

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 738/2010

Reserved on: November 2, 2011

Decision on: November 15, 2011

THDC INDIA LTD

..... Petitioner

Through: Mr. Gourab Banerji, ASG with
Mr. S.K. Taneja, Senior Advocate,
Mr. Puneet Taneja, Mr. Arjun
Krishnan and Mr. Sahil Tagotra,
Advocates.

versus

JAIPRAKASH ASSOCIATES LTD

..... Respondent

Through: Mr. S. B. Upadhyay, Senior
Advocate with Mr. Lovkesh
Sawhney, Mr. Pawan Upadhyay and
Ms. Anisha Upadhyay, Advocates.

CORAM: JUSTICE S.MURALIDHAR

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

JUDGMENT

15.11.2011

Background facts

1. THDC India Ltd., (formerly Tehri Hydro Development Corporation Ltd.) challenges an Award dated 1st October 2010 passed by the Arbitral Tribunal under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') to the extent of the award of *pendente lite* interest in its dispute with Respondent M/s Jaiprakash Industries Ltd. (now Jaiprakash Associates

Ltd.).

2. By a letter of intent dated 15th December 1998 the Petitioner awarded the work of construction of chute and shaft spillways at Tehri for its Tehri Hydro Dam Power Project to the Respondent. This was followed by an agreement entered into between the parties on 28th December 1998. The contract was priced at Rs. 474,81,53,760. The Start Date was 29th December 1998 and scheduled date of completion was 28th June 2003.

3. Clause 60.0 of the General Conditions of Contract ('GCC') provided for a dispute resolution mechanism wherein in the first place the dispute or difference was to be resolved by the Engineer-in-Charge failing which the contractor could appeal to the Chairman, THDC who would constitute a committee to resolve the dispute with the General Manager, THDC being its convener. The failure of the Committee to give a decision would give the contractor a right to seek reference to arbitration.

4. Dissatisfied with the decision dated 9th October 2007 of the Committee the Respondent invoked the arbitration clause by its letter dated 1st November 2007. An Arbitral Tribunal consisting of the Presiding Arbitrator and one nominee each of the Petitioner and the Respondent came to be constituted. The Respondent raised the following claims:-

- (a) Claim No. 1: Claim for reimbursement of Rs.38,75,887/- on account of fluctuations in foreign exchange rates in respect of some of the construction equipment .
- (b) Claim No. 2: Claim for balance payment of Rs.35,17,760/- against the supply of Micro Silica.
- (c) Claim for interest @ 16% p.a. on the above two claims.

(d) Cost of Arbitration.

5. The Petitioner disputed Claims 1 and 2 and further submitted that by virtue of Clauses 50.0 and 51.0 of the GCC, the Tribunal could not award pre-reference and *pendente lite* interest. The said two clauses read as under:

“Clause 50.0 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 account, be due to him.

Clause 51.0 No claim for delayed payment due to dispute etc.

No claim for interest or damage will be entertained or be payable by the corporation in respect of any amount or balance which may be lying with the corporation owing to any dispute, difference or misunderstanding between the parties or in respect of any delay or omission on the part of the Engineer in charge in making intermediate or final payments or in any other respect whatsoever.”

The Arbitral Award

6. The Arbitral Tribunal allowed Claim No. 1 for Rs. 18,59,377/- and Claim No. 2 for Rs. 6,13,160/-. Further it awarded the Respondent *pendente lite* interest at 10% per annum taking the date of cause of action/invocation of arbitration as 9th October 2007 till the expiry of sixty days from the date of the Award and thereafter future interest at 18% per annum till the date of actual payment.

7. A perusal of the Award shows that in para 24 of the majority opinion, there is a discussion of the reasons for award of interest. After noticing

Clause 51.0, the majority opinion has extracted a passage from the decision of the Supreme Court in the ***Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age (1996) 1 SCC 516*** and observed that since in terms of Clause 9.0 of the GCC the contractor was required to pay interest at 16% per annum on the loan and advances taken from the Petitioner, it is that rate of interest which should be awarded for any payment due to the Respondent from the Petitioner.

Submissions of counsel

8. Mr. Gourab Banerji, learned ASG appearing for the Petitioner at the outset submitted that the Petitioner is confining its challenge to the award of *pendente lite* interest. He submitted that the Arbitral Tribunal erred in interpreting Clauses 50.0 and 51.0 GCC. He laid emphasis on the words “or be payable by the Corporation...in any other respect whatsoever” occurring in Clause 51 GCC and submitted that there was a complete bar against payment of interest both where the amount was ascertained and unascertained. According to him even in Clause 50.0, the phrase “....nor upon any balance which may on the final settlement of his account, be due to him” indicated that there was no liability on the part of the Petitioner to pay *pendente lite* interest on an amount which is later determined as being due to the Respondent. He submitted that the decision in ***Engineers-De-Space-Age*** was distinguished in later decisions including ***Union of India v. Saraswat Trading Agency (2009) 16 SCC 504***, ***Sayed Ahmed & Co. v. State of Uttar Pradesh (2009) 12 SCC 26***, ***Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat (2010) 8 SCC 767*** and ***Union of India v. Krafters Engineering & Leasing Pvt. Ltd. (2011) 7 SCC 279***.

9. On behalf of the Respondent Mr. S.B. Upadhyay, learned Senior counsel and Mr. Lovkesh Sawhney, learned counsel referred to the judgment in ***Secretary, Irrigation Department v. G. C. Roy 1992 (1) SCC 508*** and submitted that since there was no specific bar in the contract against payment of *pendente lite* interest, the Arbitral Tribunal was justified in awarding such interest. It is submitted that Clause 50.0 GCC dealt entirely with ascertained amounts. In fact, the first part of the Clause 50 GCC did not relate to any prohibition against payment of interest. There was no omission arising from the inaction on the part of the Engineer-in-Charge in supplying drawing or issuing instructions as per Clause 5 GCC leading to voiding of the contract. The second part of Clause 50 related to ascertained amount, i.e., the amounts which were not in dispute, viz., namely, interest on any guarantee (for instance, performance guarantee, security etc. as per Clauses 6, 6.01, 6.02 and 6.03 GCC), payment in arrears as envisaged in Clause 38.2 GCC and any balance amount as ascertained upon final settlement of the contractor's account by the employer/engineer-in-charge as per Clause 38.3 and 38.4 GCC upon the final measurement of the work done and after effecting admissible recoveries. This again was an ascertained amount as per Clause 38.4 GCC. A claim made by the contractor for further sums would give rise to a dispute to be adjudicated by the Arbitral Tribunal and that would by its very nature be an unascertained amount. Such sum was therefore not covered by the phrase "any balance which may on final settlement of his account be due to him." As regards Clause 51.0 GCC, it was submitted by Mr.Upadhyay that it dealt with any amount lying with the corporation owing to (a) any dispute (b) difference or (c) misunderstanding between the parties or any delay in making intermediate payment or final payment. As regards the phrase "in any other respects whatsoever" occurring in Clause 51 GCC he referred to a similarly

worded Clause G1.09 interpreted by Supreme Court in *State of Uttar Pradesh v. Harish Chandra and Co. 1991 (1) SCC 63* to mean “any other amount which might have been with the government and refund of which might have been withheld by the government.” The words “entertained” or be “payable” occurring in the first part of Clause 51 GCC also related to to an ascertained amount lying with the Petitioner and could not be read out of context. A distinction was sought to be drawn between the clauses which were considered in the decisions cited by the learned Senior counsel for the Petitioner and Clauses 50.0 and 51.0 of the GCC which, according to the Respondent, was closest to Clause G.1.09 in the *Harish Chandra* case.

The change in the legal position brought about by the 1996 Act

10. A claim for *pendente lite* interest in arbitration proceedings has been the subject matter of several decisions of the Supreme Court. These decisions can be broadly classified as those arising under the Arbitration Act 1940 (‘the 1940 Act’) and those under the 1996 Act. In *Secretary, Irrigation Department v. G. C. Roy, Dhenkanal Minor Irrigation Division v. N.C. Budharaj (2001) 2 SCC 721, Bhagawati Oxygen Ltd. Hindustan Copper Ltd. (2005) 6 SCC 462* and *State of Rajasthan v. Ferro Concrete Construction (P) Ltd. (2009) 12 SCC 1* the position as regards the power of the arbitrator to award interest under the 1940 Act for the pre-reference, *pendente lite* and post-reference periods was considered. It was held that he did have the power to do so, if there was no express bar in the contract regarding award of interest. The said decisions also seemed to suggest that a bar on the employer paying interest to the contractor did not imply a similar restriction on the arbitrator awarding *pre-reference* or *pendente lite* interest.

11. However, the legal position under the 1996 Act is different. There is now an express provision in Section 31 (7) of the Act which reads thus:

“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.”

12. As explained by the Supreme Court in *Sayeed Ahmed & Co. v. State of Uttar Pradesh*, under Section 31 (7) of the 1996 Act “the difference between the pre-reference period and pendente lite period has disappeared.” It recognises only two periods for which the arbitral tribunal may award interest (SCC @ p. 32):

“(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.”

13. Consequently it was held by the Supreme Court in *Sayeed Ahmed & Co. v. State of Uttar Pradesh* (SCC, p.31):

“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 the arbitrator has the discretion to award interest during pendente lite period in spite 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.”

14. The above changed position in the law after the enactment of Section 31 (7) of the 1996 Act has to be borne in mind while examining the decisions relied upon by the parties in the present case. In other words, although under the 1940 Act an arbitrator could award *pendente lite* interest unless there was an express bar in the contract against his awarding such interest, Section 31 (7)(a) of the 1996 Act beings with the words “Unless otherwise agreed by the parties” meaning thereby that a bar in the contract between the parties against grant of interest would bind the arbitrator as well. This then requires examining the Clauses 50 and 51 GCC in the present case to determine if they impose a bar on award of *pendente lite* interest.

Interpretation of Clauses 50 and 51 GCC

15. As far as Clause 50 GCC is concerned, this Court is inclined to accept the submission on behalf of the Respondent that it refers to only ascertained sums. The second part of Clause 50 refers to “interest upon any guarantee”, “payment in arrears” and any balance which may on the final settlement of the account be found due to the contractor. All these sums are obviously “ascertained” sums. Clause 50 GCC bars the payment of interest on such sums alone.

16. Clause 51.0 GCC on the other hand makes it clear that:

“no interest or damage will be entertained or be payable” by the Petitioner,

(a) in respect of any amount or balances which may be lying with the

Petitioner owing to any dispute, difference or misunderstanding

between the parties, or

(b) in respect of any delay or omission on the part of the Engineer-in-Charge in making intermediate or final payments, or

(c) “in any other respect whatsoever.”

17. The words which unravel the true purport of the bar on payment of interest are those that follow the words “in respect of” and “any other respect”. While the sums mentioned in (a) above may be “ascertained” sums as suggested by the learned Senior counsel for the Respondent, the sum envisaged in (c) above can be an “unascertained” amount if it is read with reference to the words “or be payable”. In such event, the clause would read “no interest..will..be payable..in any other respect whatsoever.” In the context in which it occurs, the word “payable” could well refer to an amount which is not yet determined and might become payable at a later point in time. This could be determined by the Arbitral Tribunal as well. The words “in any other respect whatsoever” when read with “payable” expands the ambit of the expression and does not limit it to (a) or (b). Therefore, the wording of Clause 51.0 GCC does support the plea of learned senior counsel for the Petitioner that it imposes a complete bar on the Arbitral Tribunal awarding *pendente lite* interest on any unascertained sum, including a sum which is the subject matter of the claim before it.

Analysis of case law

18.1 Since the main plank of the Respondent’s submissions revolved around the decision in *State of UP v. Harish Chandra and Co.*, that decision is discussed hereafter in some detail. There, Clause 1.9 of Special

Conditions of the Contract ('SCC') read as under (SCC @ p. 67):-

“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 making periodical or final payments or in any other respect whatsoever.”

18.2 Interpreting the above clause, the Supreme Court in ***Harish Chandra and Co.***, observed as under (SCC @ p. 67):

“10. A mere look at the Clause shows that the claim for interest by way of damages was not to be entertained against the Government with respect to only a specified type of amount, namely, any moneys or balances which may be lying with the Government owing to any dispute, difference between the Engineer-in-Charge and the contractor; or misunderstanding between the Engineer-in-Charge and the contractor in marking periodical or final payments or in any other respect whatsoever. The words "or in any other respect whatsoever" also referred to the dispute pertaining to the moneys or balances which may be lying with the Government pursuant to the agreement meaning thereby security deposit or retention money or any other amount which might have been with the Government and refund of which might have been withheld by the Government. The claim for damages or claim for payment for the work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government. Consequently, on the express language of this Clause, there is no prohibition which could be called out against the respondent-contractor that he could not raise the claim for interest by way of damages before the arbitrator on the relevant items placed for adjudication.”

18.3 It will be noticed that the above Clause 1.9 is not identical to Clause 51.0 GCC. The crucial words “or be payable” occurring in Clause 51.0 GCC is missing in Clause 1.9. Also, when read as a whole while Clause 1.9

can convey the meaning attributed to it by the Supreme Court, Clause 51.0 GCC in the instant case has not only to be read along with the words “or be payable” but also in the context of and distinguished from Clause 50.0 which appears to deal only with ascertained claims. This is apart from the fact that the case arose in the context of the 1940 Act and, as explained in *Sayeed Ahmed & Co.* will not apply to arbitrations under the 1996 Act. Accordingly, this Court declines to accept the submission by learned Senior counsel for the Respondent that the decision in *Harish Chandra and Co.* applies on all fours. It is in fact distinguishable on facts.

19. In *Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age* the Supreme Court was interpreting Clause 13(g) of the contract in that case which provided that “no claim for interest would be entertained by the Commissioners with respect to any money or balance which may 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.” A two-Judge Bench of the Supreme Court interpreted Clause 13(g) as merely prohibiting the Commissioner from entertaining any claim for interest and as not prohibiting the arbitrator from awarding interest. In other words, once the matter goes to arbitration the discretion of the arbitration is not, “in any manner, stifled by the terms 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.” As explained in *Sayeed Ahmed & Co.* this is no longer good law when it comes to arbitrations under the 1996 Act, which would be governed by Section 31 (7) thereof.

20.1 In *Sayeed Ahmed & Co. v. State of Uttar Pradesh*, the clause in

question was G1.09 which read as under (SCC @ p. 30):-

“G. 1.09. No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be lying with the Government or any 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 any other respect whatsoever.”

20.2. After referring to Section 31(7) of the 1996 Act, the Supreme Court interpreted Clause G1.09 whereunder no interest or damages could be paid in regard to (SCC @ p. 33):

- “(i) any money or balance which may be lying with the Government;
- (ii) any money which 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;
- (iii) any delay on the part of the Engineer- in-Charge in making periodical or final payment; or
- (iv) any other respect whatsoever.

20.3 The Supreme Court held that the above clause was “comprehensive and bars interest under any head in clear and categorical terms.” The words “any becoming due” in Clause G1.09 is no different from the words “and be payable” in Clause 51.0 GCC. In *Sayeed Ahmed & Co.* the Supreme Court distinguished the decision in *Harish Chandra* on the ground that the wording of Clause 1.09 was restrictive whereas Clause G1.09 in *Sayeed Ahmed & Co.*, was “significantly different”. It was accordingly observed as under (SCC @ p. 34):

“19....It specifically provides that no interest shall be payable in respect of any money that may become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge and contractor or with respect to any delay on the

part of the Engineer-in-Charge in making periodical or final payment or in respect of any other respect whatsoever. The bar under clause G-1.09 in this case being absolute, the decision in Harish Chandra will not assist the appellant in any manner.”

20.4 Further, the decision in *Engineers-De-Space-Age* was distinguished in the following manner (SCC @ p. 36):

“The observation in *Engineers-De-Space-Age* 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.”

21.1 In *Union of India v. Saraswat Trading Agency*, the clause in question was Clause 31 which read as under (SCC @ p. 516):

“20. 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.”

21.2. This was a case under the 1996 Act. Explaining that the Clause 31 differed from Clause 13(g) in the *Engineers-De-Space-Age*, it was observed that the wording of Clause 31 barred payment of interest “for any reason whatsoever”. Consequently, the award of the High Court of pre-

reference and pendente-lite interest was held to be unsustainable.

22.1 In *Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works)*, again under the 1996 Act, the relevant clause was 16(2) which reads as under (SCC @ p. 770):

“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.”

22.2 In that case, there were two claims. One in relation to erroneous billing and other in relation to security deposit. After referring to the decisions in *Sayeed Ahmed & Co., Saraswat Trading Agency* as well as *Engineers-De-Space-Age* and *Madnani Construction Corpn. (P) Ltd. v. Union of India (2010) 1 SCC 549*, it was held that since the parties had agreed that no interest should be paid, the refusal by the arbitrator to award pendente-lite was correct.

23. As observed earlier, the above decisions draw a distinction between two lines of cases, one under the 1940 Act which includes *Harish Chandra and Co., Engineers-De-Space-Age* and *Madnani Construction Corpn. (P) Ltd.*, and the other under the 1996 Act which includes *Sayeed Ahmed & Co., Saraswat Trading Agency, Sree Kamatchi Amman Constructions* and *Union of India v. Krafters Engineering & Leasing Pvt. Ltd.* It has been held that the decisions which arose in the context of the 1940 Act regarding *pendente lite* interest would be inapplicable to cases arising under the 1996 Act, which contains a specific provision in the form of Section 31 (7)(a). Secondly, the decision in each case turned on the precise wording of the clause in question. Therefore, while in *State of UP v. Harish Chandra and*

Co., this Court upheld the award of *pendente lite* interest because of the wording of Clause 1.09 of the contract in that case, it negated the claim for *pendente lite* interest in *Sayeed Ahmed & Co.*, on the basis of the wording of Clause G.1.09 in that case. The wording of Clause 1.09 in the *Harish Chandra and Co.* case, which arose under the 1940 Act, was indeed restrictive and differed from the wording of Clause 51.0 GCC in the present case. The latter, if at all, is closer to Clause G1.09 in *Sayeed Ahmed & Co.* which distinguished both *Harish Chandra and Co.* and *Engineers-De-Space-Age* and negated the claim for *pendente lite* interest. *Sree Kamatchi Amman Constructions*, where also a similar claim was negated, was concerned with Clause 16(2) which contained the phrase “will be payable” which is similar to “or be payable” in Clause 51.0 GCC

Conclusion

24. It appears to this Court, in light of the above decisions, that the interpretation placed on Clause 51.0 GCC by the Petitioner should prevail. The impugned Award dated 1st October 2010 of the Arbitral Tribunal is modified to the extent that the award by it of *pendente lite* interest in favour of the Respondent is held to be contrary to the express agreement between the parties in terms of Section 31(7)(a) of the Act and therefore unsustainable in law. That portion of the impugned Award is accordingly set aside. However, in all other respects, the impugned Award is upheld. The petition is disposed of in the above terms, with costs of Rs.20,000 which will be paid by the Respondent to the Petitioner within four weeks.

S. MURALIDHAR, J.

NOVEMBER 15, 2011

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