

The Arbitrator concluded that there is no prohibition in the Contract for payment of interest for the pre-suit, *pendente lite* and future period and thus, awarded *pendente lite* and future interest at the rate of 10% per annum on the award amount from the date of filing the claim petition till the date of realization of the award amount.

APPLICATION FOR SETTING ASIDE THE AWARD

Aggrieved by the said Award, BHEL filed an application under Section 34 of the Act before the Court. BHEL challenged the award on the ground that the arbitrator was a creature of the contract and thus could not travel beyond the award to grant *pendente lite* interest, as the same was barred by the Contract. The Court held that the power of the arbitral tribunal to award *pendente lite* interest was contingent to the parties not agreeing to the contrary. The Award was set aside to the extent of award of *pendente lite* interest.

GB preferred an appeal against the said order of the Court before the Division Bench of the Delhi High Court. The Division Bench *vide* order dated September 19, 2017, upheld the order of the Single Judge.

PROCEEDINGS BEFORE THE SUPREME COURT

GB appealed against the decision of the Division Bench of the Delhi High Court before the Supreme Court.

Arguments advanced by Garg Builders

GB advanced a two-fold argument before the Supreme Court:

- The Arbitrator took a plausible view in terms of Clause 17 of the Contract to hold that the said clause did not bar the payment of interest for the *pendente lite* period. GB relied on the judgments of the Supreme Court in the cases of *Ambica Construction v. Union of India*² and *Raveechee and Company v. Union of India*³.
- Clause 17 of the Contract barring payment of interest to Garg Builders on *any sum* due to the contractor is *ultra vires* and against the provision of Section 28 of the Indian Contract Act, 1872.⁴

Arguments advanced by BHEL

BHEL opposed the appeal on the following grounds:

- Section 31(7)(a) of the Act⁵, gives paramount importance to the contract entered between the parties and categorically restricts the power of the arbitrator to award pre-reference and *pendente lite* interest, when the parties have themselves agreed to the contrary. BHEL contended that since the contract itself contains a specific clause that barred the payment of interest, it was not open for the arbitrator to grant *pendente lite* interest. BHEL stated that the decision of *Ambica Constructions*, was inapplicable to the case, since the same pertained to the Arbitration Act of 1940 and not the Act.
- Section 3(3) of the Interest Act, 1978⁶ although confers powers on the Court to allow interest in the proceedings for recovery of any debt or damages, it carves out an exception and recognizes the right of the parties to contract out of payment of interest arising out of any debt or damages.

² (2017) 14 SCC 323

³ (2018) 7 SCC 664

⁴ Section 28 of the Indian Contract Act (barring the exceptions) is reproduced herein for ready reference:

“28. Agreements in restraint of legal proceedings, void.—Every agreement,— (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or (b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to the extent.”

⁵ Section 31(7)(a) of the Arbitration and Conciliation Act, 1996 states as follows:

“31. Form and contents of arbitral award—

(7) (a) Unless otherwise agreed by the parties, where and in so far 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.”

⁶ Section 3(3) of the Interest Act, 1978 states as follows:

“3. Power of court to allow interest

3) Nothing in this section,— (a) shall apply in relation to— (i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or (ii) any debt or damages upon which payment of interest is barred, by virtue of an express agreement.”

Findings of the Court

Upon hearing the parties, the Supreme Court observed that:

- The law relating to award of *pendente lite* interest by the arbitrator under the Act is no longer *res integra* or undecided. The provisions of the Act give paramount importance to the contract entered into between the parties and categorically restricts the power of an arbitrator to award pre-reference and *pendente lite* interest when the parties themselves have agreed to the contrary. The Court concluded that if the contract contains a specific clause which expressly bars payment of interest, then it is not open for the arbitrator to grant *pendente lite* interest.
- The Supreme Court analyzed Section 31(7)(a) of the Act to conclude that if the contract prohibits pre-reference and *pendente lite* interest, the arbitrator cannot award interest for the said period. The Supreme Court relied on its earlier decisions to support its view that, if the contract bars payment of interest, the arbitrator cannot award interest from the date of cause of action till the date of cause of award⁷.
- The Supreme Court further distinguished the judgments of *Ambica Construction and Raveechee and Company* as relied on by Garg Builders, on the ground that both the judgments were decided under the Arbitration Act, 1940 and not the Act.
- On the contention that Clause 17 of the Contract, which categorically bars payment of interest by BHEL, is ultra vires Section 28 of the Indian Contract Act, 1872, the Court held that where there is an express statutory permission for the parties to contract out of receiving interest [being Section 37(1)(a) of the Act as well as Section 3(3) of the Interest Act, 1978] and the parties have done so without vitiating free consent, it is not open for the arbitrator to grant *pendente lite* interest and in view thereof, Clause 17 of the Contract is not ultra vires in terms of Section 28 of the Indian Contract Act, 1872.

Analysis

The concept of party autonomy is at the very foundation of an arbitration regime and is *a de facto*, globally recognized norm. The contract entered between the parties necessarily takes supremacy and is to be considered as a guiding factor for resolution of every aspect of disputes between parties to an arbitration. This concept of party autonomy has been sufficiently detailed in various provisions of the Act. The present decision of the Supreme Court goes to the very heart of this foundation and appears to uphold the true spirit of the Act.

Section 31(7)(a) of the Act, which is the subject matter of the present dispute, provides for payment of interest on amounts awarded under the arbitral awards, *unless otherwise agreed by the parties*. Thus, contractual clauses that *categorically* bar the grant of such interest ought to be upheld in view of this provision.

The present decision accords paramount importance to the contract entered between the parties and shifts the focus back to the contract. The decision of the Supreme Court ought to be considered as a guiding principle for contracting parties to make a conscious decision about insertion or deletion of clauses contained in their contracts, particularly those pertaining to restriction on payment of interest.

We hope you have found this information useful. For any queries/clarifications please write to us at insights@elp-in.com or write to our authors:

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⁷ *Sayed Ahmed and Company v. State of Uttar Pradesh & Ors* (2009) 12 SCC 26, *Sree Kamatchi Amm an Constructions v. Divisional Railway Manager (Works), Palghat & Ors* (2010) 8 SCC 767, *Bharat Heavy Electricals Limited v. Globe Hi-Fabs Limited* (2015) 5 SCC 718 and *Sri Chittaranjan Maity v. Union of India* (2017) 9 SCC 611