

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

% *Judgment Reserved on : December 11, 2012*

Judgment Pronounced on : December 14, 2012

+ **FAO(OS) 596/2011**

JAIPRAKASH ASSOCIATES LTD. ...Appellant

Represented by: Mr.V.P.Singh, Sr.Advocate
instructed by Mr.Lovkesh Sawhney, Advocate.

versus

THDC INDIA LTD. Respondent

Represented by: Mr.A.S.Chandhiok, A.S.G. and
Mr.S.K.Taneja, Sr.Advocate instructed by
Mr.Puneet Taneja, and Mr.Gurpreet S.Parwanda,
Advocates.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. Majority award dated October 10, 2010 dealt with two claims and if allowed, interest thereon. And as against ₹38,75,887/- prayed for under claim No.1 for reimbursement on account of fluctuations in foreign exchange rates in respect of construction equipment ₹18,59,377/- has been allowed, and under claim No.2 in sum of ₹35,17,760/- pertaining to supply of Micro Silica sum awarded is ₹6,13,160/-; and on the two amounts interest awarded is @ 10% per annum from date when arbitration was invoked i.e. October 9, 2007, till 60 days after the award and thereafter @ 18% per annum till when payment is made.

2. Objections filed under Section 34 of the Arbitration and Conciliation Act 1996 by Tehri Hydro Development Corporation Ltd., now known as THDC India Ltd. concerned only the interest awarded by the learned Majority Arbitrators. Vide impugned order dated November 15, 2011, the objection has succeeded resulting in the majority award being set aside limited to the interest being awarded.

3. Two clauses under the contract between the parties, being Clause No.50 and Clause No.51 under the General Condition of Contract were the subject matter of consideration before the learned Arbitrators as also the learned Single Judge. The two clauses reads 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, different 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 on in any other respect whatsoever.”

4. Para 24 of the award penned by the majority would reveal that the learned Arbitrators have relied upon the law declared by the Supreme Court in the decision reported as (1996) 1 SCC 516 *Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age*, and before the learned Single Judge the appellant had principally relied upon the decision of the

Supreme Court reported as (1999) 1 SCC 63 State of U.P. v. Harish Chandra and Co. and the respondent had sought to urge that the decision in Engineers-De-Space-Age's (supra) pronounced by the Supreme Court was distinguished in various decisions reported as (2009) 12 SCC 26 Sayeed Ahmed & Co. v. State of U.P.; (2009) 16 SCC 504 UOI v. Saraswati Trading Agency; (2008) SCC 767 Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palgat; and (2011) 7 SCC 279 UOI v. Krafters Engineering & Leasing Pvt. Ltd.

5. Noting that whereas there could be a debate under the Arbitration Act 1940 with respect to the powers of the Arbitrators to award pendente lite interest notwithstanding the contract prohibiting grant of interest, with reference to Sub Section 7 of Section 31 of the Arbitration and Conciliation Act, 1996, the learned Single Judge has found no scope for any debate, and on the premise that if a contract prohibits grant of interest with respect to any claim, the Arbitrator(s) cannot order payment of pendente lite or future interest. Thus holding, the learned Single Judge has proceeded to consider the two clauses to ascertain whether the two clauses prohibit interest to be paid on the two claims allowed.

6. Construing Clause 50 as referable to only ascertainable sums, the learned Single Judge has referred to the phrases '*interest upon any guarantee*' and '*payments in arrears*' to conclude that these phrases clearly contemplate '*ascertained*' sums.

7. Thereafter, the learned Single Judge has proceeded to analyze Clause 51 and has highlighted the expression '*no claim for interest or damages will be entertained or payable*' and the expression '*in any other respect whatsoever*' to bring out that the said clause prohibits payment of interest on any amount not paid on account of a dispute or a difference. The learned Single Judge has thereafter contrasted the language of Clause

1.9 of the contract considered by the Supreme Court in Harish Chandra's (supra) and has noted that the phrase 'or be payable' in Clause 51 of the instant contract was missing in Clause 1.9 of the contract considered by the Supreme Court in Harish Chandra's case (supra). The learned Single Judge has also found that the said decision was considering the matter under the Arbitration Act, 1940. The learned Single Judge has thereafter noted that the decision relied upon by the appellant in Engineers-De-Space-Age's case (supra) was held to be no longer good law by the Supreme Court in Sayeed Ahmed's case (supra). The learned Single Judge has thereafter noted the other decision relied upon by the respondent and has concluded the opinion against the appellant setting aside the award insofar interest was awarded.

8. It was urged before us by the learned Senior Counsel for the appellant that Clause 1.9 in Harish Chandra's case (supra) is pari materia with Clause 51 of the instant contract and thus urged that a differently worded Clause being Clause No.4 in the decision reported as (1997) 2 SCC 469 State of Orissa v. B.N.Agarwalla, but having similar purport, requires it to be held that the view taken by the learned Single Judge is not correct.

9. The clause considered by the Supreme Court in B.N.Agarwalla's case (supra) reads as under:-

“Rates, Materials and Workmanship

The rates quoted shall be for finished work inclusive of all materials, labour, taxes, royalties, transportation etc.

The Engineer-in-charge will have full and final authority to reject any material or work done due to defect therein and the contractor/contractors shall forthwith remedy the defects at his/their own expense and no further work shall be done in connection with particular work or portion of the work till such time as

the defect is removed to the entire satisfaction of the Engineer-in-charge.

All materials, tools and plants brought to site by the contractor/contractors shall be deemed to be held in lien by the BCCL and the contractor/contractors shall not have the right to remove the same from the site without the written permission of the Engineer-in-Charge. However, the BCCL shall not be liable for any loss, theft or damage due to fire or other causes sustained during this period of lien.

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

The BCCL shall be at liberty to deduct from the security deposit or from any other sum due or to become due under this contract or under another contract all sums that become due to the BCCL. All bills shall be pre-audited before amounts and will be made by cheque only.”

10. Clause 1.9 which was the focal point of interpretation in the decision reported as (1999) 1 SCC 63 State of U.P v. Harish Chandra & Co. reads as under:-

“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.”

11. Learned Senior Counsel for the respondent urged that in another contract between the parties, Clauses 1.2.2.14 and 1.2.15 which are pari materia with clauses 50 and 51 of the instant contract and were the focal point of consideration by the Supreme Court in the decision reported as 2012 (4) Arb.LR 88 (SC) Tehri Hydro Development Corporation Ltd. & Anr. v. Jai Prakash Associates Ltd. have been interpreted by the Supreme Court as has been done by the learned Single Judge.

12. The two clauses considered by the Supreme Court in the afore noted decision read as under:-

“1.2.14 No claim for delayed payment due to dispute, etc. – The contractor agrees that no claim for interest or damages will be entertained or payable by the government in respect of any money or balances which may be lying with government owing to any disputes, differences or misunderstandings between the parties or in respect of any delay or omission on the part of the Engineer-in-Charge in making immediate or final payment or in any other respect whatsoever.

1.2.15 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 accounts be due to him.”

13. We contrast the language of Clause 50 of the instant contract and the language of clause 1.2.14 considered by the Supreme Court in Jai Prakash Associates’ case (supra) as also the language of Clause 51 of the instant contract and clause 1.2.15 considered by the Supreme Court in Jai Prakash Associates’ case (supra) by juxtaposing the same in a tabular form 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	1.2.14 No claim for delayed payment due to dispute, etc. – The contractor agrees that no claim for interest or damages will be entertained or payable by the government in respect of any money or balances which may be lying with government owing to any disputes, differences or
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balance which may on the final settlement of his account, be due to him.	misunderstandings between the parties or in respect of any delay or omission on the part of the Engineer-in-Charge in making immediate or final payment or in any other respect whatsoever.
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, different 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 on in any other respect whatsoever.	1.2.15 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 accounts be due to him.

14. Now, in Harish Chandra's case (supra) the clause in question prohibited a claim towards interest being entertained with respect to money or balances lying with the Government owing to any dispute or difference. Thus, as would be evident from paragraph 10 of the said decision, the Supreme Court clearly held that the clause would apply only with respect to specified type of amounts i.e. the amounts lying with the Government pursuant to the agreement; such as security deposits or retention money and taking the argument further, the phrase '*or in any*

other respect whatsoever’ was read to mean a claim akin thereto i.e. of a kind where money was retained and not of a kind where pursuant to a work done or any other clause of the contract a claim for money was raised.

15. Thus, the argument by learned counsel for the appellant that there is hiatus between the decisions of the Supreme Court in Harish Chandra’s case (supra) and Jai Prakash Associates’ case (supra) is not correct inasmuch as in the latter case there were two clauses prohibiting interest and both of them clearly envisaged a prohibition to pay interest with respect to not only monies lying with the government but even with respect to delayed payments or omissions to make payments for work done or on account of measurements not taken etc. Clauses 50 and 51 of the instant contract are *pari materia* with clause 1.2.14 and 1.2.15 in Jai Prakash Associates’ case (supra).

16. The reasoning of the learned Single Judge by drawing a distinction between Clause 1.9 in Harish Chandra’s case (supra) and Clause-51 of the instant contract is palpably not sound inasmuch as the learned Single Judge has emphasized that in Harish Chandra’s case (supra) the prohibition was limited to a claim being entertained and in the instant case the prohibition related to not only a claim being entertained but even payable; for the reason how would a thing be payable unless it is to be entertained. But, the final conclusion arrived at by the learned Single Judge is correct.

17. We thus correct the reasoning. Clause 50 of the instant contract prohibits interest to be paid if payment is delayed on account of a measurement or otherwise. Clause 51 prohibits interest to be paid in respect of money lying with the corporation i.e. security deposits or retention money and also includes a prohibition for interest to be paid

owing to any dispute, difference or misunderstanding between the parties or on account of delay or omission to make payments and the clause terminates with the phrase '*in any other respect whatsoever*'.

18. The rule of *ejusdem generis* guides us that where two or more words or phrases which are susceptible of analogous meaning are coupled together, a *noscitur a sociis*, they are to be understood to mean in their cognate sense and take colour from each other but only if there is a distinct genus or a category. Where this is lacking i.e. unless there is a category, the rule cannot apply.

19. Thus, the two clauses in the instant case compel us to hold that neither there is a conflict in the decisions of the Supreme Court in Harish Chandra's case (supra) and Jai Prakash Associates' case (supra) and that the law declared in Jai Prakash Associates' case (supra) governs the instant contract.

20. The appeal is accordingly dismissed but without there being any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

DECEMBER 14, 2012
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