

IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 631 of 2010

Union of India

Versus

Ajanta Enterprises

Mr. Ajay Chaubey

Mr. Shailendra Tiwari

.....Union of India

Ms. Supriya Bose

Ms. Kum Kum Das

.....For the respondent

Heard on : 15.06.2022, 27.06.2022, 06.07.2022 & 13.07.2022

Judgment on : 30.08.2022

Krishna Rao, J.:

This is an application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Award passed by the Ld. Sole Arbitrator dt. 13th July, 2010. The respondent being the successful bidder entered into a Contract No. 205 dt. 14th December, 1995 for supply and delivery of stone Ballast and to loading into wagon of Nimdih Depot of Adra Division. As per contract, the stipulation date of completion was 12 months

with effect from 28th November, 1995. The estimated cost of the said work was 53,25,000/- and the value of the contract on the basis of the rate agreed by the respondent was Rs. 56,22,750/-. The respondent had supplied ballast during the 1st quarter but the respondent could not supply 7500 cum of stone ballast within 2nd quarter i.e. in between 28th February, 1996 and 27th May, 1996 and only 6851.89 cum of stone ballast was supplied. The respondent had applied for extension of time for supply of balance 2nd quarter till 27th November, 1996 but the petitioners have not taken any decision and finding no other alternative the respondent had stopped the work from 28th November, 1996 and finally the petitioners have terminated the contract on 31st March, 1997.

As the petitioners have withheld the amount of Rs. 66,425/- and also instead of extending the time for supply of balance quantity of stone ballast have terminated the contract, the respondent has invoked the provision of appointment of Arbitrator. The petitioners have not appointed an arbitrator as per the request made by the respondent and accordingly the respondent had approached this Court for appointment of Arbitrator and an Arbitrator was appointed.

On 30th May, 2002, the Ld. Sole Arbitrator had published an award in favor of the respondent by rejecting the counter claim made by the petitioner. Being aggrieved with the Award dt. 30th May, 2002, the petitioners have preferred an application under Section 34 of the Arbitration and Conciliation Act, 1996 before this Court being AP No. 273 of 2002 and

the said application was disposed of on 18th February, 2009 by passing the following order:

“Mr. Mukherjee pointed out that the respondent closed its evidence at the 26th sitting, held on 19th September, 2001. On that day, the sitting scheduled for 9th October, 2001 was cancelled by mutual consent. Next sitting were fixed on 8th October, 2001, 9th October 2001 and 11th October, 2001. However, at the 29th sitting on 11th October, 2001, the learned Arbitrator recorded as follows:

“Mr. Sanjeeb Kumar for the Respondent submits that due to an accident he could not be present at the last sitting for deposition and prays for an opportunity to be given to him for deposition. Hearing his submissions the Arbitrator views that Mr. Sanjeeb Kumar has no personal knowledge of the case, nor he was present at the site at the material time and whatever evidence he would be given would be on the basis of record and hearsay. So no useful purpose will be served by giving an opportunity to depose in the matter. The railways were given ample opportunity to call for witness. So his prayer is not acceptable. Whatever is admitted on record and admitted by both the parties the Arbitrator will take cognizance of such records.”

There appears to have been an explanation for the inability of the petitioner to appear on 8th October, 2001. Having regard to the enormity of the counter claim, opportunity ought to have been given to the witness. I am thus inclined to accept Mr. Mukherjee’s submission that the learned arbitrator has pre-judged the admissibility of evidence, even before the evidence was tendered. In the process the learned Arbitrator denied the petitioner, equal opportunity to contest the claim of the petitioner as also to press its counter claim.

The entire award is thus set aside and the disputes are remitted back to the learned arbitrator for adjudication. The learned Arbitrator shall decide the disputes afresh, after giving the respondent an opportunity to adduce oral evidence. Having regard to the fact that the reference has been pending for long, the arbitrator is requested to decide the reference expeditiously, preferably within 4 months from the date of receipt of a copy of this judgment. The arbitrator may either conduct the proceedings de novo or from the stage at which the evidence of the respondent was closed.”

In terms of the order passed by this Court in AP No. 273 of 2002, the Ld. Sole Arbitrator had started the proceeding from the stage at which evidence was closed and an opportunity was given to the petitioner to

produce their witnesses in support of their counter claim and also given an opportunity to both the parties to produce documents if any for support of their respective claims. The petitioners failed to adduce any witness in support of their counter claim and accordingly on 13th July, 2010, the Ld. Arbitrator has passed the following Award :

“13. This being the position, I find there is no reason whatsoever shown and/or established, for the Arbitrator to differ from the earlier reasons recorded in the earlier Award dated 30th May 2001 and for the sake of brevity I repeat and reiterate the same as deemed to be incorporated in this judgment. The several claims of the claimant are accordingly re-affirmed and awarded once again as follows:-

Claim No. 1

for loss of profit or value or unexecuted portion of contract. The claimant entitled to loss of expected profit on the value of the unexecuted portion of the contract as for no fault of Claimant contractor the agreement wrongfully terminated. The ratio of the judgment cited by learned lawyer of the Claimant (A.I. Brijlal Singh vs. State of Gujrat : AIR 1984 S.C. 1703 – namely that where contractor prevented from executing certain portion of the contract for reasons attributable to department, the Contractor would be entitled to be compensated on account of the profit he could have earned by executing the job, and the percentage of compensation payable would vary from 10% to 15% and the Court or Arbitrator would be at liberty to fix the percentage of profit considering the facts and circumstances of a particular case. In the present Arbitration proceedings noting the facts of the case that the value of the contract was Rs. 56,22,750/- whereas the Claimant was able to execute works for only Rs. 15,32,351/- and the value of the unexecuted work was Rs. 40,90,389/- and the contract terminated by the Respondent wrongfully, I held that claim under this head is certainly admissible but not the amount claimed. I hold that a percentage of 6% on the executed portion of the value of the unfinished works of Rs. 40,90,389/- would be a reasonable amount to award as measure of damages, as it appear that the shortfall for the 2nd quarter was not due to any laches on the part of the Respondent either, as recorded in the Respondent's note and correspondence and not contradicted by the Claimant. I accordingly award on this amount Rs. 2,45,423.34p. being 6% of the value of the unfinished works and this sum awarded in the facts of the case is reasonable.

Claim No. 2:

With regard to this claim for withholding by the Department in view of my findings stated above I hold the deductions and withholding of Rs. 66,425/- is the patently wrongful. The Respondent's letter dated 31st October 2000 record "to be kept as per agreement provision if penalty is waived off." Admittedly no penalty imposed upon the Claimant at any stage and thus the Claimant entitled to an award for Rs. 66,425/-.

Claim No. 3:

For Rs. 1,50,000/- being amount of refund kept in deposit towards security in respect of instant work. Admittedly a F.D.R. for Rs. 50,000/- dated 5th August 1995 submitted with tender (vide letter of intent dated 28th November 1995, and Rs. 1,00,000/- in all i.e. Rs. 52,806/- deducted from 1st Account Bill, Rs. 39,614/- from the 2nd O/A Bill and Rs. 7,580/- from 3rd O/S Bill totaling Rs. 1,00,000/- as appears from A-1 and not disputed (C/34) – deducted from progressive bills of the Claimant Contractor (vide Q. 162 and 163 of Claimant. This amount is thus refundable, and I award a sum of Rs. 1,50,000/- accordingly on this account.

Claim No. 4:

Rs. 3,55,500/- on account of works executed but not recorded and not paid for by the Department, as per details enclosed with page 2 of Annexure 'B' of Statement of Claim. This claim appears to be for the cost of ballast lying at the quarry in respect of unexecuted supply of some ballast made ready at the quarry but could not be transported to Depot due to failure of the Respondent for allotting stacking space (vide minutes of 34th sitting held on 22nd November 2001 at page 4 where arguments recorded). It is the case of the Claimant that Mr. S. S. Bisit (Assistant Engineer) visited quarry along with the Claimant P.K. Agarwalla where stone ballast lying (vide arguments recorded in minutes of 30th sitting) and also answer to Q.84 – Agarwalla. It is admitted by the Respondent not only in its contemporaneous documents and also arguments made on its behalf (vide minutes of 38th sitting held on 18th February 2002) that the Respondent's Assistant Engineer Mr. Bisit had inspected quarry and it is admitted that 3000 cum stone ballast lying at quarry. In the face of this admission while I do not accept the entire claim made of Rs. 3,55,500/- as the same is not established by cogent and/or satisfactory evidence, at the same time the submission on behalf of the Railways that stone ballast lying at the quarry has no relevance is not acceptable to me, as the case of the Claimant has been that he had made advances to quarry owners for the ballast which was kept lying at quarry but could not be transported to

the Nimdih Depot for lack of stacking space. As such, admittedly if the Respondent's Assistant Engineer Mr. Bisit had inspected the quarry and found 3000 cum lying at site which he did – the value of the same at Rs. 95/- per cum must be paid for. The case in arguments on behalf of the Respondent that the materials were not approved by Mr. Bisit is not acceptable to me as no body on behalf of the Railway took the responsibility of so depositing, and no witness produced on behalf of Respondent Railways at all. In fact C/23 Exhibit A-1 letter of claimant dated 12th August 1996 also record this fact and there can be no controversy thereon. I accordingly award a sum of Rs. 2,85,000/- for 3000 cum of ballast at Rs. 95/- per cum established to be stacked at the quarry, but the same could not be transported to site for lack of space, and I find the evidence of the Claimant on this point acceptable vide Exhibit 3 the Respondent's letter of 31st October 2000.

Claim No. 5:

For Rs. 85,000/- as compensation on account of amounts paid to six number of transporters who had remained idle from time to time due to reasons solely attributable to the Department. This claims I do not find to have been established by cogent and satisfactory evidence of any advance paid and hence rejected.

Claim No. 6:

For Rs. 1,95,000/- as unrealized sum on account of advances made to four number of quarry owners also rejected as I have already considered the claim made for 3000 cum ballast in Claim No. 4 and given my Award thereon.

Claim No. 7:

For compensation : Rs. 82,000/- for idle labour rejected as not proved by satisfactory and cogent evidence.

Claim No. 8:

For Rs. 2,00,000/- for loss of goodwill is not acceptable and not proved and hence rejected.

Re : Interest

I allow interest at the rate of 18% per annum on Claims Nos. 2, 3 and 4 only from 20th December 1996 till date of Award i.e. 12 July 2010 and thereafter at the same rate from July 13, 2010 till date of payment or full realization.

I also award costs to the Claimant for being unnecessarily dragged into the vexatious and frivolous limitation and for not having availed of the opportunity to depose as given by the Court.

Such costs assessed at Rs. 1,25,000/- (as awarded in the earlier Award) plus a further sum of Rs. 20,000/- for the last three sittings after Award remitted as back for adjudicating the same afresh, totaling Rs. 1,45,000/-. The lump sum payment of Rs. 1,45,000/- awarded after consideration of actual fees paid to Arbitrator and her staff as also fee paid to Claimant's lawyer. Such costs to be paid within three months from date of Award. No interest payable on costs awarded. The Counter Claim of the Respondent for lack of any evidence whatsoever is thus rejected in toto."

Mr. Ajay Choubey, Ld. Advocate representing the petitioner in support of the application under Section 34 of the Arbitration and Conciliation Act, 1996 has raised the following issues :

- (a) Ld. Arbitrator had no jurisdiction to decide the issue raised by the respondent in the statement of claim.,*
- (b) Ld. Arbitrator awarded interest on earnest money and security deposit in violation of clause 16(2) of the Agreement.*
- (c) Ld. Arbitrator awarded interest @18% without any basis and beyond the scope of Section 31(7)(a) of the Arbitration and Conciliation Act, 1996.*
- (d) Ld. Arbitrator awarded cost of Rs. 1,25,000/- for the last three sitting without any cogent and material evidence.*
- (e) Ld. Arbitrator rejected reference of Agreement no. 64 dt.30.04.1997 in complete violation of natural justice.*
- (f) Ld. Arbitrator awarded Rs. 66,425/- on non execution of work withheld by the respondent in complete violation of clause 62 (c) of he Contract.*
- (g) Ld. Arbitrator rejected counter claim violating the provision laid down in section 19 of the Arbitration and Conciliation Act, 1996.*
- (h) Ld. Arbitrator awarded Rs. 2,45,423.34 with respect of claim no.1 assessing 6% interest on the value of unexecuted portion of contract in violation of clause 67(a)(d) of the contract.*

Per contra, Ld. Counsel for the respondent submits that as regard the jurisdiction of the Arbitral Tribunal has already decided by this Court in the

earlier round of litigation in AP No. 273 of 2002 wherein the Coordinate Bench of this Court held that the Chief Justice is not obliged to appoint an Arbitrator with the qualification specified in the agreement. The legislature has, therefore, in its wisdom used the expression shall have due regard to. Had it been the intention of legislature that the Chief Justice would be bound by qualification specified in the agreement, the language of Section 11 would have been different. The Hon'ble Judge further held that there was no legal infirmity in appointing a retired High Court Judge, who was certainly not less competent than a Gazetted Railway Officer in any way, to act as Arbitrator.

The Counsel for the respondent submits that with regard to interest there is specific provision in Section 31 (7) (a) of the Arbitration and Conciliation Act, 1996 and as thus the Arbitrator has a jurisdiction to award interest.

The Counsel for the respondent further submits that it is upon the Arbitrator to award cost which is provided under law and thus the same cannot be questioned by way of an application under Section 34 of the Arbitration and Conciliation Act, 1996. The Counsel for the respondent further submits that in the earlier round of litigation, the petitioner has challenged the award with regard to violation of natural justice and accordingly the Coordinate Bench of this Court had set aside the award and remanded the matter to the Ld. Arbitrator and in terms of the award passed by this Court, the Ld. Sole Arbitrator had given an opportunity to the petitioner for adducing evidence but the petitioner failed to adduced the

evidence and thus the petitioner cannot urge with regard to violation of natural justice.

Ld. Counsel for the respondent further submits that the petitioner though made the counter claim but has failed to prove the counter claim by adducing any evidence and the Ld. Sole Arbitrator by considering the material facts and the submissions made by the parties had decided the issues and passed the award.

Ld. Counsel for the respondent further submits that the Ld. Sole Arbitrator had passed a reasoned order by considering all the materials available on record and thus the application filed by the petitioner is liable to be rejected.

Heard, the Ld. Counsel for the respective parties. Considered the documents available on record and the impugned award passed by the Ld. Sole Arbitrator dt. 13.07.2010. The main contention raised by the Ld. Counsel for the petitioner that the Ld. Arbitrator is not a Gazetted Officer of Indian Railway and is not qualified/competent to attribute the disputes between the parties in terms of Clauses 63 and 64 of the General Conditions of Contract.

To decide the issue raised by the petitioner, the extract of clause 63 and 64 of General Condition of Contract reads as follows:-

“63. MATTERS FINALLY DETERMINED BY THE RAILWAY: All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the Railway and the

Railway shall within a reasonable time after receipt of the contractor's presentation make and notify decisions on all matters referred to by the contractor in writing, provided that matters for which provision has been made in Clauses 18, 22(5), 39, 45(a), 55, 55-A(5), 61(2), and 62(1) (xiii), (B) (e) (b) of the General Conditions of contract or in any Clause of the special conditions of the contract shall be deemed as "excepted matters", and decisions thereon shall be final and binding on the contractor, provided further that "excepted matters" shall stand specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration.

64.(1)(i) DEMAND FOR ARBITRATION: In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within a reasonable time, then and in any such case, save the "excepted matters" referred to in clause 63 of these conditions, the contractor, after 90 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

(ii) The demand for arbitration shall specify the matters which are in question, dispute or difference. Only such dispute(s) or difference(s) in respect of which the demand has been made shall be referred to arbitration and other matters shall not be included in the reference.

(iii) If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Government that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.

64.(2) OBLIGATIONS DURING PENDENCY OF ARBITRATION: Work under the contract, shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be with-held on account of such proceedings provided however it shall be open for the arbitrator or arbitrators to consider and decide whether or such work should continue during arbitration proceedings.

64. (3)(a) ARBITRATION: Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to:-

3. (a) (i) A sole Arbitrator who shall be the General Manager or a Gazetted Railway Officer nominated by him in that behalf in cases where the claim in question is below Rs.5,00,000/- (Rupees five lakhs) and in cases where the issues involved are not of a complicated nature.

The General Manager shall be the sole Judge to decide whether or not the issues involved are of a complicated nature.

3. (a) (ii) Two Arbitrators who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid in Clause 64(3)(b) for all claims of Rs. 5,00,000/- (Rupees five lakhs) and above, and for all claims irrespective of the amount of value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole Judge to decide whether the issues involved are of a complicated nature or not. In the event of the two Arbitrators being divided in their opinions the matter under disputes will be referred to an Umpire to be appointed in the manner laid down in Clause 3. (b) for his decision.

3. (a)(iii) It is a term of this contract that no person other than a Gazetted Railway Officer, should act as an Arbitrator/Umpire and if for any reason, that is not possible, the matter is not to be referred to Arbitration at all.”

In the earlier proceeding when the petitioner has challenged the award passed by the Ld. Sole Arbitrator dt. 30.05.2002 in AP No. 273 of 2002, the petitioner has raised the similar issue and this Court while deciding the said issue held that : *“The Chief Justice is not obliged to appoint an Arbitrator with the qualification specified in the Agreement. The legislature, has therefore, in its wisdom used the expression ‘shall have due regard to’. Had it been the intention of the legislature that the Chief Justice would be bound by the qualifications specified in the agreement, the language of Section 11 would have been different. There was no legal infirmity in appointing a retired High Court Judge, who was certainly not less competent than a Gazetted Railway Officer in any way, to act as Arbitrator.*

Under Section 16 (2) of the 1996 Act, the plea that the Arbitral Tribunal did not have jurisdiction, was required to be raised not later than the submission of the statement of defense. This has not been done. The objection

was raised after several sittings, when the reference had made several progresses.

A party may not be precluded from raising objection to the jurisdiction of the Arbitrator merely on the ground of participation in the appointment of Arbitrator. That does not, however, mean that an Arbitrator can be challenged at any time, even after participation in the proceedings. Participation in the arbitration proceedings without raising any objection to the jurisdiction of the Arbitral Tribunal would, in my view, amount to submission to the jurisdiction of the Arbitral Tribunal.”

In support of the submission, the petitioner has relied upon the judgment reported in (2020) 2 SCC 464 (Union of India –vs- Pradeep Vinod Construction Company) wherein the Hon’ble Supreme Court held that :

“14. *It is seen from the above that under Clause 64(1) of GCC, if there is any dispute or differences between the parties or the respective rights and liabilities of the parties on any matter in question or any other ancillary dispute arising from the terms of the contract or if the Railway Administration fails to make a decision within the time stipulated thereon, then in any such case, but except in any of the “excepted matters”, the General Manager may nominate the officer by designation as referred to under Clauses 64(3)(a)(i) and a(ii) respectively with further procedure being prescribed for the sole arbitrator or the Arbitral Tribunal to adjudicate the dispute/differences arising under the terms of the contract between the parties.*

15. *In Union of India v. M.P. Gupta, Union of India v. V.S. Engg. (P) Ltd., Union of India v. Singh Builders Syndicate and in a catena of judgments, the Court held that whenever the agreement specifically provides for appointment of named arbitrators, the appointment of arbitrator should be in terms of the contract. After referring to M.P. Gupta, in V.S. Engg., it was held as under:-*

“3. The learned Additional Solicitor General appearing for the appellant Union of India has pointed out that as per Clauses 63 and 64 of the General Conditions of Contract, this Court in no uncertain terms has held that the Arbitral Tribunal has to be

constituted as per the General Conditions of Contract, the High Court should not interfere under [Section 11](#) of the Act and the High Court should accept the Arbitral Tribunal appointed by the General Manager, Railways. In this connection, the learned ASG invited our attention to a decision of this Court directly bearing on the subject in [Union of India v. M.P. Gupta](#) wherein a similar question with regard to appointment of the Arbitral Tribunal for the Railways with reference to Clause 64 of the General Conditions of Contract came up before this Court and this Court held that where two gazetted railway officers are appointed as the Arbitral Tribunal, the High Court should not appoint a retired Judge of the High Court as a sole arbitrator and the appointment of sole arbitrator was set aside. The conditions of Clauses 63 and 64 of the General Conditions of Contract are almost analogous to the one we have in our hand. In that case also relying on Clause 64 of the contract a three-Judge Bench presided over by the Chief Justice of India observed as follows: (SCC p. 505, para 4)

‘4. In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators, Justice P.K. Bahri could not be appointed by the High Court as the sole arbitrator. On this short ground alone, the judgment and order under challenge to the extent it appoints Justice P.K. Bahri as sole arbitrator is set aside. Within 30 days from today, the appellants herein shall appoint two gazetted railway officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months.’”

16. The Court in *V.S. Engg. case*, however observed in para 6 that in the case of public institutions which are slow in responding to the request made by the contractor for appointment of an arbitrator, the power of the High Court to appoint an arbitrator under [Section 11](#) is not taken away. The failure of the authorities in appointing an arbitrator and when the contractor approached the court for appointment of an arbitrator under [Section 11](#) of the Act, it will then be in the discretion of the Chief Justice/Designated Judge to appoint a railway officer as per the contract or a High Court Judge.

17. Considering the various matters of railway contracts and setting aside the appointment of independent arbitrators, after referring to [M.P. Gupta and V.S. Engg. case](#) and other judgments, in *Parmar Construction Co.*, this Court set aside the appointment of the independent arbitrator and directed the General Manager of the Railways to appoint arbitrator in terms of Clause 64(3) of the agreement. In paras 47 and 48, this Court held as under: (*Parmar Construction Co. case*, SCCp. 715)

“47. To conclude, in our considered view, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of an arbitrator which has been prescribed under Clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties.

48. Consequently, the orders 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 passed by the High Court are quashed and set aside. The Appellants are directed to appoint the arbitrator in terms of Clause 64(3) of the agreement within a period of one month from today under intimation to each of the respondents/contractors and since sufficient time has been consumed, at the first stage itself, in the appointment of an arbitrator and majority of the respondents being the petty contractors, the statement of claim be furnished by each of the respondents within four weeks thereafter and the arbitrator may decide the claim after affording opportunity of hearing to the parties expeditiously without being influenced/inhibited by the observations made independently in accordance with law.”

The ratio of the above decision squarely applies to the case in hand. When the agreement specifically provides for appointment of named arbitrators, the appointment should be in terms of the agreement. The High Court, in our view, was not right in appointing an independent arbitrator ignoring Clause 64 of the General Conditions of Contract.”

In the instant case, on the application filed by the respondent under Section 11 (6) of the 1996 Act for appointment of Arbitrator, the then Hon’ble Chief Justice of this Court appointed the Arbitrator. After the appointment of Arbitrator, the petitioner had participated in the arbitration proceeding before the Ld. Sole Arbitrator. The Ld. Arbitrator has passed an award and being aggrieved with the said award, the petitioner had preferred an application under Section 34 of the 1996 Act before this Court and this Court had set aside the award passed by the Ld. Sole Arbitrator and remanded the matter back to the Arbitrator for adjudication to decide the dispute afresh after giving an opportunity to the respondent to adduce oral

evidence. The petitioner had accepted the judgment passed by this Court in AP No. 273 of 2002 dt. 18.02.2009 and had participated in the de novo proceeding before the Ld. Arbitrator. Even in the second time also the petitioner has not raised any objection before the Ld. Arbitrator with regard to his jurisdiction.

The judgment referred by the petitioner is distinguishable as in the case of *Union of India –vs- Pradeep Vinod Construction Company (supra)*, the petitioner, the Union of India had challenged the order of appointment of Arbitrator but in the instant on the application filed by the respondent for appointment of Arbitrator, the then Chief Justice of this Court had appointed an Arbitrator. The petitioner has not challenged the order of appointment of Arbitrator and the petitioner had participated in the proceeding on two occasions and as such the judgment referred by the petitioner is not applicable in the instant case.

As regard the issue for awarding interest on earnest money and security deposit, Clause 16 (2) of the Agreement is required to be considered. Clause 16 (2) reads as follows:-

“16 (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.”*

The petitioner has raised the said issue before this Court on the earlier round of litigation being AP 273 of 2002 and while deciding the said issue, this Court held that : *“In view of the express provision of Section 31 (7) (a) of the 1996 Act, the interest can have no application to pendent lite interest*

in arbitral proceeding under 1996 Act. The provisions of the special statute will prevail over the provisions of general law relating to award of interest.”

In support of the submission, the Ld. Counsel for the petitioner had relied upon the judgment reported in (2022) 2 SCC 331 (Union of India –vs- Manraj Enterprises) wherein the Hon’ble Supreme Court held that :

“14. *The last submission made on behalf of the respondent is that as the learned counsel appearing on behalf of the appellant herein, before the High Court, conceded that the issue raised in the petition is covered by the judgment of this Court in Pradeep Vinod Construction Co. and that even the appellant has claimed interest @ 18% against the respondent-contractor, therefore it is not open for the appellant to re-agitate the issue before this Court is concerned, it is required to be noted that the concession if any by the counsel which is contrary to the law laid down by this Court shall not be binding on the parties. Further, merely because the appellant has claimed interest, does not imply that the contractor shall be entitled to interest pendente lite. Even if the appellant would have been awarded interest, the same also was not permissible and could have been a subject-matter of challenge. In short, there cannot be an estoppel against law.*

15. *In view of the aforesaid discussion and for the reasons stated above, we hold that the learned arbitrator in the instant case has erred in awarding pendente lite and future interest on the amount due and payable to the contractor under the contract in question and the same has been erroneously confirmed by the High Court.*

16. *Accordingly, the present appeal succeeds. The impugned judgment and order passed by the Division Bench of the High Court in an appeal under [Section 37](#) of the 1996 Act and the order passed by the learned Single Judge in an application under [Section 34](#) of the 1996 Act and the award passed by the learned Arbitral Tribunal awarding pendente lite and future interest on the amounts held to be due and payable to the contractor under the contract are hereby quashed and set aside. It is held that in view of specific bar contained in Clause 16(2) of the GCC, the contractor shall not be entitled to any interest pendente lite or future interest on the amounts due and payable to it under the contract.”*

In the present case, the Ld. Sole Arbitrator has passed an award allowing interest @ 18 % per annum on Claim nos. 2, 3 and 4 from 20.12.1996 till the date of award i.e. 12.07.2010 and thereafter at the same rate from 13.07.2010 till the date of payment or full realization. Claim no. 2 is with respect of the amount payable to the respondent contractor on account of the amount withheld by the petitioner. Claim no. 3 is with respect of Rs. 1,50,000/- being the amount of refund kept in deposit towards security. Claim no. 4 is with respect of the amount payable on account of work executed but not recorded. The Ld. Sole Arbitrator while passing the award has not considered the Clause 16 (2) of the Agreement which specifically provided that no interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract.

Section 31 (7) (a) of the 1996 Act which deals with the payments of interest is as under :

“31. (7) (a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the Arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.”

The words used in Clause 16 (2) is “or”. Therefore, the expression “amounts payable to the contractor under the contract” cannot be read in conjunction with “earnest money deposit” or “security deposit” by applying the principle of ejusdem generis. The expression “amounts payable to the

contractor under the contract” has to be read independently and disjunctively to earnest deposit or security deposit as the word used is “or” and not “and” between “*earnest money deposit*”, “*security deposit*” and “*amounts payable to the contractor under the contract*”. Therefore, the principle of ejusdem generis is not applicable in the present case.

The judgment relied by the petitioner is appropriately applicable in the instant case and thus the respondent is not entitled to get any interest on Rs. 1,50,000/- towards the amount of Security Deposit.

The Coordinate Bench of this Court vide Order dt. 18.02.2009 by setting aside the award had remanded the matter back to the Ld. Arbitrator for adjudication. In terms of the order passed by the Coordinate Bench, the Ld. Arbitrator has proceeded with the arbitration proceeding from the stage of evidence of the petitioner herein. The Ld. Arbitrator had granted several opportunities to the petitioner to adduce evidence to prove the counter claim raised by the petitioner but in spite of several opportunities, the petitioner failed to adduce any evidence. The petitioner had produced the agreement no. 64 dt. 30.04.1997 on the basis of which risk and costs annexed with the counter claim has been calculated. The petitioner has only produced the said document but had not proved by way of a cogent and satisfactory evidence. The representative of the petitioner who had conducted the proceeding before the Ld. Arbitrator also admitted before the Ld. Arbitrator, the statement of risk and costs in the counter claim prepared and signed by the Divisional Engineer, South Eastern Railway, who is not available to depose before the Arbitrator to prove the said document.

The Ld. Arbitrator while passing the award categorically held that the petitioner has not made any improvement by adducing cogent evidence even after the matter was remanded to the Ld. Arbitrator and even after giving further opportunity of hearing and accordingly the Ld. Arbitrator has reaffirmed the award.

As regard Award of Rs. 66,425/- on non execution of work withheld by the petitioner in complete violation of Clause 62 of the G.C.C. the Ld. Arbitrator while considering the said claim held that in Exhibit-3 which is the letter of the petitioner dt. 19.07.1996 recorded the reason for non-supply of ballast as per terms of agreement and the petitioners themselves certified that delay was for the reasons beyond the control of claimant and in the circumstances *“it is proposed that the penalty for a shortfall quantity of 3148.11 cum during the second quarter may be executed by one month i.e. uptill 27th December, 1996.”* But the petitioner has rescinded the contract in the month of November, 1996 which is patently illegal and thus Clause 62 of G.C.C. is not applicable.

It is found that on earlier occasion, the Coordinate Bench of this Court had set aside the award and remanded the matter to the Arbitrator only on the ground that the petitioner was not given an opportunity of hearing but now, the Ld. Arbitrator has given appropriate opportunity of hearing to the petitioner but the petitioner failed to prove the counter claim by adducing cogent evidence and thus this Court is of the view that the Ld. Arbitrator has assigned appropriate reason while passing the award.

In view of the above, **AP 631 of 2010** is **disposed of** by modifying the award only to the extent that the respondent is not entitled to get any interest with respect of claim no. 3 i.e. for refund of Security Deposit.

Parties shall be entitled to act on the basis of a server copy of the Judgment and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)