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

\+ **Date of Decision: 12.04.2021**

% FAO(OS) 52/2018

UNION OF INDIA ..... Appellant

Through: Mr. Prashant Kumar Nair, Advocate.

versus

MANRAJ ENTERPRISES ..... Respondent

Through: Mr. Abhishek Semwal, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

1. The present appeal is directed against the order dated 20.09.2017 passed by the learned Single Judge disposing of the objections preferred under Section 34 of the Arbitration & Conciliation Act to the award made on claim No.5 vide Award dated 17.01.2011. Claim No.5 pertained to pre-suit, *pendente lite* and future interest awarded on the balance due payment, from the due date of payment. The learned Arbitral Tribunal had awarded interest @ 12% per annum from 01.01.1997 till the date of publication of the award on the awarded amount, except on the amount of security deposit and earnest money.

2. The impugned order shows that both the parties stated before the learned Single Judge that Section/ Clause 16(2) of the General Conditions of

Contract (GCC) had been interpreted by the Supreme Court in ***Union of India Vs. M/s Pradeep Vinod Construction Co.***, Civil Appeal No.2099/2017 decided on 03.08.2017. In view of the said statement made before the learned Single Judge, the challenge to the impugned award made on Claim No.5 granting *pendente lite* and future interest to the respondent, was negated and the objections were dismissed.

3. The Union of India has submitted in this appeal that reliance placed by the learned Single Judge on ***M/s Pradeep Vinod Construction Co.*** (supra) is misplaced, and the said decision is *per incuriam* as it has not taken into consideration the earlier larger bench decisions rendered by the Supreme Court, particularly the decision in ***Union of India Vs. Bright Power Projects (India) Private Limited***, (2015) 9 SCC 695. Learned counsel for the appellant has submitted that Clause 16(2) – which was considered in the present case, was *parimateria* to Clause 13(3) considered by the Supreme Court in ***Bright Power Projects (India) Private Limited*** (supra).

4. Clause 16(2) of the contract in question, which was also considered by the Supreme Court in ***M/s Pradeep Vinod Construction Co.*** (supra), reads as follows:

> *"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."*

5. Clause 13(3) of the contract considered by the Supreme court in

Bright Power Projects (India) Private Limited (supra) reads as follows:

> *"13. (3) No interest will be payable upon the earnest money and 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."*

6. The submission of learned counsel for the appellant is that in ***Bright Power Projects (India) Private Limited*** (supra), the Supreme Court held that in the light of the Clause 13(3), the Arbitral Tribunal was powerless to grant *pendente lite* or future interest, since Section 31(7) of the Arbitration & Conciliation Act is clear to the effect that unless otherwise agreed by the parties, the Arbitral Tribunal can award interest at reasonable rate for the period commencing from the date when the cause of action arises till the date of the award. The Supreme Court laid emphasis on "*unless otherwise agreed by the parties*" and, therefore, held that since the parties agreed that no interest would be payable either on earnest money, or security deposit, or amounts payable to the contractor under the contract, the Arbitral Tribunal could not award interest even on the amount found payable under the contract.

7. Learned counsel has also sought to place reliance on other decisions of the Supreme Court to the same effect, namely ***Sri Chittaranjan Maity Vs. Union of India***, Civil Appeal No.15545-15546/2017 decided on 03.10.2017 (AIR 2017 SC 4588); ***Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager (Works), Palghat and Others***, AIR 2010 SC 3337; and, ***Sayeed Ahmed and Company Vs. State of Uttar Pradesh & Others,*** (2009)

12 SCC 26. In particular reference has been made to paragraph 16 of the decision of the Supreme Court in ***Sri Chittaranjan Maity*** (supra) to submit that the Supreme Court noticed the difference in the statutory schemes of the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996 and held that under the later Act, the Arbitral Tribunal could not award interest on the amount found due, in the light of the specific prohibition contained in the contract. Paragraph 16 of this decision reads as follows:

> *"16. Relying on a decision of this Court in Ambica Construction v. Union of India, (2017) 14 SCC 323, the 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 Ambica Construction v. Union of India, (2017) 14 SCC 323, 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 State of Orissa v. 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 Ambica Construction v. Union of India, (2017) 14 SCC 323, cannot be made applicable to the instant case."*

8. We have considered this submission of learned counsel for the appellant U.O.I. in the light of the decisions above referred to. It is pertinent to note that ***Bright Power Projects (India) Private Limited*** (supra) has been

considered by the Supreme Court in ***M/s Pradeep Vinod Construction Co.*** (supra), as also the decision in ***Sree Kamatchi Amman Constructions*** (supra), and ***Sayeed Ahmed and Company*** (supra). Therefore, it is not correct for learned counsel for the appellant to claim that ***M/s Pradeep Vinod Construction Co.*** (supra) was rendered in ignorance of the said decisions. It is equally pertinent to note that none of the decisions relied upon by the appellant, contain an interpretation by the Court of the relevant contractual Clause i.e. 13(3) (in the case of ***Bright Power Projects (India) Private Limited*** (supra)), or Clause 16(2) (in the cases of ***Sri Chittaranjan Maity*** (supra), and ***M/s Pradeep Vinod Construction Co.*** (supra)). In fact, a reading of paragraph 16 of ***Sri Chittaranjan Maity*** (supra) shows that the Court proceeded on the basis that Clause 16(2) prohibited the grant of interest even on the amount found due payable under the contract to the contractor. The decision in ***M/s Pradeep Vinod Construction Co.*** (supra), however, delves into interpretation of Clause 16(2) of the GCC, and in paragraph 7 of the said decision, the Supreme Court has interpreted Clause 16(2) of the GCC in the following words:

> *"7. **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. Even though, there can be no dispute whatsoever, that Clause 16(2) is in pari materia with the clause taken into consideration in Tehri Hydro Development Corpn. Ltd. v. Jai Prakash Associates Ltd. (2012) 12 SCC 10, yet in the case before us, having read the clause in its entirety, we are satisfied, that the parties had agreed, that payment of interest would not be due, only with reference to earnest money and security deposit. Thus viewed, we have no hesitation in concluding, that the determination in the arbitral award, of component of interest, payable by the appellant to the respondent, was in terms of the contractual obligation. Nothing in the contract provided for non-payment of interest on the contractual obligations." (emphasis supplied)

9. Since none of the earlier decisions relied upon by the appellant have actually undertaken the process of analysis and interpretation of the contractual clauses namely Clause 16(2) of the GCC, or the similar clause contained in Clause 13(3) of the contract considered in ***Bright Power Projects (India) Private Limited*** (supra), we are of the view that there is no merit in the submission of learned counsel for the appellant that the decision in ***M/s Pradeep Vinod Construction Co.*** (supra) has been rendered in ignorance of the earlier binding precedents rendered by the Supreme Court, including in the case of ***Bright Power Projects (India) Private Limited*** (supra). We may refer to the following observations of the Supreme Court in ***State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another***, (1991) 4 SCC 139 – on the aspect as to what constitutes a judgment binding precedent:

"40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd. [(1944) 1 KB 718 : (1944) 2 All ER 293]). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey [(1962) 2 SCR 558 : AIR 1962 SC 83] this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. [(1941) 1 KB 675, 677 : (1941) 2 All ER 11] the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur. [(1989) 1 SCC 101] The bench held that, 'precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on *consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In B. Shama Rao v. Union Territory of Pondicherry [AIR 1967 SC 1480 : (1967) 2 SCR 650 : 20 STC 215] it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."*

10. In the light of the above, we are of the view that the decisions relied upon by the appellant did not constitute a binding precedent on the interpretation of Clauses 13(3), or 16(2) of the GCC.

11. We, therefore, do not find any merit in the present appeal and the same is, accordingly, dismissed.

VIPIN SANGHI, J

REKHA PALLI, J

APRIL 12, 2021
B.S. Rohella