Serial No.01
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HIGH COURT OF MEGHALAYA
AT SHILLONG

Arb.A.No.1/2024

Date of CAV : 20.05.2025
Date of pronouncement : 19.06.2025

Astra Construction Pvt. Ltd. ..... Appellant

Vs.

North Eastern Electric Power Corporation Ltd. (NEEPCO) ..... Respondent

Coram:

Hon'ble Mr. Justice I.P. Mukerji, Chief Justice
Hon'ble Mr. Justice B. Bhattacharjee, Judge

Appearance:

For the Appellant : Mr. P. Jain, Adv with
Ms. S. Nair, Adv

For the Respondent : Mr. K. Agarwal, Sr.Adv with
Mr. D. Senapati, Adv
Dr. P. Agarwal, Adv

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

Note: For proper public information and transparency, any media reporting this judgment is directed to mention the composition of the bench by name of judges, while reporting this judgment/order.

JUDGMENT

(*Delivered by the Hon'ble, the Chief Justice*)

A point of some impotance is involved in this appeal.

There were arbitral proceedings between the parties resulting in an arbitral award in favour of the appellant. In the award the Arbitral Tribunal granted pre-reference and pendente lite interest on awarded claims.

This award was challenged by the respondent in an application under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the "Act of 1996") before the learned Commercial Court, East Khasi Hills, Shillong. The learned judge by a judgment and order dated 15th February, 2024 upheld the substantive part of the award but set aside the grant of pre-reference and pendente lite interest, the ground being that clause 54 of the terms and conditions of the contract between the parties read with Section 31(7) of the Act of 1996 prohibited grant of such interest.

The Appellant appeals to this Court from that part of the judgment and order against them. The respondent has not preferred any appeal from the part upholding the award.

Therefore, the issue in this appeal was confined to the extremely small area relating to grant of pre-reference and pendente lite interest.

I set out Section 31 (7) of the Act of 1996 below:

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.

(b) a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation. – The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978)".

One has to first look at the terms of the contract between the parties, namely clause 54 of the General Conditions of Contract (GCC) to examine whether it bars and if yes, to what extent an interest claim before the arbitral tribunal.

Clause 54 of the contract is in the following terms:

"54.0 <u>No Claim for Delayed Payment due to Dispute Etc</u>.

No claims for interest or damages will be entertained by the Corporation with respect to any money or balance which may be lying with the Corporation owing to any dispute, difference or misunderstanding between the Engineer-in-Charge on the one hand and contractor on the other or with respect to any delay on the part of the Engineer-in-Charge making periodical or final payments or in any other respect whatsoever."

What is the impact of clause 54 on any claim for interest?

Section 31 (7) clearly states that unless expressly agreed to the contrary by the parties, the arbitral tribunal would have power to grant pre-reference and post-arbitral interest.

Assuming that the clause expressly barred grant of interest, on any claim whether by conduct, the respondent revoked this prohibition?

Similarly, worded clauses fell for consideration over several years before the Supreme Court.

The main question before the court was the meaning to be ascribed to the words "or in any other respect whatsoever".

In ***State of U.P. v. Harish Chandra & Co*** with a connected matter reported in ***(1999) 1 SCC 63*** the contract term was as follows:

> "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 the 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."

> The view expressed by *Mr. Justice Majumdar* was:

> "10. 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 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 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 by lying with the Government. Consequently, on the express language of this clause, there is no prohibition which could be culled 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. ….."

The issue once again engaged the attention of the Supreme Court in ***Sayeed Ahmed & Company v. State of Uttar Pradesh & ors*** reported in ***(2009) 12 SCC 26***. The case of *Harish Chandra* was placed before the Supreme Court. The Court distinguished *Harish Chandra* on facts observing that "a different version of clause G-1.09 was considered … but in the present case, clause G-1.09 is significantly different … the bar under clause G-1.09 in this case being absolute, the decision in *Harish Chandra* will not assist the appellant in any manner".

Ratio decidendi is the legal reasoning process by which the conclusion or the decision in a case is made by a judge. It is only these reasons which are binding on a court below. Obviously, if the facts of another case are absolutely similar to the facts of a previous case decided

by a superior court, a judge of the court below is required to apply the same legal reasoning or ratio decidendi and come to the same conclusion. This principle ensures uniformity and consistency in the justice delivery system. Ratio decidendi is quite different from res judicata which is a decision on facts by a court between the same parties. That decision on facts is binding on those parties and cannot be regurgitated in a subsequent proceeding between them, but does not bind any third party.

It follows from the above that once the facts are different a court is not bound by the ratio decidendi of a superior court in an earlier case and is required to apply the law on the given facts.

In my opinion, interpretation and application of clause 54 is partly in the realm of interpretation and ascertainment of a term of the contract which is factual in nature and partly legal reasoning based on those facts.

In ***Jaiprakash Associates Limited (JAL) through its Director v. Tehri Hydro Development Corporation (India) Limited (THDC) through its Director*** reported in ***(2019) 17 SCC 786***, a three-judge bench of the Supreme Court, once again, considered this clause as in the *Sayeed* case and came to the following conclusion:

> "**21.** It is also pertinent to note that the judgment in *Sayeed Ahmed & Co.* distinguishing the restrictive wording in *Harish Chandra* has been consistently followed by this Court in number of cases thereafter. In this scenario, when we find that *Harish Chandra case* which is of the vintage of the 1940 Act and is distinguished in *Sayeed Ahmed & Co.* coupled with the fact that the ratio of *Sayeed Ahmed & Co.* has been consistently followed, there is no reason to deviate from the construction to Clauses 50 and 51 of the GCC given by the Arbitral Tribunal in the first instance as well as the High Court. Above all, these clauses are in pari materia with Clauses 1.2.14 and 1.2.15 of GCC in *THDC* case which was a judgment between the same parties."

I would consider the judgment in ***Jaiprakash Associates Limited (JAL) through its Director v. Tehri Hydro Development Corporation (India) Limited (THDC) through its Director*** reported in ***(2019) 17 SCC 786*** as most relevant because it copiously considered all the judgments in the field. It approved the decision in ***Tehri Hydro Development Corporation Limited & anr. v. Jai Prakash Associates Ltd.*** reported in ***(2012) 12 SCC 10***.

It also considered ***Sayeed Ahmed & Company v. State of Uttar Pradesh & ors*** reported in ***(2009) 12 SCC 26***, ***Sree Kamatchi Amman Constructions v. Railways*** reported in ***(2010) 8 SCC 767***, ***Union of India v. Bright Power Projects (India) Private Limited*** reported in ***(2015) 9 SCC 695***, ***Reliance Cellulose Products Ltd. v. ONGC*** reported in ***(2018) 9 SCC 266***.

Great reliance was placed on paragraph No. 25 of the *Reliance* judgment setting out paragraph Nos.18 and 19 from the *Sayeed* judgment which are set out below:

> "18. In *Harish Chandra* a different version of clause 1.09 was considered. Having regard to the restrictive wording of that clause, this Court held that it did not bar award of interest on a claim for damages or a claim for payments for work done and which was not paid. This Court held that the said clause barred award of interest only on amounts which may be lying with the Government by way of security deposit/retention money or any other amount, refund of which was withheld by the Government.
>
> 19. But in the present case, Clause G1.09 is significantly different. It specifically provides that no interest shall be payable in respect of any money that may become due owing to any dispute, difference or misunderstanding between the Engineer-in-charge and contractor or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or in respect of any other respect whatsoever. The bar under Clause G1.09 in this case being absolute, the decision in *Harish Chandra* will not assist the appellant in any manner."

The principal reason advanced by the Supreme Court in its subsequent decisions departing from *Harish Chandra* was that according to it, the clauses under consideration by it were different from *Harish Chandra*. On interpretation on those clauses, it came to the conclusion, in each of those cases, that the clause completely barred any claim for interest. In *Sayeed's* case, the Supreme Court observed that it was considering "a different version of clause G-1.09".

Therefore, I am entitled to make an interpretation of clause 54.

It is in my opinion it is identical to the clause in *Harish Chandra*. If one ascribes an ordinary, literal and grammatical meaning to the clause, it states that no claim for interest would lie on any money or balance lying with the government because of (i) a dispute regarding payment between the Engineer-in-charge and the contractor; (ii) delay on the part of the Engineer-in-Charge to make payment; and (iii) “any other respect whatsoever.”

Now, (iii) is to be understood as any delayed payment which the Corporation would be making to the contractor from the contractor’s account with it, on account of (i) or (ii) or any other circumstance. “Any other respect” in the clause could only refer to any other circumstance attending delayed payment and any meaning given to it as referring to other claims which the contractor may have against the Corporation would be totally absurd, and a wholly erroneous understanding and interpretation of the english language. Hence, interest claim on deferred payment of the contractor’s money lying with the Corporation which is held up for the above reasons is barred. It does not bar a claim for interest on any other head or an interest on an award on such head of claim. On a

plain, ordinary, literal and grammatical meaning of the clause only this interpretation is tenable and reasonable in my opinion.

This meaning was ascribed to the clause in *Harish Chandra's* case. I would make the same interpretation.

Furthermore, it has been held by the Supreme Court in the other cases that the clauses on which it denied interest claims are different from *Harish Chandra*.

Therefore, on clause 54 which in my opinion is identical in meaning to that in *Harish Chandra*, I am entitled to adopt the same legal reasoning or ratio decidendi as in that case. It does not bar claims for interest on heads of award other than those relating to payment of withheld amounts by the Corporation. It did not bar the arbitral tribunal from awarding interest on payment towards escalation in minimum wages for ₹96,99,848/-, payment of 10% contractor's profit amounting to ₹55,20,000.00/- and claim on account of idle overhead charges from May, 1999 to 31st December, 2000 amounting to ₹32,17,741.00/-. At best interest on the head of the award against serial no.3(a) at page 40 of the award "payment towards unjust deductions towards reinforcement steel and refund of amount deducted" could be denied under the above clause.

Now, having held that clause 54 could only restrain the arbitral tribunal from granting interest on awards on specific claims and did not prohibit it from granting interest on other claims, I turn to the issue of waiver.

Alternatively, it was contended on behalf of the appellant that the respondent had waived its right in the contract barring claim for interest by its subsequent conduct. It was said that the claim of the appellant for interest was not raised in the application under Section 11 of the Act of 1996, in the counter statement or in any argument before the learned arbitrator. It was contended that in ***Union of India v. Susaka Pvt. Ltd.*** reported in ***(2018) 2 SCC 182*** the facts were similar. The point of interest bar in the contract was not taken up to the Division Bench. The Supreme Court held that there was waiver of this right by the Union of India and the claim for interest was upheld.

To this learned counsel for the respondent responded by arguing that Section 31(7) of the Act of 1996 provided for grant of interest for pre-reference and pendente lite period unless expressly agreed. Clause 54 was the express agreement barring such claim. That agreement could only be revoked or varied by another express agreement. Waiver could not be

termed as an express agreement. Hence, the argument of learned counsel for the appellant on this issue could not be sustained. He also submitted that the point had been raised in the affidavit of the relevant application and in the counter statement. He, however, could not deny the contention that the point was not argued before the learned arbitrator.

In Anson's Laws of Contract 31st edition it is stated that "a party, who voluntarily agrees to forbear from insisting on the mode of performance or time of performance which is provided by the contract or forbears from so insisting will be held to have waived the right to require that the contract be performed by the other party in accordance with its terms". *Denning LJ* in ***Charles Rickards L.D. v. Oppenhaim*** reported in ***1950(1) KB 616*** remarked "whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relation. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it".

Therefore, the concept of waiver is based on the doctrine of promissory estoppel.

The plea regarding interest was taken very laconically in the opposition to the Section 11 petition, as well as in the counter statement and not argued before the learned arbitrator. The Supreme Court ruled that the point regarding interest had to be specifically argued before the arbitrator and the court and if not so done, could not be taken in a higher forum. *Mr. Justice Sapre* delivering the judgment of the Supreme Court in *Susaka* held that the Union having failed to urge the point from the stage of the arbitral tribunal to the Division Bench of the High Court, was estopped from taking the point before the Supreme Court. Just making a cursory denial in a pleading would not do. The Union was held to have waived it.

Here also similar was the situation. Therefore, the judgment in the *Susaka* case squarely applies and the respondent is deemed to have waived its right under clause 54 and also its defence based on this clause. It could not take up this point in the appeal before us. Hence, the appellant could claim and the arbitral tribunal could grant pre-reference and pendente lite interest on any claim.

The last point which I have to deal with in this judgment relates to Section 28(3) of the Act of 1996. It is in the following words:

> "**28. Rules applicable to substance of dispute.–** …..
>
> (3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction."

When the legislature has enjoined the arbitral tribunal with the duty of taking "into account the terms of the contract," it is to be implied that the arbitral tribunal would only be expected to consider those terms which are placed before it and not those which are not even relied upon by any party.

Any other interpretation of this Section would result in a most unacceptable state of affairs. I will try to explain. The contract between the parties contains rights and obligations. Now, if certain rights are not urged before the arbitral tribunal, it simply means that the party in whose favour those rights are created is not insisting on them or in other words not insisting on enforcement of a corresponding obligation from the other party. In other words, as very poignantly pointed out by the Supreme Court in the *Susaka's* case, those rights are to be taken as waived. To fix the arbitrator with the duty of looking into the terms and conditions which are not even canvassed before him would result in an award which would be perverse. This is so because it would point to misconduct on the part

of the arbitrator, for enforcing rights and which have been given up and obligation which have been excused.

Hence, the arbitral tribunal rightly did not consider clause 54 of the contract which was not even relied upon before it.

In those circumstances, this appeal succeeds. The impugned order of the learned court below is set aside. The appeal is allowed. No order as to costs.

(B. Bhattacharjee)
Judge

(I.P. Mukerji)
Chief Justice

Meghalaya
19.06.2025
"Lam DR-PS"