



IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 8261-8262 OF 2012

THE STATE OF JHARKHAND

...APPELLANT(S)

VERSUS

THE INDIAN BUILDERS JAMSHEDPUR

...RESPONDENT(S)

JUDGMENT

1. In view of our opinion that *Bharat Drilling & Foundation Treatment Pvt. Ltd. v. State of Jharkhand and Ors*¹ is not an authority for the proposition that an *excepted clause* or a *prohibited claim* in a contract applies only to the employer and not to the Arbitral Tribunal, for the reasons to follow, in order to obviate uncertainty and for clear declaration of law, we are referring *Bharat Drilling* (supra) to a larger bench for reconsideration and authoritative decision. The context in which we have referred the matter to a larger bench

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Reason:

¹ (2009) 16 SCC 705.

2. State of Jharkhand is in appeal against the judgment of the High Court of Jharkhand allowing Section 37² appeal under Arbitration and Conciliation Act, 1996³. The appeal was filed by the respondent-claimant against the judgment of the Civil Court⁴ setting aside the arbitral award allowing the objections filed by State under Section 34. By its award dated 19.04.2007, the Arbitral Tribunal allowed certain claims but the Civil Court set aside the claims 3, 4 and 6 on the ground that they were specifically prohibited under the contract between the parties.

3. Mr. Rajiv Shankar Dwivedi, learned counsel appearing for the State of Jharkhand has made a short submission that the High Court committed a serious error in allowing the appeal on the ground that the issue arising for consideration is covered by decision of this Court in *Bharat Drilling* (supra). Mr. Dwivedi has expressed a serious concern that the decision in *Bharat Drilling* (supra) is being applied, regularly and wrongly, to interpret prohibitory claim clauses in all Government contracts. He would therefore submit that even if the Court may not interfere in the facts of this case, there is a compelling necessity to clarify the position of law. On the other hand, Mr.

² In Arbitration Appeal No. 17 of 2007 dated 11.05.2012.

³ Hereinafter referred to as the 'Act'.

⁴ Sub-Judge-1, Jamshedpur in Misc. Arbitration Case No. 01/2004 dated 19.04.2007.

Manoj C. Mishra, learned counsel appearing for the respondent, supported the decision of the High Court.

4. In view of the concern expressed by Mr. Dwivedi, we agreed to examine the question of law and the principle in *Bharat Drilling* (supra). Before we proceed any further, it is necessary to examine the relevant clauses under the agreement, which are extracted hereinbelow for ready reference;

“4.20.0 CLAIMS:

4.20.2: No claim for idle labour, idle machinery, etc. on any account will be entertained...

4.20.4: No claim shall be entertained for business loss or any such loss.”

5. It is submitted that the Arbitral Tribunal committed a serious error in allowing claim no. 3 (relating to underutilised overheads) when that claim is barred under clause 4.20.2, claim no. 4 (relating to loss due to underutilised tools, plants and machinery) when such claim is clearly barred under contractual clause 4.20.2. Further, it is also contended that claim no. 6 (relating to loss of profit) could not have been granted in the teeth of clause 4.20.4, which specifically declares that “*no claim shall be entertained for business loss or any such loss*”.

6. This submission, however, found favour with the Civil Court accepting Section 34 objections of the State and setting aside the award on claim nos. 3, 4 and 6. When we peruse the judgment of the High Court under Section 37, we find that there is no discussion whatsoever as regards to claim nos. 3, 4 and 6, except for reference and reliance on the order of this Court in *Bharat Drilling* (supra). Placing reliance upon *Bharat Drilling* (supra), without any other discussion or analysis, the High Court proceeded to restore the award as regards claim nos. 3, 4 and 6.

7. As we examined the decision of this Court in *Bharat Drilling* (supra), we find that it was argued therein that, the contractual “*bar against such claims is applied only to the department and not to the Arbitral Tribunal*”. Without examining the contention in detail, the Court proceeded further and referred to the decision of *Board of Trustees For The Port of Calcutta v. Engineers-De-Space-Age*⁵ and set aside the order passed by the High Court and restored the award. Mr. Dwivedi therefore contends that *Bharat Drilling* (supra) does not lay down any law and that it is an order in the facts and circumstances of the case.

8. It is quite evident from the order impugned before us that the High Court has not examined the contractual clauses extracted hereinabove and

⁵ (1996) 1 SCC 516.

has proceeded to dispose of the appeal under the impression that the issue is conclusively covered by the decision of this Court in *Bharat Drilling* (supra). As has been already indicated, in *Bharat Drilling* (supra), the Court has not examined the contractual clauses that have fallen for our consideration herein. Contractual clauses that limit claims are founded on freedom to contract. They are agreements that crystallise informed choices of parties. Explaining the incorporation of party autonomy in the statutory scheme of the Act, this Court in *Central Organisation for Railway Electrification (CORE)*,⁶ explained this position:

“22. The basis of any arbitration is the freedom of the parties to agree to submit their disputes to an individual or to a panel of individuals whose judgment they are prepared to trust and obey. Party autonomy is fundamental to international commercial arbitration because it allows the parties to design the arbitration proceedings to suit their needs and commercial reality. Party autonomy has been described by this Court as the “brooding and guiding spirit” and “backbone” of arbitrations. The principle of minimum judicial interference supplements the autonomy of parties by prohibiting courts from interfering in arbitral proceedings unless mandated by the law. This principle respects the autonomy of the parties to mutually chart the course of the arbitral proceedings.

23. The Arbitration Act has given pre-eminence to party autonomy throughout the arbitral process. The Arbitration Act has used phrases such as “unless otherwise agreed by the parties”, “failing any agreement”, “the parties are free to agree”, “failing such agreement”, and “unless the agreement on the appointment procedure provides other means” to recognize the autonomy of parties to determine the arbitral proceedings. The use of the above phrases also indicates that an arbitrator is bound by the procedures agreed upon between the parties.”

(emphasis supplied)

⁶ 2024 INSC 857; 2024 SCC OnLine SC 3219.

9. Applicability of excepted or prohibitory clauses would primarily depend upon the agreement between the parties, which alone is the guiding principle for the Arbitral Tribunal. In similar circumstances, interpreting the contractual clauses, this Court in *Pam Developments Private Limited v. State of West Bengal*⁷ held as follows;

“12. This submission is persuasive, but the contract clauses speak for themselves. In fact, the High Court did what the arbitrator should have done. Examine what the contract provides. This is not even a matter of interpretation. It is the duty of every Arbitral Tribunal and court alike and without exception, for contract is the foundation of the legal relationship. Having considered the above referred clauses in the contract the High Court came to the conclusion that awarding any amount towards idle, machinery, etc. is prohibited under the “Special Terms and Conditions” of the contract. The arbitrator did not even refer to the contractual provisions and the District Court dismissed the objections under Section 34 with a standard phrase as extracted hereinabove. The High Court exercising jurisdiction under Section 37 did its duty and we are of the opinion that the conclusions of the High Court are correct and cannot be interfered with.”

(emphasis supplied)

10. Returning to *Bharat Drilling* (supra), we also notice that the Court referred to *Port of Calcutta* (supra) concerning *payment of interest*, which stands on a completely different footing. This is because, jurisdiction relating to grant of interest is sourced from Section 31(7) of the Act. *Pam Developments* (supra) articulates this principle in the following manner;

“23. The power of the arbitrator to grant pre-reference interest, pendente lite interest, and post-award interest under Section 31(7) of the Act is fairly well-settled. The judicial determinations also highlight the difference in the position of law under the Arbitration Act, 1940. The following propositions can be summarised from a survey of these cases:

⁷ (2024) 10 SCC 715.

23.1. *Under the Arbitration Act, 1940, there was no specific provision that empowered an arbitrator to grant interest. However, through judicial pronouncements, this Court has affirmed the power of the arbitrator to grant pre-reference, pendente lite, and post-award interest on the rationale that a person who has been deprived of the use of money to which he is legitimately entitled has a right to be compensated for the same.⁸ When the agreement does not prohibit the grant of interest and a party claims interest, it is presumed that interest is an implied term of the agreement, and therefore, the arbitrator has the power to decide the same.⁹*

23.2. *Under the 1940 Act, this Court has adopted a strict construction of contractual clauses that prohibit the grant of interest and has held that the arbitrator has the power to award interest unless there is an express, specific provision that excludes the jurisdiction of the arbitrator¹⁰ from awarding interest for the dispute in question¹¹.*

23.3. *Under the 1996 Act, the power of the arbitrator to grant interest is governed by the statutory provision in Section 31(7). This provision has two parts. Under clause (a), the arbitrator can award interest for the period between the date of cause of action to the date of the award, unless otherwise agreed by the parties. Clause (b) provides that unless the award directs otherwise, the sum directed to be paid by an arbitral award shall carry interest @ 2% higher than the current rate of interest, from the date of the award to the date of payment.*

23.4. *The wording of Section 31(7)(a) marks a departure from the Arbitration Act, 1940 in two ways : first, it does not make an explicit distinction between pre-reference and pendente lite interest as both of them are provided for under this sub-section; second, it sanctifies party autonomy and restricts the power to grant pre-reference and pendente lite interest the moment the agreement bars payment of interest, even if it is not a specific bar against the arbitrator.¹²*

⁸ State of Orissa v. G.C. Roy, (1992) 1 SCC 508, para 43(i). Also see State of Orissa v. N.C. Budharaj, (2001) 2 SCC 721; Union of India v. Krafters Engg. & Leasing (P) Ltd., (2011) 7 SCC 279 : (2011) 3 SCC (Civ) 533

⁹ State of Orissa v. G.C. Roy, (1992) 1 SCC 508, paras 43 (iv) & 44.

¹⁰ Port of Calcutta v. Engineers-De-Space-Age, (1996) 1 SCC 516, paras 4 and 5; Madnani Construction Corp. (P) Ltd. v. Union of India, (2010) 1 SCC 549 : (2010) 1 SCC (Civ) 168; Tehri Hydro Development Corp. Ltd. v. Jai Prakash Associates Ltd., (2012) 12 SCC 10 : (2013) 2 SCC (Civ) 122, paras 18-20; Union of India v. Ambica Construction, (2016) 6 SCC 36 : (2016) 3 SCC (Civ) 36 (First Ambica Construction Case); Ambica Construction v. Union of India, (2017) 14 SCC 323 : (2018) 1 SCC (Civ) 257 (Second Ambica Construction Case); Raveechee & Co. v. Union of India, (2018) 7 SCC 664 : (2018) 3 SCC (Civ) 711; Reliance Cellulose Products Ltd. v. ONGC Ltd., (2018) 9 SCC 266 : (2018) 4 SCC (Civ) 351.

¹¹ State of U.P. v. Harish Chandra, (1999) 1 SCC 63.

¹² Sayeed Ahmed & Co. v. State of U.P., (2009) 12 SCC 26, paras 14, 23, 24 : (2009) 4 SCC (Civ) 629; Union of India v. Saraswat Trading Agency, (2009) 16 SCC 504 : (2011) 3 SCC (Civ) 499; Sree Kamatchi Amman Constructions v. Railways, (2010) 8 SCC 767, para 19 : (2010) 3 SCC (Civ) 575; Union

23.5. The power of the arbitrator to award pre-reference and pendente lite interest is not restricted when the agreement is silent on whether interest can be awarded¹³ or does not contain a specific term that prohibits the same¹⁴.

23.6. While pendente lite interest is a matter of procedural law, pre-reference interest is governed by substantive law.¹⁵ Therefore, the grant of pre-reference interest cannot be sourced solely in Section 31(7)(a) (which is a procedural law), but must be based on an agreement between the parties (express or implied), statutory provision (such as Section 3 of the Interest Act, 1978), or proof of mercantile usage¹⁶.

(emphasis supplied)

11. As issues relating to payment of interest arising under Section 31(7) of the Act stand on a different footing from that of contractual clauses excepting or prohibiting certain claims, we are of the opinion that the judgment in *Bharat Drilling* (supra), relying on the judgment of this Court in *Port of Calcutta* (supra), dealing with the principle of grant of interest *pendente lite*, is not appropriate. Further, we are also of the opinion that the approach adopted in *Bharat Drilling* (supra) is not in tune with the principles laid down by this Court in the recent decisions of *Cox and Kings Ltd. v. SAP India Private Ltd.*¹⁷,

of India v. Bright Power Projects (India) (P) Ltd., (2015) 9 SCC 695, para 13 : (2015) 4 SCC (Civ) 702; Reliance Cellulose Products Ltd. v. ONGC Ltd., (2018) 9 SCC 266, para 24 : (2018) 4 SCC (Civ) 351; Jaiprakash Associates Ltd. v. Tehri Hydro Development Corpn. (India) Ltd., (2019) 17 SCC 786, paras 13-15 : (2020) 3 SCC (Civ) 605; Delhi Airport Metro Express (P) Ltd. v. DMRC, (2022) 9 SCC 286, paras 16-20, 24 : (2022) 4 SCC (Civ) 623.

¹³ Jaiprakash Associates Ltd. v. Tehri Hydro Development Corpn. (India) Ltd., (2019) 17 SCC 786, para 13.2.

¹⁴ Oriental Structural Engineers (P) Ltd. v. State of Kerala, (2021) 6 SCC 150, paras 15-18: (2021) 3 SCC (Civ) 548.

¹⁵ Central Bank of India v. Ravindra, (2002) 1 SCC 367, para 39 following State of Orissa v. G.C. Roy, (1992) 1 SCC 508, para 43(v).

¹⁶ Central Bank of India v. Ravindra, (2002) 1 SCC 367, para 39; Central Coop. Bank Ltd. v. S. Kamalaveni Sundaram, (2011) 1 SCC 790, para 13 : (2011) 1 SCC (Civ) 331.

¹⁷ 2024 4 SCC 1.

CORE (supra) and *In Re: Interplay Between Arbitration Agreements Under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899*¹⁸.

12. In view of the above discussion and in order to ensure clarity and consistency, we are of the opinion that the ratio of *Bharat Drilling* requires to be reconsidered. In this view of the matter, we direct the registry to place our judgment and order before the Hon'ble Chief Justice for appropriate orders for placing the matter before a larger bench of appropriate strength.

.....J.
[PAMIDIGHANTAM SRI NARASIMHA]

.....J.
[ATUL S. CHANDURKAR]

NEW DELHI;
DECEMBER 05, 2025

¹⁸ 2023 SCC OnLine SC 1666.