

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.01.2018

PRONOUNCED ON : 02.02.2018

CORAM

THE HON'BLE MR.JUSTICE **M.M.SUNDRESH**

O.P.Nos.188 of 2010 and 289 of 2014

O.P.No.188 of 2010

Deputy Chief Engineer (Construction),
Southern Railway, Podanur. .. Petitioner

-vs-

1.M/s.Vishal Constructions,
Rep. By its Proprietor Sri.B.Vijayakumar.

2.Sri.B.N.S.Chalam,
Senior Divisional Engineer/Works,
Southern Railway, Chennai 600 003.
(Sole Arbitrator). .. Respondents

O.P.No.289 of 2014

1.The Union of India,
Rep. By the General Manager,
Southern Railway, Park Town,
Chennai 600 003.

2.The Chief Administrative Officer
(Construction), Southern Railway,
Egmore, Chennai 600 008.

3.The Deputy Chief Engineer (Gauge
Conversion), Southern Railway,

Chetpet, Chennai 600 031.

.. Petitioners

-VS-

1.M/s.Veeyar Enterprises
Rep. By its Managing Partner,
Mr.S.J.Alphones.

2.Hon'ble Mr.Justice I.David Christian (Retd.)
G-2, B.R.N.Apartments, No.18,
Rajarathinam Street, Kilpauk,
Chennai 600 010.

.. Respondents

Petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996, O.P.No.188/2010: - to set aside the award of the 2nd respondent dated 4th May, 2009 made in relation to disputes arising out of Agreement No.DCE/CN/PTJ/239/96 dated 23.09.1996 in so far as the 2nd portion of claim 1 and claims 2, 3, 4 and 6 are concerned; and O.P.No.289/2014: - to set aside the award dated 05.06.2010 as clarified under the order dated 01.09.2010 made in relation to the disputes arising out of agreement No.09 GC/SUB/2008 in so far as it relates to award of *pendente lite* interest is concerned.

For Petitioner/s
in OP.188/2010 : M/s.A.Sri Jayanthi
in OP.289/2014 : Mr.P.T.Ramkumar

For respondents
in OP.188/2010 : Mr.K.S.V.Prasad
in OP.289/2014 : M/s.Giridhar & Sai.

* * * * *

COMMON ORDER

Though certain additional issues are involved in O.P.No.188 of 2010, the legal one raised by the petitioner/Southern Railway being the same, a common order is passed.

2.Before going into the legal issue, let us first take the other issues raised in O.P.No.188 of 2010. The petitioner invited tenders for re-modeling the existing yard at Coimbatore junction and for that, made a decision to collect machine crushed ballast. The tender of the first respondent was accepted. As the work could not be completed, it was accordingly extended. Thereafter, the petitioner/Southern Railway has informed the first respondent office the decision to rescind the contract. Thus, the first respondent invoked the arbitration clause.

3.Claim No.1 is for the refund of security deposit; Claim No.2 is for the interest over the security deposit; Claim No.3 pertains to compensation on time-over run; under Claim No.4, compensation for dumping of ballast qua the extended period was sought for; Compensation by way of idle wages was sought for under Claim No.5,

which was rejected; and under Claim No.6, *pendente lite* interest of Claim Nos.3 to 5 were asked, in which it was ordered at 12% per annum from 01.03.2006 for Claim Nos.3 and 4.

4.On merits, this Court is of the view that no interference is required since the Tribunal has considered the exhibits filed on merit and gave a factual finding that the delay was caused by the petitioner/Southern Railway and the first respondent did complete the work. The escalation of price for the prolonged period of six years was taken into consideration. Thus, as rightly submitted by the learned counsel appearing for the first respondent, this Court does not find any reason to exercise the power under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act'). In fact, the learned counsel appearing for the petitioner/Southern Railway made specific emphasis on the legal issue. Therefore, while rejecting the contentions on merit qua Claim Nos.1, 3 and 4, the legal issue will be taken up and decided along with the other original petition.

5.The legal issue which is of importance in these petitions is as to whether the first respondent in both the petitions are entitled for interest for pre-award and *pendente lite* period.

6.Clause 16 of the General Conditions of Contract (in short 'GCC'), which forms part of the contract *inter se* the parties, comes under the heading 'General Obligations'. Therefore, this provision obligates the parties to perform their roles where there is no dispute. Clause 16 speaks about the 'security deposit' and the manner in which it has to be dealt with. The aforesaid provision is extracted hereunder:

16. (1) Security Deposit: - *The Earnest Money deposited by the Contractor with his tender will be retained by the Railways as part of security for the due and faithful fulfillment of the contract by the Contractor. The balance to make up the security deposit, the rates for which are given below, may be deposited by the Contractor in cash or may be recovered by percentage deduction from the Contractor's "on account" bills. Provided also that in case of defaulting contractor, the Railway may retain any amount due for payment to the Contractor on the pending "on account bills" so that the amounts so retained may not exceed 10% of the total value of the contract.*

(2) *Unless otherwise specified in the special conditions, if any, the Security Deposit/rate of recovery/mode of recovery shall be as under:*

- (a) Security Deposit for each work should be 5% of the contract value,*
- (b) The rate of recovery should be at the rate of 10% of the bill amount till the full security deposit is recovered,*
- (c) Security Deposits will be recovered only from the running*

bills of the contract and no other mode of collecting SD such as SD in the form of instruments like BG (except Note (ii) below); FD etc. shall be accepted towards Security Deposit.

Security Deposit shall be returned to the contractor after the expiry of the maintenance period in all the cases other than Note (i) mentioned below and after passing the final bill based on No Claim Certificate with the approval of the Competent Authority. The Competent Authority shall normally be the authority who is competent to sign the contract. If this Competent Authority is of the rank lower than JA Grade, then a JA Grade Officer (concerned with the work) should issue the certificate. The certificate, inter alia, should mention that the work has been completed in all respects and that all the contractual obligations have been fulfilled by the contractor and that there is no due from the contractor to Railways against the contract concerned. Before release the SD, an unconditional and unequivocal no claim certificate from the contractor concerned should be obtained.

Note:-

(i) *After the work is physically completed, security deposit recovered from the running bills of a contractor can be returned to him if he so desires, in lieu of FDE/irrevocable Bank Guarantee for equivalent amount to be submitted by him.*

(ii) *In case of contracts of value Rs.50 crore and above, irrevocable Bank Guarantee can also be accepted as a mode of obtaining security deposit.*

(3) *No interest will be payable upon the Earnest Money and 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.

(4) Performance Guarantee (P.G)

The procedure for obtaining Performance Guarantee is outlined below:

(a) The successful bidder may give Performance Guarantee amounting to 5% of the contract value in any of the following forms:-

- i. a deposit of Cash.*
- ii. Irrevocable Bank Guarantee.*
- iii. Government Securities including State Loan Bonds at 5 percent below the market value,*
- iv. Deposit Receipts, Pay Orders, Demand Drafts and Guarantee Bonds. These forms of Performance Guarantee could be either of the State Bank of India or of any of the Nationalized Banks;*
- v. Guarantee Bonds executed or Deposits Receipts tendered by all Scheduled Banks;*
- vi. A Deposit in the Post Office Saving Bank;*
- vii. A Deposit in the National Savings Certificates;*
- viii. Twelve years National Defence Certificates;*
- ix. Ten years Defence Deposits;*
- x. National Defence Bonds; and*
- xi. Unit Trust Certificates at 5 per cent below market value or at the face value whichever is less.*

Also FDR in favour of FA&CAO/C, (free from any encumbrance) may be accepted.

NOTE: The instruments as listed above will also be acceptable for Guarantees in case of Mobilization advance.

- (b) The Performance Guarantee shall be submitted by the successful bidder after the letter of acceptance has been issued, but before signing of the agreement. The agreement should normally be signed within 15 (fifteen) days after the issue of LOA and the Performance Guarantee shall also be submitted within this time limit. This guarantee shall be initially valid upto the stipulated date of completion plus 60 days beyond that. In case, the time limit for completion of work gets extended, the contractor shall give the validity of Performance Guarantee extended to cover such extended time for completion of work plus 60 days.
- (c) The Performance Guarantee (PG) shall be released after the physical completion of the work based on the 'Completion Certificate' issued by the competent authority stating that the contractor has completed the work in all respects satisfactorily. The security deposit, however, shall be released only after the expiry of the maintenance period and after passing the final bill based on 'No Claim Certificate'.
- (d) Wherever the contract is rescinded, the security deposit shall be forfeited and the Performance Guarantee shall be encashed and the balance work shall be got done independently without risk and cost of the failed contractor, the failed contractor shall be debarred from participating in the tender for executing the balance work. If the failed contractor is a JV or a partnership form, then every

member/partner of such a firm shall be debarred from participating in the tender for the balance work either in his/her individual capacity or as a partner of any other JV/ partnership firm.

(e) The Engineer shall not make a claim under the Performance Guarantee except for amounts to which the President of India is entitled under the contract (not withstanding and/or without prejudice to any other provisions in the contract agreement) in the event of:

- i. Failure by the contractor to extend the validity of the Performance Guarantee as described hereinabove, in which event the Engineer may claim the full amount of the Performance Guarantee*
- ii. Failure by the contractor to pay President of India any amount due, either as agreed by the contractor or determined under any of the Clauses/Conditions of the agreement, withint 30 days of the service of the notice to this effect by Engineer.*
- iii. The contract being determined or rescinded under provision of the GCC the Performance Guarantee shall be forfeited in full and shall be absolutely at the disposal of the President of India.*

7.As per sub-clause (3) of Clause 16, no interest is payable upon the Earnest Money and Security Deposit or amounts payable to the contractor under the contract. On a simple reading of this provision, it is clear that while it requires the Railways to pay the Earnest Money

and Security Deposit or any amount payable under the contract, the same will not be visited with any interest. Though the principle governing *ejusdem generis* would not be applicable in strict terms, it is quite clear that this provision does not envisage any dispute between the parties. In other words, it involves a situation in which the Railways is bound to make the payment towards Earnest Money and Security Deposit and other amount payable under the contract. However, while doing it so, in the event of any possible delay, the contractor is not entitled for any interest. The exception was for the Government Security deposit as it augments accrued interest. Therefore, sub-clause (3) of Clause 16 of the GCC provides for mere payment due to a contractor *sans* interest. To put it differently, this provision does not take in its sweep a claim or dispute over return of Earnest Money and Security Deposit and any other amount payable under the contract. Therefore, Clause 16(3) is a distinct provision by itself.

8. Clauses 46, 51 and 52 of the GCC would come under the heading 'Claims'. Clause 46 speaks about "On-Account" payments. As per this clause, a contractor is entitled to be paid from time to time for the work done, on a certification by the Engineer of the Railways,

which is indicative of the fact that work was executed in terms of the contract. Therefore, this Clause has to be read *in consonam* with Clause 16. Thus, the payment mentioned under Clause 46 is something which the Railways is bound to make in favour of the contractor, after the exercise done by the Engineer concerned.

9. Clause 51 (1) involves the final payment on the Engineer's certificate of completion in respect of the works. Clause 52 deals with withholding and lien in respect of sums claimed. As we are concerned with the interpretation of this clause, it is opposite to place it on record and it reads thus:

52. Withholding and lien in respect of sums claimed:-

Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the contractor, the Railway shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the contractor and for the purpose aforesaid, the Railway shall be entitled to withhold the said cash security deposit or the security if any, furnished as the case may be and also have a lien over the same pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the Railway shall be entitled to withhold and have a lien to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any

time thereafter may become payable to the contractor under the same contract or any other contract with this or any other Railway or any Department of the Central Government pending finalization or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above, by the Railway will be kept withheld or retained as such by the Railways till the claim arising out of or under the contract is determined by the arbitrator (if the contract governed by the arbitration clause) or by the competent court as the case may be and that the contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company, the Railway shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner / limited company, as the case may be whether in his individual capacity or otherwise."

10. Thus, on a perusal of the aforesaid provision, when a claim for payment is made, it is well open to the Railways to withhold it. Incidentally, the Railways shall have a lien to retain such sum from the Security Deposit made by the contractor. If that is not sufficient, the Railways can withhold any amount otherwise payable under the contract. Such withholding can be allowed to continue till the claim is

determined by the Arbitrator. In such contingency, the contractor will have no claim for interest in respect of such withholding or retentions. Therefore, Clause 52 deals with the power of the Railways to retain the amount by way of withholding and lien. Though the provision says a claim against the contractor, it has to be understood as a claim *inter se* the parties made at the instance of either one. After all, the withholding and lien would take place over a sum which is otherwise due to a contractor.

11. Thus, there is distinction between Clauses 16 and 46 on the one hand and Clauses 51 and 52 on the other hand. Clause 64(5) comes under the caption 'Settlement of Disputes'. Under this provision, when once an award is passed for payment of money, no interest shall be payable for any period till the date on which the award is made. The aforesaid provision is extracted hereunder:

"64(5) *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."*

12. Thus, this provision places fetters on the powers of the Arbitrator to award interest for the period till the award is passed. Therefore, it prohibits the Tribunal from granting any award at the pre-

award stage and *pendente lite*. This provision has to be read along with the other two provisions, namely Clause 16 (3) read with Clause 46 and Clauses 51 and 52. Hence, under no circumstances, a contractor is entitled for payment of money on the amount awarded till the date of pronouncement. Therefore, a combined reading of the provisions discussed above do not provide any room for awarding of interest by the Tribunal on the payment of money till its pronouncement.

13. The aforesaid position of law has in fact been dealt with by the Apex Court in **UNION OF INDIA V. CONCRETE PRODUCTS AND CONSTRUCTION COMPANY AND OTHERS ((2014) 4 Supreme Court Cases 416)**. In the said case also, the contract was between the private authority and the railways. Paramateria provisions were available for withholding the amount and have lien, which is otherwise due and payable to the contractor. The following paragraphs would be apposite.

“17. Clause 2401 provides that the railways shall be entitled to withhold and also have a lien to retain any amount deposited as security by the contractor to satisfy any claims arising out of or in the contract. In such circumstances, the railways can withhold the amount deposited by the contractors as security and also have lien over the same pending finalization or adjudication of

the claim. In case, the security deposit is insufficient to cover the claim of the railways, it is entitled to withhold and have lien to the extent of the amount claimed from any sum payable for any works done by the contractor thereafter under the same contract or any other contract. This withholding of the money and the exercise of the lien is pending finalization or adjudication of any claim. This clause further provided that the amount withheld by the railways over which it is exercising lien will not entitle the contractor to claim any interest or damages for such withholding or retention under lien by the railways.

18. Clause 2403 again provides that any sum of money due and payable to the contractor under the contract may be withheld or retained by way of lien by the railway authorities or the Government in respect of payment of a sum of money arising out of or under any other contract made by the contractor with the railway authority or the Government. Clause 2403(b) further provides that it is an agreed term of the contract that against the sum of money withheld or retained under lien, the contractor shall have no claim for interest or damages whatsoever provided the claim has been duly notified to the contractor.

19. We are of the opinion that the sole arbitrator in awarding interest to the contractors has failed to take into account the provisions contained in the aforesaid two clauses. We find merit in the submission made by learned Additional Solicitor General that award of interest at-least from the date when the amount was deposited in Court was wholly unwarranted. Therefore, the High Court as well as the arbitrator, in our opinion, have committed an error of jurisdiction in this respect. This view of ours will find support from the judgment of this Court in the

case of Sayeed Ahmed & Company (supra), wherein it has been held as follows:-

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

20. This view has been reiterated by this Court in Sree Kamatchi Amman Construction (supra), wherein it has been held as follows:-

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

21. From the aforesaid it becomes apparent that the arbitrator could not have awarded any interest from the date when the recovery was made till the award was made. However, interest would have been payable from the date when the award was made till the money was deposited in the High Court and thereafter converted to fixed deposit receipts. Upon the amount

being deposited in the High Court, no further interest could be paid to the respondents.”

14. The Interest Act, 1978, was introduced to consolidate the allowance of interest in certain cases. The provisions of the Act do apply to Arbitral Tribunal, subject to other laws and covenants in the agreement. Section 3 speaks about the power of the Court to allow interest. Under Section 4, interest shall be payable by virtue of an Act, Rule or usage having the force of law. As per sub-clause (2), the Court can award interest, but without prejudice to the provisions of sub-section (1). Therefore, when there is a Rule or an Act or usage having force of law, Section 4 does not have any application. The Interest Act, 1978, cannot be construed to be one in conflict with the GCC. The conditions are binding in nature having force of law. Similarly, the Interest Act also will have to be taken as the one in operation without violating the provisions of the Arbitration Act. It is well settled that even a right created under the statute can be waived by agreement. Thus, the payment of interest having been waived by accepting the terms and conditions cannot be agitated for the first time before the Tribunal. After all, the role of the Tribunal is to adjudicate the right of the parties under the contract and in order to set at naught its provisions, the other decisions viz., M/S CWHEC-HCIL

(JV) V. M/S CHPRCL (CDJ 2017 DHC 640); S.K.SHARMA V. CHANDER PRAKASH ARORA AND ANOTHER (CDJ 2012 DHC 2017); VENTURE GLOBAL ENGINEERING V. SATYAM COMPUTER SERVICES LTD., AND ANOTHER (CDJ 2010 Supreme Court 693); P.GOPIRATHNAM AND OTHERS V. FERRODOUS ESTATE (PVT) LTD., REP., BY ITS POWER OF ATTORNEY HOLDER SRI G.JOHN ARTHUR (CDJ 1999 MHC 502); NHAI V. M/S HINDUSTAN CONSTRUCTION CO., LTD., (CDJ 2017 DHC 540); NORTH DELHI MUNICIPAL CORPORATION V. PREMCHAND GUPTA (AIR 2017 DELHI 171) and KAUSHAL KISHORE MISHRA V. STATE OF U.P., (CDJ 2018 ALL HC 020) relied upon by the learned counsel appearing for the first respondent also are of no help.

15. Coming to the Arbitration Act, Section 31(7) starts with the words "Unless otherwise agreed by the parties". Therefore, while the Tribunal has got a power to award interest, it is subject to the agreement *inter se* parties. Thus, in a case where the entitlement towards interest along with the extent is determined and decided by the agreement, then the Tribunal would not have the power and award it. In other words, the covenants in the agreement would prevent the Tribunal from exercising the power under Section 31 (7) of the Arbitration Act, in view of the express bar providing therein to do so.

16. At this juncture, it is pertinent to note that as per Clause 64 (7) of the GCC, it has been specifically made known that the provisions of the Arbitration Act and the Rules made thereunder shall apply to the arbitration proceedings.

17. Section 23 of the Contract Act deals with existence of the factors, which would make an agreement unlawful. Such an agreement having its object or consideration as unlawful would become void. The aforesaid provision would not be applicable to a case where a party chooses not to insist upon its right while entering into contract. Payment of interest is not mandatory in all cases meaning thereby it can even be given up and not insisted upon by agreement. Therefore, in such a case, Section 23 of the Contract Act, 1872 would not come into play. When once a party knows its position qua the terms of the contract even prior to the agreement, then that forms part of an offer. Therefore, when an offer is made by a party, it presupposes a knowledge that in the event of withholding of an amount by exercising waiver, it would not get interest on it.

18. Heard the learned counsel appearing for the parties.

19. The learned counsel appearing for the petitioner/Southern Railway would submit that inasmuch as there is an express bar under Clauses 16 and 64(5), the award of interest for pre-award and *pendente lite* period cannot be sustained in the eye of law. The decisions relied upon by the learned counsel for the first respondent are with respect to the old enactment where there is no express provision as contained under Section 31 (7) of the new Arbitration Act. Clause 16 (3) is of wider import. It involves every other claim. The decision relied upon by the first respondent in **Union of India vs. Pradeep Vinod Constructions**, reported in **MANU/SCOR/30509/2017** is distinguishable on facts. The scope and applicability of Clause 64 (5) has not been taken note of. There is no question of applying the Interest Act, 1978. This Hon'ble Court has already rejected the said contention in O.P.Nos.143 and 525 of 2010 dated 19.10.2016. Thus, the petitions will have to be allowed. To buttress the submissions made, the learned counsel relied upon the following judgments :

- 1) Unreported decision of this Court in O.P.No.22 of 2007, dated 03.02.2009 (between Union of India vs. M/s.Emjay Constructions)**
- 2) Sree Kamatchi Amman Constructions vs. Railways, (2010) 8 SCC 767**
- 3) Tehri Hydro Development Corpn. Ltd. vs. Jai**

Prakash Associates Ltd., (2012) 12 SCC 10

- 4) Decision of the Andhra Pradesh High Court in V.K.Engineering Constructions vs. Union of India, 2015 (2) R.A.J. 377 (AP)**
- 5) Union of India vs. Bright Power Projects (India) (P) Ltd., (2015) 9 SCC 695**
- 6) BHEL vs. Globe Hi-Fabs Limited, (2015) 5 SCC 718**
- 7) Sri Chittaranjan Maity vs. Union of India, 2017 (12) Scale 216**
- 8) Union of India vs. Ambica Construction, (2016) 6 SCC 36**
- 9) Unreported decision of this Court in O.P.Nos.143 and 525 of 2016 dated 19.10.2016 (between M/s.SAVIO Industrial and Structural Corporation vs. Southern Railway and Ors.**
- 10) Unreported decision of this Court in O.P.No.187 of 2010 dated 09.11.2017, (between Union of India and Another vs. K.V.Mohanarao and Ors.)**

20.The learned counsel appearing for the first respondent in both the petitions would submit that the law laid down by the Apex Court in **Union of India vs. M/s.Pradeep Vinod Construction Co.,** reported in **MANU/SCOR/30509/2017** would govern the parties. Clause 16(2) cannot be made to include other claims and payments.

An award can only be set aside when it is in conflict with the public policy, which is lacking in the case on hand. The provision of Interest Act with specific reference to Section 4 would be applicable. Clause 64(5) deals with the procedural part as against the substantive part, which involves Clause 16. Even under Clauses 51 and 52, the relief can be granted. Section 73 of the Indian Contract Act also would come into play. Reliance has been made by the learned counsels on the following decisions:

- 1) *Union of India and Ors., vs. Dhanwanti Devi and Ors., reported in Manu/SC/1272/1996***
- 2) *Decision of the Delhi High Court in Union of India vs. N.K.Garg & Co., reported in Manu/DE/4099/2015***
- 3) *Union of India vs. M/s.Pradeep Vinod Construction Co., reported in Manu/SCOR/30509/2017***
- 4) *Union of India vs. M/s.Susaka Pvt. Ltd. & Ors.***

21. On the understanding of the provisions, I have already dealt with in extenso. Reliance has been made on three enactments other than the GCC. As discussed above, the primary duty of the Court is to make sure that all the provisions are not made to militate against each other. Rather, they should be allowed to synchronise and sail together. The object of the enactments are totally different. As a

Court dealing with the power conferred under Section 34 of the Arbitration Act, endeavour must be to give effect to the agreement rather than destroying it, being the one created with the approval of the parties. The conditions dealt with cannot be termed as unlawful. Section 73 of the Indian Contract Act deals with the issue qua compensation for loss or damage as a consequence of breach of a contract by one party. Therefore, Section 73 deals with a different situation. Nothing prevents a party from claiming compensation for loss or damage. However, the said provision cannot be read into a clause created by agreement to destroy it.

22. We are concerned with the power of the Tribunal to pass an award for interest prior to the pronouncement when it involves payment of money. When once the role of the Tribunal is defined and thus, prohibited from going into certain claims, the same cannot be allowed in a different form. Otherwise, it will amount to setting aside the very clauses themselves. When it is found that the clauses are not unlawful and entered into voluntarily by the parties, then the Tribunal will have to give effect to it rather than go against. The same logic applies to this Court as well. When the Tribunal exceeded its jurisdiction and undertakes such an exercise, then the power under

Section 34 of the Arbitration Act has to be exercised with certainty.

23. Judgments have been relied upon both for and against by the learned counsel appearing for the parties. It is a settled law that an issue or a decision made in ignorance of certain provisions and without conscious consideration could never be termed as binding. Unfortunately, in the cases relied upon by the learned counsel appearing for the first respondent, the clauses, namely Clauses 46, 51, 52 and 64(5) were not brought to the notice of the Court. In cases where they were brought, they were accepted and followed in favour of the Railways.

24. In **Union of India vs. Pradeep Vinod Constructions**, supra, Clauses 46, 51, 52 and 64(5) were not brought to the notice of the Court. The Apex Court gave a factual finding on the case involved that interest awarded was in terms of the contractual obligation. It is to be noted that though the earlier decisions were quoted, they were not held to be bad in law. On the contrary, it has been held that if the contract expressly bars the award of interest *pendente lite*, the same cannot be awarded by the Tribunal. The Apex Court referred the

judgment of a three Bench judgment in **Tehri Hydro Development Corpn.Ltd. v. Jai Prakash Associates Ltd.**, reported in **(2012) 12 SCC 10**, the following paragraph would be of relevance:

"34. Thus, our answer to the reference is that if the contract expressly bars the award of interest pendente lite, the same cannot be awarded by the arbitrator. We also make it clear that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits."

25. Reliance has been made by the learned counsel for the first respondent on the judgment of the Delhi High Court in **Union of India vs. N.K.Garg & Co.**, reported in **Manu/DE/4099/2015**, on the scope and application of the Interest Act, 1978. This Court is afraid that in the aforesaid judgment also, the other provisions of the GCC have not been considered. Furthermore, this decision was made without taking into consideration the other decisions of the Apex Court.

26. In **Union of India vs. M/s.Susaka Pvt. Ltd.**, the issue of applicability of Clause 13 (3) of the GCC was raised for the first time

before the Apex Court. Though the Apex Court took note of Section 31 (7) (a) (b), the issue having not raised, the contention was rejected on the principle of a waiver by the appellant. Hence, the said judgment also would not help the case of the first respondent.

27. In **Union of India vs. Ambica Constructions**, referred to supra, the general principle that the Tribunal is bound to decide the dispute as per the agreement has been reiterated through the following paragraph:

"..The court can exercise the power specified in Second Schedule of the Act. However, Arbitrator is not a court. Arbitrator is the outcome of agreement. He decides the disputes as per the agreement entered into between the parties. Arbitration is an alternative forum for resolution of disputes but an Arbitrator ipso facto does not enjoy or possess all the powers conferred on the courts of law. "

28. Taking note of the existence of Clause 64 (5), this Court has held in **Union of India vs. M/s. Emjay Constructions**, supra, dated 03.02.2009 that the conditions do not contemplate payment of any interest. The following paragraphs would be of relevance:

29. According to clause 64(5) of the GCC, whether the arbitral award is for the payment of money, no interest shall be payable on the whole or any part of the money for any period till the date on

which, the award is made. In respect of these clauses, the second respondent/ Arbitrator deemed it reasonable to grant the rate of 12% per annum as interest on the total sum awarded, which, in my view, is absolutely incorrect and which is contrary to the clauses contained in the contract. Therefore, I am inclined to set aside the grant of 12% interest on the total sum awarded, which accrued from 14.12.2004 till 23.6.2006. Hence, this grant of interest is set aside. In so far as the future interest granted at the rate of 18% per annum is to be upheld because clause 64(5) does not prohibit grant of future interest. But, the future interest would not be given to the EMD and SD as clause 16(7) GCC prohibits the same. It is made very clear that no interest whether past or future can be given with regard to the EMD and SD.

30. In fact, Sec.31(7) (a) of the Act 1996 will also prohibit granting of any interest if otherwise agreed to by the parties. In this case, clauses 16(3) and 64(5) of the General Conditions of Contract do not contemplate payment of any interest and therefore no interest could be granted by ignoring these clauses.

29. A similar view has also been expressed by a Division Bench of Andhra Pradesh High Court in **V.K.Engineering Constructions**, referred supra, in the following manner:

"55. Even the submission of the learned counsel for the 1st respondent that fact that GCC of December, 1998 contains specific prohibitory clause in Clause 64(5), reading thus:

"64(5) Where the arbitral award is for the payment of the 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."

would make it abundantly clear, in view of conspicuous absence of a similar clause in predecessor GCC in force when the agreement was entered into by inference that the power of arbitral tribunal was not curtailed, does not assist the claim of the 1st respondent to interest, pre-reference and pendente lite, in view of the principle as to bar to award interest laid down by the Hon'ble Supreme Court in the line of decisions referred to hereinbefore and in the presence of prohibition contained in Clause 16(2) (old) and 16(3) (modified) of GCC which are similar and identical.

30. In **Sri Chittaranjan Maity vs. Union of India**, supra, which is rendered very recently, it has been held by the Apex Court that when the agreement prohibits any payment of interest, the same cannot be awarded. Following are the necessary and relevant paragraphs:

"16. Admittedly, the GCC, governing the contract between the parties, contains a clause which bars the payment of interest, which is as under:

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

17. Relying on a decision of this Court in *M/s. Ambica Construction vs. Union of India* (2017) SCC OnLine SC 678, (C.A.No.410 of 2008, disposed of on 26.04.2017) learned senior counsel for the appellant submits that mere bar to award interest on the amounts payable under the contract would not be sufficient to deny payment on pendente lite interest. Therefore, the Arbitrator was justified in awarding the pendente lite interest. However, it is not clear from *M/s. Ambica Construction* (supra) as to whether it was decided under *The Arbitration Act, 1940* (for short 'the 1940 Act') or under the 1996 Act. It has relied on a judgment of Constitution Bench in *Secretary, Irrigation Department, Government of Orissa and Others. vs. G.C. Roy* (1992) 1 SCC 508. This judgment was with reference to the 1940 Act. In the 1940 Act, there was no provision which prohibited the Arbitrator from awarding interest for the pre-reference, pendente lite or post award period, whereas the 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the Arbitrator cannot award interest for the said period. Therefore, the decision in *M/s. Ambica Construction* (supra) cannot be made applicable to the instant case.

21. In *Union of India vs. Bright Power Projects (India) Private Limited* (2015) 9 SCC 695, a three-Judge Bench of this Court, after referring to the provisions of *Section 31(7)(a)* of the 1996 Act, held that when the terms of the agreement had prohibited award of interest, the Arbitrator could not award interest for the pendente lite period. It has been held thus:

"10. Thus, it had been specifically understood between the parties that no interest was to be paid on the earnest money, security deposit and the amount payable to the contractor under the contract. So far as payment of interest on government securities, which had been deposited by the respondent contractor with the appellant is concerned, it was specifically stated that the said amount was to be returned to the contractor along with interest accrued thereon, but so far as payment of interest on the amount payable to the contractor under the contract was concerned, there was a specific term that no interest was to be paid thereon.

11. When parties to the contract had agreed to the fact that interest would not be awarded on the amount payable to the contractor under the contract, in our opinion, they were bound by their understanding. Having once agreed that the contractor would not claim any interest on the amount to be paid under the contract, he could not have claimed interest either before a civil court or before an Arbitral Tribunal." Therefore, it is clear that the appellant is not entitled for any interest on the amount awarded by the Arbitral Tribunal."

Therefore, it is clear that the appellant is not entitled for any interest on the amount awarded by the Arbitral Tribunal."

31. This Court is quite conscious about the role required to be played in exercise of the power under Section 34 of the Arbitration and

Conciliation Act, 1996. Suffice it is to place below the following paragraphs of the Division bench judgment of this Court in **THE BOARD OF TRUSTEES OF V.O. CHIDAMBARANAR PORT TRUST V. M/S PSA SOCIAL TERMINALS LIMITED AND OTHERS (C.M.A.(MD) NO.345 OF 2016 dated 01.11.2017)**, which in turn has taken note of the law governing the scope and applicability of Section 34 of the Arbitration and Conciliation Act, 1996.

32. Therefore, in the light of the discussions made, both on facts and law, this Court is of the view that O.P.No.289 of 2014 deserves to be allowed and it is, accordingly, allowed, by setting aside the award passed in so far as awarding of interest at the pre-award and *pendente lite* period. O.P.No.188 of 2010 stands allowed-in-part in so far as interest awarded on the claims for the pre-award and *pendente lite* period. No costs.

02.02.2018

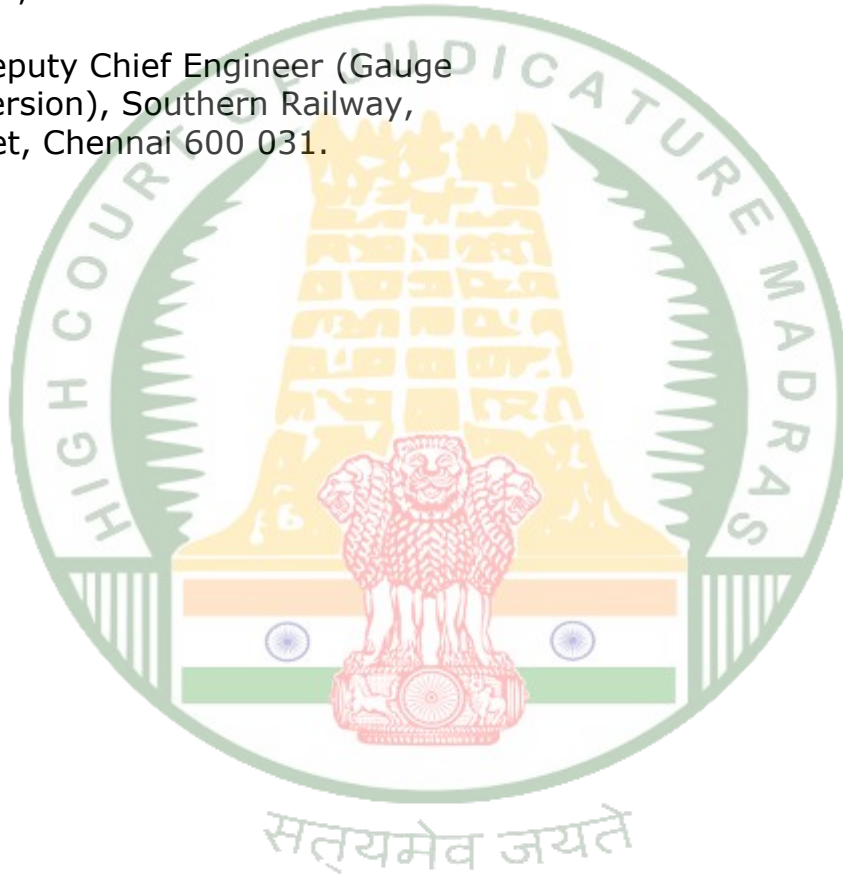
Index : Yes/No
Internet : Yes/No

sra/raa

To

1. The Deputy Chief Engineer (Construction),
Southern Railway, Podanur.

- 2.The Union of India,
Rep. By the General Manager,
Southern Railway, Park Town,
Chennai 600 003.
- 3.The Chief Administrative Officer
(Construction), Southern Railway,
Egmore, Chennai 600 008.
- 4.The Deputy Chief Engineer (Gauge
Conversion), Southern Railway,
Chetpet, Chennai 600 031.



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M.M.SUNDRESH, J.

(sra/raa)



**Pre-Delivery Order in
O.P.Nos.188 of 2010
and 289 of 2014**

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02.02.2018