the Act, 1940. The relevant observations of the Supreme in the said judgment Court are reproduced hereinbelow:-

“36. Be it noted that by reason of a long catena of cases, it is now a well-settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of

fact exercise of power by the court to reappraise the evidence is unknown to proceedings under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award.

37. The common phraseology “error apparent on the face of the record” does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined.

(emphasis supplied)

13. Keeping in view the aforesaid, I am of the view that the arbitral award insofar as it awards Claims No. 1, 2, 5 and 6, requires no interference.

14. As far as the objection with regard to award of Claim No.8 is concerned, I am of the view that respondent-claimant could not change the nature of the claim that was initially referred to the Arbitrators. Respondent-claimant had sought reference of Claim No.8 towards costs of work done but not paid for. The basis of this claim was certainly not the price variation clause. Consequently, in my opinion, Claim No.8 to the extent it awards under the price variation clause is in excess of jurisdiction of the Arbitral Tribunal.

15. However, I find that Arbitral Tribunal has awarded a sum of Rs.1,23,250/- under Claim No.8 on account of the fact that the said amount had been found due and payable by the petitioner-Union of India after the scrutiny of the final bills. Accordingly, this amount of Rs.1,23,250/- is certainly towards the costs of work done but not paid for by the petitioner-Union of India. Consequently, the amount awarded under Claim No.8 is reduced from Rs.1,75,000/- to Rs.1,23,250/-.

16. As far as the rejection of petitioner's counter claim is concerned, I am of the view that the Arbitrators have given cogent reasons for disallowing the same. In fact, the Arbitrators after considering the contractual term of risk purchase and the documents on record, have unequivocally found that the Union of India's risk purchase offer was not similar to the terms of the initial tender. The relevant reasoning of the Arbitrators is reproduced hereinbelow:-

*“B. Railways' Liquidated Damages - Rs. 12,59,090/-
The contract was terminated by the Respondents due to poor progress of work. However, there has been dispute between the Respondents and Claimants as they wanted additional payment for the items which were not in their original scope of work and they asked for interim arbitration during progress of work. A special Review Committee was appointed for determination of contract which recommended that the work should be terminated and should be awarded on limited tender basis and the Review Committee has suggested that agency which is now selected for doing the work should be reliable, dependent, trustworthy etc. for executing of the residual work. Normally risk & cost tenders are invited in the same manner through same method as was awarded to Claimants and same terms & conditions are followed while work is executed for risk & cost of terminated agency. However in this case, open tender was not invited and Claimants was not informed about the work being*

done on limited tender basis. It is therefore not correct to recover liquidated damages as rate of single/limited tender on which work was awarded, was obviously higher as compared to open tender basis (due to limited competition) and therefore such higher recoveries cannot be justified. Hence counter claim of Respondents for liquidated damages is rejected and nil amount is awarded to the Claimants”.

(emphasis supplied)

17. As far as the Arbitrators power to award interest is concerned, I am of the view that the issue is no longer res integra in view of the Supreme Court Judgment in ***Madnani Construction Corporation (P) Ltd.*** (Supra). In the said judgment, the Hon’ble Supreme Court after considering the entire law on the said issue, has observed as under:

42. Following the Constitution Bench ratio in ***G.C. Roy*** another Three Judge Bench in the case of ***Hindustan Construction Company Limited vs. State of Jammu and Kashmir, (1992) 4 SCC 217=1992(2) Arb. LR 412 (SC)***, While referring to the ratio in ***G.C. Roy*** held in paragraph 5 at page 220 (page 415 of Arb. LR):

“...Though the said decision deals with the power of the arbitrator to award interest pendente lite, the principle of the decision makes it clear that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure. Section 34 of Code of Civil Procedure provides both for awarding of interest pendente lite as well as for the post-decree period and the principle of Section 34 has been held applicable to proceedings before the arbitrator, though the section as such may not apply....

43. Subsequently, in the case of State of Orissa vs. B.N. Agarwalla, (1997) 2 SCC 469=1997(1) Arb. LR 612(SC), before another Three Judge Bench a similar question came up for consideration and this bench following the ratio in G.C. Roy and Hindustan Construction considered the question of payment of interest. After discussing the ratio in Abhaduta Jena and G.C. Roy and various other cases, the learned judges in paragraph 18 at page 477 of the report came to the conclusion that-(a) it is well settled that the arbitrator has a jurisdiction to award pre-reference interest in cases which arose after the Interest Act, 1978 had become applicable. It is no doubt that in this case arbitration proceedings were initiated after the 1978 Act became applicable; (b) for the period in which the arbitration proceedings are pending the arbitrator has the power to award interest; (c) the court also held that the power of the arbitrator to award interest for the post-award period also exists.

44. In **G.C. Roy** this Court made it clear that the arbitration clause was silent on the payment of interest but in **B.N. Agarwalla** the court considered Clause (4) which had the following stipulation on interest:

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

45. Considering the said Clause (4), the learned judges held that the claim which was made before the arbitrator was for non-payment of the full amount as per the final bill submitted by the claimant and the arbitrator awarded interest on that. The interest so awarded, according to the learned Judges, is not prohibited under Clause (4) of the Contract. Therefore, the Three Judge Bench clearly held that just a stipulation in the contract purporting to indicate non-payment of interest cannot denude the arbitrator of his right to pay interest.

46. In a subsequent decision of Three Judge Bench in the case of State of U.P. vs. Harish Chandra and Company : (1999) 1 SCC 63=1998(2) Arb. LR 716(SC), there was stipulation in the arbitration agreement against grant of interest. The relevant clause namely Clause 1.9 to the aforesaid effect is set out below:

“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.”

47. Considering the said clause, the court held that the prohibition in the said clause does not prevent the contractor from raising the claim of interest by way of damages before the arbitrator on the relevant items placed for adjudication (See paragraph 10 page 67). In saying so, the learned judges relied on the ratio in the case of **B.N. Agarwalla and G.C. Roy**.

48. In **Board of Trustees for the Port of Calcutta vs. Engineers De Space Age**, (1996) 1 SCC 516=1995(Suppl.) Arb. LR 733(SC) a Two Judge Bench of this court considered the same question. That was a case under the 1940 Act. In **Engineers** the so-called prohibition in the contract relating to payment of interest was in Clause 13(g), which is set out below:

“13(g) 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.”

xxxx xxxx xxxx

53. In the instant case also the relevant clauses, which have been quoted above, namely, Clause 16(2) of GCC and Clause 30 of the 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.

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55. In **N.C. Budharaj Justice Raju**, speaking for the majority, considered the question of the arbitrator's jurisdiction and authority to grant interest in great detail and also considered both Indian and English cases and the ratio of the decision of the Constitution Bench of this Court in G.C. Roy.

56. In paragraph 25 (paragraph 47, p.381 of Arb. LR) of the judgment the learned Judge summed up the position as follows:

“.....By agreeing to settle all the disputes and claims arising out of or relating to the contract between the parties through arbitration instead of having recourse to civil court to vindicate their rights the party concerned cannot be considered to have frittered away and given up any claim

which otherwise it could have successfully asserted before courts and obtained relief. By agreeing to have settlement of disputes through arbitration, the party concerned must be understood to have only opted for a different forum of adjudication with less cumbersome procedure, delay and expense and not to abandon all or any of its substantive rights under the various laws in force, according to which only even the arbitrator is obliged to adjudicate the claims referred to him. As long as there is nothing in the arbitration agreement to exclude the jurisdiction of the arbitrator to entertain a claim for interest on the amounts due under the contract, or any prohibition to claim interest on the amounts due and become payable under the contract, the jurisdiction of the arbitrator to consider and award interest in respect of all periods subject only to Section 29 of the Arbitration Act, 1940 and that too the powers of the court thereunder, has to be upheld.”

(emphasis supplied)

18. I may mention that the judgment of **Sayeed Ahmed &Co.** (Supra) is clearly inapplicable to the facts of the present case as it has been passed with regard to an award passed under the Act, 1996 and not under the Act, 1940. In fact, in the said judgment, Supreme Court had placed reliance upon the embargo contained in Section 31(7) of the Act, 1996—which prohibition is missing in the Act, 1940. The Supreme Court in **Madnani Construction Corporation (P) Ltd.** (Supra) has also observed as under:-

“30. The present Act of 1996 (the Arbitration and Conciliation Act, 1996), however, empowers the arbitrator under Section 31(7)(a) and (b) to grant interest. Admittedly, in this case, the 1996 Act is not attracted. Therefore, the provisions of 1940 Act will govern. The arbitrator's power to grant interest is governed by the various judicial pronouncements and the provisions of Interest Act of 1978.”

19. The Gauhati High Court's judgment referred to by the learned counsel for petitioner-Union of India is of no relevance as the said judgment is based upon the judgment of the Supreme Court in *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa & Ors. Vs. N.C. Budhraj (Deceased) By LRs. & Ors.* reported in *2001 2 SCC 721*. I may also mention that the aforesaid case of *N.C. Budhraj* (Supra) has been considered and interpreted by the Supreme Court in paras 55 and 56 of *Madnani Construction Corporation (P) Ltd.* (Supra). Consequently, petitioner – UOI's objection with regard to award of interest is baseless.

20. In my view the respondent-claimant is also entitled to future simple interest from the date of the decree till the date of payment @ 6% per annum. Consequently, in my opinion, the impugned award calls for no interference except as modified with regard to award of Claim No.8. With the aforesaid observations, the impugned Award dated 27th May, 2009 is made rule of the Court and Registry is directed to prepare a decree sheet in terms thereof. Accordingly, present petitions and pending applications stand disposed of.

MANMOHAN,J

APRIL 05, 2010

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