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

% *Date of Decision: 11.10.2022*

\+ FAO (COMM) 88/2022

M/S MANRAJ ENTERPIRSES ..... Appellant

Through: Mr. Vivekanand, Adv.

Versus

UNION OF INDIA ..... Respondent

Through: Mr. Ankit Raj and Mr. Kumaresh Singh, advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration & Conciliation Act, 1996 (hereafter **'the A&C Act'**) impugning a judgment dated 17.02.2021 (hereafter **'the impugned judgment'**) passed by the learned Commercial Court (hereafter '**the Court'**) in ARBTN. No.5173/2018. By the impugned judgment, the Court has partly allowed the respondent's application under Section 34 of the A&C Act seeking to set aside the arbitral award dated 19.06.2018 (hereafter '**the impugned award'**).

2. Whilst the Court rejected the respondent's challenge to the amounts awarded against substantive claims, it set aside the impugned award to the extent of pre-award interest on the claims awarded to the appellant.

3. The Court accepted the submissions that the contract between the parties proscribed payment of any pre-award interest, in terms of Clauses 16(2) and 64.5 of the General Conditions of Contract (hereafter '**the GCC**'), as applicable to the contract in question.

4. The principal question to be addressed in the present appeal is whether the finding of the Court that Clause 16(3) of GCC and / or Clause 64.5 of the GCC, bars pre-award interest, is erroneous.

5. Mr. Vivekanand, learned counsel appearing for the appellant, contended that Clause 64.5 of the GCC, referred to by the respondent, was not part of the GCC, as applicable to the contract in question. He submitted that the Northern Railway General Conditions of Contract 1989 (hereafter **'GCC-1989'**) was applicable to the contract in question and the same did not include Clause 64.5 of the GCC, which proscribed the Arbitral Tribunal to award any interest for the period prior to the date of the award. He submitted that the said clause was introduced in the General Conditions of Contract 1999 (hereafter **'GCC-1999'**), which was published in Handbook-I and Handbook-II in the month of May, 1999.

6. He also submitted that the respondent had not raised any ground that the contract in question proscribed payment of interest and thus, the Court had erred in setting aside the award of pre-award interest. He referred to the decision of the Supreme Court in ***J.G. Engineer's Pvt. Ltd. v. Calcutta Improvement Trust & Anr.: (2002) 2 SCC 664*** and on the strength of the said decision, contended that it was not open for the

appellant to raise a fresh dispute and urge grounds to contest the claims that were not urged before the Arbitral Tribunal.

7. Next, he contended that the impugned judgment to the extent it finds that Clause 16(2) of the GCC [incorrectly mentioned as Clause 16(3) of the GCC in the impugned judgment] bars payment of interest on the claims awarded in favour of the appellant, is *ex facie* erroneous. He submitted that the said clause provides that no interest would be payable on earnest money, security deposit or the amounts payable under the contract; it does not proscribe payment of interest on claims in the nature of damages. He submitted that the claims allowed by the Arbitral Tribunal relate to reimbursement of expenditure and compensation for expenses. Such sums were not payable under the contract and therefore, do not fall within the sweep of Clause 16(2) of the GCC.

8. He submitted that this issue was squarely covered by the decision of the Supreme Court in ***M/s Raveechee and Co. v. Union of India: (2018) 7 SCC 664***. In that case, the Supreme Court had considered the import of Clause 16(2) of the GCC [which was numbered as Clause 16(3) of the GCC in that case] and found that the interest awarded by the arbitrators on the amount awarded on account of the loss suffered by the appellant was not covered under the said clause.

9. He also relied upon the decision of the Supreme Court in ***Union of India v. M/s Pradeep Vinod Construction Co.: Civil Appeal No.2099/2017, decided on 03.08.2017*** as well as the decision of the larger bench (three Judges) of the Supreme Court in ***Union of India v.***

Ambica Construction: (2016) 6 SCC 36 (hereafter ***'Ambica Construction I'***).

10. He pointed out that the decision in ***Ambica Construction I*** was rendered pursuant to a reference made by a Division Bench of the Supreme Court in regard to the power of an arbitrator to award *pendente lite* interest, where a contract contains a bar for grant of interest. The Division Bench had doubted the earlier decisions in the case of ***Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age: (1996) 1 SCC 516*** and ***Madnani Construction Corporation (P) Ltd. v. Union of India and Ors: (2010) 1 SCC 549***. He submitted that following the decision in ***Ambica Construction I***, the Supreme Court in ***Ambica Construction v. Union of India: (2017) 14 SCC 323*** **(**hereafter ***'Ambica Construction II'*****)** allowed the appeal as it found that the arbitrator was justified in granting *pendente lite* interest as the same was not proscribed by Clause 16(2) of the GCC, which is identically worded as the clause in the present case.

11. He submitted that in the latter decision between the same parties [***Union of India v. Manraj Enterprises: (2022) 2 SCC 331***], a Division Bench of the Supreme Court has taken a contrary view. He contended that the said view is *per incurium* and contrary to the view taken by the Supreme Court in ***Ambica Construction I, Ambica Construction II***, ***M/s Raveechee and Co. v. Union of India*** (*supra*), and ***Union of India v. M/s Pradeep Vinod Construction Co*** (*supra*).

12. Mr. Ankit Raj, learned counsel appearing for the respondent, countered the aforesaid submissions. He submitted that the GCC-1989

was revised on 06.08.1997, in view of a promulgation of the Arbitration & Conciliation Ordinance, 1996. The said revised conditions included Clause 64.5 of the GCC, which prohibited the Arbitral Tribunal to award any interest for the period prior to the date of the award.

13. Next, he submitted that the issue whether Clause 16(2) of the GCC prohibited award of *pendente lite* interest is squarely covered by the decision of the Supreme Court in ***Union of India v. Manraj Enterprises*** (*supra*).

Reasons & Conclusion

14. The first question to be addressed is whether the Court had erred in entertaining the plea that the contract in question barred award of interest even though no such contentions had been advanced before the Arbitral Tribunal. Clearly, if there is a contentious issue, which has not been agitated before the Arbitral Tribunal, it would be impermissible for any party to raise the same. A claimant before an arbitral tribunal cannot support his claim on grounds that were not urged before the arbitral tribunal. Equally, the respondent cannot raise fresh grounds, which were not raised before the arbitral tribunal to contest the claim that has been allowed. This is obvious for the reason that jurisdiction of the Court under Section 34 of the A&C Act is limited. The Court is not called upon to adjudicate any claims or dispute between the parties. That jurisdiction is vested solely in the forum chosen by the parties, that is, an arbitral tribunal. The Court, while considering an application under Section 34 of the A&C Act, is merely to decide whether an award

is to be set aside on the limited grounds as set out in Section 34 of the A&C Act.

15. However, if a question is raised as to the jurisdiction of an arbitral tribunal to award any claim, which does not involve deciding any question of fact, the party assailing the arbitral award is not prohibited from raising any such ground. In ***J.G. Engineer's Pvt. Ltd. v. Calcutta Improvement Trust & Anr.*** (*supra*), the Supreme Court had drawn a distinction between questions that relate to the jurisdiction of an arbitrator and those that do not. Even in cases where a question as to jurisdiction of an arbitrator is raised, the Court held that if it requires any factual determination, the party would be precluded from raising the said issue if a specific plea in this regard was not raised before the arbitral tribunal. In the said case, it was contended that the dispute fell within the 'excepted matters' and therefore, was not arbitrable. The Court found that the said issue was contingent on whether an Engineer's Certificate had been issued. Since no specific plea to that effect was raised before the arbitral tribunal, the party could not be permitted to raise the same. The relevant extract of the said decision is set out below:

> "12. The issue of termination of the contract in question, on the facts under consideration before us, does not relate to the jurisdiction of the arbitrator. Without going into the scope of clause 1.9 of the contract and assuming that issue of termination of contract can be brought within the scope of the said clauses and, thus, made an excepted matter but that would depend upon the fact whether the Engineer's certificate under clause 1.9 has been issued or not. Therefore, specific plea had to be taken that such a

certificate was issued and, therefore, the aspect of termination was not arbitrable. As already noticed no such fact was pleaded or contention urged in the counter statement of facts. In this view, it is not necessary to decide whether the issue of termination of the contract could be brought within the ambit of the excepted matter or not or that the Engineer's certificate could be conclusive only as to the quality or measurement of the work done.

13. The Division Bench was, thus, not correct in coming to the conclusion that the fundamental terms of the agreement between the parties prohibited the arbitrability of the excepted matters. The first ground on the basis of which the judgment of the learned Single Judge was reserved is, thus, not sustainable."

16. If the contract specifically prohibits award of interest, an arbitral award allowing the claim for interest would be amenable to challenge under Section 34 of the A&C Act. It is also relevant to note that Section 28(3) of the A&C Act also requires an arbitral tribunal to take into consideration the terms of the contract while making an award.

17. In view of the above, this Court is unable to accept that the decision of the Court to entertain the plea that award of pre-award interest was proscribed by the terms of the contract in question, is flawed or warrants any interference by this Court.

18. The next question to be considered is whether Clause 64.5 of the GCC was part of the terms of the contract. The bids for execution of the works in question were invited in terms of the notice inviting tenders dated 10.02.1999. The appellant had submitted its bid on 14.02.1999, which was subsequently accepted by the respondent. As noted above,

the respondent had issued a Letter of Intent to award the contract to the appellant on 10.07.2000 and the works were required to be completed within a period of eighteen months thereafter, that is, on or before 09.01.2002.

19. There is no dispute that the notice inviting tenders and the bid submitted pursuant thereto were prior to the publication of the GCC-1999 (Handbook-I and Handbook-II). Admittedly, the GCC-1989 was applicable to the contract. The only area of controversy is whether the GCC-1989 had been revised prior to the GCC-1999. It is admitted that the GCC that included Clause 64.5 was published for the first time in Handbook-I and Handbook-II in the month of May, 1999. The learned counsel for the respondent does not dispute that revision in GCC-1989 was not communicated to the appellant prior to the month of May, 1999. The impugned award expressly provides that the GCC-1989 (incorrectly typed as "GCC-1979") is applicable to the contract. The respondent had neither challenged the said finding nor at any point, claimed before the Court that GCC-1989 was revised.

20. In the given circumstances, we are of the view that it would not be open for the respondent to now claim that the GCC, as revised in the year 1999, is applicable to the contract in question. As noted above, the finding of the Arbitral Tribunal that GCC-1989 was applicable to the contract was not a subject matter of challenge before the Court and admittedly GCC-1989 did not include Clause 64.5. Thus, the decision of the Court to set aside the award of pre-award interest on the ground that Clause 64.5 of GCC bars the same, cannot be sustained.

21. The last question to be addressed is whether the finding of the Court that the award of *pendente lite* interest is contrary to Clause 16(2) of the GCC, is flawed.

22. Clause 16(2) of the GCC reads as under:

> "16. **Earnest-money and security deposit. –**
> (1) xxx xxx xxx
> (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."*

23. In ***M/s Raveechee and Co. v. Union of India*** (*supra*), the Supreme Court had considered the import of an identically worded clause. Mr. Vivekanand, learned counsel appearing for the appellant, referred to the following extract of the said decision:

> "8. In the present case, the Arbitral Tribunal giving effect to the purport of Clause 16(3) did not award any interest on security deposits. The clause in terms states that no interest will be payable on earnest money, security deposits or on any amounts payable to the contractor under the contract. The Arbitrators in their award have relied on Clause 16(3) of the contract to deny interest on the security deposit. The Arbitrators held that what was intended under Clause 16(3) barred the grant of interest on earnest money, security deposit and amounts payable to the appellant, it does not in any way bar grant of interest pendente lite.
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> 9. Clause 16(1) and 16(3), which are relevant, read as follows:

"16(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 in the form of Government Securities or may be recovered by percentage deduction from the contractor's 'on account' bills.

Provide 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.

16(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 payable with interest accrued thereon."

10. On behalf of the Union of India, it is contended that the Arbitrators by reason of Clause 16(3) could not have awarded interest pendente lite. This contention is incorrect. Ex facie the clause does not deal with interest pendente lite. In terms the clause only bars interest upon earnest money and security deposits or amounts payable to the contractor under the contract. The abovementioned amounts are amounts which in a sense belong to the contractor. They are amounts voluntarily deposited with the other contracting party in order to be refunded or forfeited depending on the performance of the contract. As such they are not amounts of which the contractor is deprived the use of against his wishes, so as to attract interest. It is not the case of the Government before us that interest has been awarded to the contractor under any of the three heads. Neither does any question of

interest payable on Government Security arise in the present case. The agreement bars the Arbitrators from awarding interest pendente lite. On a plain reading we find that there is no such bar.

11. In fact, the Arbitrators have awarded amounts to the claimant on account of the losses suffered by them for various reasons, mainly due to the ban on mining. These amounts are not awarded on account of any payment due under the contract but are awarded on losses determined in the course of arbitration of the 'lis'. A claimant becomes entitled to interest not as compensation for any damage done but for being kept out of the money due to him. Obviously, in a case of unascertained damages such as this, the question of interest would arise upon the ascertainment of the damages in the course of the lis. Such damages could attract interest pendente lite for the period from the commencement of the arbitration to the award. Thus, the liability for interest pendente lite does not arise from any term of the contract, or during the terms of the contract, but in the course of determination by the Arbitrators of the losses or damages that are due to the claimant. Specifically, the liability to pay interest pendente lite arises because the claimant has been found entitled to the damages and has been kept out from those dues due to the pendency of the arbitration i.e. pendente lite.

12. We are, therefore, of the view that the Arbitrators rightly awarded interest pendente lite for the period from 26.09.1988 to 23.03.2001 which is the date of the award, on the amounts found due to the claimant. Undoubtedly, such a power must be considered inherent in an Arbitrator who also exercises the power to do equity, unless the agreement expressly bars an Arbitrator from awarding interest pendente lite. An agreement which bars interest is essentially an agreement that the parties will not claim interest on specified amounts. It does not bar an Arbitrator,

> who is never a party to the agreement from awarding it. We are not called upon, in this case, to decide whether parties can agree that they will not claim interest pendente lite even in respect of unascertained damages determined in the course of arbitration. The present case must be decided on the general rule that an arbitrator has the power to award interest unless specifically barred from awarding it; and the bar must be clear and specific."

24. By an order dated 16.03.2016 passed by the Division Bench of the Supreme Court in ***Union of India v. Ambica Construction*** [in SLP(C) No.11114/2009], the Division Bench, doubted the correctness of the earlier decisions of the Supreme Court in ***Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age: (1996) 1 SCC 516*** and in ***Madnani Construction Corporation (P) Ltd. v. Union of India and Ors.: (2010) 1 SCC 549*** and referred the issue regarding power of an arbitral tribunal to award *pendente lite* interest where the contract bars the same, to a larger bench. The said reference was decided by a larger bench of three Judges in ***Ambica Construction I*** in the following terms:

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

25. Following the said decision in ***Ambica Construction I***, a three Judge bench of the Supreme Court decided the matter in ***Ambica Construction II*** and held that the bar to pay interest in terms of Clause 16(2) *"would not be sufficient to deny payment of pendentelite interest"*.

26. However, in ***Sri Chittarajan Maity v. Union of India: (2017) 9 SCC 611***, the Supreme Court distinguished the decision in ***Ambica Construction II*** on the ground that it was rendered in the context of the Arbitration Act, 1940. In ***Garg Builders v. Bharat Heavy Electricals Ltd.: 2021 SCC OnLine SC 855***, the Supreme Court referred to the decision in ***Sri Chittranjan Maity v. Union of India*** (*supra*) and distinguished the said decision in ***M/s Raveechee and Co. v. Union of India*** (*supra*) on the same ground. In that case, the Supreme Court, in the context of a contractual clause, which provided that "*no interest shall be payable by BHEL on Earnest Money Deposit, Security Deposit or on any moneys due to the contractor*", held that the said clause proscribed the payment of *pendente lite* interest.

27. The decision in ***Garg Builders v. Bharat Heavy Electricals Ltd.*** (*supra*) was also followed by the Supreme Court in ***Union of India v. Manraj Enterprises*** (*supra*). The said decision also noted the decisions of the Supreme Court in ***Union of India v. M/s Pradeep Vinod Construction Co.*** (*supra*) as well as in ***M/s Raveechee and Co. v. Union of India*** (*supra*). The Court found that Clause 16(3) of the GCC, which is identically worded as Clause 16(2) of the GCC in this case, proscribes grant of any interest prior to the date of the award.

28. The said decision is binding and the question whether Clause 16(2) of the GCC proscribes the payment of interest prior to the date of the award is no longer *res integra*.

29. The decision of the Court to set aside the impugned award to the extent of the award of *pendente lite* interest in favour of the appellant, requires no interference by this Court.

30. The appeal is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

OCTOBER 11, 2022
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