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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 29.11.2019

Pronounced on: 19.05.2020

+ O.M.P. 200/2015

ASHI LIMITED

..... Petitioner

Through Mr. Angad Mehta, Advocate.

versus

UNION OF INDIA

..... Respondent

Through Mr. Jitendra Kumar Singh,
Standing Counsel for Railways
(UOI) with Mr. Amit Kumar and
Mr. Saurabh Sharma, Advocates.

+ O.M.P. 210/2015 and I.A. No. 4969/2015

UNION OF INDIA

..... Petitioner

Through Mr. Jitendra Kumar Singh,
Standing Counsel for Railways
(UOI) with Mr. Amit Kumar and
Mr. Saurabh Sharma, Advocates.

versus

M/S. ASHI PRIVATE LIMITED

..... Respondent

Through Mr. Angad Mehta, Advocate.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petitions have been filed challenging an Award dated 20.10.2014. OMP 200/2015 is filed by M/s. Ashi Private Limited (hereinafter referred to as 'Petitioner') and OMP 210/2015 is filed by the Union of India (hereinafter referred to as 'Respondent') challenging some

portions of the same Award dated 20.10.2014. Since challenge in both the petitions is to the same Award and common questions of fact and law arise, the petitions are being disposed of by a common judgment.

2. Shorn of unnecessary details, the brief facts are that a contract agreement was entered into between Chief Engineer/DSP Northern Railway and the Petitioner on 10.06.2003 for manufacture and supply of 3,29,000 pre-stressed concrete (hereinafter referred to as 'PSC') sleepers. Total value of the contract was Rs. 23,24,05,600/-, @ ex-works unit rate of Rs. 706.40 per sleeper, subject to escalation/de-escalation as per the Agreement.

3. Petitioner commenced the supplies and some of these sleepers laid by the Respondent on the Delhi-Shahdara-Shamli-Saharanpur Section developed cracks. Vide letter dated 09.07.2003, Respondent advised the Petitioner to suspend production and dispatch, till further instructions. Subsequent to the letter, inspections of the factory were carried out by Research Design and Standards Organization (hereinafter referred to as 'RDSO') and Northern Railway and as per their Report, certain deficiencies were found in the manufacturing process.

4. Petitioner submitted a response to the report, including an Action Taken Report on 28.07.2003, and requested for resumption of production. This was followed by another Compliance Report dated 03.08.2003 addressed to RDSO. The CE/TSP wrote to the Executive Director (Track M), Railway Board on 08.08.2003 giving its observation on the issue of resumption of production, disposal of sleepers, awaiting inspection/dispatch and replacement of failed sleepers and sought further

directions. Another inspection was thereafter carried out at the factory of the Petitioner by Vigilance Department of the Railways.

5. It is the case of the Petitioner that no communication was received by the Petitioner, thereafter to resume production or for disposal of sleepers, already manufactured and nor were they intimated of any deficiencies, that could be rectified.

6. Petitioner avers that it made several representations to various authorities of the Respondent. On 31.10.2003, Executive Director (Track) issued a Memorandum to the Petitioner proposing to ban business along with Articles of Charges and asked the Petitioner to show cause against the action proposed. Petitioner replied to the Show Cause Notice on 4.12.2003 denying the allegations made and enclosed a report of the Technical Consultant appointed by them to investigate the cause of cracks in the sleepers. Respondent issued a corrigendum to the Notice on 08.12.2003 and the Petitioner replied to the same vide letter dated 24.12.2003. Finally, Respondent informed the Petitioner vide its letter dated 08.09.2005 that the Railway Board had decided to ban business dealings with the Petitioner permanently, with effect from the date of issue of the letter.

7. At this stage, litigation ensued between the parties and needs a mention. Petitioner challenged the said order before this Court by filing a Civil Writ Petition. The Court quashed the order on the ground that it was a non-speaking order and remitted the matter back to the Respondent to comply with principles of natural justice and pass a speaking order. Respondent thereafter passed a speaking order on 24.04.2006, after hearing the parties and the order is a detailed and lengthy one. Vide the

said order, Respondent banned business dealings with the Petitioner and its allied/sister concerns/partners for a period of five years, since the suspension of work, which was on 09.07.2003. In addition, Petitioner was directed to replace all defective sleepers supplied to the Respondent at its own cost.

8. The said order was challenged by the Petitioner by filing a writ petition being W.P.(C) 9840-41/2006 before this Court.

9. During the pendency of the said petition, Respondent floated Tenders for manufacture and supply of BG PSC Line Sleepers. Petitioner, desirous of participating in the Tender sought a review of the Banning Order. On 24.07.2007, Respondent passed the following order:

“Banning of business with your firm has been reviewed and it has been decided to permit you to participate in the forthcoming tender for manufacture and supply of BG PSC Line Sleeper subject to the condition of withdrawal of the writ petitions filed in the Hon'ble Delhi High Court against the banning of business.

You are requested to take immediate necessary action as the next tender for manufacture and supply of BG PSC Line sleepers is likely to be opened in Railway Board by the end of August 2007.”

10. Petitioner moved an application in the pending writ petition. The application was listed before the Court on 23.08.2007. Notice was issued and was accepted by the counsel for the Respondent. Petitioner pointed out to the Court that it had received a letter on 24.07.2007 to the effect that the Respondent had reviewed the entire matter and withdrawn the banning order. In these circumstances, the Petitioner wanted to withdraw

the petition with liberty to approach the Court later, if the occasion so arose, in respect of any other cause of action. This was also without prejudice to the rights in the pending arbitration proceedings. The Court recorded the submission of the counsel for the Petitioner in the presence of the counsel for the Respondent and permitted withdrawal of the petition with the liberty sought. The order is a short one and is extracted hereunder for ready reference:

“..... The applicant received a letter on 24th July, 2007 to the effect that the respondents have reviewed the entire matter and withdrawn the banning order. In these circumstances the Petitioner wishes to withdraw this petition but with liberty to approach this Court on a latter date if the occasion so arises in respect of any other cause of action. Counsel also submitted that this shall be without prejudice to the rights and contentions in the pending arbitration proceedings. Application allowed. The liberty as prayed for is granted.”

11. In the meantime, arbitration started between the parties and the Petitioner filed its Statement of Claim making the following Claims:

1. *Claim No. 1:*
A sum of Rs 29,52,585 due and payable under invoice Nos. bearing No. 123 dated 16-6-2003 for Rs 11,76,037/-, No. 124 dated 16-6-2003 for Rs 8,41,306 and No. 125 dated 28-6-2003 for Rs 9,35,242/- towards supply of concrete sleepers to the Respondent.
2. *Claim No. 2:*
A sum of Rs. 11,46,9911.30 plus taxes and duties on account of non-approval of the updated price of concrete sleepers.
3. *Claim No. 3:*

A sum of Rs. 83,917.47/- plus taxes and duties towards the final rate of sleepers calculated as per the PVC Clause No. 14 of the Contract Agreement.

4. Claim No. 4:

A sum of Rs. 65,71,851/-, being 90% of the price of inspected sleepers to be paid against Inspection Certificate towards invoices no. Appellant/CSD/4/2003-2004 dated 25-06-2003 for Rs. 17,66,777/-, Appellant/CSD/5/2003-04 dated 26-06-2003 for Rs. 10,43,282/-, APL/CDS/6/2003-04 dated 04-07-2003 for an amount of Rs. 18,46,883/- and APL/CDS/7/2003-04 dated 25-06-2003 for an amount of Rs. 19,14,909/-, plus balance 10% and the escalation amount.

5. Claim No.5:

Allow the Claim of the Claimant for an amount of Rs.99,61,750/- towards 12,863 sleepers which have been manufactured by the Claimant, the delivery of which the Respondent have failed to take and make payment for them.

6. Claim No. 6:

Allow the Claim of the Claimant for an amount of Rs. 10,65,37,503.60/- towards loss suffered by the Claimant as a result of the Respondent keeping the factory closed.

7. Claim No. 7:

Allow the Claim of the Claimant for an amount of Rs. 1,70,9811/- on account of loss suffered by the Claimant due to disposing off the suspect quality/rejected cement in the market at a lower price.

8. Claim No. 8:

Allow the Claim of the Claimant for an amount or Rs. 2,47,09,972.67/- towards loss of profit suffered by the Claimant as a direct consequence of the illegal and perverse suspension of business since 9-7-2003 till date.

9. Claim No. 9:

Award future and pendente lite interest to the Claimant @ 18% per annum, on all the aforesaid Claims. ”

12. Respondent filed its Statement of Defence and also raised Counter Claims, claiming Cost of Arbitration and Cost of the Alleged Defective Sleepers and direct and indirect costs towards their replacement. Written submissions were filed by the parties.

Case of the Petitioner on suspension of the Contract before the Arbitrator

13. Petitioner claimed that suspension was ordered by the Respondent without any provision in the Contract and without any cause while keeping the Contract alive at the same time. It was urged that during this period, Petitioner had to incur various expenses to maintain the factory in readiness so as to resume production, if ordered to do so. Despite several representations to the Respondent to permit commencement of production and dispatch, no response was received save and except the Show Cause Notice and Banning Order. Notwithstanding such action/inaction of the Respondent, it kept on asking the Petitioner to extend the Performance Bank Guarantee which clearly amounted to an act of keeping the Contract alive.

Case of the Respondent on suspension of the Contract before the Arbitrator

14. Respondent urged that the decision of suspension was taken in view of the sleepers being of suspect quality, making it necessary to investigate the manufacturing process and quality control measures. Several deficiencies were found and therefore a 'Banning Order' was issued. Petitioner produced sub-standard sleepers without following the specifications of the Contract and Respondent is thus, not liable for any

expenditure incurred in maintaining the factory. The original delivery period under the Contract was over on 31.3.2005 and Petitioner never requested the Respondent to extend the delivery period and the Contract thus came to an end after the said date. Any expenditure towards maintaining the factory, after original delivery period was over, was for the Petitioner to bear. Extension of PBG was sought for replacement of the defective sleepers and not to keep the Contract alive for further supplies.

15. The Arbitrator decided the said issue as under:

“There is no explicit provision in the contract for suspension of manufacturing and dispatch of sleepers. However, it seems reasonable that if the Respondents being the purchasers suspect inadequacies in manufacturing process leading to production of sleepers with inadequate or sub-standard quality, it may order the manufacturer to temporarily stop the production so as to investigate the deficiencies and take corrective measures to obtain the desired quality. There is an implied power to suspend the dealing or purchase, vesting in the purchaser who has also power to terminate the dealings, in the event of the goods being found of sub-standard or suspect quality. However such a suspension has obviously to be for minimal period, wherein the deficiencies on the part of the manufacturer can be removed, and there should also be prompt action on the part of the purchaser to notify the deficiencies and permit resuming of production at the earliest upon satisfactory rectification of the deficiencies. It is to be noted that rigorous insistence on supply of quality sleepers is in public interest. Thousands and lacs of people travel in trains and defective or substandard sleepers resulting in an accident can be a cause for loss of human lives.

In this case, the Respondents, being the purchaser, ordered suspension of manufacturing and dispatches on 09.07.2003.

After the inspection of factory premises by the Respondents and reporting the deficiencies in the manufacturing processes, the Claimants submitted a response and action taken report on 28.07.2003 which was followed by another Compliance Report on 03.08.2003. However the Respondents neither advised the Claimants to commence the manufacturing nor for any further action needed in rectification of deficiencies nor for termination of the contract in case the contractor was considered to be in breach thereof. Rather the Respondents issued a Show Cause Notice on 31.10.2003 to the Claimants asking them to show cause as to why business dealing may not be banned with them. Eventually on 08.05.2006 an order of banning business for 5 years was issued which is a speaking order.

I find no merit in the submission of the Claimants that they continued to maintain the factory premises in the hope that their business with the Respondents would be resumed in spite of order of banning. This may be true of the period during which the purchase of sleepers was suspended, but this cannot be true for the period falling after the decision to ban the dealings with the Claimants was taken. A decision to ban the business is clear indication on the part of the Respondents that they were no longer desirous of buying of sleepers from the Claimant. If the Claimants continued to keep and maintain the factory premises after the banning order dt.08.05.2006 then they did so at their own risk. The Respondents cannot be held liable or fastened with any liability for any costs and expenses incurred by the Claimants on maintaining the factory premises after the decision of banning was communicated to the Claimants. The Claimants in fact took action to dispose of the sleepers lying in its premises to other clients. Thus it would be reasonable to hold that for the period of suspension the manufacturer could have had a reasonable ground to maintain the factory premises but not after the date of order banning the business.

As far as the Respondent's argument of Claimants not applying for extension of Delivery Period (DP) goes, it is more than evident that the Claimants had served numerous requests upon the Respondents asking for a decision regarding commencement of production on which there was no response from the Respondents save the Show Cause notice for banning business and the subsequent order for banning business. Under these circumstances the Claimants can not be faulted for not applying for extension of DP and the Respondents can not be absolved of their responsibility of conveying a clear decision on commencement or otherwise of the production after having once ordered suspension of the same.

The manufacturing by the Claimants came to be suspended in view of order dated 09.07.2003 of the Respondents. The Claimants submitted Compliance Report, Claiming to have cured the deficiencies, on 28.07.2003 and again on 03.08.2003, in continuation of the earlier one. A further period of one month from the date of submission of compliance report is considered reasonable for the Respondents to take decision on the same. If the Respondents were not satisfied with the Compliance Report of the Claimants then the Respondents should have said so by communicating their reasons for the opinion formed duly intimating the further course of action under the contract i.e. either further deficiencies to be rectified or termination of the contract. Nothing such was done. Notice to show cause against banning was issued on 31.10.2003. The decision to ban was taken on 24.04.2006 (by speaking order, in compliance with the order of the High Court, which order has become final in view of the Claimants having filed a Writ Petition their against and then having withdrawn the same). After the date of communicating speaking order of banning, a period of one month is considered reasonable for the Claimants to wind up the business. Thus, in my opinion, the Claimants are entitled to

reasonable amount of costs and expenses for the period 03.09.2003 to 08.06.2006 (one month after the date i.e. 08.05.2006 on which the order dt. 24-04-2006 was received by the claimants) where after the Claimants cannot make any Claim against the Respondents if they continued to maintain the factory.”

16. The next issue framed by the Arbitrator was regarding the quality of sleepers supplied by the Petitioner.

Case of the Petitioner

17. Petitioner contends that the sleepers were required to be manufactured as per design, specification, manufacturing process, inspection and tests stipulated by the Respondent. Manufacturing process was supervised at every stage by representatives of the Respondent and the incoming raw material was cleared by Respondent at the source of supply. After production, sleepers were put through tests under supervision of the Inspecting Engineer etc. of the Respondent. Cement was procured from suppliers approved or nominated by Respondent. Thus the entire control on all aspects of manufacturing was with the Respondent and no fault can be found with the Petitioner.

Case of the Respondent

18. Respondent urged that Clause 4.6.1 of the Indian Railway Standard Conditions of Contract (hereinafter referred to as IRSCC) of Concrete Sleepers which forms part of the Contract provides that manufacturer shall engage qualified persons for testing and manufacturing. Clause 21.1 mandates the contractor to guarantee that the sleepers would be manufactured in accordance with specifications and Clause 21.2 guarantees that sleepers will be free from defects in material and

workmanship. The role of Inspecting Engineer does not absolve Petitioner of its responsibility. Assuming the Engineer erred in discharging its duty in pointing out the deficiency, Petitioner cannot escape its liability.

19. The Arbitrator decided the said issue as under:

“Having considered the arguments and facts put forth by both the parties, it is a reasonable conclusion that the primary responsibility of producing goods as per specifications is on the manufacturer. The contract has been awarded by the Respondents to the Claimants to manufacture and supply sleepers as per stipulated drawing and specifications. The manufacturer can not be absolved of its responsibility in ensuring stipulated processes and quality control notwithstanding any oversight in inspection by the purchaser which is to assure itself of the compliance of the stipulated processes by the manufacturer. Though the cement was to be procured from the suppliers approved/nominated by the Respondents, it does not absolve the Claimant's responsibility of procuring cement of stipulated quality, more so when the clause .4,6.1 of the specifications expressly requires the manufacturer of sleepers to test the cement. That the deficiencies noticed in the manufacturing procedures during the investigations should not have been allowed to happen is primarily the responsibility of the manufacturer. An Inspecting Engineer could have only pointed out the deficiencies. Any failure of the Inspecting Engineer (assuming it to be so) cannot be taken as a shelter to dilute manufacturer's responsibility to produce the sleepers as per the specifications, Power to inspect and test the sleepers at any stage of manufacturing process is a power retained by the purchaser to safeguard its own interest, but it cannot be a substitute for Claimants own responsibility to produce quality goods nor can it be used as a shelter to protect sub-standard quality of sleepers.”

20. The third and the final issue framed and decided by the Arbitrator was whether the sleepers were defective or not.

Case of the Petitioner

21. Petitioner argued that on the same Railway line, sleepers supplied by another manufacturer had also developed cracks. Sleepers cracked due to zero Clean Ballast Cushion; Senior Divisional Engineer had advised laying the sleepers by PRT as there was no Clean Ballast Cushion in the Section; no follow up tamping was done; trains were permitted to run at full speed without restrictions; no complaints were received from other consignees of the same sleepers.

Case of the Respondent

22. Respondent argued that after noticing cracks, investigations were conducted by Northern Railway, RDSO and Vigilance Department and deficiencies were noted in the manufacturing process.

23. The Arbitrator decided the said issue as under:

"I have carefully considered this document; the original query to which response has been given is not before the Tribunal. The response given is very general. It is not enough to rebut the case of the Respondents that the work was executed under speed restriction of 20 kmph. On the other hand, I find from the documents the case of the Respondents having been substantiated. In letter dated 08.02.2011, the Chief Engineer/TSP has stated as under-

"The record of the speed restriction is not available being older than 3 years, however, it is clear from relevant documents that the work of TSR was done at speed restriction of 20 kmph (copy enclosed as Annexure-A), which was normalized during various sequences of work as per Para No. 308 of IRPM. The work was done by TRT followed

by Tamping Machines DUO 8036 & 8045. The track was stabilized by DGS 281 (copy of progress report of TRT, DUO 8036, DUO 8045 & DGS 281 are enclosed as Annexure-B) ”.

The Respondents have enclosed a letter written by Senior Divisional Engineer dated 31.03.2006 at the said Annexure-A, informing that the work had been executed under speed restriction.

Secondly, similar contention was raised before the competent authority who passed order for banning of business. The Competent Authority, after examining all the records, while passing speaking order on 24.04.2006, has recorded the finding - "In this case, the work of through sleeper renewal was done at a speed restriction of 20 kmph and full speed was not allowed without packing. Laying of concrete sleepers by TRT (Track Relaying Train) is an established procedure and it is followed all over the Indian Railway."

There is no reason to disbelieve this documentary evidence. This is in addition to the presumption that the requisite work being an official work of the railways, would have been done regularly and in the required manner.

In any case the order of banning was not based on merely cracking of sleepers but had been passed after detailed investigation of manufacturing process and noticing deficiencies in the same, duly notifying the deficiencies to the Claimants and having considered their response on the articles of charges.

The fact that deficiencies were found in the manufacturing process after detailed investigation is adequate to conclude that the cracked sleepers were defective notwithstanding any other alleged deficiencies in the process of laying which may or may not have contributed to cracking. As far as this contract is concerned, the manufacturer was liable to produce sleepers as per specifications; the Claimants failed

to do so, is clear from the fact that deficiencies were noticed upon investigations. Thus the Claimants cannot be absolved of the liability for defects in the manufacturing process in respect of the cracked sleepers.

As per clause 21.2 of the contract, the Contractor is liable to replace the defective sleepers. A question had arisen as to how many sleepers supplied by the Claimants were actually found defective by the Respondents. From Respondents' letter no. 187-S/998/TSO/Quality dt. 12.12.2003 and the details of counter Claims filed by Respondents on 22.06.2011, it is clear that Respondent's Claim for replacement of defective sleepers laid in track is in respect of sleepers laid between Km.17/0 to Km.30/0 of AEN/Shamli of Northern Railway. The respondents had in various arguments claimed that all the 18305 sleepers supplied by the Claimants were defective. Claimants had argued that in spite of declaring the cracked sleepers as defective, the Respondents continued to run trains on the track laid with these sleepers. During the course of hearing the Respondents were asked to submit details of sleepers supplied by Claimants and which were actually replaced due to the cracking. The Respondents have informed that they have replaced 1496 no. of sleepers supplied by Claimants due to cracking, out of the 18305 sleepers supplied by Claimants under this contract and laid between km 17/0 to 30/0 i.e. the location at which the Respondents asked the Claimants to replace defective sleepers laid in track and supplied under this contract and in respect of which the Respondents have raised a counter Claim. The other sleepers which have not been replaced even after several years of laying can reasonably be concluded as serviceable as the Respondents did not eventually consider it necessary to replace them, Hence it would be reasonable to limit the liability of Claimants to replace defective sleepers to 1496 no."

24. Based on the decisions on these three issues, the Arbitrator partially allowed Claim Nos. 1, 2, 3, 6 and 9 in favour of the Petitioner and rejected Claim Nos. 7 and 8 while Claim Nos. 4 and 5 were not

pressed by the Petitioner. Insofar as Counter Claims were concerned, the Arbitrator disallowed Counter Claim No. 1 and partially allowed Counter Claim No. 2.

25. Argument of the counsel for the Petitioner assailing the Award is that the Arbitrator has held the Banning Order dated 08.05.2006 to be legal whereas evidence was placed that the Banning Order was reviewed and withdrawn by the Respondent. Copy of the said order as well as the order of the High Court was placed before the Arbitrator, but this material evidence has been completely overlooked. Supreme Court in the case of *Associate Builders v. DDA, AIR (2015) SC 620*, has clearly held that all evidence must be considered by the Arbitrator and non-consideration is a good ground to set aside the Award. Reliance is also placed on the judgment in case of *M.S.J. Construction (P) Ltd v. Delhi Development Authority & Anr, (2006) 4 Arb.LR 464*.

26. Solely on the basis of this erroneous finding, the Arbitrator has denied the Claim for loss of profit at 10% and that too despite the finding of the Competent Authority that the Petitioner was suffering a financial loss due to suspension of work.

27. It is next contended that the Arbitrator has completely overlooked the evidence on record and held contrary to the evidence, that Petitioner was responsible for the cracks in the sleepers. The evidence clearly indicated that the cracks occurred due to dismantling and laying of 18,305 sleepers and there was also evidence of freight for transportation of the sleepers to the concerned section for relaying.

28. Learned counsel contends that the Arbitrator has misinterpreted and misread the order of the High Court and held that the Suspension

Order and the Banning Order have been confirmed in view of the fact that the Petitioner withdrew the Writ Petition challenging the Banning Order and has failed to appreciate that the Writ Petition was withdrawn on the ground that the Respondent had itself recalled the Banning Order and permitted the Petitioner to bid in the upcoming tender. It is for this reason that the Petitioner reserved its right to approach the Court in case any other cause of action arose and not for the same cause of action. The argument is that the Arbitrator, in fact, could not even have gone into the issue of the Banning Order and relied on it, which has been erroneously done, in most parts of the Award, for the simple reason that the Banning Order stood withdrawn and the withdrawal became a part of the judicial order in favour of the Petitioner.

29. The Arbitrator wrongly held that there is an implied power to suspend, in the event of goods being found sub-standard or of suspect quality, which was in the teeth of its own finding that there are no provisions in the contract for suspension of manufacturing and dispatch of sleepers. It is further contended that the entire basis of the Arbitrator to hold that the Petitioner can make no Claim after 8th June 2006 i.e. one month after the Banning Order is misplaced since there was no Banning Order in existence after the High Court has passed the order taking into account the review order passed by the Railways. In addition, learned counsel has argued with respect to Claim Nos. 1, 6, 7, 8 and 9 which would be discussed in the later part of the judgement.

30. Learned counsel for Respondent argued that the scope of interference in an Arbitral Award under section 34 of the Act is extremely narrow and the grounds have been set out in the Section itself. In the

present case, none of the grounds, such as, the Award being contrary to fundamental policy of India, patent illegality, against the interest of India or justice or morality have been made out by the Petitioner. The grounds raised by the Petitioner would amount to appreciating the evidence before the Tribunal and would be an interference in findings of fact as well as interpretation of contractual provisions, which is impermissible.

31. It is contended that a detailed and speaking order was passed by the Railways on 24.04.2006, after hearing the parties, and it was decided to ban business dealings with the Petitioner for five years from the date of suspension i.e., 09.07.2003. Petitioner is wrong in contending that the Banning Order was withdrawn. In fact, it was confirmed when the Petitioner withdrew the petition before this Court challenging the said Order. Respondent had only modified the Order to permit the Petitioner to participate in the upcoming tender.

32. The sleepers produced by the Petitioner were not as per the specifications required under the contract. The RDSO Report dated 23.07.2003 shows the deficiencies in manufacturing process which were clearly known to the Petitioner and the said deficiencies have been brought out in detail in the Banning Order. The contention of the Petitioner that the sleepers supplied by other firms also developed cracks cannot inure to the advantage of the Petitioner as he was responsible for manufacturing sleepers as per the required specifications and two wrongs cannot make a right. Petitioner has no right to Claim any money on account of any alleged loss as it was continuously supplying sleepers to third parties in the market and earning profit therefrom. Once the Respondent had communicated to the Petitioner to stop manufacturing

and supply, there was no reason why the Petitioner was maintaining the factory for production of the sleepers. Petitioner at no stage claimed any extension in the original Delivery Period and is not entitled to any expenses on account of maintaining the factory premises. Counsel for the Respondent also argues that the inspection was carried out not only by the Respondent but also by an independent agency, RDSO which found the sleepers to be defective. Reliance is placed on the judgements in the case of *Associate Builders v. DDA*, (2015) 3 SCC 49 and *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India Ltd.*, (2019) SCC OnLine SC 677 to argue that the Award impugned in the petition calls for no interference on the parameters laid down for judicial review. Arguments have been made on each of the Claims separately.

33. Insofar as the issue of suspension of manufacturing and dispatch of sleepers is concerned, whilst it is true that there was no provision in the contract enabling the Respondent to suspend the process, however the Arbitrator has rightly held that if the purchaser suspected inadequacies in the manufacturing process, due to which the sleepers were of a substandard quality there was an implied power to suspend the supplies. The Arbitrator observed and rightly so, that rigorous insistence on the supply of quality sleepers was in public interest as lakhs of people travel in trains and defective sleepers could result in accidents, causing loss of human lives. Having so observed, the Arbitrator found that the action of the Respondent in not taking prompt action to notify the deficiency and permit resuming of production at the earliest and having waited till 08.05.2006 to issue a Banning order was not correct. Once the

deficiencies were known, prompt action should have been taken, but the Respondent neither advised the Petitioner to commence manufacturing nor for rectification of deficiencies and neither terminated the Contract for nearly 3 years. In the opinion of the Arbitrator, once the Petitioner had submitted a compliance report on 28.07.2003 and again on 03.08.2003, a period of one month was sufficient for the Respondent to have taken a decision. If they were not satisfied then they should have intimated further course of action and not waited for such a long period to take a decision of banning. In this frame, Arbitrator held that the Petitioner was entitled to reasonable amount of costs and expenses for the period, 03.09.2003 to 28.06.2006. Arbitrator however, rejected the argument of the Petitioner that they maintained the factory premises in the hope that business would be resumed in spite of the order of Banning. According to the Arbitrator, keeping the factory premises operational in the hope of resuming business was justified till the time the decision was not taken to ban dealings with the Petitioner, but once the decision was taken and known to the Petitioner there was no reason for them to continue maintaining the premises and incur expenditure, if any.

34. None of these findings of the Tribunal, in my opinion, deserve any interference. In fact, the Arbitrator has, on one hand condemned the action of the Respondent for keeping the matter in limbo for nearly 3 years, after realizing the deficiency in the sleepers and on the other hand held the Petitioner entitled to benefit of the period, upto the date of the Banning Order. Tribunal rightly held that after the banning order was passed, Petitioner had no reason to continue to keep the factory premises operational and if it did so, it was at its own peril. Insofar as the

suspension is concerned, while there may not be any explicit power in the Contract to suspend the manufacturing and supply, but it cannot be overlooked that the subject-matter of the Contract were sleepers, which are used in track laying process. Any defect in the sleepers could be fatal and cause loss of lives, in case of accidents. Thus, if the Respondent found defects in the sleepers, resorting to suspension was justified, though, not for the prolonged period.

35. Insofar as the quality of the sleepers is concerned, the Arbitrator has made an in-depth analysis of the arguments by both parties. The Arbitrator has come to a finding that there were defects in the sleepers that were supplied and that cracks developed in the sleepers supplied by other manufacturers cannot be a ground for the Petitioner to take shelter under. The Railways conducted detailed investigation in the manufacturing process not only through its own agency but by the RDSO and deficiencies were noticed. Arbitrator also found, as a matter of fact, that the records produced by the Respondent evidenced that the laying of sleepers was followed by requisite tamping. Petitioner's argument that trains were allowed to run without any speed restrictions in spite of deficiencies of ballast and tamping, was also rejected by the Arbitrator on the ground that the Respondent had taken a categorical stand that the work was executed under speed restriction of 20 Kmph and also relied on a letter produced by the Respondent, authored by the Senior Divisional Engineer, dated 31.03.2006. These are clear findings of fact arrived at by the Arbitrator, after examining the respective stands of the parties and the documents on record. It is neither in the scope of interference under Section 34 of the Act to interfere in findings of fact and nor does this

Court have the technical expertise to arrive at findings to the contrary. Once expert bodies like the Vigilance Department and the Technical Department of the Railways and an independent agency, i.e., RDSO found that there were defects in the sleepers and the other documents placed before the Arbitrator supported the stand of the Respondent, that there were no extraneous factors contributing to the defects, there is no reason for this Court to interfere in the findings.

36. Having come to these three broad findings, the Arbitrator examined the Claims made by the Petitioner individually.

Claim no.1: Invoices raised but not paid

37. The Arbitrator after considering the invoices, the amounts paid, number of sleepers supplied and the remaining balance, including the number of sleepers replaced by the Respondent themselves, held as under:

“The amount had been withheld by Respondents after noticing cracking of sleepers and considering the sleepers were of suspect quality. As per contract, the liability of the contractor is to replace defective sleepers. The respondents have replaced a total of 1496 sleepers which had been laid in track and were supplied by Claimants under this contract. The value of these sleepers at basic rate of Rs.706.40 comes to Rs. 12,74,892.64 (after adding the excise duty @16% and CST @4%). Further, against Invoice No. 125, though 90% payment for 4816 sleepers had been done, 495 sleepers out of this were not actually dispatched. Hence the cost of these 495 sleepers is not payable which at basic rate of Rs.706.40 comes to Rs.4,21,839.47 (after adding the excise duty @16% and CST @4%) including the amount already paid and the balance now claimed. This amount also needs to be

deducted from the claim. The rest of the withheld amount Rs.12,55,852.89 should be released to the claimants. This amount consists of the value of sleepers supplied by the Claimants and retained by the Respondents. Hence an amount of Rs.12,55,852.89 is held to be payable to Claimants under this Claim.”

38. The Arbitrator having concluded that cracks had developed in the sleepers supplied, partially allowed the Claim by a simple mathematical calculation. Respondent replaced 1496 sleepers which had been supplied by the Petitioner having a value of Rs. 12,74,892.64/- against Invoice No. 125. 90% payment had been made for 4,816 sleepers, but 495 sleepers had not been supplied. Deduction was made on this account. For the sleepers supplied and retained by the Respondent, the Arbitrator allowed the Claim of the Petitioner. No infirmity can be found with this part of the award.

Claim no. 6: On account of loss suffered by the Petitioner as a result of the Respondents keeping the production suspended.

39. This Claim was under four different heads with the following breakup:

Schedule	Head	Amount (Rs.)
4A	Overhead Expenses- Other	1,21,37,973.37
4B	Interest on Investment	2,93,02,726.00
4C	Labour Cost	4,69,48,948.07
4D	Loss on Fixed Assets	1,81,47,86.16
	Total	10,65,37,503.60

40. This Claim has been allowed by the Arbitrator as under:

Schedule	Brief Description	Amount Claimed (Rs.)	Amount Awarded (Rs.)
4A	Overhead Expenses- General	1,21,37,973.37	12,83,733.26
4B	Interest on Investment	2,93,02,726.00	NIL
4C	Labour Cost	4,69,48,948.07	37,36,755.47
4D	Loss on Fixed Assets	1,81,47,86.16	27,89,829.60
Total		10,65,37,503.60	78,10,318.33

41. Petitioner argued that it suffered losses on account of Overheads etc., as it had to remain in a state of readiness to meet ITS obligations under the Contract. Per contra, Respondent claimed that the Petitioner did not supply the product as per Contract Specifications and the Speaking Order has narrated the defaults, in detail. After the Banning Order was passed on 08.09.2005, Petitioner could not take a stand that it was to remain ready to resume production and therefore, the Claim for years 2006 – 2008 was not sustainable. Respondent also argued that the Claims under Schedule 4A were remote or indirect and without any documentary evidence. For the other sub-heads, it was argued that no interest on investment could be paid as no proof was given of having actually paid the interest and similarly, even with respect to Claim for depreciation of fixed assets, no proof was furnished for the plant and machinery etc., used or continued to be used.

42. The Arbitrator was of the view that the Respondent's suspension was for an unreasonably long period, wherein Petitioner repeatedly asked the Respondent to permit resumption. No decision was conveyed till the Order of Banning was passed. The Arbitrator was thus of the view that

the Petitioner was entitled to compensation, but restricted the period from 03.09.2003 i.e. one month after the Claimants submitted final compliance to the deficiencies noticed during inspection at factory premises, to 08.06.2006 i.e., one month after the revised and speaking order of banning was passed by the Respondents. The Arbitrator has allowed Claims under Schedule 4A for the expenses directly attributable to maintenance of factory premises and production and a detailed calculation represented in a tabular form has been made for the expenses allowed and those disallowed.

43. Claim under Schedule 4B has been disallowed as the Arbitrator found that the Petitioner had not produced any evidence of having paid any such interest or dividend.

44. Under Schedule 4C the Arbitrator observed that the Claim was towards labour costs, taking the same as 19% of the approximate cost of sleepers that were required to be produced in each month, but the production was actually not carried out. Petitioner had not given documentary evidence of having engaged labour to that extent. The Arbitrator observed that, in case the production was to resume, the Petitioner could have engaged labour at any point of time and it was unreasonable that a manufacturer would keep labour in waiting for months altogether. However, claim of costs incurred on security services and labour that was actually employed at the factory and was supported by audited balance sheets, was allowed by the Arbitrator.

45. Claim under Schedule 4D was towards depreciation of fixed assets. The Arbitrator found that the assets were not used and remained idle and the Claim was highly exaggerated. The Petitioner had not produced any

evidence to show the exact rate of depreciation, yet taking the totality of the circumstances, the Arbitrator permitted a Claim of depreciation at the rate of 5% per annum for the above-mentioned period.

46. The Award to this extent is well reasoned. The Arbitrator has given the benefit for the period for which the suspension was unduly prolonged by the respondents and up to the date of the revised Banning order. The expenses which the Petitioner could substantiate and were directly attributable to the maintenance of the factory have been allowed. Likewise depreciation in the assets has also been allowed despite the Petitioner not having been able to show the exact rate of depreciation. The Arbitrator has rightly held that it was unbelievable that any businessman would keep the labour in waiting for months together and certainly if the production was to resume, labour could have been engaged. Arbitrator has allowed expenses incurred on account of deploying security services and labour which the Petitioner could substantiate by audited Balance Sheets. No infirmity can be found in this part of the Award.

Claim no. 7: Loss due to selling rejected cement at lower price.

47. The Arbitrator has disallowed the Claim on the ground that the cement was found not confirming to the specifications coupled with the fact that while the Petitioner alleged that it had disposed off the cement at lower price, it had not produced any documentary evidence of the loss suffered. It is settled law that the party claiming loss would have to produce evidence in support of the loss. No interference can be made against the rejection of this Claim.

Claim No. 8: Towards loss of profit as a consequence of breach of contract by suspension.

48. The amount was claimed by the Petitioner as 10% profit element in the price of sleepers that the Petitioner could not produce due to suspension of business. Petitioner arrived at an anticipated updated contract value, taking into account the updated rates on account of price variation. Respondent had argued that the Petitioner did not produce sleepers as per the specifications and were in breach. Petitioner could not claim profit while supplying defective goods. Arbitrator dealt with the said Claim as under:

“I have carefully considered the submissions made by both the parties and also taken into consideration the decided cases relied on by the Claimants.

The facts of the case go to show that the dealings with the Claimants came to be suspended on account of the sleepers supplied by the Claimants having been initially suspected as being of sub-standard quality or defective as the sleepers cracked and later, the suspicion having been found to be well founded after detailed inspection of manufacturing processes.

The Competent Authority took the decision of banning the business with the Claimants meaning thereby having decided not to buy any sleepers from the Claimant. By necessary implication, banning order amounts to termination of contract. True that in the first instance the ban order was found by the High Court to be unsustainable and therefore, set aside with the liberty of fresh order being passed by the competent authority. The competent authority complied with the principles of natural justice and passed a detailed reasoned order. That was also challenged in the High Court but the writ petition was withdrawn by the Claimants as the

Claimants were satisfied with the modification in ban order made by the competent authority whereby a limited relief was allowed to the Claimants that the Claimants would be permitted to participate in tendering process for new work floated by the Respondent. Thus, the ban order dated 08.05.2006 as modified by the competent authority has achieved a finality. The fact remains that the decision of the competent authority to not to deal with the Claimants and buy its sleepers has ultimately been upheld and remained unchallenged/not set aside. It is pertinent to note that sleepers are not any ordinary goods; on sleepers depends the safety of thousands of rail commuters. A decision taken in public interest and after complying with principles of natural justice cannot be easily found fault with.

Initial order of suspension has merged into the subsequent banning order. This much knowledge can be imputed to the claimants that the respondents were not going to buy the sleepers from the claimants. The question of the claimants manufacturing the sleepers in the hope that they would be supplied and purchased by the Respondents is baseless. In the facts of this case, the claimants cannot be allowed a claim on account of loss or profit. The case law which has been relied on by the claimants deals with cases of illegal termination of contract. In the present case the suspension and banning which is equivalent to termination) has been held to be legal.

For the above reasons, I hold the Claimants not entitled to any profit on the assumption that it could have manufactured the sleepers, sold to the railway and earned profit.”

49. Petitioner argued that Respondent was in breach of the contract on account of illegal and prolonged suspension since 09.07.2003. The updated contract value was Rs.24,70,99,726/-. In terms of Railways' own determination of costs, an element of 10% of profit for the contractor is built in the contract price. Therefore, the Claim was made taking 10% as

the loss of profit. Reliance was placed on the judgment in the case of ***DDA V. Polo Singh, 2003 (1) Arb. LR 270 Del*** to argue that 10% is universally considered as reasonable rate of profit. The Arbitral Tribunal has rejected the claim on the ground that the Competent Authority after finding that the sleepers supplied in part, were defective, took a decision of banning business with the Petitioner. The Banning Order was ultimately upheld by the High Court in a Writ Petition challenging the Order, filed by the Petitioner. The decision was known to the Petitioner. The Suspension Order passed in 2003, according to the Arbitrator, merged with the Banning Order and thus, for this period the Petitioner cannot be held entitled to Claim on account of Loss of Profit. The Petitioner may be right in arguing that the reasoning of the Arbitrator is not completely correct when he holds that the Banning Order or the Suspension Order is equivalent to Termination. In law, the three terms have different connotation and consequences. In contractual matters, termination of a contract and banning of business cannot be held to be equivalent. The question, however, is as to what turns on this wrong interpretation by the Arbitrator. It is undisputed that the Respondent had suspended the Contract as soon as some of the sleepers supplied were found to be defective. The Arbitrator has held in the earlier part of the Award that the suspension was on account of the fact that there was a suspicion that the sleepers were of sub-standard quality or defective and had cracks, which suspicion turned out to be correct in subsequent investigations and reports. The Respondent was justified in suspending the further supply of sleepers as this is a commodity on which the running of the trains depends and any slight defect can lead to loss of lives. Once

the investigation reports came, the Respondent issued a Banning Order. The order was challenged by the Petitioner in the High Court. During the pendency of the petition, the Petitioner had requested for permission to participate. The Respondent had reviewed the Order to permit the Petitioner to participate in the upcoming tender. On an understanding or legal advice, the Petitioner viewed this act of the Respondent as an act of having recalled the banning order with respect to the tender in the present petition. On that understanding, the Petitioner had withdrawn the Writ Petition in the High Court. The Arbitrator is right in its observation that the modification in the Banning Order was only for the new tender which was being floated and could not have been with respect to the disputed tender, else all disputes would have been resolved in favour of the Petitioner. Therefore, the consequence of withdrawing a challenge to the Banning Order would naturally be, that it holds good. The Arbitrator rightly observed that once the Petitioner supplied defective sleepers and the work was suspended immediately, it had no reason to claim loss of profit. The Petitioner complicated the situation by withdrawing the Writ Petition challenging the Banning Order. The upholding of the Banning Order can lead to only one conclusion in law i.e., the action of the Respondent was justified. No infirmity can be found in this part of the Award.

Claim No.9 : Interest on the claimed amounts at the rate of 18% p.a. from the date the payments became due till realization.

50. The Petitioner in support of its claim of pendente lite interest had argued that the claim was not limited to only unpaid invoices but also to other claims arising due to the breach on the part of the Respondent. It

claimed that in case of unclaimed invoices, no lien was exercised by the respondents as required under the Contract. Reliance was placed on the judgment in the case of *State of Rajasthan v. Ferro Concrete Construction (P) Ltd.*, (2009) 12 SCC 1.

51. Per contra, Respondent had relied upon Clauses 2401 and 2403 of the IRSCC to argue that it was an agreed condition between the parties that interest will not be paid. Reliance was placed on Section 31 (7) of the Act and the judgments in the case of *M.B. Patel & Co. v. ONGC*, (2008) 8 SCC 251, *Sayeed Ahmed & Co. v. State of U.P.*, (2009) 12 SCC 26 & *Sree Kamatchi Amman Constructions v. Railways*, (2010) 8 SCC 767. It was further argued that the claim for the rate of interest at 18% p.a. was without any justification. Respondent also relied on Section 31 of the Act to argue that awarding the rate of interest is the power and domain of the Arbitrator and cannot be interfered with.

52. The Arbitrator relied on a letter dated 12.12.2003 by the Chief Engineer informing the Petitioner that the sleepers were defective and liable to be replaced, failing which direct/ indirect costs towards replacement shall be recovered. In the Banning Order also, it was mentioned that the petitioners must replace the defective sleepers supplied by them at their own costs. Although the word, 'lien' may not have been used, but according to the Arbitrator, it was clear that the payments were withheld as the supplies were not upto the required specification. The Arbitrator, therefore, rejected the claim for interest on the unpaid bills in view of the Clauses 2401 and 2403 of the Contract that stipulated that there will be no payment of interest. The Arbitrator has, however, allowed interest from the date of the Award.

53. As far as the interest on the claims of damages was concerned, the Arbitrator held that since the claim was quantified only by the Award, Petitioner was entitled only to post award interest. On the rate of interest, the Arbitrator relied upon Section 31(7)(a) of the Act which gives discretion to the Arbitrator to award interest at a reasonable rate. Finding 9% p.a. to be a reasonable rate, the Arbitrator allowed the said rate and relied upon some judgments of the Supreme Court in this behalf.

54. In so far as the grant of interest by an Arbitrator is concerned, the law is no longer *res integra*. Section 31(7)(a) of the Act clearly stipulates that unless otherwise agreed by the parties, where the Award is for payment of money, the Tribunal may grant such rate as it deems reasonable, on the whole or any part of the money and for the whole or any part of the period between the date of cause of action and the date of the Award. In the case of ***Jaiprakash Associates Ltd. (Jal) v. Tehri Hydro Development Corporation India Ltd., 2019 SCC OnLine SC 143***, the Supreme Court after noticing the provisions of the 1996 Act and various judgments on the issue of interest, more particularly, the recent judgment in the case of ***Reliance Cellulose Products Ltd. v. ONGC Ltd., (2018) 9 SCC 266***, summed up the law on interest as under :

“13. Insofar as power of the arbitral tribunal in granting pre-reference and/or pendente lite interest is concerned, the principles which can be deduced from the various judgments are summed up below:

(a) A Constitution Bench judgment of this Court in the case of Secretary, Irrigation Department, Government of Orissa v. G.C. Roy⁵ exhaustively dealt with this very issue, namely, power of the arbitral tribunal to grant pre-

reference and pendente lite interest. The Constitution Bench, of course, construed the provisions of the 1940 Act which Act was in vogue at that time. At the same time, the Constitution Bench also considered the principle for grant of interest applying the common law principles. It held that under the general law, the arbitrator is empowered to award interest for the pre-reference, pendente lite or post award period. This proposition was culled out with the following reasoning:

“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, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.*
- (ii) An arbitrator is an alternative forum (sic forum) 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 [Seth Thawardas Pherumal v. Union of India, (1955) 2 SCR 48 : AIR 1955 SC 468] 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 case [(1988) 1 SCC 418 : (1988) 1 SCR 253] 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.”*

It is clear from the above that the Court decided to fall back on general principle that a person who is deprived of the use of money to which he is legitimately entitled to, has a right to be compensated for the deprivation and, therefore, such compensation may be called interest compensation or damages.

- (b) As a sequitur, the arbitrator would be within his jurisdiction to award pre-reference or pendente lite interest even if agreement between the parties was silent as to whether interest is to be awarded or not.*
- (c) Conversely, if the agreement between the parties specifically prohibits grant of interest, the arbitrator cannot award pendente lite interest in such cases. This proposition is predicated on the principle that an arbitrator is the creature of an agreement and he is supposed to act and make his award in accordance with the general law of the land and the agreement. This position was made amply clear in G.C. Roy case in the discussion that ensued thereafter:*

“44. Having regard to the above consideration, 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 (along with 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.”

(d) Insofar as 1940 Act is concerned, it was silent about the jurisdiction of the arbitrator in awarding pendente lite interest. However, there is a significant departure on this aspect insofar as 1996 Act is concerned. This distinction has been spelt out in Sayeed Ahmed case in the following manner:

“Re: Interest from the date of cause of action to date of award

7. The issue regarding interest as noticed above revolves around Clause G1.09 of the Technical Provisions forming part of the contract extracted below:

“G. 1.09. No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be lying with the Government or any become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge on the one hand and the contractor on the other hand or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or any other respect whatsoever.”

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14. The decisions of this Court with reference to the awards under the old Arbitration Act making a distinction between the pre-reference period and pendente lite period and the observation therein that the arbitrator has the discretion to award interest during pendente lite period in spite of any bar against interest contained in the contract between the parties are not applicable to arbitrations governed by the Arbitration and Conciliation Act, 1996.””

55. In the case of *Sree Kamatchi (supra)*, the Supreme Court held as under :-

“12. This Court had occasion to consider the jurisdiction and authority of the arbitrator to award interest under the Arbitration Act, 1940 and under the new Act in Sayeed Ahmed & Co. v. State of U.P. [(2009) 12 SCC 26] Relying upon the earlier decisions of this Court in Irrigation Deptt., Govt. of Orissa v. G.C. Roy [(1992) 1 SCC 508] , Dhenkanal Minor Irrigation Division v. N.C. Budharaj [(2001) 2 SCC 721] , Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd. [(2005) 6 SCC 462] and State of Rajasthan v. Ferro Concrete Construction (P) Ltd. [(2009) 12 SCC 1], this Court held that the arbitrator had the jurisdiction and authority to award interest for three distinct periods, namely, the pre-reference period (which referred to the period between the date of cause of action to the date of reference), pendente lite (which referred to the period between the date of reference to the date of award), and future period (which referred to the period between the date of award to the date of payment) if there was no express bar in the contract regarding award of interest.

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19. Section 37(1)[Sic Section 31(7)] 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 [(1996) 1 SCC 516] and Madnani [(2010) 1 SCC 549] are inapplicable for yet another reason. In Engineers-De-Space-Age [(1996) 1 SCC 516] and Madnani [(2010) 1 SCC 549] 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 [(1996) 1 SCC 516] and Madnani [(2010) 1 SCC 549] are inapplicable. Be that as it may.”

56. In the case of ***Union of India v. Bright Power Projects (India) (P) Ltd.***, (2015) 9 SCC 695, Supreme Court held that when agreement between the parties bars interest on the amounts from cause of action to the date of the Award, the Arbitrator is bound by it and cannot award interest as Section 31(7)(a) clearly begins with the words ‘unless otherwise agreed by parties’.

57. In ***State of Haryana v. S.L. Arora & Co.***, (2010) 3 SCC 690, Supreme Court has held that it is not open to the courts to interfere in the discretion exercised by an Arbitrator in granting the rate of interest. This is purely the domain, power and prerogative of the Arbitrator. Relevant part of the judgment reads as under :-

“23. The difference between clauses (a) and (b) of Section 31(7) of the Act may conveniently be noted at this stage. They are:

- (i) Clause (a) relates to pre-award period and clause*
- (b) relates to post-award period. The contract binds and prevails in regard to interest during the pre-*

award period. The contract has no application in regard to interest during the post-award period.

(ii) Clause (a) gives discretion to the Arbitral Tribunal in regard to the rate, the period, the quantum (principal which is to be subjected to interest) when awarding interest. But such discretion is always subject to the contract between the parties. Clause (b) also gives discretion to the Arbitral Tribunal to award interest for the post-award period but that discretion is not subject to any contract; and if that discretion is not exercised by the Arbitral Tribunal, then the statute steps in and mandates payment of interest, at the specified rate of 18% per annum for the post-award period.

(iii) While clause (a) gives the parties an option to contract out of interest, no such option is available in regard to the post-award period.

In a nutshell, in regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract, as per discretion of the Arbitral Tribunal. On the other hand, in regard to the post-award period, interest is payable as per the discretion of the Arbitral Tribunal and in the absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum.”

58. In view of the above, the Court finds no merit in this argument of the Petitioner.

OMP 210/2015

59. OMP 210/2015 is a petition wherein objections have been filed by Union of India. The objections with respect to Claim No.1 is that the Arbitrator has wrongly awarded the amounts against the said Claim in as much as the sleepers were dispatched on 16.06.2003 but as the same were

defective, 100% payment towards the costs had been withheld. Subsequent investigation reports confirmed the defects in the sleepers.

60. With respect to Claim No.2 and 3, learned counsel for Union of India argued that once the sleepers were declared of a substandard quality and information was given to the Petitioner on 12.12.2003, the question of any payment on account of updation did not arise. No documents were given by the Petitioner in support of the Claims, hence, the Claims have been wrongly awarded.

61. Objection with respect to Claim No.6 is that the Petitioner was responsible for the defects in the sleepers and could not claim expenses for maintenance of the factory once it was known that further production and dispatch was suspended. The amount claimed was only hypothetical and considerably enhanced while filing the Statement of Claim while earlier Rs.5 Crores were claimed. Suspension Order continued for two years and the Banning Order was subsequently imposed. Therefore, it was wrong for the Petitioner to claim that the factory and machinery was in a state of readiness and they suffered loss.

62. No other arguments were made on behalf of the Union of India.

63. In so far as the Award in favour of the Petitioner under claim No. 1 is concerned, it is noted in the earlier part of the judgment that the Tribunal has adopted a mathematical calculation to arrive at the amount due to the Petitioner. The Tribunal found that the liability of the Petitioner was to replace defective sleepers. Respondents had replaced a total of 1496 sleepers which were laid in the track and the value of these sleepers was worked out at their basic rate under invoice No. 125 though 90% payment for 4816 sleepers had been made but 495 were not actually

dispatched. Having held that the cost of these was not payable, the Tribunal deducted the said amount and directed the release of the balance amount. In so far as the objection to claim Nos. 2 & 3 is concerned, the same has been examined by this Court. The Tribunal has made a detailed mathematical calculation taking into account the number of sleepers supplied, along with the escalation rates and adding the amount of freight for cement. Wherever, the sleepers were of a suspect quality, payment on account of updating was not allowed. In so far as claim No. 6 is concerned, the Tribunal has given a finding that Respondent ordered for keeping the production under suspension, but continued the suspension for an unreasonably long period, while the Petitioner repeatedly asked for permission to resume production. The banning order was also passed after nearly 2 years. However, having found so, the Tribunal restricted the claim for compensation only between the date of final compliance of deficiency and upto one month after the speaking order of banning was passed. The arguments of the respondent entail re-appreciating the evidence which is beyond the scope of judicial review under Section 34 of the Act. The Award of the Tribunal with respect to these claims is a well reasoned Award, based on evidence and mathematical calculations and not only a possible but a plausible view.

64. There is no merit in both the petitions, which are accordingly dismissed with no order as to costs.

JYOTI SINGH, J.

MAY 19th, 2020
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