

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO. 536 OF 2015

Jawaharlal Nehru Port Trust	...Petitioner
vs.	
Seatrans Shipping Ltd.	...Respondent

WITH

COMMERCIAL ARBITRATION PETITION NO. 1 OF 2015

Seatrans Shipping Ltd.	...Petitioner
vs.	
Jawaharlal Nehru Port Trust	...Respondent

Mr.Amir Arsiwala with Mr.Amit Bhave and Mr.Vinod Sakpal i/b. Milan Bhise & Co. for Petitioner in ARBP 536/2015 and for Respondent in CARBP 1/2015.

Mr.Ashwin Shanker with Mr.Bimal Rajasekhar and Ms.Ridhi Nyati for Respondent in ARP 536/2015 and for Petitioner in CARBP 1/2015.

CORAM : S.C. GUPTE, J.

DATE : 15 MAY 2020

JUDGMENT :

These two petitions, filed under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act"), are cross petitions challenging a majority award passed in an arbitration reference. (The reference to the parties in the order below is made from the facts of Arbitration Petition No.536 of 2015).

2 The short facts of the case may be noted as follows :

2.1 In or about November 2001, pursuant to a tender floated by the Petitioner herein for dredging of port and shallow water berth at Jawahar Lal Nehru Port, one Sunder Underwater Services (acting as a lead contractor in a joint venture with one Ocean Dredging India Ltd. and the Respondent herein) was awarded a contract for works aggregating to Rs.5,13,35,000/-. In February 2002, the Respondent took over as the lead contractor.

2.2 By about 20 August 2002, the Respondent claimed to have completed the entire dredging work as per the scope of work in the tender and requested for issuance of a substantial completion certificate. This position was contested by the Petitioner employer. According to the Petitioner, there were a number of patches which had still to be dredged and the design depth was not achieved throughout the dredging area, including the area where hard patches were encountered.

2.3 It was the case of the Petitioner that on or about 23 August 2002, the Respondent had, without the Petitioner's prior permission, abandoned the site after demobilizing men and machinery. According to the Petitioner, such demobilization amounted to a default as per Clause 73(1) of General Conditions of Contract. The Petitioner called upon the Respondent to remobilize the equipment and commence the balance work, failing which the former threatened to initiate action under Clause 73 of General Conditions.

2.4 On or about 26 August 2002, the Petitioner encashed the performance bank guarantee of Rs.51,33,500/- given by the Respondent.

An arbitration petition, challenging invocation of that bank guarantee, filed by the Respondent was dismissed by this court.

2.5 In or about October 2002, the Respondent returned to the site and resumed the work in hard patch area. In or about November 2002, the Respondent claimed to have completed dredging of approx. 6000 cum. of rocks by barge load. It was the Respondent's case that the compressive strength of the rocks, where such dredging was carried out, exceeded 250 kg/sq.cm., which was beyond its scope of work. The Respondent requested for testing of rock samples and also forwarded a report of an expert agency, VJTI, Mumbai, in support of its case of compressive strength of more than 250 kg/sq.cm.

2.6 Whilst these issues were pending consideration, it is the Petitioner's case that the Respondent once again abandoned the site and finally left it by about 13 December 2002.

2.7 On or about 30 January 2003, the Respondent submitted its final bill calling for payment and seeking refund of the bank guarantee amount of Rs.51,33,500/- and retention money of Rs.25,66,750/-. This was followed by reference of various claims by the Respondent to the Engineer-in-charge under the contract. The Engineer-in-charge rejected all the claims.

2.8 In the premises, by its advocates' notice dated 25 March 2003, the Respondent invoked the arbitration agreement forming part of the contract.

2.9 An arbitral tribunal of three arbitrators heard the reference.

2.10 By their award dated 8 December 2014, the majority arbitrators awarded a sum of Rs.2,96,98,732/- against the Respondent's claim nos.1, 2, 4, 5, 6, 7, 8 and 9, together with interest, and also cost of Rs.25,00,000/-, and rejected the Petitioner's counter claim. The minority arbitrator, by his award of the same date, granted Claim No.1 in the sum of Rs.27,15,300/-, rejected claim Nos.2 and 9, and concurred with the findings of the majority on all other claims and counter-claim.

3 The impugned award has been challenged by the Petitioner on the following main points :

(a) It is submitted that the Respondent's claims were beyond the scope of the contract and awarding them effectively amounted to re-writing of the contract. In particular, it is submitted that claim nos.1, 2, 3, 6 and 9 were not arbitrable; and on claim nos.1, 2, 4 and 8 the decision of the Engineer-in-charge was final.

(b) In particular reference to claim no.1, on merits, it is submitted that the conclusion of the majority arbitrators that the dredged quantity was 26504.20 cubic meters of soft rock was completely contrary to the facts and record of the case as well as the provisions of the contract. It is submitted that the total dredged quantity was only 9051 cubic meters, as was reflected in the joint measurement book signed by both parties.

(c) In particular reference to claim no.2, on merits, it is submitted that not only was this claim, which was for excavation in hard rock having crushing strength of above 250 kg/sq.cms, beyond the scope

of the contract, but the majority arbitrators erred in working out both the quantity of excavated hard rock and the rate awarded for it. It is submitted that the determination of compressive strength of the rock was in breach of the applicable contractual provisions; so also, fixation of the rate of Rs.1500 per cubic meter was, on the face of it, contrary to the applicable contractual provisions.

(d) In particular reference to claim no.4, on merits, it is submitted that the Petitioner had rightly deducted liquidated damages for the delay of 14 days at the rate of Rs.34,000/- per day and reversal of this deduction by the arbitrators was contrary to the contract as well as law.

(e) It is submitted that the claims of (i) return of bank guarantee, (ii) refund of recovery towards demobilization fees/charges, and (iii) refund of retention money were not justified and awarded by the arbitrators contrary to the contract and against evidence.

4. The submission of the Petitioner concerning non-arbitrability of claims (particularly, Claim Nos.1,2,4 and 8) is based on Clause 54 of the Additional Supplementary Clauses. Clause 54 provides for duties of the Engineer-in-charge and his representative. Sub-Clause (c) thereof provides for binding nature of “*any written instructions or written approval on all technical matters given by the Engineer-in-charge.*” Under item (ii) of sub-clause (c), the contractor was entitled, upon dissatisfaction with any decision of the Engineer-in-charge’s representative, to refer the matter to the Engineer-in-charge in writing. The latter could thereupon confirm, reverse or vary any such decision. The decision of the Engineer-in-charge

was then to be final and not to form the subject matter of any dispute. Matters covered under claim nos.1, 2, 4 or 8 cannot be said to be matters of a technical nature forming part of any written instruction or approval or decision of Engineer-in-charge within the meaning of these sub-clauses. The arbitrator's finding in this behalf can certainly be termed as a reasonable and possible finding based on a fair construction of the contract. Besides, the other materials used by the arbitrators, such as the communication of 4-10-2002 and Engineer-in-charge's writings (vide C-12, Pg.16 and C-13, Pg.17 of Part I of Claimant's compilation), are clear pointers towards the correctness of the particular construction adopted by the arbitrators. The other aspect of the Petitioner's objection to the award on account of want of jurisdiction or authority is based on their submission that excavation of rocks of a compressive strength above 250 kg/sq. cms., which was compensated for in the award, was outside the scope of the contract. The arbitrators rejected the submission, holding that the objective of the contract was to achieve a depth of 9.5 meters below datum and this could be done only by dredging and excavating upto that depth, irrespective of whatever strata – whether hard or soft rock – was encountered at site. This was a reasonable interpretation of the contract. Besides, it is also supported by documentary material in the form of communications by the Petitioner, which were considered by the arbitrators. The arbitrators accordingly held that all these claims (Claim Nos.1, 2 and 3) were for work carried out under the contract and were arbitrable as such. Claim no.6 was for refund of money which the Petitioner had wrongly deducted, whereas claim no.9 was for issuance of a completion certificate; both of these claims were clearly within the jurisdiction of the arbitrators and rightly considered by them. This part of the impugned award, thus, does not call for any interference.

5 Coming now to the merits of claim no.1, which was in respect of the quantity of soft rock dredged by the Respondent, according to the Respondent, the quantity for B area was 14287.60 cum and for C area of the lagoon was 12216.55 cum, the total quantity aggregating to about 26504 cum. On the other hand, according to the Petitioner, the total quantity of soft rock dredged was 9051 cum. There was also dispute between the parties as regards the rate to be applied. The contractual rate was Rs.300/- per cum. The Petitioner, thus, admitted a sum of Rs.27,15,300/- as payable to the Respondent on this account (i.e. 9051 cum x Rs.300/-). Originally, the Respondent had claimed a total sum of Rs.79,51,260/- (i.e. 26504 cum x Rs.300/-). This claim was amended subsequently to Rs.1,37,03,360/- (by enhancing the rate from Rs.300/- to Rs.800/- for quantity beyond 15000 cum). The arbitrators were thus called upon to decide both the dredged quantity and the rate to be applied to it. The arbitrators held that they were satisfied that the total dredged quantity of soft rock was 26504.20 cum. So far as the quantity was concerned, the difference in the two estimates, i.e. the estimates respectively of the parties, was partly due to the method of computation of the volume. The Respondent had used MPSO survey charts with 210 khz echo-sounder recordings and Simpson rule to compute the volume. The arbitrators also considered the alternative method of computation, which was by Daily Dredging Reports (DDR's), which were maintained as per the contract as a cross check for progress of work. As per DDR recordings, the quantities of volume worked out to 27034 cum for soft rock, as against 26504 cum claimed by the Respondent. The arbitrators were satisfied by the relevant material and evidence as well as legal and factual justification in support of the method of computation used by the Respondent. On the other hand, as

far as the Petitioner's quantity of 9051 cum is concerned, the Petitioner claimed to have arrived at it by carrying out heavy iron beam survey. The arbitrators, firstly, found that this figure was never communicated by the Petitioner to the Respondent until filing of compilations. Besides, the arbitrators noted that the Petitioner could not explain the vast difference in the quantity calculated by them and the quantity as per DDRs (which was approximately in line with the MPSO charts used by the Respondent). The arbitrators were accordingly not satisfied with the calculation suggested by the Petitioner. The conclusion of the arbitrators is a reasonable and possible conclusion; it is supported by evidence; for arriving at it, the arbitrators appear to have considered all relevant and germane materials, and not taken into account any irrelevant or non-germane material, or circumstance. The conclusion does not accordingly deserve any interference under Section 34 of the Act.

6 One of the contentions of the Petitioner in this behalf was that the quantity mentioned in the contract for excavation of soft rock was only 15000 cum, and that, accordingly, nothing was payable to the Respondent beyond 15000 cum. The arbitrators rightly held that the contract was not for dredging any particular quantity of soft rock, but achieving a depth of 9.5 m below chart datum by dredging; the quantity of soft rock to be dredged mentioned in the contract was a mere estimation. This, again, is not only a pre-eminently possible, but even probable conclusion, and brooks no interference within the parameters of the law of challenge to an arbitral award under Section 34.

7 So far as the rate is concerned, the arbitrators having merely applied the contractual rate of Rs.300/- per cum, no fault can possibly be

found with the same.

8 Much of the discussion at the bar during the hearing of the petition, as indeed apparently even before the arbitral tribunal, was on the compressive strength of the rock and the treatment to be given to it within the framework of the contract. This was part of claim no.2. There could not possibly be two opinions that if the Respondent had actually carried out this work, the work itself having been done under the watch of the Petitioner's site engineers, they were entitled to be paid for it and the contract did not provide for any rate for dredging in hard rock, i.e. rock of a crushing strength of over 250 kg/sq.cms. The claim, thus, involved three aspects : (i) What was the correct compressive strength – whether it was more than 250 kg/sq.cms as alleged by the Respondent?; (ii) What was the total quantity (of rock of such compressive strength) dredged?; and (iii) What was the rate to be applied to it? The majority arbitrators held that the Respondent had dredged substantial amount of rock with compressive strength in excess of 250 kgs/sq.cms; such quantity was 8109 cum; and that the Respondent was entitled to receive a rate higher than the contractual rate which was for soft rock (i.e. rock with compressive strength upto 250 kgs/sq.cms), which rate the arbitrators estimated at Rs.1500 per cum. The majority arbitrators, accordingly, awarded a sum of Rs.97,30,800/- on claim no.2, i.e. 8109 cum multiplied by the difference between Rs.1500 (awarded rate) and Rs.300/- (the contractual rate paid) i.e. Rs.1200/-. The minority arbitrator rejected the claim altogether.

9 The quantity of 8109 cum was worked out by the majority arbitrators on the basis of computations based on MPSO charts using 210 khz echo-sounder (which, according to them, was the contractually agreed

method, and which was considered even for claim no.1), which was also in line with the barge load calculations. For the nature of the strata dredged, namely, hard rock, i.e. rock of compressive strength of 250 kg/per sq.cm. and above, the arbitrators relied on clause no.53 of the contract. According to this clause, hard patches meant all types of rock which cannot be dredged by using grab. The clause made it clear that dredging of hard rock having compressive strength of 250 kg/per sq. cm. or more was not included within the scope of the work. The clause provided that the contractor's contention regarding encountering of hard rock would be agreed to only after establishment of the same through soil investigation. The arbitrators noted that from the evidence, it appeared quite clear that in about May 2002, the Respondent first suspected presence of hard rock in "C" area of the lagoon and, accordingly, informed the Petitioner. It also claimed to have furnished samples, which the Petitioner had denied. The arbitrators, however, noted that the Petitioner had asked the Respondent to submit a proposal for establishing the strength of hard patch and offered to scrutinize the same by itself or through consultants and give clearance to the same thereafter. The arbitrators noticed that the Petitioner did not appear to have taken any effective steps to investigate or determine the compressive strength or take cognizance of the Respondent's say. The samples of hard rock encountered were sent by the Respondent to VJTI, who, the arbitrators noted, were often employed by the Petitioner itself for soil investigation and testing of rocks. VJTI reports indicated that tests carried out by them on the samples showed crushing strength of above 500 kg/cm². The test results were conveyed by the Respondent to the Petitioner, who, admittedly, did not take any independent step to determine the compressive strength of excavated rock. The Respondent's witness, Prof. Choudhari, deposed before the arbitral tribunal that representative and

random samples were collected by him, in the presence of the Engineer-in-charge of the Petitioner, during dredging and chiseling operations and the tests showed crushing strength well above 250 kg/cm². The arbitrators also relied upon test reports of IIT, Mumbai, reporting crushing strength above 250 kg./cm². The arbitrators noted that though IIT, Chennai was claimed to be “approved” agency to certify hardness of rock by the Petitioner, at one stage, the Petitioner had ruled out IIT, Chennai acting as the soil investigator, since the Petitioner wanted the soil investigating agency to be independent; the Petitioner, however, did not propose any other agency for testing the compressive strength of the rock. In the premises, the majority arbitrators accepted the evidence of Prof. Choudhari. The arbitrators observed that it was clear from the record that the Respondent had collected samples of rocks dredged in the presence of the Petitioner’s site engineers; the Respondent had sent samples of rocks dredged in May 2002 to the Petitioner for testing; samples were also sent to VJTI and IIT, Mumbai; and both reported compressive strength in excess of 250 kgs/sq.cms. The arbitrators, in the premises, were satisfied that (i) substantial rock dredged by the Respondent was of compressive strength in excess of 250 kgs/sq.cms; and (ii) going by MPSO survey charts such quantity was 8109 cum.

10 The arbitrators then had to consider what treatment was to be given to this quantity – whether any higher rate was to be applied to it over and above the contractual rate of Rs.300 per cum, which was for dredging of ‘soft’ rock, i.e. rock with compressive strength upto 250 kgs/sq.cms. The arbitrators noted that the Respondent had asked for a rate of Rs.1500 per cum, which, according to it, was half the prevailing rate of Rs.3000 per cum for dredging of similar hard rock at Indian ports. The arbitrators

observed that the Petitioner did not deny that the fair and prevalent market rate for dredging of hard rock was about Rs.1500 per cum. The arbitrators also noted that on two different occasions, the Petitioner had put out tenders for dredging of hard rock in the lagoon area and had received two offers at rates exceeding Rs.4000 per cum. (This was placed on record in the affidavit of evidence of the Respondent's witness E.J. D'sa.) The majority arbitrators were, therefore, satisfied that Rs.1500 per cum, claimed by the Respondent, was a fair estimate.

11 All these conclusions can certainly be described as reasonable and possible conclusions. All of them are, as noted above, supported by some evidence. The arbitrators, for arriving at these conclusions have not left out any relevant or germane material or circumstance, or taken into account any irrelevant or non-germane material or circumstance. These are questions of fact and the conclusions, being reasonable and possible and which any reasonable person would come to, and there being nothing in them to shock the conscience of the court, do not merit any interference.

12 The main objections of the Petitioner to the award on claim no.2 are based on the scope of the contract or contract work and the rate mentioned in the Bill of Quantities. The contentions are that any quantity of compressive strength of above 250 kg/sq.cms. was not within the scope and the rate was prescribed in BOQ. As we have seen above, both contentions have been dealt with in the impugned award fairly and reasonably and the awards on these matters represents a possible view of the material available before the arbitrators.

13 Claim no.4 of the Respondent, which was for return of

deductions made by the Petitioner towards liquidated damages (Rs.4,76,000) was allowed by the arbitrators. These deductions were made on account of fourteen days' alleged delay in completion of work. The Respondent's case was that it had completed dredging of all rock upto 9.5 meters' designed depth by 5 August 2002 (the date of completion being 6 August 2002); that shallow water berths were put to operational use on 19 August 2002 which could well be taken as the admitted date of completion; and that no loss was suffered by the Petitioner on this count. The Respondent claimed that the short delay, i.e. delay between 6 August 2002 and 19 August 2002, was attributable to the Petitioner. There were mainly two factors alleged in this behalf: (i) non-availability of berth for uninterrupted dredging for about 12 days (due to the berth being occupied by commercial vessels due to navigational exigencies and pursuant to instructions of the port authorities); and (ii) loss of 5 days on account of hoisting of storm signal by the port authorities, when barges were not allowed to ply. The arbitrators found both factors in favour of the Respondent. Nothing was pointed out at the Bar to contest these findings of fact. No interference is, accordingly, warranted.

14 Claim no.5 was for refund of retention money of Rs.25,66,750/-. This amount was deducted from payments due to the Respondent against invoices. The deduction was sought to be justified by the Petitioner on various grounds. It was submitted that the Respondent had not fully completed the contract work or achieved the design depth of 9.5 meters. It was submitted that shallow patches in lagoon area had to be cleared by the Petitioner at a cost of over Rs.19 lakhs. Besides, the Petitioner was entitled to survey charges for this work (Rs.94,680), liquidated damages (Rs.20,90,750) and for removal of hard patches in the

lagoon (Rs.68,86,740). The Petitioner had relied on a circular in this behalf (circular dated 23 February 2004) notifying that the draught at shallow water berth was reduced to 7.20 meters. The arbitrators did not accept the Petitioner's case. They found that the circular was issued almost one and a half years after the berthing of the first vessel after completion of the dredging work (Darya Shaan) in August 2002. The arbitrators observed that it was not denied by the Petitioner that the area was getting new siltation. In fact, by the Petitioner's own admission, the area needed annual dredging to maintain the depths. These are reasonable and possible conclusions. If the arbitrators, in the premises, did not accept the evidence of the circular of February 2004 for establishing the depth achieved in August 2002, which was the only evidence produced by the Petitioner in support of its case of inadequate depth achieved through the contract work, their approach or conclusion cannot be faulted as an impossible conclusion or a conclusion which no fair or judiciously minded person would have reached or something which might shock the conscience of the court.

15 No specific submissions were advanced on the award of claim no.6 (Rs.7,40,422/- deducted by the Petitioner on account of hire of barge Tirtha under the earlier contract) or of claim no.7 (Rs.51,33,500/- on account of return of bank guarantee amount) or claim no.8 (Rs.5,00,000/- towards demobilization fees/charges). Award in respect of these claims is based on contractual stipulations (clauses 64, 54 and 4.1, respectively) and the particular interpretation applied by the arbitrators is fair and reasonable and, at any rate, clearly possible.

16 Coming now to the claim of interest, which forms the subject matter of the Respondent's companion petition (Commercial Arbitration

Petition No.1 of 2015), it is pertinent to note that there was a specific clause in the contract, namely, Clause 60(d), which disentitled the contractor from any interest on withheld or delayed payments. The clause is quoted below :

“No claim of interest will be entertained by the employer with respect to any money or balances which may be in its hands owing to any dispute between itself and the contractor or with respect to any delays on the part of the employer in making the interim or final payment or otherwise.”

The arbitrators, in the light of this clause, rejected the Respondent's claim for interest. They relied on the decision of the Supreme Court in the case of **Sayed Ahmed & Co. vs. State of U.P.**¹ for their conclusion. Originally, whilst interpreting a similar clause, the Supreme Court had, in **Board of Trustees for the Port of Calcutta vs. Engineers De Space Age**², held that such a clause barred the employer from entertaining any claim for interest but did not prohibit the arbitral tribunal from awarding interest. The Supreme Court, however, did not find favour with this view in **Sayed Ahmed & Co.**'s case (supra) decided later. In this later case, the Supreme Court held that such a provision amounted to a clear prohibition for award of interest even by the arbitrator.

17 Mr.Shanker, learned Counsel for the Respondent, who is the petitioner in companion Arbitration Petition No.1 of 2015, relies on several later judgments of the Supreme Court on interest. The judgments are either distinguishable on facts or can be easily explained. In **Jaiprakash Associates Ltd. vs. Tehri Hydro Development Corporation India Ltd.**³, the Supreme

1 (2009) 12 SCC 26,36

2 (1996) 1 SCC 516

3 2019 SCC OnLine SC 143

Court actually reiterated the law in the following words :

“(b) As a sequitur, the arbitrator would be within his jurisdiction to award pre-reference or *pendente lite* interest even if agreement between the parties was silent as to whether interest is to be awarded or not.

(c) Conversely, if the agreement between the parties specifically prohibits grant of interest, the arbitrator cannot award *pendente lite* interest in such cases. This proposition is predicated on the principle that an arbitrator is the creature of an agreement and he is supposed to act and make his award in accordance with the general law of the land and the agreement. This position was made amply clear in *G.C. Roy* case in the discussion that ensued thereafter:

"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.”

(d) Insofar as 1940 Act is concerned, it was silent about the jurisdiction of the arbitrator in awarding *pendente lite* interest. However, there is a significant departure on this aspect insofar as 1996 Act is concerned. This distinction has been spelt out in *Sayeed Ahmed* case in the following manner:

"Re: Interest from the date of cause of action to date of award

7. The issue regarding interest as noticed above revolves around Clause G1.09 of the Technical Provisions forming part of the contract extracted below:

“G. 1.09. No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be

lying with the Government or any become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge on the one hand and the contractor on the other hand or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or any other respect whatsoever.”

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14. The decisions of this Court with reference to the awards under the old Arbitration Act making a distinction between the pre-reference period and pendente lite period and the observation therein that the arbitrator has the discretion to award interest during pendente lite period in spite of any bar against interest contained in the contract between the parties are not applicable to arbitrations governed by the Arbitration and Conciliation Act, 1996.”

In **Jaiprakash Associates** (supra), the Supreme Court, whilst referring to the law stated in **Reliance Cellulose Products Limited vs. Oil and Natural Gas Corporation Limited**⁴, dealt with the contractor’s contention based on **State of U.P. vs. Harish Chandra**⁵ in the following words :

“19) In this backdrop, the only argument of the appellant that remains to be considered is as to whether such a construction is contrary to the judgment in *Harish Chandra* case.

20) Complete answer to this argument is provided in *Reliance Cellulose Products Limited* judgment. Following discussion contained therein which discussed THDC judgment would amply demonstrate this:

"Also, unlike the clause in *Tehri Hydro Development Corporation Ltd.* (Supra), clause 16 does not contain language which is so wide in nature that it would interdict an arbitrator from granting pendente lite interest. It will be remembered that the clause in *Tehri Hydro Development Corporation Ltd.* (supra) spoke of no claim for interest being entertained or payable in respect of any money which may be lying with the Government owing to disputes, difference or misunderstanding between the parties and not merely in respect of delay or omission; Further, the clause in *Tehri Hydro Development Corporation Ltd.* (supra) goes much further and makes it clear that no claim for interest is payable “in any other respect whatsoever.””

4 (2018) 9 SCC 266

5 (1999) 1 SCC 63

(emphasis supplied)

Relying heavily on the above quoted portion (where emphasis is supplied), Mr.Shanker submits that this makes it clear that there must be a specific restriction in the clause that no interest should be **payable**; it is not good enough if there is merely a restriction from entertaining a claim of interest. I am afraid, the judgment does not lend support to the submission made. The Supreme Court, in **Jaiprakash Associates's** case (supra) has reiterated the law stated in **Sayed Ahmed & Co.'s** case (supra) and has not made any distinction between “entertainment of a claim of interest” and “payment of a claim of interest”. The case of **Harish Chandra**, as the Supreme Court noted in **Jaiprakash Associates**, was explained and distinguished in **Sayed Ahmed & Co.'s** case itself. As the Supreme Court noted, that case was under the 1940 Act; the position under the 1996 Act was wholly different; under the 1996 Act, as explained in **Sayed Ahmed & Co.**, the arbitrator had no power to grant interest, where a restrictive clause in the agreement prohibited entertainment of any claim of interest.

18 In **Bharat Heavy Electricals Ltd. vs. Globe Hi-Fabs Ltd.**⁶, the clause was in the following terms :

“No interest shall be payable by the employer on earnest money, security deposit or on any money due to the contractor by the employer.”

The argument before the court was that the words “*or on any money due to the contractor by the employer*” should be read ejusdem generis with the words “on earnest money, security deposit”. The argument was not accepted by the court. The court held that the clause barring interest was

6 (2015) 5 SCC 718

very widely worded, and it was not possible to read the words ejusdem generis. This judgment does not in any way help the Respondent contractor in our case.

19 The case of **Union of India vs. Ambica Construction**⁷ cited by Mr.Shanker does not state the law otherwise. It affirms the law stated in **Sayeed Ahmed & Co.**'s case, in the following words :

“21. In *Sayeed Ahmed* (supra) the decision in *Engineers-De-Space-Age* (supra) has been considered and it was observed that it cannot be used to support an outlandish argument that bar on the Government or department paying interest is not a bar on the Arbitrator awarding interest. This Court expressed doubt as to the correctness of certain observations made in *Engineers-De-Space-Age* (supra) to the extent that the Arbitrator could award interest pendente lite ignoring the express bar in the contract. But this Court did not consider the question further as the case in *Sayeed Ahmed* (supra) arose under the Arbitration and Conciliation Act of 1996, and there was a specific provision under new Act regarding award of interest by the Arbitrator. From the discussion made in *Sayeed Ahmed* (supra) it is apparent that this Court has emphasized that it would depend upon the nature of clause and claim etc. and it is required to be found on consideration of stipulation whether interest is barred, if yes, on what amounts interest is barred under the contract.”

20 In **Ambica Construction vs. Union of India**⁸, what the Supreme Court explained was that as held by the Constitution Bench in **Irrigation Deptt., State of Orissa vs. G.C. Roy**⁹, the bar to award interest on delayed payment by itself would not be readily inferred as an express bar to award *pendente lite* interest by the arbitral tribunal. This law has also been explained by the Supreme Court in **Jaiprakash Associates**'s case, by quoting

7 AIR 2016 SC 1441

8 (2017) 14 SCC 323

9 (1992) 1 SCC 508

the following passage from **Sri Chittaranjan Maity vs. Union of India**¹⁰ :

"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."

The present case is under the 1996 Act and as explained above, the decision in **Ambica Construction** (supra) cited by the Respondent's Counsel cannot be made applicable here.

21 Mr.Shankar relies on the Supreme Court judgment in **Nabha Power Ltd. vs. Punjab State Power Corporation**¹¹ and submits that, having regard to the tests laid down in that judgment, the term that an arbitral tribunal is barred from awarding *pendente lite* interest cannot be implied in the interest clause, i.e. Clause No.60(d), of the contract in our case. In the first place, there is no question of implying any term in Clause 60(d)

¹⁰ (2017) 9 SCC 611

¹¹ (2008) 11 SCC 508

here. The clause is in express terms. It makes it clear that the contractor cannot make any claim for interest on any money or balance that may be in the hands of the employer owing to any dispute or on account of any delay in payment, whether interim or final. The judgment of **Sayed Ahmed & Co.** (supra) makes it clear, as explained above, that such a clause not only restricts the employer, but even an arbitral tribunal in awarding any interest, whether pre-reference or *pendente lite*. There is no question of any such restriction being implied against the arbitral tribunal; such restriction follows and is a natural consequence of such clause. The business efficacy test (also referred to as the 'Moorcock test'), referred to in **Nabha Power Ltd.**, for implying a term in a contract when such term is (i) reasonable and equitable; (ii) necessary to give business efficacy to the contract; (iii) of such nature as to go without saying ("Officious Bystander Test"); (iv) capable of clear expression; and (v) not contradictory to any express term of the contract, really is not required to be invoked. But even if one does need to invoke that test, all these five conditions are clearly satisfied in our case. It is certainly reasonable to assume, when a claim is not entertainable by an employer, no arbitral tribunal can award it against the employer. The restriction not to pay would have no business efficacy, if the employer were to be within his rights not to pay, but the arbitral tribunal were free to order him to pay. It certainly goes without saying that if some claim could not be made, it could not be allowed. The expression of such restriction made that clear; and it is certainly in keeping with the express term of the contract.;

22 The question in **Transmission Corporation of Andhra Pradesh Ltd. vs. GMR Vemagiri Power Generation Ltd.**¹², relied upon by Mr.Shankar,

¹² (2018) 3 SCC 716

concerned what was meant by the expression “natural gas” used in the contract in that case; particularly, whether it included Regasified Liquified Natural Gas (‘RLNG’). The court observed that the parties had never referred to the availability of RLNG as fuel contemplated within the term ‘natural gas’; their discussion was confined to ‘natural gas’ only; had the parties intended otherwise, it would have figured in their discussion before the Commissioner. The Court held that the absence of the same, combined with the fact of RLNG having to be imported, deletion of the importation clause in the PPA led to an inevitable conclusion that it was never in the contemplation of the parties that RLNG was to be included in the term ‘natural gas’, even though it might be a variant of the same. It was in this context that the Court said that a contract document had to be interpreted in accordance with the language used, with reference to the context in which it came to be prepared; a technical view, torn out of context, cannot be taken so as to arrive at something which was not intended by the parties; in the event of any ambiguity arising, the terms of the contract would have to be interpreted by taking into consideration all surrounding facts and circumstances, including correspondence exchanged, to arrive at the real intendment of the parties. This decision has no bearing on the facts of our case at all.

23 The group of judgments including the case of **Antaios Compania Naviera SA vs. Salem Rederierna AB**¹³ referred to by Mr.Shankar in support of his case that a commercial contract cannot be interpreted so as to flout business common sense, does not really support him. If at all, the shoe is here on the other foot. If the interest restriction clause, Clause 60(d), were to be interpreted so as to restrict it only to the employer and

13 (1985) 1 AC 191

not to the arbitral tribunal, it would make no business common sense of the clause.

24 That leaves us with two other judgments referred to by Mr.Shankar, namely, the cases of **South Delhi Municipal Corporation vs. Prithvi Associates**¹⁴ and **The Chief Engineer, Haryana State Agriculture Marketing Board vs. Pantawas Khurd Co-op. L&C Society Ltd.**¹⁵, respectively decided by Delhi and Punjab & Haryana High Courts. In both cases, the arbitrator's award on interest in the face of a similar interest restriction clause was upheld by the respective High Courts.

25 In the Delhi case of **Prithvi Associates** (supra), the award was upheld in the face of the following clause, which barred payment of interest :

“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.”

Despite this clause, the award of interest was upheld on the ground that (i) the arbitrator had taken into account that the claimant had “*made efforts for recovery of the amounts and various reminders were issued*” by him for recovery of amounts due; (ii) the restriction applied only till the

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15 MANY/PH/2541?2019

time the agreement was in force but not thereafter; and (iii) the security deposit and caution money was “illegally withheld” by the appellant. The facts in the Delhi case were clearly distinguishable. It is nobody’s case here that the agreement had come to an end or that the restriction on payment of interest had no effect thereafter. Besides, it is also possible to say that the view that the restriction applied to the ordinary case of the employer retaining the earnest money and security deposit during the performance of the contract and not illegally thereafter was a possible view. After all, as the Division Bench of Delhi High Court noted in that case, the arbitrator had awarded interest, and the Court was considering an appeal under Section 37 from a learned Single Judge of that court upholding the award under Section 34 of the Act and the scope for interference was very minimal. In our case, relying on the law stated in **Sayeed Ahmed and Co.’s** case, the arbitral tribunal has refused to award interest and I am examining that conclusion under Section 34. The conclusion of the tribunal is, to say the least, a possible conclusion; it surely cannot be described as perverse or opposed to Indian public policy or, for that matter, the Indian law on award of interest.

26 In the Punjab & Haryana case in **Pantawas Khurd Co-op. Society** (supra), the interest restriction clause prohibited award of interest “*on any of the items of contract agreement*” executed between the parties. The court held that allowing of a claim for payment of interest (on account of delay) on the final bill amount would not be hit by the restriction clause, “*since it is not an item of contract agreement*” but a compensation to the contractor for withholding the final payment. With utmost respect, I have serious doubts if final payment could be termed as not an item of contract agreement and the restriction could be said to be inapplicable to it. I,

however, do not have to decide that question, since in our case there is no such clause. The relevant clause, in our case, prohibits interest “*with respect to any money or balances which may be in its* (i.e. the employer’s) *hands owing to any dispute between itself and the contractor*” or “*with respect to any delays on the part of the employer in making the interim or final payment or otherwise.*” These restrictions clearly cover the dues claimed by the contractor here. Clearly, no interest is payable thereon. The decision in **Pantawas Khurd Co-op. Society** is thus distinguishable and has no application to the facts of our case.

27 The learned arbitrators have, accordingly, correctly disallowed any pre-reference or *pendente lite* interest and only allowed post-award interest under Clause (b) of Section 31(7) of the Act. No fault can be found with this part of the award.

28 In any event, if I may repeat what I have said whilst dealing with the case of **Prithvi Associates** (supra), the impugned award has taken a view on a legal issue arising in the reference, namely, whether or not interest should be awarded on the contractor’s claim allowed by the tribunal, by noting the statement of law in **Sayeed Ahmed and Co’s** case (supra) and fairly applying it to the facts of the case. It is clearly a possible view; it cannot be termed either as an impossible view or a view which no fair or judiciously minded person would be expected to take or a view that would shock the conscience of the court. If that be so, it ought to pass muster in a judicial scrutiny under Section 34 of the Act.

29 In the light of the above discussion, there is no infirmity in the

impugned award. Both petitions, Arbitration Petition No.536 of 2015 and Commercial Arbitration Petition No.1 of 2015, have accordingly no merit and are dismissed.

(S.C. GUPTE, J.)