

M/S Ferro Concrete Construction ... vs The State Of Rajasthan on 2 April, 2025

Author: Pamidighantam Sri Narasimha

Bench: Pamidighantam Sri Narasimha

2025 INSC 429

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2025
ARISING OUT OF SLP (C) No. 7851 OF 2023

M/S FERRO CONCRETE CONSTRUCTION
(INDIA) PVT. LTD.

... APPELLANT

VERSUS

THE STATE OF RAJASTHAN

...RESPONDENT (S)

JUDGMENT

PAMIDIGHANTAM SRI NARASIMHA, J.

1. Leave granted.

2. It is just as necessary to follow a precedent as it is to make a precedent.

3. The short issue arising for consideration in this appeal is whether the contractual clause that bars the appellant/contractor from claiming any interest on any payment, arrears or balance due to it amounts to an express bar on the arbitrator's power to grant pendente lite interest as per the law under the Arbitration Act, 1940. While the arbitrator granted 15% pendente lite interest, the Hereinafter "1940 Act".

same was set aside by the District Judge while deciding objections against the award, and upheld by the High Court by order dated 06.01.2023, which is impugned herein. By relying on settled case-law on the grant of interest under the 1940 Act and the interpretation of contractual clauses barring payment of interest, we have allowed the present appeal and have directed payment of pendente lite interest on the arbitral sum.

4. The relevant facts are that the appellant was awarded a works contract by the respondent, and they entered into an agreement dated 06.02.1988 that contains the following clause barring the

appellant from claiming interest on any payment or arrears or balance due to him at any time:

“22. Payments :-

(i) Payments will be made to the contractor within one month of the issuing of the corresponding bills. The contractor shall comply with the procedure that may be prescribed for all operations from the recording of progress measurements upto payment of bills.

(ii) All materials and work for which payment is made in part or full shall become the sole property of the Govt, but this provision shall not relieve the contractor of his responsibility for the care and protection of the materials and works at his own cost nor his liability to make good the damage if any unless and until the whole work has been deemed to have been completed and handed over to the Government.

The contractor shall not be entitled to claim any interest upon any payment, any arrears or upon any balance, which may be found due to him at any time.” (emphasis supplied)

5. When disputes arose under the contract, the appellant invoked arbitration and filed its claim, resulting in arbitral award dated 07.03.1995 for a sum of Rs. 1,78,17,146 in its favour. The arbitrator also directed payment of 15% interest p.a. on all dues payable from 18.12.1991 (when the arbitrator entered reference) till payment or the date of decree, whichever is earlier. The respondent filed an application to set aside the award, which was decided by the District Judge’s order dated 16.08.2005 that only set aside the interest awarded by the arbitrator, and instead granted 9% simple interest on the principal sum from that date till the date of payment. The other objections against the award were rejected and the rest of the award was upheld. It was held that the arbitrator did not consider that Clause 22 of the contract is widely worded and prohibits the appellant from claiming interest at any time. Both parties preferred appeals against this order, which were dismissed by the High Court by order dated 06.01.2023, impugned herein.

6. While issuing notice on 24.04.2023 in the present special leave petition converted to a civil appeal, this Court passed the following order:

“1. Learned counsel appearing on behalf of the petitioner relies upon paragraph 24 of the decision of this Court in Reliance Cellulose Products Ltd Vs Oil and Natural Gas Corporation Limited 2. He urges that Clause 22 of the agreement does not specifically exclude either the power of the arbitrator to grant pendente lite interest or rule out the claimant from claiming interest pendente lite in the course of arbitration.

2. Issue notice returnable in four weeks.”

7. We have heard Mr. Vinayak Mehrotra, learned counsel for the appellant, and Ms. Sansriti Pathak, learned Additional Advocate General for the respondent State on the issue of whether Clause 22 amounts to a bar on the arbitrator from awarding pendente lite interest under the 1940 Act.

7.1 Mr. Mehrotra submits that the present issue is covered by this Court's decision in *Reliance Cellulose* (supra). He submits that the contractual clause in the present case does not clearly and expressly bar the arbitrator from awarding interest on the arbitral sum. He has also referred to this Court's decision in *Pam* (2018) 9 SCC 266.

Developments Private Limited v. State of West Bengal 3 in support of his argument.

7.2 On the other hand, Ms. Pathak has made detailed submissions regarding the interpretation of the contractual clause, which are as follows: First, the interpretation of an ouster clause is the same under the 1940 Act and the Arbitration and Conciliation Act, 1996 4. Under both statutes, the arbitrator can award interest unless the agreement provides otherwise. The key difference between the statutes is that the 1996 Act contains an express statutory provision for the grant of interest in Section 31(7), but this is based on the principle in *G.C. Roy* 5 that recognised the arbitrator's power to award interest under the 1940 Act. Further, that Section 31(7)(a) of the 1996 Act does not differentiate pre-reference and pendente lite interest. However, these differences do not have any bearing on the interpretation of contractual clauses. Second, by referring to various decisions of this Court, she submits that narrower contractual clauses have been treated as ouster clauses that bar the arbitrator from awarding pendente-lite interest. 6 Third, she submits that (2024) 10 SCC 715, para 23.

Hereinafter "1996 Act".

Secretary, Irrigation Department, Government of Orissa v. G.C. Roy, (1992) 1 SCC 508. Relied on *M.B. Patel & Co. v. ONGC*, (2008) 8 SCC 251; *Union of India v. Krafters Engg. & Leasing (P) Ltd.*, (2011) 7 SCC 279 under the 1940 Act.

paragraph 24 of *Reliance Cellulose* (supra), which is relied on by the appellant, is based on this Court's decision in *Board of Trustees For The Port of Calcutta v. Engineers-De-Space-Age* 7, which has been doubted in several cases. A 3-judge bench of this Court in *Union of India v. Ambica Construction* 8 (First *Ambica* case) held that the observations in *Engineers-De-Space-Age* (supra) cannot be considered as general observations and each contractual clause barring payment of interest must be interpreted by the words used therein. Fourth, in the facts of the present case, the respondent has already paid a sum of Rs. 4.65 crores to the appellant, of which Rs. 2.83 crores is the interest component. Hence, a further award of pendente lite interest is not warranted in the present case.

8. The position of law on the grant of interest under the 1940 Act and the 1996 Act is well-settled. The constitution bench decisions of this Court in *GC Roy* (supra) and *NC Budharaj* 9 recognised the arbitrator's power to grant pre-reference, pendente lite, and post-award interest on an arbitral award made under the 1940 Act unless there is a contractual bar. 10 The question that falls for our consideration is whether the contractual bar in the (1996) 1 SCC 516.

(2016) 6 SCC 36.

Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj, (2001) 2 SCC 721. GC Roy (supra), para 45.

present case prohibits the arbitrator from granting pendente lite interest, which necessarily entails an interpretation of the clause.

9. This Court has, on multiple occasions, noted that a contractual clause which bars the payment of interest is interpreted differently under the 1940 Act and the 1996 Act. In fact, while deciding cases under the 1996 Act, this Court has been slow to rely on the principles laid down under the 1940 Act, considering the legislative incorporation of the arbitrator's power to grant interest through Section 31(7) of the 1996 Act. 11 The difference in the interpretative approach has been expounded by this Court in *Reliance Cellulose* (supra) as follows:

“24. A conspectus of the decisions that have been referred to above would show that under the 1940 Act, an arbitrator has power to grant pre-reference interest under the Interest Act, 1978 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. Since interest is compensatory in nature and is parasitic upon a principal sum not having been paid in time, this Court has frowned upon clauses that bar the payment of interest. It has therefore evolved the test of strict construction of such clauses, and has gone on to state that 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 *Sayeed Ahmed & Co. v. State of U.P.*, (2009) 12 SCC 26, para 24; *Sree Kamatchi Amman Constructions v. Railways*, (2010) 8 SCC 767, paras 18-19; *Union of India v. Bright Power Projects (India) (P) Ltd.*, (2015) 9 SCC 695, paras 17-19; *Chittaranjan Maity v. Union of India*, (2017) 9 SCC 611, para 16; *Garg Builders v. BHEL*, (2022) 11 SCC 697, para 17.

parties and clearly bar payment of interest, cannot stand in the way of an arbitrator awarding pre-reference or pendente lite interest. Thus, when one contrasts a clause such as the clause in *Second Ambica Construction* case with the clause in *Tehri Hydro Development Corpn. Ltd.*, it becomes clear that unless 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 under the 1940 Act. As has been held in *First Ambica Construction* case, 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. We hasten to add that the position as has been explained in some of the judgments above 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.” (emphasis supplied)

10. The difference in the interpretative approach can be stated as follows. Under the 1940 Act, a stricter approach is followed that requires a clear and express clause against the payment of interest in case of difference, dispute, or misunderstanding, in case of delay of payment, or any other case whatsoever, to constitute a bar on the arbitrator from granting interest. A clause that only provides that interest shall not be granted on amounts payable under the contract would not be sufficient. On the other hand, under the 1996 Act wherein Section 31(7)(a) sanctifies party autonomy, interest is not payable the moment the contract provides otherwise. This distinction has been reiterated by us in a recent decision in Pam Developments (supra), which summarised the position of law as follows:

“23. 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:

23.1. 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. 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.

23.2. 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.

23.3. 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 clause (a), the arbitrator can award interest for the period between the date of cause of action to the date of the award, unless otherwise agreed by the parties. Clause (b) provides that unless the award directs otherwise, the sum directed to be paid by an arbitral award shall carry interest @ 2% higher than the current rate of interest, from the date of the award to the date of payment. 23.4. The wording of Section 31(7)(a) marks a departure from the 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. 23.5. The power of the arbitrator to award pre-reference and pendente lite interest is not restricted when the agreement is silent on whether interest can be awarded or does not contain a specific term that prohibits the same.

23.6. While pendente lite interest is a matter of procedural law, pre-

reference interest is governed by substantive law. 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 usage.” (emphasis supplied)

11. At this stage, we find it necessary to deal with Ms. Pathak’s submission that Reliance Cellulose (supra) relies on Engineers-De- Space-Age (supra), which was later read down and clarified by a 3-judge bench in the First Ambica case. Upon reading Reliance Cellulose (supra), it is clear that this Court undertook a comprehensive survey of the case-law on the issue of payment of interest on arbitral awards, including a detailed discussion of the First Ambica case, 12 before formulating the legal position extracted hereinabove.

12. In the First Ambica case (supra), the issue before this Court was whether Engineers-De-Space-Age (supra) and Madnani Construction 13 were correctly decided. 14 After taking note of the interpretation of various contractual clauses barring payment of interest in this Court’s decisions under the 1940 Act and the 1996 Act, it summarised their rulings as follows:

“28. It is apparent from various decisions referred to above that in G.C. Roy the Constitution Bench of this Court has laid down that where the agreement expressly provides that no interest pendente lite shall be payable on amount due, the arbitrator has no power to award interest. In N.C. Budharaj a Constitution Bench has observed that in case there is nothing in the arbitration agreement to exclude jurisdiction of the arbitrator to entertaining claim for interest, the jurisdiction of the arbitrator to consider and award interest in respect to all periods is subject to Section 29 of the Act. In Hindustan Construction Co. Ltd. this Court has followed the decision in G.C. Reliance Cellulose (supra), paras 19-21.

Madnani Construction Corpn. (P) Ltd. v. Union of India, (2010) 1 SCC 549.

First Ambica case (supra), para 1.

Roy and laid down that on the basis of principles of Section 34 the arbitrator would have the power to award pendente lite interest also. In B.N. Agarwalla, this Court has again followed G.C. Roy and Hindustan Construction Co. Ltd. with respect to the power of the arbitrator to award pendente lite interest and it was held that the arbitrator has the power to award interest. In Harish Chandra this Court interpreted Clause 1.9 which provided that no claim for interest or damages will be entertained

by the Government in respect to any monies or balances which may be lying with the Government. It was held that there was no provision which could be culled out against the contractor not to claim interest by way of damages before the arbitrator on the relevant items placed for adjudication. In Ferro Concrete Construction (P) Ltd. this Court considered Clause 4 containing a stipulation that no interest was payable on amount withheld under the agreement. It was held that Clause 4, which dealt with rates, material and workmanship, did not bar award of interest by the arbitrator on claims of the contractor made in the said case. In Sayeed Ahmed this Court has emphasised that award of interest would depend upon nature of the clause in the agreement. In Bright Power Projects (India) (P) Ltd. this Court has considered the expression “unless otherwise agreed by parties” employed in Section 31(7)(a) of the 1996 Act and laid down that in case contract bars claim of interest the contractor could not have claimed interest. The provision of Section 31(7)(a) of the 1996 Act is binding upon the arbitrator. In Sree Kamatchi Amman Constructions similar view has been taken.” The Court then took note of the doubts expressed regarding the correctness of Engineers-De-Space-Age (supra) and Madnani Construction (supra) in Sayeed Ahmed (supra) and Tehri Hydro Development Corpn. Ltd. v. Jai Prakash Associates Ltd.¹⁵, on the ground that they allow the arbitrator to grant interest by ignoring an express bar in the contract. ¹⁶ In order to resolve the discordant note, this Court in the First Ambica case (supra) held as follows:

“32. In para 4 in Engineers-De-Space-Age this Court has observed that bar under the contract will not be applicable to the arbitrator cannot be said to be observation of general application. In our opinion, it would depend upon the stipulation in the contract in each case whether the power of the arbitrator to grant pendente lite interest is expressly taken away. If answer is “yes” then the arbitrator would have no power to award pendente lite interest.

33. The decision in Madnani Construction Corpn. has followed the decision in Engineers-De-Space-Age. The same is also required to be diluted to the extent that express stipulation under contract may debar the arbitrator from awarding interest pendente lite. Grant of pendente lite interest may depend upon several factors such as phraseology used in the agreement, clauses conferring power relating to arbitration, nature of claim and dispute referred to arbitrator and on what items power to award interest has been taken away and for which period.

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 (2012) 12 SCC 10.

First Ambica case (supra), paras 29-31.

aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits.” (emphasis supplied)

13. From the above extracted paragraphs, the decision of the 3- judge bench in the First Ambica case (supra) can be stated as follows. The arbitrator’s power to grant interest would depend on the contractual clause in each case, and whether it expressly takes away the arbitrator’s power to grant pendente lite interest. This would have to be determined based on the phraseology of the agreement, clauses conferring powers relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest is contractually barred and for which period. Further, a bar on award of interest for delayed payment would not be readily inferred as an express bar to the award of pendente lite interest by the arbitrator.

14. We find that the position of law laid down in paragraph 24 of Reliance Cellulose (supra) is in line with the position of law laid down in the First Ambica case. Both decisions emphasise the need for an express contractual bar on the payment of pendente lite interest to create a bar on the arbitrator from awarding interest. They also emphasise that a bar on the arbitrator’s power would depend on the phraseology of the contractual clause in that case. In this light, Ms. Pathak’s submission regarding the correctness of Reliance Cellulose (supra) ought to be rejected. We do not find any reason to unsettle the position of law, when it has been clearly enunciated and followed. It is not sufficient to lay down a precedent, but it is equally important to follow and apply them as well.

15. Now that we have stated the law applicable to this case, we will consider the terms of Clause 22 of the contract to determine whether it bars the arbitrator from awarding pendente lite interest on the arbitral award. Clause 22 prohibits the appellant (contractor) from claiming interest on any payment, arrears or balance, which may be found due to him at any time. Applying the above-stated law, we find that this clause does not expressly bar the award of pendente lite interest in the event of disputes, differences, or misunderstandings between the parties, or on delayed payment, or in any other respect whatsoever. Under the 1940 Act, this Court has not readily inferred a bar on the arbitrator from clauses that merely bar the contractor from claiming interest, and the same will apply to this case as well.

16. In view of the above discussion, we allow the present appeal and set aside the impugned judgment of the High Court in SBCMA No. 3175/2006 dated 06.01.2023. Considering that the arbitrator entered reference in 1991 and the award was made in 1995, along with the passage of time in litigation as well as the amounts already paid by the respondent including post-award interest @ 9%, we deem it appropriate to grant 9% pendente lite interest, instead of 15% as granted by the arbitral tribunal, from 18.12.1991 till 07.03.1995 (date of the arbitral award) within a period of 60 days. 17

17. No order as to costs.

18. Pending applications, if any, stand disposed of.

.....J. [PAMIDIGHANTAM SRI NARASIMHA]J.
[JOYMALYA BAGCHI] NEW DELHI;

APRIL 02, 2025 As these proceedings arise under the 1940 Act, the scope and jurisdiction of the Court to modify or vary the award is larger than that of the court exercising jurisdiction under Section 34 of the 1996 Act.