

\$~

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

%

Judgement Reserved: 11th September 2018

Judgement Pronounced: 28th May, 2019

+ **FAO(OS) 202/2017**

M/S TEKNOV CONSULTANTS & ENGINEERS PVT LTD

..... Appellant

Through: Ms. Niyati Kohli, Mr. Rishi Agrawala,
Mr. Karan Luthra and Ms. Malavika
Lal, Advocates.

versus

BHARAT HEAVY ELECTRICALS LIMITED

..... Respondent

Through: Mr. Ravi Gupta, Sr. Adv. with Mr.
Pallav Kumar and Mr. Prashant
Kumar, Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J.

1. The appellant has filed the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') read with Section 10 of the Delhi High Court Act, 1966 against the judgment dated 16.03.2017 passed by the learned Single Judge setting aside in part the Award of the Sole Arbitrator dated 30.04.2015 with regard to *pendente lite* interest.

2. Some necessary facts, which are required to be noticed for the disposal of this appeal are as under:
3. The Appellant is a company incorporated under the Companies Act, 1956, registered as an SME, and is engaged in the business of construction of switchyards and allied structure. Whereas, the respondent is a public sector undertaking having its registered office at New Delhi. The respondent invited tenders on 05.07.2006 for execution and handling of civil works for M/s Neyveli Lignite Corporation, Rajasthan. On 03.11.2006, the appellant submitted its revised price offer and the same was accepted by the respondent on 28.11.2006. The respondent awarded the work under the tender vide Letter of Intent dated 28.11.2006 and issued a detailed Work Order dated 12.02.2007 to the appellant.
4. As per the Work Order, the original stipulated period of completion of work was 27.03.2008. The appellant applied for the first extension of time on 24.03.2008, the same was granted by the respondent till 31.01.2009 without any financial implication. Further, the second extension was granted till 30.04.2009 on similar grounds. The third extension was sought by the appellant till 31.08.2009. The respondent vide communication dated 22.06.2009 wrote to the appellant asking them to get the work started by 23.06.2009, otherwise the same would be dealt as per the contract agreement. The appellant vide its letter dated 28.06.2009 asked the respondent to close the contract as on 26.06.2009 and award the balance work to any other party after releasing the appellant's overdue payment in terms of escalation and compensation from 31.04.2008 onwards. Pursuant to which, the

respondent vide e-mail dated 30.06.2009 conveyed to the appellant that there was no provision in the contract for short closing of the contract. However, it was stated that the “run over charges as per the contract shall be paid.” The appellant responded vide letter dated 4.07.2009 stating that the appellant informed the respondent that it is required to pay the over run charges as it was deputing its representative for taking joint measurement of the site on 5.07.2009 for the purpose of the closure. The respondent on 15.07.2009 granted the final extension to the appellant to complete the work by 31.07.2009.

5. However, the disputes arose between the parties in relation to the timelines with respect to the completion of work, pursuant to which, the appellant sent a notice for invocation of the arbitration to the respondent dated 05.09.2009. The Sole Arbitrator after hearing the matter, passed an award in favour of the appellant.
6. The respondent herein had filed a petition under Section 34 of the Act, which was registered as OMP No.534/2015, wherein the Learned Single Judge has set aside the Award in part, passed by the Sole Arbitrator dated 30.04.2015 with regards to the *pendente lite* interest. Learned Single Judge has upheld the claim no.6 of Rs.10,76,084/- on account of over run charges in favour of the appellant as the respondent vide its e-mail dated 30.06.2009 themselves stated that while the escalation would not be payable, over run charges would in fact be paid. Furthermore, the learned Single Judge has dismissed the objections barring the decision rendered by the Arbitrator with respect to Claim No.7. Claim No.7 was raised by the appellant herein for pre

suit, *pendente lite* and future interest @ 18 % *per annum*. The Arbitrator granted interest @ 13% per annum from 01.07.2009 till the date of the award and upto the date of payment. The Arbitrator also held that if the payment is made beyond 90 days from the date of the award, then the claimant shall be entitled to interest @ 18 % *per annum* from the date of payment till actual realization. The objections of the respondent herein regarding Claim no.7 were allowed.

7. The respondent has made a reference to Clause 5.7 of the Work Order, which reads as under:

“5.7 No interest shall be payable by BHEL on Security Deposit or on any money due to the contractor.”

8. The learned Single Judge placed reliance on Clause 5.7 and held that the award with regards to the *pendente lite* is contrary to the contract and is hit by section 28(3) of the Act. For the sake of brevity, paragraphs 15 and 16 of the order of the learned Single Judge are being reproduced below:

“15. However, as regards the award of pendente lite interest, learned counsel for the Petitioner is right in his contention that under Clause 5.7 no pendente lite interest could be granted. The Award to the extent that it has awarded pendente lite interest is contrary to the express terms of the contract and is hit by Section 28(3) of the Act. The Award to this extent is opposed to the fundamental policy of Indian law and is hereby set aside. Only the post Award interest in the manner awarded in the impugned Award is upheld.

16. As a result the challenge to the impugned Award as regards over run charges is hereby rejected. The Award is interfered with and set aside only to the extent that the grant of pre-suit and pendente lite interest up to the date of the Award. The Award of interest at the post-Award stage, as directed in the impugned Award, is hereby upheld.”

9. Learned counsel for the appellant submits that the learned Single Judge in paragraph 15 of the impugned order, has erroneously held that the Arbitrator could not have granted *pendente lite* interest (Claim No.7) in view of Clause 5.7 of the Work Order dated 12.02.2007. It is contended that the Sole Arbitrator has given a detailed award while allowing Claim no.7 regarding *pendente lite* interest on the amounts payable. Counsel categorically submits that the learned Single Judge did not consider the scope and ambit of the said clause. He submits that Clause 5.7 specifically deals with the security deposit to be submitted by the appellant prior to commencement of the work.
10. It is further contended that the respondent had neither pleaded nor raised or argued any ground pertaining to Clause 5.7 of the Work Order during the course of the proceedings before the Sole Arbitrator. Counsel for the appellant has relied upon a decision rendered by the Supreme Court in the case of ***State of Maharashtra vs. Hindustan Construction Company Limited*** reported at (2010) 4 SCC 518, wherein it was held that the grounds, which were not taken at the first stage, cannot be raised in subsequent proceedings. It is contended that the learned Single Judge has overlooked the fact and reached a conclusion that there was no enforceable contract between the parties after 30.04.2009, the date upto which the respondent herein had given extension vide their letter dated 19.02.2009. Counsel for the appellant further submits that the Single Judge has failed to appreciate that the Arbitral Tribunal has not granted interest for the period of the currency of the contract and has only granted interest for the period after the date of closure of the contract, i.e.30.04.2009. The contention

of the learned counsel for the appellant is, thus, that Clause 5.7 would be inapplicable after the contract between the parties came to an end and Clause 5.7 would not apply during the pendency of the contract between the parties and it is during that period the appellant herein, could not seek payment of interest on amount due and payable.

11. It is further submitted that the finding of the learned Arbitrator i.e. there was no enforceable contract between the parties after 30.04.2009 has attained finality as challenge to the award on this ground was dismissed by the Single Judge and the order of the Single Judge has been upheld by the Division Bench by an order dated 25.09.2017 passed in FAO (OS) 261/2007. Counsel further highlighted that the Single Judge has failed to appreciate that the Arbitrator has not granted interest (including Security Deposit) for the period of the currency of the contract and has only granted interest for the period after the date of closure of the Contract, i.e. 30.04.2009. Counsel further submits that the terms and conditions prescribed under the Work Order would cease to be applicable from the date of Closure, i.e. 30.04.2009, including Clause 5.7 and post the closure, withholding of any amounts would no longer be under the aegis of the contract and such would rightfully be subject to payment of interest. Moreover, as per the doctrine of contra- proferentem, the ambiguity regarding the period of applicability of Clause 5.7 must be read in favour of the appellant as the respondent has framed the Work Order. Reliance is placed on *Union of India Vs. Saraswat Trading Agency* reported in (2009) 16 SCC 504, wherein the Supreme Court held that in case, the parties claim was in regard to two periods: when the agreement was

subsisting and the parties were bound by its terms, and the other when the agreement was admittedly terminated and the party continued to work on the request of the other. In that case, the former is covered by the agreement while the latter fell beyond it is significant. On that account, the two periods must receive different treatments. The relevant paragraphs are reproduced below: -

“28. In the case in hand, the respondent's claim was in regard to two periods; one from 3-8-1991 to 31-12-1992 when the agreement was subsisting and the parties were bound by its terms, and the other from 1-1-1993 to 31-8-1994 when the agreement was admittedly terminated and the respondent was carrying on the work on the request of the appellant. In our view the fact that the first period was covered by the agreement while the second fell beyond it is significant and on that score the two periods must receive different treatments.

(Emphasis Added)

29. 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.”

The Division Bench of the High Court took the view that Clause 31 of the agreement operated as a bar only between the parties but it would not affect the authority of the arbitrator to grant interest for the pre reference period and pendente lite.

.....

33. In the case in hand Clause 31 of the agreement is materially different. It bars payment of any interest or damage to the contractor for any reason whatsoever. We are, therefore, clearly of the view that no pre-reference or pendente lite interest

was payable to the respondent on the amount under Item No. 3 and the arbitrator's award allowing pre-reference and pendente lite interest on that amount was plainly in breach of the express term of the agreement. The order of the High Court insofar as pre-reference and pendente lite interest on the amount under Item No. 3 is concerned is, therefore, unsustainable.

34. The position with regard to the claim under Item No. 4 is quite different. That relates to the period after the termination of the agreement and hence, the bar of Clause 31 would not apply to it in the same way as it would apply to Item No. 3. We, therefore, find no infirmity in grant of pre- reference and pendente lite interest on the amount under Item No. 4.

35. In light of the discussions made above, the respondent shall be entitled to interest only on the sum of Rs. 10, 79,456.80, the amount determined under Item No. 4, at the rate of 16% per annum for the period 1-11-1994 to 9-9-2000. The final amount under the award shall be accordingly worked out. The consolidated amount of the award after being re-calculated shall carry, as provided in the award, interest at the rate of 18% from the date of the award till the date of payment. In working out the amount of interest for the post-award period, the period(s) for which the operation of the award was stayed by the court would be excluded.”

12. Counsel for the appellant submits that Clause 5.7 of the Work Order in no manner prohibits or imposes any restriction on the power of the Arbitral Tribunal to award *pendente lite* interest. Counsel has further drawn the attention of the court to section 29 of the Arbitration Act, 1940 and section 7 of the Arbitration Act, 1996. It is contented that irrespective of the fact whether the dispute pertains to the *pendente lite* interest under 1940 act or 1996 act, it is not disputed that the Arbitrator has power to award *pendente lite* interest until and

unless the same is prohibited by the agreement between the parties and the court has to consider the relevant clause in each case.

13. Counsel for the appellant submits that the Supreme Court in a three Bench decision rendered in the case of ***Union of India vs. Ambica Constructions*** reported in (2016) 6 SCC 36 has considered catena of judgments pertaining to the *pendente lite* interest. Although the case was under the 1940 Act but the Court has considered various decision under the 1996 Act [***Sayed Ahmed & Co. vs. State of UP***, (2009) 12 SCC 26; ***Sree Kamatchi Amman Constructions vs. Railways***, (2010) 8 SCC 767; ***Union of India vs. Krafters Engg.& Leasing (P) Ltd.***, (2011) 7 SCC 279; ***Union of India vs. Bright Power Projects (India) (P) Ltd.***, (2015) 9 SCC 695; and, ***BHEL vs. Tata Projects Ltd.***, (2015) 5 SCC 682] held as under:

“22. In our opinion, it would depend upon the nature of the ouster clause in each case. In case there is express stipulation which debars pendente lite interest, obviously, it cannot be granted by the arbitrator. The award of pendente lite interest inter alia must depend upon the overall intention of the agreement and what is expressly excluded.

....

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.”

14. The appellant has also relied on the judgment of the Hon'ble Supreme Court in the case of ***Ambika Construction vs. Union of India*** reported in (2017) 14 SCC 323, wherein the Hon'ble Supreme Court while interpreting a virtually identical clause relying on the aforesaid judgment of ***Ambika Construction(2016)*** (supra) has held as under:

“5.....The relevant clause affirming the above position is extracted hereinbelow:

“(2) Interest on amounts.— 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 deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon.”

The aforesaid clause has been relied upon by the learned counsel representing the Union of India to contend, that when interest was not payable even on the principal amount, there was no question of the same being payable during the period the matter remained pending for adjudication. It is therefore apparent, that the learned counsel for the respondent, relied upon the contractual obligation contained in the clause, extracted hereinabove, to counter the claim of pendente lite interest and to support the impugned order passed by the High Court.

6. 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. Ambika Construction [Union of India v. Ambika Construction, (2016) 6 SCC 36 : (2016) 3 SCC (Civ) 36] , wherein, having examined the legal position declared by this Court by a Constitution Bench in Irrigation Deptt., State of Orissa v. G.C. Roy [Irrigation Deptt., State of Orissa v. G.C. Roy, (1992) 1 SCC 508] , it was held as under: (Ambika Construction case [Union of India v. Ambika Construction, (2016) 6 SCC 36 : (2016) 3 SCC (Civ) 36] , SCC p. 59, para 34)

“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 Added)

15. It is the stand of the Counsel for the appellant that in view of the aforesaid decision, the findings of the learned Single Judge to the extent it set aside the award of *pendente lite* interest i.e. from 1.2.2011 to 30.04.2015, deserves to be set aside. Additionally, learned counsel further submitted that the respondent did not raise any contention before the Arbitral Tribunal in respect of Clause 5.7 of Work Order and simply denied the grant of interest, which prohibits the respondent from raising any such plea at the stage of proceedings under section 34 of the Act and as per the principle of estoppel, Learned Single Judge ought not to have considered the said plea. Accordingly, counsel for

appellant concluded that paragraph 15 of the impugned judgment passed by the learned Single Judge is liable to be set aside.

16. Mr. Ravi Gupta, Learned Senior Counsel appearing for the respondent, however, submits that the law with regard to grant of interest pertaining to contracts, which create an express bar is no longer *res integra*. He submits that in view of Clause 5.7, there is an express bar for grant of interest and thus, the Learned Single Judge has rightly relied upon the aforesaid clause and allowed the objections so filed and rejected claim No.7.
17. Mr Gupta, Senior Counsel for the respondent has placed reliance on Section 31 (7) (a) of the Arbitration Act, 1996, which provides for payment of interest, by an Arbitrator, which reads as under: -

“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.”

18. Learned Senior Counsel for the respondent has strongly urged before us that in the 1940 Act, there was no provision, which prohibited the Arbitrator from awarding interest for the pre-reference, *pendente lite* of post award period, whereas in the 1996 Act, a specific provision has been incorporated whereby, if the agreement prohibits award of interest for the pre- award period (i.e. pre-reference and *pendente lite* period), the Arbitrator cannot award interest for the said period. Counsel further emphasized on the text of the statute, by using the words “unless otherwise agreed by the parties”, which categorically

specifies that the arbitrator is bound by the terms of the contract so far as award of interest from the date of cause of action to date of the award is concerned. Thus, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest. If there is a bar against payment of interest in the contract, the arbitrator cannot award any interest for such period.

19. Mr. Gupta has placed reliance on *Sayeed Ahmed* (supra), where the Supreme Court noted that the 1940 Act did not contain any provision relating to the power of the Arbitrator to award interest. However, now a specific provision has been created under Section 31 (7)(a) of the 1996 Act. As per this section, if the agreement bars payment of interest, the Arbitrator cannot award interest from the date of cause of action till the date of award. The court has observed that in regard to the provision in the 1996 Act, the difference between the pre-reference period and the *pendente lite* interest has disappeared insofar as award of interest by the Arbitrator is concerned Section 31 (7)(a) recognizes only two periods, i.e. pre-award and post-award period.
20. Mr. Gupta further relies on *Sree Kamatchi* (supra), where the court dealt with the case, wherein Clause 16 of the GCC of Railways had required interpretation, by holding that where the parties had agreed that the interest shall not be payable, the Arbitral Tribunal cannot award interest between the date on which the cause of action arose to the date of the award. The relevant paragraphs are reproduced below: -

“9. Clause 16(2) of the General Conditions of contract governing the contract between the parties bars payment of interest and the same is extracted below:

“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.”

(emphasis supplied)

10. The two claims on which amounts are awarded are with reference to claim No. (4) relating to erroneous billing and claim No. (6) relating to security deposit. Clause 16(2) in terms specifically bars payment of interest on security deposit. Insofar as claim No. (4) is concerned, the question is whether the amount awarded is an "amount payable to the contractor under the contract.

....

12. This Court had occasion to consider the jurisdiction and authority of the arbitrator to award interest under the Arbitration Act, 1940 and under the new Act in Sayeed Ahmed & Co. v. State of U.P. 2009 (12) SCC 26. Relying upon the earlier decisions of this Court in Irrigation Department, Government of Orissa v. G.C. 1992 (1) SCC 508, Executive Engineer, Dhenkanal Minor Irrigation Division v. N C Budharaj 2001 (2) SCC 721 and Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd. 2005 (6) SCC 462 and State of Rajasthan v. Ferro Concrete Construction (P) Ltd 2009 (12) SCC 1, this Court held that the arbitrator had the jurisdiction and authority to award interest for three distinct periods namely, the pre-reference period (which referred to the period between date of cause of action to date of reference), pendente lite (which referred to the period between date of reference to date of award) and future period (which referred to the period between the date of award to date of payment) if there was no express bar in the contract regarding award of interest.

.....

14. We may also refer to the decision of this Court in Union of India v. Saraswat Trading Agency 2009 (16) SCC 504 this Court reiterated that if there is a bar against payment of interest in the contract, the arbitrator cannot award any interest for the pre-reference period or pendente lite. In view of the specific bar under Clause 16(2), we are of the view that the arbitral tribunal

was justified in refusing interest from the date of cause of action to date of awards.”

21. Learned Senior Counsel for the respondent also placed reliance on ***Bright Power Projects*** (supra), where a three- Judge Bench of the Supreme 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 the award of interest, the Arbitrator could not award interest for the pendente lite period. The relevant paragraphs are stated below:-

“9. Clause 13(3) of the contract entered into between the parties reads as under:

“13. (3) No interest will be payable upon the earnest money and the security deposit or amounts payable to the contractor under the contract, but government securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon.

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.”

22. The Senior Counsel further placed reliance on ***Bharat Heavy Electricals Limited vs. Globe Hi-Fabs Limited***, reported at (2015) 5 SCC 718, the court here dealt with an identical case wherein Clause 3.3 (ix) of the General Conditions of Contract (GCC) provides that “No interest shall be payable by the Employer on Earnest Money, Security Deposit or on any money due to the Contractor by the Employer.” Which is similar to Clause 5.7 of the Work Order, prohibiting grant of interest, which is also applicable in the facts of the present case. Paragraph 16 of the judgment read as under:

“16. In the present case we noticed that the clause barring interest is very widely worded. It uses the words “any amount due to the contractor by the employer”. In our opinion, these words cannot be read as ejusdem generis along with the earlier words “earnest money” or “security deposit”.

23. He further relies on ***B.H.E.L vs. Tata Projects Ltd.***, reported in (2015) 5 SCC 682, dealing with an identical issue wherein Clause 1.15.5 of the agreement, which provides that “no interest shall be payable by BHEL on earnest money/security deposit or any money due to the contractor by BHEL” had required interpretation. Relevant paragraphs of the same have been reproduced below:

“3. On the other hand, the learned Senior Counsel for the respondent has submitted that the award in respect of crane hire charges is based on an overall view of the entire material available before the Arbitral Tribunal and, therefore, although the Tribunal finally concluded that “there is nothing on record of the Arbitral Tribunal to substantiate the ‘understanding’ between the parties regarding swapping of crane usage days between Units II and III as has been pleaded by the claimant”, it only allowed Rs 8.25 lakhs in favour of the appellant's claim

for such charges. According to him, for the very same reason, taking a holistic view of the whole matter, the Division Bench in the impugned order [Tata Projects Ltd. v. BHEL, Appeal from Order No. 60 of 2013, decided on 12-6-2013 (Cal)] took the same view. On behalf of the respondent, the grant of pre-award interest could not be successfully defended in view of Clause 1.15.5 of the agreement which provides that “no interest shall be payable by BHEL on earnest money/security deposit or any money due to the contractor by BHEL”. The ambit and scope of the aforesaid clause was the subject-matter in Civil Appeal No. 7423 of 2005 between the appellant and M/s Globe HI-Fabs Ltd. decided on 12-11-2009 [BHEL v. Globe HI-Fabs Ltd., (2015) 5 SCC 718] wherein this Court accepted and held that in view of such a provision in the agreement, interest is payable only from the date of the award. The aforesaid legal position ought to have been accepted by the Division Bench of the High Court in view of law settled by judgments of this Court in Sayeed Ahmed & Co. v. State of U.P. [(2009) 12 SCC 26 : (2009) 4 SCC (Civ) 629] and several other cases including Union of India v. Concrete Products & Construction Co. [(2014) 4 SCC 416 : (2014) 2 SCC (Civ) 551]

4. On the issue of award of interest, the learned Senior Counsel for the respondent tried to persuade us to enhance the post-award interest granted by the Arbitral Tribunal @ 10.5% to 18% p.a. in the light of provisions in Section 31(7)(b) of the Act. We are unable to accept this contention because the Arbitral Tribunal has already granted post-award interest @ 10.5%. Only if the award had not made such a direction, the statutory rate of interest @ 18% p.a. would have been payable from the date of the award to the date of payment as per statutory provision noted above.

5. In the light of the aforesaid discussion, we are constrained to hold that the order under appeal ought not to have approved grant of any pre-award interest.”

24. Mr. Gupta lastly relies on **Chittaranjan Maity vs. Union of India**, reported in (2017) 9 SCC 611, which distinguished the judgment of

the Supreme Court in *Ambica Construction*(2017) (supra), held as under:-

“15. Admittedly, 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.”

16. Relying on a decision of this Court in Ambica Construction v. Union of India [Ambica Construction v. Union of India, (2017) 14 SCC 323] , the 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 Ambica Construction [Ambica Construction v. Union of India, (2017) 14 SCC 323] 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 State of Orissa v. G.C. Roy [State of Orissa v. 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 Ambica Construction [Ambica Construction v. Union of India, (2017) 14 SCC 323] cannot be made applicable to the instant case.

17. The learned Additional Solicitor General appearing for the respondent submits that the position of law for cases covered under the 1996 Act i.e. if agreement prohibits award of interest

then the grant of pre-award interest is impermissible for the arbitrator, has been reiterated by this Court in various judgments.

18. In Sayeed Ahmed and Co. v. State of U.P. [Sayeed Ahmed and Co. v. State of U.P., (2009) 12 SCC 26 : (2009) 4 SCC (Civ) 629] , this Court noted that the 1940 Act did not contain any provision relating to the power of the arbitrator to award interest. However, now a specific provision has been created under Section 31(7)(a) of the 1996 Act. As per this section, if the agreement bars payment of interest, the arbitrator cannot award interest from the date of cause of action till the date of award. The Court has observed that in regard to the provision in the 1996 Act, the difference between pre-reference period and the pendente lite interest has disappeared insofar as award of interest by the arbitrator is concerned. Section 31(7)(a) recognises only two periods i.e. pre-award and post-award period.

19. In Sree Kamatchi Amman Constructions v. Railways [Sree Kamatchi Amman Constructions v. Railways, (2010) 8 SCC 767 : (2010) 3 SCC (Civ) 575] , this Court was dealing with an identical case wherein Clause 16 of the GCC of Railways had required interpretation. This is the same Clause 16(2) of GCC prohibiting grant of interest which is also applicable in the facts of the present case. The Court held that where the parties had agreed that the interest shall not be payable, the Arbitral Tribunal cannot award interest between the date on which the cause of action arose to the date of the award.

20. In Union of India v. Bright Power Projects (India) (P) Ltd. [Union of India v. Bright Power Projects (India) (P) Ltd., (2015) 9 SCC 695 : (2015) 4 SCC (Civ) 702] , 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: (SCC p. 698, paras 10-11)

“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.

21. The Arbitral Tribunal had determined the amount payable to the appellant in a sum of Rs 11,13,136 and interest of Rs 12,44,546. A sum of Rs 38,82,150 was deposited by the respondent which includes the award amount, interest for the pre-reference period, pendente lite and post-award interest. We have held that the appellant is not entitled for any interest. The appellant has already withdrawn 50% of the amount deposited by the respondent, which is in excess of the award amount exclusive of interest. Having regard to the facts and circumstances of the case, we deem it proper to direct the respondent not to recover the excess amount withdrawn by the appellant. Ordered accordingly.”

25. Mr. Gupta concluded while submitting that in view of the explicit provision in the contract barring payment of interest, as well as in

terms of the provisions contained in Section 31 (7)(a) of the 1996 Act and the well settled legal position in this regard, the appellant is not entitled to the interest for the pre-award period.

26. We have heard learned counsel for the parties, perused the impugned order passed by the learned Single Judge and have also gone through the judgments and documents placed on record.
27. The learned Single Judge has rightly modified the award on the issue of award of *pendente lite* interest under the garb of Clause 5.7. The bare reading of Clause 5.7 makes it clear that no *pendente lite* interest could be granted, otherwise the same would be in contravention to the provision of section 28 (3) of the Act. Thus, Award with respect to the post-award interest is rightly upheld and accordingly the appellant has been rightly denied Claim No.7 with respect to *pendente lite* interest.
28. Furthermore, a bare reading of Section 31(7)(a) of the Arbitration Act 1996 explicitly shows that the Arbitrator has the power to award reasonable interest provided, the same is backed by a valid contract. On the contrary, if an agreement bars the payment of interest, the arbitrator cannot award the same from the date of cause of action till the date of award. The said section has to be read along with the contract which would show the intent of the parties. Clause 5.7 of the agreement explicitly states that the respondent will not be liable to pay any interest either on Security Deposit or on any money due to the contractor.
29. The position of the law stands crystallized for the cases covered under the 1996 Act, i.e. if agreement prohibits award of interest then the grant of pre-award interest is impermissible for the Arbitrator. The

Supreme Court in *State of Rajasthan v. Ferro Concrete Construction*, reported in (2009) 12 SCC 1, held as under:-

“34....

a) where a provision has been made in any contract, for interest on any debt or damages, interest shall be paid in accordance with the such contract.

(b) where payment of interest on any debt or damages is expressly barred by the contract, no interest shall be awarded.

(c) where there is no express bar in the contract and where there is also no provision for payment of interest then the principles of section 3 of Interest Act will apply in regard to the pre-suit or pre- reference period and consequently interest will be payable :

(i) where the proceedings relate to a debt (ascertained sum) payable by virtue of a written instrument at a certain time, then from the date when the debt is payable to the date of institution of the proceedings;

(ii) where the proceedings is for recovery of damages or for recovery of a debt which is not payable at a certain time, then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed, to date of institution of proceedings.

(d) payment of interest pendente lite (date of institution of proceedings to date of decree) and future interest (from the date of decree to date of payment) shall not be governed by the provisions of Interest Act, 1978 but by the provisions of section 34 of Code of Civil Procedure 1908 or the provisions of the law governing Arbitration as the case may be.”

30. Moreover, the Courts time and again in catena of judgments have decided the issue, that the parties would be entitled to interest on the discretion of the arbitrator unless barred by the contract. In a recent decision of *Jaiprakash Associates Ltd. Vs. Tehri Hydro Development Corporation India Ltd. (THDC)* reported at 2019 SCC OnLine SC 143, the Supreme Court has categorically held that

a Tribunal's power to award *pendente lite* interest would depend on the terms of the agreement between the parties. It further held that if the agreement prevented the award of such interest, there would be no scope to contend that the tribunal had the jurisdiction to do so. The finding of the court is in accordance with section 31(7) of the 1996 Act (which specifically stipulates the same) and also upholds the previous decisions of the Supreme Court. In paragraph 15 of the decision, the court further demarcated the difference between 1940 Act and 1996 Act, the same has been reproduced below:

“15. In a recent judgment in the case of Reliance Cellulose Products Limited v. Oil and Natural Gas Corporation Limited⁹, the entire case law on the subject is revisited and legal position re-emphasised. That was also a case which arose under the 1940 Act. The Court held that under the 1940 Act, an arbitrator has power to grant pre-reference interest under the Interest Act as well as *pendente lite* and future interest, however, he is constricted only by the fact that an agreement between the parties may contain an express bar to the award of pre-reference and/or *pendente lite* interest. Further, the Court has evolved the test of strict construction of such clauses, and unless there is a clear and express bar to the payment of interest that can be awarded by an arbitrator, clauses which do not refer to claims before the arbitrators or disputes between parties and clearly bar payment of interest, cannot stand in the way of an arbitrator awarding pre-reference or *pendente lite* interest. Further, unless⁹ (2018) 9 SCC 266 a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever, leading the Court to find an express bar against payment of interest, a clause which merely states that no interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding *pendente lite* interest. Further, the

grant of pendente lite interest depends upon the phraseology used in the agreement, clauses conferring power relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest has been taken away and for which period. Also, the position under Section 31(7) of the 1996 Act, is wholly different, inasmuch as Section 31(7) of the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered.”

31. Having regard to the settled position of law and clause 5.7 of the contract. We find no infirmity with the decision of the learned Single Judge.
32. Accordingly, the appeal is dismissed.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

MAY 28 2019//rb