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IN THE HIGH COURT OF DELHI AT NEW DELHI

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FAO (OS) 494 OF 2010

Judgment Delivered On:24.2.2012

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UNION OF INDIA

... PETITIONERS

Through :

Mr. A.S. Chandhiok, ASG with Mr.
H.R. Tiwari and Mr. J.K. Singh,
Advocates

VERSUS

M/S CONBES INDIA PVT LTD

... RESPONDENT

Through:

Mr. Vivekanand, Advocate.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

A.K.SIKRI,ACTING CHIEF JUSTICE: (ORAL)

1. This intra court appeal is preferred by the Union of India challenging the orders dated 5.4.2010 passed by the learned Single Judge in CS(OS) 122/2009 preferred by the appellant which was a petition under Section 14 & 17 of the Arbitration Act, 1940 filed by the respondent herein for making the award passed by the Arbitrator as a rule of the Court. On receipt of notice of the said petition, the appellant had filed objections under Section 30 & 33 of the Arbitration Act, (hereinafter referred to as 'the Act, 1940'). Specific objection was laid to the award

in respect of Claims No. 1,2,5,6, and 8 etc. Objection qua Claims No. 1,2,5 and 6 were rejected and qua claim no.8, objections were sustained thereby reducing the amount awarded under this claim to Rs. 1,75,000/-. Insofar as this part of the order of the learned Single Judge is concerned, there is no dispute. In this behalf, though the order of the learned Single Judge sustaining the claims is challenged, the same was not pressed at the time of arguments and only controversy which is raised before us pertains to the award of pendente lite interest by the learned Arbitrator.

2. The submission of the appellants was that the Arbitrators could not have awarded any interest on the awarded amount in view of Section 16 (2) of the General Conditions of Contract (GCC). However, this contention did not find favour with the learned Single Judge who has, by means of impugned order, held that notwithstanding the aforesaid contractual provision, the Arbitrator had the jurisdiction to award the interest. While taking this view various judgments cited by the learned Counsel for the parties on either side have been taken note of and considered, to which we shall be referring to at an appropriate stage.

3. When the matter came up for argument before the Division Bench, the Division Bench took note of the judgments cited on either side and *prima facie* found that there appears to be some conflict and, therefore, the vexed question needed consideration by a Larger Bench. Vide orders dated 5.12.2011, the matter

was referred to the Larger Bench. Since this order takes note of the controversy involved, we reproduce that order in verbatim:-

“The vexed question whether the clause prohibiting the grant of interest contained in the contract between the parties could also preclude the Arbitrator from granting pendent lite interest has arisen in this appeal. There have been various positions on this aspect.

Suffice it to say that a number of judgments of the learned Single Judge of this Court have taken a view that the award of pendent lite interest by the Arbitrator is not barred under the Indian Arbitration Act, 1940. In this behalf we may refer to the judgment in FAO No. 289/2003 Union of India Vs. R.C. Singhal and Ors. decided on 21.03.2006. The subsequent judgment by one of us (Sanjay Kishan Kaul, J.) in Thermospares India Vs. BHEL and Ors. 130 (2006) DLT 382 followed this view. We are informed that a similar view has been taken in OMP No. 403/2002 Union of India Vs. TRG Industries Pvt. Ltd. decided on 28.07.2006 and OMP No. 44/2010 Union of India Vs. M/s Chenab Construction Joint Venture decided on 05.03.2010.

The clause in question in the present case is identical to the one in Union of India Vs. R.C. Singhal and Ors. case (supra) and Mandnani Construction Corporation (P) Ltd. Vs. Union of India and Ors. 2009 (4) Arbitration Law Reporter 457 (SC).

Thus this view is favourable to the respondent as adopted by the learned Single Judge in the impugned order.

The matters does not rests at this since, in Madnani Construction Corporation (P) Ltd. Vs. Union of

India and Ors. case (supra), the Supreme Court has taken the same view. However, learned counsel for the appellant has referred to a judgment in Sayeed Ahmed & Co. Vs. State of U.P. and Ors. 2009 (3) Arbitration Law Reporter 29 (SC), which is an earlier judgment and according to him takes a contrary view. Learned counsel has also referred similarly to the Union of India Vs. Saraswat Trading Agency and Ors. (2009) 16 SCC 504.

In FAO (OS) No. 239/2000, M/s Housing and Urban Development Corporation Vs. M/s Shapoorji Pallonji & Co. Ltd. decided on 02.11.2011 various judgments were not brought to our notice and in respect of a different clause, we took a view relying on the judgment in Secretary, Irrigation Department, Govt. of Orissa and Ors. Vs. G.C. Roy (1992) 1 SCC 508.

We are thus of the view that this issue needs to be examined by a larger bench of this court to bring about a settled legal position.

The papers be placed before Hon'ble the Acting Chief Justice for constitution of a Larger Bench."

This is how the matter comes up before this Full Bench.

4. We have heard Mr. A.S.Chandhiok, learned ASG for the appellant and Mr.Vivekanand, learned counsel who appeared for the respondent.

5. The reference order spells out the conflicting approach of this Court and takes note of relevant judgments of the Supreme Court which have to be kept in mind while straightening the controversy. In the first blush, though it may appear that the view taken by the Supreme Court in *Engineers-De-Space-Age* 9 (1996) 1

SCC 516 and *Madnani*(supra) is contrary to the ratio of *Sayeed Ahmed* (supra), a close scrutiny of these judgments which all interpreted the Constitution Bench judgments in *Secretary, Irrigation Department, Government of Orissa Vs. G.C. Roy* (supra) and *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa Vs. N.C. Budharaj* 2001 (2) SCC 721, would make it clear that the issue stands squarely decided by a Constitution Bench judgment in *G.C.Roy* (supra). In fact, it is not even necessary for us to indulge in detailed discussion on this aspect as our task is made easier by a recent judgment of the Supreme Court in the case of *Union of India Vs. Krafters Engineering and Leasing Private Ltd.* (2011) 7 SCC 279 wherein the Supreme Court has undertaken the identical exercise which we are supposed to undertake. The Court extensively quoted from *G.C. Roy* (supra) which was also a case under the Arbitration Act, 1940 and dealt with the question of pendente lite interest. We would like to extract some portion from the said Constitution Bench judgment hereunder:-

“43. The question still remains whether arbitrator has the power to award 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](#), Code of Civil Procedure and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative form (sic 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 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.

44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes - or refer the dispute as to interest as such - to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter **within his discretion** to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view.”

(emphasis added)

6. Thereafter, the Court reproduced the following discussion from *N.C.*

Budharaj (*supra*):-

“26. 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 empower any court to reopen proceedings which have already become final, and apply only to any pending proceedings. No costs.”

7. Further exercise undertaken by the Court relates to the discussion of the subsequent judgments particularly ***Engineering De-Space-Age*** and ***Sayeed Ahmed*** (*supra*) and summed up the position in the following manner:-

“15. Considering the specific prohibition in the agreement as discussed and interpreted by the Constitution Bench, we are in respectful agreement with the view expressed in ***Sayeed Ahmed and Company*** (*supra*) and we cannot possibly agree with the observation in ***Board of Trustees for the Port of Calcutta*** (*supra*) in a case arising under the Arbitration Act, 1940 that the arbitrator could award interest pendente lite ignoring the express bar in the contract.

17. At the end of the argument, learned Counsel for the Respondent heavily relied on the recent decision of this Court in *Madnani Construction Corporation Private Limited* (supra) which arose under the Arbitration Act, 1940. There also, Clause 30 of SCC and Clause 52 of GCC prohibits payment of interest. Though the Bench relied on all the earlier decisions and considered the very same clause as to which we are now discussing, upheld the order awarding interest by the arbitrator de hors to specific bar in the agreement.

21. In the light of the above principle and in view of the specific prohibition of contract contained in Clause 1.15, the arbitrator ceases to have the power to grant interest. We also clarify that the Arbitration Act, 1940 does not contain any specific provision relating to the power of arbitrator to award interest. However, in the Arbitration & Conciliation Act, 1996, there is a specific provision with regard to award of interest by the arbitrator. The bar under Clause 1.15 is absolute and interest cannot be awarded without rewriting the contract.”

8. No doubt, this latest judgment is rendered by two Judges Bench. However, it has interpreted the earlier two Constitution Bench judgments and it is well established principle of law that the interpretation given by the Apex Court to the earlier judgments is also law under Article 141 of the Constitution and binding on High Courts and Subordinate Courts. The principle which clearly emerges from the reading of the aforesaid judgment culled out from the *GC Roy* (supra) is that in case where agreement is silent about the award of interest, the discretion lies with

the Arbitrator to award or not to award the interest. The Arbitrator shall have the power to award the pendente lite interest though it would be in his discretion to exercise such a power and decide whether to award or not to award the interest in a given case. On the other hand, if the arbitration clause specifically prohibits grant of interest, then, the arbitrator is bound by such contractual provision and would have no power to grant the interest. It would be of interest to mention at this stage that situations have occurred where the clause in the agreement prohibits the contractor from claiming the interest and on such clause issues have arisen as to whether the Arbitrator can still grant the interest. In *Sayeed Ahmed* (supra) the Supreme Court was categorical in holding that in the face of such a provision even the Arbitrator was powerless.

9. It was for this reason that when the contract barred the Arbitrator from granting any interest or bars the contractor from claiming any interest, it would amount to a clear prohibition regarding interest as the Arbitrator could not ignore such express bar in the contract.

10. Applying the aforesaid principle to the facts of this case, the clear answer would be that the Arbitrator had no power to award pendente lite interest. As pointed out above, Clause 16(2) of GCC stipulates in no uncertain terms that the interest would not be payable. The said Clause 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.”

11. We, thus, are of the view that the award of pendente lite interest by the Arbitrator was not legally justified. That order of the learned Single Judge making the award a rule of the Court on this aspect is set aside.

12. The appeal is disposed of accordingly.

13. There shall be no order as to costs.

ACTING CHIEF JUSTICE

**(SANJAY KISHAN KAUL)
JUDGE**

**(RAJIV SHAKDHER)
JUDGE**

FEBRUARY 24,2012

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