

## AWARD OF INTEREST

### JAIPRAKASH ASSOCIATES LTD V. TEHRI HYDRO DEVELOPMENT CORPORATION INDIA LTD. 2019 SCC ONLINE SC 143

Supreme Court of India; 3 judge bench, **A.K. Sikri**, S. Abdul Nazeer, and M.R. Shah JJ; decided on 07 February 2019

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Grant of pendente lite interest when the agreement barred it; award set aside on that point

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The agreement between the parties had an arbitration clause. Two claims raised by Jaiprakash were referred to arbitration under the ACA. By majority, the tribunal allowed the claims to a certain extent, and also granted interest at the rate of 10% per annum from the date of invocation of arbitration till 60 days after the award. Future interest at the rate of 18% *per annum* till the date of payment was also awarded.

The clauses on interest were as follows:

#### **“Clause 50.0 Interest on money due to the contractor**

No omission on the part of the Engineer in charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his account, be due to him.

#### **Clause 51.0 No claim for delayed payment due to dispute etc.**

No claim for interest or damage will be entertained or be payable by the corporation in respect of any amount or balance which may be lying with the corporation owing to nay (*sic* any) dispute, different or misunderstanding between the parties or in respect of any delay or omission on the part of the Engineer in charge in making intermediate or final payments on in any other respect whatsoever.”

The tribunal concluded that the agreement did not authorize interest but granted it nonetheless relying on the *Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age*, (1996) 1 SCC 516 [A.M. Ahmadi CJ and S.C. Sen JJ]. A single-judge bench of the High Court quashed the award on the point of interest. A 2-judge bench upheld that order in an intra-court appeal.

The dispute came to the Supreme Court, which upheld the decision of the High Court's single-judge order. This is how the Supreme Court arrived at its conclusions: -

- (i) The court “deduced from the various judgments” the principles. In the course, the court also referred to “a recent judgment” *Reliance Cellulose Products Limited v. Oil and Natural Gas Corporation Limited* (2018) 9 SCC 266 (R.F. Nariman and Indu Malhotra JJ) where “the entire case law on the subject is revisited and legal position reemphasised”. The court said that in *Reliance Cellulose*, a case under the Arbitration Act, 1940:
  - a. It was held that under the Arbitration Act, 1940, an arbitrator has the power to grant pre-reference interest under the Interest Act, 1978 as well as *pendente lite* and future interest. But this is “constricted only by the fact that an agreement between the parties may contain an express bar.”
  - b. A test of strict construction of such clauses was evolved and it was held that the bar must be clear and express.
  - c. Further, “unless a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever, leading the Court to find an express bar against payment of interest, a clause which merely states that no interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding *pendente lite* interest”.
  - d. Further, “*pendente lite* interest depends upon the phraseology used in the agreement, clauses conferring power relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on

- what items the power to award interest has been taken away and for which period.”
- e. The position under Section 31(7) ACA is wholly different because this provision “sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered.”
  - (ii) The court looked at the agreement and held that clauses 50 and 51 of General Conditions of Contract (“GCC”) put a bar on the arbitral tribunal to award interest. It noted that right from the stage of arbitration proceedings till the High Court, the clauses were interpreted to contain a bar. Even the majority award recognized that.
  - (iii) The court referred to *Board of Trustees for the Port of Calcutta* case relying on which the tribunal had nonetheless granted interest. It held that that case was inapplicable because:
    - a. It was a judgment under the Arbitration Act, 1940.
    - b. The “legal position in this behalf have (*sic* has) taken a paradigm shift” under the ACA which is clarified in *Sayeed Ahmed & Co. v. State of U.P.* (2009) 12 SCC 26 [a 2-judge bench of R.V. Raveendran and P. Sathasivam JJ considered Section 31 (7) (a) ACA and crystallised the legal position that under the ACA, an arbitrator could not award *pendente lite* interest when there was an express bar in the agreement].
  - (iv) The court agreed with the High Court’s reasoning that clauses 50 and 51 of GCC are *pari materia* with the clauses in *Tebri Hydro Development Corporation (THDC) Limited v. Jai Prakash Associates Limited* (2012) 12 SCC 10 where “they have been interpreted by holding that no interest is payable on claim for delayed payment due to the contractor.”
  - (v) The court examined whether “such a construction is contrary” to the judgment in *State of U.P. v. Harish Chandra & Co.* [(1999) 1 SCC 63, 3-judge bench of S.B. Majumdar, S. Saghir Ahmad and K. Venkatasami JJ]. The court held that “the judgment in *Sayeed Ahmed and Company* dis-

tinguishing the restrictive wording in *Harish Chandra*, a case under the 1940 Act, has been consistently followed by this Court in number of cases thereafter". Thus, the court found no reason to deviate from the construction that the agreement did not authorize the grant of interest.

- (vi) The court rejected an argument based on the principle of *ejusdem generis*.