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

% *Reserved on: 19th July, 2019*
Pronounced on : 15 October, 2019

+ **FAO(OS) (COMM) 16/2018**

UNION OF INDIA Appellant

Through: Mr. Vijay Kumar Pandey and Mr.
Anshuman Sinha, Advocates.

Versus

M/S CHENAB CONSTRUCTION COMPANY (REGD)

..... Respondent

Through: Mr. Sandeep Sharma and Mr. Sarthak
Mannan, Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S. SISTANI, J.

1. This is an appeal filed under Section 13(3) of the Commercial Courts Act read with Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").
2. The appellant/Union of India has assailed the impugned order dated 22.09.2017 passed by a learned Single Judge of this Court by which the objections to the award have been dismissed and the award of the learned Arbitrator dated 26.12.2016 has been upheld.
3. The brief facts necessary to be noticed for disposal of this appeal are that the appellant/petitioner invited tenders for the work of

Construction of Tunnel No.12 & 12-A from 42/450 Km to 42/500 Km & 42/585 Km to 42/775 Km and cut and cover from 42/425 Km to 42/450 Km and 42/450 Km to 585 Km and 42/775 Km to 42/805 Km including earth work in approaches, breast walls, retaining walls, protection works, drains etc. in zone No. E-24 from 42.400 Km to 42.825 Km on Jammu Udhampur Rail Line Project. On 24.05.1994, the letter of acceptance was issued in favour of the respondent for a consideration of Rs. 2,10,37,997/-. On 19.09.1994, a formal agreement was entered between the parties.

4. The consistent stand of the appellant before the learned Arbitrator and also before the learned Single Judge was that although the work was to be completed within a period of 15 months i.e. between 24.05.1994 and 24.08.1995, the progress of the work was very slow and infact the respondent herein was unable to complete the work within the stipulated time period. During the passage of 15 months, the progress of the work was merely 17% while total payment of Rs.23,75,000/- had been made to the respondent up to 3.08.1995 excluding the mobilization advance and machinery advance. It is not in dispute that the appellant vide letter dated 26.09.95 accorded time extension up to 23.02.1996 without any penalty and PVC (Price Variation Clause). Subsequently, four extensions were sought and granted without imposing any penalty, damages and PVC.
5. It is also not in dispute that the last date of completion of work was finally extended up to 31.05.2001. Since the work was not completed the appellant rescinded the contract on 21.11.2001 under clause 62 of the General Conditions of the Contract (GCC) on risk and cost basis.

The respondent achieved only 83% of the contractual work till September 2000 and thereafter, no work was done. Resultantly, the appellant rescinded the contract and was forced to issue a fresh tender for the balance work at much higher price.

6. The respondent vide letter dated 29.09.2004, invoked the arbitration clause for adjudicating 11 claims. On 05.06.2008, the appellant nominated Mr. N.C. Goel and Mr. Devender Rai as Arbitrators. Pursuant to which, in 2013, the respondent filed a petition being O.M.P No. 381/2013, claiming that on account of transfer of the Arbitrators, no effective hearing was taking place as per the directions of the court. The respondent sought the indulgence of the court for terminating the mandate of the Arbitral Tribunal and requested for appointment of a Sole Arbitrator. The learned Single Judge passed an order dated 25.02.2015, where the Single Judge terminated the mandate of the Arbitral Tribunal and appointed Hon'ble Mr. Justice Devinder Gupta (retd) as the sole arbitrator.
7. The respondent filed its modified statement of claim before the Arbitrator including Claim no.4 for Rs.30 lacs on account of escalation during the extended period of contract alongwith Claim no.6 for Rs.10 lacs being extra expenses incurred as hire charges of compressors, various cutting machines and equipments etc. for the additional period i.e. after expiry of stipulated period on 23.08.1995 and grant of interest @ 24% per annum on the aforesaid amounts from due dates till the date of payment.
8. The Arbitral Tribunal held the recession of the contract as illegal on account of the fact that the appellant failed to issue a written notice of

either seven days or 48 hours to the respondent. The Arbitral Tribunal allowed almost all the Claims of the respondent in the total sum of Rs.2,13,17,935/- along with future interest @12% p.a. and also allowed the Counter Claim for an amount of Rs. 6,81,146/-. The learned Single Judge held that the reasoning given by the Arbitrator on “Excepted Matter” under Clause 63 of GCC is partially correct as the Arbitrator has confined the meaning of “Excepted Matter” to only such matters, which are adjudicated/ decided by the named authority. Whereas, “Excepted Matter” would also include claims, which are covered by no claim, no damages or no liability clauses. However, since the appellant did not explain or show as to why claims 4 to 10 can be termed as “Excepted Matters”, the Single Judge did not find sufficient reasons to interfere with the Award according to the limited scope of judicial interference under Section 34 of the Act.

9. Learned counsel for the appellant has reiterated his submissions made before the learned Single Judge. The first submission of learned counsel for the appellant is that the learned Single Judge has wrongly upheld the Arbitral Award on Claim No.4 of the respondent for Rs. 30,00,000/- on account of escalation during the extended period of contract. As the Arbitral Tribunal allowed the claim on the ground that during the subsistence of the contract, neither the appellant imposed or recovered any liquidated damages nor raised any counter-claim against it. Further, even when the respondent lodged its claim, the appellant neither levied any liquidated damages nor raised any claim for liquidated damages. Thus, the learned Arbitrator presumed that the respondent was not at fault and hence allowed the claim of the

respondent without considering the law on the point of imposition of liquidated damages.

10. Counsel for the appellant submits that the learned Single Judge has also failed to appreciate the fact that Claim No.4 of the respondent pertains to the price escalation, which would fall under the category of “Excepted Matters” and is governed by Clause 18.1 of the Special Conditions of Contract (SCC) relating to site data and the specifications of SCC. It is the submission of the appellant that SCC was duly signed and entered into between the parties to the present proceedings. The relevant clause has been extracted below:-

“18 Price Variation:

18.1. The price variation during extended period of contract. The price adjustment as worked out above i.e. either increase or decrease will be applicable upto the stipulated date of completion and for all extensions of time granted to the stipulated dated of completion of work except extension (s) granted under clause 17(4) of Northern Railway General Conditions of contract”

11. It is the case of the appellant that the learned Single Judge wrongly reached a conclusion that since no liquidated damages were imposed, it cannot be said that time extensions were granted under Clause 17 (4) of GCC. As the appellant while granting the extension categorically mentioned that extensions are granted under Clause 17(4) of GCC, however, the court failed to appreciate the terms and conditions of the contract entered into and by and between the parties. Counsel urged that Clause 18.1 of SCC is to be read with Clause 17(4) of GCC, which reads as under:-

“Clause 17.4-Time to be of the essence of the contract-The time for completing the works by the date or extended date fixed for completion shall be deemed to be of the essence of the contract and if the Contractor shall fail to complete the works within the time prescribed, the Railway shall, if satisfied that the works can be completed by the contractor within a reasonably short time thereafter be entitled, without prejudice to any other right or remedy available on that behalf, to recover by way of a certain and liquidated damages a sum equivalent to one-half of one percent of the contract value of the works for each week or part of week the Contract is in default and allow the contractor such further extension of time as the Engineer may decide after, serving on the contractor, a notice of Railway’s intention, to recover the said liquidated damages (Form Annexure.-VIII).-if the Railway is not satisfied that the works can be completed by the contractor and in the event of failure on the part of the Contractor to complete the works within the further extension of time allowed as aforesaid the Railway shall be entitled, without prejudice to any other right or remedy available in that behalf, to appropriate the Contractor’s security deposit and rescind the contract! Under Clause 62 of these conditions whether or not actual damage is caused by the such default.”

12. Learned counsel for the appellant has referred to Clause 63 of the General Condition of the Contract to explain what is deemed to be an “Excepted Matter”, and submits that Claim No.4 falls under the category of “Excepted Matter” and was beyond the scope of arbitration. The relevant clause has been reproduced below:

“Clause 63: all disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the Railway and the Railway shall within a reasonable time after receipt of the Contractor’s representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provisions has been made in clauses 18,22(5), 39, 45(a)J 55, 55-A (5), 61(2) and 62(I)(xiii)(B)(e)(b) of the General Conditions of Contract or in any clauses of the special conditions of the contract shall be deemed as ‘excepted matters’ and decisions thereon shall be final and binding on the contractor provided further that ‘excepted matter’ shall stand specifically excluded from the purview of the arbitration clause and not be referred to arbitration?”

13. The second ground urged by the counsel for the appellant pertaining to Claim No.6 on account of extra expenses incurred as hire charges of various cutting machinery and equipments for additional period i.e. after 23.08.1995. He submits that the learned Single Judge has wrongly upheld the finding of the Arbitral Tribunal of awarding Rs 5 lacs as extra expenses merely on the ground that the appellant did not expressly deny it in its pleadings. He further submits that non denial of any fact in the pleading cannot be considered as an admission on the part of the appellant. Counsel has laboured hard to submit that the onus lies on the respondent to prove his claim of the additional expenses and in the absence of an express admission on the part of the appellant, such a claim could not have been allowed. Counsel further

submits that the respondent has failed to place any documents to substantiate his claim and thus, the claim should be set aside.

14. Counsel for the appellant further submits that as far as Claim no.6 is concerned, the same could not have been referred to the learned Arbitrator and was to be decided by the Railways and the decision was to be final and binding on the contractor as the said claim falls within the category of “Excepted Matters” in accordance with Clause 21.5 of SCC and as such is beyond the scope of arbitration. Clause 21.5 of the SCC reads as under:

“No claim for idle labour and or idle machinery etc. on any account will be entertained. Similarly no claim shall be entertained for business loss or any such loss.”

15. It is contended that the learned Single Judge has dismissed the objections on the issue and also observed the two types of claims, which would fall under the category of “Excepted Matters”. Firstly, the ones, which are prohibited and secondly, which are to be decided by an in-house mechanism. But the learned Single Judge has failed to correctly apply the law to the present case. He further submits that the learned Single Judge was constrained to notice that although the ground of “Excepted Matters” was raised but neither elaborated in the reply to the statement of the claim nor addressed in an appropriate manner while drafting objections to the award and unfortunately nor at the time of hearing.
16. Learned counsel for the appellant contends that the appellant should not be made to suffer either on account of poor pleadings or on account of counsel not being able to explain or urge the grounds in

accordance with law. He further submits that the aforesaid clause 21.5 makes it abundantly clear that no claim for idle labour or idle machinery etc. on any account was to be entertained. He further submits that the clause 21.5 was overlooked by the learned Arbitrator and also by the learned Single Judge.

17. Counsel for the appellant further submitted that Claim No.10 with respect to pendente lite interest awarded to the respondent with an interest of 12% p.a. is bad in law. It is the case of the appellant that the said claim is specifically barred under Clause 16 (2) of the GCC. He submits that a conjoint reading of Section 31(7)(a) of the act along with Clause 16(2) makes the claim passed under this head liable to be set aside. For the sake of convenience, Clause 16(2) has been reproduced below:-

“Clause 16(2)- Interest on amounts:

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.”

18. It is the submission of the learned counsel for the appellant that as per clause 18.1, parties have specifically agreed that the Price Variation during standard period of contract was to be applicable up to the stipulated date of completion except extensions granted under clause 17(4) of the Northern Railway General Conditions of Contract. It is thus, contended that for the extended period, no Price Variation is required as the stipulated period of date was extended from time to

time. He relies to the extension chart to show that the extension was granted from time to time which is reproduced below:

S.N o.	Particulars of the application	Period for which Extension sought	Period for which Extension granted	Remarks
1.	Letter Ex.C- 3 dt.01.08.199 5	Extension sought from 23.08.1995 to 23.08.1996	Letter C-4 dt.26.09.1996 Extension granted up to 23.02.1996	Without penalty and without further P.V.C.
2.	Letter Ex.C- 5 dt.12.03.199 6	Extension sought from 24.02.1996 to 31.10.1996	Extension granted from 24.02.1996 to 23.06.1996	
3.	Letter Ex.C- 7 dt.17.06.199 6	Extension sought from 24.06.1996 to 31.03.1997	Letter Ex.C-8 dt.16/26.09.1996 Extension granted upto 31.12.1996	Without penalty and without further P.V.C.
4.	Letter Ex.C- 9 dt.14.12.199 6	Extension sought from 01.01.1997 to 30.06.1997		
	Letter Ex.C- 10 dt.26.10.199 7	Request for extension repeated upto 30.09.1997	24.12.1996 to 30.09.1997	

5.			Letter Ex.C-15 dt.10.12.1997 extension granted upto 31.03.1998	Extension granted under Clause 17(4) GCC, 1998 without additional benefit of PVC and reserving right impose penalty.
6.	Letter Ex.C- 16 dt.26.12.199 7	Extension sought upto 30.06.1998		
	Letter Ex.C- 17 dt.11.03.199 8	Extension sought upto 30.09.1998		
	Letter Ex.C- 18 dt.25.05.199 8	Extension sought upto 30.09.1998		
	Letter Ex.C- 19	Extension sought upto 31.03.1999	Letter Ex.C-20 dt. 31.12.1998 extension granted upto 31.03.1999	Sixth Extension granted under Clause 17(4) GCC, 1988

				without additional benefit of PVC and reserving Railways right for penalty.
7.	Letter Ex.C-22 dt.31.03.1999	Extension sought from 01.04.1999 to 30.04.1999		
8.	Letter Ex.C-24 dt.30.11.1999	Extension sought upto 30.06.2000	Letter Ex.C-26 dt. 28.01.2000 extension granted upto 31.03.2000	Extension granted under Clause 17(4) GCC, 1988 without additional benefit of PVC and reserving Railways right for penalty.
9.	Letter Ex.C-28 dt.29.04.2000	Extension sought upto 31.07.2000	Letter Ex.C-29 dt. 30.06.2000/04.07.2000 extension granted upto 31.07.2000	Extension granted under Clause 17(4) GCC, 1988 without additional

				benefit of PVC and reserving Railways right for penalty.
10.	Letter Ex. dt.05.12.2000	Extension sought upto 31.05.2001 (wrongly mentioned as 31.05.2000 in the letter)	Letter Ex.R-12 dt. 02.02.2001 extension granted upto 31.05.2001	Extension granted under Clause 17(4) GCC, 1988 without additional benefit of PVC and reserving Railways right for penalty.

19. Per contra, Mr. Sandeep Sharma, learned counsel for the respondent rebutted to the submissions of the appellant while relying on the Arbitral Award, whereby it is clearly stated that as per Clause 64 of GCC, any dispute or differences between the parties as to the construction or operation of the contract, or the respective rights and liabilities of the parties on any matter in question withheld by the railways, if any certificate to which contractor may claim to be entitled to, or if the railway fails to make a decision, within a reasonable time, then in that case, the matter referred to in clause 63 will be referred for adjudication through the process of arbitration. Clause 63 states that matters for which, a provision has been made under GCC or in any

clause of SCC, those matters shall be deemed as “Excepted Matters”. The decisions thereon shall be final & binding and these matters shall stand specifically excluded from the purview of the arbitration clause. Reading of clause 63 makes it abundantly clear that matters in which there is in-house mechanism provided under the contract, for taking decision on matters referred by the contractor in writing under various clauses of GCC or SCC, such matters on which decision has been taken will be deemed to be an “Excepted Matters”, and decision in those matters shall be final and binding and not otherwise. Mere raising a plea by the appellant that the disputes with respect to the claims fall under the category of ‘excepted matter’ is not sufficient. It was the duty of the appellant to have pointed out the availability of in-house mechanism for adjudicating such claims. However, counsel for the respondent submits that the appellant themselves referred the claim for arbitration vide letter dated 05.06.2008. Thus, the submission with regard to the claim being an excepted matter is highly misplaced.

20. Counsel for the respondent submits that the delay was on the part of the appellant and the same is evident from appellant’s letter dated 8.06.2011 furnished to the Arbitral Tribunal, whereby the Arbitrator observed that the quantities worked by the appellant were on the lesser side as compared to that of respondent. The said communication also confirmed that there were no approved drawings for the work, which was critically commented upon by the Chief Engineer/ C North in his letter dated 07.05.1997 and held that delay was on part of the appellant, as there were no approved drawings for the tunnels beyond

tunnel No.8. Communications dated 27.01.2000 and 02.02.2002 further depict that drawings were prepared and approved in 2000, while it is the admitted position of the appellant that 80% of the work was already completed in early 1997.

21. Mr. Sharma has laboured hard to submit that the respondent on each and every occasion protested the extension under clause 17(4). He submits that even when the respondent learned about the extension to be without the additional benefit of PVC, the respondent accordingly laid its claim for price valuation even for the extended period before the learned Arbitrator. Even thereafter, the appellant did not levy any liquidated damages and he did not even raise it in its counter claim.
22. Counsel for the respondent further submits that the Clause 18.1 of the Special Condition of contract is one of the Price Variation during the extended period of contract. Relying on Clause 18.1, it is submitted that the price adjustment will be applicable up to the stipulated date of completion and for all extensions of time granted upto the stipulated date of completion of work except extension(s) granted under Clause 17 (4) of the GCC. There is no doubt that in some of the letters communicated to the respondent, while granting extension , it is mentioned that the extension has been granted under Clause 17 (4) of GCC but merely mentioning Clause 17 (4) would not imply that the extension in its true meaning has been given under Clause 17 (4). Counsel further submits that the correct clause is to be read to examine whether the extension is in fact under clause 17(4) of GCC or otherwise. In case extension is granted under the ambit of Clause 17(4), there would be no reason as to why liquidated damages were

not imposed. The damages could only be imposed in case the delay was due to the default of the respondent. Clause 17(4) explicitly states that the time for completing the works by the date or extended date fixed shall be deemed to be of the essence of the contract. In case, the contractor fails to complete the work within the time prescribed, the railway shall, if satisfied that the contractor is in default for delay but the work awarded can be completed within a reasonable span thereafter, such extension can be granted by the engineer after serving a notice on the contractor, clarifying the intention to recover the liquidated damages for a sum equivalent to one-half of one percent of the contract value of the works for each week or part of week of delay without prejudice to any other right or remedy available. Mr. Sharma contends that in view of the explicit clause 18.1, the appellant is not justified in asserting that the respondent is entitled for escalation as per the formula at the indices prevailing on 23.08.1995, the stipulated date of completion. In fact the price escalation has to be worked out on the prevailing indices at the time of execution of the work or the extended date of completion.

23. The counsel for the respondent relying upon the Award of the learned Arbitrator submits that there has been no delay on the part of the respondent as even after the letter dated 15.03.2001, there was neither any response nor any action on the part of the appellant for release of the payment and issue of material. He submits that no decision was given by the railways qua the said excepted matter which is against the provision of Clause 62 of GCC. The respondent further relying upon a decision of the Arbitral Tribunal submits that the appellant has not

denied the period and the actual amount spent by the respondent, the Sole Arbitrator has relied upon a decision of the Supreme Court in *M/S J.G. Engineers Pvt. Ltd. Vs. UOI & anr* reported at *JT 2011(5) SC 380*, whereby the Supreme Court upheld the award on similar claim for loss of hire charges of machinery, shuttering materials etc. engaged for execution of work for the period beyond the stipulated date of completion and awarded 50% of the claimed amount.

24. Mr. Sharma has relied upon the Supreme Court decision in *General Manager Northern Railways and Anr. Vs. Sarvesh Chopra*, reported at *(2002) 4 SCC 45*, more particularly paragraph 15 which reads as under:-

“In our country question of delay in performance of contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, Chitty on Contracts (Twenty-Eighth Edition, 1999, at p.1106, para 22-015) states

"a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract- breaker on the basis that he has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ("damages for loss of the whole transaction")."

If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party, i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms."

25. Counsel for the respondent further submits that the respondent had to deploy machinery, which otherwise was required to be deployed till 23.08.1995 but due to various extensions granted, the respondent had to keep the entire machinery at site till termination of the contract on 21.11.2001.
26. The learned counsel for the respondent submits that the intent of the contract has to be seen as there was no bar in the GCC of 1989 but there is a clear bar on interest under Clause 64 of GCC of 1999. Mr. Sharma submits that clause 16(2) bars interest only on security and earnest money and is to be read along with clause 16 (1). The relevant clauses have been reproduced as under:-

“16 (1) Earnest money and security deposit:- The earnest money deposited by the Contractor with his tender will be retained by the Railway as part of security for the due and faithful fulfillment of the contract by the Contractor. The balance to make up this security deposit which will be 10 percent of the total value of the contract, unless otherwise specified in the special conditions, if any, may be deposited by the contractor in cash or in the form of Government Securities or may be recovered by percentage deduction from the Contractor’s “on account” bills, provided also that in case of a defaulting contractor the Railway may retain any amount due for payment to the contractor. On the speeding “on account bills” so that the amount or amounts so retained may not exceed 10% of the total value of the contract.

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 deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon.”

27. Learned counsel for the respondent submits that as far as payment of the interest is concerned, Clause 16(2) of the GCC refers to interest on earnest money and security deposit. This issue is no longer res integra as the Hon’ble Supreme Court has interpreted an identical clause in Civil Appeal No. 2099/2017 titled as **“Union of India vs M/s Pradeep Vinod Construction Company”** decided on 03.08.2017. Relevant para reads as under:

“Having given our thoughtful consideration to the contractual obligations entered into by the parties through clause 16, we have no reason to doubt, firstly, that the clause related exclusively to earnest money and security deposit. The above Clause did not relate to the other contractual obligations between the parties. A perusal of clause 16 (1) further clarifies the position, inasmuch as, even if some payment under the contractual obligation was diverted to

make good the security deposit payable, no interest would be payable thereon as well. Therefore, there can be no doubt, that non-payment of interest, contemplated between the parties under clause 16, was exclusively limited to the component of earnest money and the security deposit, which was held by the appellant and nothing else.”

28. Furthermore, the respondent seeks to rely on the judgment of the Hon’ble Supreme Court in the case of **Ambika Construction vs. Union of India** reported in (2017) 14 SCC 323, wherein the Hon’ble Supreme Court while interpreting an identical clause held as under:

“5.....The relevant clause affirming the above position is extracted herein below:

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

The aforesaid clause has been relied upon by the learned counsel representing the Union of India to contend, that when interest was not payable even on the principal amount, there was no question of the same being payable during the period the matter remained pending for adjudication. It is therefore apparent, that the learned counsel for the respondent, relied upon the contractual obligation contained in the clause, extracted hereinabove, to counter the claim of pendente lite interest and to support the impugned order passed by the High Court.

.....

A perusal of the conclusions drawn by this Court in the above judgment, rendered by a three-Judge Division Bench, leaves no room for any doubt, that the bar to award interest on the amounts payable under the contract, would not be sufficient to deny payment of pendente lite interest. In the above view of the matter, we are satisfied, that the clause relied upon by the learned counsel for the Union of India, to substantiate his contention, that pendente lite interest could not be awarded to

the appellant, was not a valid consideration, for the proposition being canvassed. We are therefore satisfied, that the arbitrator, while passing his award dated 28-6-1999, was fully justified in granting interest pendente lite to the appellant.”

29. Counsel for the respondent submits that Clause 16(2) of the GCC refers to interest on earnest money and security deposit. Reading of clauses 16(1) and 16(2) of the General Condition of the Contract and the observation of the Hon’ble Supreme Court has no bar. The second ground urge by the counsel for the petitioner with regard to the escalation clause towards his claim no.4 toward payment due as escalation.
30. We have heard the counsels for the parties and considered their rival contentions.
31. In our view, there is no infirmity in the view taken by the learned Single Judge and by the learned Arbitrator for the reasons that there is no explanation as to why the Railway continued to extent the period of contract and did not claim any liquid damages, the only answer to this is that the respondent was not in fault else, the Railway would certainly have imposed penalty on the appellant.
32. The learned Single judge rightly pointed it out that the appellant has made a mere defense statement before the learned Arbitrator that claims 4 to 10 falls under the ambit of the ‘Excepted Matters’ but has not given any explanation as to why these claims are ‘Excepted Matters’. The learned Single Judge also rightly observed that mere labeling a claim as “Excepted Matters” does not make it an Excepted Matter. The onus was on the appellant to show that a particular claim as per the contract had to be decided by a particular authority whose

decision is final but no such contention has been raised by the appellant.

33. The learned Single Judge has rightly pointed that as per the Clause 17(4), the respondent is not entitled to Price Variation and is subjected to liquidation damages during the extension of time, however, it is an admitted fact that the appellant has accepted an escalation of Rs. 3,30,363/- payable to the respondent and the appellant also failed to impose any liquidated damages. Therefore, the interpretation of the Arbitral Tribunal is within its domain and the interpretation cannot be said to be illegal in any manner.
34. This court is also of the view that Clause 17 (4) has been misread and wrongly construed, as Clause 17(4) categorically talks about a situation where in case if the contractor is unable to complete the work within the stipulated time and the appellant shall, if satisfied that the contractor is in default for delay but the work awarded can be completed within a reasonable span thereafter, such extension can be granted by the engineer after serving a notice on the contractor with clarifying the intention to recover the liquidated damages. Simply marking the extension under clause 17 (4) of GCC is not sufficient, in order to attract the clause 17 (4), the appellant should have served the respondent with a notice informing about the intention of the appellant to impose the liquidated damages on the respondent. However, the appellant has neither imposed any liquidated damages on respondent, nor has raised the same in its counter-claims. Clause 17(4) of GCC would be attracted if extension of time is granted subject to liquidated damages. Therefore, the extension given during the tender is issued

under clause 17 (3) of GCC and not clause 17 (4) of GCC. Clause 17 (3) of GCC is reproduced as under:-

“(3) Extension of time on Railway Account:- In the event of any failure or delay by the Railway to hand over to the Contractor possession of the land necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions of any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the Contractor to damages or compensation therefore but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable.”

35. Moreover, it is an admitted position that the appellant had rescinded the contract, which in itself would show that they were unhappy in the manner of the contract have been delayed and thus, would be covered by the latter half of clause 17(4) of the General Condition of the Contract. This submission of counsel for the appellant is also without any force and is only liable to be rejected.
36. It is well settled that findings of fact, as well, as of law, by the Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is absolutely necessary. The Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. While entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the

Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence.

37. In the case of **MTNL Vs. Fujitsu India Private Limited**, reported at 2015(2)ARB LR332(Delhi), in paragraph 17 and 19, the division bench held as under:

“17.The law is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re- appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited: MANU/DE/1282/2013: 202(2013) DLT 218.

19.The extent of judicial scrutiny under section 34 of the Act is limited and scope of interference is narrow. Under section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under section 37 is like a second appeal, the first appeal being to the court by way of objections under section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which

are then confirmed by the court while dealing with objections under section 34, in an appeal under section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under section 34.”

38. In the case of **NHAI vs. M/s. BSC RBM PATI JV**, FAO (OS) (COMM) 107/2017, this court in paragraph 10 read as follows :-

10. ... “41. It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the ld. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at MANU/DE/0459/2015, MTNL v. Fujitsu India Pvt. Ltd. (FAO(OS) No. 63/2015) , the Division Bench of this court has held that "an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse. ”

39. We find no infirmity with the claims awarded to the respondent by the Arbitral Tribunal and also, the learned Single Judge has rightly upheld the claims awarded to the respondent.

40. In the view of the above-mentioned reasons, present appeal is dismissed accordingly.

CM APPL 3879/2018 (Stay)

41.The application also stands dismissed in view of the order passed in the appeal.

G.S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

OCTOBER 15, 2019//

