

(2014) 09 AP CK 0111

In the Andhra Pradesh High Court

Case No : REV.C.M.A.M.P. No. 1930 of 2013 in C.M.A. No. 1044 of 2012

V.K. Engineering Constructions

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 12-09-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31, 34, 37(1)
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 8, 34
Interest Act, 1978 — Section 3, 3(3)(a)(ii), 5

Citation : (2015) 1 ALD 296 : (2014) 6 ALT 147 : (2014) 4 ARBLR 564

Hon'ble Judges : R. Subhash Reddy, J;A. Shankar Narayana, J

Bench : Division Bench

Advocate : K. Preabhaker, Advocate for the Appellant; C.V. Rajeev Reddy, Advocate for C.V. Vinitha Reddy, Advocate for the Respondent

Judgement

A. Shankar Narayana, J.—This is a review application filed by the 1st respondent - Contractor in C.M.A. No. 1044 of 2012 requesting this Court to review the order, dated 11-12-2012.

2. The Union of India, South Central Railway, Secunderabad and its Chief Engineer, Construction - V, preferred the aforesaid appeal questioning award of interest for pre-reference and pendente lite periods by the Arbitrator, the 2nd respondent in the appeal.

3. For the sake of convenience, the parties are hereinafter referred to as arrayed in the appeal.

4. This Court in the aforesaid appeal, acceding to the request of the appellants, by placing reliance on the decisions of the Hon'ble Supreme Court in Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager (Works), Palghat and Others, and Union of India (UOI) Vs. Krafters Engineering and Leasing (P) Ltd., , and the judgment of this Court in General Manager, South Central Railway and Others Vs. Ch. Kotaiah and Another, holding that Clause 16(2) of General Conditions of Contract (GCC) prohibits award of interest for the

periods pre-reference and pendente lite, allowed the appeal.

5. The 1st respondent, on the ground that, though, placed reliance on the judgment of the Hon''ble Supreme Court in Madnani Construction Corporation (P) Ltd. Vs. Union of India (UOI) and Others, , supporting the award of interest by the Arbitrator for pre-reference and pendente lite periods, the same had not been considered by this Court, approached the Hon''ble Supreme Court with Special Leave Petition (Civil) in C.C. No. 14285 of 2013.

6. When the said matter came up before the Hon''ble Supreme Court, and upon hearing the matter, since the 1st respondent sought leave to withdraw the S.L.P., so as to file the instant review application urging that the judgment of the Hon''ble Supreme Court in Madnani's Case (Supra 4), had not been considered by this Court, permission was granted and the S.L.P. was accordingly dismissed as withdrawn. The Hon''ble Supreme Court, observed that in case the review application is rejected by this Court, it will be open to the 1st respondent to approach the Hon''ble Supreme Court.

7. Thus, the instant Review C.M.A. M.P. (S.R.) No. 35681 of 2013 came to be filed, along with C.M.A. M.P. No. 1760 of 2013, requesting to condone the delay of 206 days in filing the review petition. This Court, having satisfied with the explanation offered for the delay, condoned the delay. Consequently, the Registry assigned Review C.M.A. M.P. No. 1930 of 2013. The review petition, thus, taken up for re-hearing in accordance with Rule - 8 of Order - XLVII of the Code of Civil Procedure, 1908 (for short "CPC") since non-advertence to the decision in Madnani's Case (Supra 4), relied on by the learned counsel for the 1st respondent, falls within the ambit of the words "for any other sufficient reason" occurring in sub-rule (1) of Order- XLVII of CPC.

8. For better appreciation of the controversy between the parties in the instant review application, we are of the view to refer to the sequence of events that lead to preferring the S.L.P. before the Hon''ble Supreme Court contextually referring to the factual aspect as the same has direct bearing on resolution of the controversy herein.

9. Feeling aggrieved of the award, the appellants filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, "Arbitration Act") contending that the Arbitrator has awarded interest at 18% per annum on claim amounts passed under Claims 1(a), 1(b) and 3 for pre-reference and pendente lite periods, despite an express bar contained in Clause 16(2) of General Conditions of Contract (GCC), without jurisdiction to do so.

10. The said grievance was registered as O.P. No. 1621 of 2007 on the file of III Additional Chief Judge, City Civil Court, Hyderabad. On appraisal of evidence on record let in by the respective parties and hearing the arguments, placing reliance on the decision of the Hon''ble Supreme Court in Master Kartik being Minor rep. by his Father and Others Vs. A.P. State Electricity Board and Another, , upheld the "interest" awarded by the Arbitrator. It is that order, which has driven

the appellants to approach this Court by preferring the instant appeal.

11. Adverting to the fact scenario, the appellants entrusted certain construction work to the 1st respondent under a contract in the year 1997. The said work relates to Gauge conversion from Meter Gauge to Broad Gauge between Hotgi and Bijapur sections. An agreement was entered into by the parties on 21-02-1997.

12. For the purpose of clarity touching the controversy, we intend to project the relevant items of Schedule - A of the agreement. The contract includes the following items among other items:

- "1. Provision of pile foundations for piers P-I to P-13 for MBG loading,
2. providing pile caps over the piles for supporting the already completed jacketing, and
3. Carrying out routine pile load tests."

13. The 1st respondent sought additional amounts over and above the agreed amount under the said contract on the ground that as on 25-04-1997, in addition to four (4) Rigs that were working at the site, he was organising 5th Rig also as it became necessary to compensate the time lost due to variety of unanticipated problems confronted by it during execution of work. For better appreciation, we intend to refer to certain details on that aspect.

14. The 1st respondent submits that while driving the piles, number of materials like boulders, old dismantled bed blocks, steel plates, sheets and rails were coming in the way and due to the said reason, chisels were getting damaged and progress in the work had become very very slow, it had to completely take out the liner, remove the obstruction by proclain and drive the liner again in most of the times, due to which delay, it could complete piles for piers P-8, P-9, P-10 and P-11 and struggling to speed up the progress of work. Even, it has kept one proclain exclusively at the site as one of the measures to save time, though, the cost to be borne by it for the said purpose was huge, and on completion, a detailed report regarding additional work done by the 1st respondent was submitted. Soon after completion of the work, the 1st respondent made requests with the officials of the appellants, in the hierarchy. According to the 1st respondent, earlier to execution of work, the appellants assured that variation statement was being prepared and payment will be released soon for the additional works involved and got the work executed, but his efforts proved abortive. After constant communication and correspondence between the officials of the appellants and the 1st respondent, the Chief Administrative Officer (Con), South Central Railway, Secunderabad, informed the 1st respondent through the letter, dated 01-05-2002, that the General Manager of the appellants has appointed a Committee of three SAG Officers to go into the claims and that the said committee has come to an unanimous conclusion that the 1st respondent is not entitled to any additional payment towards removal of above mentioned

obstructions encountered during piling operations in execution of the work; that decision was the challenge before the Arbitrator.

15. On the Arbitration Application No. 45 of 2003, on the file of this Court, this Court appointed the 3rd respondent herein as Arbitrator by the order, dated 18-12-2003, to adjudicate upon the disputes between the parties. The claims before the Arbitrator for adjudication were as under:

"Claim No. 1(a):- Under this claim, the claimant has claimed a sum of Rs. 36,63,000/- towards non payment of amount due towards extra work got executed by the Department.

Claim No. 1(b):- Under this claim, the claimant has claimed a sum of Rs. 2,21,344/- towards additional charges over and above the claim Item No. 1(a) for extra depths beyond 2 M. at the rate of 10% extra running metre as detailed in the statement annexed therein."

Thus, the claimant has claimed a total sum of Rs. 38,84,344/- under claim No. 1(a) and claim No. 1(b).

Claim No. 2:- Under this claim, the claimant has claimed a sum of Rs. 22,50,000/- towards incurrence of establishment charges during the prolonged period of completion of work.

Claim No. 3:- Under this claim, the claimant has claimed a sum of Rs. 3,00,000/- towards payment of Final Bill and Return of Earnest Money Deposit and Security Deposit and for interest at 24% p.a., from the date of completion of the works and for return of original TDRs to the claimant.

Claimant No. 4:- The claimant has claimed interest at 24% p.a., on the amounts mentioned under claim No. 1(a), claim No. 1(b) and claim No. 2.

Claim No. 5:- The claimant has also claimed exemplary costs, including arbitration costs."

16. The Arbitrator allowed the claims under Claim 1(a) for a sum of Rs. 36,63,000/-, Claim 1(b) for Rs. 2,21,344/-, and Claim 3 for Rs. 3,00,000/- while disallowing Claim 2. However, the Arbitrator awarded interest at 18% per annum under Claims 1(a), 1(b) and 3 from the date of cause of action i.e., 25-04-1997, till the date of payment. It is that part of the award, which relates to grant of interest, has been the challenge before the III Additional Chief Judge, City Civil Court, Hyderabad, in O.P. No. 1621 of 2007, which was confirmed and further challenged in the instant appeal.

17. Thus, the controversy between the parties is very limited to the extent of awarding interest for the pre-reference and pendente lite periods before the Arbitrator.

18. The 1st respondent submits in the grounds that the GCC was amended in the year 1998, wherein Clauses 16(3) and 64(5) were introduced and the same are

applicable to the contracts from December, 1998 onwards, whereas the contract in question was of the year 1997, wherein there was no prohibition and as contended by the appellants, if really Clause 16(2) of GCC prior to 1998 was a prohibitory Clause, there was no need for the appellants to amend Clauses 16 and 64 by introducing Sub Clauses (3) and (5) respectively.

19. It is stated that this Court disposed of the appeal relying on the decision of this Court in Kotaiah's Case (Supra 3) holding that Clause 16(2) of GCC prohibits awarding interest for the pre-reference and pendente lite periods, and, thereby, awarded interest from the date of award and, in fact, the facts and circumstances of the said case are not applicable to the fact-situation occurring in the instant case, as such, the said order is inapplicable to the facts of the present case and the ratio laid down is also inapplicable and has to be reviewed.

20. It is also submitted that Clause 16 of GCC deals with earnest money deposit and security deposit and not otherwise and even the Railway Board categorically clarified in its enclosures to Letter No. 2013/CE-I(CT/RTI/13/31957, dated 20-05-2013, that Clauses 16(1) to 16(3) pertain to earnest money deposit and security deposit and the Hon'ble Supreme Court laid down law on this subject that it is not a prohibited clause in granting interest by the Arbitrators in Madnani's Case (Supra 4).

21. It is further stated that Clause 16(1) deals with various deposits in percentage wise deductions from the Contractors "on account" bills with a proviso that in case of defaulting contractor, the appellants (Railways) may retain any amount due for the payment to the contractor on the pending "on account bills", which may not exceed 10% of the total value of the contract and it is not the case of the appellants that the 1st respondent herein is a default Contractor as the specific case of the 1st respondent is, that extra works admittedly got executed by the appellants way-back in the year 1997 which were not contemplated in the contract for which payments were not made and sought for payment. It is stated that there is a clear finding in the award that for the extra works, which were not contemplated in the contract, admittedly, done, for which no payment was made, the claim was allowed and even on passing of the award, the appellants, without any demure, have released payments for the extra works got executed, but contested the award so far as grant of interest by the Arbitrator is concerned relying on Clause 16 of GCC, which is inapplicable to the facts of the case.

22. It is also stated that this Court ought to have seen that the said Clause is contrary to Interest Clause 1998, which is invariably applicable, and it is well known principle of law that there cannot be any estoppel against the statute. It is contended that the Railway Board's Letter No. 78/WI/CT/38 (Rev.Com. dt. 21-10-1979), addressed to General Manager/All Indian Railway, opined that if the proceedings relate to the debt or damages has been payable by virtue of a written instrument or by the person making the claim, interest is awardable in the manner provided in Section 3 of the Interest Act, 1978, and that the

provisions of Section 5 of the Interest Act makes the provision of Section 34 of Code of Civil Procedure, 1908 applicable, as a result of which, Arbitrator is also competent to award interest for the period during arbitration proceedings have lasted.

23. It is stated that despite a provision in the GCC (16.2 of GCC), if a notice is given by the 1st respondent claiming interest on the date on which the amount is payable/refundable, but which is denied by the Railway Administration, and the matter is thereafter, referred to arbitration, a claim for interest may be tenable in view of Section 3 of the Interest Act. It is stated that when the appellants have accepted the award and have not contested the same and paid the principal amount towards extra work as awarded by the Arbitrator, they are estopped in saying that the 1st respondent is not entitled to claim interest on the amount awarded by the Arbitrator from the date of contract.

24. Heard Sri K. Prabhaker, learned counsel for the 1st respondent (review petitioner - Contractor), and Smt. C.V. Vinitha Reddy, learned counsel for the appellants (Railways).

25. Learned counsel for the 1st respondent contends that the interest awarded by the Arbitrator relates to the additional work executed by the 1st respondent and, therefore, the same does not constitute integral part of the contract covered by the agreement, dated 21-02-1997. It is his submission that the time stipulated for completion of the work was three months from the date of letter of acceptance, but the work was continued even after the stipulated time i.e., beyond 31-07-1997, which was accepted by the appellants while paying the bills submitted by the 1st respondent by way of making endorsements on them to the effect that the work was satisfactorily executed and it is not the case of the appellants that the 1st respondent did not execute extra work and that the correspondence between the parties shows that the nature of additional work was, admittedly, not indicated in the agreement and when execution of work was rightly accepted by the appellants, the inference is that the said extra work done by the 1st respondent was only with the full knowledge of the appellants, as no objection at all was raised at any point of time, and that that silence of the appellants, invariably, suggests that there was acceptance on its part for execution of the said extra work and when it derived additional benefit, it is not open for the appellants to claim that the 1st respondent is not entitled to claim any additional amount towards the extra work, and, therefore, awarding interest on the sums granted towards extra work cannot be brought within the fold of the bar indicated by Clause 16.2 of the GCC.

26. It is also the submission of the learned counsel for the 1st respondent that Clause 64(5) of GCC enforced from December, 1998 was specifically introduced stating that where the arbitral award is for payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made and in the absence of a similar Clause in its predecessor GCC, makes it very clear that the appellants never intended to

incorporate an embargo in awarding interest till the date of passing of award by the Arbitral Tribunal. It is, therefore, his submission that awarding interest by the Arbitrator for both, pre-reference and pendente lite, periods and the order of the Court below confirming the same cannot be faulted. Thus, the learned counsel supports the award passed by the Arbitrator.

27. Learned counsel also placed reliance on the decisions in Engineers-De. Space-Age's Case (Supra 5) and Madnani's Case (Supra 4), besides contending that since works executed by the 1st respondent are additional works, the power of the Arbitrator in awarding interest for pre-reference and pendente lite periods cannot be termed as without jurisdiction.

28. Learned counsel for the appellants submits that Clause 16(2) of GCC and even 16(3) of GCC expressly prohibit awarding of interest and also the subsequent GCC of 1998, and therefore, awarding interest by the Arbitrator is contrary to the terms of GCC and also contrary to law. Learned counsel, to fortify his stand, placed reliance on the decisions of Hon'ble Supreme Court in S.K.A. Constructions (Supra 1), Krafers' Case (Supra 2), Tehri Hydro Dev. Corporation Ltd. and Another Vs. Jai Prakash Asso. Ltd., and a judgment of a Division Bench of this Court in Kotaiah's Case (Supra 3).

29. The learned counsel has drawn our attention to the relevant observations of the Hon'ble Supreme Court contained in the above decisions and submits that when there is an express bar for awarding interest in the agreement mutually agreed upon by the parties, awarding interest for pre-reference and pendente lite periods by the Arbitrator and confirming the same by the Court below is unsustainable.

30. Perused the award passed by the Arbitrator, the order of the Court below and the material on record.

31. In our view, the resolution of the entire controversy rests on the following two main points that require determination:

"(1) Whether the works executed by the 1st respondent termed as additional or extra works fall outside the contract entered into by the parties?

(2) Whether the Contract between the parties contains an express bar regarding award of interest, and, if so, whether the Arbitral Tribunal was justified in awarding interest for the period between the date of cause of action and the date of award?"

POINT No. 1:

32. We have referred to in the above that the contract includes,

"1. Provision of pile foundations for piers P-I to P-13 for MBG loading,

2. providing pile caps over the piles for supporting the already completed jacketing, and

3. Carrying out routine pile load tests, of Schedule - A of the agreement."

33. At the time of execution of the said works, the 1st respondent addressed a letter to the Chief Engineer, dated 25-04-1997, that while driving the piles, number of materials like boulders, old dismantled bed blocks, steel plates, sheets and rails were coming in the way and due to the said reason, chisels were getting damaged and progress in the work has become very slow and that a detailed report regarding additional work done by it would be submitted soon. He was advised by the Chief Engineer to route the correspondence in connection with execution of works to the Field Officer concerned i.e., Deputy Chief Engineer/C/ Bijapur. The 1st respondent again represented to the Field Officer by the letter, dated 07-06-1997, mentioning therein that Schedule - A of the agreement stipulates that while executing works, they were expected to meet with some boulders and bed-blocks at various depths which they have to break to clear way for driving liners of piles, for which no additional charges would be paid and the said condition was taken note of while quoting their minimum workable rates, but for their misfortune, they rarely met with boulders and bed-blocks, but, on the contrary, they had to face with several obstructions while driving piles like discarded rails, wooden and iron sleepers, sheets, steel girders etc., at various depths. The 1st respondent also mentioned that while boulders and bed-blocks could be broken using heavy chisel and bailed out without removing the liner, all other obstructions viz., iron, steel and wooden items had to be taken out by deploying proclain only, on removal of liner every time an obstruction is met with and since the said obstructions were met with at various depths, the chisels used for boring, which were costlier, got damaged, besides removal of liners and other obstructions and redoing the same work, taxed it very heavily and it had to incur more than double the cost quoted by it, which was neither contemplated nor was any indication given in the tender documents about such obstructions. Therefore, the 1st respondent has claimed additional rates for the alleged extra works involved and obstructions removed other than those indicated in Schedule - A of the agreement under each pile, which are thus:

"1. 0/0 M to 2/0 M level from ground level Rs. 19,800/- per RMT,

2. Additional 10% increase in rate for every 1 RMT increase in depth of boring above Item-1."

34. Thus, according to the first respondent Claim - 1(a) relates to the alleged extra work got executed by the Department and Claim -1 (b) relates to additional charges over and above the claim under Item 1(a) for extra depth beyond 2 meters at the rate of 10% extra running meter, and Claim - 2 relates to incurrence of establishment charges during the prolonged period of completion of work.

35. The Arbitrator acceded to the plea of the 1st respondent and treated the works projected by the Contractor, as extra work, which constitutes subject of Claim - 1(a) and held that the amount of Rs. 36,63,000/- claimed was towards

non-payment of amount due towards extra works got executed by the appellants.

36. We would like to mention, at this stage, that the 1st and 2nd items among the three (3) items mentioned by the 1st respondent, covered by Schedule - A of the agreement among other items, include the works now claimed as additional work carried out by the 1st respondent. It is no doubt true, that the variation statement originally filed, does not contain reference to the subject of Claims - 1(a) and 1(b), but that cannot be a ground to construe automatically, the work carried out by the 1st respondent was extra work or additional work. In fact, removal of obstructions at various depths falls within the stipulation that while executing the work, the 1st respondent was expected to meet with the obstructions at various depths, which finds place as one of the stipulations in Schedule - A of the agreement. Therefore, it is difficult to construe that the removal of obstructions such as iron, steel and wooden items at various depths, fall outside the works specified under Schedule - A of the agreement as sought to be viewed by the 1st respondent. For execution of remaining pan of work, removal of obstructions is absolutely indispensable. That has been the reason, in our view, that the work, which the 1st respondent now sought to treat as additional work or extra work cannot be construed as either extra or additional work and in our view, it constitutes integral part of the contract. Therefore, the amount claimed under Claims - 1(a) and 1(b), the same can be viewed as the 1st respondent, had to incur in complying with the stipulation under Schedule - A of GCC, but cannot be treated, as an independent work falling out side the purview of the GCC entered in to by the parties. The Arbitral Tribunal, somehow, viewed that the said work was extra work executed by the 1st respondent by facing all the hurdles and that the agreement does not indicate the said extra work, which finding recorded by it, in our view, is incorrect.

37. Therefore, we have no hesitation in holding this point against the 1st respondent observing that the works executed by the 1st respondent for the claims laid for Rs. 36,63,000/- under Claim 1(a) and Rs. 2,21,344/- under claim 1(b) of GCC cannot be construed as an additional or extra work falling outside the contract entered into by the parties since as held by us in the above, carrying out the said work is sine qua non to execute the work under the contract.

POINT No. 2;

38. The main ground on which S.L.P. was withdrawn by the 1st respondent by seeking permission is, that this Court did not consider the judgment of the Hon"ble Apex Court in Madnani's Case (Supra 4).

39. Learned counsel for the 1st respondent submits that the Arbitrator's power to grant interest is not curtailed either by Clause 16(2) of GCC or Clause 30 of SGC and that by virtue of Section 3(3)(a)(ii) of the Interest Act, the applicability of Section 3 of the Interest Act is excluded in relation to any debt or damages upon which payment of interest is barred by virtue of an express agreement and in that view of the matter, Clauses 16(2) and 30 of GCC and SCC, respectively,

do not restrict the power of the Arbitrator to award interest from the date of cause of action.

40. It is in the said context, the learned counsel placed reliance on Madnani's Case (Supra 4). Agreement in that case was entered into on 03-11-1981 between the Railways and the appellant therein for construction of Bridge Islands Nos. 13 and 14 over Kosi River.

41. Clause 16(2) GCC was considered by the Hon''ble Supreme Court and referring to the decision of the Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, , and to yet another decision of the Constitution Bench in Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa, Vs. N.C. Budharaj (Dead) by Lrs. etc. etc., , held that Clause 16(2) of GCC and Clause 30 of SCC do not contain any prohibition on the Arbitrator to grant interest from the date of cause of action.

42. Learned counsel for the appellants submits that the ratio laid down in Madnani's Case (Supra 4), was considered by the Hon''ble Supreme Court in Krafters' Case (Supra 2), and the Hon''ble Supreme Court referring to its earlier decision in S.K.A. Constructions' Case (Supra 1), wherein the Hon''ble Supreme Court held that the decisions in Engineers-De. Space-Age's Case (Supra 5) and Madnani's Case (Supra 4) were inapplicable, for the reasons, firstly, that the decision in Madnani's Case (Supra 4) relates to a case under the old Act and that the Hon''ble Supreme Court did not independently consider the issue, but, merely, relied upon the decision in Engineers-De. Space-Age's Case (Supra 5) wherein the Arbitrator had awarded interest for the pendent elite period, which was upheld by the Apex Court on the ground that under the old Act, the Arbitrator had discretion to decide whether the interest should be awarded or not during the pendent elite period and he was not bound by the contractual terms so far as the interest for the pendent elite period, but, in the decision in Krafters' Case (Supra 2), held that the Arbitral Tribunal itself has refused to award interest for the pendent elite period and expressing that when the Arbitral Tribunal has exercised its jurisdiction and refused award of interest for the pendent elite period, even if the principles in the decisions in Engineers-De. Space-Age's Case (Supra 5) and Madnani's Case (Supra 4), were applicable, the award of the Arbitrator could not be interfered with, and, thus, on that ground also the decision in both these cases were held inapplicable, and, thus observing, the Hon''ble Supreme Court reiterated that where the parties have agreed that no interest shall be payable, the Arbitrator, cannot award interest for the amounts payable to the 1st respondent under the contract and where the agreement does not prohibit grant of interest and where a party claims interest and the said dispute is referred to the Arbitrator, he shall have the power to award interest for the pendent elite period.

43. It is, therefore, his submission that when there is an express bar regarding interest contained in the contract, granting interest from the date of cause of action by the Arbitral Tribunal is not tenable and so also the order of the Civil

Court confirming the same under Section 34 of the Arbitration Act.

44. In the same context, the learned counsel also placed reliance on the decisions in Tehri's Case (Supra 6) and Union of India (UOI) Vs. Concrete Products and Const. Co. Etc., to fortify his submission as to prohibition to award interest in view of the bar contained in the provisions of the contract and the decision of this Court in Kotaiah's Case (Supra 3).

45. For resolution of the controversy involved in the instant point, Clause 16 of GCC attains great significance in the light of the contentions raised by the learned counsel on either side and on the decisions of the Hon'ble Supreme Court afore-referred to.

46. Clause 16(1) of GCC deals with earnest money and security deposits. Whereas, Clause 16(2) (Old GCC) or 16(3) (modified GCC) is a prohibitory clause putting an embargo for payment of interest not only upon the earnest money or the security deposit but also on the amounts payable to the contractor under the contract. For better appreciation, we would like to extract Clause 16.2 of GCC, which reads, thus:

"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."

Thus, sub-clause (2) of Clause 16 of GCC, not only bars payment of interest upon the earnest money or the security deposit, but also on the amounts payable to the contractor under the contract. Whereas, sub-clause (1) of Clause 16 of GCC refers to the earnest money to be deposited by the contractor and the security deposit when the value is Rs. 1.00 lakh at 10%, more than Rs. 1.00 lakh and upto Rs. 2.00 lakhs at 10% of the first rupees one lakh and 7.5% on the balance and if the contracts costing more than rupees two lakhs, then at 10% of first rupees one lakh and 7.5% of the next one lakh and 5% of the balance subject to a maximum of rupees one and half lakhs. Though, sub-clause (I) of Clause 16 of GCC does not include the words "amounts payable to the contractor under the contract", still, so far as prohibition to pay interest contained in sub-clause (2) of Clause 16 of GCC includes payment of amounts to the contractor for the said works.

47. The submission of the learned counsel for the 1st respondent that the bar contained in sub-clause (2) of Clause 16 of GCC concerns with earnest money and security deposit alone is, therefore, without any merit.

48. We, now intend to initially refer to the principles laid down in Krafters' Case (Supra 2). In the said decision, the Hon'ble Supreme Court had an occasion to comprehensively consider the earlier decisions rendered in Engineers-De. Space-Age's Case (Supra 5), Madnani's Case (Supra 4), G.C. Roy's Case (Supra 7), Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and

Others, , N.C. Bhdharaj's (Supra 8), and Sayeed Ahmed and Co. Vs. State of U.P. and Others, . Touching facts in Krafter's Case (Supra 2), the agreement was entered into on 16-05-1988. When certain disputes arose between the parties, for resolution, the High Court of Judicature at Bombay directed the General Manager of the South Central Railway to appoint an Arbitrator and refer the disputes for adjudication. Since the Arbitrator appointed could not deliberate the matter within the time limit, the respondent therein invoked the jurisdiction of the Umpire and that the Umpire by his order gave award for certain claims and rejected the other claims. Challenging the said award, appellant herein filed arbitration petition before the High Court and the same was dismissed by the learned Single Judge of the High Court. Aggrieved of the same, an arbitration appeal was preferred before the Division Bench, in which, the appellant was also unsuccessful. Challenging the said judgment, the appeal by Special Leave was preferred before the Hon''ble Supreme Court. The controversy relates to award of interest granted by the Arbitrator and confirmed by the High Court. In that view of the matter, the Hon''ble Supreme Court was considering the only point as to whether the Arbitrator has jurisdiction to grant interest despite the agreement prohibiting the same. In the contract therein, Clause 1.15 deals with interest on amounts, which is a replica of Clause 16(2) of GCC in the instant case. For better appreciation, we would like to extract Clause 1.15. It reads as under:

"1.15 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 clause 1.14.4 will be re-payable with interest accrued thereon."

49. The Hon''ble Supreme Court while considering the decisions in Engineers-De. Space-Age's Case (Supra 5) and Madnani's Case (Surpa 4), on which reliance was placed by the learned counsel for the respondent therein, observed in paragraph No. 6, thus:

""6. We have already extracted the relevant clause wherein the words ""amounts payable to the Contractor under the contract" are of paramount importance. If there is no prohibition in the arbitration agreement to exclude the jurisdiction of the arbitrator to entertain a claim for interest on the amount due under the contract, the arbitrator is free to consider and award interest in respect of the period. If there is a prohibition in the agreement to pay the interest, in that event, the arbitrator cannot grant the interest. Clause 1.15 prohibits payment of interest on the amount payable to the contractor under the contract."

Thereafter, the Hon''ble Supreme Court having considered various decisions in G.C. Roy's Case (Supra 7), N.C. Budharaj's Case (Supra 8), Union of India (UOI) Vs. Saraswat Trading Agency and Others, and considering the reasoning given in Madnani's Case (Supra 4), held in paragraph No. 13, thus:

"Inasmuch as we have already expressed similar view as mentioned above and conveyed our inability to apply the reasoning in Madnani Construction

Corporation (P) Ltd. Vs. Union of India (UOI) and Others, , we fully endorse the view expressed in Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager (Works), Palghat and Others, .

The Hon''ble Supreme Court recorded the conclusion in paragraph No. 14, thus:

"14. In the light of the above discussion, following conclusion emerges:

Reliance based on the ratio in Board of Trustees for the Port of Calcutta (supra) is unacceptable since the said view has been overruled in Sayeed Ahmed and Company (supra) and insofar as the ratio in Madnani Construction Corporation Private Limited (supra) which is also unacceptable for the reasons mentioned in the earlier paras, we reject the stand taken by the counsel for the respondent. On the other hand, we fully accept the stand of the Union of India as rightly projected by Mr. A.S. Chandhiok, learned ASG. We reiterate that where the parties had agreed that no interest shall be payable, the arbitrator cannot award interest for the amounts payable to the contractor under the contract. Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and the said dispute is referred to the arbitrator, he shall have the power to award interest pendent elite. As observed by the Constitution Bench in Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, , in such a case, it must be presumed that interest was an implied term of the agreement between the parties. However, this does not mean that in every case, the arbitrator should necessarily award interest pendente lite. In the subsequent decision of the Constitution Bench, i.e., N.C. Budharaj's case (supra), it has been reiterated that in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest, the arbitrator is free to award interest."

50. Thus, having laid down the principle contained in paragraph No. 14, afore-extracted, the Hon''ble Supreme Court, held that in view of the specific prohibition of contract contained in Clause 1.15, arbitrator ceases to have the power to grant interest. The Hon''ble Supreme Court also clarified that since the Arbitration Act, 1940 does not contain any specific provision relating to the power of arbitrator to award interest, though, the Arbitration Act contains a specific provision with regard to award of interest by the Arbitrator, the bar under Clause 1.15 is absolute and interest cannot be awarded without re-writing the contract.

51. Since we held on point No. 1 that the amounts claimed for the works executed by the 1st respondent cannot be construed as either additional or extra works and they were the works executed under the contract and since there is a specific prohibition of contract to award interest contained in Clause 16(2)(Old) or 16(3)(Modified) Conditions, which are replica of Clause 1.15 in Krafert's Case (Supra 2), as held by the Hon''ble Supreme Court, the Arbitrator herein ceases to have the power to grant interest.

52. In the decision in Tehri's Case (Supra 6), relied on by the learned counsel for

the appellants, the facts would reveal that the agreement between the parties was executed on 29-03-1978 and when a dispute arose, the parties went to arbitration and award was passed on 29-01-1996, holding the respondent - Contractor therein to be entitled to a sum of Rs. 10,17,461/- with interest at 6% per annum from the date of notification of the claim till the date of award, and at 12% per annum from the date of award till payment or till the award is made Rule of Court, whichever is earlier.

53. Clauses 1.2.14 and 1.2.15 of conditions of contract under part - 2 therein contain prohibition to claim interest. The Hon"ble Supreme Court having considered the decisions in State of Orissa Vs. B.N. Agarwalla, etc., and Engineers-De. Space-Age"s Case (Supra 5), while holding that grant of pendente lite interest is not justified, concluded in paragraph No. 16, thus:

"17. Clauses 1.2.14 and 1.2.15, already extracted and analysed, imposed a clear bar on either entertainment or payment of interest in any situation of non-payment or delayed payment of either the amounts due for work done or lying in security deposit. On the basis of the discussions that have preceded we, therefore, take the view that the grant of pendente lite interest on the claim of Rs. 10,17,461 is not justified. The award as well as the orders of the courts below are accordingly modified to the aforesaid extent."

54. In the decision in Concrete Products" Case (Supra 9), relied on by the learned counsel for the appellants, in the context of Arbitrator"s jurisdiction to award interest where there has been prohibition in the contract, the Hon"ble Supreme Court referring to the decisions in Sayeed Ahmed"s Case (Supra 11) and S.K.A. Constructions" Case (Supra 1), while holding that the Arbitrator could not have awarded any interest from the date when the recovery was made till the award was made and the interest would have been payable from the date when the award was made till the amount was deposited in the High Court and thereafter, converted to Fixed Deposit Receipts held in paragraph Nos. 19 and 20, thus:

"19. We are of the opinion that the sole arbitrator in awarding interest to the contractors has failed to take into account the provisions contained in the aforesaid two clauses. We find merit in the submission made by the learned Additional Solicitor General that award of interest at least from the date when the amount was deposited in the Court was wholly unwarranted. Therefore, the High Court as well as the arbitrator, in our opinion, have committed an error of jurisdiction in this respect. This view of ours will find support from the judgment of this Court in Sayeed Ahmed & Co., wherein it has been held as follows: (SCC p.33, para 16)

"16. In view of clause (a) of sub-section (7) of Section 31 of the Act, it is clear that the arbitrator could not have awarded interest up to the date of the award, as the agreement between the parties barred payment of interest. The bar against award of interest would operate not only during the pre-reference period,

that is, up to 13-3-1997 but also during the pendente lite period, that is, from 14-3-1997 to 31-7-2001."

20. This view has been reiterated by this Court in Sree Kamatchi Amman Constructions, wherein it has been held as follows: (SCC p.774, para 19)

"19. Section 37(1) of the new Act by using the words "unless otherwise agreed by the parties" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to the date of award. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest between the date when the cause of action arose to the date of award."

Thus, having extracted Clause 16(2) of GCC, the Hon'ble Supreme Court acceded to the submission of the learned counsel for the appellants, holding that the Arbitral Tribunal cannot award interest from the date of cause of action till the date of payment on the amount awarded. The learned counsel therein placed reliance on S.K.A. Constructions" Case (Supra 1) and Krafter"s Case (Supra 2). In view of the aforesaid decisions of the Hon'ble Supreme Court, relied on by the learned counsel for the appellants, we have no hesitation in reaching to inevitable conclusion that the Arbitral Tribunal has no jurisdiction to award interest from the date of cause of action.

55. Even the submission of the learned counsel for the 1st respondent that GCC of December, 1998, contain a specific prohibitory clause in Clause 64.5, reading thus;

"64.5 Where the arbitral award is for the payment of the money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made."

would make it abundantly clear, in view of conspicuous absence of a similar clause in predecessor GCC in force when the agreement was entered into by inference that the power of Arbitral Tribunal was not curtailed, does not assist the claim of the 1st respondent to interest, pre-reference and pendente lite, in view of the principle as to bar to award interest laid down by the Hon'ble Supreme Court in the line of decisions referred to hereinbefore and in the presence of prohibition contained in clause 16(2)(Old) and 16(3)(Modified) GCCs which are similar and identical.

56. The order under challenge in C.M.A. No. 1044 of 2012 rendered by the III Additional Chief Judge, City Civil Court, Hyderabad, in O.P. No. 1621 of 2007 reflects that the petition was filed under Section 34 of the Arbitration and Conciliation Act, 1996. Thus, the challenge is under the new Arbitration Act. Sub-section (7) of Section 31 of the new Arbitration Act, by using the words "unless otherwise agreed by the parties", specifically provides that the Arbitrator is bound by the terms of the contract insofar as award of interest from the date of cause of action to the date of award, and as already referred to in the above,

since in S.K.A. Constructions" Case (Supra 1), the Hon"ble Supreme Court held that where the parties have agreed that no interest shall be payable, arbitral Tribunal cannot award interest between the date when the cause of action arose and the date of award and the said principle has been reiterated by the Hon"ble Supreme Court including the Constitution Bench in Hydro Development Corporations Case (Supra 6) and later in Concrete Products Case (Supra 9), we are of the considered view, that the bar contained in 16(2)(Old) and 16(3) (Modified in 1998) General Conditions of Contract is absolute, and consequently, the 1st respondent disentitled to make claim for interest for the pre-reference and pendente lite periods.

57. For the reasons recorded hereinabove, we find no merit in this review petition and the same is, accordingly, dismissed.