

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

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Judgment delivered on: 20.03.2017

+ **O.M.P. (COMM) 576/2016 and IA No. 15795/2016**

**PAWAN HANS HELICOPTERS LIMITED**

..... Petitioner

versus

**IDEB PROJECTS PRIVATE LIMITED**

..... Respondent

**Advocates who appeared in this case:**

For the Petitioner : Mr Puneet Taneja and Ms Shaheen.  
For the Respondent : Mr Neeraj Sharma with Mr Seshagiri  
Vadnani, Mr. Adhish Rajvanshi & Mr.  
Ravinder Parsad.

**CORAM:**

**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. Pawan Hans Helicopters Limited (hereafter 'PHHL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 06.09.2016 (hereafter 'the impugned award') rendered by the Sole Arbitrator, Justice P.K. Bahri (Retd.).

2. The impugned award was made and published in respect of the disputes raised by the respondent, IDEB Projects Private Limited (hereafter 'IDEB') in connection with the Contract dated 01.09.2004 entered into between the parties for construction of PHHL's office complex building at Noida. The impugned award was rendered in the context of the second

round of disputes between the parties. The arbitral proceedings in the first round commenced with IDEB invoking the arbitration clause by its letter dated 07.10.2008; pursuant to which a sole arbitrator was appointed who entered upon reference on 15.11.2008. The said arbitration proceedings culminated in the arbitral award dated 03.02.2016. During the pendency of the aforementioned arbitral proceedings, IDEB sent another notice dated 17.12.2012. There is some controversy regarding the date of the said notice; PHHL's counsel claims that the said notice was issued on 17.09.2012. However, the said controversy is not of any material significance. It is sufficient to note that IDEB had sought reference of certain additional disputes that had arisen subsequent to the disputes referred to arbitration pursuant to IDEB's earlier notice dated 07.10.2008.

3. PHHL, a Government of India enterprise, is primarily engaged in providing helicopter support services to the oil sector for offshore exploration operations; air transport services in remote and hilly areas; and charter services for promotion of tourism. In the month of March 2004, PHHL invited bids for construction of its office complex building at Plot no. C-14, Sector 1, Noida, Uttar Pradesh (hereafter 'the office building'). IDEB's bid being the lowest was accepted and the same was communicated by PHHL by its letter dated 05.08.2004. Subsequently, the parties entered into a Contract dated 01.09.2004 (hereafter 'the Agreement'). In terms of the Agreement, the construction was to be completed by 10.09.2006. The Agreement was an '*item rate variable price*' contract.

4. According to PHHL, the execution of the Agreement was delayed and the delays were solely attributable to IDEB. This led PHHL to extend

the completion date of the Agreement on seven occasions, upto 31.10.2009. It is PHHL's case that due to delays on IDEB's part, PHHL suffered severe financial hardships. As a result, disputes arose between the parties.

5. In view of the disputes, IDEB invoked the arbitration clause by its letter dated 07.10.2008 and the sole arbitrator was appointed on 02.11.2008 to adjudicate the disputes who entered reference on 15.11.2008. These proceedings culminated in the arbitral award dated 03.02.2016.

6. In or around April 2010, PHHL took possession of the office building in an unfinished state. Thereafter, PHHL called upon IDEB to rectify certain defects in the construction of the office building on various occasions. However, PHHL claims that IDEB abandoned the works in June 2010 without fulfilling its obligations and, therefore, PHHL had to appoint another agency to complete the pending works.

7. Further, the Chairman cum Managing Director of PHHL failed to appoint the arbitrator pursuant to the notice dated 17.12.2012. Consequently, IDEB filed an application under Section 11 of the Act before this Court and Justice P.K. Bahri (Retd.), a Former Judge of this Court was appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

8. IDEB filed its statement of claims raising the following claims: Claim A - ₹18,05,302/- as the balance amount due under the 43<sup>rd</sup> Running Account (RA) Bill; Claim B - ₹57,20,903/- being the amount of Bank Guarantee - furnished towards security deposit - encashed by PHHL; Claim C - ₹52,91,637/- as amount due under the final bill; Claim D -

₹93,48,538/- as interest on the aforesaid amounts till 30.06.2015; Claim E - ₹20,00,000/- as legal costs; Claim F - *pendente lite* interest at the rate of 18% p.a. from 01.07.2015 till the date of the award computed at ₹1,95,268/- per month; and Claim G - future interest at the rate of 18% p.a. from the date of award till date of payment.

9. After the statement of claims and statement of defence had been filed, IDEB filed an application for amendment of its statement of claims for raising additional claims. PHHL also filed an application for amendment of statement of defence to raise counter claims to seek award of liquidated damages. The Arbitrator considered the aforesaid applications and rejected the same as being barred by limitation.

10. Thereafter, the Arbitrator proceeded to consider the disputes and published the impugned award. Insofar as Claim A is concerned, the Arbitrator allowed the claim to the extent of ₹12,37,483.98 as the said amount was admitted by PHHL as payable. The Arbitrator also awarded Claim B for ₹57,20,903/- in favour of IDEB being the Bank Guarantee (against security deposit) invoked and encashed by PHHL. The Arbitrator observed that the said Bank Guarantee was furnished for securing PHHL for any defect liability during the defect liability period. The works were completed on 17.03.2011 and, therefore, the defect liability period had come to an end on 16.03.2012. The Arbitrator held that since no evidence of defect in the works executed by IDEB was established, PHHL ought to have released the said amount and withholding of the same was wrongful.

11. The Arbitrator rejected the other claims raised on account of extra items and held that IDEB was entitled to ₹4,12,070/- on account of final bill. Thus, in aggregate, the Arbitrator awarded a sum of ₹73,70,456/- in

favour of IDEB. In addition, the Arbitrator also awarded interest at the rate of 10% p.a. on the aforesaid amount with effect from 01.04.2012 till the date of the award and future interest at the rate of 12% p.a. on the awarded sum. However, he also held that future interest would be payable only if the awarded amounts were not discharged within a period of three months from the date of the award.

### ***Submissions***

12. Mr Puneet Taneja, learned counsel appearing for PHHL assailed the award on two aspects. First, he submitted that the decision of the Arbitrator to reject PHHL's application for raising counter claims as being barred by limitation was contrary to law. He stated that PHHL was entitled to levy liquidated damages and had raised counter claims to the aforesaid effect in the arbitration proceedings initiated pursuant to IDEB's invocation of the arbitration clause on 07.10.2008 (the first round).

13. He submitted that the Agreement had been extended seven times from 16.01.2007 upto 31.10.2009 and although the first four extensions fell within the scope of disputes referred to arbitration in the first round, the other three extensions - that is, from 24.04.2009 to 31.10.2009 - were not considered by the initially constituted arbitral tribunal in the award rendered on 03.02.2016. He contended that the dispute regarding levy of liquidated damages, thus, for the period of 24.04.2009 to 31.10.2009 could be raised as a counter claim and the period of limitation for raising the said disputes could only be reckoned from the date of filing of the statement of claims. He submitted that since PHHL's application for raising the counter claims was made within a period of three years from the date of the filing of the statement of claims, the same was within the period of limitation. He

relied on the decision of the Supreme Court in **State of Goa v. Praveen Enterprises**: (2012) 12 SCC 581 and on the strength of the said decision submitted that the time period for making the counter claims where no notice of disputes was served, would be reckoned from the date of the filing of the statement of claims.

14. Secondly, Mr Taneja contended that the award of interest on the security deposit ran contrary to the express terms of the Agreement and was, therefore, unsustainable. He relied on the decisions of the Supreme Court in **Shree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat and Others**: (2010) 8 SCC 767 and **Union of India v. Ambica Construction**: (2016) 6 SCC 36. He also drew the attention of this Court to a recent decision in **Bharat Heavy Electricals Limited v. Garg Builders**: OMP (COMM) 28/2017, decided on 10.03.2017 in support of his contentions.

15. Mr Neeraj Sharma, the learned counsel appearing on behalf of IDEB countered the submissions made by Mr Taneja. He submitted that the counter claim of liquidated damages related to the period from 31.01.2009 to 31.10.2009 being the three extensions granted from 31.01.2009 to 31.10.2009. He pointed out that the said disputes were not the subject matter of reference in the initial round and the same was conclusively held by the arbitral tribunal constituted to consider the first reference. He submitted that the impugned award was rendered pursuant to IDEB invoking the arbitration clause on 17.12.2012 and the liquidated damages now sought to be claimed by PHHL were even beyond the period of three years from the invocation of the arbitration clause.

16. He also referred to the decision of the Supreme Court in ***Voltas Limited v. Rolta India Limited***: (2014) 4 SCC 516 and drew the attention of this Court to paragraph 25 of the said decision wherein, the Supreme Court had considered the ratio of its earlier decision in ***Praveen Enterprises*** (*supra*).

17. Insofar as the issue regarding award of interest on security deposit is concerned, Mr Sharma contended that clause 41.3 of General Conditions of Contract (hereafter 'GCC') relied upon by PHHL did not prohibit interest on the amount recovered by PHHL by wrongfully encashing the Bank Guarantee as the same was only applicable to the sum deposited as security deposit. He further submitted that a plain reading of the said clause clearly indicated that the security deposit was only for the defect liability period. That period having expired, the Arbitrator was not precluded from awarding interest for the period thereafter. He submitted that security deposit ceased to bear the character of a security deposit after the defect liability period was over.

### ***Reasoning and Conclusion***

18. The date of commencement of the Agreement was 10.09.2004 and the works were to be completed by 10.09.2006. PHHL granted extension of time for completion of the works on seven occasions as indicated in the table below:-

| Extension | Date of Extension | Extension granted upto      |
|-----------|-------------------|-----------------------------|
| FIRST     | 16.01.2007        | 19.06.2007                  |
| SECOND    | 06.07.2007        | 20.06.2007 to<br>16.12.2007 |

|         |            |            |
|---------|------------|------------|
| THIRD   | 21.01.2008 | 31.07.2008 |
| FOURTH  | 12.09.2008 | 31.01.2009 |
| FIFTH   | 24.04.2009 | 31.05.2009 |
| SIXTH   | 09.07.2009 | 31.07.2009 |
| SEVENTH | 09.10.2009 | 31.10.2009 |

19. Admittedly, PHHL's counter claim for liquidated damages on account of extension of the Agreement for the first four extensions - that is, till 31.01.2009 was the subject matter of arbitral proceedings which culminated in the arbitral award dated 03.02.2016 rendered by the arbitral tribunal constituted by Justice R.C. Lahoti (Retd.). The said arbitral tribunal concluded that PHHL was instrumental in contributing to the delay in performance of the works. The arbitral tribunal held that PHHL should mainly bear the responsibility for such breach in performance of the obligations and, accordingly, disallowed PHHL's claim for liquidated damages. The arbitral award dated 03.02.2016 was assailed by PHHL in a petition filed under Section 34 of the Act which was disposed of by this Court on 09.01.2017 without interfering with the conclusion of the arbitral tribunal that PHHL was not entitled to liquidated damages and should bear the responsibility for such breach in performance of obligations.

20. Concededly, PHHL's claim for liquidated damages in respect of the last three extensions granted till 31.10.2009 were not the subject matter of the said reference. PHHL sought to raise the claim by way of an application to amend the statement of defence filed before the Arbitrator

(Justice P.K. Bahri (Retd.)). As mentioned above, IDEB also sought to raise additional claims by way of amendment to the statement of claims by seeking to raise claims for (a) compensation for loss incurred for the period October 2008 to May 2010; and (b) for amendment of the final bill for the aforesaid period, apparently, on account of escalation in prices of materials and other inputs. PHHL resisted the aforesaid claim on the ground that the said claims were time barred. PHHL claimed that cause of action for making the said claim arose during October 2008 to May 2010 and, therefore, IDEB could not be permitted to raise the same for the first time in 2016. Admittedly, by virtue of Section 43 of the Act, the Limitation Act, 1963 is applicable to arbitrations as it applies to proceedings in Court. As held by the Supreme Court in **Panchu Gopal Bose v. Board of Trustees for Port of Calcutta: (1993) 4 SCC 338**, the period of limitation for commencement of arbitration runs from the date on which cause of action would have accrued as if there was no arbitration agreement. The Arbitrator after noticing various decisions rightly applied the test as to whether a civil suit for the claims sought to be raised would be barred by time. And, concluded that since the claims sought to be raised were beyond the period of three years from the date of cause of action, the same were barred by limitation.

21. Thus, the aforesaid objections were sustained by the Arbitrator and IDEB's application for amendment of the statement of claims was rejected.

22. PHHL's application for raising the counter claim was on no better footing. Concededly, the liquidated damages sought to be claimed pertained to the period prior to 31.10.2009.

23. Even, according to PHHL, IDEB had abandoned the works in June 2010. In the circumstances, the Arbitrator rightly rejected PHHL's application for raising counter claims as barred by limitation.

24. It is also relevant to note that before the Arbitrator, PHHL had claimed that the cause of action arose on 03.02.2016 when the earlier reference was decided. PHHL had claimed that since it was pursuing its claims for liquidated damages before the arbitral tribunal constituted earlier, it became aware for the first time on receiving the award on 03.02.2016 that its claims were outside the scope of reference. The said contention was not accepted by the Arbitrator and rightly so. However, no such contention has been advanced before this Court. On the contrary, it is a conceded position that the disputes relating to liquidated damages for the period beyond 31.01.2009 were not covered within the scope of the earlier reference.

25. In view of the above, the only contention that remains to be considered is whether the period of limitation for raising the counter claim on account of liquidated damages was to be reckoned from the date of filing of the statement of claims before the Arbitrator.

26. Mr Taneja has canvassed the above proposition, solely on the strength of the decision of the Supreme Court in *Praveen Enterprises (supra)*. In view of this Court, the said decision does not advance the case of PHHL. In that case, the Supreme Court had held as under:-

“20. As far as counterclaims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of the Limitation Act, 1963 provides that in regard to a counterclaim in suits, the date on which the counterclaim is made in court shall be deemed to be

the date of institution of the counterclaim. As the Limitation Act, 1963 is made applicable to arbitrations, in the case of a counterclaim by a respondent in an arbitral proceeding, the date on which the counterclaim is made before the arbitrator will be the date of 'institution' insofar as counterclaim is concerned. There is, therefore, no need to provide a date of 'commencement' as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counterclaims. There is however one exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counterclaim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under Section 11 of the Act, the limitation for such counterclaim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counterclaim."

27. Plainly, the date of filing the counter claim would be the date in reference to which the question of limitation is required to be considered; the exception being where notice for raising the counter claim was served earlier. In *Voltas Limited* (*supra*), the Supreme Court referred to the above quoted passage from the decision in *Praveen Enterprises* (*supra*) and observed as under:-

"25. On a careful reading of the verdict in *Praveen Enterprises* [State of Goa v. *Praveen Enterprises*, (2012) 12 SCC 581], we find that the two-Judge Bench, after referring to, as we have stated hereinbefore, Sections 21 and 43 of the Act and Section 3 of the Limitation Act has opined, regard being had to the language employed in Section 21, that an exception has to be carved out. It saves the limitation for filing a counterclaim if a respondent against whom a claim has been made satisfies the twin test, namely, he had made a claim against the claimant and sought arbitration by serving a notice to the claimant...."

28. In view of the above, the contention that the period for making a counter claim would run from the date of filing of the statement of claims by the claimant is misconceived. IDEB had invoked the arbitration clause on 17.12.2012 and, therefore, could only raise claims that stem from a cause of action arising within a period of three years prior to the said date. Plainly, PHHL could not be permitted to raise claims beyond the said period only for the reason that IDEB had filed its claims.

29. The next question to be considered is with regard to the award of interest at the rate of 10% p.a. There is no dispute to the proposition that if the contract between the parties prohibits award of any interest on any amount, the arbitral tribunal would have no power to award the same. This is apparent from the opening words of Section 31(7)(a) of the Act which expressly provides "*unless otherwise agreed by the parties*".

30. In ***Shree Kamatchi Amman Constructions*** (*supra*), the Supreme Court has explained that the opening words of Section 31(7) of the Act categorically clarified 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 is concerned and, therefore, in cases where parties had agreed that no interest would be payable, the arbitral tribunal would have no jurisdiction to award any interest from the date when the cause of action arises till the date of the award.

31. In ***Ambica Construction*** (*supra*), the Supreme Court had discussed the law on the issue of pre-award interest at some length and after noting various earlier decisions concluded that the question of grant of *pendente lite* interest would depend on several factors such as "*phraseology used in the agreement, clauses conferring power relating to arbitration, nature of*

*claim and dispute referred to Arbitrator and on what items power to award interest has been taken away and for which period".*

32. Thus, plainly the question whether payment of interest was prohibited would have to be considered in the context of the language of the Agreement between the parties. In the present case, the Arbitrator had considered the Agreement between the parties and after noting the relevant clause (41.3 of the GCC) concluded that the same applied only during the contract period and not beyond that. Thus, the only question to be considered in the present proceedings is whether the said decision is perverse, patently illegal and contrary to the plain language of the Agreement between the parties.

33. In this regard, it is necessary to observe that clause 41.3 of the GCC falls within Article 41 of the GCC which is captioned as "SECURITY DEPOSIT (INTEREST FREE) TOWARDS DEFECT LIABILITY:".

34. In terms of clause 41.1, the contractor was obliged to deposit the sum of 10% of the value of the Agreement as security deposit with PHHL. The contractor had various options to deposit the amount. The same could be deposited in a lump sum or could be deposited in tranches; the same could also be recovered by deductions from the RA bills submitted by the contractor.

35. In terms of clause 41.2, the contractor had the option to furnish the initial total security deposit either through a demand draft or by a bank guarantee from any Schedule A Bank.

36. It is not disputed that the security deposit (either by way of the bank guarantee or by deposit of sums) was to secure PHHL towards any defect liability as is apparent from the caption of Article 41. Clause 41.3 must be read in the aforesaid context and is set out below:-

"All compensation or other sums of money payable by the contractor to PHHL under terms of this contract may be deducted from or paid by the sale of a sufficient part of his security deposit or from any sums which may be due or may become due to the contractor by PHHL on any account whatsoever and in the event of his security deposit being reduced by reasons of any such deductions or sale as aforesaid the contractor shall within ten days thereafter make good in cash, bank draft, or Government securities endorsed as aforesaid any sum or sums which may have been deducted from or realized by sale of his security deposit, or any part thereof. No interest shall be payable by PHHL for sum deposited as security deposit."

37. In the aforesaid context, the Arbitrator had noted that the entire work had been completed around March 2011. Thus, in any event, the defect liability period could not extend beyond March 2012 and PHHL was duty bound to refund any sum deposited as security deposit on the expiry of the said period. The Arbitrator had reasoned that the stipulation for maintaining interest free deposit for defect liabilities would obviously cease once the defect liability period expired. In view of the above, the Arbitrator has awarded interest at the rate of 10% p.a. on the amount with effect from 01.04.2012; that is after expiry of the defect liability period.

38. It is well settled that the question as to interpretation of an agreement between the parties is clearly within the jurisdiction of the arbitrator. In **Mcdermott International Inc. v. Burn Standard Co. Ltd and Others.:** (2006) 11 SCC 181, the Supreme Court held as under:-

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration

agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*: AIR 2003 SC 4519 and *D.D. Sharma v. Union of India* : (2004) 5 SCC 325].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

39. In *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.*: (2009) 10 SCC 63, the Supreme Court observed as under:-

“...If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.”

40. The Court further explained that “*an error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award*”.

41. In *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Corporation Limited*: (2010) 11 SCC 296, the Supreme Court held as under:-

“.....The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at

the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

42. The aforesaid view was reiterated by the Supreme Court in **Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran**: (2012) 5 SCC

**306.** In that case, the Supreme Court held as under:-

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.”

43. Although the decisions in *Steel Authority of India Ltd.* (*supra*) and *Sumitomo Heavy Industries Limited* (*supra*) were rendered in the context of the Arbitration Act, 1940, the view expressed therein continues to be applicable as the scope of interference under the Act has not been widened but has only been narrowed down considerably.

44. The view of the Arbitrator that the agreement to maintain an interest free security was limited to the defect liability period - on a plain reading of the clause 41.3 in the context of Article 41 of the GCC - is a plausible one and it is difficult to hold that the same is perverse, patently illegal or a view that no reasonable person could take. Thus, the same cannot be interfered with unless his view is found to be perverse or unreasonable.

45. In view of the above, no interference with the impugned award is warranted. The petition and the pending application are, accordingly, dismissed.

**MARCH 20, 2017**  
**RK**

**VIBHU BAKHRU, J**

