

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 922 OF 2012

Union of India,)
Through Dy. Chief Engineer (Con)/ Works,)
Headquarter Office Building, Central Railway,)
CST, Mumbai – 400 001) **..... Petitioner**

Versus

M/s.Vinay Agarwal,)
Old Ranchi Road, P.O.Chakradharpur,)
Dist. Singhbhum (W), Jharkhand – 833 102) **..... Respondent**

Mr.Suresh Kumar, a/w.Ms.Sangita Yadav for the Petitioner/Union of India.

Mr.Yogendra Singh, i/b.Auris Legal for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 20th APRIL, 2015

PRONOUNCED ON : 6th MAY, 2015

JUDGMENT :

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short the said 'Arbitration Act') the petitioner has impugned the majority award dated 14th September, 2010 rendered by the arbitral tribunal thereby allowing five claims made by the respondents and rejecting the counter claims made by the petitioner. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The respondent herein was the original claimant whereas the petitioner herein was the original respondent in the arbitral proceedings. The petitioner had

also made counter claims in the arbitral proceedings.

3. Sometime in the year 1996, the petitioner had invited tenders regarding the work of Narkhed-Amravati New BG line – Earthwork in embankment, cutting and bridge approaches in Section XXIII from Ch.98000 to Ch.108000 between Chandurbazar and Walgaon Station. The respondent submitted the tender in response to the said notice. The tender of the respondent was accepted by the petitioner. On 11th July, 1996 the parties entered into a contract agreement. The contract was awarded at Rs.67,21,043/- with completion period of 12 months including monsoon period. The contract was governed by the General Condition of Contract. The said contract was extended from time to time. The dispute arose between the parties. On or about 14th January, 2002, the respondent invoked the arbitration clause and requested the General Manager of the petitioner to appoint arbitral tribunal.

4. By an order dated 11th February, 2005, the learned Judge designated by the Hon'ble Chief Justice directed the General Manager of the petitioner to appoint arbitral tribunal as per clause 64 of the General Condition of Contract in Arbitration Application No.182 of 2004 filed by the respondent. Pursuant to the liberty granted by the arbitral tribunal, the respondent herein filed statement of claim and made 14 claims in the sum of Rs.3,79,24,214/- with further interest thereon. The petitioner resisted the said claim by filing written statement and also simultaneously filed a counter claims thereby making five claims with interest. None of the parties led any oral evidence. By an majority award dated 14th September, 2010 the learned arbitrators allowed claim nos. 1, 4, 5, 7 and 13 in favour of the respondent and rejected the counter claims made by the petitioner. The petitioner has impugned that part of the award allowing five claims in favour

of the respondent and rejecting the counter claims made by the petitioner. The respondent has not impugned the arbitral award rejecting the other claims made by the respondent.

5. Mr.Suresh Kumar, learned counsel appearing for the petitioner fairly submits that though in the prayer clause, the petitioner has applied for setting aside the entire award, the petitioner has not raised any grounds in respect of claim nos. 1 and 4.

6. Insofar as claim no.5 i.e. 'increase in cost of petroleum products and spare parts' is concerned, the respondent had originally claimed a sum of Rs.13,12,974/- and revised the said claim before the learned arbitrators at Rs.13,18,293.44. The learned arbitrators have allowed the said claim at Rs.13,12,974/-. He submits that under clause 17 of the General Conditions of Contract, 1956 even if there was any delay on the part of the petitioner in handing over to the contractor the possession of the lands necessary for execution of the work or for various other reasons mentioned therein or any other cause whatsoever, it would not affect or vitiate the contract or entitle the contractor to the damages or compensation therein but the petitioner could grant only extension of the completion date. Reliance is placed on clause 17(3) of the General Conditions of Contract which is extracted as under :-

Extension of time on Railway Accounts

(3) In the event of any failure or delay by the Railway to hand over to the Contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the Contractor to damages or compensation

therefor but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable.

7. Learned counsel invited my attention to the impugned award insofar as claim no.5 is concerned and would submit that though the learned arbitrators have noticed that there was no variation/escalation clause in the agreement in view of the completion period being only 12 months, the learned arbitrators have allowed claim for price escalation for the work carried out beyond the period of 12 months on the indices, labour, material and fuel for the months of payment of 'on account bills' taking basis as on March 1996. He submits that the said part of the award is contrary to clause 17(3) of the General Conditions of Contract. The tribunal though noted that there was delay in the completion of the work primarily because of non availability of land for which the extension had been granted to the contractor by the petitioner, though the payment of compensation was prohibited under section 17(3) of the General Conditions of Contract on that ground or for delay caused for any other reasons, the learned arbitrators exceeded their jurisdiction by allowing the said claim contrary to the said clause of the contract.

8. In support of this submission, learned counsel for the petitioner placed reliance on the judgment of this court in case of ***Union of India vs.S.N.Naik and Bros., Panvel, 2013(2) Mah.L.J. 390*** and in particular paragraphs 5, 6 and 7 which read thus :-

5. The learned counsel also invited my attention to the un-reported judgment of this court delivered on 19th October, 2012 by the Division Bench in case of Union of India vs. M/s.Shyam Constructions in Appeal (L) No.309 of 2011. The Division Bench of this court has followed the judgment of the Supreme Court in case of Sree Kamatchi Amman Constructions (supra) and in para (6) has held thus :-

"6. Counsel appearing on behalf of the Appellant has challenged the arbitral award insofar as the following claims came to be awarded viz. Claim Nos.1, 2, 5, 10, 12 and 13. The principal basis of the appeal is that the award of the claims by the arbitral Tribunal was contrary to the express terms and conditions of the contract. Hence, in order to evaluate these submissions, it would be necessary to consider the arbitral award and the specific contractual conditions governing each head of claim.

i) Claim No.1 was in respect of work done but not paid in respect of which the arbitral Tribunal awarded interest at the rate of 10% per annum from 20 November 1997 to 3 June 2002, in the total amount of Rs.2,04,813/-. The arbitral Tribunal has noted that an amount of Rs.4,55,140/- was paid over to the contractor only on 21 May 2002 and on this ground awarded interest for the period of delayed payment. Clause 16(2) of the General Conditions of Contract provides as follows :

"16(2) : No interest will be payable upon the Earnest Money and Security Deposits or amounts payable to the Contractor under the Contract ..."

"The effect of this very clause was considered by the Supreme Court in a judgment in Sree Kamatchi Amman Constructions v. The Divisional Railway Manager (Works), Palghat 1. The Supreme Court held that if there is a specific bar against payment of interest in the contract, the arbitrator cannot award any interest for the pre-reference period or pendente lite. The Supreme Court held that in view of the specific provisions made in the Act of 1996 in Section 31(7)(a) by the use of the words "unless otherwise agreed by the parties"; the arbitrator was bound by the terms of the contract in regard to the award of interest from the date of the cause of action to the date of the award. Hence, 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 the award. In view of the express provisions of Clause 16(2) of the General Terms of Contract, the award of interest was prohibit-

ed and there was an agreement between the parties as "otherwise agreed" within the meaning of Section 31(7)(a). Section 28(3) makes it clear that in all cases the arbitral Tribunal shall decide in accordance with the terms of the contract. It is not open to the arbitral Tribunal to ignore the terms of the contract. Evidently the arbitral Tribunal has acted contrary to the terms of the contract while awarding this claim;

ii) Claim No.2 related to the refund of security deposit on which interest has been awarded by the arbitral Tribunal at the rate of 10% between 19 November 1998 and 10 October 2002. Here again, it is evident that the award of interest is directly in the teeth of Clause 16(2);

iii) Claim No.5 is for the award of interest on delayed payments. The arbitral Tribunal has here again awarded interest at 10% per annum. What has been held in regard to the award of interest in respect of claim Nos.1 and 2 will also apply to the award under this head. The award of interest for the pre-reference period was clearly contrary to the provisions of Clause 16(2);

iv) Claim No.10 was for the underutilization of overheads. The arbitral Tribunal noted that the contract was extended for approximately two years from 25 March 1994 to 31 March 1996. The Tribunal came to the conclusion that the liability for this delay ought to be shared equally by both the parties and that the claimant - Respondent should be compensated for the non-utilization of overheads for a period of one year for which an award in the amount of Rs.1.56 lacs was made. Now insofar as this aspect is concerned, clause 17(iii) of the General Conditions of Contract provides as follows:

"(iii) In the event of any failure or delay by the Railway to handover to the contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no way affect or vitiate the contract or

alter the character thereof or entitle the contractor to damages or compensation therefore, but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered, reasonable."

v) When the Respondent sought an extension of the period for completion, it had declared that it shall not claim any compensation. The Appellant had while granting extension clarified that the contractor would not be entitled to make claims whatsoever against the Railways by virtue of the extension being granted nor would the Railways entertain or consider any such claim, if made. A similar provision was interpreted in the judgment of the Supreme Court in Ramnath International Construction Private Limited v. Union of India² In that case, the contractual conditions stipulated that no claim in respect of compensation or otherwise howsoever arising as a result of the extensions granted shall be admitted. The Supreme Court held that in view of the clear terms of the contract, the award of compensation had been rightly set aside by the High Court. A similar view was taken in a judgment of a Learned Single Judge of this Court in Chaitanya Electrical Private Limited v. General Manager Central Railway³ while interpreting the provisions of Clause 17(3). An appeal against the decision was dismissed by the Division Bench on 17 March 2003⁴. In view of the express terms of the contract, the arbitral Tribunal has manifestly erred in ignoring the contract and awarding the claim;

vi) Claim No.12 and Claim No.13 related to the award of compensation for the underutilization of labour force and of centering and shuttering respectively. Here again the arbitral Tribunal has granted compensation on account of the extended period of the contract by partly apportioning the liability to the Appellant. The award under both these heads is clearly unsustainable in view of the specific conditions contained in Clause 17(iii) noted earlier."

6. In my view, the facts of this case are identical to the facts before Supreme Court in case of Sree Kamatchi Amman Constructions (supra) which has been followed by the

Supreme Court subsequently in case of Union of India vs. M/s.Krafters Engineering Co. (supra).

7. Section 31(7) of the Arbitration and Conciliation Act, 1996 provides that unless otherwise agreed by the parties, the 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. In view of the express provision of 16(2) of the General Conditions of Contract prohibiting payment of interest, read with section 31(7) (a), it is clear that the payment of interest was prohibited and thus the learned arbitrator has acted contrary to the terms of the contract and also contrary to section 31(7) (a) of the Act. The award is thus contrary in conflict with public policy. The Learned District Judge has also ignored the provisions of section 31(7) (a) and also the prohibition clause prohibiting payment of interest and erroneously relied upon Section 29 of Arbitration Act 1940 which was not applicable to the facts of this case. The award as well as the order passed by the Learned District Judge is clearly unsustainable. The impugned award as well as the judgment delivered by the Learned Judge is thus contrary to the law laid down by the Supreme Court and this Court and also contrary to Section 31(7)(a) and deserves to be set aside.

9. Learned counsel for the petitioner also placed reliance on the judgment of Division Bench of this court in case of ***Union of India vs. M/s.Shyam Constructions*** delivered on 19th October, 2012 in ***Appeal (L) No.309 of 2011*** and in particular paragraphs 6 and 7 which read thus :-

6. Counsel appearing on behalf of the Appellant has challenged the arbitral award insofar as the following claims came to be awarded viz. Claim Nos.1, 2, 5, 10, 12 and 13. The principal basis of the appeal is that the award of the claims by the arbitral Tribunal was contrary to the express terms and conditions of the contract. Hence, in order to evaluate these submissions, it would be necessary to consider the arbitral

award and the specific contractual conditions governing each head of claim.

i) Claim No.1 was in respect of work done but not paid in respect of which the arbitral Tribunal awarded interest at the rate of 10% per annum from 20 November 1997 to 3 June 2002, in the total amount of Rs.2,04,813/-. The arbitral Tribunal has noted that an amount of Rs.4,55,140/- was paid over to the contractor only on 21 May 2002 and on this ground awarded interest for the period of delayed payment. Clause 16(2) of the General Conditions of Contract provides as follows :

"16(2) : No interest will be payable upon the Earnest Money and Security Deposits or amounts payable to the Contractor under the Contract ..."

The effect of this very clause was considered by the Supreme Court in a judgment in *Sree Kamatchi Amman Constructions v. The Divisional Railway Manager (Works), Palghat* 2010 ALL SCR 2282. The Supreme Court held that if there is a specific bar against payment of interest in the contract, the arbitrator cannot award any interest for the pre-reference period or pendente lite. The Supreme Court held that in view of the specific provisions made in the Act of 1996 in Section 31(7)(a) by the use of the words "unless otherwise agreed by the parties"; the arbitrator was bound by the terms of the contract in regard to the award of interest from the date of the cause of action to the date of the award. Hence, 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 the award. In view of the express provisions of Clause 16(2) of the General Terms of Contract, the award of interest was prohibited and there was an agreement between the parties as "otherwise agreed" within the meaning of Section 31(7)(a). Section 28(3) makes it clear that in all cases the arbitral Tribunal shall decide in accordance with the terms of the contract. It is not open to the arbitral Tribunal to ignore the terms of the contract. Evidently the arbitral Tribunal has acted contrary to the terms of the contract

while awarding this claim;

ii) Claim No.2 related to the refund of security deposit on which interest has been awarded by the arbitral Tribunal at the rate of 10% between 19 November 1998 and 10 October 2002. Here again, it is evident that the award of interest is directly in the teeth of Clause 16(2);

iii) Claim No.5 is for the award of interest on delayed payments. The arbitral Tribunal has here again awarded interest at 10% per annum. What has been held in regard to the award of interest in respect of claim Nos.1 and 2 will also apply to the award under this head. The award of interest for the pre-reference period was clearly contrary to the provisions of Clause 16(2);

iv) Claim No.10 was for the underutilization of overheads. The arbitral Tribunal noted that the contract was extended for approximately two years from 25 March 1994 to 31 March 1996. The Tribunal came to the conclusion that the liability for this delay ought to be shared equally by both the parties and that the claimant - Respondent should be compensated for the non-utilization of overheads for a period of one year for which an award in the amount of Rs.1.56 lacs was made. Now insofar as this aspect is concerned, clause 17(iii) of the General Conditions of Contract provides as follows :

"(iii) In the event of any failure or delay by the Railway to handover to the contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the contractor to damages or compensation therefore, but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered, reasonable."

v) When the Respondent sought an extension of the period for

completion, it had declared that it shall not claim any compensation. The Appellant had while granting extension clarified that the contractor would not be entitled to make claims whatsoever against the Railways by virtue of the extension being granted nor would the Railways entertain or consider any such claim, if made. A similar provision was interpreted in the judgment of the Supreme Court in Ramnath International Construction Private Limited v. Union of India AIR 2007 SC 509. In that case, the contractual conditions stipulated that no claim in respect of compensation or otherwise howsoever arising as a result of the extensions granted shall be admitted. The Supreme Court held that in view of the clear terms of the contract, the award of compensation had been rightly set aside by the High Court. A similar view was taken in a judgment of a Learned Single Judge of this Court in Chaitanya Electrical Private Limited v. General Manager Central Railway Arbitration Petition No.370 of 2002 while interpreting the provisions of Clause 17(3). An appeal against the decision was dismissed by the Division Bench on 17 March 2003 Appeal 69 of 2003 in Arbitration Petition 370 of 2002. In view of the express terms of the contract, the arbitral Tribunal has manifestly erred in ignoring the contract and awarding the claim;

vi) Claim No.12 and Claim No.13 related to the award of compensation for the underutilization of labour force and of centering and shuttering respectively. Here again the arbitral Tribunal has granted compensation on account of the extended period of the contract by partly apportioning the liability to the Appellant. The award under both these heads is clearly unsustainable in view of the specific conditions contained in Clause 17(iii) noted earlier.

7. For these reasons, we have come to the conclusion that the award in respect of claim Nos.1, 2, 5, 10, 12 and 13 is clearly contrary to the express terms of the contract. We do not find with respect merit in the view which weighed with the Learned Single Judge. Ex facie, the arbitral award would indicate that the arbitral Tribunal made a reference to the terms and conditions of the contract agreement in paragraph 4 of the

award as having been adverted to during the course of the hearing. If that be so, there was no reason or justification for the Tribunal to disregard the terms of the contract. In any event, the arbitral Tribunal is bound by the mandate of Section 28(3) and cannot ignore the terms of the contract between the parties to the arbitration agreement. For the aforesaid terms, we would have to allow the Appeal and accordingly allow the Appeal by setting aside the award of the arbitral Tribunal to the extent to which the Tribunal awarded the claims of the Respondent in respect of claim Nos.1, 2, 5, 10, 12 and 13. The Appeal is disposed of in these terms.

10. He submits that in the aforesaid judgment of this court, clause 17(3) of the General Conditions of Contract which is identical to the clause 17(3) of the General Conditions of Contract applicable to the facts of this case has been construed and interpreted and it is held that no compensation contrary to the said clause could be awarded by the learned arbitrators.

11. Insofar as claim no.7 i.e. for the 'cost of material at site' is concerned, the respondent had claimed 5,87,637/-. The learned arbitrators have allowed the said claim at Rs.2,30,520/-. The learned counsel for the petitioner submits that the respondent had stopped the work w.e.f. 1st June, 2000 and had removed all men, materials, machinery and labour camp etc. from the site of work and had failed to resume the work. There was no material lying at the site belonging to the respondent. He submits that though in the majority award, it was held that it was difficult to verify the claim physically and to verify the exact quantity of the material left at site, in the said majority award, the learned arbitrators have applied a thumb rule and granted 60% of the claim amount without any basis and any evidence. He submits that the award is based on no evidence and shows patent illegality on the face of the award. Learned counsel for the petitioner placed reliance on the judgment of this court in case of ***Konkan Railway Corporation***

Limited vs. M/s.Oriental Construction Company Limited (2013) 3 Bom.C.R.140

and more particularly paragraphs 4 and 17 which read thus :-

4. The learned counsel for the owner, then submits that the entire award is based on no evidence and the claims are awarded mechanically by the arbitral tribunal and without application of mind. The learned counsel invited my attention to the award in respect of claim Nos.5, 6, 7, 8, 9, 10, 11, 12, 14, 28, 33 and 34. The learned counsel submits that though the arbitral tribunal has rendered finding that both the parties were responsible for delay in respect of each claim of compensation, without apportioning the delay and without discussing separate cause of delay attributable to the parties in respect of each claim, the arbitral tribunal has allowed the claim for compensation at the flat rate of 60% of the claims made by the contractor. It is submitted that by allowing the claims for compensation which are prohibited under clause 16.3, the arbitral tribunal has exceeded its jurisdiction and has acted contrary to the terms of the contract. The learned counsel has pointed out that claims Nos.5 to 12 were claims for compensation and the claim Nos.14 and 28 were claims made for alleged extra items. Claim Nos.33 and 34 awarded by the arbitral tribunal were in respect of interest. The learned arbitrator has awarded the arbitration cost in the sum of Rs.1,21,000/-.

17. Perusal of the impugned award indicates that the arbitral tribunal has allowed the claims for compensation i.e. claim Nos.5 to 12 made by the contractor. The arbitral tribunal has rendered finding that both the parties were responsible for the delay. It is however, recorded that the tribunal was convinced that the main reasons for the delay was due to non-supply of drawings, delay in decision regarding foundation, change in the column diameter and delay in supply of rails and sleepers required for the launching of PSC girders, delay in payments etc. It was

observed that it could thus be concluded that the respondent/owner though not solely responsible for the delay was to large extent responsible. The arbitral tribunal after recording the said reasons, reduced the claim from 5% to 3% in respect of the claim for expenditure for overheads during the prolonged period. The learned arbitral tribunal has applied the same percentage of 60% in respect of other claims for compensation i.e. claim Nos.6 to 12 without any evidence and without apportioning the delay on the part of both the parties and without considering different reasons to different claims, attributing to delay on the part of either party. The arbitral tribunal has not even considered the prohibition under the contract or payment of any compensation by the owner to the contractor recorded under clause 16.3 of the general conditions of contract. In my view the arbitral tribunal was bound to decide in accordance with the provisions of the contract and could not have ignored the same. In spite of such prohibition in the contract, the arbitral tribunal has allowed claims for compensation and thus has exceeded its jurisdiction by allowing such claims. The award being contrary to the contract is in conflict with public policy.

12. Insofar as claim no.13 i.e. 'interest' is concerned, the respondent had claimed interest at the rate of 24% per annum. In the majority award, the learned arbitrators have awarded the said claim for interest at the rate of 12% per annum from 3rd November, 2001 i.e. the date on which the respondent had invoked the arbitration agreement till 13th November, 2006. Learned counsel for the petitioner invited my attention to clause 16(2) of the General Conditions of Contract and would submit that though payment of interest is specifically prohibited under the said clause on any amount payable to the contractor under the said contract, though the learned arbitrators referred to clause 16(2) of the General Conditions of Contract in the award have awarded the said claim contrary to the said clause by holding

that there was no bar under the agreement for payment of interest. He submits that the impugned award insofar as claim of interest is concerned is contrary to clause 16(2) of the General Conditions of Contract which prohibited payment of interest on any amount payable to the contractor under the said contract by the petitioner. He submits that the learned arbitrators have exceeded their jurisdiction and have decided contrary to the terms of the contract. The award is thus in conflict with the public policy. Clauses 16(1) and (2) of the General Conditions of Contract are extracted as under :-

Earnest Money Security Deposit

16(1) The earnest money deposited by the Contractor with his tender will be retained by the Railway as part of security for the due and faithful fulfilment of the contract by the Contractor. The balance to make up this security deposit which will be 10 per cent of the total value of the contract, unless otherwise specified in the special conditions if any, may be deposited by the Contractor in cash or in the form of Government Securities or may be recovered by percentage deductions from the Contractor's "on-account bill". Provided also that in case of a defaulting contractor the Railways may retain any amount due for payment to the Contractor on the pending 'on account bills' so that the amount or amounts so retained may not exceed 10% of the total value of the contract.

Interest amounts

(2) No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities in terms of Sub-Clause (1) of this clause will be repayable with interest accrued thereon.

13. In support of the aforesaid submission, learned counsel for the petitioner placed reliance on the judgment of Supreme Court in case of ***Union of India vs. Concrete Products and Construction Company and others (2014) 4 SCC 416*** and in particular paragraph (10) and would submit that the award of the learned

arbitrators allowing the interest is contrary to the terms of the contract and contrary to section 31(7)(a) of the Arbitration and Conciliation Act, 1996 and deserves to be set aside. Reliance is placed on paragraphs 10, 19 to 21 which read thus :-

10. Again the Railway Administration filed intra-court appeals challenging the order of the learned Single Judge principally on the ground that the Railway Administration was not liable to pay any interest for the period subsequent to the deposit of the principal amount into the Court. The appeals filed by the Railway Administration were dismissed by the High Court by the impugned order dated 21-3-2012¹. The High Court held that the Railway Administration had not questioned the power of the sole arbitrator to award interest. The issue with regard to the award of interest was also not raised before the learned Single Judge. For the first time before the Division Bench¹, a plea was raised that the award of interest was contrary to Clause 2401 of the Indian Railways Standard Conditions of Contract. The Division Bench of the High Court came to the conclusion that the aforesaid clause has no application at all as it applies only to amounts, which have been withheld or retained under lien. The amounts having already been paid were sought to be illegally recovered from the contractors. The sole arbitrator found that such order of recovery cannot be sustained in law and the recoveries effected were illegal. The High Court, however, concluded that Clause 2401 would have application only in respect of amounts which had not been paid to the contractors. The Railway Administration cannot exercise lien over the amounts already paid to the contractors. Therefore, award of the arbitrator did not suffer from any error apparent. It was further held that the learned Single Judge having upheld the award, the appeals deserve to be dismissed. The appeals having been dismissed, the Union of India has approached this Court in these civil appeals.

19. We are of the opinion that the sole arbitrator in awarding interest to the contractors has failed to take into account the provisions contained in the aforesaid two clauses. We find merit in the submission made by the learned Additional

Solicitor General that award of interest at least from the date when the amount was deposited in the Court was wholly unwarranted. Therefore, the High Court as well as the arbitrator, in our opinion, have committed an error of jurisdiction in this respect. This view of ours will find support from the judgment of this Court in *Sayeed Ahmed & Co.*⁹, wherein it has been held as follows: (SCC p. 33, para 16)

“16. In view of clause (a) of sub-section (7) of Section 31 of the Act, it is clear that the arbitrator could not have awarded interest up to the date of the award, as the agreement between the parties barred payment of interest. The bar against award of interest would operate not only during the pre-reference period, that is, up to 13-3-1997 but also during the pendente lite period, that is, from 14-3-1997 to 31-7-2001.”

20. This view has been reiterated by this Court in *Sree Kamatchi Amman Constructions*⁸, wherein it has been held as follows: (SCC p. 774, para 19)

“19. Section 37(1) 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.”

(emphasis in original)

21. From the aforesaid it becomes apparent that the arbitrator could not have awarded any interest from the date when the recovery was made till the award was made. However, interest would have been payable from the date when the award was made till the money was deposited in the High Court and thereafter converted to fixed deposit receipts. Upon the amount being deposited in the High Court, no further interest could be paid to the respondents

14. Learned counsel for the petitioner also placed reliance on the judgment of Supreme Court in case of ***Sree Kamatchi Amman Constructions vs. Divisional Railway Manager (Works), Palghat and others (2010) 8 SCC 767*** and in particular paragraphs 9, 10, 11, 13, 14, 17, 19 and 20 which read thus :-

9. Clause 16(2) of the general conditions of contract governing the contract between the parties bars payment of interest and the same is extracted below:

“16. (2) No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract, but government securities deposit in terms of sub-clause (1) of this clause will be repayable (with) interest accrued thereon.”

(emphasis supplied)

10. The two claims on which amounts are awarded are with reference to Claim 4 relating to erroneous billing and Claim 6 relating to security deposit. Clause 16(2) in terms specifically bars payment of interest on security deposit. Insofar as Claim 4 is concerned, the question is whether the amount awarded is an “amount payable to the contractor under the contract”.

11. The learned counsel for the appellant made a faint attempt to contend that the award relating to Claim 4 was not in regard to an amount payable to the contractor under the contract. This contention has absolutely no merit as the award itself categorically recorded a finding that under Item 19 “the actual quantity executed by the claimant at the orders of the respondent very much becomes a part and parcel of the original agreement quantity”. What was awarded for the “rate per metre of rails to be led to SLY yard and stacked vide agreement schedule Item 19” was the rate of Rs. 225 per metre. Thus Claim 4 related to a work executed by the contractor as a part and parcel of the work contemplated under the agreement. Payment directed by the Arbitral Tribunal for such work was also in accordance with the agreement schedule Item 19. Therefore, it is evident that the amount awarded in

regard to Claim 4 was an amount payable to the contractor under the contract. Consequently, no interest could be paid thereon having regard to the bar under Clause 16(2) of the general conditions of contract.

13. This Court then noticed the change under the new Act as follows: (*Sayeed Ahmed case*¹, SCC pp. 32-33, paras 13-14)

“13. The legislature while enacting the Arbitration and Conciliation Act, 1996, incorporated a specific provision in regard to award of interest by arbitrators. Sub-section (7) of Section 31 of the Act deals with the arbitrator’s power to award interest. Clause (a) relates to the period between the date on which the cause of action arose and the date on which the award is made. Clause (b) relates to the period from the date of award to date of payment. The said sub-section (7) is extracted below:

‘31. 7(a) Unless otherwise agreed by the parties, where and insofar 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 eighteen per centum per annum from the date of the award to the date of payment.’

Having regard to sub-section (7) of Section 31 of the Act, the difference between pre-reference period and pendente lite period has disappeared insofar as award of interest by the arbitrator. The said section recognises only two periods and makes the following provisions:

(a) In regard to the period between the date on which the cause of action arose and the date on which the award is made (pre-reference period plus pendente lite), the Arbitral Tribunal may award interest at such rate as it deems reasonable, for the whole or any part of the period, *unless*

otherwise agreed by the parties.

(b) For the period from the date of award to the date of payment the interest shall be 18% per annum if no specific order is made in regard to interest. The arbitrator may however award interest at a different rate for the period between the date of award and date of payment.

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.”

(emphasis in original)

14. We may also refer to the decision of this Court in *Union of India v. Saraswat Trading Agency*⁶. This Court reiterated that if there is a bar against payment of interest in the contract, the arbitrator cannot award any interest for the pre-reference period or pendente lite. In view of the specific bar under Clause 16(2), we are of the view that the Arbitral Tribunal was justified in refusing interest from the date of cause of action to the date of award.

17. In *Madnani*⁸ the arbitrator had awarded interest pendente lite, that is, from the date of appointment of arbitrator to the date of award. The High Court had interfered with the same on the ground that there was a specific prohibition in the contract regarding awarding of interest. This Court following the decision in *Engineers-De-Space-Age*⁷ reversed the said rejection and held as follows: (*Madnani case*⁸, SCC pp. 560-61, para 39)

“39. In the instant case also the relevant clauses, which have been quoted above, namely, Clause 16(2) of GCC and Clause 30 of SCC do not contain any prohibition on the arbitrator to grant interest. Therefore, the High Court was not right in interfering with the arbitrator’s award on the

matter of interest on the basis of the aforesaid clauses. We therefore, on a strict construction of those clauses and relying on the ratio in *Engineers*⁷ find that the said clauses do not impose any bar on the arbitrator in granting interest.”

19. Section 37(1) 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*⁷ and *Madnani*⁸ are inapplicable for yet another reason. In *Engineers-De-Space-Age*⁷ and *Madnani*⁸ 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*⁷ and *Madnani*⁸ are inapplicable. Be that as it may.

15. On the issue of interest, learned counsel for the petitioner also placed reliance on the judgment of this court in case of *Union of India vs. M/s. Shyam Constructions (supra)*, in case of *Konkan Railway Corporation Limited (supra)* and in case of *Union of India vs. S.N. Naik and Bros., Panvel (supra)*. Learned

counsel for the petitioner submits that in view of the prohibition under the contract under clause 16(2) of the General Conditions of Contract which prohibition would apply to interest on all the payments payable to the contractor by the petitioner, under section 31(7)(a) of the Arbitration and Conciliation Act, 1996, the learned arbitrators could not have awarded any interest.

16. In reply, Mr. Yogendra Singh, learned counsel for the respondent submits that though the petitioner has prayed for setting aside the entire award, there are no grounds raised in respect of claim nos. 1 and 4 and thus the petitioner cannot be allowed to urge any submission in respect of the said two claims.

17. Insofar as claim no.5 is concerned, it is submitted by the learned counsel that in the majority award, the learned arbitrators have rendered a finding of fact that the respondent would be entitled to price variation beyond the period of 12 months from the date of issuance of letter of acceptance on the indices, labour, material and fuel for the months of payment of 'on account bills' taking basis as on March 1996. He submits that since the petitioner was solely responsible for gross delay in commencement of the work, the petitioner could not have refused to pay the price escalation to the respondent atleast for the work done beyond the period of 12 months. He submits that the arbitral tribunal has while allowing the said claim has adverted to the judgment of Supreme Court in case of *K.N.Sathyapalan vs. State of Kerala and anr.* 2006(4) *Arbitration Law Reporter* 275. He submits that thus this court cannot interfere with the said award.

18. Learned counsel for the respondent also placed reliance on the judgment of Supreme Court in case of *Asian Techs Limited vs. Union of India and others*, (2009) 10 SCC 354 in support of aforesaid submission and more particularly

paragraphs 16 and 17 thereof.

19. Insofar as claim no.7 is concerned, learned counsel for the respondent submits that since the petitioner had terminated the contract, the material brought to the site by the respondent was lying at site and was not taken into consideration by the petitioner during the final bill. He submits that the learned arbitrators have not awarded the entire claim of Rs.5,87,637/- which was reduced to Rs.3,84,200/- by the respondent but allowed only 60% of the reduced amount i.e. at Rs.2,30,520/- as found reasonable. This court cannot interfere with the said part of the award which is based on the findings of fact and the award was fair and reasonable.

20. Insofar as claim no.13 i.e. for payment of interest is concerned, learned counsel for the respondent submits that under clause 16(2) of the General Conditions of Contract, the prohibition from payment of interest was only restricted to the amount payable to the contractor by the owner in respect of earnest money or the security deposit. He submits that clause 16(2) of the General Conditions of Contract has to be read in consonance with clause 16(1) of the General Conditions of Contract. He submits that the said prohibition under clause 16(2) of the General Conditions of Contract would not apply to any other amount due and payable by the petitioner to the respondent. In support of this submission, learned counsel placed reliance on the judgment of Supreme Court in case of ***Madhani Construction Corporation Private Limited vs. Union of India and others, (2010) 1 SCC 549*** and more particularly paragraphs 22, 38 and 39.

21. Learned counsel for the respondent placed reliance on the judgment of Delhi High Court in case of ***Union of India vs.M/s.Chenab Construction Joint Venture***

delivered on 5th March, 2010 in O.M.P.No.44/2010 in support of his submission that there was no prohibition of payment of interest under clause 16(2). Reliance is placed on paragraphs 12 to 16.

22. Learned counsel for the respondent also placed reliance on the judgment of Delhi High Court in case of ***M/s.Simplex Concrete Piles (India) Ltd. vs. Union of India*** delivered on 23rd February, 2010 in CS(OS) No.614A/2002 and more particularly paragraphs 17 to 20. Reliance is also placed on the judgment of Gujarat High Court in case of ***Union of India vs.H.K.Dhruva & Anr. 2002 Vol.XLIII (4) Gujarat Law Reporter 3263***. Relying upon the aforesaid judgments, it is submitted by the learned counsel for the respondent that the judgments of this court and judgments of Supreme Court in case of ***Sree Kamatchi Amman Constructions (supra)*** are clearly distinguishable and would not assist the petitioner.

23. Insofar as claim nos.1 and 4 are concerned, though the petitioner has prayed for setting aside the entire award in the petition, a perusal of the petition indicates that the petitioner has not raised any ground of challenge insofar as those two claims are concerned. Mr.Suresh Kumar, learned counsel for the petitioner could not point out any ground in respect of those two claims in the petition and fairly submitted that no such ground has been raised in respect of those claims though the petitioner has prayed for setting aside the entire award.

24. Insofar as claim no.5 is concerned, in the majority award, the learned arbitrators have allowed the price escalation beyond the period of 12 months from the date of letter of acceptance on the indices, labour, material and fuel for on payment of 'on account bills' taking basis as on March 1996. The learned

arbitrators noticed that there was no price variation clause in the agreement under consideration because completion period was only 12 months. It is also noticed that there has been delay in the completion of the work primarily because of non availability of land for which reason the petitioner has granted extension to the respondent. The scope of work was also increased from Rs.61,21,043/- with completion period of 12 months to Rs.9400788.02. The learned arbitrator placed reliance on the judgment of Supreme Court in case of *K.N.Sathyapalan (supra)* and allowed the claim for escalation.

25. Under clause 17(3) of the General Conditions of Contract, it is provided that in the event of any failure or delay by the petitioner to handover to the contractor possession of the lands necessary for the execution of the works or for various other reasons mentioned therein or any other delay caused by the petitioner due to any other cause whatsoever, then the contractor will not be entitled to any damage or compensation, but the petitioner may grant extension of the completion date as may be considered reasonable. A perusal of the award indicates that though there was prohibition from payment of compensation or damages, the learned arbitrators have awarded the claims for price escalation for the period beyond 12 months from the date of letter of acceptance. Though the learned arbitrators held that there had been delay in completion of the work primarily because of the non availability of land for which the extension had been granted to the contractor by the petitioner, contrary to clause 17(3), the learned arbitrator has awarded compensation. It is not in dispute that in respect of the additional work awarded to the respondent, a supplementary agreement was entered into between the parties and the new rates were derived by and between the parties.

26. Clause 17(3) of the General Conditions of Contract which was applicable to

the parties has been interpreted by the Division Bench of this court in case of ***Union of India vs. M/s. Shyam Constructions (supra)*** delivered on 19th October, 2012 in ***Appeal (L) No.309 of 2011***. After advertng to the judgment of Supreme Court in case of ***Ramnath International Construction Private Limited vs. Union of India AIR 2007 SC 509*** and the judgment delivered by the learned Single Judge of this court in case of ***Chaitanya Electrical Private Limited vs. General Manager Central Railway in Arbitration Petition No.370 of 2002***, the Division Bench has held that in view of the said express terms of the contract, the arbitral tribunal has manifestly erred in ignoring the contract and awarding the claim for compensation.

27. In my view the said judgment of Division Bench which construed clause 17(3) and after advertng to the judgment of Supreme Court in case of ***Ramnath International Construction Private Limited vs. Union of India (supra)*** squarely applies to the facts of this case and is binding on this court. I am respectfully bound by the said judgment.

28. This court in case of ***Konkan Railway Corporation Limited vs. M/s. Oriental Construction Company Limited (2013) 3 Bom.C.R.140*** has interpreted clause 15.4 which provided for bar from payment of interest and clause 16.3 which provides for bar from payment of damages or compensation in case of delay. This court after advertng to the judgment of Supreme Court in case of ***Ramnath International Construction Private Limited (supra)*** and several other judgments has held that in view of the bar from payment of any interest and compensation in the contract entered into between the parties, the arbitral tribunal has no power to award such claim for compensation of damages or interest.

29. This court in case of ***Union of India vs. S.N. Naik and Bros., Panvel,***

2013(2) Mah.L.J. 390 has dealt with clause 16(2) and 17(iii) of the General Conditions of Contract which were applicable to the parties to this contract also and has after adverting to the judgment of Supreme Court in case of **Sree Kamatchi Amman Constructions (supra)** and the judgment of Division Bench in case of **Union of India vs. M/s.Shyam Constructions (supra)** has held that the learned arbitrator could not have awarded the claims contrary to the provisions of the contract, the claims being clearly prohibited under those provisions and thus the award is contrary to and in conflict with the public policy.

30. Supreme Court in case of **Sree Kamatchi Amman Constructions (supra)** has also interpreted clause 16(2) of the General Conditions of Contract which was applicable to the parties to this contract also insofar as issue of interest is concerned and has set aside the claims for interest which was awarded by the arbitral tribunal contrary to the said clause 16(2). Supreme Court has also dealt with its earlier judgment in case of **Madnani Construction Corporation Private Limited (supra)** relied upon by the learned counsel for the respondent in the said judgment.

31. Insofar as judgment of Supreme Court in case of **K.N.Sathyapalan vs. State of Kerala and anr. (supra)** is concerned, a perusal of the said judgment indicates that there was no provision for escalation in the original agreement and there was a finding rendered by the learned arbitrator that on account of the increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause the escalation could be granted. In this case there was a clear bar under clause 17(3) from the payment of any compensation. The said judgment of Supreme Court in case of **K.N.Sathyapalan vs. State of Kerala and anr. (supra)** thus would not assist the respondent.

32. Insofar as judgment of Supreme Court in case of ***Asian Techs Limited (supra)*** relied upon by the respondent is concerned, a perusal of the said judgment clearly indicates that the judgment of Supreme Court in case of ***Ramnath International Construction Private Limited (supra)*** was not brought to the notice of the Supreme Court in the case of ***Asian Techs Limited (supra)***. A perusal of the judgment of Supreme Court in case of ***Asian Techs Limited (supra)*** indicates that in that matter the contractor was not ready to work beyond the contractual period otherwise then on separate work order. The Supreme Court noticed that the subsequent correspondence entered into between the parties had made it clear that it was only on the specific assurance given by the Union of India to the contractor to continue the work and that the rates would be decided across the table that the contractor went ahead with the work. With these facts under consideration, Supreme Court held that it was not open to the Union of India to contend that no claim for further amount could be made due to Clause 11(C) of the General Conditions of Contract and that the arbitrator would have no jurisdiction to award the same or that the learned arbitrator have no jurisdiction to award.

33. Insofar as claim no.7 is concerned, a perusal of the award indicates that though the learned arbitrators in the majority award have rendered a finding that it was difficult to verify the claims physically and even at the time of preparation of final bill after a long gap it would have been difficult to verify the exact quantity of the material left at site, the learned arbitrators have allowed the said claim applying a thumb rule by allowing 60% of the claim claim. The learned arbitrators did not dealt with the submission of the petitioner that the respondent had stopped the work w.e.f. 1st June, 2000 and had removed all men, materials, machinery and labour camp etc. from the site of work and had failed to resume the work. It was also the case of the petitioner that there was no material lying at the site belonging

to the respondent herein and the claim was not acceptable. In my view the learned arbitrators have allowed the said claim based on no evidence and has applied the thumb rule by taking a imaginary figure of 60% of the claim and has awarded a sum of Rs.2,30,520/- without any basis, which is not permissible.

34. This court in case of ***Konkan Railway Corporation Limited (supra)*** has dealt with the similar facts and has set aside the award in respect of the claims which were allowed by the learned arbitrators based on no evidence and by granting compensation at the flat rate of 60% of the claims made by the contractor. Paragraph 17 of the said judgment is relevant on this issue. I am respectfully bound by the said judgment. Impugned award insofar as claim no.7 is accordingly set aside.

35. Insofar as claim no.13 i.e. claim for interest is concerned, in the majority award, the learned arbitrators have allowed simple interest at the rate of 12% per annum from 3rd November, 2001. A perusal of the award indicates that though the learned arbitrators have referred to clause 16(2) of the General Conditions of Contract, however have allowed the said claim contrary to the said clause 16(2) of the General Conditions of Contract. It is the case of the respondent that the bar for payment of interest under clause 16(2) of the General Conditions of Contract would apply only to the amount payable by the owner to the contractor arising out of the earnest money or security deposit and not any amount other than the said two payments. It is the case of the respondent that clause 16(2) of the General Conditions of Contract has to be read with clause 16(1) and since the petitioner had withheld the legitimate dues of the respondent, the learned arbitrators have rightly allowed the claims for interest.

36. In support of this submission, learned counsel for the respondent placed reliance on the judgment of Supreme Court in case of ***Madnani Construction Corporation Private Limited (supra)*** and in particular paragraphs 22, 23 and 39 and would submit that after interpreting clause 16(2) of the General Conditions of Contract which is identical in the facts of this case, the Supreme Court has upheld the award of interest awarded by the learned arbitrator. He submits that the said judgment of Supreme Court in case of ***Madnani Construction Corporation Private Limited (supra)*** has not been interpreted by the Supreme Court in case of ***Sree Kamatchi Amman Constructions vs. Divisional Railway Manager (Works), Palghat and others (supra)*** though has referred to the said judgment. He submits that thus the judgment of Supreme Court in case of ***Madnani Construction Corporation Private Limited (supra)*** taking a view that there was no bar against the arbitrator from awarding any claim of interest under clause 16(2) of the General Conditions of Contract which was delivered prior in point of time will prevail and not the judgment of Supreme Court in later judgment in case of ***Sree Kamatchi Amman Constructions (supra)***.

37. Supreme Court in case ***Hyder Consulting (UK) Limited vs. Governor, State of Orissa, (2015) 2 SCC 189*** has dealt with the power of the arbitral tribunal under section 31(7) (a) and (b) insofar as power to award of interest is concerned. Paragraphs 3 and 4 per S.A.Bobde, J. and paragraphs 26 to 33, concurring judgment of A.M.Sapre, J. in case of ***Hyder Consulting (UK) Limited (supra)*** read thus :-

Per S.A.Bobde, J.

3. Sub-section (7) of Section 31 of the Act, which deals with the power of the Arbitral Tribunal to award interest, reads as follows:

“31. (7)(a) Unless otherwise agreed by the parties, where and insofar 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 eighteen per centum per annum from the date of the award to the date of payment.”

(emphasis supplied)

4. Clause (a) of sub-section (7) provides that where an award is made for the payment of money, the Arbitral Tribunal may include interest in the sum for which the award is made. In plain terms, this provision confers a power upon the Arbitral Tribunal while making an award for payment of money, to include interest in the sum for which the award is made on either the whole or any part of the money and for the whole or any part of the period for the entire pre-award period between the date on which the cause of action arose and the date on which the award is made. To put it differently, sub-section (7)(a) contemplates that an award, inclusive of interest for the pre-award period on the entire amount directed to be paid or part thereof, may be passed. The “*sum*” awarded may be the principal amount and such interest as the Arbitral Tribunal deems fit. If no interest is awarded, the “*sum*” comprises only the principal. The significant words occurring in clause (a) of sub-section (7) of Section 31 of the Act are “*the sum for which the award is made*”. On a plain reading, this expression refers to the *total amount* or *sum* for the payment for which the award is made. Parliament has not added a qualification like “principal” to the word “sum”, and therefore, the word “sum” here simply means “a particular amount of money”. In Section 31(7), this particular amount of money may include interest from the date of cause of action to the date of the award.

Per Sapre, J.

26. Section 31(7)(a) of the Act deals with grant of pre-award interest while clause (b) of Section 31(7) of the Act deals with grant of post-award interest. Pre-award interest is to ensure that arbitral proceedings are concluded without unnecessary delay. Longer the proceedings, the longer would be the period attracting interest. Similarly, post-award interest is to ensure speedy payment in compliance with the award. Pre-award interest is at the discretion of the Arbitral Tribunal, while the post-award interest on the awarded sum is mandate of the statute—the only difference being that of rate of interest to be awarded by the Arbitral Tribunal. In other words, if the Arbitral Tribunal has awarded post-award interest payable from the date of award to the date of payment at a particular rate in its discretion then it will prevail else the party will be entitled to claim post-award interest on the awarded sum at the statutory rate specified in clause (b) of Section 31(7) of the Act i.e. 18%. Thus, there is a clear distinction in time period and the intended purpose of grant of interest.

27. Section 31(7)(a) employs the words “... *the Arbitral Tribunal may include in the sum for which the award is made interest...*”. The words “*include in the sum*” are of utmost importance. This would mean that pre-award interest is not independent of the “*sum*” awarded. If in case, the Arbitral Tribunal decides to award interest at the time of making the award, the interest component will not be awarded separately but it shall become part and parcel of the award. An award is thus made in respect of a “*sum*” which includes within the “*sum*” component of interest, if awarded.

28. Therefore, for the purposes of an award, there is no distinction between a “*sum*” with interest, and a “*sum*” without interest. Once the interest is “*included in the sum*” for which the award is made, the original sum and the interest component cannot be segregated and be seen independent of each other. The interest component then loses its character of an “*interest*” and takes the colour of “*sum*” for which the award is made.

29. There may arise a situation where, the Arbitral Tribunal may not award any amount towards principal claim but award only “*interest*”. This award of interest would itself then become the “*sum*” for which an award is made under Section 31(7)(a) of the Act. Thus, in a pre-award stage, the legislation seeks to make no distinction between the sum awarded and the interest component in it.

30. Therefore, I am inclined to hold that the amount award under Section 31(7)(a) of the Act, whether with interest or without interest, constitutes a “*sum*” for which the award is made.

31. Coming now to the post-award interest, Section 31(7)(b) of the Act employs the words, “*A sum directed to be paid by an arbitral award...*”. Clause (b) uses the words “arbitral award” and not the “Arbitral Tribunal”. The arbitral award, as held above, is made in respect of a “*sum*” which includes the interest. It is, therefore, obvious that what carries under Section 31(7)(b) of the Act is the “*sum directed to be paid by an arbitral award*” and not any other amount much less by or under the name “*interest*”. In such situation, it cannot be said that what is being granted under Section 31(7)(b) of the Act is “*interest on interest*”. Interest under clause (b) is granted on the “*sum*” directed to be paid by an arbitral award wherein the “*sum*” is nothing more than what is arrived at under clause (a).

32. Therefore, in my view, the expression “*grant of interest on interest*” while exercising the power under Section 31(7) of the Act does not arise and, therefore, the Arbitral Tribunal is well empowered to grant interest even in the absence of clause in the contract for grant of interest.

33. My aforesaid interpretation of Section 31(7) of the Act is based on three golden rules of interpretation as explained by Justice G.P. Singh in *Principles of Statutory Interpretation* (13th Edn., 2012) where the learned author has said that while interpreting any statute, language of the provision should be read as it is and the intention of the legislature should be gathered primarily from the language used in the provision meaning thereby that attention should be paid to what has been said

as also to what has not been said; second, in selecting out of different interpretations “the court will adopt that which is just, reasonable, and sensible rather than that which is none of those things”; and third, when the words of the statute are clear, plain or unambiguous i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequence (see pp. 50, 64 and 132). I have kept these principles in mind while interpreting Section 31(7) of the Act.

38. Supreme Court in case of ***Union of India vs. Concrete Products and Construction Company and others (supra)*** has held that the arbitral tribunal could not have awarded interest upto the date of award in view of the agreement between the parties which barred the payment of interest. The said bar against award of interest would operate not only during the pre-reference period but also during the pendente lite period. Supreme Court has also adverted its earlier judgments in case of ***Kamatchi Amman Constructions (supra)***.

39. In my view the power of the arbitral tribunal to award interest from the due date till the date of payment and reasonable rate as the tribunal deems fit is subject to the contract to the contrary. In this case since there was bar under the contract and in particular clause 16(2) of the General Conditions of Contract from the payment of any interest on any amount due and payable to the respondent by the petitioner, in my view the learned arbitrators could not have awarded any interest for the period upto the date of the award on any of the claims. The said bar under clause 16(2) would apply to any payment due and payable by the petitioner to the respondent and not apply to the payment for retention money deposit or in case of security deposit as canvassed by the learned counsel for the respondent.

40. Insofar as judgment of Supreme Court in case of ***Madnani Construction***

Corporation Private Limited (supra) relied upon by the learned counsel for the respondent on the issue of interest is concerned, the said judgment of Supreme Court has been delivered under the provisions of the Arbitration Act, 1940 and has not dealt with the powers of the arbitral tribunal provided under section 31(7) (a) of the Arbitration and Conciliation Act, 1996. Supreme Court in case of **Sayeed Ahmed & Co. vs. State of U.P. (2009) 12 SCC 26** has held that the decision of the Supreme Court with reference to the award 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 discretion to award the interest during the pendente lite period in spite of any bar against interest contained in the contract between the parties are not applicable to the arbitrations governed by the Arbitration and Conciliation Act. Paragraph 14 of the said judgment in case of **Sayeed Ahmed & Co. (supra)** read thus :-

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.

41. In paragraph (18) of the judgment of Supreme Court in case of **Sree Kamatchi Amman Constructions (supra)**, Supreme Court has distinguished judgment in case of **Madnani Construction Corporation Private Limited (supra)** and has held that the said judgment was under the old Arbitration Act, 1940 which did not contain similar provisions under section 31(7)(a) of the Arbitration and Conciliation Act, 1996. Supreme Court distinguished its earlier judgment in case of **Port of Calcutta vs. Engineers-De-Space-Age (1996) 1 SCC 516** in which it

was held that while the contract governed interest from the date of cause of action to the date of reference the arbitrator had the discretion to decide the date of interest from the date of reference to the date of award and he shall not bound by any prohibition regarding interest contained in the contract insofar as pendente lite period is concerned.

42. In my view the judgment of Supreme Court in case of ***Madnani Construction Corporation Private Limited (supra)*** which was decided under the provisions of Arbitration Act, 1940 thus relied upon by the learned counsel for the respondent would not assist the case of the respondent in view of the later judgment of Supreme Court interpreting the power of the arbitral tribunal under section 31(7)(a) of the Arbitration and Conciliation Act, 1996 which powers are different than the power of the arbitral tribunal under the provisions of Arbitration Act, 1940. In my view the judgment delivered by the courts dealing with the power of the arbitrator under the provisions of the Arbitration Act, 1940 thus would not apply to the award delivered under the provisions of Arbitration and Conciliation Act, 1996 and in particular the award on interest under section 31(7) of the said Act is concerned.

43. Insofar as judgment of Delhi High Court in case of ***M/s.Simplex Concrete Piles (India) Ltd. vs. Union of India*** and in case of ***Union of India vs.M/s.Chenab Construction Joint Venture (supra)*** relied upon by the learned counsel for the respondent are concerned, in my view I am bound by the judgment of Supreme Court and this court which has taken a different view and not bound by the judgment of Delhi High Court. Even otherwise the said judgments are clearly distinguishable in the facts of this case and would not assist the respondent.

44. I, therefore, pass the following order :-

- (a) Impugned award rendered by the majority of the arbitrators on 14th September, 2010 insofar as claim nos. 5, 7 and 13 is set aside. Rest of the award is upheld.
- (b) There shall be no order as to costs.

(R.D.DHANUKA,J.)