

A . SRI CHITTARANJAN MAITY

v.

UNION OF INDIA

(Civil Appeal Nos. 15545-15546 of 2017)

B OCTOBER 03, 2017

[J. CHELAMESWAR AND S. ABDUL NAZEER, JJ.]

Arbitration and Conciliation Act, 1996 – Arbitrability of dispute – Agreement entered into between the appellant and respondent for execution of work – Disputes arose between the parties – Appellant filed an application u/s.11(6) for appointment of Arbitrator – Arbitrator appointed – Award passed by Arbitral Tribunal challenged by respondent which was dismissed by Single Judge of High Court – Order of Single Judge challenged by respondent before Division Bench contending that the dispute could not be adjudicated by Arbitral Tribunal as the appellant had issued a 'No Claims Certificate' to the respondent, thereby he forfeited his right for any claim from the respondent – Order of Single Judge and the award set aside with a direction for holding fresh reference by Arbitral Tribunal– On appeal, held: Issue relating to arbitrability of the dispute was neither raised in the proceeding u/s. 11(6) before the Chief Justice of High Court nor before the Arbitral Tribunal or before the Single Judge in the proceedings u/s.34 – Party questioning the jurisdiction of the Arbitrator has an obligation to raise the said question before the Arbitrator – Thus, Division Bench was not justified in considering the arbitrability of the disputes for the first time.

Arbitration and Conciliation Act, 1996 – s.31(7)(a) – Payment of interest – Arbitral Tribunal awarded interest on delayed payments in favour of appellant – Held: This section provides that if the agreement prohibits award of interest for the pre-award period (i.e. pre-reference and pendente lite period), the Arbitrator cannot award interest for the said period – Admittedly, in the instant case, the General Conditions of Contract (GCC) governing the contract between the parties, contained a clause which barred the payment of interest – Thus, appellant is not entitled for any interest on the amount awarded by Arbitral Tribunal.

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Practice and Procedure – Pleadings – Held: Party questioning the jurisdiction of the Arbitrator has an obligation to raise the said question before the Arbitrator – Arbitration and Conciliation Act, 1996. A

Arbitration – Arbitration award – Grounds for interference – Held: The intervention of court in arbitral awards is in few circumstances like fraud or bias by the Arbitrators, violation of natural justice – Court cannot correct the errors of the Arbitrators. B

Partly allowing the appeals, the Court

HELD: 1.1 The issue relating to arbitrability of the dispute was not raised in the proceeding under Section 11(6) of the Arbitration and Conciliation Act, 1996. One of the issues which can be considered by the Chief Justice under this provision is whether the claim is a live claim. This issue can also be kept open to be decided by the Arbitral Tribunal provided the said plea is urged before the Chief Justice. The respondent had not raised the said plea either before the Chief Justice or Arbitral Tribunal or before the learned Single Judge in the proceedings under Section 34 of the 1996 Act. [Para 11] [728-F-H] C D

1.2 Party questioning the jurisdiction of the Arbitrator has an obligation to raise the said question before the Arbitrator. [Para 12] [729-A] E

1.3 Intervention of the court is envisaged only in few circumstances like fraud or bias by the Arbitrators, violation of natural justice. The court cannot correct the errors of the Arbitrators. [Para 13] [729-D] F

1.4 Therefore, the Division Bench was not justified in considering the arbitrability of the disputes for the first time, particularly, when the respondent has not urged the issue relating to 'No Claims Certificate' before the Chief Justice, Arbitral Tribunal or before the learned Single Judge. [Para 14][729-G-H] G

2.1 Section 31(7)(a) of the 1996 Act provides for payment of interest. In this Section, a specific provision has been created, whereby if the agreement prohibits award of interest for the pre-award period (i.e. pre-reference and *pendente lite* period), the Arbitrator cannot award interest for the said period. Admittedly, H

A the GCC, governing the contract between the parties, contains a clause which barred the payment of interest. It is held that the appellant is not entitled for any interest. Further, in Section 31(7)(a) the difference between pre-reference period and the *pendente lite* interest has disappeared insofar as award of interest by the Arbitrator is concerned. It recognizes only two periods, B i.e. pre-award and post-award period. [Paras 15, 16 and 19] [730-B, D-E; 731-C-E]

2.2 The Arbitral Tribunal had determined the amount payable to the appellant in a sum of Rs.11,13,136/- and interest of Rs.12,44,546/-. A sum of Rs.38,82,150/- was deposited by the C respondent which included the award amount, interest for the pre-reference period, *pendente lite* and post-award interest. The appellant had already withdrawn 50% of the amount deposited by the respondent, which was in excess of the award amount exclusive of interest. In the facts and circumstances of the case, D the respondent is directed not to recover the excess amount withdrawn by the appellant. [Para 22] [732-E-F]

M/s. Ambica Construction v. Union of India (2017) SCC OnLine SC 678 – held inapplicable.

E *Sayed Ahmed and Company v. State of Uttar Pradesh and Others* (2009) 12 SCC 26 : [2009] 10 SCR 841; *Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat and Others* (2010) 8 SCC 767 : [2010] 10 SCR 487; *Union of India v. Bright Power Projects (India) Private Limited* (2015) 9 F SCC 695 : [2015] 6 SCR 488; *Mcdermott International Inc. v. Burn Standard Co. Ltd. and Others* (2006) 11 SCC 181 : [2006] 2 Suppl. SCR 409 – relied on.

G *National Insurance Company Limited v. Boghara Polyfab Private Limited* (2009) 1 SCC 267 : [2008] 13 SCR 638; *Secretary, Irrigation Department, Government of Orissa and Others. v. G.C. Roy* (1992) 1 SCC 508 : [1991] 3 Suppl. SCR 417 – referred to.

Case Law Reference

[2008] 13 SCR 638

referred to

Para 11

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[2006] 2 Suppl. SCR 409	relied on	Para 12	A
[1991] 3 Suppl. SCR 417	referred to	Para 17	
[2009] 10 SCR 841	relied on	Para 19	
[2010] 10 SCR 487	relied on	Para 20	
[2015] 6 SCR 488	relied on	Para 21	B

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.15545-15546 of 2017

From the final Order and Judgment dated 29.09.2011 passed by the High Court at Calcutta in A.P.O. No.213 of 2009 and A.P. No.35 of 2006.

Sanjiv Sen, Sr. Adv., Dev J. Roy, P. Parmeswaran, Advs. for the Appellant

Maninder Singh, ASG, Ms. Manita Verma, Raj Bahadur Yadav, Shadman Ali, Prabhas Bajaj, Akshay Amritanshu, Shreekant N. Terdal, Advs. for the Respondent

The Judgment of the Court was delivered by

S. ABDUL NAZEER, J. 1. Leave granted.

2. The appellant, in these appeals, has challenged the legality and correctness of the judgment and order dated 29.9.2011 in A.P.O. No.213/2009 in A.P. No.35/2006 whereby the Division Bench of the High Court of Calcutta has set aside the judgment and order of the learned Single Judge in A.P. No.35/2006 dated 27.1.2009.

3. Brief facts necessary for the disposal of these appeals are as follows:

4. On 20.3.1991, respondent invited tender for the execution of balance of earth for formation of banks for laying railway line, roads, platforms and miscellaneous work in connection with new goods terminal yard of South-Eastern Railway at Sankrail in Howrah District. The appellant's tender dated 23.3.1991 for Rs.61,24,159/- was accepted by issuance of Letter of Acceptance dated 17.6.1991. In this connection, an agreement was entered into between the appellant and the respondent on 22.8.1991. In the said agreement, General Conditions of the Contract (for short 'GCC') were incorporated and the parties were bound by the terms and conditions thereof.

A 5. Various disputes and differences arose between the parties regarding execution of work and its purported abandonment. The respondent issued notice dated 24.10.1991, seeking termination of the agreement. Another notice dated 15.11.1991 was issued to the appellant under Clause 62(1) of the GCC for rescission of the contract. However, at the request of the appellant through letter dated 2.4.1992, the validity of the contract was extended till 30.6.1992. The respondent further granted extension of time to complete the work upto July 1993. According to the appellant, the delay and/or hindrances occurred due to breaches committed by the Railway Administration. The remaining work was abandoned by the appellant w.e.f. 3.11.2003.

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C 6. The appellant raised the claim before the respondent by his letter dated 30.10.1996. By a subsequent letter dated 22.6.1998, the appellant demanded reference of the dispute to the arbitration. Finally, the appellant filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act') for appointment of an Arbitrator for adjudication of the claims and disputes before the High Court of Calcutta. The Chief Justice of the High Court of Calcutta passed an order dated 6.12.2001, whereupon the General Manager, South-Eastern Railway, was directed to appoint Arbitrators from their panel within four weeks from the said date. Pursuant to the said order, the Arbitral Tribunal was constituted which adjudicated the disputes and claims raised by the appellant, as also the respondent.

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F 7. The Arbitral Tribunal passed an award on 20.9.2006. The respondent moved an application, being A.P. No.35 of 2006 under Section 34 of the 1996 Act, for setting aside the said award. The said application was dismissed by the Single Judge of the High Court. The respondent assailed the order of the learned Single Judge by filing an appeal in A.P.O. No. 213 of 2009, wherein it was contended that the appellant had issued a 'No Claims Certificate' to the respondent, thereby forfeiting his right for any claim from the respondent in regard to which the dispute could not be adjudicated by the Arbitral Tribunal. As noticed above, the Division Bench has set aside the order of the learned Single Judge and also the award and directed holding of fresh reference by the Arbitral Tribunal.

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H 8. Learned senior counsel appearing for the appellant submits that the Division Bench failed to appreciate the question that issuance of 'No Claims Certificate' by the appellant was not urged before the Chief

Justice in the proceedings under Section 11(6) of the 1996 Act. The said plea was not even urged before the Arbitral Tribunal or before the learned Single Judge. The issue relating to existence of any live claim or the arbitrability of the dispute ought to have been urged in the proceedings under Section 11(6) of the 1996 Act or at least before the Arbitral Tribunal. The question as to whether there was any arbitral dispute or not, could not have been entertained by the Division Bench for the first time. It is further submitted that the Tribunal has rightly passed an award and granted pre-award and *pendente lite* interest from 17.7.1992 till the realization of the award amount.

9. On the other hand, learned Additional Solicitor General appearing for the respondent submits that having regard to the 'No Claims Certificate' issued by the appellant, the appellant has no right to make any claim except for security deposit of Rs.15,000/- from the respondent. There was no arbitral dispute between the parties. Therefore, the claim itself was not maintainable. It is further argued that, at any rate, the appellant was not entitled for any interest having regard to the terms of the contract. He prays for dismissal of the appeals.

10. Having regard to the contentions urged, the first question for our consideration is whether the Division Bench was justified in considering the arbitrability of the dispute for the first time in the appeal. It is evident from the materials on record that the dispute had arisen between the parties in relation to the contract in question. Therefore, the appellant filed an application before the Chief Justice of the High Court of Calcutta under Section 11(6) of the 1996 Act, for appointment of an Arbitrator in terms of the contract which was allowed and an Arbitral Tribunal was constituted for adjudication of the dispute. The Arbitrator after giving the parties opportunities of hearing and after considering the materials placed on record made and published the award. The amounts claimed and the amounts awarded against each item of the claim are briefly mentioned as follows:

CLAIM	CLAIMED AMOUNT (RS.)	AWARDED AMOUNT (RS.)
1. Balance amount payable	45,37,230/-	2,39,657/-
2. Claim for price variation due to rise in price of materials, labour and fuel	21,82,719.58	1,17,060/-

A	3.Claim for security deposit.	15,000/-	15,000/-
B	4.Claim on account of advance payment towards labour supplier	51,000/-	15,300/-
	5.Claim for advance payment to the earth supplier.	1,80,000/-	54,000/-
C	6.Claim for remaining idle wage payment.	1,80,000/-	54,000/-
D	7.Claim for overhead charges, i.e., staff salary and house rent	22,000/-	15,000/-
	8.Claim for blockage of capital and business loss	12,75,000/-	6,03,119/-
E	9.Claim for interest	1,58,23,193.16	12,44,546/-

F 11. Learned Single Judge had dismissed the application filed by the respondent for setting aside the said award. The issue relating to arbitrability of the dispute was not raised in the proceeding under Section 11(6) of the 1996 Act. One of the issues which can be considered by the Chief Justice under this provision is whether the claim is a live claim. This issue can also be kept open to be decided by the Arbitral Tribunal provided the said plea is urged before the Chief Justice. [(See : **National Insurance Company Limited vs. Boghara Polyfab Private Limited** (2009) 1 SCC 267)]. The respondent had not raised the said plea before the Chief Justice. Be that as it may, the respondent has not urged the said plea either before the Arbitral Tribunal or before the learned Single Judge in the proceedings under Section 34 of the 1996 Act.

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12. This Court, in **Mcdermott International Inc. vs. Burn Standard Co. Ltd. and Others** (2006) 11 SCC 181, has held that the party questioning the jurisdiction of the Arbitrator has an obligation to raise the said question before the Arbitrator. It has been held as under: A

“51. After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during arbitration proceedings or soon after initiation thereof. The jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the arbitrator would be the subject-matter of challenge under Section 34 of the Act. In the event the arbitrator opined that he had no jurisdiction in relation thereto an appeal thereagainst was provided for under Section 37 of the Act.” B C

13. It is also necessary to observe that intervention of the court is envisaged only in few circumstances like fraud or bias by the Arbitrators, violation of natural justice. The court cannot correct the errors of the Arbitrators. That is evident from para 52 of the judgment in **Mcdermott International Inc** (supra), which is as under: D

“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court’s jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.” E F G

14. Therefore, the Division Bench was not justified while considering the arbitrability of the disputes for the first time, particularly, when the respondent has not urged the issue relating to ‘No Claims Certificate’ before the Chief Justice, Arbitral Tribunal or before the learned Single Judge. H

A 15. The next question for consideration is whether the Arbitral Tribunal was justified in awarding interest on the delayed payments in favour of the appellant. The total interest awarded by the Arbitral Tribunal is Rs.12,44,546/- which includes interest for the pre-reference period and also *pendente lite* interest. Section 31(7)(a) of the 1996 Act provides for payment of interest, as under:

B “31(7)(a) - Unless otherwise agreed by the parties, where and insofar 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.”

C In this Section, a specific provision has been created, whereby if the agreement prohibits award of interest for the pre-award period (i.e. pre-reference and *pendente lite* period), the Arbitrator cannot award interest for the said period.

D 16. Admittedly, the GCC, governing the contract between the parties, contains a clause which bars the payment of interest, which is as under:

E “16(2) – No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract, but government securities deposit in terms of sub-clause (1) of this clause will be repayable (with) interest accrued thereon.”

F 17. Relying on a decision of this Court in **M/s. Ambica Construction vs. Union of India** (2017) SCC OnLine SC 678, (C.A.No.410 of 2008, disposed of on 26.04.2017) learned senior counsel for the appellant submits that mere bar to award interest on the amounts payable under the contract would not be sufficient to deny payment on *pendente lite* interest. Therefore, the Arbitrator was justified in awarding the *pendente lite* interest. However, it is not clear from **M/s. Ambica Construction** (supra) as to whether it was decided under The Arbitration Act, 1940 (for short ‘the 1940 Act’) or under the 1996 Act. It has relied on a judgment of Constitution Bench in **Secretary, Irrigation Department, Government of Orissa and Others. vs. G.C. Roy** (1992) 1 SCC 508. This judgment was with reference to the 1940 Act.

H In the 1940 Act, there was no provision which prohibited the Arbitrator

from awarding interest for the pre-reference, *pendente lite* or post award period, whereas the 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the Arbitrator cannot award interest for the said period. Therefore, the decision in **M/s. Ambica Construction** (supra) cannot be made applicable to the instant case.

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18. Learned Additional Solicitor General appearing for the respondent submits that the position of law for cases covered under the 1996 Act, i.e. if agreement prohibits award of interest then the grant of pre-award interest is impermissible for the Arbitrator, has been reiterated by this Court in various judgments.

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19. In **Sayeed Ahmed and Company vs. State of Uttar Pradesh and Others** (2009) 12 SCC 26, this Court noted that the 1940 Act did not contain any provision relating to the power of the Arbitrator to award interest. However, now a specific provision has been created under Section 31(7)(a) of the 1996 Act. As per this Section, if the agreement bars payment of interest, the Arbitrator cannot award interest from the date of cause of action till the date of award. The Court has observed that in regard to the provision in the 1996 Act, the difference between pre-reference period and the *pendente lite* interest has disappeared insofar as award of interest by the Arbitrator is concerned. Section 31(7)(a) recognizes only two periods, i.e. pre-award and post-award period.

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20. In **Sree Kamatchi Amman Constructions vs. Divisional Railway Manager (Works), Palghat and Others** (2010) 8 SCC 767, this Court was dealing with an identical case wherein Clause 16 of the GCC of Railways had required interpretation. This is the same Clause 16(2) of the GCC prohibiting grant of interest which is also applicable in the facts of the present case. The Court held that where the parties had agreed that the interest shall not be payable, the Arbitral Tribunal cannot award interest between the date on which the cause of action arose to the date of the award.

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21. In **Union of India vs. Bright Power Projects (India) Private Limited** (2015) 9 SCC 695, a three-Judge Bench of this Court, after referring to the provisions of Section 31(7)(a) of the 1996 Act, held that when the terms of the agreement had prohibited award of interest, the Arbitrator could not award interest for the *pendente lite* period. It has been held thus:

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- A “10. Thus, it had been specifically understood between the parties
that no interest was to be paid on the earnest money, security
deposit and the amount payable to the contractor under the
contract. So far as payment of interest on government securities,
B which had been deposited by the respondent contractor with the
appellant is concerned, it was specifically stated that the said
amount was to be returned to the contractor along with interest
accrued thereon, but so far as payment of interest on the amount
payable to the contractor under the contract was concerned,
there was a specific term that no interest was to be paid thereon.
- C 11. When parties to the contract had agreed to the fact that
interest would not be awarded on the amount payable to the
contractor under the contract, in our opinion, they were bound
by their understanding. Having once agreed that the contractor
would not claim any interest on the amount to be paid under the
contract, he could not have claimed interest either before a civil
D court or before an Arbitral Tribunal.”

Therefore, it is clear that the appellant is not entitled for any interest on the amount awarded by the Arbitral Tribunal.

- E 22. The Arbitral Tribunal had determined the amount payable to
the appellant in a sum of Rs. 11,13,136/- and interest of Rs. 12,44,546/-.
A sum of Rs. 38,82,150/- was deposited by the respondent which includes
the award amount, interest for the pre-reference period, *pendente lite*
and post-award interest. We have held that the appellant is not entitled
for any interest. The appellant has already withdrawn 50% of the amount
deposited by the respondent, which is in excess of the award amount
F exclusive of interest. Having regard to the facts and circumstances of
the case, we deem it proper to direct the respondent not to recover the
excess amount withdrawn by the appellant. Ordered accordingly.

23. The appeals are partly allowed and disposed of in the aforesaid terms without any order as to costs.