

IN THE HIGH COURT AT CALCUTTA

(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 372 of 2008

Union of India & Ors.

Versus

M/s. Pawan Construction Co. Engineers & Civil

Contractors

Mr. Ashok Bhowmick

Mr. Prashant Kumar Tripathi

Ms. Labony Ray

Ms. Ankita Upadhyay

.....For the Petitioner

Mr. Amitava Ghosh

Mr. Tapas Kumar Dey

Mr. Sourav Chatterjee

.....For the Respondents

Heard on : 24.08.2022, 10.11.2022, 28.11.2022, 15.12.2022,
24.01.2023, 27.02.2023, 13.03.2023 & 30.03.2023

Judgment on : 17.05.2023

Krishna Rao, J.:

1. The Union of India through the General Manager, East Coast Railway, Bhubaneswar, Orissa has referred the instant application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act of 1996) against the award passed by the learned sole Arbitrator dated 12th day of March, 2008.
2. The petitioner had invited tender for earth-work in formation, construction of bridges and other allied works Inspection XXI at Sambalpur End from chainage 35900 to the chainage 39600 of Sambalpur-Telcher Rail Link Project. The respondent had participated in the said tender process and accordingly after negotiation, the respondent had accepted the said work order for a total sum of Rs. 28,83,531/- on 13th July, 1989 and completion period was 20 months with effect from 31st July, 1989 to 12th March, 1991. After acceptance of the offer, an agreement was entered between the parties. The respondent had completed about 77.08% of work and accordingly as per the bill raised by the respondent an amount of Rs. 22,22,602/- was paid to the respondent.
3. Due to implementation of new Forest Act, the project area was affected and forest clearance for the said work was required to be obtained. After obtaining clearances from different departments, the petitioners by letter dated 22nd June, 1992 requested the respondent to start the balance work within 10 days and also requested the respondent to

submit an application for reasonable extension of time so as to complete the balance works along with progress of work.

- 4.** The respondent has neither started the work nor had submitted any application for extension of time to complete the balance work and accordingly on 23rd April, 1993, again a notice was served upon the respondent directing the respondent to start the balance work within seven days from the date of receipt of the letter and also to submit a request for reasonable extension of time enclosing the program of work. In the said letter, it was also informed to the respondent that if no action is taken within the time period, it will be deemed that the respondent is not interested to execute the work and appropriate action will be taken to determine the contract as per the General Condition of the Contract.
- 5.** On 5th June, 1993, the petitioner had again sent a letter to the respondent informing that the Railway Authorities desirous to discuss with the respondent with regard to closing/finalisation of the agreement and requested the respondent to attend the office of the authority on 10th June, 1993 and in the said letter it was also informed that if the contractor will not attend the office on the said date it will be deemed that the respondent is not interested to finalise the agreement and the Railway authority will take appropriate action to deal with the agreement as per extent rule.
- 6.** Immediately after receipt of forest clearance, the petitioners have advised the respondent time to time to restart the work but the respondent has not taken any effective steps to comply with the

instruction of the petitioner and accordingly by a letter dated 24th June, 1993, the petitioners in terms of the Clause 61(1) of the General Condition of Contract terminated the contract without liability on either side and requested the petitioner to vacate the site and to return all the Railway materials and machineries if any in the custody of the respondent.

7. After determination of the contract, the petitioners vide their letter dated 28th September, 1994 requested the respondent to come forward for taking final measurements and in the said letter, it was also mentioned that if the respondent fails to come within seven days of issuance of the letter, ex-parte measurement will be taken, which will be considered as final measurement for finalisation of the work. Again on 5th October, 1994, a notice was sent to the respondent informing that in spite of receipt of the letter dated 28th September, 1994, the respondent has not come forward for final measurement and again a date is fixed on 6th October, 1994 for taking measurement and if the respondent will not come for the measurement, exparte measurement will be started with effect from 6th October, 1994.
8. In spite of request made by the petitioners, the respondent has not come forward either for discussion or for measurement but on 3rd April, 1996, the respondent had submitted demand and requested the petitioner to release the said demand within 15 days failing which the matter will be referred to the arbitration. After receipt of the letter, the petitioner had again sent a letter to the respondent on 17th May, 1996, informing the respondent that in spite of several requests, the

respondent has not come forward and accordingly the petitioners have taken ex-parte measurement so as to enable the petitioners to execute the balance unexecuted work through the new agency. Even though the petitioners have requested the respondent to attend the office of the petitioner for discussion.

9. On 10th June, 1996, the respondent had sent a legal notice to the petitioner calling upon the petitioner to refer the matter to the arbitration within 30 days from the receipt of the notice in terms of the General Condition of the Contract failing which the respondent will take appropriate legal action for appointment of arbitrator.
10. As the petitioners have not appointed an Arbitrator as per the request made by the respondent and accordingly the respondent has filed an Arbitration Petition being AP No. 221 of 1997 before the Hon'ble Chief Justice of this Court for appointment of Arbitrator and by an order dated 20th December, 1999, the Hon'ble Acting Chief Justice of this Court had disposed of the said application by passing the following order:

The Court : Having regard to the qualifications required of the arbitration by the agreement of the parties having regard to the other considerations as are likely to secure the appointment of an independent and impartial Arbitrator, I hereby appoint Mr. Satyabrata Mitra, a retired Judge from this Court with a remuneration of 200 GMS. an Arbitrator to adjudicate upon the disputes and differences between the parties in terms of the order dated 5.3.98 passed by Sujit Kr. Sinha, J in A.P. No. 221 of 1997.

This order is being passed in exercise of the powers referred upon in terms of the provisions of Section 11 of the Arbitration and Conciliation Act, 1996.

This application stands disposed of.

Let a copy of this order be communicated to the Arbitrator concerned by the Registrar, Original Side of this Court.

Registrar, O.S. and all parties are to act on a Xerox signed copy of this Dictated Order on the usual."

- 11.** As per the order passed by this Court, the Learned Arbitrator had started arbitration proceeding by issuing notices to the parties wherein petitioners have also raised their counterclaim and accordingly on 12th March, 2008, the Learned Arbitrator had passed the following award:

"Accordingly there will be an award in favour of the claimant and against the respondent Railway Authorities for the sum of Rs. 16,74,500/- plus costs of Rs.5,00,000/- as mentioned above. The awarded amount of Rs. 16,74,500/- shall carry interest @ 10% per annum from 3.4.1996 (being the date of claim of the claimant with the respondent Railway Authorities) till realisation. The respondent Railway Authorities is directed to pay the awarded amount together with interest thereon @ 10% per annum from 3.4.1996 till the date of payment plus costs of Rs. 5,00,000/- within a period of 2 (two) months from the date of this Award failing which interest will run @ 12% per annum instead of 10% p.a. from the said date of claim till realisation.

While making this Award I must record my appreciation of the assistance given to me by the learned Advocates of the claimant and the officers concerned of the Railway Authorities in support of their argument.

I have signed this Award this 12th day of March, 2008 at premises No. 16A, Tarasankar Sarani, Kolkata – 700037."

- 12.** Mr. Ashok Bhowmick, learned Advocate, representing the petitioners submits that the respondent has claimed an amount of Rs. 5,25,000/- being the compaction of earth work executed by the respondent in an

area of 75,000 cubic metre @ Rs.7/-per cubic metre and the Learned Arbitrator has awarded the full amount to the respondent though the compaction of earth work was not executed by the respondent. Mr. Bhowmick relied upon the letter dated 31st July, 1990 and submits that in the said letter, it has been clearly indicated that no mechanical compaction has been carried out by the respondent and as per the condition of the contract, first of all, the soil proposed to be used in the bank is required to be tested in the laboratory for obtaining the values of optimum moisture contents, maximum dry density as per modified proctors test which has not been done in the present case. He further submits that compaction record is to be maintained for testing of the actual executed work for moisture contents and dry density to arrive at the extent of compaction actually achieved but the compaction has not been executed by the respondent and no laboratory or field testing has been done and no records have been maintained to arrive at the decision regarding acceptability of the compaction.

- 13.** Mr. Bhowmick submits that in claim No.3, the respondent claimed compensation for the loss of profit on the value of the unexecuted portion of the contract for Rs. 39,000/-and the Learned Arbitrator has awarded the total amount but the termination of the contract was done in terms of Clause 61 of the GCC and the petitioners have also provided for settlement of the claim incurred by the contractor in the expectation of completing the whole works. Mr Bhowmick relied upon Clause 43(1) of GCC and submits that the contractor is required to

prepare and furnish an account of claim in every month for any additional expense but the respondent has not presented any such claim as required as per the condition of the contract and also did not submit any vouchers in support of such claim.

14. Mr. Bhowmick submits that the Arbitrator has wrongly awarded an amount of Rs.3,93,000/-in respect of Claim No.8 with respect of extra cost in respect of the works done in terms of tender item No.1 (c) in cutting inside drain and catch water drains in rock and very hard areas requiring blasting. He submits that there was an overpayment of different items against the work amounting to Rs.10,98,530/-and the Railway is entitled to reimburse this amount which has been included as a part of petitioners counterclaim. He submits that the actual executed quantity of item No.1 (c) has already been paid to the contractor in addition to the above-mentioned overpayment and thus payment of extra cost does not arise. Mr. Bhowmick submits that before the measurement, the petitioners have several times requested the respondent to be present for joint measurement but the respondent has not attended at the time of measurement and now the respondent cannot challenge the measurement.He further submits that the Arbitrator has not given any finding or reasons for allowing the said claim.

15. Mr. Bhowmick submits that the respondent has made a claim with respect of claim no. 10 on account of hire charges for machineries deployed at the site of work but could not be utilized for the considerable period for non-aviability of the work site and the

respondents claimed Rs. 29,75,000/-and the Learned Arbitrator has wrongly awarded an amount of Rs. 5 lakhs which the respondent is not entitled for. He submits that the claim of the respondent is absolutely wrong in view of the fact that the respondent has declined to continue the work under the agreement and also has not sought for any extension of time beyond the original date of completion. Mr. Bhowmick submits that the respondent has not adduced any evidence to prove that the machineries have been kept idle at the work site. Mr. Bhowmick relied upon clause 43(1) of GCC and submits that the respondent has not submitted any monthly statement and thus it cannot be said that the respondent has made any expenses with regard to the machineries for the said period.

- 16.** Mr. Bhowmick submits that Learned Arbitrator has awarded Rs.1,50,000/-with respect of Claim No.12 being the refund of security deposit. Mr. Bhowmick submits that the Arbitrator has not considered that the petitioners have not enforced the bank guarantee. He further submits that as per the terms and conditions of the contract security deposit is to be released after passing of final bills but in the instant case, the respondent has neither attended for joint measurement nor has come forward for completing the formalities by signing the related documents for finalisation of the agreement. He further submits that as per final measurement, an amount of Rs. 10,98,530/-is to be recovered from the respondent which has to be partly adjusted with the security deposit.

- 17.** Mr. Bhowmick submits that the Arbitrator has awarded an amount of Rs.1,57,000/-with respect of Claim No. 13 being the compensation towards charges of Dozer laying at the site but could not be used and brought back due to obstruction at the site @ Rs.35,000/-per year with effect from 21st September, 1991 to 31st March, 1996 but without considering that no Dozer of the respondent was laid idle at the site even for a single day beyond the date of actual execution of the works. Mr. Bhowmick further submits that the respondent has not submitted the monthly statement in support of his claim as per clause 43(1) of the GCC to prove his claim. Mr. Bhowmick further submits that the respondent has not submitted any statement with regard to his expenditure as per clause 61(2) of the GCC. He further submits that after three years of the termination of the contract, the respondent has made a false and fabricated claim.
- 18.** Mr. Bhowmick submits that the Learned arbitrator has wrongly awarded interest @ 10% on the total sum of Rs.16,74,500/-though as per Clause 16(2) of the GCC, no interest will be payable on the earnest money or the security deposit or amount payable to the contractor under the contract. Mr. Bhowmick submits that as per Clause 16(2) of the GCC, the respondent is not entitled to get any interest over any amount.
- 19.** Mr. Bhowmick submits that the Learned Arbitrator has also wrongly awarded the cost of Rs. 5 lakhs in favour of the respondent without considering the counterclaim raised by the petitioner.

- 20.** Mr. Bhowmick submits that the Learned Arbitrator failed to appreciate the petitioners have set up their counter claim. He submits that as per the measurement recorded by the petitioner an overpayment of Rs. 10,98,530/- has been erroneously paid to the respondent contractor which requires to be reimbursed from the respondent. He submits that Learned Arbitrator has not considered that after termination of the contract and to settle the bill of the respondent, the petitioners have fixed the date of measurement and have also informed the respondent to attend the joint measurement but in spite of the request made by the petitioners, the respondent has not attended the joint measurement. Mr. Bhowmick submits that as per Clause 45 of the GCC failing of the contractor's attendance, the work may be measured up in his absence and such measurements shall notwithstanding such absence, be binding upon the contractor whether or not shall have signed the measurement book.
- 21.** Mr. Bhowmick relied upon the following judgment passed in the case of ***National Highway Authority of India -vs- Transstroy (India) Limited*** passed in Civil Appeal No. 6732 of 2021 dated 11th July, 2022 and submits that in the arbitration proceeding the counterclaim is maintainable.
- 22.** Mr. Bhowmick relied upon the judgement passed in the case of ***Jaiprakash Associates Ltd. (JAL) through its Director -vs- Tehri Hydro Development Corporation India Ltd.(Through its Director)*** passed in Civil Appeal No.1539 of 2019 dated 7th February, 2019 and submits that the position under Section 31 (7) of the 1996 Act, is

wholly different, inasmuch as section 31(7) of the Act of 1996 sanctifies agreement between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action and until the award is delivered.

23. Mr. Bhowmick relied upon the judgement passed in the case of ***Union of India -vs- Manraj Enterprises passed in Civil Appeal No. 6592 of 2021 dated 18th November, 2021*** and submits that in view of a specific bar contained clause 16(2) of the GCC, the contractor shall not be entitled to any interest or future interest on the amount is due and payable to it under the contract. Mr. Bhowmick prayed for setting aside the award and allowing the counter claim of the Railways.
24. Mr. Amitabha Ghosh, Learned Advocate representing the respondent contractor submits that the Learned Arbitrator had heard the matter at length and after hearing, the parties was pleased to pass an award wherein the Learned Arbitrator out of total 13 claims had awarded only 6 claims of the respondent contractor.
25. Mr. Ghosh submits that the award passed by the Learned Arbitrator is a well speaking award and does not require any interference. He further submits that the grounds on which the petitioners have filed the present application are not covered in any of the grounds as enumerated under Section 34 of the Arbitration and Conciliation Act.
26. Mr. Ghosh submits that Clause 61 (1) of the GCC, there is no exclusion clause for claim of compensation for loss of profit. He further submits that it is settled law that a clause excluding or prohibiting has to be considered rigidly. He further submits that once

disputes is before the Learned Arbitrator, the Learned Arbitrator cannot be prevented from considering the claim raised by the claimant and the jurisdiction of the Learned Arbitrator cannot be curtailed.

- 27.** Mr. Ghosh submits that none of the award are within the Clause 43 (1) of the GCC. The award which includes for works done, as already been submitted by the respondent at the rate fixed by the petitioners themselves.
- 28.** Mr. Ghosh submits that the letter of acceptance was issued by the Chief Engineer (CON), Bilaspur, South Eastern Railway and time to complete the work was 20 months from 13th July, 1989 to 12th March, 1991 and the contractual amount was Rs. 28,83,531/-. The initial earnest money deposited by the respondent contractor was Rs. 20,000/- and the balance security deposit was Rs. 1,30,000/- and the same was to be recovered from RA bills.
- 29.** Mr. Ghosh submits that by several letters, the respondent contractor requested the petitioners repeatedly to hand over the entire site free from hindrance but neither any reply was given nor hindrance free site was handed over to the respondent. He further submits that due to failure of the petitioners to handover the site free from all obstructions, the respondent could not complete the work and as such the petitioners are liable to pay compensation to the respondent.
- 30.** Mr. Ghosh submits that after the lapse of five months, a part site was handed over the respondent on 17th December, 1989 and accordingly the respondent commenced the work in the site and out of seven bridges only one bridge was handed over to the respondent.

- 31.** Mr. Ghosh submits that as per the directions of the petitioners, the respondent has deputed supervisors, machineries like dozer, excavator, rail steep foot roller, men and material and the same was recorded vide letter dated 17th December, 1989. The respondent had proceeded with the work in the areas where site was handed over and where there was no objection from the Forest Department and completed the work upto about 78%. He submits that the Forest Department did not allow the respondent to execute the work and the respondent has requested the petitioners to obtain necessary clearance from the Forest Department.
- 32.** Mr. Ghosh submits that after long lapse of time on or about 22nd June, 1992, the petitioner herein had intimated the respondent that the forest clearance has been obtained in the month of April, 1992 and directed the respondent to commence the work. The respondent had informed the petitioner that unless and until enhancement of rate are not sanctioned it would not be possible for the respondent to execute the work due to huge rise in prices of materials, wages of labours and hire charges of machineries.
- 33.** Mr. Ghosh submits that instead of giving the enhanced rate to the respondent, the petitioner has terminated the contract. He further submits that the respondent has claimed Rs. 4,00,000/- with respect of claim no. 1 and Rs. 5,25,000/- with respect of Claim No. 2 but the Learned Arbitrator has awarded only Claim No. 2 and had rejected the Claim No. 1.

34. Mr. Ghosh submits that Claim No. 3 of the respondent was for the compensation for loss of profit. The Learned Arbitrator has rightly allowed the Claim No. 3 in favour of the respondent that the petitioners failed to obtain permission from the Forest Authority and despite completion of the other part of the work in prolonged time, no extension of time was granted and the matter was pending before the Authorities for a very long time due to which the petitioners prevented the respondent to complete the work.
35. Mr. Ghosh relied upon Section 53 of the Contract Act and submits that it would be deemed that the claimant had executed the work and performed the part of the contract. He further submits that as the petitioners have breached the contract and prevented the respondent from performing the balance part of the work and as per Section 73 of the Contract Act, the respondent is entitled for the compensation.
36. Mr. Ghosh relied upon the judgment reported in ***AIR 1984 Supreme Court 1703 (M/s A.T. Brij Paul Singh & Bros. -vs- The State of Gujarat)*** and submits that the petitioner is guilty of breach of contract inasmuch as the recession of the contract by the petitioner is held to be unjustified and the respondent contractor had executed a part of work contract, the contractor would be entitled to damage by way of loss of profit.
37. Mr. Ghosh relied upon the judgement reported in ***AIR (88) 1951 SC (A. M. Mair and Co -vs- Gordhandas Sagarmull)*** and submits that the disputes raised by the respondent fall within the scope of

arbitration clause, then there is an end of the matter, for the arbitrators would have jurisdiction to adjudicate on the disputes.

38. Mr. Ghosh relied upon the judgment reported ***in AIR 1987 SC 2316 (Municipal Corporation of Delhi -vs- Jagan Nath Ashok Kumar and Others)*** and submits that the arbitrator is the Sole Judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a Judge of the evidence before the Arbitrator.
39. Mr. Ghosh relied upon the judgment reported in ***(2016) 9 SCC 478 (Haris Chandra and Company – vs- State of Uttar Pradesh)*** and submits that unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interfere herewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgement is based on a wrong proposition of law.
40. Mr. Ghosh relied upon the judgment reported in ***(2021) 3 SCC 308 (Anglo American Metallurgical Coal PTY. Ltd. -vs- MMTC Limited)*** and submits that it must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to

pass muster as the arbitrator is the ultimate master of the quality and quantity of evidence to be relied upon when he delivers his arbitral award.

41. Mr. Ghosh relied upon the judgment reported in **(2022) 4 SCC 116 (UHL Power Company Limited -vs- State of Himachal Pradesh)** and submits that as far as section 34 is concerned, the position and is well settled by now that the court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under section 34 (2) (b) (ii) i.e. if the award is against the public policy of India.
42. Mr. Ghosh relied upon the judgment reported **in (2007) 2 SCC 720 (Krishna Bhagya Jala Nigam Ltd. -vs- G. Harichandra Reddy and Anr.)** and submits that the delay took place on account of not getting the forest clearance by the petitioner from the Forest Department but in the meantime the respondent contractor had placed all the machineries for the purpose of execution of the work.
43. Mr. Ghosh relied upon the judgement reported **in (2017) 14 SCC 323 (Ambica Construction -vs- Union of India)** and submits that there is no bar to award interest on the amounts payable under the contract, would not be sufficient to deny payment of pendent lite interest.
44. Mr. Ghosh relied upon the judgment reported in **(2018) 7 SCC 664 (Raveechee and Company -vs- Union of India)** and submits that clause 16 (3) of GCC, that is binding on the parties cannot be extended to bind an arbitrator. The arbitrator has the power to award interest pendent lite where justified.

- 45.** Mr. Ghosh relied upon the judgement reported in **1984 CWN 672 (Bharat Barrel and Drum MFG. Co. (P) Ltd. -vs- Indian Oil Corporation and Another)** and submits that a counterclaim in a reference is a cross claim analogous to making counterclaim in a civil suit. If a counter claim in a civil suit cannot be entertained unless there is a cause of action in existence a cross claim in a reference cannot be entertained by the arbitrator unless there is a dispute in existence.
- 46.** Heard the learned counsel for the respective parties, perused the materials on record and the judgement relied by the parties.
- 47.** The respondent contractor had made the following claim before the Learned Arbitrator:

<u>Particulars of claim</u>	<u>Amount</u>
<i>Amount payable for work executed but not paid.</i>	... Rs. 4,00,000.00
<i>Amount payable on account of compaction of earth work not paid for (75,000 cubic metre @ Rs.7/- cubic metre).</i>	... Rs. 5,25,000.00
<i>Compensation for loss of expected profit on the value of unexecuted portion of the work.</i>	... Rs. 39,000.00
<i>Compensation on account of loss of goodwill for unlawful termination of the contract.</i>	... Rs. 75,000.00
<i>Compensation for loss of profit arising out of retention for an additional period of 24 months without any corresponding monthly benefit, with blocked resources during the said extended period of</i>	

<i>stay.</i>	... Rs. 5,94,000.00
<i>Compensation for additional/extra off-site expenses incurred in the over-run period.</i>	... Rs. 79,000.00
<i>Amount payable for earth work in embankment or filling in formation and/or approached level-crossing (as per tender item No. 3 at page 2 of Schedule 'A' as for earth obtained by Claimant from the lands arranged by them.</i>	... Rs. 18,02,000.00
<i>Amount payable on extra cost incurred in respect of tender item No. 1(c) viz., earth work in formation in cutting inside drains and/or catch water drains in hard rocky area requiring blasting.</i>	... Rs. 3,03,000.00
<i>Compensation on account of additional on-site expenses during the over-run period in maintaining their organization in the site in readiness.</i>	... Rs. 4,40,000.00
<i>Amount payable on account of hire charges for machinery deployed at the site but could not be utilised for a considerable period.</i>	... Rs. 29,75,000.00
<i>Compensation for depreciation of tools and plants/truck engaged at the site till 20.9.91 which could not be utilised.</i>	... Rs. 34,000.00
<i>For refund of security deposit in the shape of Bank Guarantee not refunded.</i>	... Rs. 1,50,000.00

Amount payable to the claimant for compensation towards charges of the dozer lying at site at Rs. 35,000/- per year for the period from 21.9.91 till 31.3.96 i.e. 4 ½ years. ... Rs. 1,57,500.00

Interest at 18.5% p.a., on the amount claimed for item Nos. 1 to 13 from the date of receipt of the letter dated 3.4.96 till payment. ... To be calculated.

Cost of Arbitration. ... As may be allowed.

48. Out of the 15 claims, the Arbitrator has awarded 8 claims which are as follows:

2. Claim No. 2 ... This claim is allowed at Rs. 5,25,000/- as the Railways admitted the work was done but suffered from certain technicalities.
Compaction work not paid for Rs. 5,25,000/- done in an area of 75,000 cum @ Rs.7/- per Cum.

3. Claim No. 3 ... Allowed at Rs. 39,000/-
Compensation for loss of profit on the value of the unexecuted portion of the contract for Rs. 39,000/-.

8. Claim No. 8 ... Allowed at Rs. 3,03,000/-
Amount payable on account of extra cost in respect of works done in terms of Tender Item No. 1C in cutting inside drain and/or catch water drain in rocky and very hard areas requiring blasting for Rs. 3,03,000/-.

10. Claim No. 10. ... Since it appears from the letters of the Railways and the Forest Department
Claim on account of hire chares for machineries deployed at the site of

work but could not be utilised for a considerable period for non-availability of the worksite for Rs. 29,75,000/-.

asking the claimant to remove the installation of machinery from the worksite but since there is no details of expenses incurred, I allow only a portion of the claim at Rs. 5,00,000/- as the presence of machineries was admitted by the Forest Department.

12. Claim No. 12. ... Allowed at Rs.
Amount payable in respect of refund of security deposit for Rs. 1,50,000/-.
13. Claim No. 13. ... Allowed at Rs.
Amount payable on account of compensation towards charges of Dozer lying at the site but could not be used and brought back due to obstruction at the site at Rs. 35,000/- per year from 21.9.1991 till 31.3.1996 i.e. for 4 ½ years for Rs. 1,57,5000/-.
14. Claim No. 14 ... Allowed at the rate of
for Interest. 10% per annum on the total sum allowed at Rs. 16,74,500/- from 3.4.1996 until realisation.
15. Claim No. 15.
Cost of Arbitration being amounts paid as legal expenses for 63 sittings towards fees of the Arbitrator and remuneration of his staff i.e. Stenographer,

Interpreter and Clerk and Advocate's fees and for certain costs of the claimant for attending the reference at Kolkata from Rourkella including hotel expenses and taxi fares plus for producing technical experts as witness including his train fares and lodging charges at hotels plus expenses for visiting Sambalpur with expert for inspection of documents including train fares, lodging charges etc., plus postal charges and Non-Judicial Stamp Paper for

<i>Allowed at Rs.</i>	
<i>5,00,000/-.</i>	<i>...</i>
	<i>Rs. 5,10,200/-.</i>

49. Parties have relied upon Clause 16(2), 43(1), 45 and 61 (1) and (2) of the General Conditions of Contract which reads as follows:

“16. (2) Interest on amounts. No interest will 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.

Interest on the said Government Security will be drawn by the Railway Administration and credited to the Contractor and the Contractor shall not be entitled to claim any other sum by way of interest or profit on the said Security Deposit than the amount actually drawn by the Railway Administration from the Government.

43. (1) Monthly statement of claims. The Contractor shall prepare and furnish to the Engineer once in every month an account giving full and detailed particulars of all claims for any additional works ordered by the Engineer which he has executed during the preceding month and no claim for payment for any sub work will be considered which has not been included in such particulars.

45. Measurements of works. *The contractor shall be paid for the works at the rates in the accepted schedule of rates and for extra works at rates determined under clause 39 of these conditions on the measurements taken by the Engineer or Engineer's Representative in accordance with the rules prescribed for the purpose by the Railway. The quantities for items the unit of which in the accepted schedule of rates is 100 or 1,000 shall be calculated to the nearest whole number, any fraction below half being dropped and half and above being taken as one; for items the unit of which in the accepted schedule of rates is single, the quantities shall be calculated to two places of decimals. Such measurements will be taken of the work in progress from time to time and at such intervals as in the opinion of the Engineer shall be proper having regard to the progress of the works. The date and time on which "on-account" or final measurements are to be made shall be communicated to the Contractor who shall be present at the site and shall sign the results of the measurements (which shall also be signed by the Engineer or the Engineer's Representative) recorded in the official measurement book as an acknowledgment of his acceptance of the accuracy of the measurement. Failing the contractor's attendance the work may be measured up in his absence and such measurements shall notwithstanding such absence, be binding upon the Contractor whether or not shall have signed the measurement book provided always that any objection made by him to any measurement shall be duly investigated and considered in the manner set out below:-*

- (a) It shall be open to the Contractor to take specific objection to any recorded measurement or classification on any ground within seven days of the date of such measurements. Any re-measurements taken by the Engineer or the Engineer's Representative in the presence of the Contractor or in his absence after due notice has been given to him in consequence of objection made by the Contractor shall be final and binding on the Contractor and no claim whatsoever shall thereafter be entertained regarding the accuracy and classification of the measurements.*
- (b) If an objection raised by the Contractor is found by the Engineer to be incorrect, the Contractor shall be liable to pay the actual expenses incurred in measurements.*

61.(1) Right of Railway to determine contract. *The Railway shall be entitled to determine and terminate the contract at any time should, in the Railway's opinion, the cessation of work become necessary owing to paucity of funds or from any other cause whatever, in which case the value of approved materials at site and of work done to date by the Contractor will be paid for in full at the rates specified in the contract. Notice in writing from the Railway of such determination and the reason therefore shall be conclusive evidence thereof.*

(2) Payment on determination of contract. *Should the contract be determined under sub-clause (1) of this clause and the Contractor claims payment for expenditure incurred by him in the expectation of completing the whole of the works, the Railway shall admit and consider such claims as are deemed reasonable and are supported by vouchers to the satisfaction of the Engineer. The Railway's decision on the necessity and propriety of such expenditure shall be final and conclusive."*

- 50.** As per claim no.2 the respondent contractor had claimed an amount of Rs.5,25,000/-being the compaction work for 75,000 cubm @ Rs.7/- per cubm and the arbitrator had awarded the full claim to the respondent contractor.

While deciding the claim no. 2, the learned arbitrator had recorded that in course of the evidence, the Railways had admitted that they would produce the compaction register but ultimately, it was not produced. In the absence of the rebuttal of evidence of the claimant with regard to the compaction work by the Railways, the presumption of execution of the said work goes in favour of the claimant.

The Learned Arbitrator while concluding the finding with regard to the claim no. 2 held that after having carefully considered the rival

claims and the counter claims of the parties, the arbitrator find that certain claim of the claimant cannot be entertained as made out. On the point of compaction work done by the claimant it appears that the same was not acceptable by the Railway as being done not according to the technicalities of the matter but the Railway did not deny that the compaction work was done. The learned arbitrator came to the conclusion that the contractor had done certain works for compaction of work, therefore, the claimant is entitled to certain portion of the claim for compaction and not the whole.

At the time of awarding the amount with respect of claim no.2 of the claimant, the arbitrator has allowed the total claim of Rs. 5,25,000/-which is the total claim of the claimant/respondent herein.

In the present case, it is found from the record that the Learned Arbitrator has considered certain books produced by the Railway that is initial level books and second level measurement book and cross section sheets and held that there was no dispute as to the contents of the initial level book produced by the Railway but with regard to the second level book is concerned it shows from the endorsement that is the initial level book of section 21 as recorded in the agreement and the said level book does not contain the signature of the claimant/respondent but of somebody else and thus the said level book has no relevance with the claimant/respondent. The Learned Arbitrator further considered the final bill prepared by the railways which was neither shown nor was ever intimated to the

claimant/respondent prior to the submission of the measurement book in the arbitration proceeding.

Learned Arbitrator has not considered that the Railways have issued notices upon the respondent/contractor for joint measurement but the respondent had not participated at the time of measurement inspite of receipt of notice. The Arbitrator has also not considered that the contractor has not submitted his objection to the measurement taken by the Railways within seven days as provided under Clause 45 of the GCC.

This Court find that the learned arbitrator has not considered the notices issued by the Railways to the contractor and after receipt of the notices, the respondent/ contractor has not attended for taking measurement and had also not raised any objection as provided under Clause 45 of the GCC and the Railways have acted in terms of Clause 45 of the GCC.

In view of the above, the Claim no.2 awarded in favour of the respondent/ contractor is set aside and quashed.

51. In claim No. 3, the respondent/claimant claim to Rs. 39,000/-being the compensation for loss of profit on the value of an executed portion of the contract and the learned arbitrator has awarded the total claim of Rs. 39,000/- in favour of the claimant. At the time of deciding the claim no.3, the learned arbitrator has considered that the railways have admitted that the site could not be handed over immediately as per the

request made by the claimant/respondent. By letter dated letter dated 30 September 1989 the claimant/respondent had informed to the railways that the claimant has completed jungle cutting work but by a letter dated 30th October, 1989 the railways have instructed the claimant/respondent to stop all sort of works immediately including cutting of forest. By letter dated 14 December 1989 the Railways have further instructed the claimant/respondent to stop work even in the non forest areas until the forest clearance was obtained and also instructed the claimant to withdraw their establishment and machinery deployed in the area till the forest clearance was obtained.

Considering the above fact the learned arbitrator has awarded the total claim of Rs. 39,000/- in favour of the claimant/respondent and this Court held that there is no reason to interfere with the claim no.3 awarded in favour of the claimant/respondent.

- 52.** As regard Claim No. 8 is in connection with the amount payable on account of extra cost in respect of the works done in terms of tender item No.1C in cutting inside drain and/or catch what are drain in rocky and very hard areas requiring blasting for Rs. 3,03,000/-.

The Arbitrator has awarded the total claim of Rs. 3,03,000/-. On perusal of the award, it is found that the Learned Arbitrator has neither discussed with regard to the claim no.8 raised by the claimant/respondent nor there is any finding how the learned arbitrator has come to conclusion for awarding an amount of Rs. 3,03,000/-. The arbitrator has not assigned any reason while

awarding claim no.8 in favour of the claimant/respondent and thus the claim no.8 awarded in favour of the claimant lacks reason accordingly the same is set aside.

53. In claim No.10, the claimant/respondent had claimed Rs. 29,75,000/-on account of higher charges for machineries deployed at the site for work but could not be utilized for a considerable period for non- availability of worksite. The learned arbitrator has awarded an amount of Rs. 5 lakhs out of the total claim of Rs. 29,75,000/-.

At the time of deciding the claim no.10, the learned arbitrator has held that claimant has installed and deployed certain machineries at the site of the work which could not be utilised for a considerable period due to failure of railway in making available the scope of the work. The learned arbitrator further held that claimant / respondent was prevented from utilizing the machinery that was deployed at the site is proved by the letters of the Railway and the forest department for stopping the work both in the forest area and non-forest area until the forest clearance was intimated to the claimant after more than 1½ year from the work order and thus the claimant had incurred certain infrastructures cost for keeping the machineries and utilized for certain time. After going through the award this court finds that the arbitrator has given sufficient reason and only allowed Rs.5,00,000/-out of the total claim of ₹ 29, 75,

000/-thus this court does not find any reason to interfere with the award passed by the arbitrator with respect of claim no.10.

54. The claimant/respondent has claimed Rs.1,50,000/-in claim no.12 with respect of refund of security deposit and the learned arbitrator has allowed the said claim in total. Though the learned arbitrator had allowed claim no.12 but there is no finding and reasons with respect of the said claim but however it is admitted that the claimant had secured Rs.1,50,000/-as security deposit by way of Bank Guarantee and the railways have not released the said amount of the claim thus this Court is of the view that there is no reason to interfere with the award with respect of claim no.12.

55. In claim No.13, the claimant/respondent has claimed an amount of Rs. 1,57,500/- being the amount of compensation towards the charges of Dozer lying at the site but not used due to obstruction at site from 21st September, 1991 to 31st March, 1996 at the rate of Rs. 35,000/- per year. The Learned Arbitrator has awarded the total claim on the same ground as stated in claim no.10. As this Court already held that the learned arbitrator has assigned sufficient reason after going through the evidence available on record and the submission made by the parties with respect of claim Nos. 10 and this is also connected with the same and thus there is no reason to interfere with the said claim.

56. The respondent/claimant had claimed interest in claim No. 14 and the learned arbitrator had allowed the interest at the rate of 10%

per annum on the total allowed claim at Rs. 16,74,500/- from 3rd April, 1996 until realization.

The learned arbitrator has not considered Clause 16(2) of the General Condition of Contract which 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, but Government Securities deposit in terms of sub- clause(1) of the clause will be repayable with interest accrued thereon.”

Mr. Ghosh relying upon the judgment of **Ambica Construction (supra)** wherein the Hon’ble Court held that:

“A perusal of the conclusions drawn by this court in the above judgment, rendered by three Judges Bench, leaves no room for any doubt, that the bar to award interest on the amounts payable under the contract, would not be sufficient to deny payment of pendente lite interest. In the above view of the matter, we are satisfied, that the clause relied upon by the learned counsel for the Union of India, to substantiate his contention, that Pendente lite interest could not be avoided to the appellant, was not a valid consideration, for the proposition being canvassed. We are therefore satisfied, that the arbitrator, while passing his award dated 28 June 1999, was fully justified in granting interest pendente lite to the appellant”.

Mr. Ghosh has further relied upon the judgment reported in the case of **Raveechee and Company (Supra)**, wherein the Court held that:

“17. Thus, when a dispute is referred to for adjudication to an arbitrator, a term of such a nature as contained in Clause 16(3) of GCC, that is binding on the

parties cannot be extended to bind an arbitrator. The arbitrator has the power to award interest pendent lite where justified. We, therefore, set aside the judgment of the High Court and restore the award passed by arbitral Tribunal in respect of Claim No.12.”

Mr. Ashok Bhowmick, Learned Advocate representing the petitioner/ Railways relied upon the judgment in the case of **Manraj Enterprises (Supra)**, wherein the Hon’ble Court held that:

“13. In view of the above discussion and for the reasons stated above, the learned arbitrator in the instant case has erred in awarding pendent lite interest 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.

14. Accordingly, the present appeal succeeds. The impugned judgement and order passed by the Division Bench of High Court in appeal under Section 37 of the 1996 Act and the order passed by the learned Single Judge in an application under section 34 of 1996 Act and the award passed by the learned Tribunal awarding pendent 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 a 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 judgment of **Manraj Enterprises (supra)**, the Hon’ble Supreme Court has taken into consideration of the judgment passed in the case of the **Ambica Construction (supra) and Raveecce and Company (supra)** and held that :

“However, it is not clear from Ambica Construction (supra) as to whether it was decided under the Arbitration Act,1940 or under the 1996 Act. It has

relied on a judgment of Constitution bench in the State of Orrisa -vs- G.C. Roy (1992)1 SCC 508. This judgment was with reference to the 1940 Act. In the 1940 Act, there was no provision which prohibited the arbitrator from awarding interest for the pre-reference, pendent lite or post award period, whereas the 1996 Act contains a specific provision which says that the agreement prohibits award of interest for the pre-award, the arbitrator cannot award interest for the said period. Therefore Ambica Construction (supra) cannot be made applicable in the instant case.

The decision in Raveechee and Company (supra) is again under the Arbitration Act, 1940 which has no application to the facts of the present case.”

In the present case also the award of the arbitrator is under 1996 Act and not under 1940 Act and thus the judgments relied upon by the claimant/respondent are not applicable and the judgment relied by the petitioner/Railways in the case of **Manraj Enterprises (supra)** is squarely applicable in the present facts and circumstances of the case.

In view of the above, the interest awarded by the Learned Arbitrator in claim No. 14 of the award is set aside and quashed.

57. The claim No. 15 is with regard to the cost of the arbitration proceeding and other expenses wherein the claimant/respondent has claimed Rs. 5,10,200/- and the arbitrator has awarded Rs. 5 lakhs being the cost thus this court is not inclined to interfere with the cost awarded by the Arbitrator.

58. The petitioners/Railways have preferred the counter claim for Rs. 10,56,212/- on the ground that the railways have released an excess

payment in favour of the claimant/respondent which is required to be recovered from the respondent. The learned arbitrator has rejected the counter claim on the reason that the petitioner/Railway have made the counter claim which is afterthought and was not submitted at the time when the claimant submitted their claim before the appropriate authority of the Railways and this claim of the Railway first time came in the counter statement of the Railway filed before the arbitrator. The learned arbitrator was further of the view that the railways have not even shown or claimed at the time of hearing of the application of the claimant under Section 11 of the Arbitration and Conciliation Act 1996 for appointment of arbitrator and therefore, this claim cannot be arbitrated in the arbitration for which the railways will be at liberty to initiate other proceedings against the claimant.

The Railways have relied upon clause 43(1), Clause 45 and 61(1) and submits that the claimant/respondent has not furnished the details particulars of all claims of any additional expenses once in every month during the period of contract and the claimant/respondent has not attended the measurement taken by the railways in spite of the notice issued by the railways to the claimant/respondent. As per the counterclaim, the railways have determined the contract as per clause 61 of the GCC as the claimant/respondent has not come forward to complete the work in spite of several requests made by the railways.

The railways have set up the counter claim on the basis of the measurement and claimed that an excess payment was made which is liable to be recovered.

Section 23 of Arbitration and Conciliation Act, 1996 reads as follows:

“23. Statement of claim and defence.—

(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.”

In the case of **National Highway Authority of India (supra)**, the Supreme Court held that :

“13.4. When there is a provision for filing the counterclaim - set off, which is expressly inserted in Section 23 of the Arbitration Act, 1996, there is no reason for curtailing the right of the appellant for making the counterclaim or set off. If we do not allow the counterclaim made by the NHAI in the proceedings arising out of the counter claims made by the contractor, it may lead to parallel proceedings before various fora. While passing the impugned judgment and order, the High Court has lost sight of the aforesaid aspect, which out to have been considered while considering the request on behalf of NHAI took place on record its

counterclaim. Clause 26.1 and 26.2 have been interpreted in a pragmatic and practical manner, as they require parties must at first try to settle, resolved and even try consolation but when the procedure under clause 26.1 and 26.2 fails to yield desired result, in the form of settlement within the period specified in clause 26.2, the dispute can be resolved through arbitration in terms of clause 26.3. Once any dispute, difference or controversy is notified under clause 26.1, the entire subject matter including counterclaim/set off would form subject matter of arbitration as" any dispute which is not resolved in clause 26.1 and 26.2".

In the present case admittedly an Arbitrator was appointed by an order of the court and the claimant/respondent has filed the claim and at the time of filing the written statement of defence, the railways has set off their counterclaim but the learned Arbitrator has rejected the counterclaim on the ground that the Railways have filed the counterclaim first time before the arbitrator.

Hence the reason for rejecting the counterclaim is perverse, therefore, this Court has set aside the decision of the Arbitrator wherein the arbitrator has rejected the counterclaim of the Railways.

The award passed by the Learned Arbitrator dated 12th March, 2008 is modified by setting aside award with respect of Claim no. 2, Claim no. 8, Claim No. 14 and the decision of rejecting the counterclaim of the Railway.

AP No. 372 of 2008 thus disposed of.

Parties shall be entitled to act on the basis of a server copy of the Judgment 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.)