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

% ***Judgment reserved on: 07.10.2026***

Judgment pronounced on: 29.10.2026

Judgment uploaded on: 29.10.2026

CNR No. DLHC010141642023

\+ FAO (COMM) 95/2023

M/S SANMATI BUILDERS .....Appellant

Through: Mr. Bhupesh Narula, Ms. Rinku Narula, Advs.

versus

UNION OF INDIA .....Respondent

Through: Mr. S.C. Rajpal, Mr. Varun Rajpal, Ms. Deepika Rajpal Grover, Advs.

CORAM:
HON'BLE MR. JUSTICE ANIL KSHETARPAL
HON'BLE MR. JUSTICE BHARAT PARASHAR

J U D G M E N T

ANIL KSHETARPAL, J.:

1. Through the present Appeal, the Appellant seeks to assail the judgment and order dated 14.11.2022 [hereinafter referred to as "impugned judgment"] passed by the learned Commercial Court in OMP (COMM) No. 16/2021, whereby the learned Commercial Court set aside the Arbitral Award dated 27.01.2021 passed by the learned Sole Arbitrator in the disputes between the parties.

2. The principal controversy arising in the present Appeal concerns the interpretation and application of Clause 16(4)(a) of the General Conditions of Contract, 2014 [hereinafter referred to as

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"GCC-2014"], governing the time available to a successful bidder for furnishing a Performance Bank Guarantee, and the legality of the Respondent's decision to terminate the contract and forfeit the Earnest Money Deposit. The Appeal also raises issues concerning the extent to which a Court exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "A&C Act"] may interfere with the Arbitral Tribunal's interpretation of the contractual provisions, its assessment of the evidence supporting the monetary claims, and its determination of costs.

FACTUAL MATRIX:

3. In order to appreciate the controversy involved in the present Appeal, the relevant facts, in brief, are required to be noticed.

4. The Respondent, acting on behalf of the President of India, invited tenders *vide* Tender Notice No. 128-W/280-NIT-2016-17-W-V dated 22.09.2016 for the work described as "Improvement to Platform surface of Platform No. 2, 3, 4 & 5, Hazrat Nizamuddin Railway Station", falling within the jurisdiction of the Senior Section Engineer (Works), Hazrat Nizamuddin, under the Assistant Divisional Engineer, Hazrat Nizamuddin, New Delhi. The tenders were scheduled to be opened on 01.11.2016.

5. The Appellant submitted its bid for a sum of Rs.1,49,51,535/- and deposited an Earnest Money Deposit [hereinafter referred to as "EMD"] of Rs.2,40,000/- in the form of a Fixed Deposit Receipt. The Respondent communicated acceptance of the Appellant's bid vide its letter/communication dated 27.01.2017, bearing No. 128-W/280/245/16-17/W-V, and directed the Appellant to contact the

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concerned railway authorities for commencing the work. The work was stipulated to be completed within ten months.

6. Thereafter, a detailed award/acceptance letter bearing the same reference number, dated 01.02.2017, was delivered to the Appellant on 10.02.2017. The Appellant's case was that, while the earlier communication dated 27.01.2017 had conveyed acceptance of its bid, the detailed letter introduced two additional conditions under Notes 1 and 2, which had not formed part of the original tender conditions or the Appellant's offer.

7. The aforesaid notes related to restrictions on the rates and quantities of certain items under Schedules A and B of the contract. In substance, the conditions contemplated restrictions on the future variation of quantities of specified items and prescribed consequences in relation to the rates at which payment would be made if the quantities were varied beyond the stipulated limits. The Appellant objected to the introduction of these conditions and, vide its communication dated 10.02.2017, requested the Respondent either to issue a corrected acceptance letter or to refund the EMD if the additional conditions were not withdrawn.

8. The Appellant did not furnish the Performance Bank Guarantee [hereinafter referred to as "PBG"] of Rs.7,47,600/-, representing five per cent of the contract value. The Respondent, on the other hand, maintained that the contract had been concluded upon acceptance of the bid and that the Appellant was obliged to comply with the contractual requirements, including the furnishing of the PBG and commencement of the work.

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9. In the meantime, the Respondent issued a communication dated 27.02.2017 recording that the Appellant had not commenced the work despite reminders. By a further communication dated 28.02.2017, the Respondent called upon the Appellant to deploy labour and material within seven days, failing which action under the relevant provisions of the GCC would be taken. The Appellant, however, continued to maintain its objection to the additional conditions introduced in the detailed acceptance letter. It addressed further communications dated 06.03.2017 and 05.04.2017, seeking withdrawal of the directions issued by the Respondent, while the Respondent, vide its communication dated 23.03.2017, called upon the Appellant to withdraw its objection and complete the requisite formalities.

10. Ultimately, *vide* communication dated 06.04.2017, the Respondent terminated the contract by invoking Clause 16(4)(a) of GCC-2014 and forfeited the EMD of Rs.2,40,000/-. The provision, as relied upon by the parties, required the successful bidder to furnish the PBG within thirty days from the date of issuance of the Letter of Acceptance. It further contemplated an extension, at the discretion of the competent authority, up to sixty days from the date of issuance of the Letter of Acceptance, subject to penal interest for the delay beyond the initial thirty-day period. In the event of failure to furnish the PBG even after sixty days, the contract could be terminated, with forfeiture of the EMD and other dues, and the contractor could be debarred from participating in the retender.

11. The dispute between the parties principally arose from their disagreement over the date from which the period stipulated for furnishing the PBG was required to be reckoned, as well as the effect

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of the additional conditions incorporated in the detailed acceptance letter. The Appellant contended that the termination dated 06.04.2017 was premature and contrary to the contractual stipulation, apart from being founded upon its refusal to accept conditions that had not formed part of its original offer. The Respondent, in contrast, maintained that the contract had already been concluded and that the Appellant's failure to furnish the PBG justified termination and forfeiture of the EMD.

12. The Appellant initially approached this Court by filing W.P.(C) No. 10827/2017 on 04.12.2017. The proceedings were subsequently withdrawn on 14.12.2017, with the dispute being pursued through arbitration. Upon the Appellant's request for appointment of an arbitrator not resulting in an appointment by the Respondent, the Appellant instituted a petition under Section 11(6) of the A&C Act. By order dated 17.05.2019, this Court appointed Shri Raj Kumar Sarkar, Retired Chief Engineer, Northern Railway, as the Sole Arbitrator to adjudicate the disputes between the parties.

13. Before the learned Sole Arbitrator, the Appellant raised, *inter alia*, claims seeking a declaration that the termination dated 06.04.2017 was illegal; refund of the EMD of Rs.2,40,000/- with interest; compensation of Rs.12,48,625/- towards loss of profit, overheads and other alleged losses arising from the termination; Rs.18,00,000/- towards advances allegedly rendered irrecoverable on account of the termination; pre-suit, pendente lite and future interest; and Rs.5,00,000/- towards costs incurred and to be incurred in pursuing the dispute.

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14. The Respondent contested the claims, maintaining that the contract had been validly terminated owing to the Appellant's failure to furnish the PBG and commence the work. It disputed the factual basis and evidentiary support for the monetary claims and also raised objections concerning the arbitrability of the disputes and the contractual provisions governing interest and costs. The Respondent additionally raised a counterclaim of Rs.65,34,901/-, representing the alleged difference between the original contract value and the amount at which the work was subsequently awarded to another agency.

15. By the Arbitral Award dated 27.01.2021, the learned Sole Arbitrator held, *inter alia*, that the termination of the contract had been effected before the expiry of the period available for furnishing the PBG, reckoned from the detailed acceptance letter as considered by the Tribunal. The Tribunal consequently found the termination to be premature. It rejected the Respondent's objection to its jurisdiction and proceeded to adjudicate the claims on their merits.

16. In the operative portion of the Award, the learned Sole Arbitrator awarded Rs.2,40,000/- towards refund of the EMD; Rs.12,09,000/- against the claim of Rs.18,00,000/- for alleged irrecoverable advances; and Rs.2,50,000/- towards costs. The claim for loss of profit and other damages was rejected. The Tribunal further directed payment of simple interest at the rate of eleven per cent per annum on the awarded amount, excluding the EMD, for the period specified in the Award, and prescribed post-award interest at the same rate until payment. The Respondent's counterclaim of Rs.65,34,901/- was rejected. The total principal amount awarded in favour of the Appellant, excluding interest, was Rs.16,99,000/-.

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17. Aggrieved by the Award, the Respondent instituted proceedings under Section 34 of the A&C Act, registered as OMP (COMM) No. 16/2021, seeking its setting aside. By impugned judgment dated 14.11.2022, the learned Commercial Court allowed the challenge and set aside the Arbitral Award, holding, as recorded in the present Appeal, that the Award was perverse and contrary to the terms and conditions of GCC-2014. It is this judgment and order that has been assailed by the Appellant in the present proceedings.

CONTENTIONS OF THE PARTIES:

18. Contentions on behalf of the Appellant:

18.1. It was submitted that the learned Commercial Court exceeded the scope of interference under Section 34 of the A&C Act by substituting its own interpretation of the contractual correspondence and reappreciating the evidence considered by the learned Sole Arbitrator. Reliance was placed on ***MMTC Ltd. v. Vedanta Ltd.***[1].

18.2. It was contended that the detailed acceptance letter dated 01.02.2017 introduced two additional conditions, which the Appellant had expressly rejected vide its letter dated 10.02.2017. Relying on ***Padia Timber Company (P) Ltd. v. Board of Trustees of Visakhapatnam Port Trust***[2], learned counsel submitted that acceptance subject to additional conditions constitutes a counter-proposal requiring assent. The Respondent's circular dated 03.10.2017 was also relied upon in support of this submission.

18.3. Learned counsel submitted that the learned Commercial Court

[1] (2019) 4 SCC 163
[2] (2021) 3 SCC 24

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erred in reckoning the period for furnishing the PBG from the initial acceptance communication dated 25/27.01.2017, without adequately considering the subsequent detailed letter and the Appellant's objection to the additional conditions. It was contended that the termination dated 06.04.2017 was premature and that the consequential forfeiture of the EMD could not, therefore, be sustained. Reliance was also placed on ***J.G. Engineers (P) Ltd. v. Union of India***[3], in support of the arbitrability of the dispute concerning contractual breach.

18.4. With respect to Claim No. 4, it was submitted that the learned Commercial Court incorrectly proceeded on the basis that no documentary evidence had been produced, despite the Tribunal's reference to vendor particulars, expenditure statements, bank statements, vouchers, income-tax returns and audited financial statements. The Appellant contended that the Tribunal's assessment of this material could not be displaced through reappreciation of evidence under Section 34, and that the claim concerned advances allegedly rendered irrecoverable rather than payment for work executed.

18.5. Learned counsel further challenged the setting aside of interest and costs. It was submitted that the prohibition under Clause 64(5) of GCC-2014 concerning pre-award interest did not, by itself, resolve the issue of post-award interest under Section 31(7)(b) of the A&C Act. Reliance was placed on ***Morgan Securities and Credits Pvt. Ltd. v. Videocon Industries Ltd***[4]. As regards costs, reliance was placed on

[3] (2011) 5 SCC 758
[4] Civil Appeal No. 5437/2022 decided on 01.09.2022

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Section 31A of the A&C Act and ***Union of India v. Om Vajrakaya Construction Company***[5], to contend that Clause 64(6) could not automatically bar an award of costs.

18.6. Lastly, it was submitted that the learned Commercial Court had set aside the rejection of the Respondent's counterclaim without adequately examining the Tribunal's reasoning. Relying on ***Gayatri Balasamy v. ISG Novasoft Technologies Ltd.***[6], the Appellant contended that any defect in a severable component of the Award could not, by itself, justify setting aside the entire Award.

19. Contentions on behalf of the Respondent:

19.1. *Per contra*, learned counsel for the Respondent submitted that the initial Letter of Acceptance dated 25/27.01.2017 concluded the contract, while the detailed letter dated 01.02.2017 merely clarified the consequences of quantity variations in respect of certain items. It was contended that Notes 1 and 2 did not introduce any new contractual conditions and that the Appellant was bound to comply with the terms of the accepted bid.

19.2. It was further submitted that the Appellant neither furnished the PBG within the period stipulated under Clause 16(4)(a) of GCC-2014 nor commenced the work. The termination dated 06.04.2017 and forfeiture of the EMD were, therefore, justified. The Respondent maintained that the Tribunal had erred in holding the termination to be premature and in directing refund of the EMD.

19.3. With respect to Claim No. 4, learned counsel submitted that the

[5] 2021 SCC OnLine Del 5434
[6] 2025 INSC 605

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work had never commenced and that the Appellant had failed to establish its entitlement to the amount awarded towards allegedly irrecoverable advances. The Respondent supported the learned Commercial Court's reliance on Clauses 51-A and 62(2)(c) of GCC-2014 and contended that the award of Rs.12,09,000/- was unsupported by sufficient evidence and contrary to the contractual provisions.

19.4. The Respondent also supported the setting aside of interest and costs. Relying on Clauses 16(3) and 64(5) of GCC-2014, Sections 28(3) and 31(7) of the A&C Act, and ***Union of India v. Manraj Enterprises***[7], it was contended that the Tribunal could not award interest contrary to the parties' agreement. It was further submitted that the award of costs contravened Clause 64(6) of GCC-2014, which required the parties to bear their respective arbitration costs.

ANALYSIS & FINDINGS:

20. This Court has carefully considered the submissions advanced on behalf of the parties and perused the material on record.

21. The scope of interference under Section 37 of the A&C Act, in an appeal against an order setting aside an arbitral award under Section 34, is necessarily circumscribed by the limits of the latter provision. The Court is not required to undertake a fresh adjudication of the disputes or substitute its own interpretation of the contract merely because another view may be possible. In ***MMTC Ltd.*** (*supra*), the Supreme Court reiterated that an award founded on a plausible view of the contractual terms and the material on record is not liable

[7] (2022) 2 SCC 331

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to be interfered with by reappreciation of evidence. At the same time, the statutory limitations on judicial review do not preclude interference where the award suffers from a ground expressly recognised under Section 34.

22. Examined against this standard, the impugned judgment requires consideration of whether the learned Commercial Court identified a legally sustainable ground for setting aside the Award, or whether it displaced the conclusions of the learned Sole Arbitrator by reassessing the contractual correspondence and the evidence independently. The principal findings in the impugned judgment concern the date from which the period for furnishing the PBG was to be reckoned, the refund of the EMD, the award under Claim No. 4, interest, costs and rejection of the counterclaim. Each of these aspects must be examined in the context of the reasons actually recorded by the learned Sole Arbitrator and the grounds on which the Award was set aside.

A. Termination of the contract and forfeiture of the EMD:

23. The dispute concerning termination turns substantially on the effect of the communications dated 27.01.2017 and 01.02.2017. The learned Commercial Court proceeded on the basis that the initial communication accepting the bid concluded the contract and that the detailed acceptance letter did not alter the parties' contractual position. The learned Sole Arbitrator, on the other hand, considered the detailed letter and the circumstances in which it was delivered, including the additional conditions contained in Notes 1 and 2 and the Appellant's immediate objection thereto. The said conditions are reproduced as

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under:

> *"(A) Rates of NS-1,2,3,4,5 & 6 of Schedule B --- If decreased, recovery of difference amount of LAR & accepted rates for the quantity decreased will be recovered.*
>
> *(B) Rates of USSOR chapter-9 of schedule-A is considered on much higher side ….will be paid @ LAR i.e. 3.34% below."*

24. The Appellant's case was not merely that it had received the detailed letter at a later date. Its objection was that the detailed letter introduced conditions concerning the rates and quantities of specified items which, according to it, did not form part of the original tender or its bid. The Appellant communicated its objection on 10.02.2017 and sought either withdrawal of the additional conditions or refund of the EMD. Despite being afforded an opportunity, learned counsel for the Respondent was unable to establish that the two conditions incorporated in the communication dated 01.02.2017 formed part of the original terms and conditions of the tender document or the GCC-2014. The Respondent, however, did not accept the Appellant's objection and instead called upon it to complete the contractual formalities and commence the work. In these circumstances, the issue that arises is whether a concluded contract came into existence between the parties, having regard to the Appellant's objection to the additional conditions and the absence of any demonstrated consensus on those terms. A concluded contract necessarily requires a meeting of minds on the essential terms governing the parties' rights and obligations. If the additional conditions materially altered the terms of the original offer and were not accepted by the Appellant, the existence of a concluded contract on those terms would be seriously in question.

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25. In this regard, the principle stated by the Supreme Court in ***Padia Timber Company*** (*supra*) is relevant. An acceptance which materially varies the terms of an offer does not, merely by being described as an acceptance, establish the other party's assent to the additional terms. Whether Notes 1 and 2 merely explained the tender conditions or materially altered the terms on which the bid had been accepted was, therefore, a question requiring consideration of the tender documents, the bid and the two communications, read together.

26. The learned Commercial Court, however, treated the initial acceptance as conclusive without adequately addressing the substance of the Appellant's objection to the subsequent conditions. The mere fact that the Appellant did not furnish the PBG or commence the work does not, by itself, answer the anterior question as to whether there was a contract which stood concluded. The correspondence was required to be examined as a whole, rather than the initial communication being treated as determinative without consideration of the subsequent letter and the Appellant's prompt protest.

27. The fact that the detailed letter was received on 10.02.2017, by itself, would not override the express language of Clause 16(4)(a). Nevertheless, the question before the learned Sole Arbitrator was not confined to the arithmetic computation of sixty days. It also concerned the legal effect of the two additional conditions which were added without concurrence of the Appellant in the Letter dated 01.02.2017. The learned Commercial Court was required to assess whether the Tribunal's approach to that dispute was one which could lawfully be displaced under Section 34.

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28. The learned Sole Arbitrator's conclusion that the termination was premature was based on its consideration of the correspondence and the contractual circumstances. The learned Commercial Court did not demonstrate that the Tribunal had adopted an interpretation that was impossible on the record; rather, it preferred its own conclusion that the initial acceptance alone governed the period for furnishing the PBG. In the absence of a demonstrated ground under Section 34, the substitution of one plausible interpretation for another could not justify setting aside the Award.

29. The Appellant has also contended that the termination was effected without an adequate prior notice of the proposed action. It is unnecessary to determine that contention as an independent ground in the abstract. The correspondence, including the communications calling upon the Appellant to commence work and the Appellant's replies maintaining its objection to the additional conditions, forms part of the factual context in which the termination was effected. The decisive question for present purposes remains whether the learned Commercial Court was justified in setting aside the Tribunal's finding while assuming that a concluded contract came into existence with communication dated 27.01.2017.

30. The direction to refund the EMD was consequential upon the Tribunal's conclusion concerning absence of a concluded contract. The learned Commercial Court set aside that direction principally on the premise that the termination was valid and that the contractual provisions authorised forfeiture. Once the foundation on which that conclusion rested is found unsustainable, the consequential setting aside of the refund of the EMD cannot independently be sustained on

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the same reasoning.

B. Award under Claim No. 4: alleged irrecoverable advances:

31. The learned Commercial Court also set aside the amount of Rs.12,09,000/- awarded under Claim No. 4, which related to advances allegedly rendered irrecoverable following the termination. Two principal reasons were recorded: first, that Clause 62(2)(c) of GCC-2014 concerned amounts attributable to work actually executed and did not apply where the work had not commenced; and second, that the Appellant had failed to produce the documents contemplated by Clause 51-A to establish the expenditure claimed.

32. The first consideration required the Tribunal's claim to be examined according to its actual nature. The Appellant did not seek, under Claim No. 4, payment for measured work executed at the site. It claimed compensation for advances allegedly made to labour, suppliers and machinery providers in preparation for performance of the contract, which it asserted had become irrecoverable because of the Respondent's breach. Whether such expenditure was in fact incurred, whether it was attributable to the contract, and whether it was proved to have become irrecoverable were matters requiring assessment of the evidence and the contractual framework.

33. Clause 62(2)(c), as referred to by the parties, deals with the determination and certification of amounts earned or accrued in respect of work done and the value of specified materials, plant and temporary works in the circumstances contemplated by that clause. The Tribunal relied upon the provision in considering the consequences of rescission. Whether the clause, properly construed,

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independently authorised the entire amount awarded under Claim No. 4 is a question distinct from whether the claim could be rejected solely because no physical work had commenced. The absence of executed work does not, without examination of the nature of the claim and the evidence, establish that preparatory expenditure or advances could not have been incurred.

34. More significantly, the learned Commercial Court proceeded on the premise that the Appellant had not produced statements of account, bank statements, income-tax returns, bills or vouchers. This premise does not accord with the Award, which expressly records that the Appellant had produced particulars of vendors, a summary of miscellaneous expenditure, bank-account statements, vouchers, an income-tax return for Assessment Year 2017–18, the profit and loss account for the year ending 31.03.2017, an audited balance sheet as of that date, and a bifurcation of the claim of Rs.18,00,000/-. The Tribunal further recorded that these documents showed some of the expenditure incurred in support of the claim.

35. The fact that documents were produced does not, by itself, establish that every amount claimed was proved or that the amount awarded was necessarily the only permissible quantification. It does, however, materially distinguish a case in which the claim was unsupported by evidence from one in which the Tribunal considered documentary material and awarded only part of the amount claimed. The learned Commercial Court could not treat the claim as wholly unsupported by documentary evidence without addressing the material expressly noticed in the Award.

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36. The Tribunal awarded Rs.12,09,000/- against a claim of Rs.18,00,000/-, rather than allowing the claim in full. The question before the learned Commercial Court was whether the Tribunal's determination disclosed a ground for interference under Section 34, not whether the Court itself would have assessed the documents differently. The impugned judgment does not adequately engage with the evidence identified in the Award or explain why the Tribunal's assessment of that material crossed the threshold for setting aside an arbitral award.

37. In these circumstances, the setting aside of Claim No. 4 cannot be sustained on the ground that no documentary evidence was produced. Nor can the fact that the work had not commenced, standing alone, dispose of a claim specifically advanced for preparatory expenditure and alleged irrecoverable advances. The relevant questions of proof, causal connection and quantification had to be assessed in light of the material before the Tribunal. The learned Commercial Court's contrary conclusion rests on an incomplete consideration of the reasons recorded in the Award and amounts to an impermissible reassessment of the claim.

C. Interest:

38. The issue of interest requires separate discussion. The Tribunal awarded simple interest at eleven per cent per annum on the amount awarded, excluding the EMD, for the pre-award period specified in the Award, and also directed payment of post-award interest at the same rate until realisation. The learned Commercial Court set aside the interest directions by relying, *inter alia*, on Clauses 16(3) and

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64(5) of GCC-2014 and the decision of the Supreme Court in ***Manraj Enterprises*** (supra).

39. Clause 64(5) expressly provides that, where the arbitral award is for payment of money, no interest shall be payable on the whole or any part of the amount for any period until the date on which the award is made. The effect of this provision upon the Tribunal's award of pre-award interest must be considered in light of the binding decision in ***Manraj Enterprises*** (*supra*). The Tribunal's authority to award interest cannot be exercised contrary to an express contractual prohibition applicable to the claim in question. Accordingly, the pre-award interest direction cannot be sustained to the extent that it is contrary to Clause 64(5).

40. This conclusion does not, however, justify treating all questions of interest as indistinguishable. The prohibition in Clause 64(5) is expressed by reference to the period before the award is made. Post-award interest is governed by Section 31(7)(b) of the A&C Act, subject to the applicable contractual terms and the governing legal principles. The learned Commercial Court was required to examine the Tribunal's post-award direction separately rather than assume that the conclusion concerning pre-award interest automatically disposed of every component of the interest award.

41. The award of interest on the EMD also stands on a distinct footing, as the Tribunal excluded the EMD from the pre-award interest calculation. The operative directions must therefore be understood in accordance with the Award itself, rather than by treating interest as having been awarded uniformly on every component of the

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principal sum. The impugned judgment's broad setting aside of the Award does not obviate the need for this component-wise analysis.

42. Consequently, while the learned Commercial Court was entitled to examine whether the contractual prohibition precluded pre-award interest, its conclusion on that aspect cannot, without a separate analysis, sustain the setting aside of the substantive amounts awarded or the Tribunal's determination of costs. The interest component must be dealt with in accordance with Clause 64(5), Clause 16(3), Section 31(7) of the A&C Act and the applicable binding precedent.

D. Costs:

43. The Tribunal awarded Rs.2,50,000/- towards costs, taking into account, inter alia, the Appellant's case that it had been compelled to approach this Court for appointment of an arbitrator. The learned Commercial Court set aside the award of costs on the ground that Clause 64(6) of GCC-2014 required each party to bear its own arbitration costs and that the Tribunal had not given sufficient reasons to depart from that stipulation.

44. Section 31A of the A&C Act confers discretion upon the Court or arbitral tribunal to determine costs, while sub-section (5) addresses the validity of an agreement allocating costs where such agreement was not made after the dispute had arisen. In ***Om Vajrakaya Construction Company*** (*supra*), this Court considered the effect of Clause 64(6) of the GCC in the context of Section 31A and held that the contractual provision requiring parties to bear their respective costs could not override the statutory regime where the agreement had not been entered into after the dispute arose.

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45. In view of the aforesaid principle, Clause 64(6) could not, by itself, be treated as an absolute bar to the Tribunal exercising the discretion conferred by Section 31A. The Tribunal recorded a reason for awarding costs, namely, the circumstances in which the Appellant had to seek appointment of an arbitrator through proceedings under Section 11(6) of the A&C Act. The learned Commercial Court's conclusion that the award of costs was impermissible merely because of Clause 64(6) is, therefore, not sustainable. No sufficient ground has been shown to set aside the Tribunal's determination of costs under Section 34.

E. Rejection of the counterclaim:

46. The Respondent's counterclaim was for Rs.65,34,901/-, claimed as the alleged difference between the original contract value and the amount at which the work was subsequently awarded to another agency. The Tribunal rejected the counterclaim. The learned Commercial Court described that rejection as perverse and contrary to public policy, but did not undertake a substantive examination of the basis of the counterclaim, the evidence supporting it, or the Tribunal's reasons for rejecting it.

47. A finding cannot be characterised as perverse. The Court must identify the relevant defect in the award and explain how it falls within the grounds of interference under Section 34. In the present case, the impugned judgment does not sufficiently explain why the Tribunal's rejection of the counterclaim met that threshold. Nor does the fact that the Tribunal rejected the counterclaim in its operative determination, without more, establish that the decision was contrary

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to public policy.

48. The counterclaim was founded on the Respondent's allegation that the Appellant's default necessitated the subsequent award of the work at a higher price. Its determination was therefore connected with the parties' dispute concerning concluded contract having come into existence subsequent to its termination and the consequences said to flow from it. Once the learned Commercial Court's interference with the Tribunal's assessment of the termination and the principal monetary claim is found unsustainable for the reasons discussed above, the rejection of the counterclaim could not be set aside by a bare conclusion that it was perverse. The impugned judgment discloses no adequate independent basis for interfering with that part of the Award.

CONCLUSION:

49. Accordingly, the Appeal is allowed to the aforesaid extent. The impugned judgment dated 14.11.2022 passed by the learned Commercial Court in OMP (COMM) No. 16/2021 is set aside insofar as it sets aside the Award in respect of termination, refund of the EMD, Claim No. 4, costs and rejection of the Respondent's counterclaim.

50. The Award dated 27.01.2021 is restored in respect of those determinations. The direction awarding pre-award interest shall stand modified to the extent it is contrary to Clause 64(5) of GCC-2014. The question of post-award interest shall be governed by the applicable contractual terms and Section 31(7)(b) of the A&C Act, consistently with the observations made herein.

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51. In the facts and circumstances of the case, the parties shall bear their own costs of the present Appeal.

52. The present Appeal stands disposed of.

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