THE HON'BLE SRI JUSTICE K.C. BHANU
AND
THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

C.M.A.No.302 of 2008

JUDGMENT: *(per Hon'ble Sri Justice M. Seetharama Murti)*

The unsuccessful petitioners had preferred this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 assailing the order dated 02.01.2007 in O.P.No.2128 of 2004 passed by the learned II Additional Chief Judge, City Civil Court, Hyderabad.

2. We have heard the submissions of the learned counsel for the petitioners/appellants/Railways and the learned counsel for the 1st respondent/claimant. The 2nd respondent is the sole Arbitrator.

3. In this appeal, the parties shall hereinafter be referred to as the petitioners (appellants) and the 1st respondent (claimant) for convenience and clarity.

4. The introductory facts, in brief, are as follows: 'The Union of India represented by its Divisional Railway Manager, Works (BG) and the Divisional Engineer, Special Works, (BG), South Central Railway, Secunderabad undertook repairs to the narrow banks on Vikarabad-Purli section of the track between KM No.260/10 to 261/68. The 1st respondent is the Contractor. The quantity of work to be carried out was 9016 cubic meters and the rate agreed to was Rs.28.80 per cubic meter. The tender submitted on 08.08.1986 by the 1st respondent was accepted by the 2nd petitioner. The total value of the work was Rs.2,59,660-80ps. The work was to be completed by 07.12.1986. The 1st respondent and the 2nd petitioner had entered into an agreement dated 13.08.1986 under exhibit C2. On the request of the 1st respondent/claimant, it was agreed to deduct a sum of Rs.20,483/- from the running bills towards security deposit. By a letter dated 21.11.1986, the 1st respondent sought extension of time for completion of the work. Though extension of time was sought up to 31.03.1987, time was granted up to 28.02.1987. By letter dated 18.08.1988, the 1st respondent was requested to complete the work within a fortnight. The work was completed by 31.12.1988 though not within the stipulated time. A request was made for measurement of the work done and payment of the final bill amount and refund of the security deposit. According to the 1st respondent, no measurements were taken and the final bill was not prepared. In fact, the 1st respondent addressed a letter dated 09.07.1998 and a letter dated 28.08.2001 requesting to finalize the contract and make arrangement for payment of dues along with interest. To the requests made by the 1st respondent to finalise the payment under the contract there were no replies. The 1st respondent/claimant sent a claim letter dated 30.10.2001 (exhibit C7). As there was no response and on account of the disputes that had arisen between the parties, the 1st respondent had opted for the resolution of the disputes through arbitration. This Court, vide orders dated 01.08.2002 passed in A.A.No.35 of 2002 had appointed the 2nd respondent as the learned Arbitrator to resolve the disputes between the parties arising out of the contract Work Order No.17/SW/BG/86, dated 13.08.1986 in respect of the work of repairs to the narrow banks of the track between KM No.260/10 to 261/68 on Vikarabad-Purli Section of South Central Railway. On merits, the learned Arbitrator had awarded an amount of Rs.5,12,445/- as per the 'summary of claims and award' annexed to the award. Before the learned Arbitrator, the petitioners/appellants have raised preliminary objections in regard to lack of jurisdiction and the non applicability of the provisions of the Arbitration & Conciliation Act, 1996 ('the new Act', for short). The learned Arbitrator while overruling the said preliminary objection had proceeded to decide the claims on merits and had passed the award. Aggrieved of the said award, the petitioners had preferred the aforementioned O.P before the Court below. On merits, the Court below had dismissed the said OP. Therefore, the aggrieved petitioners are before this Court.

5.1 The learned counsel for the petitioners would first contend as follows: 'The claims were made by the 1st respondent even before the new Act has come into force. Therefore, the very appointment of the learned Arbitrator under the provisions of the new Act is not legal and tenable as the arbitral proceedings had commenced much prior to the coming into force of the new Act i.e., on the date the request for referring the claims/dispute to arbitration was submitted by the 1st respondent and was received by the petitioners. Since the arbitral proceedings had commenced even before the new Act has come into force and in view of the provisions of Sections 21 and 85 of the new Act, the provisions of the Arbitration Act, 1940 (Act 10 of 1940) i.e., the old Act are only applicable and, therefore, the very appointment of an arbitrator in an application filed by the 1st respondent invoking the provisions of the new Act is untenable and not legally valid. The arbitrator appointed had lacked jurisdiction to resolve the disputes. The award passed by the learned Arbitrator appointed under the new Act by following the procedure under the new Act is an award passed without jurisdiction and for all the reasons, the award is liable to be set aside.

5.2 In support of the said contentions, reliance was placed on the decisions in (i) **Shetty's Constructions Co. Pvt. Ltd., v. Konkan Railway Construction and another**[1]**;** (ii) **Milkfood Ltd., v. GMC Ice Cream (P) Ltd.,**[2]**;** (iii) **U.P. State Sugar Corporation Ltd., v. Jain Construction Co. and another**[3]**;** (iv) **Dhirubai D. & Company,**

Engineers & Contractors, Secunderabad v. Nizam Sugar Factory Limited, Hyderabad[4]**;** and (v) a Division Bench Judgment of this Court dated 01.05.2007 in CMA.No.2625 of 2003 between **M/s. Standard Industrial Engineering Company., v. A.P. Power Generation Corporation Limited and others.**

5.3 On the other hand, on this aspect of jurisdiction, the learned counsel for the 1st respondent would contend as follows: 'No claims were made and no request for resolving the disputes by having resort to arbitration was made prior to the coming into force of the new Act. The request for settlement of claims was made in the year 2001, i.e., after coming into force of the new Act. In the case on hand, the Arbitrator was appointed by this Court and not by the parties directly. As the Arbitrator was appointed with the intervention of the Court, the proceedings commence from the date of the appointment of the Arbitrator but, not from the service of notice of the claims as in the case of appointment of an Arbitrator with the consent of the parties. Since the Arbitrator was appointed by a competent Court and as the said order appointing the Arbitrator had become final, the law as on the date the Arbitrator was appointed and the law as on the date the Arbitrator had entered the reference and passed the Award has to be applied. The order appointing the Arbitrator was allowed to become final; and, the said order was challenged only before the learned Arbitrator; and, the learned Arbitrator had ruled on his jurisdiction holding that the contention of the Railways that the Tribunal lacked jurisdiction is not tenable. The said finding of the learned arbitrator was confirmed by the court below. Therefore, there is no merit in the contentions of the petitioners/Railways on the aspects of lack of jurisdiction and the non-applicability of the provisions of the new Act. The request for settlement of claims was made after the new Act has come into force and therefore, the arbitral proceedings had commenced only after the new Act has come into force and hence, the provisions of the new Act are only applicable. On account of the Tribunal following the provisions of the new Act, no prejudice has been caused to the Railways; and, in any view of the matter, the Award need not be set aside in the absence of the Railways showing that any prejudice has been caused.

5.4 In reply, the learned counsel for the appellants/Railways would contend as follows: 'The application under Section 11 of the Arbitration and Conciliation Act, 1996 was filed before the learned Chief Justice of High Court of Andhra Pradesh, and the said application was allowed by a learned Designated Judge. In the decision in **Konkan Railway Corporation Ltd., & Anr. Vs. Rani Construction Pvt. Ltd., [(2002) 2 SCC 388]**, the Constitution Bench of the Supreme Court has held that the Order passed by the learned Chief Justice or his designate is not an order passed while exercising judicial function and that therefore, it is not open to challenge under Article 136 of the Constitution. In view of the above law laid down, the contention of the 1st respondent that the order appointing an arbitrator has become final is untenable. As the parties by then were controlled by the ratio in the above decision, which is holding the field, the petitioners are entitled to avail the remedies in accordance with the ratio in said decision of the Constitution Bench and raise the issue of jurisdiction before the learned arbitrator. Section 16 of the new Act also permits such a course.

6. Therefore, the first and important vital issue is as under: 'Whether the appointment of the learned Arbitrator under the provisions of the new Act is itself not legal and tenable? Whether the provisions of the new Act have no application as contended by the Railways/ petitioners? And, if so, whether the award was one passed without jurisdiction? And, if so, whether the Award passed by the learned Arbitrator by following the procedure under the new Act instead of following the procedure under the old Act is liable to be set aside being not legal, sustainable and valid under facts and in law?'

6.1 In the light of the facts and the contentions of the learned counsel for the Petitioners/Railways and also the contentions of the learned counsel for the 1st respondent, it is necessary to first advert to the provisions of law and the ratios in the precedents relied upon by the learned counsel for the petitioners/Railways.

Section 85 of the new Act which deals with 'Repeal and Savings' reads as under:

> **85. Repeal and saving: -**
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> **(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.**
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> **(2) Notwithstanding such repeal, -**
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> **(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;**
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> **(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.**

Section 16 of the new Act, which deals with 'competence of the Arbitral Tribunal to rule on its jurisdiction' reads as under:

> **16. Competence of Arbitral Tribunal to rule on its jurisdiction.—**
>
> **(1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—**

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of an arbitrator.

(3) A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the Arbitral proceedings.

(4) The Arbitral Tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The Arbitral Tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the Arbitral Tribunal takes a decision rejecting the plea, continue with the Arbitral proceedings and make an Arbitral award.

(6) A party aggrieved by such an Arbitral award may make an application for setting aside such an Arbitral award in accordance with section 34.

Section 21 of the new Act, which deals with the 'commencement of the arbitral proceedings', reads as follows:

21. Commencement of arbitral proceedings: - Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

In **Shetty's Constructions Co. Pvt. Ltd., v. Konkan Railway Construction and another (1 supra)** the test to determine as to which Act would apply was considered. The Supreme Court having referred to sub-section (2)(a) of Section 85 had held as follows: -

> ‘**A mere look at sub-section (2)(a) of Section 85 shows that despite the repeal of Arbitration Act, 1940, the provisions of the said enactment shall be applicable in relation to arbitration proceedings which have commenced prior to the coming into force of the new Act.**’

The Supreme Court having also considered the provision of Section 21 of the new Act had held as follows: -

> ‘**Therefore, it must be found out whether the requests by the petitioner for referring the disputes for arbitration were moved for consideration of the respondents on and after 26.01.1996 or prior thereto. If such requests were made prior to that date, then on a conjoint reading of Section 21 and Section 85(2)(a) of the new Act, it must be held that these proceedings will be governed by the old Act.**’

In the case of **Milkfood Ltd.,** (2 supra) the Supreme Court having referred to various precedents held that if the arbitral proceedings commenced for the purpose of the applicability of the 1940 Act in September 1995 the question of adopting a different procedure laid down under 1996 Act would not arise. Having regard to the facts and the law laid down, the Supreme Court concluded in that case that the 1940 Act shall apply and not the 1996 Act.

In **U.P. State Sugar Corporation Ltd.,** (3 supra) the facts of the reported case show that the disputes and differences had arisen between the parties in respect of an agreement entered into on or about 11.04.1988 and the respondents therein had filed an application under Section 20 of the 1940 Act in the Court of the Civil Judge, Dehradun for appointment of an Arbitrator. In this factual background, the Supreme Court having referred to the above two decisions (1 and 2 supra) and also the decisions in *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd [(1999) 9 SCC 334]; Fuerst Day Lawson Ltd., v. Jindal Exports Ltd., [(2001) 6 SCC 356 and State of W.B v. Amritlal Chatterjee [(2003)*

10 SCC 572] had held that in respect of the arbitral proceedings that had commenced before coming into force of the 1996 Act, the provisions of the 1940 Act shall apply.

In **Dhirubai D. & Company** (4 supra) the facts show that arbitral proceedings had commenced under 1940 Act before the coming into force of the 1996 Act. In view of the provision of Section 21 of the new Act that arbitral proceedings shall commence on the date on which the request for referring the dispute to arbitration is received by the other party, this Court had held that the resolution of the dispute between the parties by the Tribunal under 1940 Act is not improper though one of the parties had appointed the arbitrator in the year 1997.

In **Union of India v. G.G.Satyanarayana and others [2002(5) ALD 810 (DB)]** the facts show that the respondent had applied for arbitration before the commencement of the new Act, but the arbitrators expressed their willingness only on 24.04.1997 and hence, this Court held that there is no scope for commencement of proceedings prior to the commencement of the new Act, since the Arbitrators had expressed their willingness only on 24.04.1997. In the very decision, the Division Bench of this Court having referred to the provisions under Section 21 and Section 85(2)(a) of the new Act had held that the provision under Section 85(2)(a) applies only in such cases where the proceedings have already been commenced by the date the new Act has come into force.

In a Division Bench Judgement of this Court dated 01.05.2007 in CMA.No.2625 of 2003 between **M/s. Standard Industrial Engineering Company., v. A.P. Power Generation Corporation Limited and others** the question that was considered was this: – ‘Whether the arbitral proceedings commenced prior to 26.01.1996 or thereafter?’ In this cited case, this Court having referred to the decisions of the Supreme Court, which are referred to supra, and the other decisions of the Supreme

Court and having regard to the fact that the suit was instituted for appointment of an arbitrator prior to the commencement of the new Act, had held that the arbitration proceedings had commenced prior to the commencement of the new Act, though the arbitrator was appointed after the commencement of the new Act.

6.2 The propositions of law which are laid down in the precedents are not disputed by either of the parties. Reverting to the facts of the case on hand, suffice, if it is stated that the introductory facts are already stated supra. As per the provisions of law and the ratios in the precedents, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the (opposite) party concerned. Therefore, it is for the petitioners/Railways to show that the request for the dispute to be referred to arbitration was received by it prior to the coming into the force of the new Act. However, in the case on hand, no document in that regard was placed on record by the petitioners/Railways. From the material record and the documents exhibited it is evident that a request for settlement of claims was made by the 1st respondent vide letter dated 30.10.2001 and the said letter was referred to in the Award as claim letter (exhibit C7). The said letter must have been received by the petitioners/Railways on the same day or thereafter. Though the petitioners are under an obligation to show that the request to refer the dispute to arbitration was received on a particular date and that the arbitral proceedings commenced on a date, which is prior to coming into force of the new Act, the petitioners could not produce any evidence to show that any such request to refer the claims to arbitration was received in respect of the subject dispute before the provisions of the new Act had come into force. None of the documents exhibited, i.e., the letters dated 21.11.1986, 18.08.1988, 09.07.1988, 03.07.1998 and the letter dated 30.10.2001 referred to above as claim letter or any other document exhibited in the proceedings before the learned Arbitrator support the contention of the petitioners/Railways that a request for the dispute to be referred to arbitration was received by it prior to the coming into force of the new Act. Therefore, the material record in this case would disclose that the arbitral proceedings in respect of this particular dispute had commenced on a date which is subsequent to the coming into force of the new Act. Since the request for reference of the claims for arbitration was made after the coming into force of the new Act, applying the test laid down by the Supreme Court and having regard to the provisions of law extracted supra, it must be held that the *lis/*claims will be governed by the provisions of the new Act and not the old Act, as held by the learned Arbitrator and the court below. The vital questions under this issue are accordingly answered in favour of the 1st respondent and against the petitioners/Railways.

7. In the light of the finding on the issue of jurisdiction in favour of the 1st respondent and against the petitioners, it is necessary to deal with the following issues as well. **(i) Whether the claims of the 1st respondent are barred by law of limitation? (ii) Whether the petitioners made out valid and sufficient grounds for setting aside the impugned order and the award of the Tribunal?**

8. Coming to the first among the two issues supra, namely, the issue of bar of limitation, it is to be noted that this issue is a mixed question of fact and law. The learned counsel for the petitioners would contend that the claimant/1st respondent had made a request under exhibit C7 letter dated 30.10.2001 to settle the claims and that the said request was made ten long years after the cause of action for the claims had arisen and that therefore, the claims are barred by law of limitation. On the other land, the learned counsel for the 1st respondent would contend that since the final bill was not prepared, the cause of action to make claims did not accrue as contended by the petitioners, and that the learned Arbitrator and the court below had recorded concurrent findings of fact in favour of the 1st respondent on this issue of limitation and that there is no illegality or impropriety in the orders of the Court below and the award of the Tribunal and hence, this Court exercising limited jurisdiction shall not interfere with the findings on the issue of limitation. Be it noted that the learned Arbitrator having regard to the facts, the chronology of events and the ratios in the decisions cited before him had held that the contract was not terminated and that the 1st respondent/claimant was doing the work till 31.12.1988, i.e., till the completion of the work and that the 1st respondent had made an assertion of the claims on 30.10.2001 under exhibit C7 and that the cause of action had arisen on that date and that therefore, the contention that the claims are barred by limitation cannot be accepted. Thus, the learned Arbitrator having taken note of the fact that the final bill was not prepared and that the assertion of the claims was made on 30.10.2001 had accordingly rejected the contention of the petitioners that the claims are barred by law of limitation. The court below while considering this issue of limitation having referred to the decision in **Inder Singh Rekhi v. Delhi Development Authority** [AIR 1988 SC 1007] had held that the assertion of the claim in the case on hand was made on 30.10.2001 and that therefore, the cause of action had arisen on 30.10.2001 and that the period of limitation started to run from the said date and that therefore, the application filed by the 1st respondent for appointment of an arbitrator was well within time. Having analytically examined the facts and the reasoning of the Tribunal and the court below, we find no illegality or impropriety in the findings/conclusions calling for interference. The well reasoned findings recorded on the issue of limitation after accurately considering the facts cannot be said to be capricious or arbitrary. Therefore, the issue of limitation is answered against the petitioners and in favour of the 1st respondent.

9. Coming now to the next issue in regard to the merits of the matter concerning the claims awarded by the learned Arbitrator and confirmed by the court below, it is necessary to examine correctness or otherwise of the claims awarded.

9.1 Claim No.1 in two parts is towards loss on account of delay in finalizing the contract and refund of security deposit. A claim for Rs.30,000/- was made towards payment made to labour engaged through an agent and a claim for Rs.20,483/- was made towards refund of the security deposit. Before the learned Arbitrator, the 1st respondent contended that it is the duty of the petitioners to take measurements of the work done and maintain records regarding the quantity and quality of the work done and make payments and that the same was not done by the petitioners and that no measurements were recorded in the presence of the 1st respondent and that no final bill was prepared though an obligation was cast upon the petitioners to do so. On this aspect, the contentions of the petitioners before the learned arbitrator are in the nature of denial. It was *inter alia* contended that as per records, no further work was done by the 1st respondent after February 1987 and that no complaint in regard to non-payment for the work executed after February 1987 was made by the 1st respondent. The learned Arbitrator having considered the evidence on record had recorded a finding that the delay in execution of the work is not attributable to the 1st respondent/ claimant and that the delay was attributable to the petitioners and that hence, a fundamental breach was committed by the petitioners and that therefore, the 1st respondent is entitled to the said amount. The learned arbitrator had also recorded a finding that the 1st respondent did work beyond 28.02.1987 and that the 1st respondent had completed the work by 31.12.1988 and that the petitioners did not contradict the statement that they have given a certificate of completion of work to the 1st respondent. The learned arbitrator had also noted that the petitioners did not produce the record which is to be maintained by them and that the petitioners did not follow the procedure and make final payment as per general conditions of the contract. The learned arbitrator further noted that in the counter the petitioners, who are the answering respondents did not dispute the genuineness of exhibit C9, which evidences payment of Rs.30,000/- made to the labour by the 1st respondent, and that being unable to wriggle out from unimpeachable documentary evidence, the petitioners herein came forward with a lame excuse that all documents relating to measurements are destroyed. Having thus assigned reasons the learned Arbitrator had awarded the 1st part of claim no.1 to the 1st respondent. In regard to the claim of refund of security deposit having recorded a finding that the work was completed by 31.12.1988, it was held that the 1st respondent is entitled to refund of Rs.20,160/- as against the claim of Rs.20,483/-. The said awarded amount was arrived at basing on the sum mentioned in C.C.3 or Account bill.

9.2 The second claim in a sum of Rs.2,57,463/- is towards compensation for loss of legitimate earnings. The contention of the 1st respondent before the learned arbitrator was that he would have invested the final bill amount in a profitable manner had the petitioners paid the same to him within a reasonable time by settling the final bill amount and that on account of the inordinate delay and failure on the part of the petitioners in finalising the accounts and the claim, he had sustained loss and that therefore, he is entitled to this claim towards legitimate earnings on his effective productivity at 10% per annum, i.e., on effected productive value (Rs.4/- X Rs.50,483/-) for the period from 01.01.1989 till the date of actual payment. The petitioners contended before the learned Arbitrator that no documentary or material evidence was produced to substantiate the claim and that the claim is not sustainable under Section 73 of the Contract Act and clause 17(3) of the General Conditions of the Contract, which prohibits grant of compensation/damages. The learned arbitrator had awarded this claim having regard to his earlier finding that the work was completed by 31.12.1988. In fact, the learned Arbitrator had taken into consideration the further fact that the petitioners did not prepare the final bill and that there was failure on their part in settling the final account and that they had failed to follow the procedure under the general conditions of contract and that therefore, the claimant had sustained loss of legitimate earnings. The clause 17(3) of the GCC reads as under:

> "**(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 after 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.**"

The claim is made not on the ground that there was delay on the part of the petitioners/Railways in handing over possession of the lands necessary for execution of the works or on any grounds covered by sub-clause (3) of Clause 17 of GCC. On the other hand, the claim is made for the inordinate delay and failure on the part of the petitioners in finalising the account and the claim and the consequential loss. The learned arbitrator while awarding this claim in a sum of Rs.3,09,629/- had followed the precedential guidance in the decisions in **A.T.Brijpal Singh Vs. State of Gujarat** [AIR (1984) SC 1203] and **Dwarakadas v. State of Madhya Pradesh** [AIR 1999 SC 1031]

9.3 The following decisions are relevant on the aspect of extent of judicial intervention or the scope of interference of the Court. (1) **Delhi Development Authority v. R.S.Sharma and Company, New Delhi**[5]**; (2) Associate Builders v. Delhi Development Authority**[6]**; (3) M/s.Navodaya Mass Entertainment Ltd., v. M/s.J.M.Combines**[7]**; and (4) Oil And Natural Gas Corporation Limited v. Western Geco International Limited**[8]**.** The settled principles for interference with an Arbitral Award under Section 34(2) of the 1996 Act as per the decision of the Supreme Court in **Delhi Development Authority** (1 supra) are as follows**:**

> **(a) An award, which is**
>
> **(i) contrary to substantive provisions of law; or (ii) the provisions of the Arbitration and Conciliation Act, 1996 or (iii) against the terms of the respective contract; or (iv) patently illegal; or (v) prejudicial to the rights of the parties; is open to interference by the court under Section 34(2) of the Act.**
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> **(b) The award could be set aside if it is contrary to:**
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> **(a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality.**
>
> **(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.**
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> **(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.**

In the decision in **Associate Builders** (6 supra), the Hon'ble Supreme Court referred to the ratios in various earlier decisions including the decision 1st cited and had further elucidated the law on the point and had further held that when a Court is applying the public policy test to an arbitration award, it does not act as a Court of appeal and consequently errors of fact cannot be corrected and that a possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quality and quantity of evidence to be relied upon when he delivers his Arbitral award and thus, an award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score and that once it was found that the Arbitrator's approach is not arbitrary or capricious then, his word is the last word on facts. In the decision in **M/s. Navodaya Mass Entertainment Ltd (7** supra**)** the scope of interference of the Court was considered and it was held that even if two views are possible the view taken by the Arbitrator would prevail. In the decision in **Oil and Natural Gas Corporation Limited** (8 supra) it was held that the expression "fundamental policy of Indian law" includes all such fundamental principles that provide basis for administration of justice and enforcement of law in India. In this case on hand, none of the parameters for setting aside the award on the above claims are satisfied and there are no grounds to find that the award is against the fundamental policy of India or that the decision is arbitrary, capricious, perverse or irrational or not in compliance of the Principles of Natural Justice. Hence, the judgment of the Court below and the Award, in our well considered view, deserve to be confirmed.

9.4 Having thus carefully considered the contentions urged before this Court on behalf of the appellants/petitioners and the 1st respondent/claimant, we find no illegality or impropriety either in appreciation of facts or evidence by either the learned Arbitrator or the court below. Therefore, we see no reason to interfere with the amounts awarded under the above said two claims.

10. What remains now for consideration is the validity of the award in regard to award of interest @ 18% per annum on the total amount awarded under claim no.1. The 1st respondent had claimed interest @ 24% per annum on the two claims which are part of claim no.1. The petitioners herein opposed for grant of interest by placing reliance on the terms of contract and clause 16 (3) and clause 64.5 of General Conditions of Contract. It was contended on their behalf that there was a prohibition for grant of interest and that the arbitrator who is the creature of the contract cannot grant interest when the contract restricted the power of arbitrator to grant interest. Reliance was placed on the decisions of the Supreme Court in (i) **V.K.Engineering Construction rep. by its Managing Partner v. Union of India rep. by its General Manager, South Central Railway and others**[9]**;** (ii) **General Manager, South Central Railway and others v. Ch.Kotaiah and another**[10] and (iii) **Union of India rep. by its General Manager, South Central Railway and another v. V.K. Engineering Constructions rep. by its managing Partner and another**[11]. In reply, the learned counsel for the 1st respondent had contended that the clause 16(2) does not prohibit the Arbitrator from awarding the interest and that the clauses in the General Conditions of the Contract do not restrict the power of the arbitrator to grant interest and that the provisions of the said clauses only place a restriction on the power of the Railway Officers to allow interest in case of delayed payments etcetera. In support of this contention, reliance was placed upon a decision in **Union of India v. G.G.Satyanarayana** [2002(5) ALD 810 (D.B)].

10.1 In view of the contentions, it is necessary to refer to the relevant clauses in General Conditions of Contract. Clause 16(2) (old) and Clause 16(3) (modified in 1998) and clause 64.5 read as under:

> **<u>Clause 16.(2) [old]</u>:**
>
> **"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 deposited**

in terms of sub-clause (1) of this clause will be payable with interest accrued thereon".

<u>Clause 16.(3) [new]</u>:

"No interest will be payable upon the earnest money and the security deposit or amounts payable to the contractor under the contract, but Government securities deposited in terms of sub-clause (1) of this clause will be payable with interest accrued thereon".

<u>Clause 64.(5)</u>:

"Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the Award is made".

10.2 It is not disputed that clause 64.5 of GCC is enforceable from December 1998 and it was specifically introduced stating that where the arbitral award is for payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the Award is made. It is also not disputed that that the GCC was amended in the year 1998 and clause 16(3) and clause 64.5 were introduced and that the same are applicable to contracts from December 1998 onwards whereas the contract in question was much prior to the said year. Clause 16(2) of GCC not only bars payment of interest upon the earnest money or the security deposit but also on the amounts payable to the contractor on the contract. Though sub-clause (1) of Clause 16 of the GCC does not include the words 'amounts payable to the contractor under the contract', still the prohibition to pay interest contained in 16(2) of the GCC encompasses within its sphere the 'amounts payable to the contractor under the contract'. Therefore, the contention that the bar contained in 16(2) of the GCC concerns with earnest money or security deposit alone is without any merit. This Court in the decisions in **V.K.Engineering Construction's case** (9 supra) had referred to all the relevant decisions on the aspect, particularly the ratios and the principles laid down in **Union of India v. M/s. Krafters Engineering and Leasing (P) Ltd.** [2011(6) SCJ 263] and in **Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works) Palghat and others** [AIR 2010 SC 3337] and other cases and had held as follows:

> **The order under challenge in C.M.A. No. 1044 of 2012 rendered by the III Additional Chief Judge, City Civil Court, Hyderabad, in O.P. No. 1621 of 2007 reflects that the petition was filed under Section 34 of the Arbitration and Conciliation Act, 1996. Thus, the challenge is under the new Arbitration Act. Sub-section (7) of Section 31 of the new Arbitration Act, by using the words "unless otherwise agreed by the parties", specifically provides that the Arbitrator is bound by the terms of the contract insofar as award of interest from the date of cause of action to the date of award, and as already referred to in the above, since in S.K.A. Constructions' Case [2010(7) SCJ 625], the Hon'ble Supreme Court held that where the parties have agreed that no interest shall be payable, arbitral Tribunal cannot award interest between the date when the cause of action arose and the date of award and the said principle has been reiterated by the Hon'ble Supreme Court including the Constitution Bench in Hydro Development Corporations Case [2012(6) ALT 45(SC)] and later in Concrete Products Case [(2014)4 SCC 416], we are of the considered view, that the bar contained in 16(2)(Old) and 16(3) (Modified in 1998) General Conditions of Contract is absolute, and consequently, the 1st respondent disentitled to make claim for interest for the pre-reference and pendente lite periods.**

10.3 In Ch.Kotaiah's case (10 supra) and V.K. Engineering Constructions' case (9 supra) it was held that Railways are liable to pay interest on the awarded amount from the date of award till date of payment in view of the judgment of the supreme Court in **Krishna Bhagya Jala Nigam Ltd. V. G.Harischandra Reddy and others** [2007(4) SCJ 948]. In view of the prohibition in the contract in regard to award of interest and the ratios in the decisions of the Supreme Court, which are followed by the successive Division Benches of this Court, wherein it was held that interest should be awarded from the date of the award and that no pre-reference and *pendente lite* interest should be awarded as per clause 16(2) of the GCC, we hold that the 1st respondent/claimant is entitled to interest on the amount awarded under claim no.1(A) and (B) at 18% per annum simple from the date of the award till date of payment.

10.4 Having regard to the aforementioned findings coupled with reasons, we set aside the award of the 2nd respondent arbitrator insofar as granting interest on claim no.1 from the date of cause of action till the date of payment as well as the order of the court below in that regard. However, the petitioners/appellants/Railways are liable to pay interest at 18% per annum on the awarded amounts payable to the 1st respondent/claimant from the date of the award till date of payment. Except in regard to the extent of modification of interest as indicated above, the award passed by the 2nd respondent/Arbitrator is sustained in other respects.

11. Resultantly, the Civil Miscellaneous Appeal is partly allowed to the extent indicated above. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this appeal shall stand closed.

K.C. BHANU, J

M. SEETHARAMA MURTI, J

18th June 2015
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[1] 1998(5) SCC page 599

[2] (2004) 7 SCC 288

[3] (2004) 7 SCC 332

[4] 2010(1) ALT 721 (DB)

[5] (2008) 13 SCC 80

[6] 2014(13) SCALE 226

[7] 2014(9) SCALE 687

[8] (2014) 9 SCC 263

[9] 2014(6) ALT 147 (D.B)

[10] 2013(1) ALT 641 (D.B)

[11] 2013(4) ALT 168 (D.B)