

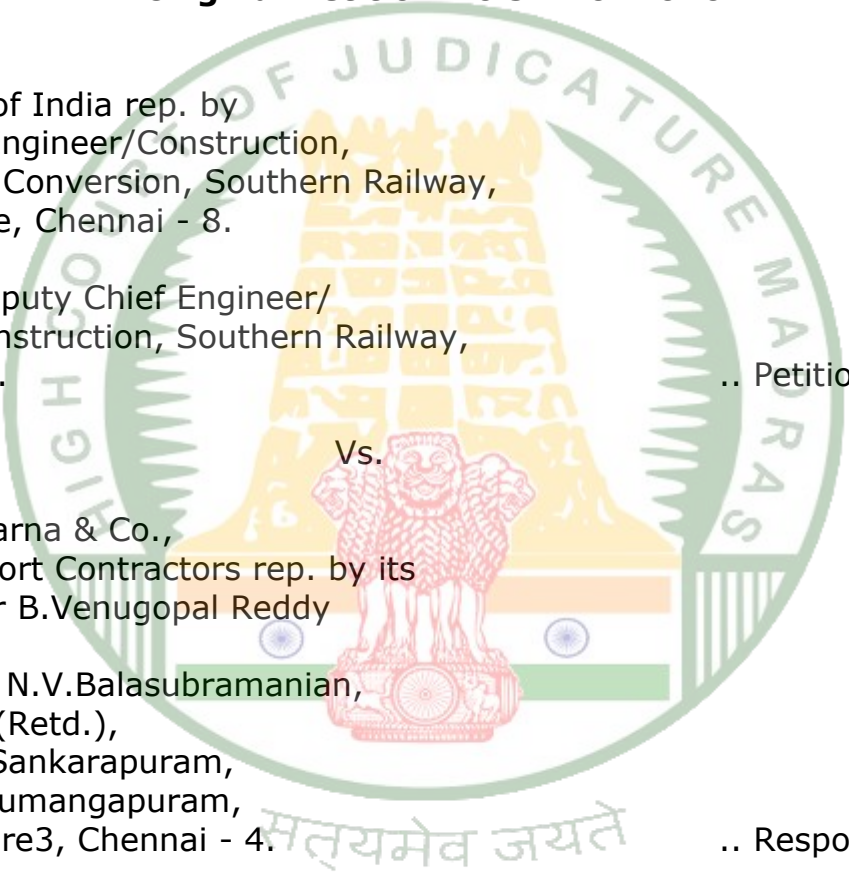
IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.01.2018

CORAM

THE HONOURABLE MR. **JUSTICE M.M.SUNDRESH**

Original Petition No.921 of 2010

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- 1.Union of India rep. by
Chief Engineer/Construction,
Gauge Conversion, Southern Railway,
Egmore, Chennai - 8.
- 2.The Deputy Chief Engineer/
Construction, Southern Railway,
Calicut. .. Petitioners

Vs.

- 1.Sri Swarna & Co.,
Transport Contractors rep. by its
Partner B.Venugopal Reddy
- 2.Justice N.V.Balasubramanian,
Judge (Retd.),
No.3, Sankarapuram,
Alamelumangapuram,
Mylapore3, Chennai - 4. .. Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 22.02.2010 and subsequent clarification award passed on 13.05.2010.

For Petitioners : Mr.P.T.Ramkumar
For Respondents : No appearance

ORDER

Challenging the award dated 22.02.2010 and the subsequent clarification award dated 13.05.2010, the present Original Petition has been filed.

2.Heard the learned counsel appearing for the petitioners. Despite service of notice and the names of the respondents having been printed in the cause list, there is no representation on behalf of the respondents.

3.The first petitioner floated tender for certain works. The first respondent became the successful bidder. After work was completed within the time extended by the first petitioner, a claim was made by the first respondent. The first petitioner did not agree with the claim on the premise that the extension was granted only due to the fault of the first respondent.

4.The learned Arbitrator was pleased to grant a sum of Rs.17,17,782/- at 9% interest insofar as Claims Nos.1, 2 and 4 are concerned. Claim No.3 is with respect to loss of profit. For the aforesaid claim, a sum of Rs.1,89,158/- was awarded. Apart from the same, for the interest *pendete lite* under Claim No.10, a sum of Rs.16,04,268/- was awarded.

5.Out of this award amount, Claims Nos. 1, 2 and 4 have been satisfied. Therefore, these claims are not subject matter of the present original petition. Hence we are concerned with the remaining two claims.

6.Learned counsel appearing for the petitioners would submit that Claim No.3 cannot be awarded as the delay has occasioned due to the fault of the first respondent. Insofar as Claim No.10 is concerned, as per Clause 16.2, 64.8 of the General Conditions of Contract, which governs the contract between the parties, there is no question of payment of interest *pendente lite* and for pre-award. Reliance has been made on the judgment of the Apex Court in **Sri Chittaranjan Maity Vs. Union of India (2017 (12) SCALE 216)**.

7.Insofar as Claim No.3 is concerned, the learned Arbitrator has

rightly held that the delay cannot be attributed against the first respondent. Incidentally, a factual finding has been given that the first respondent, being the claimant, is entitled to loss of profit. This exercise having been done on a factual premise, this Court is not inclined to set aside the same in exercise of power under Section 34 of the Arbitration and Conciliation Act, 1996.

8. Coming to Claim No.10, this Court finds considerable force in the submissions made by the learned counsel appearing for the petitioners. The Apex Court in **Sri Chittaranjan Maity Vs. Union of India (2017 (12) SCALE 216)**, was pleased to consider the very same issue in paragraphs 16, 17 and 21, which are extracted hereunder:

16. Admittedly, the GCC, governing the contract between the parties, contains a clause which bars the payment of interest, which is as under:

"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.”

17. Relying on a decision of this Court in *M/s. Ambica Construction vs. Union of India* (2017) SCC OnLine SC 678, (C.A.No.410 of 2008, disposed of on 26.04.2017) learned senior counsel for the appellant submits that mere bar to award interest on the amounts payable under the contract would not be sufficient to deny payment on pendente lite interest. Therefore, the Arbitrator was justified in awarding the pendente lite interest. However, it is not clear from *M/s. Ambica Construction (supra)* as to whether it was decided under The Arbitration Act, 1940 (for short 'the 1940 Act') or under the 1996 Act. It has relied on a judgment of Constitution Bench in *Secretary, Irrigation Department, Government of Orissa and Others. vs. G.C. Roy* (1992) 1 SCC 508. This judgment was with reference to the 1940 Act. In the 1940 Act, there was no provision which prohibited the Arbitrator from awarding interest for the pre-reference, pendente lite or post award period, whereas the 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the Arbitrator cannot award interest for the said period. Therefore, the decision in *M/s. Ambica Construction (supra)* cannot be made applicable to the instant case.

21. In Union of India vs. Bright Power Projects (India) Private Limited (2015) 9 SCC 695, a three-Judge Bench of this Court, after referring to the provisions of Section 31(7)(a) of the 1996 Act, held that when the terms of the agreement had prohibited award of interest, the Arbitrator could not award interest for the pendente lite period. It has been held thus:

"10. Thus, it had been specifically understood between the parties that no interest was to be paid on the earnest money, security deposit and the amount payable to the contractor under the contract. So far as payment of interest on government securities, which had been deposited by the respondent contractor with the appellant is concerned, it was specifically stated that the said amount was to be returned to the contractor along with interest accrued thereon, but so far as payment of interest on the amount payable to the contractor under the contract was concerned, there was a specific term that no interest was to be paid thereon.

11. When parties to the contract had agreed to the fact that interest would not be awarded on the amount payable to the contractor under the contract, in our opinion, they were bound by their understanding. Having once agreed that the

contractor would not claim any interest on the amount to be paid under the contract, he could not have claimed interest either before a civil court or before an Arbitral Tribunal.”

Therefore, it is clear that the appellant is not entitled for any interest on the amount awarded by the Arbitral Tribunal.

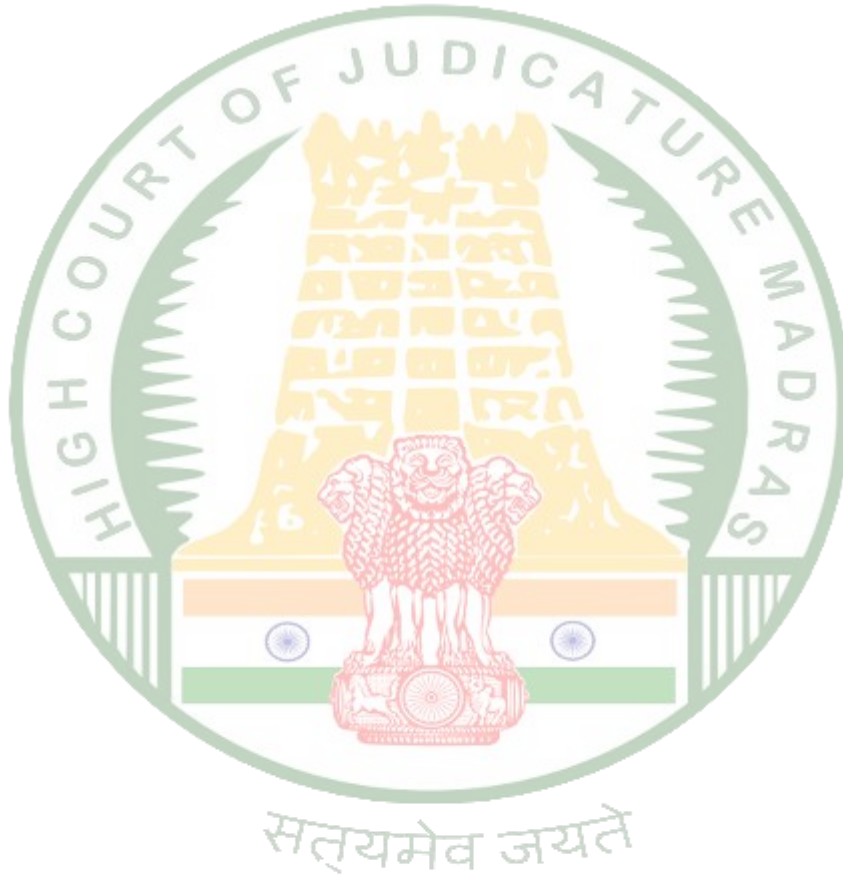
9.The ratio laid down by the Apex Court in the judgment referred above is squarely applicable to the case on hand. The clauses mentioned aforesaid being binding on the first respondent, Claim No.10 cannot be sustained in the eye of law. When once there is a prohibition for awarding interest pending the arbitration, there is no power that lies with the Tribunal to award it. The same logic would apply even to the interest prior to the initiation of the arbitration proceedings as per the aforesaid provisions and in the light of the judgment of the Apex Court referred supra.

10.In such view of the matter, the original petition stands allowed by setting aside the award insofar as Claim No.10 alone is concerned. Insofar as Claim No.3 is concerned, the petitioners shall make the requisite payment in tune with the award of the learned Arbitrator, within a period of eight weeks from the date of receipt of a

copy of this order. No costs.

03.01.2018

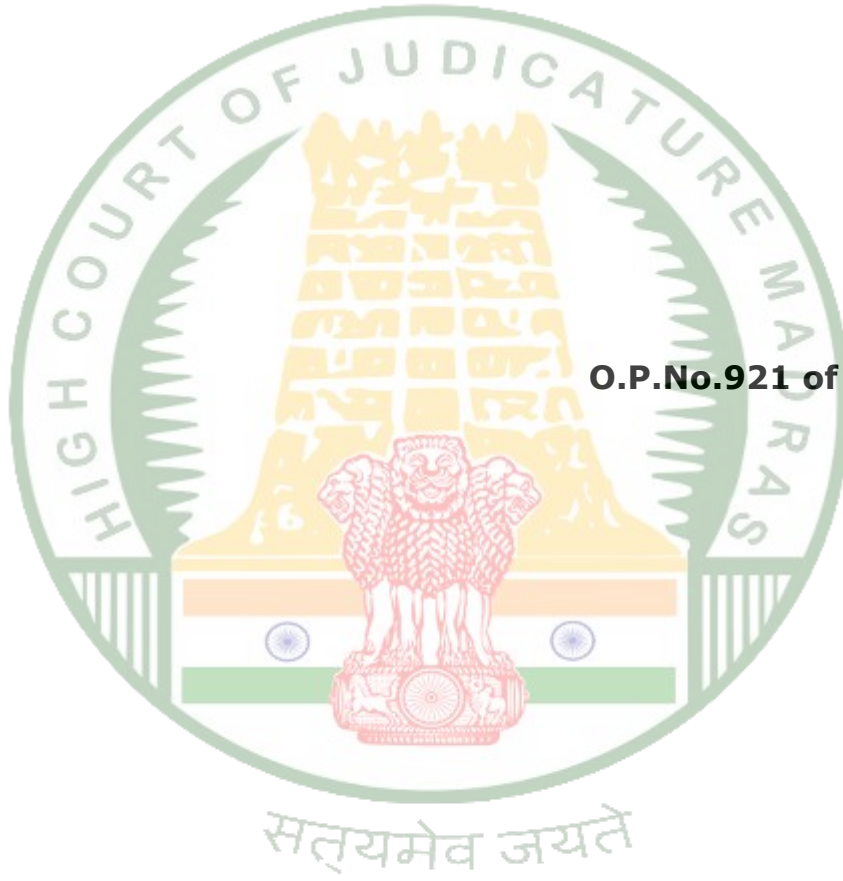
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M.M.SUNDRESH,J.

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