

(2007) 08 CAL CK 0008

In the Calcutta High Court

Case No : G.A. No. 1970 of 2006 and A.C. No. 43 of 1998

Union of India (S.E. Rly.)

APPELLANT

Vs

M/s. Ambica Construction
 M/s. Ambica Construction
Vs Union of India (S.E. Rly.)

RESPONDENT

Date of Decision : 22-08-2007

Acts Referred:

Arbitration Act, 1940 — Section 11, 20, 3, 41, 5
Civil Procedure Code, 1908 (CPC) — Section 34
Interest Act, 1978 — Section 3, 3(3)(a)(ii)

Citation : 111 CWN 1022

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : N.C. Chowdhury, Mr. R.N. Bag and Mr. D.K. Singh for Union of India, for the Appellant; Dipak Kumar Basu , Mr. S. Chowdhury, P.K. Banerjee, Bijan Majumdar for Ambica Construction, for the Respondent

Judgement

Sanjib Banerjee, J.—The principal ground urged in challenging the reasons, subsequently supplied by the arbitrator in support of the original non-speaking award, is that prior to the arbitration there was an agreement under which the respondent-contractor had received payment in full and final satisfaction of its claims. It is submitted that in view of such agreement, no payment could have been sought in terms of the principal agreement and all disputes arising out of the principal agreement stood resolved.

2. Immediately prior to the reference being taken up by the arbitrator, there were two sets of proceedings; one u/s 20 of the Arbitration Act, 1940 and the other under sections 5, 8 and 11 thereof. The application under sections 5, 8 and 11 of the 1940 Act was disposed of by an order of July 10, 1996, the relevant portion whereof is set out in the reasons given in support of the award in the following manner:

A point has been raised by the Respondent (Railways) that prior to the order of

reference a supplementary agreement was executed by the parties whereby it was agreed between them that the arbitration agreement which is the subject matter of the order of reference would cease to have effect. The said Arbitrator in adjudicating upon the disputes between the parties shall also take into account the said supplementary agreement dated 5th March, 1991 after giving an opportunity to the parties to deal with the same. In considering the said supplementary agreement the arbitrator shall also take into consideration the pleadings filed by the parties in the section 20 Suit filed before this Court.

3. The section 20 proceedings were concluded on August 7, 1997 and though such order does not find any mention in the reasons subsequently furnished by the arbitrator, there is reference in the records to such order, the relevant portion whereof is as follows:

The Court: This is an application u/s 20 of the Arbitration Act, 1940, by this application the plaintiff seeks to refer the disputes which are referred to as "Group-B" claims set out in annexure "A" to the petition in the pending reference before the Sole Arbitrator, Mr. S.P. Banerjee, Advocate.

It is stated that the said "Group-B" claims were not referred to the Arbitration by mistake and that the arbitration proceedings before the said Arbitrator in respect of "Group-A" claims are still continuing.

It is submitted on behalf of the defendant that the plaintiff has submitted "No-Claim Certificate" in respect of the said "Group-B" claims and that there is an agreement to the effect that the arbitration agreement shall cease to have effect in respect of the said "Group- B" claims.

Having regard to the facts and circumstances of this case, I direct that the said "Group-B" claims referred to in annexure-"A" to the petition in regard to the sole arbitration of Mr. S.P. Banerjee.

In adjudicating the said "Group-B" claims the Arbitrator shall take into account the "No-claim Certificate" furnished by the plaintiff the relevant the alleged agreement whereby the plaintiff as well as the aforesaid agreement relied upon by the defendant. The Arbitrator shall adjudicate on the said claims as well as the "Group-B" claims and make and publish a composite Award.

4. The original award was challenged and the petitioner herein was successful. Upon such challenge ultimately reaching the Supreme Court, the arbitrator was required to furnish reasons in support of the award by an order dated November 7, 2005.

5. The petitioner relies on the supplemental agreement and the manner in which the same has been dealt with by the arbitrator. The supplemental agreement, in its material part, provides:

The contractor shall not be entitled to make any claim whatsoever against the Railways under or virtue of or arising out of this contract nor shall the Railways

entertain or consider any such claim, if made by the Contractor after he had signed a "No claim Certificate" in favour of the Railways in such form as shall be required by the Railways after the works are finally measured up. The Contractor shall be debarred from disputing the correctness of the items covered by "No claim Certificate" or demanding a clearance to arbitration in respect thereof.

6. The arbitrator understood the order of July 10, 1996 to be a charter for him to embark on an exercise to ascertain the validity and effect of such supplemental agreement. It is a possible view on the reading of the order dated July 10, 1996.

7. In the 10 pages of reasons expended on such issue the arbitrator has concluded, on grounds that are not necessary to be gone into, that the contractor was entitled to raise disputes under the principal agreement and demand payment thereunder notwithstanding such supplemental agreement. The reasons are found at pages 38 to 48 of the 54-page award. It is the arbitrator's view that the contractor's consent to and signature on the supplemental agreement were not freely or voluntarily obtained. Such conclusion, the arbitrator has reached on the basis of the evidence before him.

8. The petitioner's contention that in view of such supplemental agreement the reference was unnecessary, cannot be accepted by reason of the order dated July 10, 1996 and the specific direction on the arbitrator found in such order, to take into account the supplemental agreement. The petitioner's contention, that once the supplemental agreement had been arrived at, until such agreement had been set aside by a properly constituted action, is equally untenable. The petitioner has cited the Judgment reported at *Nathani Steels Ltd. v. Associated Constructions* and has relied on paragraph-3 thereof and the Supreme Court's conclusion that upon a settlement being recorded, it was not open to one of the parties to unilaterally treat the settlement as non est and proceed under the arbitration clause found in the principal agreement.

9. For similar effect, the Judgment reported at *P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn.*, has also been cited. In that case upon the contractor having acknowledged the final measurement and having accepted payment in full and final settlement of the contract, it was held that the contractor could have no subsisting claim for reference. In that case also, there was a subsequent allegation of coercion which the Supreme Court held to be an afterthought and a device to get over the settlement of the disputes.

10. The facts in this case are slightly different. The petitioner asserted the supplemental agreement in both sets of proceedings for reference filed before this Court. By the order of July 10, 1996 such objection was recognised but the arbitrator was given liberty to test such objection. In such order being passed and in the petitioner having accepted the same, the entire matter as to the validity of the supplemental agreement and its effect, was at large before the arbitrator. The petitioner participated in such proceedings and upon the award

having gone against the petitioner, it is not open to the petitioner to challenge the very basis of the arbitrator having entertained the issue. The petitioner's contention that the reference itself was not maintainable was negated by orders of July 10, 1996 and August 7, 1997 when the Court directed a reference. The effect of such orders was that the supplemental agreement, including its validity and other aspects, could be looked in as part of the petitioner's defence in the reference.

11. The respondent has referred to the decision reported at Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, where, despite a settlement agreement being recorded between the parties, the Supreme Court found that it was not always the case that the disputes under the original agreement could no longer be adjudicated upon in a reference. The decisions referred to by the petitioner were considered by the Supreme Court in this later case and at paragraph 27 it was held as follows:

27. Even when rights and obligations of the parties are worked out, the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No-Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts.

12. The respondent relied on a later Supreme Court Judgment reported at 2006(4) ALR 288 where it has been recognised that in contracts of such nature a discharge certificate is sometimes given in advance to expedite the payment that the Government employer offers and the mere issuance of such discharge certificate would not preclude a contractor from seeking a reference in terms of the arbitration agreement contained in the contract or making further demands under the agreement. Paragraph 18 of the report summarises the Supreme Court's conclusions:

18. From the submissions made on behalf of the respective parties and in particular the submissions made on behalf of the appellant, it is apparent that unless a discharge certificate is given in advance, payment of bills are generally delayed. Although, Clause 43(2) has been included in the General Conditions of Contract, the same is meant to be a safeguard as against frivolous claims after final measurement. Having regard to the decision in the case of Reshmi Constructions", it can no longer be said that such a clause in the contract would be an absolute bar to a contractor raising claims which are genuine, even after the submission of such no claim certificate.

13. It is submitted on behalf of the respondent that it is open for an arbitrator to commit a mistake whether on law or on facts and unless there was a serious error in jurisdiction or a view shown to have been taken which could not have been taken at all, it is not for the Court to interfere or supplement its view in place of the arbitrator's. There can be no argument with such contention. The Court is loathe to take upon itself the burden of adjudicating the disputes that the parties, in the first place, thought could be better addressed elsewhere. Upon trifling errors having been committed by the agreed forum being brought to Court, the Court would leave the parties to their bargain and allow such errors to remain. There are of course limits as to the nature of error that can be committed by the arbitrator.

14. The respondent's reference to the decision reported a McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, is apposite. Paragraphs 112 and 113 of the report lay down the proposition that has remained unquestioned for ages:

112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondence exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (see: Pure Helium India (P) Ltd. v. ONGC and D.D. Sharma v. Union of India)

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the Court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.

15. In the present case the arbitrator did not commit any error of jurisdiction. The arbitrator rightly read the order of July 10, 1996 and proceeded to address the question as to the effect of the supplemental agreement. In addressing such question the arbitrator took into account the stand of the contractor that such agreement had been arrived at upon coercion. On the basis of the evidence before the arbitrator he concluded in the contractor's favour. There was no error of jurisdiction committed by the arbitrator.

16. Upon the principal ground urged being repelled, the petitioner has been permitted to address on the other points as to the merits of the award and/or the reasons in support thereof. Three grounds have now been put forward: that the first head of claim ought to have been rejected as the contract provided for the raw material to be supplied by the petitioner and the respondent had claimed for raw material obtained by it to discharge its obligations under the contract

following the petitioner failing to make adequate supply thereof; that the arbitrator has proceeded in derogation of the excepted matters and has upheld some claims which the parties had, by contract, agreed to keep out; and, that the award of interest was made in complete disregard to the agreement that no interest would be payable by the petitioner to the respondent.

17. The contract envisaged the respondent fabricating tie-bars for CST-9 sleepers of certain size, specification and quantity out of MS Flats to be supplied by the railways. The contract was of value of Rs. 3,51,550/-. The entire work was to be completed by March 7, 1990. The arbitrator has recorded that no sooner had the work started, than the respondent found itself in one difficulty or the other through no fault of its own. The arbitrator thereafter proceeds to address the grievance of the respondent and ultimately make an award under various heads. The petitioner contends that the arbitrator betrayed a closed mind in starting with the premise that the respondent had suffered at the hands of the petitioner and the award was tainted by such misconception. The petitioner contends that the arbitrator was guilty of misconduct and the award shows misplaced sympathy or, less generously, a pronounced bias in favour of the respondent.

18. The arbitrator found that the supply of MS Flats effected by the petitioner to the respondent did not take into account the wastage that, in the ordinary course of things, would have arisen and, as such, there was short supply of material. The arbitrator noticed letters addressed by the respondent, complaining of short supply of MS Flats and proceeded to read the letters to imply that the respondent had called for additional supply of the raw material and upon the petitioner's failure to make additional supplies, the respondent was within its rights to obtain supplies from the market to discharge its obligations to manufacture the requisite quantum of tie-bars under the agreement. The arbitrator has allowed the first head of claim raised by the respondent for the MS Flats that the respondent was required, in such circumstances, to purchase from the market to complete the supply of tie-bars that it had bargained to manufacture under the agreement. A sum of Rs. 4,22,778/- has been awarded under such head of claim.

19. The respondent submits that it was the petitioner's obligation to make adequate supply of the raw material to enable the respondent to meet production of the requisite quantum of tie-bars under the agreement. According to the respondent, it cannot be faulted for showing enterprise and imagination in procuring the raw material from the market to discharge its obligation under the contract. The respondent asserts that the agreement did not prohibit the respondent from looking elsewhere for the supply of raw material once the petitioner had failed to discharge its obligation in that regard. According to the respondent, it understood its obligation under the agreement to effect supply of the quantum of tie-bars and towards that end, the respondent thought it to be its duty to procure raw material of requisite quantity upon the petitioner failing to meet its demand therefore. The respondent submits that in upholding the respondent's contention the arbitrator took a view on the basis of the material

before him and there is nothing demonstrated by the petitioner which can detract from the award on such head of claim. The award on such head is also justified on the ground that the petitioner would have expended a like amount for procuring the raw material to supply the same to the respondent and it had neither been urged nor demonstrated that the price claimed by the respondent on account of the additional raw material was exorbitant or unconscionable.

20. It is true that the agreement provided for the petitioner making the basic raw material available to the respondent. It is also to be recognised that it was the primarily obligation of the respondent to supply the requisite quantity of tie-bars to the petitioner as provided in the agreement. The respondent may have thrown up its hands and not discharged its obligation of making available the quantum of tie bars envisaged by the agreement upon asserting that adequate raw material had not been made available to it. The arbitrator" found no fault on the part of the respondent in choosing the other option and procuring the raw material to complete the promised quantum of tie bars. On the basis of the material before him, the arbitrator did not find that the respondent was at fault and the fact that the arbitrator has found, something that remains by and large unchallenged, that additional raw material was necessary, will also justify the award on such head of claim. On the basis of the evidence before him, the arbitrator was satisfied that an additional sum of Rs. 4,22,778/- was expended by the respondent for obtaining MS Flats to complete delivery of the agreed quantity of tie-bars. Nothing in the agreement has been shown to require the respondent to suffer the consequence of inadequate supply by the petitioner or for the respondent to be tied down to effect supply of such quantum of tie-bars that could be made from out of the raw material supplied. The arbitrator has taken a view in the matter that is plausible and upon there being no real challenge to the factum of additional material obtained, or the need therefore, the challenge to the first head of claim must fail.

21. The fifth, sixth and seventh heads of claim have been challenged on the ground that the award in respect thereof is in derogation of the general conditions of contract governing all railway agreements with contractors. Clause 17(3) of such general conditions has been cited in support of such contention:

17(3) Extension of time on Railway Account. In the event of any failure or delay by the Railway to hand over to the Contractor possession of the lands necessary, for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the Contractor to damages or compensation therefore but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable.

22. The petitioner had afforded additional time to the contractor to complete the work. In enlarging the time, the petitioner claims, it had allowed the contractor a

grace period and the contractor was not entitled, upon the railway's benevolence, to make a claim on account of escalation for the extended period. According to the petitioner, the arbitrator assumes jurisdiction from the agreement and if the same agreement contains a stipulation as to the maintainability of a claim, the arbitrator has no authority to override the agreement from which he derives his power, to make an award on claims straying into the excepted matters. In support of the proposition, the petitioner refers to *Associated Engineering Co. Vs. Government of Andhra Pradesh* and another, and relies on paragraphs 24 and 25 thereof:

24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has traveled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

25. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see: *Mustill and Boyd's Commercial Arbitration*, 2nd Edn., p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see: *Halsbury's Laws of England*, Volume II, 4th Edn., para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

23. A more recent Judgment, where a clause similar to clause 17 of the general conditions was read as the petitioner asserts, was next cited. In the Judgment reported at *Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another*, , the Supreme Court considered whether the claims of the contractor were in derogation of the provisions of the contract and whether the arbitrator committed legal misconduct for not acting in terms of the provisions found in the contract. Clause 11(c) of the relevant contract in the Supreme Court case provided that if there was any delay, attributable either to the contractor or to the employer or to both, and the contractor sought and obtained extension of time for execution of the contract on such account, he would not be entitled to claim compensation of any nature on the ground of such delay, in addition to the extension of time obtained by him. The Supreme Court held that clause 11(c) of the general conditions in that case was a clear bar to any claim for compensation for delays, in respect of which extensions had been sought and obtained. The clause was read to mean a complete waiver by the contractor to claim compensation upon the contractor being permitted the additional time. The bar

under the relevant clause, according to the Supreme Court, was clear and the award by the arbitrator in disregard of such bar was without jurisdiction. Paragraphs 12 and 20 of the Supreme Court Judgment are apposite in the context:

12. Clause (C) provides that where extensions have been granted by reason of the delays enumerated in clause (A) which were beyond the control of the contractor, or on account of the delays on the part of the employer specified in clause (B), the contractor is not entitled to make any claim either for compensation or otherwise, arising in whatsoever manner, as a result of such extensions. After enumerating certain delays, sub-clause (viii) of clause (A) specifically mentions delay on account of any other cause beyond the control of the contractor. The causes for delays specified in clause (A), thus, encompass all delays over which the contractor has no control. This will necessarily include any delays attributable to the employer or, any delay for which both the employer and the contractor are responsible. The contract thus provides that if there is any delay, attributable either to the contractor or the employer or to both, and the contractor seeks and obtains extension of time for execution on that account, he will not be entitled to claim compensation of any nature, on the ground of such delay, in addition to the extension of time obtained by him. Therefore, the claims for compensation as a consequence of delays, that is Claim 24 of the Hangar Contract and Claims 13 to 16 of the Road Contract are barred by clause 11(C).

....

20. In the view that we have taken the arbitrator clearly misconduct himself in awarding compensation under Claim 24 under the Hangar Contract and Claims 13 to 16 under the Road Contract which was rightly set aside by the High Court in the order impugned herein, on the ground that the arbitrator had acted in excess of his jurisdiction.

24. The respondent suggests that clause 17(3) is but a part of the provisions under which the railways may grant extension to a contractor. It is submitted that while clause 17(3) bars a contractor from seeking compensation upon extension being granted under such provision, there is no like embargo found in clause 17(2). The respondent asserts that the petitioner has not relied on the letters issued by it granting extension nor is it evident from the records before Court that the extension was granted under clause 17(3) or on condition that the contractor would not be entitled to claim compensation for the extended period. The respondent refers to the facts narrated in the award to suggest that the railways were at fault following which the period stood extended and, in such a case, it would be unfair to bind the contractor to the original terms without making room for escalation and like charges consequential upon time being enlarged. The respondent submits that it is for the petitioner, the challenger, to sustain its challenge and in the absence of adequate material, the challenge must fail.

25. The respondent is right. The petitioner has produced nothing to show that the extension of time granted by it was under clause 17(3) and not under clause 17(2) of the general conditions. In any event, the arbitrator dealt with the matter and proceeded to partially allow the fifth, sixth and seventh heads of claim. Implicit in the arbitrator having allowed such claims is the recognition that the contractor was entitled to maintain such claims. Though the arbitrator has not referred to the distinction between clause 17(2) and clause 17(3) of the general conditions, the petitioner has not been able to demonstrate that the extension of time granted by it was under clause 17(3) nor has the petitioner been able to produce any material that was placed before the arbitrator that could have convinced the arbitrator that the claims on such heads were not maintainable in view of the extension having been granted under clause 17(3). What the petitioner urges is a ground of misconduct on the arbitrator having exceeded the bounds of his authority. The petitioner ought to have demonstrated that it had urged such ground and that despite the arbitrator having been reminded of his having no authority for entertaining such heads of claim, he disregarded such challenge and made an award. In the ordinary course of things, a cost estimate is made on certain assumptions, the time for performance being the foremost of them. If a contract runs into several months more than what had been originally contemplated, in the natural course of things, there are cost overruns. It is open to the parties to agree that no payment would be made on account of cost overruns. In the general conditions relied upon by the petitioner, there is a bar on a contractor claiming on account of escalation for the enlarged time under clause 17(3) but there is no similar bar if time is enlarged under clause 17(2). The petitioner's challenge is unacceptable merely on the ground that the petitioner has failed to show that clause 17(3) would apply and not on the ground that despite the extension having been granted under clause 17(3), the contractor would still be entitled to claim on account of escalation.

26. The final head of challenge is as to the grant of interest. The arbitrator awarded interest of Rs. 6,87,862/- being the sum arrived at on account of interest awarded at 10 percent per annum on a principal sum of Rs. 9,82,660/-. The petitioner submits that clause 16(2) of the general conditions completely rules out the award of any interest by the arbitrator. Section 3(3) (a) (ii) of the Interest Act, 1978 is placed to suggest that parties may contract to keep interest out of the equation altogether and the Interest Act recognises such a situation and does not empower Court to allow interest if the parties had bargained otherwise. Section 3 of the Interest Act, which permits a Court to allow interest, is subject, inter alia, to a limitation that no interest may be granted on any debt or damages if there is an express agreement to such effect.

27. The petitioner relies on the Judgment reported at Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa, Vs. N.C. Budharaj (Dead) by Lrs. etc. etc., and Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd., to assert that such principle has been recognised by the highest legal authority and that if parties had bargained that no interest can be paid, the arbitrator cannot override the

agreement to find room to allow interest.

28. In the first of the two cases, the question before a five-member Bench of the Supreme Court was whether the arbitrator had jurisdiction to award interest for the pre-reference period in cases which arose prior to the Interest Act, 1978 coming into force on August 19, 1981. The majority view speaking through Raju, J., was that an arbitrator, with or without intervention of Court, has jurisdiction to award interest on the sums found due and payable, for the pre-reference period in the absence of any stipulation or prohibition in the contract to claim or grant such interest. In so holding, the majority view upset the earlier view of the Supreme Court taken in *Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others*, . The principal " question raised and answered in such case, is irrelevant in the present context. The petitioner relies on that part of the Judgment and finding that the power to grant interest by the arbitrator is subject to the terms of the agreement and a bar in the agreement would rob the arbitrator of authority to allow interest.

29. In the *Bhagawati Oxygen* case, on facts, the Supreme Court held that it was within the power of the relevant arbitrator to award interest in that case. The arbitrator had awarded interest at the universal rate of 18 per cent for all three stages: pre-reference, pendente lite and post-award periods. The arbitration agreement in that case made no provision for payment of interest. In such cases it was held that the arbitrator could have awarded interest and the basis for awarding interest was justified by the fact that a loan given by one party to another was also at 18 per cent. Though it was held that section 34 of the CPC had no direct application to arbitration proceedings since the arbitrator was not a "Court" within the meaning of the Code, but the Supreme Court recognised that the arbitrator had power to grant interest for all three stages.

30. The reference in the *Bhagawati Oxygen* case was under the Arbitration and Conciliation Act, 1996. But on a point of principle, as to whether arbitrators in general had authority to award pendente lite interest, a larger Bench decision rendered in the Judgment reported at *Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy*, was noticed and the principles laid down therein were quoted in paragraph 38:

38. Regarding interest pendente lite also, there was cleavage of opinion. The question was, therefore, referred to a larger Bench in *Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C. Roy, Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy*, . The Court considered several cases and laid down following principles:

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 CPC and there is no reason or principle to hold otherwise in the case of arbitration.

(ii) An arbitrator is an alternative 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). 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, Thawardas 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 un-liquidated 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 Jena case almost all the Courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a high 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.

31. It is the third sub-paragraph from the quotation that the petitioner seeks to rely on to suggest that the arbitrator's jurisdiction to award interest is subject to the agreement between the parties, and in which the arbitration clause is found, permitting interest to be paid. Relying on such principles as laid down in the G.C. Roy case, the Supreme Court restored the arbitrator's award of interest by setting aside the order passed by a single Judge of the Calcutta High Court as confirmed by a Division Bench. The Judgment is an authority for the proposition that even if payment of interest is not specifically provided for in the agreement,

the arbitrator may award interest.

32. The petitioner submits that since the general conditions of contract governing the rights and obligations of the parties under the agreement in the present case prohibited the payment of any interest, it must be found, on the ratio of the Supreme Court Judgments cited, that the arbitrator had no authority to award interest, for the parties had agreed that no interest would be payable and the parties had not conferred upon the arbitrator any power to override such provision in the agreement.

33. The contractor relied on the Judgments reported at The Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age, ; State of Bihar and Others Vs. Hanuman Mal Jain, ; 2002(1) CHN 13 (Union of India v. Royal Construction); and 2001(2) CHN 470 (Union of India v. M. Muljee) to assert that it is entitled to interest. According to the contractor, for the bar under clause 16(2) of the general conditions to apply, such bar should have been incorporated in the arbitration agreement for it, to be effective on the arbitrator. The submission is that it is one thing to suggest that the contractor would not be entitled to interest from the employer, but quite another to say that the arbitrator would have no authority to grant interest. Clause 16(2) of the general conditions provides as follows:

16(2) Interest on amounts. 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 deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon.

34. In the decisions relied upon by the respondent, particularly in the case of Board of Trustees for the Port of Calcutta v. Engineers - De Space Age (The Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age, there appears to be a distinction between interest for the pre-reference period and interest thereafter. It would appear that an agreement between the parties recognised by section 3 of the Interest Act that no interest would be paid, would tie the arbitrator down to awarding no interest for the pre-reference period. But the arbitrator's power to grant pendente lite interest and interest on award cannot be fettered.

35. The clause in the Engineers - De Space - Age case that came up for consideration before the Supreme Court read as follows:

No claim for interest will be entertained by the Commissioners with respect to any money or balance which may be in their hands owing to any dispute between themselves and the Contractor or with respect to any delay on the part of the Commissioners in making interim or final payment or otherwise.

36. The Supreme Court construed the G.C. Roy case to have held that where the agreement between the parties did not prohibit grant of interest and where a party claimed interest and such dispute was referred to the arbitrator, the

arbitrator would have power to award interest pendente lite for the reason that in such case it is presumed that interest was a implied term of the agreement; it then becomes a matter of exercise of discretion by the arbitrator. The Supreme Court thereafter considered the clause in the relevant agreement and found that the prohibition on the commissioner from entertaining any claim on account of interest would not inhibit the arbitrator from entertaining a claim for pendente lite or post-award interest. Paragraphs 4 and 5 of the report need to be noticed:

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. If that be so, we would be justified in placing a strict construction on the term of the contract on which reliance has been placed. Strictly construed the term of the contract merely prohibits the Commissioner from paying interest to the contractor for delayed payment but once, the matter goes to arbitration the discretion of the Arbitrator is not, in any matter, stifled by this term of the contract and the Arbitrator would be entitled to consider the question of grant of interest pendente lite and award interest if he finds the claim to be justified. We are, therefore, of the opinion that under the clause of the contract the Arbitrator was in no manner prohibited from awarding interest pendente lite.

5. Looked at from another point, if there was a dispute as to whether under this term of the contract the Arbitrator was prohibited from awarding interest pendente lite, that was matter which fell within the jurisdiction of the Arbitrator, as the Arbitrator would have to interpret sub-clause (g) of Clause 13 of the contract and decide whether that clause prohibits him from awarding interest pendente lite. In that case it cannot be said that the Arbitrator had wandered outside the contract to deny to him jurisdiction to decide the question regarding payment of interest pendente lite. Even if we were to accept the contention urged by the learned counsel for the appellant placing reliance on paragraphs 26 and 29 of the Associated Engineering Co. Vs. Government of Andhra Pradesh and another, , we think, that the Arbitrator was well within his jurisdiction in awarding interest pendente lite.

37. A subsequent decision of the Supreme Court reported at State of Bihar and Others Vs. Hanuman Mal Jain, has been placed by the respondent for the same purpose and paragraphs 10, 11 and 12 thereof have been relied upon. However, the clause in the Hanuman Mal Jain case barred interest being claimed with respect of any money or balance lying with the department owing to any dispute, unsettled claim, difference of understanding between the engineer-in-charge and the contractor in respect of any unavoidable delay on the part of the executive engineer in making final payment. The clause was not a complete bar and is substantially at variance with the clause in the present case. The award in the Supreme Court case was a non-speaking award and it was ultimately held that since the parties joined issue on the question as to whether there was any unavoidable delay on the part of the executive engineer in making payment, the arbitrator must have taken the same into account and reached his conclusion by rejecting the contention on merit. Since the award was a non-speaking award in that case, the Supreme Court did not deem it fit to delve further into the matter and get into the mind of the arbitrator. The case is not an authority for the proposition that despite there being an agreement of the kind recognised by section 3 (3) (a) (ii) of the Interest Act, the arbitrator retains authority to award interest.

38. Three other decisions reported at 2002(1) CHN 13 (Union of India v. Royal Construction); 2001(2) CHN 470 (Union of India v. M. Muljee) and 1996 (Suppl.) Arb. LR 566 (N.G. Gunani v. Union of India) were referred to by the respondent but were not placed. It is not necessary to go into such other decisions in view of the answer found to the question raised herein in the Engineers-De Space-Age decision.

39. Clause 16(2) of the general conditions in this case is clearly the kind of agreement recognised by the sub-section (3)(a)(ii) as being an exception to the general rule in section 3 and the Interest Act. The relevant clause in the Engineers-De Space-Age case was also one of such kind. But the Supreme Court limited the extent of operation of an agreement to the contrary as envisaged in section 3(3)(a)(ii) of the Interest Act to a claim on account of interest for the pre-reference period. One may venture to add, in humility, that there is good reason for it. Once a reference commences, the delay thereafter is not within the control of the party making a claim for interest. The disputes are frozen at a time immediately prior to the reference and the arbitrator proceeds to adjudicate upon the claim and find the principal sum due. Such principal sum would be deemed to have become payable at the time the disputes were frozen. The time taken for the reference to be concluded and the further time taken for the award debtor to make payment on the basis of the adjudication should not be held against the award holder and he should be compensated for receiving his money not on the date that he is found to have been entitled to the sum but on a much later date. It is the principle that is recognised by section 34 of the CPC that the G.C. Roy case and the Engineers-De Space-Age case accepted as a matter of public policy and one of the many principles found in the Code that has operation beyond civil

suits and matters adjudicated in "Courts" within the meaning of the Code.

40. The award on account of the pre-reference interest falls foul of clause 16(2) of the general conditions which is a situation preserved by section 3(3) (a) (ii) of the Interest Act. But the petitioner's challenge to the pendente lite and post-award interest cannot be sustained. The petitioner succeeds only in dislodging a part of the award that it had set about to demolish almost in its entirety. The contractor will be allowed interest on the principal sum of Rs. 9,82,660/- at 10 per cent per annum from September 1, 1992 being about the time that the original arbitrators entered upon the reference. Inasmuch as the contractor is adequately compensated by interest for the period that it has been required to wait for its dues, no further order for costs is made despite the petitioner substantially failing in these proceedings.

41. There will be a Judgment and decree in terms of such part of the award that has been upheld in favour of Ambica Construction for a principal sum of Rs. 9,82,660/- and interest on such principal sum at the rate of 10 per cent per annum reckoned from September 1, 1992 till payment.

Both the petition challenging the award and the application for Judgment and decree in terms of the award are disposed of without any order as to costs.

Urgent Photostat certified copies of this Judgment, if applied for, be issued to the parties upon compliance with requisite formalities.

Petition disposed of.