

M/S Raveechee And Co. vs Union Of India on 3 July, 2018

Equivalent citations: AIR 2018 SUPREME COURT 3109, 2018 (4) KCCR SN 424 (SC) 2019 (132) ALR SOC 62 (SC), 2019 (132) ALR SOC 62 (SC)

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Bench: L. Nageswara Rao, S.A. Bobde

REPORTAB

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos. 5964-5965 OF 2018
[Arising out of SLP (CIVIL) Nos. 3310-3311 of 2016]

M/s Raveechee and Co.

...Appell

Versus

Union of India

...Respond

JUDGMENT

S.A. BOBDE, J.

1. Leave granted.

2. These Civil Appeals arise out of the final judgment and order of Gujarat High Court dated 23.07.2015 in F.A No 189 of 2005 and the final judgment and order dated 5.11.2015 in MCA No 3178 of 2015 in F.A No 189 of 2005. The High Court partly allowed the appeal of the Respondent- Union of India and quashed Order of the Arbitrators and set aside the amount awarded by them in respect of Claim No 12. The Arbitrators, under Claim No. 12 awarded interest pendente lite at 12% on the award of Rs. 30 lacs excluding security deposits amounting to Rs. 44,92,800/- per annum from 26.09.1988 to 22.03.2001. Further, the High Court dismissed the review application filed by the appellant.

3. The appellant – M/s Raveechee and Co. and the respondent- Union of India entered into a contract dated 02.06.1981 for quarrying, stacking and loading stone ballast, broken stone aggregate,

rubble etc. from the Western Railway quarry at Udvada at an estimated cost of Rs. 55,81,000/-. Thereafter, disputes arose between the parties due to which the appellant called upon the General Manager, Western Railway to appoint Arbitrators in order to settle the dispute. The Arbitration proceedings commenced on 26.09.1988 and the award was passed on 22.03.2001.

4. The Arbitral Tribunal comprising of Shri N.K. Gupta, Chief Engineer (C&S) and Shri R.K. Sinha, Director, Finance, KRCL, awarded a total of Rs. 76,43,800/- as against the claim of Rs. 1,34,87,044/- raised by the appellant. An award for the Claim Nos. 1-12 raised by the appellant was made. The present dispute relates to the amount awarded under Claim No. 12 i.e. Interest. The Arbitrators awarded the appellant interest pendente lite at 12% on the award for damages excluding security deposits amounting to Rs. 44,92,800/- from 26.09.1988 to 22.03.2001.

5. The appellant thereafter filed a Civil Miscellaneous Application No.22 of 2001 along with the award dated 22.03.2001 in the Civil Court. The award was made a rule of the Court by an order dated 29.07.2004 under Section 17 of the Arbitration Act of 1940 (hereinafter referred to as 'the Act') by the Civil Court. The respondent challenged the order of the Civil Court dated 29.07.2004 in appeal. The High Court partly allowed the appeal and set aside the order of Arbitrators qua Claim No.12 under which the Arbitrators had awarded Rs. 44,92,800/- as interest pendente lite. The Arbitrators awarded amounts in favour of the appellant as follows: Claim No.1 – Rs. 12 lacs, Claim No.3 – Rs. 8 lacs and Claim No. 5 – Rs. 10 lacs and interest on the total amount of damages (i.e. Rs. 12 lacs + Rs. 8 lacs + Rs. 10 lacs = Rs. 30 lacs) excluding the amount of security deposits. Thus, interest on Rs. 30 lacs from 26.09.1988 to 23.03.2001 at 12 % amounting to Rs. 44,92,800/-.

6. The appellant, aggrieved by the High Court's judgment and order dated 23.07.2015 filed a review application before the High Court. The High Court dismissed the review application vide judgment and order dated 05.11.2015. The present SLPs are filed against the High Court judgments and orders dated 23.07.2015 & 05.11.2015 passed by the High Court.

7. The question that arises for determination before this Court is:

Whether Clause 16(3) (reproduced hereafter) of the General Contract Clauses (hereinafter referred to as "GCC") restricted the power of the arbitrator to award interest pendente lite?

8. In the present case, the Arbitral Tribunal giving effect to the purport of Clause 16(3) did not award any interest on security deposits. The clause in terms states that no interest will be payable on earnest money, security deposits or on any amounts payable to the contractor under the contract.

The Arbitrators in their award have relied on Clause 16(3) of the contract to deny interest on the security deposit. The Arbitrators held that what was intended under Clause 16(3) barred the grant of interest on earnest money, security deposit and amounts payable to the appellant, it does not in any way bar grant of interest pendente lite.

9. Clause 16(1) and 16(3), which are relevant, read as follows:

“16(1):- The earnest money deposited by the contractor with his tender will be retained by the Railways as part of security for the due and faithful fulfillment of the contract by the contractor. The balance to make up the security deposit, the rates for which are given below, may be deposited by the contractor in cash or in the form of Government Securities or may be recovered by percentage deduction from the contractor's 'on account' bills.

Provide also that in case of defaulting contractor the Railway may retain any amount due for payment to the contractor on the pending 'on account bills' so that the amounts so retained may not exceed 10% of the total value of the contract.

“16(3): No interest will be payable upon the earnest money and the security deposit or amounts payable to the Contractor under the Contract, but Government Securities deposited in terms of sub clause (1) of this clause will be payable with interest accrued thereon.”

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

It is not the case of the Government before us that interest has been awarded to the contractor under any of the three heads. Neither does any question of interest payable on Government security arise in the present case. The contention put forth by the Government is that the above clause in the agreement bars the Arbitrators from awarding interest pendete lite. On a plain reading we find that there is no such bar.

11. In fact, the Arbitrators have awarded amounts to the claimant on account of the losses suffered by them for various reasons, mainly due to the ban on mining. These amounts are not awarded on account of any payment due under the contract but are awarded on losses determined in the course of arbitration or the 'lis'. A claimant becomes entitled to interest not as compensation for any damage done but for being kept out of the money due to him. Obviously, in a case of unascertained damages such as this, the question of interest would arise upon the ascertainment of the damages in the course of the lis. Such damages could attract interest pendente lite for the period from the commencement of the arbitration to the award.

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

due to the pendency of the arbitration i.e. pendente lite.

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

We are not called upon, in this case, to decide whether parties can agree that they will not claim interest pendente lite even in respect of unascertained damages determined in the course of arbitration. The present case must be decided on the general rule that an arbitrator has the power to award interest unless specifically barred from awarding it; and the bar must be clear and specific.

13. In *Irrigation Deptt., State of Orissa v. G.C Roy*¹ this Court thoroughly considered the question of power of the arbitrator to award interest pendente lite and held that when the agreement between the parties does not prohibit grant of interest and where the party claims interest and that dispute has been referred to an arbitrator, then the arbitrator does have the power to award interest pendente lite.

14. Subsequently, this Court in the cases of *Board of Trustee for the Port of Calcutta v. Engineers-De-Space Age*² and *Madnani Construction Corporation Pvt. Ltd. v. Union of India and Ors.*³ held that according to the view taken in the case of *Irrigation Deptt., State of Orissa* (supra), the arbitrator does have the power to award interest pendente lite. The Court observed that it essentially depends upon the ouster in each clause, which means that unless there is an express bar that provides (1992) 1 SCC 508 (1996) 1 SCC 516 (2010) 1 SCC 549 that the arbitrator cannot award interest pendente lite, the grant of interest pendente lite will predominantly be based on the arbitrator's discretion to award the same.

15. In *Sayeed Ahmed & Co v. State of Uttar Pradesh and Ors.*⁴, this Court referred to the decision in *Superintending Engineer and Ors. v. B. Subba Reddy*⁵ and observed thus:

“11. Two more decisions dealing with cases arising under the Arbitration Act, 1940 require to be noticed. In *Superintending Engineer v. B. Subba Reddy* (1999) 4 SCC 423 this Court held that interest for pre-

reference period can be awarded only if there was an agreement to that effect or if it was allowable under the Interest Act, 1978. Therefore, claim for interest for pre-reference period, which is barred as per the agreement or under the Interest Act, 1978 could not be allowed. This Court however held that the Arbitrator can award interest pendente lite and future interest.”

16. A three Judge Bench of this Court in the case of *Union of India v. Ambica Construction*⁶ held that the power of an arbitrator to grant pendente lite interest will 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. The Court observed:

“34. Thus our answer to the reference is that if contract expressly bars award of interest pendente lite, the same cannot be awarded by the Arbitrator.

(2009) 12 SCC 26 (1999) 4 SCC 423 (2016) 6 SCC 36 And that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits.”

17. Further, this Court considered an identical clause in the contract in the case of Ambica Constructions v. Union of India⁷, wherein it observed that the Clause of the GCC did not bar the arbitrator from awarding interest pendente lite and affirmed the award passed by the arbitrator. The three Judge Bench of this Court held that the contention raised by the Union of India based on the Clause of the GCC that the arbitrator could not award interest pendente lite was not a valid contention and the arbitrator was completely justified in granting interest pendente lite.

Relying on the three Judge Bench judgment in Union of India v. Ambica Construction (supra) and in Irrigation Deptt., State of Orissa (supra), this Court held that the bar to award interest on the amounts payable under the contract would not be sufficient to deny the payment of interest pendente lite.

18. Thus when a dispute is referred to for adjudication to an arbitrator, a term of such a nature as contained in the Clause 16(3) of GCC, that is binding on the parties cannot be extended to bind an Arbitrator. The Arbitrator has the power to award interest pendente lite (2017) 14 SCC 323 where justified. We, therefore, set aside the judgment of the High Court and restore the award passed by the Arbitral Tribunal in respect of Claim No. 12.

19. Appeals are allowed accordingly.

.....J. [S.A. BOBDE]J. [L. NAGESWARA RAO]
NEW DELHI JULY 03, 2018