

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) No. 236/2016 & CM.28634/2016**

% **Reserved on:** 1st September, 2017
Date of Decision: 12th October, 2017

M/S BHARAT SANCHAR NIGAM LIMITED AND
ANOTHERPetitioners

Through Mr. Dinesh Agnani, Sr. Advocate with
Mr. L.B. Rai & Mr. Mohit Kumar Sharma,
Advocates.

Versus

M/S BWL LIMITEDRespondent

Through Ms. Tanya Khan, Advocate.

FAO(OS) No. 237/2016 & CM.28641/2016

M/S BHARAT SANCHAR NIGAM LIMITED AND
ANOTHERPetitioners

Through Mr. Dinesh Agnani, Sr. Advocate with
Mr. L.B. Rai & Mr. Mohit Kumar Sharma,
Advocates.

Versus

M/S BWL LIMITEDRespondent

Through Ms. Tanya Khan, Advocate.

FAO(OS) No. 238/2016 & CM.28643/2016

M/S BHARAT SANCHAR NIGAM LIMITED AND
ANOTHERPetitioners

Through Mr. Dinesh Agnani, Sr. Advocate with
Mr. L.B. Rai & Mr. Mohit Kumar Sharma,
Advocates.

Versus

M/S BWL LIMITEDRespondent

Through Ms. Tanya Khan, Advocate.

FAO(OS) No. 241/2016 & CM.28751/2016

M/S BHARAT SANCHAR NIGAM LIMITED AND
ANOTHERPetitioners

Through Mr. Dinesh Agnani, Sr. Advocate with
Mr. L.B. Rai & Mr. Mohit Kumar Sharma,
Advocates.

Versus

M/S BWL LIMITEDRespondent
Through Ms. Tanya Khan, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J.

This common judgment would dispose of the afore-stated appeals preferred by Bharat Sanchar Nigam Limited (BSNL) and the Union of India against BWL Limited.

2. The appeals arise out of the common order dated 9th May, 2016 passed on a batch of Original Miscellaneous Petitions filed by the respondent, i.e., BWL Limited, and the appellants, i.e., BSNL, impugning the common Award dated 24th March, 2014 passed by Mr. Niranjana Singh, Sole Arbitrator.

3. Department of Telecommunications (DoT) had issued Purchase Order dated 2nd February, 1999 to BWL Limited pursuant to tender dated 10th September, 1998 for procurement of 2292 Kms. of 6F Aerial Optical Fiber Cables alongwith accessories and fixtures.

4. The supplies were to be made within two to six months from the date of the Purchase Order. However, it appears that there was no approved manufacturer available and this fact was highlighted by BWL Limited and other bidders, to which the Government, by its letter dated 7th October, 1998, had replied that the bidders would have sufficient time before supply would start and they must get the type approval within next three months. If there was any problem in getting type approval within the said time, the matter would be reviewed by DoT at that time. BWL Limited claims that they had submitted their offer vide letter dated 14th October, 1998 on the basis of the said assertion.

5. DoT had thereafter issued Advance Purchase Order on 4th January, 1999 for supply of 1146 Kms. of 6F Aerial Optical Fiber Cables with accessories. BWL Limited gave acceptance to the said Purchase Order vide letter dated 22nd January, 1999 and had furnished bank guarantee of Rs.30,22,000/-. BWL Limited had then clarified that they did not have any type approval and the said fact should be kept in mind while prescribing the delivery period. DoT thereafter issued first procurement order dated 2nd February, 1999 specifying the delivery period of four months, i.e., upto 1st June, 1999. BWL Limited immediately apprised DoT about non-availability of any type approval in the market and as such requested for extension of delivery period by eight months vide their letter dated 5th February, 1999. BWL Limited thereafter wrote letters dated 5th March, 1999, 15th April, 1999, 27th April, 1999, 26th May, 1999 and 11th June, 1999 as type approval for

fixtures was still not available. Type approval was granted by the competent authority i.e TEC on 2nd July, 1999 after a period of almost eight and a half months. BWL Limited informed DoT about the same vide letters dated 5th August, 1999 and 18th August, 1999 and had requested for extension of delivery schedule by another four months. However, when bulk production of fixtures was started, certain discrepancies in parameters of the specifications were noticed as desired results were not forthcoming. The issue was taken up with the competent authority/TEC for modification/amendments of the specification, and DoT was informed vide letters dated 7th and 11th January, 2000. In the meanwhile, DoT after a lapse of seven months and five days agreed to extend the delivery period upto 27th February, 2000 vide letter dated 6th January, 2000, without levy of liquidated damages at the provisional rate of 90% of price indicated in the said tender. BWL Limited by letter dated 2nd February, 2000 apprised DoT that the procedure for getting amendments from the competent authority/TEC was taking more time and had requested them to extend the delivery period by another three months, i.e., upto 31st May, 2000, without liquidated damages. The competent authority/TEC, thereafter, issued the required amendment in the specification on 10th February, 2000.

6. The DoT extended the delivery period vide letter dated 19th May, 2000, but with liquidated damages. It was also specified that extension of delivery period was subject to price reduction, i.e. at provisional prices, which were subject to further adjustment. BWL

Limited had protested and made supplies without prejudice to their rights. On the supplies made, DoT levied liquidated damages of Rs.39,63,730/-. DoT also reduced the price by Rs.22,02,391/- from the rates as was originally stipulated. DoT by another letter dated 25th May, 2000 made an amendment especially for supplies to be made to Himachal Pradesh. There was modification followed by re-designing of stay clamps. This had resulted in delay of some supplies, which were finally made by 14th July, 2000.

7. BWL Limited on the basis of their grievance by letters dated 25th May, 2000 and 8th February, 2001 had objected to levy of liquidated damages of Rs.39,63,730/- and lowering of rate resulting in reduced payment to the extent of Rs.22,02,391/-, on different and varied grounds.

8. BWL Limited had thereafter issued legal notice dated 14th January, 2003 for payment of the said amount, raising the aforesaid claims. This was followed by letter dated 31st January, 2003 addressed to the Director General, DoT invoking the arbitration clause.

9. By letter dated 26th February, 2003, one Mr. A.K. Jain, was appointed as the Arbitrator. BWL Limited filed a claim for recovery of liquidated damages of Rs.39,63,730/- and reduction in price of Rs.22,02,391/- totaling to Rs.61,66,121/- alongwith interest @ 24% p.a. The matter was reserved for publication of award by the Arbitrator on 6th October, 2004. However, the Award was not published till August, 2010.

10. Aggrieved, BWL Limited filed a petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (A & C Act, for short) for termination of the mandate of the Arbitrator and appointment of substitute arbitrator. When the said petition was pending and the Arbitrator had been served, an award dated 21st September, 2010 was pronounced rejecting the claims of BWL Limited.

11. BWL Limited filed a petition OMP No. 771/2010 under Section 34 of the A & C Act challenging this Award dated 21st September, 2010. The Court vide order dated 4th July, 2012 set aside the Award to the extent that the Arbitrator had rejected the claim of Rs.22,02,391/- for reduction of price without assigning any reason. Against the partial relief, BWL Limited preferred FAO(OS) No. 398/2012, which was allowed by the Division Bench vide order dated 26th November, 2012 directing the competent authority to appoint another Arbitrator in place of Mr. A.K. Jain, who was then working as Director (HR), BSNL. The new Arbitrator was to hear arguments on the basis of existing pleadings and evidence led before the earlier Arbitrator and to pronounce an award within six months of entering upon reference.

12. Pursuant to this order, Mr. Niranjana Singh was appointed as Arbitrator on 12th March, 2013 and he had pronounced the Award dated 24th March, 2014, which became subject matter of the afore-stated OMPs and the present appeals. This Award directs refund of Rs.39,63,730/- deducted as liquidated damage charges from the payments due to BWL Limited. However, the Award rejects the claim

of BWL Limited for deduction of Rs.22,02,391/- on account of reduced prices. BWL Limited's claim for payment of interest on Rs.39,63,730/- was also rejected.

13. The Award, as noticed above, became subject matter of challenge in two sets of OMPs, one preferred by the BSNL, a Government of India Enterprise, who was the successor-in-interest, having taken over the assets and liabilities of the DoT with effect from 1st October, 2000 and the other by BWL Limited. BSNL had challenged the Award to the extent it had directed refund of liquidated damages of Rs.39,63,730/-. The BWL Limited had, on the other hand, questioned the Award denying interest on Rs.39,63,730/- allegedly without assigning any reasons and by ignoring Section 31 of the A & C Act.

14. The impugned order dated 9th May, 2016 dismissed the objections raised by BSNL to the Award, directing payment of Rs.39,63,730/- deducted as liquidated damages. Objection of BWL Limited against denial of interest was allowed relying upon three decisions in *Central Bank of India versus Ravindra*, (2000) 1 SCC 367, *Hyder Consulting (UK) Limited versus Governor, State of Orissa*, (2015) 2 SCC 189 and *Mc Dermott International Inc. versus Burn Standard Co. Ltd. & Ors.*, (2006) 11 SCC 181 holding that denial of interest was erroneous and bad in law. Interest @ 18% per annum for the pre-reference, *pendente lite*, and post award periods, has been directed. This has prompted the BSNL and Union of India to prefer the present appeals on both accounts.

15. On the question of levy and imposition of liquidated damages and whether the same was justified and proper in the aforesaid factual matrix, we have referred to the facts in some detail. The dispute, we would note, is primarily factual. The appellants had primarily relied upon clause 5 of the Advance Purchase Order, which had stipulated that the delivery schedule indicated was firm and not subject to any change. Noticeably, the appellants themselves had changed the delivery schedule and granted extension upto 27th February, 2000, without liquidated damages. It is obvious that the appellants were aware and conscious that without certification and approval it was not possible to make the supplies. This was stark reality for standards had not been fixed and, therefore, supplies could not be made. The Arbitrator in the Award after referring to the facts in the first case had opined as under:-

“After going through all the related documents of the case submitted by the two parties at various stages, hearing arguments from various related persons with reference to the existing pleadings and evidences led before Mr. A K Jain, the earlier arbitrator and his award, I feel that;

- 1- The very purchase process started with a known fact that some of the articles to be purchased with given specifications are not readily available in the market and are to be developed by the vendor, which has to be to the satisfaction and also type approved from T E C before production. It becomes a grey area as has also been confirmed by 'letter dated 07-10-1998. This approval could be received only on 02-07-1999 i.e. after five and half months from the date of placing the first order on 02-02- 1999. The vendor has continuously been making it known to the respondent through it's various letters. I

could not find any instance from the respondent side indicating that the delay in getting type approval is unusually long. Even other vendors could get this approval nearly at the same time. Thus to this extent, I don't find any fault with the vendor for the delay. Even respondent has given him first delivery extension without L. D. Charges.

So far as the discrepancies(sic) observed during bulk production are concerned, the vendor has timely intimated the problem to TEC as well as to D OT. The TEC has already corrected the situation by its letter dated 7-1-2000. Whether it was a clarification or amendment, is not of much significance because in any case, the specification has been changed by TEC.

Thus the vendor got clear production time with type approval first time for 6-1-2000 to 27-2-2000 without L.D. Charges but with provisional rates and 2nd time for 19-05- 2000 to 14-07-2000 with L.D. Charges and further revised provisional rates. In the two spells, it got time for 53+ 57 days. This is little less than 4 months.

As against all the odds including the last change in specifications, required by the client for H P State, the vendor has supplied the material within 4 months. It does not deserve levy of L.D. Charges.

2- So far as the case of revision in prices is concerned, as per article 12 (ii) b of Section III of tender document;

"In case of delayed supplies after delivery period, the advantage of reduction of tax /duty would be passed on to the purchaser and no benefit of increase in price will be permitted to the supplier, if there is any increase in tax/duty."

As there has been change in rates, the reduction advantage has to go to the purchaser."

16. The second case relates to liquidated damages of Rs.11,89,303/- pertaining to Purchase Order dated 26th July, 1999 against tender dated 10th September, 1998. This Purchase Order related to supply of 304 Kms. of 6F Aerial Optical Fiber Cables alongwith fixtures and accessories. The supplies were to be completed by 25th October, 1999, i.e., within three months. Approval of the fixture was issued by the competent authority/TEC on 2nd July, 1999. BWL Limited had supplied the cables within the original delivery schedule, but inspection and dispatch of cables was withheld for issuance of inspection certificate for accessories since the fixtures were yet to be finalised and needed an amendment. BWL Limited had requested for extension of delivery period vide letter dated 30th October, 1999 as there was delay in issuance of approval of fixtures by TEC. DoT had granted first extension upto 28th January, 2000 with liquidated damages, vide letter dated 16th November, 1999. TEC vide their letter dated 10th February, 2000 had issued amendment in the fixtures against the subject tender. DoT vide their letter dated 17th February, 2000 extended the delivery period upto 28th February, 2000 with liquidated damages. As per BWL Limited, type approval was notified on 2nd July, 1999 and the fixtures specifications were certified on 10th February, 2000. The Arbitrator observed that supply of fixtures were delayed as the amendment of the specifications was required and was made belatedly on 10th February, 2000. The fixtures were dispatched to the concerned consignees on 25th February, 2000.

17. In the second case, the reasons recorded by the Arbitrator read as under:-

“Here the claimant has disputed only the LD Charges. Here the clear delivery period available is 1) From 26-7-99 to 25-10-99, ii) from 16-11-99 to 25-1-2000 but with LD Charges and iii) from 17-2-2000 to 28-2-2000 with LD Charges. The type approval for fixtures was available on 2-7-1999 and the required amendment in specifications on 10-2-2000. Against this purchase order, OF cables have been dispatched as per original schedule. Only fixtures were delayed as clearance was delayed and it was available only on 10-2-2000. The material was all dispatched by 25-2-2000 to the concerned consignee. Thus here, I don't find any delay of claimants making. I, therefore, feel that deduction of L.D. Charges is not justified.”

18. The single Judge referring to the aforesaid findings has recorded that the findings that BSNL had wrongly and unjustifiably withheld the liquidated damage charges are well reasoned and based entirely on documents, i.e., the correspondence exchanged between the parties as well as the approving authority. The appellants had not raised or pleaded that the findings recorded by the Arbitrator were unreasonable or blatantly illegal and wrong. Reliance placed by the appellants on the decision in the case of *BSNL versus Himachal Futuristic Communications Limited*, 194 (2012) DLT 661 was rejected on factual basis as in the case of *Himachal Futuristic Communications Limited (supra)*, delay in supply of goods was established and the condition for imposition of liquidated damages on extension of contract had been accepted. In the present case, BWL Limited had

objected to imposition of liquidated damages for the extended period of supply.

19. We do not see any reason or ground to interfere with the findings recorded by the single Judge, which also makes reference to the scope and ambit of jurisdiction under Section 34 of the A & C Act.

20. This brings us to the issue of interest and the interference made by the single Judge relying upon Section 31(3) and (7) of the A & C Act holding that arbitral award was bad in law for it did not record reasons for denial of interest. The reasoning given by the single Judge awarding interest @ 18% per annum for the pre-reference, *pendente lite* and post award period reads as under:-

“41. It appears that in both matters while coming to the conclusions, the sole Arbitrator has denied the interest without assigning any reason, otherwise the entire award, which proceeds to adjudicate the respective claims of the parties, holds entirely in favour of BWL, but it does not discuss or disclose any reason for denial of interest to BWL and rejects the claim in a summary and unreasoned manner.

42. In terms of Section 31 (3) of the Act, the arbitral award is required to state reasons upon which it is based. In unreasonably and summarily denial of the interest to BWL, the award fall foul to Section 31 (3) to that extent. In terms of Section 31 (7), an award for pre-reference payment of money is entitled to carry interest for pendetelitte and post award periods. In this regard, BWL places reliance on the following decisions:

i) ***Central Bank of India v. Ravindran & Ors***, (2002) 1 SCC 367 (Para 37).

ii) *Hyder Consulting (UK) Ltd. v. State of Orissa*, (2015) 2 SCC 189 (para 74-75; para 19, 80 and 81).

iii) *McDermott International Inc. Vs. Burn Standard Company Ltd.*, (2006) 11 SCC181 (para 154).

43. Therefore, the denial of interest to BWL is erroneous, bad in law and thus, liable to be set aside. BWL is entitled to interest @ 18% per annum for pre-reference pendente lite and post award periods. In fact, in terms of the judgement of *Hyder Consulting* (supra), if an award is silent on question of post-award interest, as per law, it is entitled to carry interest @ 18% per annum, an automatically attached rate of interest and therefore be allowed for the pre-reference pendente lite period which, as aforesaid, O.M.P. No.690/2014,691/2014, 1012/2014 & 1013/2014 Page 23 of 23 has been denied to BWL who is entitled for the same rate of interest till the date of publishing the award.”

21. It is no doubt true that the Award does not specifically give any reasons for rejection of the claim for interest. However, rejection of the claim for payment of interest cannot be construed as silence, in order to invoke and apply the unamended clause (b) of sub-section (7) to Section 31 of the A & C Act by default. Sub-section (7) to Section 31 prior to its substitution by Act 3 of 2015 was as under:-

“31. Form and contents of arbitral award.—

(7) (a) Unless otherwise agreed by the parties, where and in so far 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.”

22. After substitution with effect from 23rd October, 2015, clause (b) to Section 31(7) of the A & C Act reads as under:-

“31. Form and contents of arbitral award.—

(7) (a) XXXX

(7) (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two percent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.—The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).”

23. The unamended clause (b) to sub-section(7) to Section 31 specifies that the interest @ 18% per annum from the date of the Award till the date of payment would come into play, by default, only if the Award was silent and did not direct otherwise. It will not apply when the award does not specifically grant interest as in the present case. Secondly, this clause relates to the award and rate of interest, when the award does not so stipulate and is silent, from the date of the award till the date of payment. It does not relate to pre-reference and *pendente lite* interest. The three judgments referred to in the impugned order do not pertain to the present factual matrix.

24. ***Hyder Consulting (UK) Limited*** (supra) is a decision of three Judges of the Supreme Court with the dissenting judgment of H.L. Dattu, CJ. S.A. Bobde, J. in his majority opinion interpreting Sub - section 7 of Section 31 of the A & C Act observed that vide clause (a) the Arbitral Tribunal making an award for payment of money may include interest in the sum for which award is made. Vide clause (b), the sum so directed to be paid by the award shall carry interest at a certain rate for post award period. The purpose and object was to encourage early determination of the awarded amount to discourage usual delays, which accompanies the execution of the award as if it was a decree of the civil court. The question raised and answered in the said decision is whether the Arbitrator could add interest accrued in the principal amount i.e. the post award interest should be awarded on aggregate sum, which includes interest pre-reference and *pendente lite*. The Arbitration Act, 1940 did not have a specific provision for dealing with the arbitrator's power to grant post award interest. Majority opinion held that post-award interest under A & C Act can be granted on sum directed to be paid by award, whether sum is inclusive or exclusive of pre-award interest.

25. Abhay Manohar Sapre, J. in his concurring judgment had the following observations to make on the principle of Section 31(7) of the A & C Act:-

“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.”

26. In the dissenting opinion, H.L. Dattu, CJ. had observed that under clause (1) to sub-section (7) to Section 31 of the A & C Act, the arbitrator has power to impose interest from the date of cause of action till the date of arbitral award. This power, however, was subject to the condition that 'unless otherwise agreed by the parties', which would prevail. Therefore, where parties have agreed that no interest would be payable, award of interest cannot be made, as the arbitrator was a creator of the contract and was bound by its terms. Where the contract was silent, the arbitrator could impose interest as was reasonable. Interest could be for the whole or any part of money or for the whole or any part of the period. It was specifically held that the Arbitral Tribunal has been given discretionary power not only for imposing interest, but also for determining rate of interest. However, such discretion was not unfettered or is to be exercised at mere whims and fancies, but it was to be exercised as per facts and circumstances of

each case and within the parameters of statute and in accordance with the rule of law. The rate of interest must be reasonable.

27. We have referred to the dissenting opinion also as the counsel for the respondent BWL Limited had insisted that the dissenting opinion on the said aspect is not at variance with the majority opinion. We do not, however, read any of the three opinions as laying down that the arbitrator must award interest @ 18% from the date of cause of action till the payment or pronouncement of award or even post the award and unless the arbitrator records and gives his reasons, the court must award interest @ 18% or as per the amended clause.

28. Supreme Court in *Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager (Works), Palghat and Ors*, (2010) 8 SCC 767, wherein the Arbitral Tribunal had exercised its discretion and refused award of interest for *pendente lite* period, had held that the award of the arbitrator must not be interfered with where the arbitrator had the discretion to decide whether or not to grant interest. The Court had observed:

"19. Section 37(1)[Sic Section 31(7)] of the new Act by using the words "*unless otherwise agreed by the parties*" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest *from the date of cause of action to the date of award*. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest between the date when the cause of action arose to the date of award.

20. We are of the view that the decisions in *Engineers-De-Space-Age* [(1996) 1 SCC 516] and *Madnani* [(2010) 1 SCC

549] are inapplicable for yet another reason. In *Engineers-De-Space-Age* [(1996) 1 SCC 516] and *Madnani* [(2010) 1 SCC 549] the arbitrator had awarded interest for the pendente lite period. This Court upheld the award of such interest under the old Act on the ground that the arbitrator had the discretion to decide whether interest should be awarded or not during the pendente lite period and he was not bound by the contractual terms insofar as the interest for the pendente lite period. But in the instant case the Arbitral Tribunal has refused to award interest for the pendente lite period. Where the Arbitral Tribunal has exercised its discretion and refused award of interest for the period pendente lite, even if the principles in those two cases were applicable, the award of the arbitrator could not be interfered with. On this ground also the decisions in *Engineers-De-Space-Age* [(1996) 1 SCC 516] and *Madnani* [(2010) 1 SCC 549] are inapplicable. Be that as it may."

29. We would observe, as held above, the award rejects the claim for interest for pre-reference, *pendente lite*, and post award period. To this extent it is not silent, though unreasoned. It is not the case of the respondents that they had not prayed or asked for post award interest. Award itself states that the BWL Limited had prayed for *pendente lite* and future interest @ 24%, in the first case relating to refund/payment of Rs.39,63,730/-. In the second case, relating to refund of liquidated damages of Rs.11,89,303/-, BWL Limited had prayed for interest @ 24% from the dates on which the amount was deducted. The claims for interest were specifically rejected.

30. The respondents have also relied upon *Union of India versus Sasraswat Trading Agency and Others*, (2009) 16 SCC 504. This decision refers to the question of pre-reference, *pendente lite* and post

award interest. Referring to the decisions in *Executive Engineer, Dhenkanal Minor Irrigation Division versus N.C. Budharaj*, (2001) 2 SCC 721, which had overruled *Executive Engineer (Irrigation) versus Abhaduta Jena*, (1988) 1 SCC 418 (prospectively, as explained), *Bhagawati Oxygen Limited versus Hindustan Copper Limited*, (2005) 6 SCC 462 and the Larger Bench decision of the Supreme Court in *Government of Orissa versus G.C. Roy*, (1992) 1 SCC 508, it was held that clause 31 of the agreement in the said case barred payment of interest or damages to the contractor for any reason whatsoever. Therefore, no pre-reference or *pendente lite* interest was payable. To this extent, allowing *pendente lite* and pre-reference interest as upheld by the High Court, it was held, was unsustainable.

31. In *Decor India Private Limited versus Ministry of External Affairs*, (2009) 4 Arbitration Law Reporter 481 (Delhi), a single Judge of this court had made reference to Interest on Delayed Payments to Small-Scale and Ancillary Industrial Undertakings Act, 1993 (1993 Act, for short) and the issue whether this enactment would override the provisions of contract and A & C Act. Reference was made to *Delhi Development Authority versus R.S. Sharma and Company, New Delhi*, (2008) 13 SCC 80 wherein it is stated that an arbitral award was liable to be interfered by this Court only if the same was contrary to a Statute or a contract or opposed to public policy, and the arbitral award was interfered as being contrary to the provisions of the 1993 Act. It was held that the Arbitral Tribunal was bound to apply the provisions of 1993 Act to the delayed payment as there was no

conflict between Section 31(7) of the A & C Act and Sections 3, 4 and 5 of the 1993 Act. After referring to other decisions, the single Judge concluded that small-scale industrialist, i.e., the claimant, was entitled to interest at the rates specified in the 1993 Act between the date on which the cause of action arose and the date on which the Award was made and thereafter would be entitled to interest @ 18% per annum from the date of the award till payment. Reference was made to Section 10 of the 1993 Act, which states that it will have overriding effect notwithstanding anything to the contrary in any other law for the time being in force. There would be some difficulty in accepting and applying the ratio in *Decor India Private Limited* (supra) to the present case for two reasons. This enactment was not relied upon by the BWL Limited before the Arbitrator. We would not assume that the enactment would cover BWL Limited. Secondly, there would be a dispute whether the provisions of the 1993 Act would be applicable for it relates to payments to be made to the supplier for the goods supplied or services rendered and failure to make payment. In the present case, the dispute was on account of deductions made towards liquidated damages for the delayed supplies. Apparently and clearly, BWL Limited had not raised and relied upon the provisions of 1993 Act before the Arbitrator. We would not, therefore, go into all these questions as an appellate Court and decide the controversy whether 1993 Act would apply in the given facts. This would be beyond the scope and ambit of our jurisdiction.

32. There are several facets and aspects, which weigh with the Court or the tribunal when it comes to the question of interest. Equities are balanced keeping in mind the respective claims of the parties, the nature of the dispute, its merits and conduct of the parties. Even merits of the plausible defences which get rejected, can be relevant factor. On the question of quantum of interest, a strait jacket approach may not be just and fair, for the rate of interest awarded can vary and yet be justified. Choice and discretion with arbitrators and courts in the matter of interest and the rate of interest, unless statutorily mandated, is extensive and wide.

33. In these circumstances, the direction given by the single Judge modifying the award and thereafter issuing direction that interest @ 18% per annum would be automatically attracted for pre-reference, *pendente lite*, and future period cannot be sustained. In the present case, the arbitration proceedings have taken unduly long largely on account of the fact that the first Arbitrator after concluding the hearing had not pronounced the award for nearly six years from 6th October, 2004 till 21st September, 2010. The Award was partly upheld to the extent refund of liquidated damages by the single Judge of this Court by order dated 4th July, 2012. The Award was, however, completely set aside with the direction to appoint fresh arbitrator by the Division Bench in FAO(OS) No. 398/2012, decided on 26th November, 2012. The first Arbitrator was the departmental nominee. Yet the appellants could not have issued any directions to the arbitrator. There was, as noticed, some delay in invoking the arbitration clause. We cannot also

lose sight of the fact that interest is paid to compensate the party, which has been deprived of the said money. It should neither be very high or very low, when it is not fixed by a statute or by the terms of the contract.

34. Given the aforesaid factors and also having examined the nature of the dispute, the period of delay, the issues involved, etc., we feel that interest @ 12% per annum from the date when the arbitration clause was invoked by the respondent-BWL Limited till the date of payment or till amount is deposited in Court, on liquidated damages of Rs.39,63,730/- and Rs.11,89,303/- directed to be refunded, would be just and proper.

35. With the aforesaid modification, the appeals are partly allowed with no order as to costs.

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(SANJIV KHANNA)
JUDGE

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(NAVIN CHAWLA)
JUDGE

OCTOBER 12, 2017
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