

(1) FAO No. 4374 of 2008 (O&M)
Date of decision: December 20, 2019

...Appellants

Pantawas Khurd Co-op. L&C Society Ltd. and another

...Respondents

...Appellants

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CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Mr. Shashi Kumar Yadav, Advocate,
for the respondents.

JAISHREE THAKUR, J.

1. By this common order, this Court proposes to dispose of above titled three First Appeals against Order, as they arise out of the similar set of facts and involving similar question of law. The appeals have been filed seeking to challenge the impugned judgment dated 17.9.2008 passed by the District Judge, Sirsa, whereby the objection petition filed under Section 34 of the Arbitration and Conciliation Act (for short '**the Act**') against the award of the Arbitrator dated 15.8.2006 has been dismissed.

2. In brief, the facts are that an agreement was executed between the appellants and the respondents for construction of road from Chakka to Risalia. The work was to be completed within the stipulated period and as per the accepted rates and measurement mentioned in the contract. It is alleged that the work was completed after expiry of the original time period and despite the fact that full payment has been made, the respondents made a representation to the Chief Administrator, Haryana State Agriculture Marketing Board for appointment of an Arbitrator. Consequently, an Arbitrator was appointed and the claims were raised by the respondents against the appellants and an award was issued allowing the claim. The appellants filed objection petition before the District Judge, Sirsa, on the ground that the Arbitrator had gone beyond the terms and conditions of the agreement itself and, therefore, the award was not sustainable. It was also submitted that the Arbitrator failed to appreciate Clause 25-A of the agreement, while granting interest to the claimants/respondents. The said clause specifically debarred payment of any interest to the party. However, the same has been allowed.

3. Learned counsel appearing on behalf of the appellants submits that the objection petition has been dismissed in a mechanical manner without appreciating any of the contentions raised regarding the terms and conditions of

the agreement not being adhered to. It is submitted that once the parties had agreed that no interest shall be payable, the Arbitrator cannot award interest for the amounts payable to the contract under the contract. In support of the contention, reliance has been placed on the judgments **Union of India Versus Krafters Engineering and Leasing (P) Ltd. 2011 AIR SC (Civil) 1805** and **Sri Chittaranjan Maity Versus Union of India 2018 (1) R.C.R. (Civil) 989**.

4. Per contra, learned counsel appearing on behalf of the respondents submits that the Arbitrator has the power to award interest pendente lite, as has been held by the Hon'ble Supreme Court in **M/s Raveechee and Co. Versus Union of India Civil Appeal Nos. 5964-5965 of 2018 decided on 3.7.2018** and **Jugal Kishore Prabhatilal Sharma and others Versus Vijayendra Prabhatilal Sharma and another 1993 (1) ArbiLR 488**.

5. I have heard learned counsel for the parties and with their assistance have gone through the pleadings of the parties.

6. At the very outset, it is noted that a perusal of the interim order dated 1.5.2009, would reflect that the appellants herein had given up all pleas other than laying stress on the arguments that interest could not have been awarded by the Arbitrator as Clause 25-A of the agreement debars the same. Thus, the appellants herein have restricted their claim in the appeal to the award of interest given by the Arbitrator in contravention to Clause 25-A of the agreement. In this view of the matter, the short question involved in these appeals is, whether the Arbitrator has erred in allowing interest @ 9% when Section 31 (7) (a) of the Act clearly provides that unless otherwise agreed between the parties, the interest cannot be granted. Clause 25-A of the agreement reads is re-produced hereunder:-

“Clause 25 A. It shall be a term of the contract agreement that

arbitrator shall give a speaking award otherwise the award shall be null and void and will not be binding on the parties. It shall also be a term of his contract that in any dispute/difference referred to the arbitrator the arbitrator shall not award interest to the parties on any of the items of contract agreement executed in between the parties, if the arbitrator awards interest the same shall not be binding on the parties.”

7. The issue with regard to competence of the Arbitrator to award interest is no longer res-integra. Considering similar clause in the agreement, prohibiting award of interest, the Larger Bench of the Supreme Court in ***Ambica Construction v. Union of India, reported in (2017) 14 SCC 323*** has held as under:-

*"5. The only contention advanced at the hands of the learned counsel for the appellant, was based on the judgment of this Court in **Union of India v. Ambica Construction, (2016) 6 SCC 36**, wherein, having examined the legal position declared by this Court, by a Constitution Bench in **Irrigation Department, State of Orissa v. G.C. Roy, (1992) 1 SCC 508**, it was held as under:*

"34. Thus, our answer to the reference is that if the contract expressly bars the award of interest pendente lite, the same cannot be awarded by the arbitrator. We also make it clear that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits."

A perusal of the conclusions drawn by this Court in the above judgment, rendered by a three Judge Division Bench, leaves no room for any doubt, that the bar to award interest on the

amounts payable under the contract, would not be sufficient to deny payment of pendente lite interest. In the above view of the matter, we are satisfied, that the clause relied upon by the learned counsel for the Union of India, to substantiate his contention, that pendente lite interest could not be awarded to the appellant, was not a valid consideration, for the proposition being canvassed. We are therefore satisfied, that the arbitrator, while passing his award dated 28.6.1999, was fully justified in granting interest pendente lite to the appellant.(emphasis supplied)”.

8. Similarly in a recent decision rendered on 3rd July, 2018, the Apex Court in case *Raveechee and Co. v. Union of India, 2018 SCC online SC 654* has held as under:-

"11. On behalf of the Union of India, it is contended that the Arbitrators by reason of Clause 16(3) could not have awarded interest pendente lite. This contention is incorrect. Ex facie the clause does not deal with interest pendente lite. In terms, the clause only bars interest upon earnest money and security deposits or amounts payable to the contractor under the contract. The above mentioned amounts are amounts which in a sense belong to the contractor. They are amounts voluntarily deposited with the other contracting party in order to be refunded or forfeited depending on performance of the contract. As such they are not amounts of which the contractor is deprived the use of against his wishes, so as to attract interest.

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14. A claimant becomes entitled to interest not as compensation for any damage done but for being kept out of the money due to him. Obviously, in a case of unascertained damages such as this,

the question of interest would arise upon the ascertainment of the damages in the course of the lis. Such damages could attract interest pendente lite for the period from the commencement of the arbitration to the award.

15. Thus, the liability for interest pendente lite does not arise from any term of the contract, or during the terms of the contract, but in the course of determination by the Arbitrators of the losses or damages that are due to the claimant. Specifically, the liability to pay interest pendente lite arises because the claimant has been found entitled to the damages and has been kept out from those dues due to the pendency of the arbitration i.e. pendent lite.

16. We are, therefore, of the view that the Arbitrators rightly awarded interest pendente lite for the period from 26.09.1988 to 23.03.2001 which is the date of the award, on the amounts found due to the claimant. Undoubtedly, such a power must be considered inherent in an Arbitrator who also exercises the power to do equity, unless the agreement expressly bars an Arbitrator from awarding interest pendente lite. An agreement which bars interest is essentially an agreement that the parties will not claim interest on specified amounts. It does not bar an Arbitrator, who is never a party to the agreement from awarding it."

9. In present case, undisputedly, the Arbitrator has awarded interest on the amount payable on account of delayed payment of the final bill which had been presented on 10.8.2002. A careful reading of the clause as referred to would reflect that *"the arbitrator shall not award interest to the parties on any of the items of contract agreement executed in between the parties, if the arbitrator awards interest the same shall not be binding on the parties."* In the instant case, there is no dispute that it is the most of the claims of the contractor were rejected and only a paltry sum of ₹60,562/- was allowed against 4 of the claims amounting to ₹5,99,629/-. It is only claim 5 which has been allowed which pertains to interest on account of delayed payment of final

bill presented on 10.8.2002 and settled on 30.4.2003, instead of within two months. Allowing the claim for payment of interest, (on account of delayed payment) would not be hit by the aforesaid clause as referred to since it is not an '*items of contract agreement*' but to compensate the contractor for withholding the final payment. As has been held by the Supreme Court that the liability to pay interest is on account of damages as he has been deprived of his legitimize dues which should have been cleared within the time specified.

10. In view of above discussion, this appeal is dismissed and award passed by Arbitrator is upheld.

December 20, 2019

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**(JAISHREE THAKUR)
JUDGE**

Whether speaking/reasoned

Yes

Whether reportable

No