

Union Of India vs M/S Ambika Construcion on 16 March, 2016

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Bench: Prafulla C. Pant, Arun Mishra, Ranjan Gogoi

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION [C] No.11114/2009

Union of India

... Petitioner

Vs.

M/s. Ambika Construction

... Respondent

(With SLP [C] No.17219/2009]

JUDGM ENT

ARUN MISHRA, J.

1. The issue involved in the reference is in regard to the power of the Arbitrator to award pendente lite interest when contract contains bar for grant of interest in a case covered by the Arbitration Act, 1940 (hereinafter referred to as “the Act”). A Division Bench of this Court had doubted the correctness of the decisions in Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age (1996) 1 SCC 516; and Madnani Construction Corporation (P) Ltd. v. Union of India and Others (2010) 1 SCC

549. In view of the decision of the Constitution Bench judgment in Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C. Roy (1992) 1 SCC 508 and Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa & Ors. v. N.C. Budharaj (D) by L.Rs. & Ors. (2001) 2 SCC 721

which held that the Arbitrator had the jurisdiction and authority to award interest for pre-reference period, pendente lite and future period if there was no express bar in the contract regarding award of interest. A doubt was expressed about the correctness of the decision in *Engineers-De- Space Age* (supra) in *Sayeed Ahmed & Co. v. State of U.P. & Ors.* (2009) 12 SCC 26 and *Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat & Ors.* (2010) 8 SCC 767. Hence the matter had been referred to a larger Bench for decision.

2. The case has a chequered history. The tender of M/s. Ambica Construction for fabrication of tie bars from M.S. Flats in CST-9 sleepers was accepted on 8.9.1989. Final agreement was executed on 30.11.1989. The work was completed on 21.11.1990. With respect to payments, certain differences and disputes arose between the parties. Thus M/s. Ambica Construction prayed for appointment of an Arbitrator. On 5.3.1991 as the petitioner M/s. Ambica Construction was in serious financial difficulties, it accepted the amount in full and final settlement. Later on, the Union of India informed the petitioner on 11.3.1991 that the matter was under

consideration. However the Arbitrator was not appointed. An application under section 20 of the Act was filed before the High Court of Calcutta for referring the case to arbitration. On 2.6.1992 the High Court directed to file the arbitration agreement in the court and appointed two Arbitrators in terms of the arbitration clause. Said Arbitrators failed to publish the award and as such an application was filed for revocation of the authority of joint Arbitrators and another sole Arbitrator was appointed. The sole Arbitrator ultimately published the award on 30.12.1997. On an application filed by the Union of India, the High Court vide order dated 9.4.1998 remitted the award to the Arbitrator to give an item-wise break-up. On 12.5.1998 the sole Arbitrator published the item-wise award. Again the Union of India questioned the same before the High Court. The award was set aside on the ground that the Arbitrator had not given an intelligible award in terms of clause 64(3)(a)(iii) of the agreement and had not taken into effect the supplementary agreement dated 5.3.1991. The appeal preferred by the petitioner was dismissed by the Division Bench of the High Court on 15.10.2004 against which an SLP was filed in which leave was granted and ultimately C.A. No.6621/2005 was allowed and case was remitted vide order dated 7.11.2005 passed by this Court to the Arbitrator for assigning reasons and to pass fresh award. Thereafter, Arbitrator passed a fresh award on 11.2.2006. Again an application was filed by the Union of India under sections 30 and 33 of the Act. The Single Judge dismissed the application vide order dated 26.6.2007. Union of India filed an application for recall. The order dated 26.6.2007 was recalled. Vide order dated 22.8.2007 learned Single Judge set aside the award with regard to interest for pre-reference period and directed that interest would be allowed on the principal sum of Rs.9,82,660/- at the rate of 10% per annum from 1.9.1992 the date from which the original Arbitrator entered upon the reference. An appeal was preferred before the Division Bench and the same had been partly allowed with regard to claim Nos.6 and 7. Aggrieved thereby, M/s. Ambica Construction had preferred S.L.P. [C] No.17219/2009 in this Court and Union of India has also assailed the judgment and order of the High Court in S.L.P. [C] No.11114/2009.

3. The only question for consideration is whether an Arbitrator has the power to award pendente lite interest in case contract bars the same in a case covered by Act and decisions of this Court in Engineers De-Space Age (supra) and Madnani Construction Corporation (P) Ltd. (supra) have been correctly decided.

4. It was submitted on behalf of the Union of India that the Arbitrator is bound by the terms of the contract and cannot award interest in case the contract bars the same. On the other hand, learned counsel appearing on behalf of M/s. Ambika Construction has contended that in view of the decision in Engineers-De-Space Age (supra) followed in Madnani Construction Corporation (P) Ltd. (supra) notwithstanding the terms in the contract agreement barring the award of interest would cover the pre-reference period and not pendente lite interest.

5. There are certain provisions which are statutorily implied in arbitration agreement unless excluded in the agreement. Section 3 of the Act of 1940 deals with the provisions which are implied in the arbitration agreement. Section 3 is extracted below :

“3. Provisions implied in arbitration agreement.—An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.” The provisions of section 3 make it clear that unless a different intention is expressed in the arbitration agreement, the agreement would include the provisions contained in the First Schedule so far as they are applicable to the reference. Provisions in the First Schedule contain 8 paragraphs. It provides for reference to a sole Arbitrator and in case there are even numbers of Arbitrators, appointment of umpire is also provided. An Arbitrator is required to pass award within 4 months from the date of entering on the reference. In case Arbitrator fails to pass an award within the specified time the umpire shall make the award within 2 months. Para 6 of First Schedule provides that the Arbitrator or umpire shall examine the matters in difference and the award shall be final and binding. Arbitrator or umpire has the power for examining the witnesses and production of relevant documents. Para 8 of Schedule I provides for costs of reference and awards shall be in the discretion of the Arbitrator.

6. “Court” has been defined in section 2(c) of the Act to mean a civil court having jurisdiction to decide the questions forming the subject- matter of the reference. Section 41 of the Act is extracted hereunder:

“41. Procedure and powers of Court. – Subject to the provisions of this Act and of rules made thereunder :

The provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court, and to all appeals, under this Act, and The Court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it

has for the purpose of, and in relation to any proceedings before the Court:

Provided that nothing in CI. (b) shall be taken to prejudice any power which may be vested in an Arbitrator or umpire for making orders with respect to any of such matters.” The court can exercise the power specified in Second Schedule of the Act. However, Arbitrator is not a court. Arbitrator is the outcome of agreement. He decides the disputes as per the agreement entered into between the parties. Arbitration is an alternative forum for resolution of disputes but an Arbitrator ipso facto does not enjoy or possess all the powers conferred on the courts of law.

7. Section 29 of the Act confers on the court power to award interest from the date of decree. Section 34 of the C.P.C. confers on the court power to award interest prior to the institution of the suit and during pendency of the suit and post decree.

8. A Constitution Bench of this Court in G.C. Roy (supra) has considered the question of power of the Arbitrator to award pendente lite interest and it has been laid down that if the arbitration agreement or the contract itself provides for interest, Arbitrator would have the jurisdiction to award the interest. Similarly, where the agreement expressly provides that no interest pendente lite shall be payable on the amount due, the Arbitrator has no power to award pendente lite interest. In G.C. Roy (supra) this Court has held thus :

“xxx If the arbitration agreement or the contract itself provides for award of interest on the amount found due from one party to the other, no question regarding the absence of Arbitrator’s jurisdiction to award the interest could arise as in that case the Arbitrator has power to award interest pendent lite as well. Similarly, where the agreement expressly provides that no interest pendente lite shall be payable on the amount due, the Arbitrator has no power to award pendente lite interest. But where the agreement does not provide either for grant or denial of interest on the amount found due, the question arises whether in such an event the Arbitrator has power and authority to grant pendente lite interest.” The question involved in G.C. Roy (supra) was with respect to the award of interest for the period commencing from the date of Arbitrator entering upon the reference till the date of making the award. In G.C. Roy (supra), this Court has considered decisions in Raipur Development Authority & Ors. v. M/s. Chokhamal Contractors & Ors., (1989) 2 SCC 721; Executive Engineer (Irrigation) Balimela & Ors. v. Abhaduta Jena & Ors., (1988) 1 SCC 418; Nachiappa Chettiar & Ors, v. Subramaniam Chettiar, AIR 1960 SC 307; Satinder Singh v. Amrao Singh & Anr., AIR 1961 SC 908; Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore, AIR 1967 SC 1030; Union of India v. Bungo Steel Furniture Pvt. Ltd., AIR 1967 SC 1032;

Ashok Construction Company v. Union of India, (1971) 3 SCC 66; State of M.P. v. M/s. Saith and Skelton Pvt. Ltd., (1972) 1 SCC 702, various foreign courts decisions and decisions of the High Court. This Court has also referred to Halsbury’s Laws of England in Paras 36 & 37 thus:-

“36. “534. Express and implied clauses.— In general, the parties to an arbitration agreement may include in it such clauses as they think fit. By statute, however, certain terms are implied in an arbitration agreement unless a contrary intention is expressed or implied therein. Moreover, it is normally an implied term of an arbitration agreement that the Arbitrator must decide the dispute in accordance with the ordinary law. This includes the basic rules as to procedure, although parties can expressly or impliedly consent to depart from those rules. The normal principles on which terms are implied in an agreement have to be considered in the context that the agreement relates to an arbitration.”

37. At page 303, para 580 (4th edn., Vol. 2) dealing with the award of interest, it reads:

“580. Interest.— A Arbitrator or umpire has power to award interest on the amount of any debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the award.” Ultimately, in G.C. Roy (supra), this Court has answered the question whether Arbitrator has the power to award interest pendent lite. Their Lordships have reiterated that they have dealt with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant when the agreement is silent as to award of interest. This Court has laid down various principles in para 43 of the report thus: “43. The question still remains whether Arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the Arbitrator as it is for the period prior to the Arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of Arbitrator.

(ii) An Arbitrator is an alternative form (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the Arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the Arbitrator.

This would lead to multiplicity of proceedings.

(iii) An Arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The Arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the Arbitrator must have the power to award interest pendente lite. *Seth Thawardas Pherumal v. Union of India*, AIR 1955 SC 468 has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until *Executive Engineer (Irrigation) Balimela & Ors. v. Abhaduta Jena & Ors.*, (1988) 1 SCC 418 almost all the courts in the country had upheld the power of the Arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.” “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.” The Constitution Bench of this Court has laid down that where the agreement between the parties does not prohibit grant of interest and where the party claims interest and that dispute is referred to the Arbitrator, he shall have the power to award interest pendent lite. The law declared has been held applicable prospectively.

9. Another Constitution Bench of this Court in *N.C. Budharaj (supra)*, considered the question of award of interest by the Arbitrator for the pre- reference period. In that connection, discussion has been made and it has been observed as long as there is nothing in the arbitration agreement to exclude the jurisdiction of the Arbitrator entertaining claim for interest on the amount due under the contract or any provision to claim interest on the amount due, the jurisdiction of the Arbitrator to award interest for pre-reference period under section 29 of the Arbitration Act, 1940 has to be upheld. In majority opinion, this Court has held thus:

“25. If that be the position, courts which of late encourage litigants to opt for and avail of the alternative method of resolution of disputes, would be penalising or placing those who avail of the same in a serious disadvantage. Both logic and reason should counsel courts to lean more in favour of the Arbitrator holding to possess all the powers as are necessary to do complete and full justice between the parties in the same manner in which the civil court seized of the same dispute could have done. By agreeing to settle all the disputes and claims arising out of or relating to the contract between the parties through arbitration instead of having recourse to civil court to vindicate their rights the party concerned cannot be considered to have frittered away and given up any claim which otherwise it could have successfully asserted before courts and obtained relief. By agreeing to have settlement of disputes through arbitration, the party concerned must be understood to have only opted for a different forum of adjudication with less cumbersome procedure, delay and expense and not to abandon all or any of its substantive rights under the various laws in force, according to which only even the Arbitrator is obliged to adjudicate the claims referred to him. As long as there is nothing in the arbitration agreement to exclude the jurisdiction of the Arbitrator to entertain a claim for interest on the amounts due under the contract, or any prohibition to claim interest on the amounts due and become payable under the contract, the jurisdiction of the Arbitrator to consider and award interest in respect of all periods subject only to Section 29 of the Arbitration Act, 1940 and that too the powers of the court thereunder, has to be upheld. The submission that the Arbitrator cannot have jurisdiction to award interest for the period prior to the date of his appointment or entering into reference which alone confers upon him power, is too stale and technical to be countenanced in our hands, for the simple reason that in every case the appointment of an Arbitrator or even resort to court to vindicate rights could be only after disputes have cropped up between the parties and continue to subsist unresolved, and that if the Arbitrator has the power to deal with and decide disputes which cropped up at a point of time and for the period prior to the appointment of an Arbitrator, it is beyond comprehension as to why and for what reason and with what justification the Arbitrator should be denied only the power to award interest for the pre-reference period when such interest becomes payable and has to be awarded as an accessory or incidental to the sum awarded as due and payable, taking into account the deprivation of the use of such sum to the person lawfully entitled to the same.

26. For all the reasons stated above, we answer the reference by holding that the Arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in Jena case taking a contraview does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitle any party nor shall it empower any court to reopen proceedings which have already become final, and apply only to any pending proceedings. No costs.” It has also been observed that G.C. Roy’s case (supra) cannot

be said to have overruled Executive Engineer (Irrigation) Balimela's case (supra) insofar as it dealt with the power of Arbitrator to award interest for the pre-reference period.

10. A 3 Judges Bench of this Court in Hindustan Construction Co. Ltd. v. State of Jammu & Kashmir (1992) 4 SCC 217 has laid down that the Arbitrator has the power to award pendente lite interest on the basis of principle of Section 34 of the Code of Civil Procedure though same is not applicable. However, the observation has to be considered in case there is no express bar in the agreement for awarding pendente lite interest as it has simply followed what has been laid down in G.C. Roy (supra). This Court has laid down thus:

“5. The question of interest can be easily disposed of as it is covered by recent decisions of this Court. It is sufficient to refer to the latest decision of a five Judge bench of this Court in Secretary, Irrigation Department, Govt. of Orissa & Ors. v. G.C. Roy. Though the said decision deals with the power of the Arbitrator to award interest pendente lite, the principle of the decision makes it clear that the Arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an Arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure. Section 34 of Code of Civil Procedure provides both for awarding of interest pendente lite as well as for the post-decree period and the principle of Section 34 has been held applicable to proceedings before the Arbitrator, though the section as such may not apply. In this connection, the decision in Union of India v. Bungo Steel Furniture (P) Ltd. AIR 1967 SC 1032 may be seen as also the decision in Gujarat Water Supply & Sewerage Board v. Unique Erectors (Gujarat) P. Ltd. 1989 1 532 SCC which upholds the said power though on a somewhat different reasoning. We, therefore, think that the award on Item No. 8 should have been upheld.”

11. In Sayeed Ahmed (supra) various decisions of this Court have been referred. In State of Orissa v. B.N. Agarwalla, (1997) 2 SCC 469, this Court has laid down thus:

“18. In view of the aforesaid decisions there can now be no doubt with regard to the jurisdiction of the Arbitrator to grant interest. The principles which can now be said to be well-settled are that the Arbitrator has the jurisdiction to award pre-reference interest in cases which arose after the Interest Act, 1978 had become applicable. With regard to those cases pertaining to the period prior to the applicability of the Interest Act, 1978, in the absence of any substantive law, contract or usage, the Arbitrator has no jurisdiction to award interest. For the period during which the arbitration proceedings were pending in view of the decision in G.C. Roy case and Hindustan Construction Ltd. case, the Arbitrator has the power to award interest. The power of the Arbitrator to award interest for the post-award period also exists and this aspect has been considered in the discussion relating to Civil Appeal No. 9234 of 1994 in the

later part of this judgment.”

12. The decision in B.N. Agarwalla (supra) has been considered and distinguished by this Court in Sayeed Ahmed (supra) thus :

“20. The appellant next relied upon the judgment of this Court in State of Orissa v. B.N. Agarwalla (1997) 2 SCC 469. In that case, this Court held that the Arbitrator has jurisdiction to award: (i) interest for pre- reference period, (ii) interest for pendente lite, and (iii) future interest. This Court also held that the following part of Clause (4) of the contract dealing with “Rates, materials and workmanship” did not bar award of interest by the Arbitrator on the claims of the contractor: (SCC p. 478, para 22) No interest is payable on amount withheld under the item of the agreement. Interpreting the said clause (which provided that interest was not payable on the amount which was withheld), this Court held that it referred only to the amount withheld by the employer State towards retention money for the defect liability period. This Court in fact clarified the position that if the terms of contract expressly stipulated that no interest would be payable, then the Arbitrator would not get the jurisdiction to award interest. As Clause G1.09 in the present case contains an express bar and is different from the clause considered in B.N. Agarwalla (supra) the said decision is also of no assistance.” In B.N. Agarwalla (supra) this Court has observed that Clause 4 of the contract dealing with “Rates, materials and workmanship” did not bar award of interest by the Arbitrator on the claims of the contractor. The stipulation was no interest was payable on amount withheld under the agreement.

13. In Sayeed Ahmed (supra), this Court has referred the decision in State of U.P. v. Harish Chandra & Co. (1999) 1 SCC 63, in which this Court has interpreted the stipulation contained in clause 1.9 of the agreement which came up for consideration before a 3 Judges Bench of this Court. Clause 1.9 is extracted hereunder:

“1.9 No claim for delayed payment due to dispute etc.—No claim for interest or damages will be entertained by the Government with respect to any moneys or balances which may be lying with the Government owing to any dispute, difference; or misunderstanding between the Engineer-in-Charge in marking periodical or final payments or in any other respect whatsoever.” This Court has interpreted the clause 1.9 and held that there is no provision which could be culled out against the respondent-contractor that he could not raise claim of interest by way of damages before the Arbitrator on the relevant items placed for adjudication. This Court in Sayeed Ahmed (supra) has also distinguished the decision in Harish Chandra (supra) in which clause 1.09 came up for consideration thus :

“17. x x x x x This Court held that the said clause did not bar award of interest on any claim for damages or for claim for payment for work done. We extract below the reasoning for such decision: (SCC p. 67, para 10) “10. A mere look at the clause shows that the claim for interest by way of damages was not to be entertained against the

Government with respect to only a specified type of amount, namely, any moneys or balances which may be lying with the Government owing to any dispute, difference between the Engineer-in-Charge and the contractor; or misunderstanding between the Engineer-in-Charge and the contractor in making periodical or final payments or in any other respect whatsoever. The words 'or in any other respect whatsoever' also referred to the dispute pertaining to the moneys or balances which may be lying with the Government pursuant to the agreement meaning thereby security deposit or retention money or any other amount which might have been with the Government and refund of which might have been withheld by the Government. The claim for damages or claim for payment for the work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government. Consequently, on the express language of this clause, there is no prohibition which could be culled out against the respondent contractor that he could not raise the claim for interest by way of damages before the Arbitrator on the relevant items placed for adjudication." (emphasis supplied)

18. In *Harish Chandra* (1999) 1 SCC 63 a different version of Clause 1.09 was considered. Having regard to the restrictive wording of that clause, this Court held that it did not bar award of interest on a claim for damages or a claim for payments for work done and which was not paid. This Court held that the said clause barred award of interest only on amounts which may be lying with the Government by way of security deposit/retention money or any other amount, refund of which was withheld by the Government.

19. But in the present case, Clause G1.09 is significantly different. It specifically provides that no interest shall be payable in respect of any money that may become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge and contractor or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or in respect of any other respect whatsoever.

The bar under Clause G1.09 in this case being absolute, the decision in *Harish Chandra* (supra) will not assist the appellant in any manner." In *Harish Chandra* (supra), this Court has laid down that clause 1.09 did not bar award of interest for claim of damages for payment for work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government.

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

15. In *Sayeed Ahmed* (supra), this Court has referred the decision in *Superintending Engineer v. B. Subba Reddy* (1999) 4 SCC 423 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.” In *Sayed Ahmed (supra)* this Court has also referred the decision in *State of Rajasthan & Anr. v. Ferro Concrete Construction (P) Ltd.* (2009) 12 SCC 1 thus :

“12. The principles relating to interest were summarised by this Court in *State of Rajasthan v. Ferro Concrete Construction (P) Ltd.* (2009) 12 SCC 1 thus:

(a) Where a provision for interest is made on any debt or damages, in any agreement, interest shall be paid in accordance with such agreement.

(b) Where payment of interest on any debt or damages is barred by express provision in the contract, no interest shall be awarded.

(c) Where there is no express bar in the contract and where there is also no provision for payment of interest then the principles of Section 3 of the Interest Act will apply and consequently interest will be payable:

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

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

(d) Payment of interest pendente lite and future interest shall not be governed by the provisions of the Interest Act, 1978, but by the provisions of Section 34 of the Code of Civil Procedure, 1908 or the provisions of law governing arbitration as the case may be.” In *Sayed Ahmed (supra)*, the provisions of Arbitration & Conciliation Act, 1996 were applicable.

16. A 3-Judge Bench of this Court in *Union of India v. Bright Power Projects (India) Pvt. Ltd.* (2015) 9 SCC 695 has considered the provisions contained in section 31(7)(a) of the Arbitration and Conciliation Act, 1996 and considered the words “unless otherwise agreed by parties” in the said section and held that the Arbitrator is bound by the terms of the contract so far as award of interest from the date of execution to the date of award is concerned. This Court considered clause 13(3) of the contract and came to the conclusion that once agreed that contractor would not claim any

interest on the amount to be paid under the contract, he could not have claimed the interest. The Arbitrator while awarding interest failed to consider the provisions of section 31(7)(a) and binding nature of clause 13(3) of the terms of agreement. With respect to section 31(7)(a) of the Arbitration & Conciliation Act, 1996 this Court in Union of India v. Bright Power Projects (supra) has observed thus :

“18. Section 31(7)(a) of the Act ought to have been read and interpreted by the Arbitral Tribunal before taking any decision with regard to awarding interest. The said section, which has been reproduced hereinabove, gives more respect to the agreement entered into between the parties. If the parties to the agreement agree not to pay interest to each other, the Arbitral Tribunal has no right to award interest pendente lite.” Section 31(7)(a) of the 1996 Act confers power on Arbitrator to award interest pendente lite, “unless otherwise agreed by parties”. Thus, it is clear from the provisions contained in section 31(7)(a) that the contract between the parties has been given importance and is binding on the Arbitrator. Arbitration clause is also required to be looked into while deciding the power of the Arbitrator and in case there is any bar contained in the contract on award of interest, it operates on which items and in the arbitration clause what are the powers conferred on Arbitrator and whether bar on award of interest has been confined to certain period or it relates to pendency of proceedings before Arbitrator.

17. In Sree Kamatchi Amman Constructions (supra), it was observed that the words “unless otherwise agreed by the parties” in section 31 of new Act of 1996 clarify that Arbitrator is bound by the terms of contract for award of interest pendente lite. It was also held thus :

“19. Section 31(7) of the new Act by using the words “unless otherwise agreed by the parties” categorically clarifies that the Arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to the date of award. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest between the date when the cause of action arose to the date of award.

20. We are of the view that the decisions in Engineers-De-Space-Age (supra) and Madnani (supra) are inapplicable for yet another reason. In Engineers-

De-Space-Age (supra) and Madnani (supra) the Arbitrator had awarded interest for the pendente lite period. This Court upheld the award of such interest under the old Act on the ground that the Arbitrator had the discretion to decide whether interest should be awarded or not during the pendente lite period and he was not bound by the contractual terms insofar as the interest for the pendente lite period. But in the instant case the Arbitral Tribunal has refused to award interest for the pendente lite period. Where the Arbitral Tribunal has exercised its discretion and refused award of interest for the period pendente lite, even if the principles in those two cases were applicable, the award of the Arbitrator could not be interfered with. On this ground also the decisions in Engineers-De-Space-Age (supra) and Madnani (supra) are inapplicable. Be that as it may.”

18. This Court in *Union of India v. Krafers Engineering & Leasing Pvt. Ltd.* (2011) 7 SCC 279 has held that by a provision in the agreement, the jurisdiction of the Arbitrator to award interest can be excluded. This Court considered the nature of the claim vis-à-vis the provision contained in the relevant clause.

19. It is apparent from various decisions referred to above that in *G.C. Roy* (supra) Constitution Bench of this Court has laid down where 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* (supra) a Constitution Bench has observed that in case there is nothing in the arbitration agreement to exclude jurisdiction of arbitrator to entertaining claim for interest, the jurisdiction of arbitrator to consider and award interest in respect to all periods is subject to section 29 of the Act. In *Hindustan Construction Co. Ltd.* (supra) this Court has followed decision in *G.C. Roy* (supra) and laid down that on the basis of principles of section 34 arbitrator would have the power to award pendente lite interest also. In *B.N. Agarwalla* (supra), this Court has again followed *G.C. Roy* (supra) and *Hindustan Construction Co. Ltd.* (supra) with respect to power of arbitrator to award pendente lite interest and it was held that arbitrator has power to award interest. In *Harish Chandra* (supra) this Court interpreted the clause 1.9 which provided that no claim for interest or damages will be entertained by the Government in respect to any moneys 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.* (supra) 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 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 *Sayed Ahmed* (supra) this Court has emphasized that award of interest would depend upon nature of the clause in the agreement. In *Bright Power Projects (India) Pvt. Ltd.* (supra) this Court has considered the expression “unless otherwise agreed by parties” employed in section 31(7)(a) of the Act of 1996 and laid down that in case contract bars claim of interest contractor could not have claimed interest. The provision of section 31(7)(a) of the Act of 1996 is binding upon the arbitrator. In *Sree Kamatchi Amman Constructions* (supra) similar view has been taken.

20. Now we come to the question of correctness of decision of this Court rendered by a Bench of two Judges in *Engineers-De-Space-Age* (supra) which has been referred for our consideration in which this Court after consideration of *G.C. Roy*’s case has observed thus :

“3..... It will appear from what the Constitution Bench stated to be the legal position, that ordinarily a person who is deprived of his money to which he is legitimately entitled as of right is entitled to be compensated in deprivation thereof, call it by whatever name. This would be in terms of the principle laid down in Section 34 of the Code of Civil Procedure. Their Lordships pointed out that there was no reason or principle to hold otherwise in the case of an Arbitrator. Pointing out that Arbitrator is an alternative forum for resolution of disputes arising between the parties, it said that he must have the power to decide all disputes and differences arising between the parties and if he were to be denied the power to award interest pendente lite, the

party entitled thereto would be required to go to a court which would result in multiplicity of proceedings, a situation which the court should endeavour to avoid. Reliance was, however, placed on the observation in sub-para (iii) wherein it is pointed out that an Arbitrator is a creature of an agreement and if the agreement between the parties prohibits the payment of interest pendente lite the Arbitrator must act in accordance therewith. In other words, according to their Lordships the Arbitrator is expected to act and make his award in accordance with the general law of the land but subject to an agreement, provided, the agreement is valid and legal. Lastly, it was pointed out that interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference. Their Lordships concluded that where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute is referred to the Arbitrator, he shall have the power to award interest pendente lite for the simple reason that in such a case it is presumed that interest was an implied term of the agreement between the parties; it is then a matter of exercise of discretion by the Arbitrator. The position in law has, therefore, been clearly stated in the aforesaid decision of the Constitution Bench”.

4. We are not dealing with a case in regard to award of interest for the period prior to the reference. We are dealing with a case in regard to award of interest by the Arbitrator post reference. The short question, therefore, is whether in view of sub-clause (g) of clause 13 of the contract extracted earlier the Arbitrator was prohibited from granting interest under the contract. Now the term in sub-clause (g) merely prohibits the Commissioner from entertaining any claim for interest and does not prohibit the Arbitrator from awarding interest. The opening words “no claim for interest will be entertained by the Commissioner” clearly establishes that the intention was to prohibit the Commissioner from granting interest on account of delayed payment to the contractor. Clause has to be strictly construed for the simple reason that as pointed out by the Constitution Bench, ordinarily, a person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been delayed beyond reasonable time he can legitimately claim to be compensated for that delay whatever nomenclature one may give to his claim in that behalf.”

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.

22. A three-Judge Bench of this Court in Tehri Hydro Development Corporation Limited and Another v. Jai Prakash Associates Limited, (2012) 12 SCC 10, has considered the question which has been referred in the instant case and it has been laid down in the context of clauses 1.2.14 and 1.2.15 imposed a clear bar on either entertainment or payment of interest in any situation of non-payment or delayed payment of either the amounts due for work done or lying in security deposit. Thus, the arbitrator had no power to grant pendente lite interest. This Court has also doubted the correctness of the decisions in Engineers-De-Space Age (supra) and Madnani Construction Corporation (P) Ltd. (supra). This court has considered the aforesaid clauses and various decisions in Tehri Hydro Development Corporation (supra) in which one of us Ranjan Gogoi, J. spoke for the Court. This Court has laid down thus :— “14. This will lead the court to a consideration of what is the principal bone of contention between the parties in the present case, namely, the issue with regard to payment of interest. Clauses 1.2.14 and 1.2.15 on which much arguments have been advanced by Learned Counsel for both sides may now be extracted below:

PART - II CONDITIONS OF CONTRACT 1.2.14. No claim for delayed payment due to dispute, etc. - The contractor agrees that no claim for interest of damages will be entertained or payable by the Government in respect of any money or balances which may be lying with the Government owing to any disputes, differences or misunderstandings between the parties or in respect of any delay or omission on the part of the engineer-in-charge in making immediate or final payments or in any other respect whatsoever.

1.2.15. Interest on money due to the contractor. - No omission on the part of the engineer-in-charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his accounts be due to him.

A reading of the aforesaid two clauses of the contract agreement between the parties clearly reveal that despite some overlapping of the circumstances contemplated by the two clauses, no interest is payable to the contractor for delay in payment, either, interim or final, for the works done or on any amount lying in deposit by way of guarantee. The aforesaid contemplated consequence would be applicable both to a situation where withholding of payment is on account of some dispute or difference between the parties or even otherwise.

15. Of the several decisions of this Court referred to by the learned counsel for the appellant the judgments of the Constitution Bench of this Court in Irrigation Deptt., Govt. of Orissa v. G.C. Roy, (1992) 1 SCC 508 and Dhenkanal Minor Irrigation Division v. N.C. Budharaj, (2001) 2 SCC 721 will require specific notice. The true ratio laid down in the aforesaid two judgments have been elaborately considered in a more recent pronouncement of this Court in the case of Union of India v. Krafters Engg. and Leasing (P) Ltd., (2011) 7 SCC 279. In Krafters Engineers's case (supra) the ratio

of the decision in G.C. Roy's case (supra) was identified to mean that if the agreement between the parties does not prohibit grant of interest and the claim of a party to interest is referred to the arbitrator, the arbitrator would have the power to award the interest. This is on the basis that in such a case of silence (where the agreement is silent) it must be presumed that interest was an implied term of the agreement and, therefore, whether such a claim is tenable can be examined by the arbitrator in the reference made to him. The aforesaid view, specifically, is with regard to pendente lite interest. In the subsequent decision of the Constitution Bench in N.C. Budharaj's case (supra) a similar view has been taken with regard to interest for the pre-reference period.

16. In *Krafters Engineers' case* (supra), the somewhat discordant note struck by the decisions of this Court in *Port of Calcutta v. Engineers-De- Space-Age* (supra) and *Madnani Construction Corporation Private Limited v. Union of India and Ors.* (supra), were also taken note of. Thereafter, it was also noticed that the decision in *Engineers-De-Space-Age's case* (supra) was considered in *Sayed Ahmed & Co. v. State of U.P.* (supra) and the decision in *Madnani Construction case* (supra) was considered in *Sree Kamatchi Amman Constructions v. Railways* (2010) 8 SCC 767. In *Sayed Ahmed's case* (supra) (SCC para 24) it was held that in the light of the decision of the Constitution Bench in G.C. Roy's case (1992) 1 SCC 508 and N.C. Budharaj case (2001) 2 SCC 721 it is doubtful whether the observations in *Engineers-de-Space-Age's case* (supra) to the effect that the Arbitrator could award interest pendente lite, ignoring the express bar in the contract, is good law. In *Sree Kamatchi Amman Construction's case* (Supra) while considering *Madnani's case* (supra) this Court noted that the decision in *Madnani case* (supra) follows the decision in *Engineers-de-Space-Age's case* (supra).

17. From the above discussions, it is crystal clear that insofar as pendente lite interest is concerned, the observations contained in Para 43 and 44 of the judgment in G.C. Roy case (supra) will hold the field. Though the gist of the said principle has been noticed earlier it would still be appropriate to set out para 44 of the judgment in G.C. Roy's case (supra) which is in the following terms:

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.

18. The provisions of the U.P. Civil Laws (Reforms and Amendment) Act amending the First Schedule to the Arbitration Act, 1940 does not assist the respondent contractor in any manner to sustain the claim of award of interest pendente lite, inasmuch, as Para 7-A of the First Schedule, as

amended, is only an enabling provision which will have no application to a situation where there is an express bar to the entertainment or payment of interest on the delayed payment either of an amount due for the work done or of an amount lying in deposit as security. The decision in B.N. Agarwalla case (supra) on which reliance has been placed by the learned counsel for the respondent, once again, does not assist the claim of the respondent to interest pendente lite inasmuch as in B.N. Agarwalla case (supra) the views of the Constitution Bench in G.C. Roy case (supra) with regard to interest pendente lite could not have been and, in fact, were not even remotely doubted. The observation of the Bench in B.N. Agarwalla case that in G.C. Roy case (supra) the decision in Deptt. of Irrigation v. Abhaduta Jena (1988) 1 SCC 418 was not overruled was only in the context of the issue of award of interest for the pre- reference period. The decision in Asian Techs Limited case (supra) also relied on by the respondent takes note of the decision in Engineers-De-Space-Age case (supra) to come to the conclusion the prohibition on payment of interest contained in Clause 11 of the agreement between the parties was qua the department and did not bar the arbitrator from entertaining the claim. It has already been noticed that the correctness of the propositions laid down in Engineers-De-Space- Age case (supra) have been doubted in the subsequent decisions of this Court, reference to which has already been made.

19. Clauses 1.2.14 and 1.2.15, already extracted and analysed, imposed a clear bar on either entertainment or payment of interest in any situation of non-payment or delayed payment of either the amounts due for work done or lying in security deposit. On the basis of the discussions that have preceded we, therefore, take the view that the grant of pendente lite interest on the claim of Rs. 10,17,461/- is not justified. The award as well as the orders of the courts below are accordingly modified to the aforesaid extent.” In para 4 in Engineers-De-Space-Age (supra) this Court has observed that bar under the contract will not be applicable to 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 power of Arbitrator to grant pendente lite interest is expressly taken away. If answer is ‘yes’ then Arbitrator would have no power to award pendente lite interest.

23. The decision in Madnani Construction Corporation (supra) has followed decision in Engineers-De-Space-Age (supra). 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.

24. 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. 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 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.

.....J .

(Ranjan Gogoi)

.....J.
(Arun Mishra)

New Delhi;
March 16, 2016.

.....J.
(Prafulla C. Pant)