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

C.M.A.No.304 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.2126 of 2004 of the learned II Additional Chief Judge, City Civil Court, Hyderabad.

2. We have heard the submissions of the learned counsel for the appellants/petitioners/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 cess and also the work of widening of the bank on Vikarabad-Purli section of the track between KMs 173/3-9, 175/4-14, 178/8-183/10, 181/6-10 and 185/6-14. The 1st respondent is the Contractor. The tender submitted on 10.02.1992 by the 1st respondent was accepted by the 2nd petitioner, vide exhibit C1 acceptance letter. The total value of the work was about Rs.9,39,120/-. The contract is a rate contract and the rate agreed to was Rs.52/- per cubic meter and the quantity of work was 18,060 Cubic meters. The work was to be completed by 09.08.1992. The 1st respondent and the 2nd petitioner had entered into an agreement/contract dated 06.05.1992 under exhibit C2. On the request of the 1st respondent/claimant, it was agreed to deduct a sum of Rs.54,456/- from the running bills towards the security deposit. The 1st respondent could not complete the work within the stipulated time. By a letter dated 01.10.1992, the 1st respondent having stated the reasons had sought extension of time (without penalty) till 31.03.1993 for completing the work. According to the 1st respondent, there are cultivable lands along the track in which monsoon crops were raised and that there was no approach road and hence, the 1st respondent could not get outside earth. The 1st respondent by another letter dated 25.06.1993 (exhibit C4) had informed the petitioners that he was prevented by the owners of adjacent lands from taking the earth from their lands and had sought extension of time up to 30.9.1993. Even by that date the work could not be completed as the 1st respondent could not get outside earth. However, extension of time was granted up to 31.12.1994 without penalty. Thus, the 2nd petitioner accepted the reasons assigned by the 1st respondent for non-completion of the work within the time. A subsidiary agreement (exhibit R5) was executed extending the currency of the agreement from 01.01.1994 to 31.12.1994 without penalty. At the expiry of the said time, the 1st respondent had addressed a letter dated 23.05.1996 (exhibit C7) to the 2nd petitioner stating reasons like non-availability of approach road, scarcity of labour and material like water etcetera in the mid-section of the location for non-completion of the work even by 31.12.1994. By another subsidiary agreement dated 27.05.1996 (exhibit R7) extension of time without penalty was granted from 01.01.1995 to 31.08.1996. The 1st respondent could complete the work only in respect of bits 1 and 2 only by 31.08.1996 and the balance work in respect of the bits 3 to 5 had remained incomplete. A forty-eight (48) hour notice dated 25.03.1997/03.04.1997 (exhibit R10) was issued by the 2nd petitioner stating that on the expiry of the extended time the contract will be terminated and that the balance work would be carried out by another contractor at the risk and the cost of the 1st respondent. The 1st respondent sent a reply dated 09.04.1997 (exhibit C9) to the 2nd petitioner. He having stated the reasons in the said letter had sought time up to 31.12.1997 for completion of the work. It was stated by the 1st respondent that the site for carrying out the works in respect of bits 3 to 5 was not handed over and that therefore, the work was held up. 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.36 of 2002 had appointed the learned 2nd respondent as the Arbitrator to resolve the disputes between the parties arising out of the contract Work Order No.15/SW/BG/92, dated 06.05.1992 in respect of the aforementioned work. On merits, the learned Arbitrator had awarded an amount of Rs.6,66,892/- 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 objections 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, that therefore, the very appointment of an arbitrator pursuant to an application filed by the 1st respondent invoking the provisions of the new Act is untenable and not legally valid. The arbitrator who was appointed by this Court 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 only after the new Act has come into force. Even the petitioners/Railways sought to terminate the contract/agreement vide 48 hour notice dated 09.04.1997. The learned Arbitrator did not accept the contention of the Railways/petitioners that there is valid termination of the contract and had held that the contract was subsisting. 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 aspect of lack of jurisdiction or 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/petitioners; and, in any view of the matter, the Award need not be set aside in the absence of the Railways/petitioners showing that any prejudice has been caused.

5.4 In reply, the learned counsel for the petitioners/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: -**
>
> **(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.**
>
> **(2) Notwithstanding such repeal, -**
>
> **(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;**
>
> **(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. On behalf of the 1st respondent it was urged that the ratios in the decisions are not applicable as the facts of the instant case are different. 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 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 01.11.2001 and the said letter was referred to in the Award as claim letter (exhibit C11). The said letter must have been received by the appellants 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 and the claim letter dated 01.11.2001 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 coming into force of the new Act.

On the other hand, correspondence was being exchanged for extension of time up to 31.12.1997. The forty-eight hour notice seeking to terminate the agreement is dated 25.03.1997. The 1st respondent sent a reply dated 09.04.1997. By a subsidiary agreement dated 27.05.1996 (exhibit R7) extension of time without penalty was granted from 01.01.1995 to 31.08.1996. By the said date the new Act has come into force. 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 letter dated 01.11.2001 to settle the claims and that the said request was made several 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 contract was subsisting and is not validly terminated and the final bill was not prepared, the cause of action to make the 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 on this issue 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 claimant did work insofar as bits 1 and 2 and had completed the said work within the extended time, i.e., by 31.08.1996 and that the 1st respondent could not complete the work in respect of bits 3 to 5 for the reason that the site was not handed over by the petitioners to the 1st respondent. In this regard, it is evident from the material record that the 1st respondent had filed an interlocutory application before the learned Arbitrator to direct the petitioners herein to produce relevant registers to show the details of the handing over of the site in respect of the work concerning the bits 3 to 5 and that the said application was allowed, but, the petitioners herein having stated that the record/registers were destroyed long ago had failed to produce the relevant registers. The learned Arbitrator had also taken note of the fact that the final bill was not prepared and that in the forty-eight hour notice the petitioners herein had stated that the balance work would be got completed by another contractor at the risk and the cost of the 1st respondent and had, therefore, held that the contention of the petitioners that the registers were destroyed even without finalization of the contract and the payments under the contract cannot be accepted. The learned

Arbitrator had, therefore, drawn an adverse inference to the effect that the petitioners herein had deliberately suppressed the records and had failed to produce the registers for fear that if produced they would reveal the real facts that the site was not handed over by the petitioners herein to the 1st respondent. Thus, having assigned reasons and not accepted the defence of the petitioners herein that the registers were destroyed and having regard to the documentary evidence on record the learned Arbitrator had held that the site in respect of bits 3 to 5 was not handed over to the 1st respondent. The learned Arbitrator had also rejected the contention of the petitioners that exhibit C9 letter dated 09.04.1997 was fabricated. One of the reasons assigned in support of the said finding was that in exhibit C10 letter there was a reference to exhibit C9 letter. Having taken note of the fact that the 1st respondent who is executing the work of the Railways is not having equal bargaining power and that the officers of the Railways are in a dominating position, the learned Arbitrator had further held that the 2nd petitioner did not terminate the contract and did not get the work carried out through another agency and that therefore, the contract should be deemed to be subsisting. The contention of the petitioners that the contractor abandoned the work was also negatived in the light of the above findings that were recorded by the learned Arbitrator in favour of the 1st respondent. Having thus recorded reasoned findings, the learned Arbitrator had finally held that the limitation commenced on 01.11.2001 on which exhibit C11 was addressed and hence, the contention of the petitioners herein that the claims are barred by law of limitation is untenable, unsustainable and unacceptable. The court below having accurately stated the facts and properly examined the evidence had recorded a concurrent finding in favour of the 1st respondent on the issue of limitation, which is admittedly a mixed question of fact and law. Having taken note of the fact that the final bill was not prepared and that the contractor had made the claims under letter dated 01.11.2001 and till then, the Railway administration had no opportunity to either deny or refuse the claims it was held that the claims are not 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 01.11.2001 and that therefore, the cause of action had arisen on 01.11.2001 and that the period of limitation had started to run from the said date and hence, the application filed by the 1st respondent for appointment of an arbitrator was well within time. Having thus analytically examined the facts and the reasoning of the Tribunal and the court below, we find no illegality or impropriety calling for interference. The well reasoned findings recorded on the issue of limitation after accurately considering the evidence and 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.1,25,544/- was made towards the 1st part of this claim. It is not in dispute that a payment was made in August 1994 under C.C.1 bill for a lump sum quantity of 2600 cubic meters of work done at KM 175/4-9 and recorded on 11.07.1994 and the said payment was accepted by the claimant. The petitioners herein denied the instant claim and had *inter alia* contended that the 1st respondent did not specify the location of the work done for which payment is due and claim was being made. It is undisputed and it was also sufficiently established that the1st respondent had executed the work till 31.08.1996 and that the 1st respondent had completed the work in respect of bits 1 and 2. Further, according to him, he could not complete the work related to bits 3 to 5 for non-handing over of site. As already noted, after appreciation of the facts and the evidence brought on record, the learned Arbitrator had held that the site was not handed over in respect of the above said remaining work; and, the learned Arbitrator had also drawn an adverse inference for non-production of the registers while rejecting the contention of the petitioners herein that the registers were destroyed. The learned Arbitrator had also held that the contract was subsisting even after 31.08.1996. In support of the said finding, the learned arbitrator had observed that the petitioners herein had themselves acknowledged in the letters dated 27.05.1996 (exhibit R7) and 25.03.1997/03.04.1997 (exhibit R10) that the contract is subsisting and that the petitioners herein had advised the 1st respondent in the letter dated 02.01.1997 to apply for extension of time and that the contract stood expired or was terminated by 31.08.1996 is not the case of the petitioners herein in their said letters. It is also observed that the procedure for terminating the contract was not followed. However, what remains to be considered is the contention of the petitioners herein that the 1st respondent did not produce any evidence in regard to the further work, if any, done in respect of the instant claim. According to the petitioners herein no work other than the work in respect of KM 175/4-9 was done and for the work done payment was already made and accepted. It is not in dispute that 1st extension was granted from 10.06.1990 to 31.12.1993 and 2nd extension was granted from 01.01.1994 to 31.12.1994 and 3rd extension was granted from 01.01.1995 to 31.08.1996 (vide exhibits R3, R5 and R7). The extensions were given without penalty. If extensions were sought without doing any work, such further extensions without penalty would not have been given. It is to be noted that payment was made only once under C.C.1 bill for the work done up to KM 175/4-9 and recorded on 11.07.1994. Thus, it is obvious that no payment was made for the work done during the period from 11.07.1994 to 31.08.1996. No objections were raised and no dissatisfaction was expressed by the petitioners herein till 02.01.1997 in regard to the progress of the work as is evident from the letter with the even date. In fact a request was made on behalf of the petitioners to intimate the then position of the work and it was suggested that a request for granting extension of time may be made for consideration, if there are any genuine reasons. Two months thereafter the forty-eight hour notice under exhibit R10 was issued in the last week of March 1997. Having regard to the facts, the evidence and for the reasons assigned, the learned Arbitrator had held that the 1st respondent had carried out the work from 11.07.1994 to 31.08.1996 pursuant to the extensions of time granted by the petitioners herein and that during that period, the 1st respondent had done the work in respect of bits 1 and 2 and had completed the said work by 31.08.1996 and that the 1st respondent could not carry out the work in respect of the remaining bits for non-handing over of the site by the petitioners herein.

In order to substantiate the contention that the 1st respondent did work as claimed and that for the said work, no payment was made, the 1st respondent had filed an interlocutory application before the learned arbitrator to direct the petitioners herein to produce the following books/records, namely, (1) Initial Level Book for the sites, (2) Working details drawing books, (3) Earth Work Register, (4) Measurements Book (5) Site Order Book, (6) Cross Sections and (7) Site Plans. But, the petitioners herein had failed to produce the said books/records stating that the same were destroyed. Therefore, while not accepting the defence that the records/books were destroyed and by drawing an adverse inference for not producing the important records/books, the learned Arbitrator had upheld the claim of the 1st respondent and had awarded Rs.1,25,554/- towards 1st part of claim no.1. The court below having considered the facts and the reasoning in the award had inter alia held that the petitioners herein had committed breach of contract in not handing over of the sites in respect of bits 3 to 5 and that the petitioners did not respond to the letter under exhibit C9 and had thus confirmed the award in this regard.

9.2 Coming to the 2nd part of the 1st claim in a sum of Rs.54,456/- towards refund of security deposit, it is an undisputed fact that certain deposit was lying with the petitioners herein as the petitioners herein had deducted an amount of Rs.13,520/- from C.C 1 bill towards part payment of the security deposit. Therefore, the learned arbitrator had awarded only Rs.13,520/- towards refund of security deposit under part 2 of claim no.1 as against the claim of Rs.54,456/-. The said claim which was partly awarded was confirmed by the court below in the light of the fact that the awarded amount was deducted from C.C 1 bill towards security deposit and the same is refundable to the 1st respondent. There is no illegality or impropriety in awarding this claim.

9.3 The second claim in a sum of Rs.2,70,000/- 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 effective productive value (Rs.4/- X Rs.1,80,000/-) for the period from 01.01.1998 till the date of actual payment. In fact, the 1st respondent had furnished calculations in his claim statement. It is *inter alia* contended on behalf of the 1st respondent that the petitioners herein neither settled the final bill nor handed over the site in respect of bits 3 to 5 and did not allow him to complete the work. 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 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 in regard to bits 1 and 2 which was executed 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 in respect of the remaining work done in regard to bits 1 and 2 and the consequential loss. The learned arbitrator had awarded this claim having regard to his earlier finding that the work was partly completed by 31.08.1996 in respect of bits 1 and 2. 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 learned arbitrator while awarding this claim had considered 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]. Having examined the calculations, the learned Arbitrator had recorded a finding of fact that the claim is well founded and had awarded an amount of Rs.3,52,295/-.

10.4 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.**
>
> **(b) The award could be set aside if it is contrary to:**
>
> **(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.**

> **(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.

10.5 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 the learned Arbitrator and the court below. Therefore, we see no reason to interfere with the amounts awarded under the above said two claims.

11. 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 a creature of the contract has no power to award interest against the terms of the contract. 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)].

11.1 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 2sub-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".**

11.2 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 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 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.”**

11.3 In Ch.Kotaiah’s case (10 supra) and V.K. Engineering

Constructions' case (9 supra) had 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.

11.4 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 to the extent of reduction of rate of interest as stated supra, the award passed by the 2nd respondent/Arbitrator is sustained in other respects.

12. 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 Supreme Court Cases 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)