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STATE OF U.P.
v.
HARISH CHANDRA AND CO.

NOVEMBER 11, 1998

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[S.B. MAJMUDAR, S. SAGHIR AHMAD AND
K. VENKATASWAMI, JJ.]

Arbitration Act, 1940 :

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Sec. 29—Award of interest—Works contract—Claim for payment for the works done—Dispute—Arbitration—Award granting interest—Clause 1.9 of Special Conditions of Contracts stipulating that interest cannot be claimed for the amount lying with the Government due to any dispute—Effect of—Held, claim of interest for payment for the work done, is not covered under the specified type of amount mentioned in Clause 1.9—Thus, the claim is not barred—Award of interest justified.

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Sec. 29—Power of Arbitrator to grant interest pendente lite—Held, Arbitrator has power and authority to grant interest even for pre-reference period after Interest Act, 1978.

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Sec. 30—Grounds for setting aside Award—Arbitration Award—Challenge on the merit of the Award—Validity of—Held, question purely on merits of award cannot be entertained.

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Para 7-A inserted in the First Schedule (by U.P. Act 57 of 1976 Sec. 24)—Power of Arbitrator to grant interest—Award of interest beyond 6 per cent barred—Held, the bar is only on the Arbitrator and not on the Court—High Court erred in reducing the rate of interest awarded by trial court in exercise of its discretionary power.

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An agreement was entered into between the appellant-State and respondent-contractor for carrying out certain excavation and construction work. The respondent contractor failed to complete the work within the stipulated period and even after extension of time, left the work incomplete. Consequently, the appellant-State got the work done through other agencies by incurring additional expenses. A dispute arose between the parties over

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the payment of dues for the work done. On reference, the sole arbitrator awarded interest pendente lite at the rate of 15 per cent and 6 per cent interest on the amounts due from the date of award till actual payment. The trial Court made the award rule of the Court and granted 15.5 per cent interest on the amount awarded. On appeal, High Court while dismissing the appeal reduced the rate of interest from 15.5 per cent to 6 per cent. Aggrieved, both the State and respondent contractor have preferred the appeals.

The contention of appellant—State was that the arbitrator had no power to grant pre-reference period interest in view of the prohibition contained in Clause 1.9 of the Special Conditions of the Contract; paragraph 7-A inserted in the First Schedule to the Arbitration Act, 1940 (U.P. Act 57 of 1976 Section 24), barred the power of the arbitrator in granting more than 6 per cent interest on the awarded amount and, therefore, High Court was justified in reducing the interest from 15.5 per cent to 6 per cent.

The contention of the respondent-contractor was that the High Court had committed a patent error in reducing the rate of interest from 15.5 per cent to 6 per cent; interpretation of Clause 1.9 by the arbitrator could not have been made a subject matter of objections under Section 30 of the Arbitration Act.

Dismissing the appeal of the State and partly allowing the appeal of the contractor, the Court

HELD : 1. The claim for interest even for pre-reference period was within the power and authority of the arbitrator after the Interest Act, 1978. It is not a dispute between the parties in the instant case, that the cause of action for reference arose after coming into force of the Interest Act.

[665-E]

Secretary, Irrigation Deptt. Govt. of Orissa v. G.C. Roy, [1992] 1 SCC 508 and *State of Orissa v. B.N. Agarwalla*, [1997] 2 SCC 469, relied on.

2. The High Court was right in holding that clause 1.9 of Special Conditions of the Contracts was not a bar to the claim of interest. Clause 1.9 states that the claim for interest by way of damages was not to be entertained against the Government with respect to only a specified type of amount, namely, any moneys or balances which may be lying with the

- A** Government owing to any dispute or difference between the Engineer-in-Charge and the contractor; or misunderstanding between the Engineer-in-Charge and the contractor in making periodical or final payments or in any other respect whatsoever. The words “or in any other respect whatsoever” also referred to the dispute pertaining to the moneys or balances which may be lying with the Government pursuant to the agreement meaning thereby security deposit or retention money or any other amount which might have been with the Government and refund of which might have been with held by the Government. The claim for damages or claim for payment for the work done and which was not paid for, would not obviously cover any money which may be said to be lying with the Government. Consequently, on the express
- B**
- C** language of this Clause, there is no prohibition which could be called out against the respondent-contractor that he could not raise the claim for interest by way of damages before the arbitrator on the relevant items placed for adjudication. [666-C-F; 667-A]

D *State of Orissa v. B.N. Agarwalla*, [1997] 2 SCC 469, relied on.

3. Questions purely on merits of the award could not be agitated under Section 30 of the Arbitration Act. Thus, the contention that claims regarding cutting of hardrock were wrongly granted, cannot be made subject matter of an objection under Section 30 of the Arbitration Act. [667-A-B]

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4. The High Court erred in reducing the rate of interest from 15.5 per cent to 6 per cent from the date of the Trial Court’s order till the satisfaction of decree. Paragraph 7-A inserted in the First Schedule to the Arbitration Act (U.P. Act 57 of 1976, Sec. 24) barred only the power of the arbitrator in granting more than 6 per cent interest on the awarded amount and not of the Court. Further, it could not be said that the arbitrator had found the interest at the rate of 6 per cent per annum to be reasonable. In fact, he had no authority or power to go beyond 6 per cent interest. So far as the Court is concerned, it is in its discretion to award 15.5 per cent interest on the decretal amount from the date of the decree till satisfaction of the clause. As that was within the realm of the discretionary jurisdiction of the Trial Court, it could not have been set aside by the High Court in appeal.

[667-E-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7643 of 1995.

H From the Judgment and Order dated 29.11.94 of the Allahabad High

Court in FAFO No. 206/93.

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Avadh Behari Rohtagi, Mr. Kamlendra Misra and R.B. Misra for the Appellants.

Harish N. Salve, Anil Kumar Gupta and Rishi Kesh for the Respondents.

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The Judgment of the Court was delivered by

MAJMUDAR, J. Leave granted in S.L.P.(C) No. 6307 of 1995.

We have heard learned senior counsel for the parties in these two appeals.

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Both these appeals by special leave arise out of one and the same judgment rendered by the High Court of Judicature at Allahabad.

In Civil Appeal No. 7643 of 1995, the appellant-State of U.P. has brought in challenge the aforesaid order of the High Court dismissing its appeal against the award decree passed by the learned Trial Judge subject to a slight modification in favour of the appellant-State to which we will make a reference while considering the cross-appeal arising out of S.L.P.(C) No. 6307 of 1995. The cross-appeal is filed by the respondent Harish Chandra & Co. in Civil Appeal No. 7643 of 1995, who has felt aggrieved by the modification regarding rate of interest as ordered by the High Court in the impugned judgment to the extent it reduced interest from 15 per cent per annum, as awarded by the trial court, from the date of decree till payment to 6 per cent.

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A few facts leading to the controversy in question may be stated at the outset. On 26th October, 1979 an agreement was entered into between the Superintending Engineer, Irrigation Construction Circle, Dehradun on behalf of the appellant-State on the one hand and M/s. Harish Chandra & Co., New Delhi (respondent herein) on the other. The work entrusted to the respondent-contractor was for excavation of Khara Power Channel from K.M. 8 to K.M. 9.8 and also the construction of drainage crossings at Chhoti Lui at K.M. 9.2 and Bari Lui at K.M. 9.6. The work was to be started on 1.12.1979 and was to be completed latest by 31.5.1982. It is the case of the appellant-State that the respondent-contractor did not complete the work within the specified time, that is, by 31.5.1982. Time was extended and still he did not complete and left the work incomplete on 31.5.1986. That required the State to get the work completed through other agencies which resulted in incurring of additional

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A costs by the State in completing the said work. Disputes arose between the parties in connection with the work which was carried on by the respondent before the aforesaid date, *i.e.*, 31.5.1986. It appears that the respondent issued a letter dated 16.11.1983 regarding various claims put forward in the said letter and seeking arbitration of the said disputes as per the clause contained in the Special Conditions of the Contract. The Chief Engineer, Yamuna Valley Projects, Irrigation Department, Dehradun responded to the said letter of the respondent and referred the claim Nos. 1, 2, 4 to 8, 13, 15 and 16 contained in the claimant's aforesaid letter for arbitration to the sole arbitrator - Chief Engineer, Irrigation Department of the State. After hearing the parties, the arbitrator rendered his award dated 24th February, 1992. The arbitrator awarded interest on the amounts found due by him to the respondent at the rate of 15 per cent from 16.11.1983, that is, the date on which the claimant had sought for reference, to 5.1.1988 on different items. Interest pendente lite was also allowed at 15 per cent and 6 per cent interest was allowed on the amounts found due from the date of the award to the date of actual payment or date of decree whichever was earlier. The said award was sought to be made rule of the court by the respondent. The appellant-State raised various objections to the award being made rule of the court. The learned Trial Judge/Civil Judge, Dehradun, after hearing the parties, by order dated 11th March, 1993 made the award rule of the court and further directed that the claimant shall be entitled to get the ordinary interest of 15.5 per cent per annum on the amount of award with effect from the date of the order upto the satisfaction of the decree. It is this decree passed by the trial court that resulted into an appeal by the appellant-State before the High Court which came to be disposed of by the impugned judgment.

F Learned senior counsel for the appellant-State Shri Avadh Behari Rohtagi, in support of the appeal, vehemently submitted that the arbitrator had no power to grant interest prior to the reference in view of Clause 1.9 of the Special Conditions of the Contract which clearly prohibited granting of such interest. He also submitted that the two claims which were granted by the arbitrator regarding hardrock cutting were also not sustainable on the evidence on record. In the cross-appeal, it was submitted by learned senior counsel G Shri Harish N. Salve while supporting the main part of the judgment under appeal that the High Court had committed a patent error in reducing the rate of interest from 15.5 per cent to 6 per cent from the date of the trial court's order till satisfaction of the decree. He further submitted that interpretation of Clause 1.9 by the arbitrator could not have been made a subject matter of H objections under Section 30 of the Arbitration Act.

In view of the aforesaid rival contentions, the following points arise for our determination :- A

(1) Whether the award of interest prior to the date of the reference was within the power and jurisdiction of the arbitrator ?

(2) Even if it was within the jurisdiction of the arbitrator, whether Clause 1.9 barred such consideration ? B

(3) Whether such an objection could have been raised before the court in objections under Section 30 of the Act ?

(4) Whether the reduction of interest from 15.5 per cent to 6 per cent from the date of the decree till satisfaction of the decree as ordered by the High Court was justified ? C

Point No.1

So far as this point is concerned, we may note a decision of the 3-Judge Bench of this Court in *State of Orissa v. B.N. Agarwalla*, [1997] 2 SSC 469, which has clearly ruled in the light of the earlier Constitution Bench judgment of this Court in *Secretary, Irrigation Deptt., Govt. of Orissa v. G.C. Roy*, [1992] 1 SCC 508, that the claim for interest even for the pre-reference period was also within the power and authority of the arbitrator after the Interest Act, 1978. It is also not in dispute between the parties that in the present cases the cause of action for reference arose after coming into force of the Interest Act, 1978. Consequently, it cannot be effectively urged by learned senior counsel for the appellant-State that the arbitrator had no power to grant such pre-reference period interest. The first point is, therefore, answered in affirmative. D E F

Points Nos. 2 and 3

However, it was vehemently contended that even if arbitrator had power to award interest for pre-reference period, Clause 1.9 prohibited the consideration of such claim by the arbitrator. Now it must be kept in view that the arbitrator has interpreted Clause 1.9 and has rejected the contention that claim of interest would not survive by virtue of the said Clause. Shri Salve submitted that once the arbitrator has so decided, it was within his jurisdiction to decide one way or the other and when the question of interest itself was a subject matter of dispute referred to him, it was for the arbitrator to decide that question and that could not have been made subject matter of any H

A objection under Section 30 of the Arbitration Act. It is not necessary for us to closely examine this contention of Shri Salve for the simple reason that when we turn to the Clause itself, we find that even on merits learned counsel for the appellant-State cannot effectively support his contention in the light of the said Clause. The reason is obvious. The said Clause reads as under:-

B “1.9 No claim for delayed payment due to dispute etc. :

No claim for interest or damages will be entertained by the Government with respect to any moneys or balances, which may be lying with Government owing to any dispute, difference; or misunderstanding between the Engineer-in-charge in marking periodical or final payments or in any other respect whatsoever.”

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A mere look at the Clause shows that the claim for interest by way of damages was not to be entertained against the Government with respect to only a specified type of amount, namely, any moneys or balances which may be lying with the Government owing to any dispute, difference between the

D Engineer-in-Charge and the contractor; or misunderstanding between the Engineer-in-Charge and the contractor in marking periodical or final payments or in any other respect whatsoever. The words “or in any other respect whatsoever” also referred to the dispute pertaining to the moneys or balances which may be lying with the Government pursuant to the agreement meaning

E thereby security deposit or retention money or any other amount which might have been with the Government and refund of which might have been withheld by the Government. The claim for damages or claim for payment for the work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government. Consequently, on the express language of this Clause, there is no prohibition which could be called

F out against the respondent-contractor that he could not raise the claim for interest by way of damages before the arbitrator on the relevant items placed for adjudication. In fact, similar contention has been repelled by the aforesaid decision of the 3-Judge Bench of this Court in paragraphs 24 and 25 of the Report. It has been clearly observed in paragraphs 25 of the Report that under

G Clause 4 which was pressed in service, no interest was payable on the amount withheld. The claim which was made in that case by Durga Parshad before the arbitrator was for the non-payment of the full amount as per final bill submitted by him and the interest so awarded on the said amount was clearly not covered by Clause 4 of the contract. Similar is the facts situation in the present case and the wording of the Clause in question is also of an identical

H nature. Therefore, the contention of learned senior counsel for the appellant-

State that Clause 1.9 barred the consideration of such a claim for interest cannot be sustained. The High Court, therefore, rightly came to the conclusion that that Clause was not a bar to such a claim. Further contention of learned senior counsel for the appellant that the claims regarding cutting of hardrock were wrongly granted, cannot be made subject matter of an objection under Section 30 of the Arbitration Act which could have been agitated for getting any reduction of the amount as awarded by the arbitrator. It was a question purely on merits of the award which could not be agitated in objections as they were not in the nature of an appeal against the award before the court below. Civil Appeal No. 7643 of 1995 is disposed of accordingly.

Point No. 4

In the cross-appeal being Civil Appeal arising out of Special Leave Petition (Civil) No. 6307 of 1995, learned senior counsel for the respondent-State vehemently submitted that as per Section 24 of the U.P. Civil Laws (Reforms and Amendment) Act, 1976, paragraph 7-A was inserted in the First Schedule to the Arbitration Act, 1940 which barred the power of the arbitrator in granting more than 6 per cent interest on the awarded amount and, therefore, the High Court was justified in reducing 15.5 per cent interest to 6 per cent in the light of the said provision. The aforesaid contention of the learned counsel has to be examined in the light of what the High Court stated in para 9 of the impugned judgment. It has observed that when the arbitrator has found interest at the rate of 6 per cent per annum to be reasonable, the trial court ought to have adopted the same rate of interest for being awarded to the contractor. In our view, the said reasoning cannot be sustained for the simple reason that even if aforesaid Paragraph 7-A which was not pressed in service before the High Court could be resorted to, it only barred the power of the arbitrator and not of the court. Further, it could not be said that the arbitrator had found the interest at the rate of 6 per cent per annum to be reasonable. In fact, he had no authority or power to go beyond 6 per cent interest. So far as the court is concerned, it is in its discretion to award 15.5 per cent interest on the decretal amount from the date of the decree till satisfaction of the decree. As that was within the realm of the discretionary jurisdiction of the trial court it could not have been set aside by the High Court in appeal. The cross-appeal will stand allowed to this extent by modifying the judgment and order of the High Court by substituting 15.5 per cent interest instead of 6 per cent interest per annum from the date of the decree till payment.

Consequently, Civil Appeal No. 7643 of 1995 is dismissed and the Civil

A Appeal arising out of Special Leave Petition (Civil) No. 6307 of 1995 is allowed to the aforesaid limited extent. In the net result, the impugned judgment of the High Court is modified to the extent indicated and the order of the trial court will stand wholly confirmed. In the facts and circumstances of the present case, there will be no order as to costs.

B Interim orders will stand vacated. The security furnished by the respondent-contractor in compliance with the earlier interim order will stand discharged.

S.V.K.I.

Appeal of the State dismissed and
Appeal of Contractor partly allowed.