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Union of India and Ors. Vs. M/S. Venus Engineering Concern Pvt. Ltd.

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Court : Kolkata

Decided On : Feb-28-2017

Judge : Soumen Sen

Appellant : Union of India and Ors.

Respondent : M/S. Venus Engineering Concern Pvt. Ltd.

Judgement :

IN THE HIGH COURT AT CALCUTTA ORDINARY ORIGINAL CIVIL JURISDICTION ORIGINAL SIDE BEFORE: THE HONBLE JUSTICE SOUMEN SEN AP No.274 of 2005 UNION OF INDIA & ORS. -VersusM/S. VENUS ENGINEERING CONCERN PVT. LTD. For the Petitioner : Mr. Partha Sarathi Bose, Sr. Adv. Ms. Aparna Banerjee, Adv. For the Respondent : Mr. Jayanta Kumar Mitra, Sr. Adv. Ms. Srinanda Bose, Adv., Mr. Arijt Basu, Adv. Heard On :

10. 11.2016, 30.11.2016, 05.01.2017, 19.01.2017, 25.01.2017, 08.02.2017, 15.02.2017, 17.02.2017, 24.02.2017. Judgment On :

28. h February, 2017 Soumen Sen, J.:- This is an application for setting aside of an award at the instance of the Eastern Railway. The award is assailed principally on three grounds. The first ground is the existence of the prior award. The second ground is of legal misconduct since the arbitrator had no authority to allow Claim No.6 by disregarding Clause 17(3) of General Conditions of Contract. The third ground is that the arbitrator has exceeded its authority in allowing Claim No.15

which is a claim on account of interest pendente lite by disregarding Clause 16(2) of the General Conditions of Contract. In order to appreciate the first point I have called for affidavits and production of the record. It appears from the documents disclosed by the parties that the umpire published an award on 31st July, 1999. The reference arose as normally used to happen under the 1940 Act by filing an application under Section 20 of the Arbitration Act, 1940 which used to be treated as special suit being Special Suit no.32 of 1995 filed by the claimant. On 15th September, 1995 the said application was allowed by directing the General Manager, Eastern Railway to take steps to appoint two arbitrators within six weeks from the date of communication of the order. The procedures were duly followed and on 15th May, 1996 the Joint Arbitrators entered into the reference. On 11th February, 1999 the umpire entered into reference. Between February 25, 1999 and June 14, 1999 some sittings were held and it appears that on 14th June, 1999 the claimant requested the umpire to publish the award within 15 days. In view of failure of the arbitrator to dispose of the reference and make and publish the award within the stipulated time, an application under Sections 5, 8, 11 and 12 of the Arbitration Act, 1940 being AP No.222 of 1999 was filed on 5th July, 1999 and the said application was allowed in presence of the Advocates for the petitioner by appointing Justice Murari Mohan Dutt (Retd.) to adjudicate upon the disputes between the parties. Consequent upon the said order on 22nd September, 1999 the sole arbitrator entered reference and published an award on 20th December, 2004 after holding 68 meetings. Before the arbitrator the petitioner urged that prior to the appointment of the sole arbitrator the umpire had published an award on 31st July, 1999 and produced a copy of the award and letter dated 21st September, 1999 of the Eastern Railway wherein it was stated that the railway would prefer an appeal against the order dated 19th August, 1999 appointing the present incumbent and prayed for stay of the proceedings. The Umpire, however, refused to stay the proceedings in absence of any order either staying or reversing the order appointing His Lordship to act as a sole arbitrator. Thereafter 68 sittings were held. It appears that the parties have adduced extensive evidence and on consideration of the materials and appreciation of the evidence an award was passed. The learned senior counsel appearing for the petitioner submits that in view of a prior published award the entering upon reference of Justice Dutt to act

as a sole arbitrator is coram non judice and accordingly the award made and published by the learned arbitrator is a nullity. It is submitted that once an objection to the jurisdiction is raised before the learned arbitrator it was the duty of the learned arbitrator to decide the question of jurisdiction before deciding the other issues on merit and the decision to the jurisdiction is no way affected by the order appointing him to act as an arbitrator. This submission is unacceptable to this Court. The said submission proceeds on an assumption that the arbitrator under the 1940 Act exercises same and/or similar jurisdiction as of an arbitrator appointed under the 1996 Act where he is empowered to decide his jurisdiction under Section 16 of the 1996 Act notwithstanding an appointment made by the Court under Section 11 of the 1996 Act. Until the Larger Bench in Konkon Railways settled the issue that the order appointing an arbitrator under Section 11 is a judicial order all orders passed prior thereto were treated to be administrative order and clothed the arbitrator with the jurisdiction to decide its own jurisdiction under Section 16 of the Arbitration and Conciliation Act, 1996. The petitioner is not questioning that the arbitrator is denuded of his jurisdiction to decide the matters in dispute due to non-arbitrability of the dispute but has acted without jurisdiction in proceeding with reference and then deciding the dispute afresh disregarding an alleged prior award. It has to be remembered that the reference was under the 1940 Act. Before I embark on any discussion on the scope of the power of the Umpire it would be necessary to consider the relevant provisions of the 1940 Act, namely, Sections 3, 28 and the first schedule of Section 3 of the Implied Conditions of Arbitration Agreements which read: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.

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28. Power to Court only to enlarge time for making award. - (1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award. (2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge

the time for making the award, shall be void and of no effect.

. Implied Conditions of Arbitration Agreements:3. The arbitrators shall made their award within four months after entering on the reference or after having called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators.

5. The umpire shall make his award within two months of entering on the reference within such extended time as the Court may allow.

. Under the Arbitration Act, 1899, the umpire had the authority to extend the time for making award by an order of his own in writing. That power has been taken away by the present paragraph. If extension of time is necessary, the Court alone will have authority to grant extension under Section 28(1). The only exception allowed is when the arbitration agreement itself authorizes the arbitrator or the umpire to extend the time with the consent of the parties. If an umpire fails to make the award within the time allowed by the Court or within two months, as the case may be, failure of the umpire to do so may be treated by the parties as neglect or refusal to act and they may take steps to have another umpire appointed under Section 8(1)(b) or may have the umpire removed under Section 11(1) and his substitute appointed under Section 12(2)(a). The Court will also have discretion to set aside the reference and order that the arbitration agreement shall cease to have effect under Section 12(2)(b). Section 3 of the Arbitration Act, 1940 read with paragraph 5 of the First Schedule to the 1940 Act, mandate that the umpire would be required to make its award within two months of entering on the reference or within such extended time as the Court may allow. The petitioner has failed to demonstrate that any such extension was granted beyond April 11, 1999. By reason of the aforesaid provisions, the award passed by the umpire beyond the said period is non est as the umpire derives its jurisdiction to make and publish the award on the basis of the said provisions and not dehors it. There is nothing on

record to show that the parties have agreed to extend time beyond the stipulated period. Moreover, it appears that before the umpire could make and publish the award, an application for appointment of a sole Arbitrator was pending which resulted in an order dated 19th August, 1999. The said order was passed in presence of the petitioner. It goes to show that the petitioner has never consented to extend the tenure of the reference. The petitioner although represented that they would file an application for recalling of the order appointing Justice Dutt (Retd.) to act as sole arbitrator appears to have filed an application for recalling but did not pursue the said application. The petitioner appears to have filed an application for recalling and/or modifying the order dated 19th August, 1999 being GA No.5097 of 1999 which ultimately was dismissed for default on 22nd April, 2010 and no step was taken for restoration of the said application. In the meantime, the petitioner filed an application on 21st September, 2005 being the instant application for setting aside of the award dated 20th December, 2004. The applicant has failed to demonstrate that either of the parties has approached the Court for enlargement of the time in making the award after expiry of two months period. On the contrary, it appears that an application was carried to the Court for a fresh reference in view of the inability of the Umpire to proceed with the reference diligently. The earlier award disclosed in the proceeding shows that the award was passed after an application was filed to the Court for removal of the Umpire and appointment of a fresh arbitrator. This itself shows that the award holder never agreed to the extension of time and the Court being satisfied allowed the said application and appointed Justice Dutt (Retd.) to act as a sole arbitrator. An Umpire becomes functus officio by the expiry of the time limit and there is no question of revoking his authority when in law the Umpire does not exist or cannot function. In the instant case, it is not in dispute that the statutory body to make and publish the award had expired and the award holder did not consent to the extension of time to make and publish the award. The application has also failed to apply to the Court for enlargement of time. Failure and neglect of the Umpire to use all reasonable dispatch in proceeding with the reference and making an award. The application was filed under Sections 8,9,11 and 12 of the Arbitration, 1940. The Court after hearing the parties allowed the said application and appointed Justice Dutt (Retd.) as the sole arbitrator. This order has remained

unchallenged. The application for recalling of the said order was dismissed for default and no attempt was made to restore the said application. The applicant has allowed the fresh reference to proceed which has culminated in an award dated December 20, 2004. The award on which reliance has now sought to be placed is non est since it was passed beyond the statutory period and when the Umpire had no jurisdiction to pass such an award. The Umpire became functus officio after April, 1999. Moreover the award does not record any consent of the parties beyond April, 1999 which is a sine qua non in proceeding with the reference. In proceeding beyond the said period unilaterally by the Umpire is in contravention of Section 28(2) of the Arbitration Act, 1940. The award shows that the respondent has clearly abandoned its right to have the order passed by this Court making a fresh appointment either recalled or modified and instead participated in the proceeding. The petitioner had enough opportunities either to prefer an appeal against the order or to apply for review and/or recall of the said order. The petitioner virtually abandoned the said application although appears to have filed in 1999 and instead participated in the said proceeding and allowed the arbitration proceeding to continue. The Arbitrator has rightly observed that unless the order appointing him to act as Arbitrator is recalled and/or reversed, the Arbitrator has no power to decide his own jurisdiction. The petitioner if at all has any right to question the said order appointing an Arbitrator has clearly waived such right in failing to pursue the remedy opened to them and has virtually abandoned the said application for recalling of the order. Under such circumstances, it is too late in the day to contend that the award passed by the present sole Arbitrator is non est. The disputes were decided on merits and on appreciation of evidence. However, the second ground urged on behalf of the petitioner merits consideration. The Arbitrator derives its authority from the contract and it appears that the learned Arbitrator has acted in disregard of the terms of the contract and has allowed the claim no.6 when there is a clear prohibition. The arbitrator has relied upon a decision of the Honble Supreme Court in Board of Trustees for the Post of Calcutta Vs. Engineers-De-Space-Age reported at AIR 1996 SC2853in allowing the said claim. The arbitrator admitted that under Clause 17(3), the Contractor is not entitled to claim damages or compensation on account of delay caused by the Railway, but such clause has got no binding force on the Arbitrator. contract terms

clearly prohibit in Clause 17(3) any payment of The such compensation due to extension of time on Railway Account. The Clause 17(3) of the General Conditions of Contract reads:- 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 on 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 therefor but in any such case the Railway may grant such extension or extensions of the completion date as may be considered reasonable.

. Moreover, it is well-settled that the arbitrator derives authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one as it would be deliberate departure from the contract. The arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error. The role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference. (Please refer the decisions in Oil & Natural Gas Corporation Ltd. -versus- Saw Pipes Ltd. reported at (2003) 5 Supreme Court Cases 705; M/s. Rashtriya Chemicals & Fertilizers Ltd. -versus- M/s. Chowgule Brothers & Ors. reported at AIR2010 Supreme Court 3543 and Ramnath International Construction Pvt. Ltd. -versus- Union of India and Anr. reported at 2006(4) Arb. LR385SC). The arbitrator has completely misdirected its mind in relying upon the Board of Trustees (supra) in allowing the same disregarding clear prohibition clause in the agreement. In

view thereof, the arbitrator has acted without jurisdiction in allowing claim no.6 and award to that extent is set aside. The arbitrator has allowed claim No.15 after taking into consideration the objection raised by the petitioner that the claimant is not entitled to any interest in view of Provision Clause 16(2) of the General Conditions of Contract which provides no interest will be payable upon the earnest money or the security deposit or the amount payable to the contractor under the contract. The Clause 16(2) of the General Conditions of Contract states: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.

. The arbitrator held that it is apparent that Clause 16(2) prohibits payment of interest for the pre-reference period. However, there is no indication in Clause 16(2) that it prohibits granting of pendente lite interest. The arbitrator in arriving at the said conclusion has relied upon the decision of the Honble Supreme Court in the case of The Board of Trustees (supra) where the contract provides as follows:No claim for interest will be entertained by the Commissioner with respect to any money or balance which may be in their hands owing to any dispute between themselves and the contractor or in respect of any delay on the part of the Commission in making interim or final payment or otherwise.

. It was observed by the Supreme Court that strictly construed the term of the contract merely prohibits the Commissioner from payment of interest to the contractor for delayed payment, but once the matter goes to arbitration, the discretion of the Arbitrator is not in any manner, shifted by the 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. Similarly, as Clause 16(2) GCC does not in any way prohibit granting of pendente lite interest, the Arbitrator is entitled to grant pendente lite interest if considered just and proper. Mr. Partha Sarathi Bose, the learned Senior Counsel appearing on behalf of the petitioner submits that in view of such express bar in the contract the arbitrator could not have allowed the said claim. It is submitted that in view of the later decisions of the Honble Supreme Court the ratio of The Board of Trustees (supra) is no more a good law. The attention of this Court is drawn to the two later decisions of the Honble Supreme Court, one of Coordinate Bench and the other a

Three-Judge Bench, namely, Krafters Engineering and Bright Power Projects and it is submitted that similar clause came up for consideration in those two matters and the said clauses have been interpreted as a prohibitive clause denuding the jurisdiction of the arbitrator to decide any claim of interest pendente lite. In two later decisions of the Honble Supreme Court in Union of India Vs. Bright Power Projects (India) Pvt. Ltd. reported at (2015) 9 SCC695and Union of India Vs. Krafters Engineering & Leasing Pvt. Ltd. reported at (2011) 7 SCC279the Honble Supreme Court after taking into consideration the Board of Trustees (supra) held that the said decision is no more a good law in view of a subsequent decision in Sayed Ahmed and Co. v. State of U.P. reported at (2009) 12 SCC26 However, Mr. Jayanta Kr. Mitra, the learned Senior Counsel in reply submitted that the said decisions were rendered under the 1996 Act after taking into consideration the phrase unless otherwise agreed by the parties. under Section 31(7)(a) of the Arbitration and Conciliation Act, 1996. The attention of this Court is drawn to the decision of the Honble Supreme Court in Madnani Construction Corpn. (P) Ltd. v. Union of India reported at (2010) 1 SCC549and it is submitted that in the said decision it has been categorically held that such clause would not denude the power of the arbitrator to allow interest pendente lite. The said submission has been made treating the expression amounts payable to the contractor. to be somewhat relatable to the other two expressions immediately preceding it, namely, earnest money or the security deposit. and the said expression is required to be read ejusdem generis. It is submitted that the amount claimed is in respect of the contract and sounds in damages which is only payable on adjudication and the said claim obviously would not cover any amount payable under the contract. The said submission is presumably based on the observations of a Three-Judge Bench in State of Orissa Vs. B.N. Agarwalla reported at (1997) 2 SCC469since followed in State of U.P. Vs. Harish Chandra & Co. reported at (1999) 1 SCC63 Moreover, the claim on account of pendente lite interest is compensatory in nature and the arbitrator is not denuded of its power to grant damages. The learned Senior Counsel would perhaps argue that in the absence of the phrase unless otherwise agreed by the parties. there is no impediment under the 1940 Act to grant such relief. Moreover, it was argued that the decision rendered under the 1996 Act would be not relevant in deciding an application for setting aside of an award

under the 1940 Act. The learned Senior Counsel remonstrates that a later Co-ordinate Bench decision of the Supreme Court in Sayed Ahmed could not have overruled Engineers-De-Space-Age (supra) in view of doctrine of precedence and any judgment passed by a Coordinate Bench without noticing the earlier bench decision is per incuriam and in any event a Coordinate Bench cannot differ from an earlier decision of a Bench of equal strength and the only course open is to refer the matter to the Larger Bench. Mr. Mitra in this regard has referred to a Special Bench decision of our Court in Bholanath Karmakar & Ors. Vs. Madanmohan Karmakar & Ors. reported at AIR1988 Cal 1 Paragraph 14 and a fairly recent decision in Sundeep Kumar Bafna Vs. State of Maharashtra & Anr. reported at (2014)16 SCC623Paragraphs 19, 20 and 21 in which the Honble Supreme Court stated that it is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. The inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam. An earlier judgment cannot possibly be seen as per incuriam a later judgment as the latter if numerically stronger only then it would overrule the former. It is submitted that the later decisions of the Honble Supreme Court in disregarding a Coordinate Bench decision or a numerically stronger Bench decision is against the doctrine of precedence. The purpose of precedence is to impart predictability and bring consistency. Moreover, Madnani Construction (supra), a subsequent decision of the Honble Supreme Court on this point, has upheld and, in fact, followed Engineers-De-Space-Age (supra). The later decisions of the Honble Supreme Court although observed that the arbitrator may not have the power to grant interest pendente lite in view of Clause 16(2) GCC but such interpretation was based on the expression unless otherwise agreed by the parties. in Section 31(7)(a) of the Arbitration and Conciliation Act, 1996. The learned Senior Counsel has referred to Paragraphs 18, 19 and 20 of the Krafters Engineering (supra) which read:18. It is relevant to point out that the decision of Madnani Construction Corporation Private Limited (supra) was cited before another Bench of this Court in Sree Kamatchi Amman Constructions vs. Divisional Railway Manager (Works), Palghat and Others, (2010) 8 SCC767 wherein the decision in Madnani Construction Corporation Private Limited (supra) was very much discussed and considered. After adverting to all the earlier decisions

including the Constitution Bench judgments, this Court has analyzed the effect of Madnani Construction Corporation Private Limited (supra). The following discussion and ultimate conclusion are relevant:

"7. In Madnani the arbitrator had awarded interest pendente lite, that is, from the date of appointment of arbitrator to the date of award. The High Court had interfered with the same on the ground that there was a specific prohibition in the contract regarding awarding of interest. This Court following the decision in EngineersDe- Space-Age reversed the said rejection and held as follows:(Madnani case, SCC pp. 560-61, para 39)

"9. In the instant case also the relevant clauses, which have been quoted above, namely, Clause 16(2) of GCC and Clause 30 of SCC do not contain any prohibition on the arbitrator to grant interest. Therefore, the High Court was not right in interfering with the arbitrator's award on the matter of interest on the basis of the aforesaid clauses. We therefore, on a strict construction of those clauses and relying on the ratio in Engineers find that the said clauses do not impose any bar on the arbitrator in granting interest."

18. At the outset it should be noticed that Engineers-De- SpaceAge and Madnani arose under the old Arbitration Act, 1940 which did not contain a provision similar to Section 31(7) of the new Act. This Court, in Sayeed Ahmed held that the decisions rendered under the old Act may not be of assistance to decide the validity of grant of interest under the new Act. The logic in Engineers-De-Space-Age was that while the contract governed the interest from the date of cause of action to date of reference, the arbitrator had the discretion to decide the rate of interest from the date of reference to date of award and he was not bound by any prohibition regarding interest contained in the contract, insofar as pendente lite period is concerned. This Court in Sayeed Ahmed held that the decision in Engineers-De-Space- Age would not apply to cases arising under the new Act. We extract below, the relevant portion from Sayeed Ahmed: (SCC p. 36, paras 23-24)

"3. The observation in Engineers-De-Space-Age that the term of the contract merely prohibits the department/employer from paying interest to the contractor for delayed payment but once the matter goes to the arbitrator, the discretion of the

arbitrator is not in any manner stifled by the terms of the contract and the arbitrator will be entitled to consider and grant the interest pendente lite, 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. Whether the provision in the contract bars the employer from entertaining any claim for interest or bars the contractor from making any claim for interest, it amounts to a clear prohibition regarding interest. The provision need not contain another bar prohibiting the arbitrator from awarding interest. The observations made in the context of interest pendente lite cannot be used out of contract.

24. The learned counsel for the appellant next contended on the basis of the above observations in Engineers-De-Space-Age, that even if Clause G109 is held to bar interest in the pre-reference period, it should be held not to apply to the pendente lite period, that is, from 14-3-1997 to 31-7-2001. He contended that the award of interest during the pendency of the reference was within the discretion of the arbitrator and therefore, the award of interest for that period could not have been interfered with by the High Court. In view of the Constitution Bench decisions in G.C. Roy and N.C. Budharaj rendered before and after the decision in Engineers-De-Space-Age, it is doubtful whether the observation in Engineers-De-Space-Age in a case arising under theArbitration Act, 1940 that the arbitrator could award interest pendente lite, ignoring the express bar in the contract, is good law. But that need not be considered further as this is a case under the new Act where there is a specific provision regarding award of interest by the arbitrator."

(emphasis added) The same reasoning applies to the decision in Madnani also as that also relates to a case under the old Act and did not independently consider the issue but merely relied upon the decision in Engineers-De-Space-Age. (emphasis added) 19. Section 37(1) 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 and Madnani are inapplicable for yet another reason. In Engineers-DeSpace-Age and Madnani 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 and Madnani are inapplicable..."

19. Inasmuch as we have already expressed similar view as mentioned above and conveyed our inability to apply the reasoning in Madnani Construction Corporation Private Limited (supra), we fully endorse the view expressed in Sree Kamatchi Amman Constructions (supra).

20. In the light of the above discussion, following conclusion emerge: reliance based on the ratio in Board of Trustees for the Port of Calcutta (supra) is unacceptable since the said view has been overruled in Sayeed Ahmed and Company (supra) and insofar as the ratio in Madnani Construction Corporation Private Limited (supra) which is also unacceptable for the reasons mentioned in the earlier paras, we reject the stand taken by the counsel for the respondent. On the other hand, we fully accept the stand of the Union of India as rightly projected by Mr. A.S. Chandhiok, learned ASG. We reiterate that where the parties had agreed that no interest shall be payable, the arbitrator cannot award interest for the amounts payable to the contractor under the contract. Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and the said dispute is referred to the arbitrator, he shall have the power to award interest pendent elite. As observed by the Constitution Bench in G.C. Roy's case (supra), in such a case, it must be presumed that interest was an implied term of the agreement between the parties. However, this does not mean that in every case, the arbitrator should necessarily award interest pendente lite. In the

subsequent decision of the Constitution Bench, i.e., N.C. Budharaj's case (supra), it has been reiterated that in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest, the arbitrator is free to award interest.

. (emphasis added) Mr. Mitra relied upon Sree Kamatchi Amman Constructions v. Railways reported at (2010) 8 SCC767where both Engineers-De-Space-Age (supra) and Sayeed Ahmed (supra) were considered. It is submitted that in Sree Kamatchi (supra) the Honble Supreme Court noticed Section 37(1) of the 1996 Act and refused to interfere with award on the ground that interpretation of the terms of the contract is within the jurisdiction of the arbitral tribunal and any exercise of discretion in this regard is not to be interfered with. The Paragraphs relied upon are Paragraphs 18, 19 and 20 which read:18. At the outset it should be noticed that Engineers-De-Space-Age and Madnani arose under the old Arbitration Act, 1940 which did not contain a provision similar to section 31(7) of the new Act. This court, in Sayeed Ahmed held that the decisions rendered under the old Act may not be of assistance to decide the validity of grant of interest under the new Act. The logic in Engineers-De-Space-Age was that while the contract governed the interest from the date of cause of action to date of reference, the arbitrator had the discretion to decide the rate of interest from the date of reference to date of award and he was not bound by any prohibition regarding interest contained in the contract, insofar as pendente lite period is concerned. This Court in Sayeed Ahmed (supra) held that the decision in Engineers-DeSpace-Age would not apply to cases arising under the new Act. We extract below, the relevant portion from Sayeed Ahmed:

"3. The observation in Engineers-De-Space-Age (supra) that the term of the contract merely prohibits the department/employer from paying interest to the contractor for delayed payment but once the matter goes to arbitrator, the discretion of the arbitrator is not in any manner stifled by the terms of the contract and the arbitrator will be entitled to consider and grant the interest pendente lite, 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. Whether the provision in the contract bars the employer from entertaining any

claim for interest or bars the contractor from making any claim for interest, it amounts to a clear prohibition regarding interest. The provision need not contain another bar prohibiting Arbitrator from awarding interest. The observations made in the context of interest pendente lite cannot be used out of contract.

24. The learned Counsel for appellant next contended on the basis of the above observations in Engineers-De-Space-Age, that even if Clause G- 1.09 is held to bar interest in the pre-reference period, it should be held not to apply to the pendente lite period that is from 14.3.1997 to 31.7.2001. He contended that the award of interest during the pendency of the reference was within the discretion of the arbitrator and therefore, the award of interest for that period could not have been interfered by the High Court. In view of the Constitution Bench decisions in G.C. Roy and N.C. Budharaj (supra) rendered before and after the decision in Engineers-De- Space-Age, it is doubtful whether the observation in Engineers-De-Space- Age in a case arising under Arbitration Act, 1940 that Arbitrator could award interest pendente lite, ignoring the express bar in the contract, is good law. But that need not be considered further as this is a case under the new Act where there is a specific provision regarding award of interest by the arbitrator."

The same reasoning applies to the decision in Madnani also as that also relates to a case of under the old Act and did not independently consider the issue but merely relied upon the decision in Engineers-DeSpace-Age.

19. Section 37(1) 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 date of award. Therefore where the parties had agreed that no interest shall be payable, arbitral tribunal cannot award interest between the date when the cause of action arose to date of award.

20. We are of the view that the decisions in Engineers-De-Space-Age and Madnani are inapplicable for yet another reason. In Engineers-De-Space- Age and Madnani 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 this 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 EngineersDe-Space-Age and Madnani are inapplicable. Be that as it may.

. In short it is submitted that the decisions of Engineers-De-Spage-Age (supra) is the correct law inasmuch as later decisions have followed the said decision. Any other contrary views are per incuriam, as they are rendered without considering the earlier decisions rendered by Three-Judge Bench. The power of the arbitrator to grant interest at the three stages of the proceeding, namely, pre-reference, post-reference and post award has been summarized in the Constitution Bench in Secretary, Irrigation Department, Government of Orissa & Ors. VS. G.C. Roy reported at (1992) 1 SCC508Paragraphs 43 and 44 which state:-

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, C.P.C., and there is no reason or principle to hold otherwise in the case of arbitrator. (ii) an arbitrator is an alternative form 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. 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 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 Jena's 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 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 considerations, 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 (alongwith 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.

. In a fairly recent decision in Union of India Vs. Ambica Construction reported at (2016) 6 SCC36the Honble Supreme Court on consideration of the earlier decisions on this point made the following observations:32. In Para 4 in Engineers-De-Space-Age, this Court has observed that bar under the contract will not be applicable to the 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 the power of the arbitrator to grant pendente lite interest is expressly taken away. If answer is yes. then the arbitrator would have no power to award pendente lite interest.

33. The decision in Madnani Construction Corpn. Has followed the decision in Engineers-De-Spage-Age. The 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.

34. Thus, our answer to the reference is that if the contract expressly bars the 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 the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits.

. Although, Mr. Mitra submits that the said clause is only applicable during the subsistence of the contract and cannot travel beyond it and such a clause lacks mutuality and has to be read against the petitioner applying the contra proferentem rule but having regard to the law laid down by the Honble Supreme Court interpreting the same clause as a prohibitive clause, this Court is unable to accept such submission. Since the contract expressly bars the award of interest on amounts payable to the contractor under the contract the arbitrator could not have allowed interest pendente lite. In view of the aforesaid, the application for setting

aside of the award is allowed in part. The award in respect of Claim Nos.6 and 15 is set aside. The application stands disposed of. However, there shall be no order as to costs. Urgent Photostat copy of this judgment, if applied for, be given to the parties on usual undertaking. (SOUMEN SEN, J.)

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