

Pam Developments Private Limited vs The State Of West Bengal on 23 August, 2024

Author: Pamidighantam Sri Narasimha

Bench: Pankaj Mithal, Pamidighantam Sri Narasimha

2024 INSC 628

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs. 9781-9782 of 2024
@ SLP (C) Nos. 8128 -8129 of 2021

PAM DEVELOPMENTS PRIVATE LIMITED

...APPELLANT

VERSUS

THE STATE OF WEST BENGAL & ANR.

...RESPONDENT(S)

JUDGMENT

PAMIDIGHANTAM SRI NARASIMHA, J.

1. Leave granted.

2. State of West Bengal, respondent herein, issued a notice inviting tenders on 08.09.2010, for the widening and strengthening of Egra Bajkul road under the Tamruk Highway Division in Purbo Medinipur District and accepted appellant's offer, leading to grant of a Work Order for the project to be completed within 18 months from 23.12.2010. The project got delayed by about five months, but the work was completed by 09.11.2012.

3. The appellant raised a bill for Rs. 77,85,290 and that was in addition to seven other claims under different heads, owing to alleged delays on part of the Respondent. As the respondent denied any liability, the dispute was referred to Arbitration for resolution.

4. The Arbitrator gave his award on 30.01.2018, holding the respondents are liable to the tune of Rs.1,37,25,252, with interest. There were seven claims. Claim no. 1 related to loss of business, with respect to which Rs. 3,87,530 was awarded; claim no. 2 related to uneconomic utilization of plant and machinery, with respect to which Rs. 61,22,000 was awarded and claim no. 3 related to labour charges for uneconomical stoppage of work, with respect to which Rs.5,80,500 was awarded; claim

no. 4 related to interest on delayed payment of running account bills and escalation bill for which the Arbitrator awarded Rs. 54,84,024; claim no. 5 related to escalation with respect to which Rs.11,51,198 was granted; and claim 6 related to interest on the sum awarded, with respect to which interest @12% p.a. was awarded from 12.04.2016 to 30.01.2018 and @ 9.25% p.a. post award interest till date of actual payment. Finally claim no.7 pertained to costs and the Arbitrator awarded 4 lakhs to the appellant, being the successful party.

4.1. The Respondents challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996 and it was allowed in part by the District Judge setting aside claim no. 1 for loss of business, since the same had never been claimed by the appellant and was thus beyond the Arbitrator's jurisdiction. Claim no. 2 for uneconomic utilization of plant and machinery was also set aside because the Arbitrator didn't account for the loss of 135 days at the behest of the appellant while determining the alleged 200 days of 'wasted machine'.

4.2. Aggrieved by the decision of the District Judge, the appellant filed an appeal under Section 37 of the Act against the order setting aside the award on claims 1 and 2. On the other hand, the Respondent filed a cross appeal seeking setting aside of the rest of the claims as well. By the order impugned before us, the Calcutta High Court exercising jurisdiction under Section 37 of the Act set aside claim no.1 as well as claim nos. 3 and 4, but restored the Award with respect to claim no.2. However, while retaining claim no. 5 as it is, the High Court slightly modified claim no. 6 relating to pre-reference interest.

Hereinafter referred to as the 'Act'.

5. A comprehensive table of the claims and the decision in the Award, Section 34 and Section 37 jurisdiction is as follows – Claim no. Arbitral Award Section 34 Section 37

1. Loss of Awarded Award Set aside, Affirmed the business Rs.3,87,530. because it was never decision of claimed by the District judge.

		appellant and was the basis for granting of-site expenses.	
2. Uneconomic utilization plant machinery	Awarded of 61,22,000 and deploying plant account for wastage reversing machinery of 135 days by the decision by the on all 200 wasted appellant itself. days as required under the Contract.	Rs. Award set aside, as Awarded for Arbitrator did not no. 2, thereby	c
3. Labour Charges uneconomical stoppage work	Arbitrator Award upheld by the Set for granted 3% of the District Court. contract amount of Rs.5,80,500/- as per the Hudson's	because it contrary to the Special Terms and Conditions	aside

	formula.		of the Contract.
4. Interest	on Awarded	Rs. Award upheld by the Set	a
delayed	54,84,024/-	on District Court.	because
payment	of the ground	of	monthly
Running	interest	on	raised
Account	Bills blocked	capital	appellants were
and Escalation (when		amount	paid without
Bills			delay. As
	exceeded	Rs.1	clauses 7-9, no
	crore) @12% pa.		claim for
5. Escalation	Awarded	Award upheld by the	interest arises.
Bill	Rs.11,51,198/-	District Court.	Affirmed the
	as respondent		Award and
	has already paid		decision of the
	part of such		District Judge.
	amount. The		
	claimant is		
	entitled to the		
	balance.		
6. Interest	Arbitrator	Award upheld by the Modified.	Only
	awarded interest District Judge.		interest pendent
	@12% on amount		lite and post
	of claims w.e.f		award payable.
	12.04.2016 to the		No interest for
	date of Award and		pre-reference
	further interest		period.
	@9.25% p.a. from		
	date of award till		
	actual payment.		
7. Cost	Awarded	Rs.4	
	Lakhs towards		
	legal and		
	administrative		
	expenses.		

6. Mr. Saurav Agarwal, counsel for the appellant, confined his submissions to claim no. 3, 4 and 6 awarded by the Arbitrator and upheld by the District Judge but set aside/modified by the High Court. We will deal with each of these claims.

7. Re claim no. 3: This claim relating to loss caused due to idle labour, machinery, etc. 7.1. On this count, the Arbitrator accepted the claim of loss on the ground of on-site establishment 'as permissible' to the extent of 3% of the contract amount by the Hudson's formula for expenses of engineers, supervisors, etc. It was his considered view that the appellant maintained such an establishment to execute the work and the same has not been disputed by the Respondent.

Therefore, he awarded claim no. 3 in favour of the appellant for Rs.5,80,500. 7.2. The challenge to the Award made by the Respondent was dismissed by the District Judge under Section 34, holding that the findings of the Arbitrator cannot be held to be irrational, insensible or unrealistic and also that they are not in conflict with public policy. We may state at this very stage that this common reasoning of the District Court while upholding the Award for claim nos. 3, 4, 5 and 6. The standard reasoning of the District Court for these claims is as follows:

“I have gone through the observation of the learned Arbitrator in respect of claim Nos. 3, 4, 5 and 6. On meticulous scrutiny of the award with reference to the documents produced by the parties to the ease, I find that the reasons and findings given by the learned Arbitrator cannot be said to be irrational, insensible or unrealistic. In fact, award in respect of claim Nos. 3, 4, 5 & 6 cannot be said to be in conflict with the public policy of India even by stretch of Imagination. On the other hand, it is apparent that cogent and acceptable reasons have been furnished by the learned Arbitrator in respect of these four heads of claims (claim Nos. 3 to 6). The award in respect of such four claims does not call for any interference.” 7.3. While exercising jurisdiction under Section 37, the High Court examined the relevant clauses of the contract and held the claim is impermissible under the contractual provisions. They are extracted herein below for ready reference.

"SPECIAL TERMS AND CONDITIONS CONDITION IN EXTENDED PERIOD As Clause 4 of W.B.F. 2908 or Clause 5 of W.B.F. No.2911

(ii) as the case may be when an extension of time for completion of work is authorised by the Engineer-In-Charge, it will be taken for granted that the validity of the contract is extended automatically upon the extended period with all terms and conditions rates, etc. remaining unaltered, i.e. the tender is revalidated upon the extended period. EXTENSION OF TIME For cogent reasons over which the contractor will have no control and which will retard the progress, extension of time for the period lost will be granted on receipt of application from the contractor before the expiry date of contract. No claim whatsoever for idle labour, additional establishment, cost of materials and labour and hire charges of tools & Plants etc. would be entertained under any circumstances. The contractor should consider the above factor while quoting this rate. Applications for such extension of time should be submitted by the contractor in the manner indicated in Clause 5 of the printed form of W.B.F. No. 2911

(ii).

IDLE LABOUR Whatever the reasons may be no claim or idle labour, enhancement of labour rate additional establishment cost, cost of TOLL and hire and labour charges of tools and plants Railway freight etc. would be entertained under any circumstances."

7.4. Mr. Saurav Agarwal submitted that the High Court under Section 37 ignored the plausible view of the Arbitrator, as upheld under Section 34, and substituted it with its own reasoning. 7.5. This submission is persuasive, but the contract clauses speak for themselves. In fact, High Court did what

the Arbitrator should have done. Examine what the contract provides. This is not even a matter of interpretation. It is the duty of every Arbitral Tribunal and Court alike and without exception, for contract is the foundation of the legal relationship. Having considered the above referred clauses in the Contract the High Court came to the conclusion that awarding any amount towards idle, machinery, etc. is prohibited under the 'Special Terms and Conditions' of the Contract. The Arbitrator did not even refer to the contractual provisions and the District Court dismissed the objections under Section 34 with a standard phrase as extracted hereinabove. High Court exercising jurisdiction under Section 37 did its duty and we are of the opinion that the conclusions of the High Court are correct and cannot be interfered with.

8. Re claim no. 4: This claim relates to interest on delayed payment of running account bills.

8.1. The Arbitrator held that the Claimant is entitled to receive compensation for any loss and/or damage of capital which arose naturally from breach or which parties knew to be likely to arise from breach. Payments on running account bills is guided by clause 7 of the Contract and there is no prohibition in the contract regarding payment of interest on the 'blocked capital'. Therefore, holding that the injured party ought to be placed in the same financial position he would have been but for the other party's fault, the Arbitrator awarded interest on delayed payments at the rate of 12% p.a., which was quantified to Rs. 54,84,024. As indicated above, the District Court upheld the Award. 8.2. The relevant portion of the Award is as follows:-

“23.1... As the claimant is entitled to payment of R/A bills when the amount is Rs. 1 crore and above, I accept the statements/calculation made by the claimant vide Statement submitted before the arbitral tribunal for Rs. 82,26,036/-. In compliance of direction issued by MOM no. 21 dated 24.7.2017, based on work value of Rs. one crore.

Such statement giving all details covering the criteria of bill value of Rs. 1 crore was served to respondent and there was no comment on such statement whatsoever. Payment of R/A bills is guided only by the provision under clause 7 with amendment thereon. Claimant claimed interest @ 18% p.a. which is not allowed. I restrict rate of interest @ 12% p.a. only and thereby the admissible amount of the claim stands at Rs. 54,84,024/- [Rs. 82,26,036 ÷ 18 X 12] 23.2 The claimant notified loss of interest during the execution period under Interest Act (vide annexure-K, page 109, Annexure-m page-112, annexure-O, page 115, annex.- R1, page-119 & 122 with claimant's document). Moreover, such payment is out of the written contract for executed quantities. There is no prohibition in the contract for payment of interest on blocked capital. The claimant is otherwise entitled to receive payment on account of interest on blocked capital. Such principle of law is laid down in the case of Secretary, Irrigation Department Government of Orissa Vs. G.C. Ray reported in (1992) 1 SCC 508. The claimant is entitled to receive compensation for any loss or damage and/or blockage of capital which arose naturally from the breach or which the parties knew to be likely to arrive from such breach. The injured party is to be placed in the same financial position, as he would have been in, if the other party had duly carried out the contract, i.e., to place the injured party in the same position if the contract has been performed. I award Rs. 54,84,024/- only.” 8.3. Mr. Saurav Agarwal submitted that the payments became due when the gross amount of work done exceeded

Rs.1 crore, therefore the delay was to be accounted for from this date. The error, he submits is because the High Court relied on chart submitted by the respondents, unlike the Arbitrator and the District judge who relied on appellant's chart. 8.4. High Court exercising jurisdiction under Section 37 merely recounted the dates on which the bills were raised, and the payments made. Thereafter High Court formulated certain questions, which it felt that the Arbitrator and the District Judge should have answered, but failed to hold any discussion on such questions. In this view of the matter, the High Court proceeded to set aside Award of claim no. 4. The relevant portion of the High Court Judgment is as follows:-

“The learned Arbitrator proceeded on the basis of the statement submitted by the appellant that there was delay in the payment of these bills. The unpaid running account bills were described as “blocked capital”. He viewed the delay in receiving “this blocked capital” as “loss and damage” to the appellant and granted Rs. 54,84,024/- on that reasoning, as “interest”.

The learned Judge upheld this award. It is challenged by the respondent. The respondent relies on Clauses 7, 8 and 9 of the contract by which monthly bills had to be raised by the appellant on the measurement made. These payments against the monthly running account bills were to be treated as advance under Clause 7. Payment could have been made only when the gross amount exceeded Rs. 1 crore. According to the respondent no bill was raised by the appellant. According to the statement of claim of the appellant, the first bill for Rs. 1,32,91,180/- was prepared on 29th August, 2011 and paid on or about 30th August 2011. Similarly, the second was prepared on 7th February, 2012 and paid on 9th February, 2012. The third and fourth bills for Rs. 1,28,23,488/- and Rs.

1,30,90,000/- respectively were prepared on 5th March, 2012 and paid between 30th March, 2012 and 20th June, 2012. The fifth bill for Rs. 3,14,82,214/- was prepared on 6th July, 2012 and paid between 24th July, 2012 and 1st October, 2012. The sixth bill was raised on 5th July, 2012 and paid between 6th July, 2012 and 1st October, 2012. The work was completed on 9th November, 2012.

What the learned Arbitrator did not determine were the following:

- a) Who was responsible for non-preparation of the RA bill within time?
- b) Which of the RA bill claims of the appellant were to be treated as advance under the above clause of the contract?
- c) Was any notice under the Interest Act, 1978 issued by the appellant and to what effect?
- d) For what amount and for which period the claim for interest was being entertained and granted by him?

From the above narration of facts it appears that the bills were paid soon after they were prepared. In that case there could not have been any claim for interest. If a claim for interest has been made for running account bill below one crore, under the said terms it is to be treated as a claim for interest for unpaid advance.

No right to claim interest arose.

Now, unless these facts were established by the appellant and discussed by the learned Arbitrator to show that there was delay in the preparation of the bills by the respondent, that those bills were over one crore and not be treated as advance and that the right to obtain payment thereof arose on their due submission and service of a notice under the Interest Act, 1978, the award of interest could not be justified. Total absence of discussion of these facts signifies that the learned Arbitrator completely failed to exercise its jurisdiction....” 8.5. The conclusion of the High Court, “that it appears that the bills were paid soon after they were prepared” or that, “in that case there could not have been any claim for interest” cannot qualify as grounds for interference under Section 37. Equally, the approach of the High Court in holding that the Arbitrator neither established nor discussed the questions posed by it is not a ground to set aside the Award. The reasoning of the Arbitrator is reflected in that portion of the Award extracted hereinabove and we see nothing perverse in it. Nor such conclusion is against our public policy. The scope of Section 37 is enunciated in many decisions of this Court, and we apply the principles laid down therein to the facts of the present case.

8.6. For these reasons, we set aside the judgment of the High Court in relation to claim no. 4 and restore the Award and thereby the judgment of the District Court upholding the Award.

9. Re claim no. 6: This claim relates to Interest 9.1. Arbitrator awarded interest @12% on sum awarded from 12.04.2016, which is the date when appellant claimed breach of contract, to 30.01.2018, which is the date of the Award, and further interest @ 9.25% p.a. from date of Award till actual payment. This was confirmed by the District Judge under Section

34. 9.2. High Court held that the contract between the parties prohibits grant of pre-reference interest and therefore interest could not have been granted for this period. As per the High Court, as the Arbitrator could have granted interest only for pendent lite and post award, the Award was modified directing - pendente lite interest @12% p.a. from 03.08.2016 till date of award i.e. 30.01.2018, along with post award interest @ 9.25% p.a. 9.3. The learned counsel for the appellants has submitted that the award for interest is within the domain of the Arbitrator under Section 31(7) and ought not to be substituted by courts under Section 34 or 37.

9.4. Section 31(7) of the Act determines the grant of interest. The relevant provision is extracted hereunder for ready reference. “31. Form and contents of arbitral award.— (7) (a) 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.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.—The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).” 9.5. The power of the Arbitrator to grant pre-reference interest, pendente lite interest, and post-award interest under Section 31(7) of the Act is fairly well-settled. The judicial determinations also highlight the difference in the position of law under the Arbitration Act, 1940. The following propositions can be summarised from a survey of these cases:

I. Under the Arbitration Act, 1940, there was no specific provision that empowered an Arbitrator to grant interest.

However, through judicial pronouncements, this Court has affirmed the power of the Arbitrator to grant pre-reference, pendente lite, and post-award interest on the rationale that a person who has been deprived of the use of money to which he is legitimately entitled has a right to be compensated for the same.² When the agreement does not prohibit the grant of interest and a party claims interest, it is presumed that interest is an implied term of the agreement, and therefore, the Arbitrator has the power to decide the same. ³ II. Under the 1940 Act, this Court has adopted a strict construction of contractual clauses that prohibit the grant of interest and has held that the Arbitrator has the power to award interest unless there is an express, specific provision that excludes the jurisdiction of the Arbitrator ⁴ from awarding interest for the dispute in question ⁵.

III. Under the 1996 Act, the power of the Arbitrator to grant interest is governed by the statutory provision in Section 31(7). This provision has two parts. Under sub-section (a), the Arbitrator can award interest for the period between the date of cause of action to the date of the award, unless otherwise ² Secretary, Irrigation Department, Government of Orissa v. G.C. Roy, (1992) 1 SCC 508, para 43(i). Also see Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. N.C. Budharaj, (2001) 2 SCC 721; Union of India v. Krafters Engg. and Leasing (P) Ltd., (2011) 7 SCC 279.

³ G.C. Roy (supra), paras 43(iv) and 44.

⁴ Board of Trustees for the Port of Calcutta v. Engineers-de-Space-Age, (1996) 1 SCC 516, paras 4 and 5; Madnani Construction Corporation Private Limited v. Union of India, (2010) 1 SCC 549; Tehri Hydro Development Corporation Ltd. v. Jai Prakash Associates Ltd., (2012) 12 SCC 10, paras 18-20; Union of India v. Ambica Construction, (2016) 6 SCC 36 (First Ambica Construction Case); Ambica Construction v. Union of India, (2017) 14 SCC 323 (Second Ambica Construction Case); Raveechee and Company v. Union of India, (2018) 7 SCC 664; Reliance

Cellulose Products Ltd. v. ONGC Ltd., (2018) 9 SCC 266. 5 State of U.P. v. Harish Chandra and Co., (1999) 1 SCC 63.

agreed by the parties. Sub-section (b) provides that unless the award directs otherwise, the sum directed to be paid by an arbitral award shall carry interest at the rate of 2% higher than the current rate of interest, from the date of the award to the date of payment.

IV. The wording of Section 31(7)(a) marks a departure from Arbitration Act, 1940 in two ways: first, it does not make an explicit distinction between pre-reference and pendente lite interest as both of them are provided for under this sub-section; second, it sanctifies party autonomy and restricts the power to grant pre-reference and pendente lite interest the moment the agreement bars payment of interest, even if it is not a specific bar against the Arbitrator.⁶ V. The power of the Arbitrator to award pre-reference and pendente lite interest is not restricted when the agreement is 6 Sayeed Ahmed and Company v. State of Uttar Pradesh, (2009) 12 SCC 26, paras 14, 23, 24; Union of India v. Saraswat Trading Agency, (2009) 16 SCC 504; Sree Kamatchi Amman Constructions v. The Divisional Railway Manager (Works), Palghat, (2010) 8 SCC 767, para 19; Union of India v. Bright Power Projects (India) Pvt Ltd., (2015) 9 SCC 695, para 13; Reliance Cellulose Products Ltd (supra), para 24; Jaiprakash Associates Limited v. Tehri Hydro Development Corporation India Limited, (2019) 17 SCC 786, paras 13-15; Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation, (2022) 9 SCC 286, paras 16-20, 24. silent on whether interest can be awarded ⁷ or does not contain a specific term that prohibits the same ⁸. VI. While pendente lite interest is a matter of procedural law, pre-

reference interest is governed by substantive law.⁹ Therefore, the grant of pre-reference interest cannot be sourced solely in Section 31(7)(a) (which is a procedural law), but must be based on an agreement between the parties (express or implied), statutory provision (such as Section 3 of the Interest Act, 1978), or proof of mercantile usage¹⁰.

9.6. In view of the above, the High Court had no reason to interfere with the Arbitral Award with respect to grant of pre-reference interest, since the Contract between parties does not prohibit the same.

10. Having analysed the reasoning in the Award and the judgment of the District Judge under Section 34 of the Act and of the High Court under Section 37 with respect to claim nos. 3, 4 and 6, we;

7 Jaiprakash Associates Limited v. Tehri Hydro Development Corporation India Limited, (2019) 17 SCC 786, para 13.2.

8 Oriental Structural Engineers Private Limited v. State of Kerala, (2021) 6 SCC 150, paras 15-

18. 9 Central Bank of India v. Ravindra, (2002) 1 SCC 367, para 39 following G.C. Roy (supra), para 43(v).

Central Bank of India (supra), para 39; Secy./GM, Chennai, Central Coop. Bank Ltd. v. S. Kamalaveni Sundaram, (2011) 1 SCC 790, para 13.

(a) Uphold the decision of the High Court in setting aside the Award with respect to claim no. 3 and dismiss the Civil Appeal to this extent.

(b) Allow the appeal and set aside the judgment of the High Court in so far as it rejected and set aside claim no. 4 awarded by the Arbitrator, as upheld by the District Judge under Section 34.

(c) Allow the appeal and set aside the judgment of the High Court in so far as it modified claim no. 6, to the extent of rejecting pre-reference interest awarded by the Arbitrator, as upheld by the District Judge under Section 34.

(d) In conclusion, Award of claim no. 3 is set aside and Award of claim no. 4 is upheld. Under claim no.6, the appellant will also be entitled to claim pre-reference interest.

11. The Civil Appeal arising out of SLP (C) No. 8128 of 2021 is allowed in part as indicated hereinabove and Civil Appeal arising out of SLP (C) No. 8129/2021 stands disposed of accordingly. Parties shall bear their own costs.

.....J. [PAMIDIGHANTAM SRI NARASIMHA]J.
[PANKAJ MITHAL] NEW DELHI;

AUGUST 23, 2024.