IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 09.04.2019

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THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.Nos.894 of 2010 and 965 of 2017
AND
A.No.7855 of 2017 in O.P.No.965 of 2017

O.P.No.894 of 2010

M/s.Unique Builders,
Rep. by its Sole Proprietor P.Nallasamy
S/o.Periyanna Gounder, No.1369, 5th Street,
Golden Colony, Padi, Chennai-50. ... Petitioner

Vs.

1.The Union of India,
Rep. by the General Manager,
Southern Railway,
Chennai-3.

2.The Chief Engineer,
O/o.The Chief Administrative Officer (Construction),
Southern Railway, Egmore,
Chennai-8.

3.The Deputy Chief Engineer-I,
Gauge Conversion, Southern Railways,
Opposite Arun Hotel, SBI Road,
Tiruchirappalli-1.

4.Justice R.Balasubramanian (Arbitrator),
No.5, Tiger Varadachary Road,
1st Street, Kalakshetra Colony,
Besant Nagar, Chennai-90. ... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 04.09.2010 passed by sole Arbitrator namely the 4th respondent and consequently allow all the claims of the petitioner.

For Petitioner : Mr.Amalaraj S.Penikilapatti
For R1 to R3 : Mr.P.T.Ramkumar,
Standing Counsel for Railways

O.P.No.965 of 2017

1.Union of India,
Rep. by the General Manager,
Southern Railway,
Chennai-3.

2.The Chief Engineer,
O/o.The Chief Administrative Officer (Construction),
Southern Railway, Egmore,
Chennai-8.

3.The Deputy Chief Engineer/I,
Gauge Conversion, Southern Railway,
Opposite Arun Hotel, SBI Road,
Tiruchirappalli-1. ... Petitioners

Vs.

1.M/s.Unique Builders,
Rep. by its Sole Proprietor,
P.Nallasamy
No.1369, 5th Street,
Golden Colony, Padi, Chennai-50.

2.Hon'ble Justice R.Balasubramanian (Retired),
No.157/17, P.S.Kumaraswamy Raja Road,
Raja Annamalaipuram,
Chennai-28. ... Respondents

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 04.09.2010 made in relation to disputes arising out of agreement No.Dy.CE/TPJ/KKDI/HQ/09 in so far as Claim Nos.5 to 9 are concerned.

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| For Petitioners | : | Mr.P.T.Ramkumar, Standing Counsel for Railways |
| For 1st Respondent | : | Mr.Amalaraj S.Penikilapatti |

**COMMON ORDER**

This common order will dispose of both these 'Original Petitions' ('OPs' in plural and 'OP' in singular for brevity). 'OP.No.894 of 2010' shall be referred to as 'senior OP' and 'OP.No.965 of 2017' shall be referred to as 'junior OP'.

2.Fulcrum and nucleus of this lis is an agreement dated 01.12.2005 between one Mr.P.Nallasamy, carrying on business in the name and style of Unique Builders as proprietor (hereinafter 'contractor' for brevity) and Southern Railways. This contract dated 01.12.2005 bears reference Agt.No.DYCE/TPJ-KKDI/HQrs/09 (shall hereinafter be referred to as 'said agreement' for the sake of brevity and clarity).



3.Work which is subject matter of said agreement is as follows :

'Proposed construction of existing Bridge No.67 as 3 x 12.2 m Clear Span with PSC Slab @ KM.435/12-13 on Diversion and Re-building of Minor Bridges

Nos.62, 63 and 64 as RCC Boxes in Tiruchirapalli - Karaikudi Section as part of Gauge Conversion Works between Tiruchirapalli - Manamadurai Section' and the same shall hereinafter be referred to as 'said work' for the sake of convenience and clarity.

4.It is not in dispute that said work under said agreement had to be completed within five months from the date of letter of acceptance and it is also not in dispute that the five months period elapsed on 04.03.2006. Total value of said agreement is Rs.1,83,54,371/- (Rupees one crore eighty three lakhs fifty four thousand three hundred and seventy one only). It is also not in dispute that out of said work, the contractor completed work for the value of Rs.1,53,54,437/- (Rupees one crore fifty three lakhs fifty four thousand four hundred and thirty seven only) leaving a balance of Rs29,99,934/- and the balance work was completed by Southern Railways by calling for an open tender *vide* notice 05.05.2006.



5.It is also not in dispute that the five months time frame which was originally agreed for completion of said work qua said agreement was extended subsequently.

6.In the aforesaid backdrop, contractor raised arbitral disputes against Southern Railways, 'Arbitral Tribunal' ('AT' for brevity) was constituted by appointment of a Sole Arbitrator, a former Hon'ble Judge of this Court *vide* an order dated 26.10.2007 made in OP.No.185 of 2007 by the then Hon'ble Chief Justice of this Court.

7.AT entered upon reference. Before the AT, contractor was the sole claimant and there were three respondents, but, suffice to say that the three respondents are being collectively referred to as 'Southern Railways'.

8.Before AT, contractor made claims under eight different heads, the details of which as can be culled out from the impugned award are as follows :

1. Rs.5,67,201/- stated to be payable to contractor and recovered under the "Risk and Cost" clause from the final bill;
2. Rs.9,25,219/- as the "Refundable Security Deposit and Earnest Money Deposit";
3. Rs.7,50,000/- as damages for additional expenses towards "Establishment and Overheads" due to working for an additional period of two months;
4. Rs.4,83,000/- as damages for wasteful expenses suffered due to "Under Utilisation and idling of Contractors' Labour";

5. Rs.3,00,000/- as damages for wasteful expenses suffered due to "Under Utilisation of the Contractors' Machinery, Tools, Plants, Materials, etc.,
6. Rs.3,00,000/- as damages for the loss of anticipated profits suffered by the claimant arising due to the illegal termination resulting in the claimant being prevented from executing the balance work.
7. In addition to the above, an amount to be determined if the termination of contract is found to be illegal;
8. For a declaration that once the contract had expired on 04.03.2006, the opposite party cannot initiate any penal proceedings whatsoever, including under Clause 62 of General Conditions of Contract.

Besides the aforesaid eight heads of claim, contractor also claimed cost and interest.



9.As far as Southern Railways is concerned, it made a counter claim before the AT and the counter claim was essentially what according to Southern Railways is difference in rates, being difference between the rates at which the said agreement was entered into with the contractor and the rate at which a new agreement was entered into with a third party i.e., new contractor (pursuant to the open tender *vide* tender notice dated 05.05.2006) for completing the balance work qua said work/said agreement. The counter claim made by Southern Railways is captured by AT in paragraph 6 of the impugned award and this Court considers it appropriate to usefully extract and reproduce paragraph 6 of the impugned award which reads as follows :

> '6.The opposite parties made their counter claim as hereunder :
>
> The tender for the execution of balance work was called through "open tender", by tender notice dated 05.05.2006. The difference in rates between the existing and the new agreement had been worked out to Rs.6,60,106/-. Out of this, a sum of Rs.5,67,201/- had been recovered from the final bill and a sum of Rs.92,905/- had been recovered from the security deposit. The available security deposit is for a sum of Rs.50,000/- in Indian Bank, Anna Nagar and a sum of Rs.2,50,000/- in the form of FDR issued by Indian Bank, Chennai. A sum of Rs.1,77,142/- had been incurred towards advertisement charges for the balance work and the "Risk and Cost" through open tender referred to above.'

10.On the aforesaid rival claims, eleven issues were framed and the eleven issues as can be culled out from the impugned award are as follows :

1. Is not the constitution of Arbitral Tribunal against the terms of the contract between the parties and assuming so, is not the reference is in violation of term 16(2) of the General Conditions of contract ?

2. Whether there is any breach of the contract between the parties and if so, who is responsible for such breach ?
3. Whether the Railway's termination of contract and its subsequent "Risk and Costs" proceedings against the claimant are legal and valid ?
4. Whether the respondents are entitled to deduct any amount under the head of risk and cost amount from any amount available with them and payable to the claimant and if not, whether the claimant is entitled to the various amounts due to him and available with the respondents ?
5. Whether the claimant is entitled for a declaration that the contract had expired on 04.03.2006 and that the Railways cannot initiate any penal proceedings whatsoever including under Clause 62 GCC ?
6. Whether the claimant is entitled for compensation for the additional expenses towards "Establishment and Overheads" due to working for an additional period of two months ? If so how much ?
7. Whether the claimant is entitled for damages for wasteful expenses suffered by the claimant due to the under utilization and idling other contract labour, machinery,

tools, plants, materials, etc., during the said contract period ?

8. Whether the claimant is entitled for compensation for the loss of its anticipated profits due to non-execution of the balance works under the contract ? If so how much ?
9. Whether the respondent is entitled to its counter claims ? If so, how much ?
10. Whether the parties are entitled to interest ? If so how much?
11. To what other relief the parties are entitled for ?

11.AT ruled on it's own jurisdiction. However, there is no challenge to this ruling of AT about it's own jurisdiction and therefore, it is not necessary to delve into this aspect of the matter.

12.With regard to issue No.2, AT after detailed discussion of evidence before it, came to the conclusion that Southern Railways had committed breach or in other words, to put it conversely, AT has returned a finding that the contractor has not committed breach.

13.Issue Nos.3 and 4 deal with legality of termination of said agreement and validity of deductions made by Southern Railways under the head risk and costs respectively. On both these issues, AT ruled in favour of contractor. With regard to issue No.5, which pertains to declaration that Southern Railways cannot initiate penal proceedings as the said agreement expired on 04.03.2006, the same was answered in favour of contractor. Issue Nos.6 and 7 were also answered in favour of contractor and with regard to issue No.8, contractor was awarded a sum of Rs.1,00,000/- towards compensation for loss of anticipated profits due to non-execution of balance work under the said agreement. With regard to issue No.9, it was held that Southern Railways is not entitled to the counter claim as AT had returned a finding that Southern Railways had committed breach (as alluded to *supra*). With regard to issue Nos.10 and 11, AT awarded interest at the rate of 9% per annum from January 2008 on all amounts that were awarded under impugned award. It is submitted that AT entered reference in January 2008 and therefore, interest has been awarded from January 2008.



14.In the aforesaid backdrop, both contractor and Southern Railways have filed instant OPs assailing the impugned award. To be noted, senior OP has been filed by the contractor and junior OP has been filed by Southern Railways.

15.Today, Mr.Amalaraj S.Penikilapatti and Mr.P.T.Ramkumar, learned Standing Counsel for Southern Railways are before this Court. Both learned counsel advanced arguments and both instant OPs were heard out.

16.As would be evident from the narrative *supra*, all the claims of the contractor have been answered in the affirmative/acceded to and therefore arguments of learned counsel for contractor turned heavily on quantum. With regard to learned counsel for Southern Railways, it was submitted that there is a price variation clause i.e., clause 44(4) and there is also a special condition which stipulates that the tender rights include wastage and therefore the AT acceding to claim Nos.5 to 8 adumbrated *supra* were assailed by Southern Railways on this ground.

17.To be noted, reference to clause 44(4) and clause 39.2 of 'General Conditions of Contract' ('GCC' for brevity) which are generic and in the nature of a template apply to said agreement in instant case is common say of Southern Railway and contractor. In the instant case, as both the learned counsel submit that there is no dispute or disagreement that GCC applies qua said agreement and said work, it is not necessary to delve further into the aspect of GCC being telescoped into said agreement.

18.Before this Court proceeds further to discuss the rival submissions that have been made, it is necessary to highlight that two clauses in GCC are significant and those two clauses are Clauses 16 and 64(5).

19.Clause 16 of GCC reads as follows:

*16. Security Deposit: -(1) 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 fulfilment 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 of 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, within 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.'*

20.Clause 64(5) of GCC reads as follows:

*'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.'*

21.On interpretation of Clauses 16 and 64(5), both learned counsel relied on a reported judgment of this Court in *Deputy Chief Engineer (Construction) Vs. Vishal Constructions* reported in *2018 (3) CTC 285*. It was pointed out that the same two clauses viz., 16 and 64(5) of GCC were interpreted by this Court which held that *pendente lite* interest cannot be imposed. Relevant paragraphs in *Vishal Constructions* case law are paragraphs 6, 7, 16, 22 and 29, which read as follows:

*'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. Security Deposit: -(1) 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 of 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.*

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*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, within 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.*

*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.*

*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.*

29. *A similar view has also been expressed by a Division Bench of Andhra Pradesh High Court in V.K.Engineering Constructions Vs Union of India reported in 2015 (2) R.A.J. 377 (AP), 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 herein before and in the presence of prohibition contained in Clause 16(2) (old) and 16(3) (modified) of GCC which are similar and identical.*

22.In the light of the aforesaid obtaining undisputed position of law, the award on *pendente lite* interest in the impugned award is liable to be interfered with is the say of learned counsel for Southern Railways.

23.Responding to this, learned counsel for contractor pressed into service an order made by a Division Bench of this Court being order dated 05.09.2018 made in O.S.A.No.279 of 2018 in the case of *Union of India and Another Vs. M/s.Appachi Gounder and Sons and Another*. In this Division Bench order of this Court, after referring to *Union of India Vs. Susaka Pvt. Ltd. & Others* reported in *(2018) 2 SCC 182,* the Division Bench held that if a party does not raise the issue of *pendente lite* interest being a bar before AT as well as Single Judge, it cannot be raised in an intra-court appeal in Section 37 of A & C Act. This is articulated in paragraph 21.1 of Division Bench judgment which read as follows :

*"21.1.The learned Senior Counsel has placed heavy reliance upon the Reliance Cellulose case (Reliance Cellulose Products Ltd. Vs. Oil and Natural Gas Corporation reported in 2018(9) SCALE 88) which lay down the preposition that Section 31(7) of the 1996 Act, sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of cause of action until the award is*

*delivered. No doubt Clause 64.5 of the General Conditions of Contract stipulates that no interest shall be payable, where the Arbitral award is for the payment of money, on whole or in part of the money till the date on which the award was made. Unfortunately, despite the specific claim No.13 has been made by the first respondent/claimant, no defence has been raised to the said claim and the learned Arbitrator while dealing with the same in Issue No.17, has given the above said finding. Though award of pendente lite interest has been raised as a ground in O.P.No.77 of 2011, no arguments have been advanced on the said ground. In the light of the decision rendered in Susaka's case cited supra, it amounts to waiver and therefore, the appellants are precluded from raising the said plea as a ground in this appeal."*

24.Adverting to aforesaid paragraph 21.1, learned counsel for Southern Railways submitted that in the instant case, Southern Railways is certainly raising *pendente lite* interest before this Court i.e., Single Judge in instant OP in Section 34 of A & C Act. Learned counsel referred to the grounds in junior OP, more particularly, ground No.4 and submitted that *pendente lite* interest has certainly been challenged and is being advanced as an argument before this Court. Ground No.4 in junior OP filed by Southern Railways reads as follows :

*"(4) In so far as Claim No.9 towards interest is concerned, under issue No.10, interest has been awarded at 9% per annum from January, 2008 till the date of the award and Clause 64.5 of the General Conditions of Contract provides that no interest is payable in respect of any claims and cannot be awarded till the*

> *date of the award. Section 31(7)(a) of the Act stipulates that the Tribunal is competent to award interest unless otherwise agreed to between the parties and under the circumstances, the award of interest from January, 2008 till the date of the award is again against the terms of the contract."*

25.Saying so learned counsel for Southern Railways contended that case on hand is clearly distinguishable on facts as the issue is being raised before Single Judge besides raising it before AT.

26.Therefore, this Court is inclined to accept the submission that this case is different on facts qua *Appachi Gounder and Sons case* decided by the Division Bench, as it is a case where parties did not raise *pendente lite* issue not only before AT, but before learned Single Judge also.

27.In the instant case, as it has been clearly articulated in the grounds of junior OP and more particularly, in ground No.4 and it is now being advanced as an argument, the judgment in *Vishal Constructions* referred to *supra* will apply.



28.Therefore, it is necessary to hold that in the instant OPs, there will be judicial intervention qua impugned award with regard to *pendente lite* interest. In other words, interest awarded qua impugned award for the period from January 2008 to the date of the impugned award being 04.09.2010 is set aside.

For the purpose of abundant clarity, it is set out that interest post award i.e., from 05.09.2010 at the same rate of 9% per annum will operate.

29.This takes us part to the grounds raised with regard to the findings returned by AT. With regard to the grounds raised by the learned counsel for contractor as already alluded to *supra*, they are only on quantum. All this is based on evidence. One witness each on the side of the contractor and Southern Railways were examined before the AT and as many as 94 documents being Ex.C1 to Ex.C94 were marked on behalf of the contractor as claimant before AT, as many as 26 documents being Ex.R1 to Ex.R26 were marked on behalf of Southern Railways being respondent before AT. A perusal of the impugned award reveals that each one of the issues have been dealt with in detail, there is abundant discussion on the same and there is nothing before this Court to show that any of it is vitiated much less vitiated on grounds that can fit into Section 34 of A & C Act.



30.Therefore, disputing quantum will tantamount to re-appreciation of evidence and revisiting the matter on merits which is clearly impermissible. In this regard, this Court reminds itself of the time honoured *Hodgkinson* principle (*Hodgkinson Vs. Fernie*, the reference being 140 ER 712) which has been referred to by Hon'ble Supreme Court in the oft-quoted *Associate Builders Vs.*

*Delhi Development Authority* case reported in *(2015) 3 SCC 49*. *Hodgkinson* principle in simple terms is to the effect that AT is the best Judge of the quantity and quality of evidence before it.

31.This takes us to the grounds of attack made by the learned counsel for Southern Railways.

32.As mentioned *supra*, they turn on Clause 44.4 and 39.2 of GCC. While Clause 44.4 of GCC is price variation, Clause 39.2 of GCC is a special condition which stipulates that tender rates includes wastage. These very Clauses are not a bar in any manner for award of damages as long as the award of damages can be sustained on its own merits. This Court has no hesitation in coming to the conclusion that these Clauses by themselves cannot impede the grant of damages as long as the grant of damages are supported by sufficient reasons and is on the basis of evidence before AT.



33.This Court has also reminded itself of *Fiza Developers* principle laid down by the Hon'ble Supreme Court in *Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited* reported in *(2009) 17 SCC 796*. *Fiza Developers* principle is to the effect that proceedings under Section 34 of A & C Act are summary procedures. To be noted, *Fiza Developers* principle was subsequently explained by Hon'ble Supreme Court in *Emkay Global Financial Services Ltd. Vs. Girdhar Sondhi* reported in (2018) 9 SCC 49.

34.In the light of the narrative *supra*, both the OPs viz., senior and junior OPs are partly allowed, to the limited extent that *pendente lite* interest awarded by the AT *vide* the impugned award i.e., interest at the rate of 9% per annum from January 2008 to the date of award being 04.09.2010 alone is set aside. In all other aspects, the impugned award is sustained. Considering the nature of the matter and the trajectory of the hearing, parties are left to bear their respective costs. Connected application is closed.

09.04.2019

Speaking Order/Non-Speaking Order

Index : Yes/No
Internet: Yes
gya



M.SUNDAR, J.

gya

O.P.No.894 of 2010
AND
O.P.No.965 of 2017

09.04.2019