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13th August, 2019

INTEREST - IN CASE OF ARBITRAL AWARDS

1. Secretary Irrigation Department -Vs- State of Orissa, (1992) 1 SCC 508, Relevant Para 43-46

- Arbitrator can award pendent lite interest.
- When the Contract does not bar entitlement of Interest, then implied term that party will have the right to claim interest.

A copy of the judgment attached hereto at **page no. 2 to 28.**

2. MSK Projects Ltd. -Vs- State of Rajasthan, (2011) 10 SCC 573, Relevant Para 25-28, 24

- Power of the Court to vary the rate of interest. Interest changed from 18% to 10%
- Arbitrator is competent to award interest from the date of the award to date of payment of decree

A copy of the judgment attached hereto at **page no. 29 to 47.**

3. Krishna Bhagya Jala Nigam Ltd. -Vs- G. Harishchandra Reddy, (2007) 2 SCC 720, Relevant Para 11

- Economic reforms have changed the interest regime in the country.
- Interest reduced from 18% to 9%

A copy of the judgment attached hereto at **page no. 48 to 53.**

4. Executive Engineer -Vs- NC Budhraj, (2001) 2 SCC 721, Relevant Para 22-26

- The Arbitrator appointed with or without the intervention of the court has jurisdiction to award interest for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract (Overrulled Jena Case)

A copy of the judgment attached hereto at **page no. 54 to 90.**

5. Bhagwati Oxygen Ltd. -Vs- Hindustan Copper Ltd., (2005) 6 SCC 462, Relevant Para 36-40

- Arbitrator has power to grant interest on all three stages pre-reference, pendent lite and post award

A copy of the judgment attached hereto at **page no. 91 to 107.**

6. Sunangro Seeds Ltd. -Vs- National Seeds Corporation Lt., (2018) SCC Online Del 13053, Relevant Para 20.1-20.11, 21-24

- Award passed before 2015 Amendment of Arbitration and Conciliation Act, interest rate modified by the Court

A copy of the judgment attached hereto at **page no. 108 to 115.**

7. State of Rajasthan -Vs- Concrete Construction Pvt. Ltd., (2009) 12 SCC 1, Relevant Para 62-67

- Principles relating to interest propounded

A copy of the judgment attached hereto at **page no. 116 to 141.**

8. HUDA -Vs- Raj Singh Rana, (2009) 17 SCC 199, Relevant Para 17-22

- Interest rate should not exceed the current rate of interest.

The agreed rate of interest will have precedence over any statue which provides for interest.

A copy of the judgment attached hereto at **page no. 142 to 151.**

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(1992) 1 Supreme Court Cases 508

(BEFORE K.N. SINGH, C.J. AND P.B. SAWANT, N.M. KASLIWAL, B.P. JEEVAN REDDY AND G.N. RAY, JJ.)

Civil Appeal No. 1403 of 1986

SECRETARY, IRRIGATION DEPARTMENT, GOVERNMENT OF ORISSA AND OTHERS .. Appellants;

Versus

G.C. ROY .. Respondent.

With

Civil Appeal No. 2586 of 1985

SECRETARY TO GOVERNMENT OF ORISSA AND OTHERS .. Appellants;

Versus

RAGHUNATH MOHAPATRA .. Respondent.

Civil Appeal Nos. 1403 of 1986 and 2586 of 1985, decided on December 12, 1991

Arbitration Act, 1940 — Ss. 14 and 29 — Interest pendente lite — Held can be awarded by arbitrator having regard to facts and circumstances of the case for doing complete justice between the parties where claim as to interest is made by the parties and the agreement does not contain anything to the contrary — Abhaduta Jena decision overruled

The State Government entered into an agreement with the respondent for construction of head works. Clause 23 of the contract provided: "All questions and disputes relating to the meaning of the specifications etc. ... or as to any other question or claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitrator ...." The work was completed on February 20, 1980. The respondent's claim for certain amounts was not accepted by the government as a result of which a dispute arose between the parties. The dispute was referred to the arbitrator who made his award on August 6, 1982. The arbitrator held that the respondent was entitled to certain amount of money and in addition he was entitled to receive interest @ 9 per cent on the awarded amount from March 20, 1980, being the date on which the amount claimed by the respondent became due to him, till the date of payment or decree whichever was earlier. The respondent made an application before the court for making the award rule of the court, which was contested on behalf of the State. The court by its order set aside the award but the High Court reversed it and made the award rule of the court. The State thereupon filed the appeal before Supreme Court. When the appeal was taken up for hearing by a Division Bench, the appellant State placed reliance on a three judge bench decision of the Court in *Executive Engineer (Irrigation)* v. *Abhaduta Jena*, (1988) 1 SCC 418, wherein it was held

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that the arbitrator to whom the reference is made without the intervention of the court, does not have jurisdiction to award interest pendente lite. On behalf of the respondents the correctness of that view was assailed. The Division Bench being of the view that the *Abhaduta Jena* decision required reconsideration, referred the matter to the Constitution Bench of the Court. Dismissing the appeals and overruling *Abhaduta Jena case* the Constitution Bench of the Court

Held:

The arbitrator acted with jurisdiction in awarding pendente lite interest to the contractor-respondent when the agreement was silent as to award of interest. (Para 46)

Where the agreement between the parties does not prohibit grant of interest *and* where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such — to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view. (Para 44)

[See also principles laid down by the Court at para 43]

The decision in *Abhaduta Jena case* does not lay down good law on this aspect. However, the present decision shall only be prospective in operation, which means that this decision shall not entitle any party nor shall it empower any court to reopen proceedings which have already become final. In other words, the law declared herein shall apply only to pending proceedings. (Para 46)

Executive Engineer (Irrigation), Balimela v. *Abhaduta Jena*, (1988) 1 SCC 418: (1988) 1 SCR 253, *overruled prospectively*

Seth Thawardas Pherumal v. *Union of India*, AIR 1955 SC 468: (1955) 2 SCR 48; *Bengal Nagpur Railway Co. Ltd.* v. *Ruttanji Ramji*, 65 IA 66; *Union of India* v. *A.L. Rallia Ram*, AIR 1963 SC 1685: (1964) 3 SCR 164; *Union of India* v. *West Punjab Factories Ltd.*, AIR 1966 SC 395: (1966) 1 SCR 580; *Podar Trading Co. Ltd.* v. *Francois Tagher*, (1949) 2 All ER 62: (1942) 2 KB 277, *explained* and *distinguished*

Edwards v. *Great Western Railway Company*, (1851) 138 ER 603: (1851) 11 CB 588; *Chandris* v. *Isbrandsten-Moller Co. Inc.*, (1951) 1 KB 240: (1950) 1 All ER 768; *Nachiappa Chettiar* v. *Subramaniam Chettiar*, AIR 1960 SC 307: (1960) 2 SCR 209; *Satinder Singh* v. *Amrao Singh*, AIR 1961 SC 908: (1961) 3 SCR 676; *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*, AIR 1967 SC 1030: (1967) 1 SCR 105; *Union of India* v. *Bungo Steel Furniture Pvt. Ltd.*, AIR 1967 SC 1032: (1967) 1 SCR 324; *Ashok Construction Company* v. *Union of India*, (1971) 3 SCC 66; *State of M.P.* v. *Saith and Skelton Private Limited*, (1972) 1 SCC 702: (1972) 3 SCR 233; *Government Insurance Office of NSW* v. *Atkinson-Leighton Joint Venture*, 146 CLR 206, *relied on*

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Swift & Co. v. *Board of Trade*, 1925 AC 520: 41 TLR 411; *Inglewood Pulp and Paper Co. Ltd.* v. *New Brunswick Electric Power Commission*, 1928 AC 429; *Union of India* v. *Premchand Satram Das*, AIR 1951 Pat 201: ILR 30 Pat 972; *Bhowanidas Ramgobind* v. *Harasukhdas Balkishendas*, AIR 1924 Cal 524: 27 CWN 933; *Sherry* v. *Oke*, (1835) 3 Dowl 349; *Beahan* v. *Wolfe*, (1832) 1 Alc & Na 233, *cited*

Halsbury's Laws of England, 4th edn., Vol. 2, page 273 (para 534), page 303, para 580 and para 592, *relied on*

R-M/T/11059/C

The Judgment of the Court was delivered by

K.N. SINGH, C.J.— These two appeals are directed against the judgment of the Orissa High Court making the award made by the arbitrator rule of the court. The appellants challenged the validity of the award before this Court on two grounds, namely: (1) the award was vitiated as it contained no reasons; and (2) the arbitrator had no jurisdiction to award pendente lite interest.

2. The first question was considered by a Constitution Bench of this Court in *Raipur Development Authority* v. *Chokhamal Contractors*[1]. The Constitution Bench held that an award is not liable to be set aside merely on the ground of absence of reasons. The Constitution Bench further held that where the arbitration agreement itself stipulated reasons for the award the arbitrator is under a legal obligation to give reasons. Thus the first question stands concluded against the appellants. As regards the second question, when the appeal was taken up for hearing by a Division Bench the appellants placed reliance on a three Judge bench decision of this Court in *Executive Engineer (Irrigation), Balimela* v. *Abhaduta Jena*[2] wherein it was held that the arbitrator to whom the reference is made without the intervention of the court, does not have jurisdiction to award interest pendente lite. On behalf of the respondents the correctness of that view was assailed. The bench hearing these appeals referred the matter to Constitution Bench by order dated March 15, 1991, as the learned Judges were of the view that the correctness of the view taken by this Court in *Jena case*[2] insofar as it held that the arbitrator has no power to award pendente lite interest, requires consideration by a larger bench. That is how these appeals are before this Constitution Bench.

3. Before we deal with the submissions raised before us, we consider it appropriate to refer to the facts involved in Civil Appeal No. 1403 of 1986. On April 27, 1977, Government of Orissa the appellant and G.C. Roy respondent entered into an agreement for construction of head works in Phulwani. Clause 23 of the contract contained provision for resolution of disputes through arbitration. Clause 23 is as under :

1 (1989) 2 SCC 721
2 (1988) 1 SCC 418 : (1988) 1 SCR 253

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"All questions and disputes relating to the meaning of the specifications etc. ... or as to any other question or claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitrator ...."

The work was completed on February 20, 1980. G.C. Roy's claim for certain amounts was not accepted by the government as a result of which a dispute arose between the parties. The dispute was referred to the arbitrator who made his award on August 6, 1982. The arbitrator held that G.C. Roy, the respondent, was entitled to certain amount of money and in addition he was entitled to receive interest @ 9 per cent on the awarded amount from March 20, 1980 till the date of payment or decree whichever was earlier. It appears that March 20, 1980 was evidently the date on which the amount claimed by G.C. Roy became due to him as the work was completed on February 20, 1980. The respondent made an application before the court for making the award rule of the court, which was contested on behalf of the State of Orissa. The Subordinate Judge by his order dated November 29, 1982 set aside the award. On appeal by the respondent, the High Court set aside the order of the Subordinate Judge and made the award rule of the court. The appellant thereupon filed this appeal by obtaining leave from this Court. As noted earlier two questions were raised in the appeals. The first question has already been decided by a Constitution Bench. The second question relating to the jurisdiction of the arbitrator to award pendente lite interest is under consideration before us. We do not consider it necessary to refer the facts involved in C.A. No. 2565 of 1991. Suffice it to say that in that appeal also the High Court held that in the absence of agreement to the contrary, the arbitrator has jurisdiction to award interest pendente lite.

4. A dispute between two parties may be determined by court through judicial process or by arbitrator through a non-judicial process. The resolution of dispute by court, through judicial process is costly and time consuming. Therefore, generally the parties with a view to avoid delay and cost, prefer alternative method of settlement of dispute through arbitration proceedings. In addition to these two known processes of settlement of dispute there is another alternative method of settlement of dispute through statutory arbitration. Statutory arbitrations are regulated by the statutory provisions while the parties entering into agreement for the resolution of their dispute through the process of arbitration are free to enter into agreement regarding the method, mode and procedure of the resolution of their dispute provided the same are

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not opposed to any provision of law. Many a time while suit is pending for adjudication before a court, the court with the consent of the parties, refers the dispute to arbitration. On account of the growth in the international trade and commerce and also on account of long delays occurring in the disposal of suits and appeals in courts, there has been tremendous movement towards the resolution of disputes through alternative forum of arbitrators. The alternative method of settlement of dispute through arbitration is a speedy and convenient process, which is being followed throughout the world. In India since ancient days settlement of disputes by Panches has been a common process for resolution of disputes in an informal manner. But now arbitration is regulated by statutory provisions.

5. In India, the Second Schedule to the Code of Civil Procedure of 1908 contained provisions relating to the law of arbitration and all proceedings of arbitration were regulated by those provisions. Subsequently, the Arbitration Act of 1940 was enacted by the legislature with a view to consolidate and amend the law concerning arbitration. By virtue of Section 47 of the Act the provisions of the Act apply to all arbitrations and all proceedings thereunder except insofar as is otherwise provided by any law for the time being in force. Section 3 declares that :

> "3. *Provisions implied in arbitrations agreement.*— An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule insofar as they are applicable to the reference."

The First Schedule to the Act contains eight rules. For our purposes it is not necessary to notice these rules in detail except Rule 8 which provides: "the costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to and by whom and in what manner such costs or any part thereof shall be paid and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client." Section 41 sets out the procedure and powers of the court. The expression 'court' as defined in Section 2(*c*) means a civil court and does not include an arbitrator. It would be appropriate to set out Section 41 in its entirety.

> "41. *Procedure and powers of Court.*— Subject to the provisions of this Act and of rules made thereunder—
>
> (*a*) the provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court and to all appeals, under this Act; and
>
> (*b*) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in

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respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in clause (*b*) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters."

6. A reading of the above provision shows that Section 41 makes the provisions of Code of Civil Procedure applicable to all proceedings before the court including appeals under the Act. It further declares that the court shall have "for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule, as it has, for the purpose of, and in relation to, any proceedings before the court". This is without prejudice to conferment of similar powers upon the arbitrators by the parties. In other words if the parties confer powers similar to those as contained in the Second Schedule upon the arbitrator, his powers are not affected or curtailed by Section 41(*b*). The Second Schedule enumerates the powers of the court which it can exercise while the dispute is pending before the arbitrator. These include the power to give directions for the preservation, interim custody or sale of any goods which are the subject matter of reference to give appropriate directions for securing the amount in difference in the reference and also power to given appropriate directions for the detention, preservation or inspection of any property and similar other powers specified in Rule 3. Rule 4 empowers the court to issue interim injunction or to appoint a receiver pending proceedings before the arbitrator, while Rule 5 empowers the court to appoint a guardian in respect of a person of unsound mind for the purpose of arbitration proceedings.

7. Proceedings before the arbitrator are regulated by the provisions of the Arbitration Act and the arbitrator's powers are specified therein. However it is always open to the parties to confer more or additional powers on the arbitrator by consent or agreement. The arbitrator derives power to decide the dispute under the agreement of the parties. The Act provides for arbitration with or without intervention of a court and it also provides for making the award rule of the court and also for passing decree in terms of the award. It provides that every arbitration agreement unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule to the Act. The award may be modified or remitted to the arbitrator by the court for reconsideration. The court has power under Section 30 of the Act to set aside the award if it suffers from apparent errors of law or if it is otherwise invalid. The award made by the arbitrator is final and binding on the

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parties and persons claiming under them respectively. It is open to the parties and it would be a welcome feature to accept the award without the same being made a rule of the court. However, generally the parties approach the court for making the award rule of the court with a view to ensure enforceability of the award through the instrumentality of the court. Though the arbitrator is an alternative forum for resolution of disputes he does not ipso facto enjoy or possess all the powers conferred on the courts of law. Nonetheless the arbitrator has power to decide the dispute and his powers are regulated by the provisions of the Arbitration Act and the substantive law of the land. As already noted Section 3 of the Act provides that an arbitration agreement unless a different intention is expressed shall be deemed to include the provisions set out in the First Schedule insofar as they are applicable to the reference. The matters specified in the First Schedule are accordingly treated as implied conditions of arbitration agreement. Rule 8 of the First Schedule confers power on the arbitrator to award cost. Section 29 confers power on the court to award interest on the amount awarded by the arbitrator from the date of the decree. Section 41 makes provisions of the Code of Civil Procedure applicable to all arbitration proceedings. Section 34 of the Code of Civil Procedure confers power on the court to award interest but the Arbitration Act does not confer any express power on the arbitrator to award interest pendente lite. However, under Sections 3 and 4 of the Interest Act, 1978, the 'court' which includes a Tribunal or an 'Arbitrator' within the meaning of Section 2(*a*) of that Act is empowered to award interest. In the context of these provisions the question arises whether an arbitrator to whom reference is made by the parties has jurisdiction or authority to award interest pendente lite. If the arbitration agreement or the contract itself provides for award of interest on the amount found due from one party to the other, no question regarding the absence of arbitrator's jurisdiction to award the interest could arise as in that case the arbitrator has power to award interest pendente lite as well. Similarly, where the agreement expressly provides that no interest pendente lite shall be payable on the amount due, the arbitrator has no power to award pendente lite interest. But where the agreement does not provide either for grant or denial of interest on the amount found due, the question arises whether in such an event the arbitrator has power and authority to grant pendente lite interest.

8. Generally, the question of award of interest by the arbitrator may arise in respect of three different periods, namely: (i) for the period commencing from the date of dispute till the date the arbitrator enters upon the reference; (ii) for the period commencing from the date of the arbitrator's entering upon reference till the date of making the award;

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and (iii) for the period commencing from the date of making of the award till the date the award is made the rule of the court or till the date of realisation, whichever is earlier. In the appeals before us we are concerned only with the second of the three aforementioned periods. In *Jena case*[2], two questions arose for consideration of the Court, namely: (i) the power of the arbitrator to award interest for the period prior to his entering upon reference, and; (ii) the powers of the arbitrator to award interest for the period the dispute remained pending before him pendente lite. Since, the Court dealt with the second question in detail and held that the arbitrator had no jurisdiction or authority to award interest pendente lite, we think it necessary to consider the reasons for the decision. Justice Chinnappa Reddy, J. speaking for the bench held that neither the Interest Act, 1839 nor the Interest Act, 1978 conferred power on the arbitrator for awarding interest pendente lite. The learned Judge observed that Section 34 of the Civil Procedure Code which provides for the same did not apply to arbitrator inasmuch as an arbitrator is not a court within the meaning of the said provision. Consequently the arbitrator could not award interest pendente lite.

9. For this proposition, the learned Judge relied upon the decision in *Thawardas*[3]. The learned Judge pointed out that in *Thawardas*[3] "question of payment of interest was not the subject matter of reference to the arbitrator" though the interest awarded by the arbitrator related to the period prior to the reference to arbitration as well as the period during the pendency of the arbitration. The learned Judge also noticed that the observations of Bose, J. in *Thawardas*[3] have given rise to considerable difficulty in later cases wherein they have been explained as having been never intended to lay down any such broad and unqualified proposition as they appear to lay down on first impression. The learned Judge then referred to various decisions including the decisions in *Nachiappa Chettiar*[4], *Satinder Singh*[5], *Madanlal Roshanlal*[6], *Bungo Steel*[7], *Ashok Construction*[8] and *Saith and Skelton*[9] wherein the power of the arbitrator to award interest was upheld, and explained them on the basis that all those were "cases in which the reference to arbitration was made by the court, of all the disputes in the suit". It would be appropriate to reproduce the observations insofar as they are relevant : (SCC pp. 432-33, para 16)

3 *Seth Thawardas Pherumal* v. *Union of India*, (1955) 2 SCR 48 : AIR 1955 SC 468
4 *Nachiappa Chettiar* v. *Subramaniam Chettiar*, (1960) 2 SCR 209 : AIR 1960 SC 307
5 *Satinder Singh* v. *Amrao Singh*, (1961) 3 SCR 676 : AIR 1961 SC 908
6 *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*, (1967) 1 SCR 105 : AIR 1967 SC 1030
7 *Union of India* v. *Bungo Steel Furniture Pvt. Ltd.*, (1967) 1 SCR 324 : AIR 1967 1032
8 *Ashok Construction Co.* v. *Union of India*, (1971) 3 SCC 66
9 *State of M.P.* v. *Saith and Skelton (P) Ltd.*, (1972) 1 SCC 702 : (1972) 3 SCR 233

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"The question of award of interest by an arbitrator was considered in the remaining cases to which we have referred earlier. *Nachiappa Chettiar* v. *Subramaniam Chettiar*[4], *Satinder Singh* v. *Amrao Singh*[5], *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*[6], *Union of India* v. *Bungo Steel Furniture Private Limited*[7], *Ashok Construction Company* v. *Union of India*[8] and *State of M.P.* v. *Saith and Skelton (P) Limited*[9] were all cases in which the reference to arbitration was made by the court, of all the disputes in the suit. It was held that the arbitrator must be assumed in these circumstances to have the same power to award interest as the court. It was on that basis that the award of pendente lite interest was made on the principle of Section 34, Civil Procedure Code, in *Nachiappa Chettiar* v. *Subramaniam Chettiar*[4], *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*[6], *Union of India* v. *Bungo Steel Furniture Private Limited*[7], and *State of M.P.* v. *Saith and Skelton (P) Limited*[9]."

10. Certain English decisions including the decisions in *Chandris*[10] were brought to the notice of the learned Judges apart from certain passages from *Halsbury's Laws of England* and *Russell's Arbitration*. The learned Judge however, refrained from referring to them in view of the abundance of authoritative pronouncements by this Court. The correctness of the decision in *Jena case*[2] is challenged by the respondent. We therefore departed from the normal rule and heard learned counsel for the respondent Mr Milon Banerji before hearing the appellant's counsel. Mr Banerji appearing for the respondent made the following submissions:

(1) The power of an arbitrator to award interest is by virtue of an implied term in the arbitration agreement or reference i.e. by virtue of the arbitrator's implied authority to follow the ordinary rules of law;

(2) It is an implied term in every arbitration agreement that the arbitrator will decide the dispute according to Indian law. Though Section 34 of the Civil Procedure Code does not expressly apply to arbitrators, its principle applies, just as the principle of several other provisions (e.g., Section 3 of the Limitation Act) has been held applicable to the arbitrators. Inasmuch as the arbitrator is an alternative forum for resolution of disputes he must be deemed to possess all such powers as are necessary to do complete justice between the parties. The power to award interest pendente lite is a power which must necessarily be inferred to do complete justice between the parties. The principle is that a person who has been deprived of the use of money should be compensated in that behalf.

10 *Chandris* v. *Isbrandsten-Moller Co. Inc.*, (1951) 1 KB 240 : (1950) 1 All ER 768

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In short it is based upon the principle of compensation or restitution, as it may be called.

(3) In every case where the arbitration agreement does not exclude the jurisdiction of the arbitrator to award interest pendente lite, such power must be inferred.

(4) The decision in *Jena*[2] does not take into account several earlier decisions of this Court where the power of the arbitrator to award interest pendente lite has been upheld. Many such decisions have been explained away as cases where reference to arbitration was in a pending suit, though as a matter of fact it is not so. Even on principle the said decision does not represent the correct view.

11. Shri Soli J. Sorabji who supported the reasoning of Shri Milon Banerji submitted that there is no good reason why the arbitrator should be held to have no power to award interest pendente lite. Arbitrator is an alternative forum for resolution of disputes. The idea is to avoid going to court. If so, the arbitrator must be held to possess all the powers as are necessary to do complete and full justice between the parties. If the arbitrator is held to have no power to award interest pendente lite, the party claiming such interest would still be required to go to the civil court for such interest even though he may have obtained satisfaction in respect of his other claims from the arbitrator. Such a course is neither consistent with the concept of arbitration nor is conducive to the rule of avoidance of multiplicity of proceedings. After all, interest is nothing but another name for compensation for deprivation. It is based upon the principle of restitution. He submitted further that in a number of cases, this Court has held that though a particular provision is not applicable in a particular situation, the principle of that provision is yet applicable. This course has been applied to ensure that justice prevails. On the same analogy, it must be held that though Section 34, CPC does not apply to arbitrators, its principle does. To the same effect is the submission of Shri R.K. Garg.

12. On the other hand, Shri Sanghi, learned counsel appearing for the State of Orissa urged that interest was never regarded as a matter of right at common law. It is either a matter of agreement or a right created by statute. of course, interest can also be awarded on the ground of equity but that is applicable only to limited class of cases referred to in the decision of Privy Council in *Bengal Nagpur Railway Co. Ltd.* v. *Ruttanji Ramji*[11]. This indeed is the basis of the judgment of this Court in *Seth Thawardas Pherumal* v. *Union of India*[3]. According to learned counsel, a reading of Sections 3, 17 and 41 of the Arbitration Act goes to establish that arbitrator is denied such a power. If this Court holds that the

11 65 IA 66

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arbitrator has the power to award interest pendente lite on the ground that principle of Section 34 CPC avails him though the section itself does not apply, it will open the door for innumerable cases. It will create room for submitting that all the powers of the civil court should be inferred in the case of arbitrator as well by extending the same analogy. This would indeed amount to legislation by this Court which it ought to desist from doing.

13. The question with which we are faced has been considered by the Indian and English courts in detail. The decisions of the English courts have been followed by the Indian courts. It is, therefore, necessary to refer to some of the English decisions to examine how this question has been dealt with by the courts in England. In *Edwards* v. *Great Western Railway Company*[12], the question raised before the court was: whether the arbitrator is empowered to award interest on the amount awarded by him if he thinks such a course proper. The plaintiff's case was that he was entitled to such interest whereas the defendant company disputed the power of the arbitrator. The Company's case was that inasmuch as the notice of action did not demand interest, the plaintiff was not entitled to claim interest. This argument was repelled by Jarvis, C.J. in the following words:

> "There are two answers to this: one is that there is no plea of want of notice of action, but only a plea of never indebted 'by statute', — the effect of which is altered by Sir F. Pollock's act, 5 & 6 Vict., c. 97, s. 3. The defendants had, therefore, no right to rely upon the general plea; they are bound to plead specially the want of notice of action. A further answer would be, that this is a submission, not only of the action, but of all matters in difference; and the interest would be a matter in difference, whether demanded by the notice of action or not. If the arbitrator could give it, he might give it in that way, notwithstanding the want of claim of interest in the notice."

14. It is relevant to notice that the court clearly held that where a money claim is referred to an arbitrator, it would include the claim for interest as well. This is how it has been understood in subsequent decisions, as we shall presently notice.

15. In *Podar Trading Co. Ltd.* v. *Francois Tagher*[13] the dispute was whether the arbitrator had the power to award interest for the period subsequent to his award. The court held that prior to Civil Procedure Act, 1833, interest could be awarded in three cases only, namely where it is provided by statute or by agreement or by mercantile custom, and in no

12 (1851) 138 ER 603 : (1851) 11 CB 588
13 (1949) 2 All ER 62 : (1949) 2 KB 277

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other situation. Subsequent to the said enactment, however, the position was — according to the decision — that there was no difference between a court and an arbitrator. According to it, this proposition flowed from *Edwards*[12]. It noticed that Section 11 of the Arbitration Act, 1934 specifically empowered the court to award interest from the date of award, and further that Sections 28 and 29 of the Code of Civil Procedure empowered awarding of such interest in certain other specified situations. In other words, the court held, the arbitrator had the same power as the court in the matter of awarding interest. It then noticed the effect of Law Reforms (Miscellaneous Provisions) Act, 1934 and observed that Section 3(1) of the said Act empowered only the court to award interest from the date of cause of action to the date of judgment. It further noticed the fact that Section 3(2) of this Act repealed Sections 28 and 29 of the Civil Procedure Act, 1833. By virtue of this repeal, the court held, the arbitrator has no power to award interest. This may have been an omission, said the court, but it is for the legislature to rectify and not for the court to fill up the gap.

16. In *Chandris* v. *Isbrandsten-Moller Co. Inc.*[10] the arbitrator awarded interest without specification of any time. One of the questions before the Court of Appeal was whether he had the power to award interest. The matter came up before Devlin, J. in the first instance the Court held, following the decision in *Podar Trading*[13] that arbitrator had no such power. The matter was then carried in appeal to Court of Appeals. Lord Tucker who delivered the leading judgment held that *Podar Trading*[13] was wrongly decided and that the High Court was wrong in *Podar Trading*[13] in assuming that the decision in *Edwards*[12] was based upon the Civil Procedure Act of 1833. The ratio of *Edwards*[12] is that it is the submission which empowers the arbitrator to award interest and that power of the arbitrator was not derived from 1833 Act. Lord Tucker observed : (KB pp. 262-63)

> "But I agree with Mr Mocatta that the real basis of *Edwards* v. *Great Western Rly.*[12] was not that the arbitrator derived his powers from the Act of 1833, but that he derived them from the submission to him, which necessarily gave him the 'implied powers' — referred to by Lord Salvesen; and I see no reason why, since the Act of 1934, an arbitrator should not be deemed impliedly to have the same powers. Therefore, with diffidence, having regard to the view expressed by the Divisional Court on this matter, I have come to the conclusion that in such a case as this the arbitrator has power to award interest. Accordingly, to that extent, I think, this appeal should succeed and *Podar Trading Co. Ltd., Bombay* v. *Francois Tagher, Barcelona*[13] should on this point be overruled."

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17. Cohen, J. who delivered a concurring opinion observed that the Law Reforms (Miscellaneous Provisions) Act, 1934 really did not bring about any change. All that it did was to substitute court in place of jury, inasmuch as by that time, damages were being normally awarded by the Judge sitting alone i.e. without jury. Asquith, L.J., who too delivered a separate concurring opinion observed that the decision in *Edwards*[12] had assumed that the arbitrator has the same power as that of courts in the matter of awarding interest, which assumption has stood the test of time and that there was no good reason to discard the said assumption.

18. In *Thawardas*[3] the dispute related to the power of arbitrator to award interest both for the period prior to entering upon reference and for the period the reference was pending before him (pendente lite). The contractor had claimed interest and the arbitrator did award such interest at the rate of 6 per cent which was questioned before the Court. The Court, in the first instance, examined the power of the arbitrator to award interest for the period anterior to his entering upon reference and held that such interest could not be awarded inasmuch as the requirements of Section 1 of Interest Act, 1839 were not satisfied in that case. Since the requirements of Interest Act were not satisfied, the Court held the arbitrator had no power to award interest just because he thought it just to do so. It was then urged for the contractor that at least for the period the dispute was pending before the arbitrator, he could award interest on the analogy of Section 34 CPC. This too was repelled holding that Section 34 does not apply to arbitrator since he is not a court within the meaning of Code of Civil Procedure nor does the Civil Procedure Code apply to proceedings before him. The Court observed that but for Section 34, even the court could not have the power to award interest for the period the suit is pending before it for the later period. It would be appropriate to reproduce the relevant paragraph : (SCR p. 65)

> "It was suggested that at least interest from the date of 'suit' could be awarded on the analogy of Section 34 of the Civil Procedure Code, 1908. But Section 34 does not apply because an arbitrator is not a 'Court' within the meaning of the Code nor does the Code apply to arbitrators, and, but for Section 34, even a court would not have the power to give interest after the suit. This was, therefore, also rightly struck out from the award."

19. In *Nachiappa Chettiar* v. *Subramaniam Chettiar*[4] the arbitrators to whom the disputes pending in a suit were referred, awarded interest for all the three periods, namely for the period anterior to the reference, pendente lite and for the period subsequent to the award. The award was challenged in view of the decision in *Thawardas case*[3]. This objection was overruled by Gajendragadkar, J. in the following words: (SCR p. 238)

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"This argument is based solely on the observations made by Bose, J. who delivered the judgment of this Court in *Seth Thawardas Pherumal* v. *Union of India*[3]. It appears that in that case the claim awarded by the arbitrators was a claim for an unliquidated sum to which Interest Act of 1839 applied as interest was otherwise not payable by law in that kind of case. Dealing with the contention that the arbitrators could not have awarded interest in such a case, Bose, J., set out four conditions which must be satisfied before interest can be awarded under the Interest Act, and observed that none of them was present in the case; and so he concluded that the arbitrator had no power to allow interest simply because he thought that the payment was reasonable. The alternative argument urged before this Court that interest could be awarded under Section 34 of the CPC 1908, was also repelled on the ground that the arbitrator is not a court within the meaning of the Code nor does the Code apply to arbitrators. Mr Viswanatha Sastri relies upon these observations and contends that in no case can the arbitrators award interest. It is open to doubt whether the observations on which Mr Viswanatha Sastri relies support or were intended to lay down such a broad and unqualified proposition. However, we do not propose to pursue this matter any further because the present contention was not urged before the High Court. It was no doubt taken as a ground of appeal but from the judgment it is clear that it was not urged at the time of hearing. Under these circumstances we do not think we would be justified in allowing this point to be raised before us."

20. It is true that the contentions were not allowed to be urged on the ground that the same had not been urged in the High Court. However, it is significant to note that the court expressed its doubt whether the observations in *Thawardas*[3] relied upon by Sri Viswanatha Sastri were intended to lay down any such broad and unqualified proposition as was contended for before them.

21. *Satinder Singh* v. *Amrao Singh*[5] was not a case under the Arbitration Act. It arose under the East Punjab Acquisition and Requisition of Immovable Property (Temporary Powers) Act, 1948. We would consider this case, since it was referred to in *Jena*[2] along with *Nachiappa*[4] and other cases considered hereinafter. The relevant facts were that certain land was acquired under the provisions of the said Act and compensation was awarded, but no interest was awarded on the compensation on the ground that the Act did not provide for interest. The High Court held that no interest was payable on the compensation amount, in view of Section 5(*e*) of the Act while making the provisions of Section 23(1) of the Land Acquisition Act applicable but it did not apply the provisions of Sections 28 and 34 of the Land Acquisition Act which must lead to the necessary inference that it did not intend to provide for grant of interest.

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This Court did not agree with the High Court's reasoning, and it held that application of Section 23(1) did not necessarily mean exclusion of Sections 28 and 34. It then proceeded to examine the question on principle, on the assumption that awarding of interest was not excluded by the provisions of the said enactment. The Court observed: (SCR p. 693)

> "What then is the contention raised by the claimants? They contend that their immovable property has been acquired by the State and the State has taken possession of it. Thus they have been deprived of the right to receive the income from the property and there is a time lag between the taking of the possession by the State and the payment of compensation by it to the claimants. During this period they have been deprived of the income of the property and they have not been able to receive interest from the amount of compensation. Stated broadly the act of taking possession of immovable property generally implies an agreement to pay interest on the value of the property and it is on this principle that a claim for interest is made against the State. This question has been considered on several occasions and the general principle on which the contention is raised by the claimants has been upheld. In *Swift & Co.* v. *Board of Trade*[14] it has been held by the House of Lords that 'on a contract for the sale and purchase of land it is the practice of the Court of Chancery to require the purchaser to pay interest on his purchase money from the date when he took, or might safely have taken, possession of the land'."

22. The Court then referred to the decision of the House of Lords in *Swift & Co.* v. *Board of Trade*[14] and of the Privy Council in *Inglewood Pulp and Paper Co. Ltd.* v. *New Brunswick Electric Power Commission*[15] and observed: (SCR p. 694)

> "It would thus be noticed that the claim for interest proceeds on the assumption that when the owner of immovable property loses possession of it he is entitled to claim interest in place of right to retain possession. The question which we have to consider is whether the application of this rule is intended to be excluded by the Act of 1948, and as we have already observed, the mere fact that Section 5(3) of the Act makes Section 23(1) of the Land Acquisition Act of 1894 applicable we cannot reasonably infer that the Act intends to exclude the application of this general rule in the matter of the payment of interest."

23. The decision of this Court in *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*[6] is a case where a dispute pending in a suit was referred to arbitration. In the suit, plaintiff had specifically claimed interest. The arbitrator awarded interest and when it was objected to, it was

14 1925 AC 520 : 41 TLR 411
15 1928 AC 492

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upheld on the ground that inasmuch as interest was claimed in the suit, it must be assumed that all the issues in controversy in the suit between the parties, including interest, were referred to arbitrator. The appellant, who disputed the award of interest, however, relied upon the observations in *Thawardas*[3] quoted earlier. This Court (K.N. Wanchoo, J.C. Shah and R.S. Bachawat, JJ.) dealt with the said observations in the following words: (SCR pp. 108-09)

> "These observations divorced from their context, lend colour to the argument that the arbitrator has no power to award pendente lite interest. But, in later cases, this Court has pointed out that the observations in *Seth Thawardas case*[3] were not intended to lay down such a broad and unqualified proposition .... The relevant facts regarding the claim for interest in *Seth Thawardas case*[3] will be found at pp. 64 to 66 of the Report and in paragraphs 2, 17 and 24 of the judgment of the Patna High Court reported in *Union of India* v. *Premchand Satram Das*[16]. The arbitrator awarded interest on unliquidated damages for a period before the reference to arbitration and also for a period subsequent to the reference. The High Court set aside the award regarding interest on the ground that the claim for interest was not referred to arbitration and the arbitrator had no jurisdiction to entertain the claim. In this Court, counsel for the claimant contended that the arbitrator had statutory power under the Interest Act of 1839 to award the interest and, in any event, he had power to award interest during the pendency of the arbitration proceedings under Section 34 of the Code of Civil Procedure, 1908. Bose, J. rejected this contention. It will be noticed that the judgment of this Court in *Seth Thawardas case*[3] is silent on the question whether the arbitrator can award interest during the pendency of arbitration proceedings if the claim regarding interest is referred to arbitration. In the present case, all the disputes in the suit were referred to the arbitrator for his decision. One of the disputes in the suit was whether the respondent was entitled to pendente lite interest. The arbitrator could decide the dispute and he could award pendente lite interest just as a court could do so under Section 34 of the Code of Civil Procedure. Though, in terms, Section 34 of the Code of Civil Procedure does not apply to arbitrations, it was an implied term of the reference in the suit that the arbitrator would decide the dispute according to law and would give such relief with regard to pendente lite interest as the court could give if it decided the dispute. This power of the arbitrator was not fettered either by the arbitration agreement or by the Arbitration Act, 1940. The contention that in an arbitration in a suit the arbitrator had no power to award pendente lite interest must be rejected."

16 AIR 1951 Pat 201, 204-05 : ILR 30 Pat 972

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24. The above observations were no doubt made in the context of a reference to arbitrator in a pending suit, wherein one of the issues in controversy was the plaintiff's claim for interest. What is of significance is the basis on which the decision in *Thawardas*[3] was explained and distinguished. In fact, the learned Judges looked into the High Court record too to ascertain the correct formal position.

25. The next decision is in *Union of India* v. *Bungo Steel Furniture Pvt. Ltd.*[7] Reference in this case to the arbitration was otherwise than in a pending suit. The dispute, however, pertained to interest for the period subsequent to the making of the award i.e. from the date of the award onwards. The arbitrator did award such interest which was objected to on the strength of this Court's decision in *Thawardas*[3] but the objection was rejected by the Court. Ramaswamy, J. speaking for the three Judge bench, observed: (SCR pp. 328-30)

> "This passage supports the argument of the appellant that interest cannot be awarded by the arbitrator after the date of the award but in later cases it has been pointed out by this Court that the observations of Bose, J. in *Seth Thawardas Pherumal* v. *Union of India*[3] were not intended to lay down such a broad and unqualified proposition .... In *Seth Thawardas Pherumal* v. *Union of India*[3], the material facts were that the arbitrator had awarded interest on unliquidated damages for a period before the reference to arbitration and also for a period subsequent to the reference. The High Court set aside the award regarding interest on the ground that the claim for interest was not referred to arbitration and the arbitrator had no jurisdiction to entertain the claim. In this Court, counsel for the appellant contended that the arbitrator had statutory power under the Interest Act of 1839 to award the interest and, in any event, he had power to award interest during the pendency of the arbitration proceedings under Section 34 of the Code of Civil Procedure, 1908. Bose, J. rejected this contention, but it should be noticed that the judgment of this Court in *Seth Thawardas case*[3] does not deal with the question whether the arbitrator can award interest subsequent to the passing of the award if the claim regarding interest was referred to arbitration. In the present case, all the disputes in the suit, including the question of interest, were referred to the arbitrator for his decision. In our opinion, the arbitrator had jurisdiction, in the present case, to grant interest on the amount of the award from the date of the award till the date of the decree granted by Mallick, J. The reason is that it is an implied term of the reference that the arbitrator will decide the dispute according to existing law and give such relief with regard to interest as a court could give if it decided the dispute. Though, in terms, Section 34 of the Code of Civil Procedure does not apply to arbitration proceed-

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ings, the principle of that section will be applied by the arbitrator for awarding interest in cases where a court of law in a suit having jurisdiction of the subject matter covered by Section 34 could grant a decree for interest. In *Edwards* v. *Great Western Rly. Co.*[12] one of the questions at issue was whether an arbitrator could or could not award interest in a case which was within Section 28 of the Civil Procedure Act, 1833. It was held by the Court of Common Pleas that the arbitrator, under a submission of 'all matters in difference', might award the plaintiff interest, notwithstanding the notice of action did not contain a demand of interest; and further, that, assuming a notice of action to have been necessary, the want of insufficiency of such notice could not be taken advantage of, since the 5 & 6 Vict., c. 97, s. 3, unless pleaded specially. In the course of his judgment Jarvis, C.J. observed:

> 'A further answer would be, that this is a submission, not only of the action, but of all matters in difference; and the interest would be a matter in difference, whether demanded by the notice of action or not. If the arbitrator could give it, he might give it in that way, notwithstanding the want of claim of interest in the notice.'

This clearly decides that, although the Civil Procedure Act, 1833, speaks in terms of a jury, and only confers upon a jury a discretionary right to give interest, nonetheless, if a matter was referred to an arbitrator — a matter with regard to which a jury could have given interest — an arbitrator may equally give interest, and that despite the language used in that Act. The principle of this case was applied by the Court of Appeal in *Chandris* v. *Isbrandsten-Moller Co. Inc.*[10] and it was held that though in terms Section 3 of the Law Reforms (Miscellaneous Provisions) Act, 1934 giving the court power to award interest on any debt or damages did not apply to an arbitrator, it was an implied term of the contract that the arbitrator could award interest in a case where the court could award it. It was pointed out by the Court of Appeal that the power of an arbitrator to award interest was derived from the submission to him, which impliedly gave him power to decide 'all matters in difference' according to the existing law of contract, exercising every right and discretionary remedy given to a court of law; that the Law Reforms (Miscellaneous Provisions) Act, 1934, which repealed Section 28 of the Civil Procedure Act, 1833, was not concerned with the powers of arbitrators; and that the plaintiff was entitled to the interest awarded by the arbitrator.

The legal position is the same in India. In *Bhowanidas Ramgobind* v. *Harasukhdas Balkishendas*[17] the Division Bench of the Calcutta High Court consisting of Rankin and Mookerjee, JJ. held that

17 AIR 1924 Cal 524: 27 CWN 933

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the arbitrators had authority to make a decree for interest after the date of the award and expressly approved the decision of the English cases — *Edwards* v. *Great Western Rly. Co.*[12], *Sherry* v. *Oke*[18] and *Beahan* v. *Wolfe*[19]. The same view has been expressed by this Court in a recent judgment in *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd., Indore*[6]. We are accordingly of the opinion that the arbitrator had authority to grant interest from the date of the award to the date of the decree of Mallick, J. and Mr Bindra is unable to make good his argument on this aspect of the case."

26. The above passages show that the Court laid down two principles: (i) it is an implied term of the reference that the arbitrator will decide the dispute according to existing law and give such relief with regard to interest as a court could give if it decides the dispute; (ii) though in terms Section 34 of the Code of Civil Procedure does not apply to arbitration proceedings, the principle of that section will be applied by the arbitrator for awarding interest in cases where a court of law in a suit having jurisdiction of the subject matter covered by Section 34 could grant a decree for interest. It is also relevant to notice that this decision refers with approval to both the English decisions in *Edwards*[12] and *Chandris*[10] case besides the decision of this Court in *Firm Madanlal Roshanlal*[6]. It is noteworthy that the decision explains and distinguishes the decision in *Thawardas*[3] on the same lines as was done in *Firm Madanlal Roshanlal case*[6].

27. It would be appropriate to deal, at this stage, with a submission of Sri Sanghi that in this case, the court stated in so many words that "all the disputes in the suit, including the question of interest were referred to the arbitrator for his decision". He urged that in the face of the said statement, it is not open to this Court to say that it was not a reference in a pending suit. But he conceded that on a reading of the judgment, it does not appear to be a reference in a pending suit, yet he contended that we cannot treat it as a case of reference otherwise than in a pending suit in view of the abovequoted sentence. We cannot agree. On perusal of the facts as narrated in the judgment it is evident that the use of the words "in the suit" in the sentence quoted above is an accidental or typographical error.

28. *Ashok Construction Co.* v. *Union of India*[8] was a case of arbitration otherwise than in a pending suit. The arbitrator made his award and also awarded interest from the date the amount fell due. One of the objections before the Supreme Court was that the arbitrator acted beyond his jurisdiction in awarding interest. This objection was dealt with in the following words: (SCC p. 68, para 6)

18 (1835) 3 Dowl 349
19 (1832) 1 Alc & Na 233

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"The appellants made a claim for interest on the amount withheld after the due date and the arbitrator was competent to decide that claim. The arbitration agreement by clause 25 provides:

> 'Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other questions, claim, right, matter or thing, whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whatever, arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the Superintending Engineer.'

* * *

The terms of the arbitration agreement did not exclude the jurisdiction of the arbitrator to entertain a claim for interest, on the amount due under the contract. The award of the arbitrator cannot be said to be invalid."

29. The principle of this judgment is that since the arbitration agreement did not exclude the jurisdiction of the arbitrator to entertain claim for interest he was competent to award interest on the amount due under the contract. Though no decisions are cited in support of this proposition, it is in accord with the principles laid down in *Edwards*[12] as understood in *Chandris case*[10].

30. In *State of M.P.* v. *Saith & Skelton (P) Ltd.*[9], disputes had arisen between the contractor and the State of Madhya Pradesh in respect of certain work done by the contractor. An arbitrator was appointed but there were disputes even with respect to the said appointment and that dispute reached this Court. This Court appointed a sole arbitrator with the consent of the parties and directed that the arbitration records be sent to the sole arbitrator. The arbitrator gave award and awarded simple interest from a date anterior to the date of reference. The respondent-contractor filed a petition for passing a decree in terms of the award, which was opposed by the State before this Court. One of the questions canvassed before this Court was whether the arbitrator had jurisdiction to award interest from a date anterior to the date of award, or the date of reference, till the date of decree, as was done by him. It was urged on behalf of the State that he had no such power and in support of this argument decision of the Privy Council in *Bengal Nagpur Railway*[11] and of this Court in *Thawardas*[3] and other decisions were relied upon. This Court

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referred to the decision in *Bungo Steel*[7] and *Firm Madanlal Roshanlal*[6] and pointed out that the decision in *Thawardas*[3] was distinguished in *Firm Madanlal Roshanlal*[6] "on the ground that the said decision is silent on the question whether an arbitrator can award interest during the pendency of the arbitration proceedings, if all the disputes in that suit including the claim for interest, were referred for arbitration". After referring to the decision in *Firm Madanlal*[6] the Court observed thus: (SCC p. 712, paras 32 and 33)

> "In the case before us there is no controversy that all the disputes including a claim for payment of the amount with interest was referred to the arbitrator. The arbitrator, as pointed out earlier, found that the firm was entitled to the payment as price in the sum of Rs 1,79,653.18. The arbitrator has further found that this amount become payable as balance price for the goods supplied by the firm on June 7, 1958, on which date the final inspection took place. If that is so, Section 61 of the Sale of Goods Act, 1930 squarely applies and it saves the right of the seller (in this case the firm) to recover interest, where by law interest is recoverable. Sub-section (2) of Section 61, which is material is as follows:
>
> > '61.(2) In the absence of a contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of the price —
> >
> > > (*a*) to the seller in a suit by him for the amount of the price — from the date of the tender of the goods or from the date on which the price was payable,
> > >
> > > (*b*) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller — from the date on which the payment was made.'
>
> In the case before us, admittedly the contract does not provide that no interest is payable on the amount that may be found due to any one of them. If so, if follows that the seller, namely, the firm is entitled to claim interest from the date on which the price became due and payable. The finding of the arbitrator in this case is that the price became payable on June 7, 1958. As held by this Court in *Union of India* v. *A.L. Rallia Ram*[20], which related to an arbitration proceeding, under sub-section (2) of Section 61, in the absence of a contract to the contrary, the seller is eligible to be awarded interest on the amount of the price for the goods sold. On this principle it follows that the award of interest from June 7, 1958 is justified."

31. Having so said the Court proceeded to point out that: (SCC pp. 712-13, para 34)

20 (1964) 3 SCR 164: AIR 1963 SC 1685

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"If the contention of Mr Shroff that under no circumstances an arbitrator can award interest prior to the date of the award, or prior to the date of reference, is accepted, then the position will be very anomalous. As an illustration, we may point out that there may be cases where the only question that is referred to the arbitrator is whether any of the parties is entitled to claim interest on the amount due to him from a date which may be long anterior to the date of reference. When such a question is referred to the arbitrator, naturally he has to decide whether the claim for award of interest from the date referred to by the parties is acceptable or not. If the arbitrator accepts that claim, he will be awarding interest from the date which will be long prior even to the date of reference. Therefore, the question ultimately will be whether the dispute referred to the arbitrator included the claim for interest from any particular period or whether the party is entitled by contract or usage or by a provision of law for interest from a particular date."

32. It is relevant to notice that the principle of this decision is again the same in the cases of *Ashok Construction Co.*[8], *Edwards*[12] and *Chandris*[10].

33. Sri Milon Banerji urged that in *Jena case*[2] Chinnappa Reddy, J. referred to six decisions of this Court (which the learned Judge referred to as cases where reference to arbitration was made by the Court of all the disputes in the suit). Only two cases were really of that kind whereas the other four were not. In other words, his submission was that of the six cases, only *Nachiappa Chettiar*[4] and *Firm Madanlal Roshanlal*[6] were cases in which reference to arbitration was made in pending suits whereas the other four cases namely *Satinder Singh*[5], *Bungo Steel*[7], *Ashok Construction*[8] and *Saith and Skelton*[9] were cases where the reference to arbitration was otherwise than in a pending suit. We have already referred to the facts of all six cases hereinabove and we find that the learned counsel appears to be right in his submission. We must also point out that *Nachiappa Chettiar decision*[4] dealt with interest for all three periods, viz. pre-reference, pendente lite and post-award, whereas *Firm Madanlal Roshanlal*[6] dealt with pendente lite interest alone. *Satinder Singh case*[5] as has been pointed out hereinabove, was not a case under Arbitration Act at all but one arising under Punjab Requisition and Acquisition of Immovable Property Act, 1948. *Bungo Steel*[7] dealt with the interest for the post-award period while *Ashok Construction*[8] dealt generally with the power of the arbitrator to award interest from the due date onwards which evidently included pendente lite interest as well. *Saith and Skelton*[9] dealt with power of the arbitrator to award interest for the period prior to reference.

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34. The High Court of Australia too considered this question in *Government Insurance Office of NSW* v. *Atkinson-Leighton Joint Venture*[21]. The respondents before the High Court agreed to construct an embankment under an agreement entered into with the Maritime Services Board of NSW. By a contractors' all risks policy of insurance, the Government Insurance Office of NSW agreed to indemnify the Joint Ventures against any unforeseen loss or damage to the contract works. The policy contained certain exclusions with which we are concerned. Construction of the embankment began in 1971. While it was in progress, a violent storm occurred causing considerable damage to the embankment under construction. Even thereafter there were repeated storms causing further damage to the embankment. The Joint Ventures laid a claim against the insurer which was rejected, whereupon an arbitrator was appointed as provided by the Insurance Policy. The arbitrator found in favour of the respondent but stated a special case for the opinion of the Supreme Court of New South Wales in accordance with the provisions of Arbitration Act, 1902 (NSW). Of the two questions stated, the second one is relevant for our purposes. It reads:

> "Whether the arbitrator had power to award interest on any sum awarded in the course of the arbitration."

35. The Supreme Court of NSW answered the same in affirmative. Accordingly, the arbitrator made his award. The insurer then applied for setting aside the award on the ground of error apparent on the face of the record, whereas the respondent applied for making it a decree of the court. The matter ultimately reached the High Court of Australia where it was argued that the arbitrator had no power to award interest for the period the dispute was pending before him (pendente lite). The majority (Stephen, Mason and Murphy, JJ.), on a consideration of the decisions in *Chandris*[10], *Edwards*[12] and *Podar Trading*[13] among other cases, held that the arbitrator has power to award interest in the following words:

> "In those circumstances I would affirm the views expressed by the New South Wales Court of Appeal concerning arbitrators' powers regarding the award of interest. Not only is it in conformity with the great weight of authority; that authority appears to me to involve no error of principle. Moreover, it is wholly beneficial in its operation, conferring, as it does, upon arbitrators power to do justice as between parties to a submission by enabling them to award interest, up to the date of the award, upon amounts found due. This is a power the need for which is the greater in times of dear money, reflected in prevailing high rates of interest — *The Myron* (28)."

21 146 CLR 206

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Of course Barwick, C.J. and Wilson, J. dissented. According to them the arbitrator has no such power, but the majority opinion accords with the view we are taking herein.

36. *Halsbury's Laws of England*, 4th edn., Vol. 2., page 273 (para 534) states:

> "534. *Express and implied clauses.*— In general, the parties to an arbitration agreement may include in it such clauses as they think fit. By statute, however, certain terms are implied in an arbitration agreement unless a contrary intention is expressed or implied therein. Moreover, it is normally an implied term of an arbitration agreement that the arbitrator must decide the dispute in accordance with the ordinary law. This includes the basic rules as to procedure, although parties can expressly or impliedly consent to depart from those rules. The normal principles on which terms are implied in an agreement have to be considered in the context that the agreement relates to an arbitration."

37. At page 303, para 580 (4th edn., Vol. 2) dealing with the award of interest, it reads:

> "580. *Interest.*— A arbitrator or umpire has power to award interest on the amount of any debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the award."

38. Para 592 (4th edn., Vol. 2) deals with the conduct of proceedings of the arbitrator and evidence upon which he can act. Since we find this paragraph relevant we extract it hereunder:

> "592. *Conduct of proceedings; evidence.*— In the conduct of the proceedings in his capacity as arbitral tribunal, the arbitrator or umpire must conform to any directions which may be contained in the agreement of reference itself. Subject to any such directions, he should observe, so far as may be practicable, the rules which prevail at the trial of an action in court, including rules as to issue estoppel, but he may deviate from those rules provided that in so doing he does not disregard the substance of justice. Fundamental to notions of justice are the rules that each party has a right to know the case made against him and a right to put his own case, but it does not follow that a party is entitled to an oral hearing. Again, the arbitrator is bound by the rules of evidence, and although the parties may agree that rules of evidence as observed in the courts shall not be strictly followed, he must not admit and act upon evidence which is obviously inadmissible, and which goes to the root of the question which he has to decide. Hearsay evidence is, however, now generally admissible."

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39. Now, we think it appropriate to consider the decisions cited by Sri Sanghi in support of his contention.

40. The first decision relied upon by him is in *Union of India* v. *West Punjab Factories Ltd.*[22] He referred to the passage at page 590 to contend that the Constitution Bench in this case has approved decision in *Thawardas*[3]. We do not agree. The question the Constitution Bench was considering in the said paragraph was whether interest could be awarded for the period prior to the institution of the suit. (It was not a case under Arbitration Act but was a civil suit). In that connection the Court referred to *Thawardas*[3] as laying down the correct law in that behalf, along with *Bengal Nagpur Railway*[11] and *Union of India* v. *A.L. Rallia Ram*[20]. It is not possible to read this paragraph as approving or affirming the decision of *Thawardas*[3] insofar as it held that an arbitrator had no power to award interest pendente lite.

41. Mr Sanghi then relied upon the decision in *Rallia Ram*[20] to which a brief reference would be sufficient. That case related to the power of the arbitrator to award interest for the pre-reference period. Following the decision of the Privy Council in *Bengal Nagpur Railway*[11] and the decision of this Court in *Thawardas*[3] it held that the arbitrator had no power to award interest for the said period merely because he thought it to be just in the circumstances. It was held that interest for the pre-reference period is a matter of substantive law, usage or agreement. Accordingly, they held that in the absence of usage, contract or any provision of law to justify the award of interest, interest cannot be awarded by way of damages. We do not think that this case has any relevance on the question of arbitrators' power to award interest pendente lite.

42. A few other decisions were also cited by both sides but we do not think it necessary to burden this judgment with them since those are not cases arising under the Arbitration Act or arbitration matters.

43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or

22 (1966) 1 SCR 580 : AIR 1966 SC 395

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damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative form (*sic* forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit *and* a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. *Thawardas*[3] has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until *Jena case*[2] almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.

44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:

Where the agreement between the parties does not prohibit grant of interest *and* where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the

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arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such — to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view.

45. For the reasons aforesaid we must hold that the decision in *Jena*[2], insofar as it runs counter to the above proposition, did not lay down correct law.

46. In view of the above discussion we hold that in two appeals namely Civil Appeal No. 1403 of 1986 and Civil Appeal No. 2586 of 1985 the arbitrator acted with jurisdiction in awarding pendente lite interest and the High Court rightly upheld the award. In the result both the appeals fail and are, accordingly, dismissed but there will be no order as to costs. Even though we have held that the decision in *Jena case*[2] does not lay down good law, we would like to direct that our decision shall only be prospective in operation, which means that this decision shall not entitle any party nor shall it empower any court to reopen proceedings which have already become final. In other words, the law declared herein shall apply only to pending proceedings.

47. As regards the C.A. No. 2565 of 1991 and SLP No. 5428 of 1990 the same shall be placed before an appropriate bench for decision in the light of this judgment.

(1992) 1 Supreme Court Cases 534

(BEFORE T.K. THOMMEN AND R.M. SAHAI, JJ.)

SHRISHT DHAWAN (SMT) .. Appellant;

Versus

M/S SHAW BROTHERS .. Respondent.

Civil Appeal No. 4927 of 1991†, decided on December 13, 1991

Rent Control and Eviction — Delhi Rent Control Act, 1958 — S. 21 — Permission for limited period of tenancy — Held, can be assailed by tenant at the stage of execution only by prima facie establishing fraud or collusion in respect of jurisdictional facts of availability of vacant premises not required by landlord for a particular period and its letting out for residential purposes only

† From the Judgment and Order dated 21.1.1989 of the Delhi High Court in S.A.O. No. 18 of 1989

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SUPPLEMENTARY ORDER

67. We have delivered today the judgment in these cases (*supra* paras 1-66) and while answering the last substantial question of law, we have held that when a particular demand is raised on a licensee, the licensee can challenge the demand before the Tribunal and the Tribunal will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the licence agreement and in particular the definition of adjusted gross revenue in the licence agreement and can also interpret the terms and conditions of the licence agreement.

68. It is stated by Mr C.S. Vaidyanathan, learned Senior Counsel for some of the licensees that demands have already been raised on them. He submitted that two months' time be granted to the licensees to raise their disputes before the Tribunal and in the meanwhile the demands should not be enforced.

69. If the demands have been raised, we grant two months' time to the licensees to raise the dispute before the Tribunal against the demands and during this period of two months, the demands will not be enforced.

(2011) 10 Supreme Court Cases 573

(BEFORE P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.)

MSK PROJECTS INDIA (JV) LIMITED .. Appellant;

Versus

STATE OF RAJASTHAN AND ANOTHER .. Respondents.

Civil Appeals No. 5416 of 2011† with No. 5417 of 2011,
decided on July 21, 2011

A. **Contract and Specific Relief — Remedies for Breach of Contract — Damages — Measure/Quantification of damages — Measure of contractual damages — Expectation interest — Loss of expected profit, attributable to breach(es) of contract by the other party, reiterated, is recoverable — Contractual measure of damages distinguished from "reimbursement" or "compensation" — Contract Act, 1872, Ss. 73 and 74**

Held :

In common parlance, "reimbursement" means and implies restoration of an equivalent for something paid or expended. Similarly, "compensation" means anything given to make the equivalent. However, a claim by a contractor for recovery of amount as damages as expected profit out of contract cannot be disallowed on ground that there was no proof that he suffered actual loss to the extent of amount claimed *on account of breach of contract.* (Para 38)

Damages can be claimed by a contractor where the Government is *proved to have committed breach by improperly rescinding the contract* and for estimating

† From the Judgment and Order dated 24-4-2007 of the High Court of Judicature of Rajasthan at Jaipur in Civil Misc. Appeal No. 1581 of 2006

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the amount of damages, the court should make a broad evaluation *instead of going into minute details*. Where in the works contract, the party entrusting the work committed *breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract*. Claim of expected profits *is legally admissible on proof of the breach of contract* by the erring party. What would be the measure of profit would depend upon the facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract *is guilty of breach of contract* cannot be gainsaid. (Para 39)

Dwaraka Das v. *State of M.P.*, (1999) 3 SCC 500; *A.T. Brij Paul Singh* v. *State of Gujarat*, (1984) 4 SCC 59, *followed*

BSNL v. *Reliance Communication Ltd.*, (2011) 1 SCC 394 : (2011) 1 SCC (Civ) 192; *ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705, *relied on*

State of Gujarat v. *Shantilal Mangaldas*, (1969) 1 SCC 509; *TISCO Ltd.* v. *Union of India*, (2001) 2 SCC 41; *GDA* v. *Balbir Singh*, (2004) 5 SCC 65; *HUDA* v. *Raj Singh Rana*, (2009) 17 SCC 199 : (2011) 2 SCC (Civ) 136, *referred to*

[Ed.: This aspect of the recoverability expected profits is considered the standard measure of contractual damages and has been called the "expectation interest" in the classic article "The Reliance Interest in Contract Damages" by Lon L. Fuller and W.R. Perdue, 46 Yale Law Journal (1936) 52-92.

Available free at http:cisg.law.pace.edu/cisg/biblio/fuller.html#iv last accessed on 19-11-2011)

It is valuable to consider Fuller and Perdue's definitions of the three kinds of interest to be protected by damages in the contractual context:

> "It is convenient to distinguish three principal purposes which may be pursued in awarding contract damages. These purposes, and the situations in which they become appropriate, may be stated briefly as follows:
>
> First, the plaintiff has in reliance on the promise of the defendant conferred some value on the defendant. The defendant fails to perform his promise. The court may force the defendant to disgorge the value he received from the plaintiff. The object here may be termed the prevention of gain by the defaulting promisor at the expense of the promisee; more briefly, the prevention of unjust enrichment. The interest protected may be called the ***restitution interest***. For our present purposes it is quite immaterial how the suit in such a case be classified, whether as contractual or quasi-contractual, whether as a suit to enforce the contract or as a suit based upon a rescission of the contract. These questions relate to the superstructure of the law, not to the basic policies with which we are concerned."

The Law of Restitution has since gained explicit recognition in Common Law Jurisdictions as an independent cause of action, and these are very clearly purely restitutionary claims, and the fiction of "quasi-contract" is no longer necessary to sustain such claims. For further case law *see* Contract and Specific Relief, '**12(n)** Remedies/Relief *Restitutionary Remedies*', pp. 363 et seq. in Vol. 13, *Complete Digest of Supreme Court Cases*, 2nd Edn.

Fuller and Perdue continue:

> "Secondly, the plaintiff has in reliance on the promise of the defendant changed his position. For example, the buyer under a contract for the sale of land has incurred expense in the investigation of the seller's title, or has neglected the opportunity to enter other contracts. We may award damages to the plaintiff for the purpose of undoing the harm which his reliance on the defendant's promise has caused him. Our object is to put him in as good a position as he was in before the promise was made. The interest protected in this case may be called the ***reliance interest***.

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Thirdly, without insisting on reliance by the promisee or enrichment of the promisor, we may seek to give the promisee the value of the expectancy which the promise created. We may in a suit for specific performance actually compel the defendant to render the promised performance to the plaintiff, or, in a suit for damages, we may make the defendant pay the money value of this performance. Here our object is to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise. The interest protected in this case we may call the expectation interest."]

B. **Contract and Specific Relief — Remedies/Relief — Remedies for Breach of Contract — Damages — Measure/Quantification of damages — BOT (build, operate and transfer) contract for construction of bypass road — Grant of concession to contractor for collection of tolls thereon — Delay in issuance of notification by State barring use of old route diverting vehicles to use new route alone — Damages claimed for loss of expected profit occasioned thereby — Entitlement to**

— Held, in pre-bid meetings parties decided compensation would be worked out on basis of investment made by contractor — As per Noti. dt. 10-2-1997 toll can only be collected to recover cost of construction and maintenance including interest thereon — Toll fee cannot be collected to recover the amount never spent by the contractor — In first phase, appellant spent about Rs 10.45 crores and recovered the same with certain profit but below expected profit — For second phase, amount of Rs 3.55 crores has not been spent by appellant

— Appellant was entitled to sum of Rs 26.34 lakhs with 10% interest as loss of expected profit in first phase, awarded by Arbitral Tribunal, caused by delay in issuing notification

— Matter remanded to Arbitral Tribunal to determine issues as to second phase of contract — Arbitration and Conciliation Act, 1996 — Ss. 2(1)(a), 7, 34 and 37(1)(a) — Tolls Act, 1851 — Noti. dt. 10-2-1997, Cl. IV(a) — Motor Vehicles — Rajasthan Motor Vehicles Taxation (Amendment) Act, 1994 (9 of 1995) — Contract Act, 1872, S. 73

(Paras 43 to 50 and 29 to 32)

C. **Cess, Tolls and Miscellaneous Taxes — Toll fee/tax — Toll concession — Entitlement to recover toll fee — Toll fee cannot be collected to recover the amount never spent by the contractor — Notification in question provided that toll can only be collected to recover cost of construction and maintenance including interest thereon (Paras 43 to 50)**

ONGC Ltd. v. *Saw Pipes Ltd.*, (2003) 5 SCC 705; *HUDA* v. *Raj Singh Rana*, (2009) 17 SCC 199 : (2011) 2 SCC (Civ) 136; *GDA* v. *Balbir Singh*, (2004) 5 SCC 65; *State of Gujarat* v. *Shantilal Mangaldas*, (1969) 1 SCC 509; *Tisco Ltd.* v. *Union of India*, (2001) 2 SCC 41; *Dwaraka Das* v. *State of M.P.*, (1999) 3 SCC 500; *A.T. Brij Paul Singh* v. *State of Gujarat*, (1984) 4 SCC 59; *BSNL* v. *Reliance Communication Ltd.*, (2011) 1 SCC 394 : (2011) 1 SCC (Civ) 192, *relied on*

D. **Arbitration and Conciliation Act, 1996 — Ss. 34 and 16 — Jurisdiction and power of arbitrator — Scope — Held, it is not permissible for arbitrator to travel beyond terms of reference — If award goes beyond reference or there is an error apparent on face of award it would be open to court to interfere with such award — However, in exceptional circumstances where a party pleads that demand of another party is beyond terms of contract and statutory provisions, arbitrator may examine terms of contract**

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and statutory provisions — In absence of proper pleadings and objections, such a course may not be permissible — In present case matters which were beyond reference, and had thus been wrongly entered into, remanded to Arbitral Tribunal for reconsideration (Paras 15 to 21 and 29 to 32)

Grid Corpn. of Orissa Ltd. v. *Balasore Technical School*, (2000) 9 SCC 552; *DDA* v. *R.S. Sharma and Co.*, (2008) 13 SCC 80; *Associated Engg. Co.* v. *Govt. of A.P*, (1991) 4 SCC 93; *Gobardhan Das* v. *Lachhmi Ram*, AIR 1954 SC 689; *Thawardas Pherumal* v. *Union of India*, AIR 1955 SC 468; *Union of India* v. *Kishorilal Gupta & Bros.*, AIR 1959 SC 1362; *Alopi Parshad & Sons Ltd.* v. *Union of India*, AIR 1960 SC 588; *Jivarajbhai Ujamshi Sheth* v. *Chintamanrao Balaji*, AIR 1965 SC 214; *Renusagar Power Co. Ltd.* v. *General Electric Co.*, (1984) 4 SCC 679; *Kishore Kumar Khaitan* v. *Praveen Kumar Singh*, (2006) 3 SCC 312; *Cellular Operators Assn. of India* v. *Union of India*, (2003) 3 SCC 186; *ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705; *Hindustan Zinc Ltd.* v. *Friends Coal Carbonisation*, (2006) 4 SCC 445, *relied on*

Williams v. *Lourdusamy*, (2008) 5 SCC 647, *considered*

E. **Arbitration and Conciliation Act, 1996 — Ss. 34, 31, 16 and 37(1)(a) — Arbitral award — Interference with award — Power of court — New plea — Defence/Claim not raised before arbitrator, held, cannot be considered by court — Toll road concession agreement — Dispute relating to delay in issuance and implementation of notification by State barring use of old route — Arbitral award for loss sustained on account of, by contractor — Set aside by courts below on ground that there was no clause in agreement for State to issue such notification — Such defence/claim not raised before Arbitral Tribunal — Held, courts below fell into error in considering issue not raised by State before Arbitral Tribunal during arbitration proceedings (Paras 22, 23 and 48)**

F. **Arbitration and Conciliation Act, 1996 — S. 31(7) — Rate of Interest — Interest rate agreed upon — Power of courts to vary — Interest rate of 20% agreed upon by parties — Courts below reducing interest awarded by Arbitral Tribunal from 18% to 10% — Validity of — Held, under S. 3 of Interest Act, 1978 court is empowered to award interest at rate prevailing in banking transactions — Thus, impliedly, court has a power to vary rate of interest agreed to by the parties — Debt, Financial and Monetary Laws — Interest Act, 1978 — S. 3 — Civil Procedure Code, 1908, S. 34 (Paras 24 to 28)**

G. **Arbitration and Conciliation Act, 1996 — S. 31(7) — Interest — Powers of arbitrator — Pre-reference and post-reference period — Distinguished — Held, arbitrator is competent to award interest for period commencing with date of award to date of decree or date of realisation, whichever is earlier — Award of interest for period prior to arbitrator entering upon reference is a matter of substantive law, while grant of interest for post-award period is a matter of procedure (Para 24)**

Krishna Bhagya Jala Nigam Ltd. v. *G. Harischandra Reddy*, (2007) 2 SCC 720, *followed*

Thawardas Pherumal v. *Union of India*, AIR 1955 SC 468; *Union of India* v. *Bungo Steel Furniture (P) Ltd.*, AIR 1967 SC 1032; *Deptt. of Irrigation* v. *Abhaduta Jena*, (1988) 1 SCC 418; *Gujarat Water Supply & Sewerage Board* v. *Unique Erectors (Gujarat) (P) Ltd.*, (1989) 1 SCC 532; *Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy*, (1992) 1 SCC 508; *Hindustan Construction Co. Ltd.* v. *State of J&K*, (1992) 4 SCC 217; *Dhenkanal Minor Irrigation Division* v. *N.C. Budharaj*, (2001) 2 SCC 721; *Bhagawati Oxygen Ltd.* v. *Hindustan Copper Ltd.*, (2005) 6 SCC 462; *Indian Hume Pipe Co. Ltd.* v. *State of*

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Rajasthan, (2009) 10 SCC 187 : (2009) 4 SCC (Civ) 115; *HUDA* v. *Raj Singh Rana*, (2009) 17 SCC 199 : (2011) 2 SCC (Civ) 136, *relied on*

GDA v. *Balbir Singh*, (2004) 5 SCC 65; *Bihar State Housing Board* v. *Arun Dakshy*, (2005) 7 SCC 103; *HUDA* v. *Manoj Kumar*, (2005) 9 SCC 541; *HUDA* v. *Prem Kumar Agarwal*, (2008) 17 SCC 607, *referred to*

H. **Cess, Tolls and Miscellaneous Taxes — Toll fee/tax — Held, is compensatory in nature — It can be collected by State to reimburse to itself amount it has spent on construction of road/bridge, etc. — State is competent to levy/collect toll fee only for period stipulated under statute or till actual cost of project with interest, etc. is recovered — It cannot be a source of revenue for State — Tolls Act, 1851 — Noti. dt. 10-2-1997, Cl. IV(a)** **(Paras 34 to 37)**

State of U.P v. *Devi Dayal Singh*, (2000) 3 SCC 5, *relied on*

I. **Government Contracts/Tenders — Particular contracts/clauses/terms — Toll concession contract — Scope of — BOT (build, operate and transfer) contract for construction of bypass road — Grant of concession to contractor for collection of tolls thereon — Alternative road widened and strengthened by contractor during construction of bypass road — Collection of toll fee therefrom — Entitlement to — Held, bid documents indicate particular patch had also been an integral part of the project — Concession agreement also provided that Government would levy and charge fee from all persons using project facilities — Project was not in parts but was a composite and integrated project which included this part of road also — Hence, appellant contractor entitled to collect toll fee on that part of the road** **(Paras 29 to 32)**

B-D/48309/CV

Advocates who appeared in this case :

K.K. Venugopal, Senior Advocate (Shirish Patel, Karan Patel, Ankur Saigal, Abhay Anand, Gaurav Singh and Ms Bina Gupta, Advocates) for the Appellant;

Dr. Manish Singhvi, Additional Advocate General (Vijay Verma and Milind Kumar, Advocates) for the Respondents.

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5. (2008) 13 SCC 80, *DDA* v. *R.S. Sharma and Co.* 581*d-e*
6. (2008) 5 SCC 647, *Williams* v. *Lourdusamy* 582*b-c*
7. (2007) 2 SCC 720, *Krishna Bhagya Jala Nigam Ltd.* v. *G. Harischandra Reddy* 584*c-d*, 585*a-b*
8. (2006) 4 SCC 445, *Hindustan Zinc Ltd.* v. *Friends Coal Carbonisation* 582*d*
9. (2006) 3 SCC 312, *Kishore Kumar Khaitan* v. *Praveen Kumar Singh* 582*a-b*
10. (2005) 9 SCC 541, *HUDA* v. *Manoj Kumar* 584*e-f*
11. (2005) 7 SCC 103, *Bihar State Housing Board* v. *Arun Dakshy* 584*e-f*
12. (2005) 6 SCC 462, *Bhagawati Oxygen Ltd.* v. *Hindustan Copper Ltd.* 584*a-b*
13. (2004) 5 SCC 65, *GDA* v. *Balbir Singh* 584*e-f*, 586*g-h*

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14. (2003) 5 SCC 705, *ONGC Ltd.* v. *Saw Pipes Ltd.* 582*d*, 587*e-f*
15. (2003) 3 SCC 186, *Cellular Operators Assn. of India* v. *Union of India* 582*b-c*
16. (2001) 2 SCC 721, *Dhenkanal Minor Irrigation Division* v. *N.C. Budharaj* 584*a-b*
17. (2001) 2 SCC 41, *Tisco Ltd.* v. *Union of India* 586*g-h*
18. (2000) 9 SCC 552, *Grid Corpn. of Orissa Ltd.* v. *Balasore Technical School* 581*d-e*
19. (2000) 3 SCC 5, *State of U.P.* v. *Devi Dayal Singh* 586*a*
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25. (1988) 1 SCC 418, *Deptt. of Irrigation* v. *Abhaduta Jena* 584*a*
26. (1984) 4 SCC 679, *Renusagar Power Co. Ltd.* v. *General Electric Co.* 582*a-b*
27. (1984) 4 SCC 59, *A.T. Brij Paul Singh* v. *State of Gujarat* 587*a-b*
28. (1969) 1 SCC 509, *State of Gujarat* v. *Shantilal Mangaldas* 586*g-h*
29. AIR 1967 SC 1032, *Union of India* v. *Bungo Steel Furniture (P) Ltd.* 583*h*
30. AIR 1965 SC 214, *Jivarajbhai Ujamshi Sheth* v. *Chintamanrao Balaji* 582*a*
31. AIR 1960 SC 588, *Alopi Parshad & Sons Ltd.* v. *Union of India* 582*a*
32. AIR 1959 SC 1362, *Union of India* v. *Kishorilal Gupta & Bros.* 582*a*
33. AIR 1955 SC 468, *Thawardas Pherumal* v. *Union of India* 582*a*, 583*h*
34. AIR 1954 SC 689, *Gobardhan Das* v. *Lachhmi Ram* 582*a*

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J.— Both these appeals have been preferred by the rival parties against the judgment and order dated 24-4-2007 passed by the High Court of Rajasthan (Jaipur Bench) in Civil Miscellaneous Appeal No. 1581 of 2006 under Section 37(1)(*a*) of the Arbitration and Conciliation Act, 1996 (hereinafter called "the 1996 Act") against the order dated 17-1-2006 passed by the District Judge, Jaipur City, Jaipur in Arbitration Case No. 89 of 2004 whereby the application filed by the State of Rajasthan under Section 34 of the 1996 Act for setting aside the arbitral award dated 1-12-2003 had been allowed.

2. The facts and circumstances giving rise to these appeals are: the Public Works Department of the State of Rajasthan (hereinafter called "PWD") decided in September 1997 to construct the Bharatpur bypass for the road from Bharatpur to Mathura, which passed through a busy market of the city of Bharatpur. For the aforesaid work, tenders were invited with a stipulation that the work would be executed on the basis of build, operate and transfer (BOT). The total extent of the road had been 10.850 km out of which 9.6 km was new construction and 1.25 km was improvement i.e. widening and strengthening of the existing portion of Bharatpur-Deeg Road.

3. After having pre-bid conference/meeting and completing the required formalities it was agreed between the tenderers and PWD that compensation would be worked out on the basis of investment made by the entrepreneur concerned. The tender submitted by MSK, appellant for Rs 1325 lakhs was accepted vide Letter dated 5-2-1998 and MSK, appellant was called upon to

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furnish security deposit which was done on 25-7-1998. Concession agreement dated 19-8-1998 was entered into between the parties authorising collection of toll fee by MSK, appellant. According to this agreement, the period of concession had been 111 months including the period of construction. The said period would end on 6-4-2008. It also contained the provisions for making repayment/collection of toll fee and in case of any difference/dispute to refer the matter to the arbitrator.

4. MSK, appellant completed the Bharatpur Bypass Project on 10-4-2000 and also started collection of toll fee as provided under the agreement with effect from 28-4-2000. There had been some problem in collecting the toll fee because of agitation by local people. The State issued a Notification dated 1-9-2000 under the provisions of the Tolls Act, 1851 and the Rajasthan Motor Vehicles Taxation (Amendment) Act, 1994 (hereinafter called "the Notification dated 1-9-2000") preventing the entry of vehicles into Bharatpur City, stipulating its operation with effect from 1-10-2000.

5. MSK, appellant invoked the arbitration clause raising the dispute with respect to:

(*a*) Delay in issuance of notification prohibiting entry of commercial vehicles into Bharatpur Town and diverting traffic through the bypass; and

(*b*) Collection of toll from vehicles using Bharatpur-Deeg patch of the road.

6. The State/PWD failed to make appointment of the arbitrator. MSK, appellant preferred SB Civil Arbitration Application No. 31 of 2002 before the High Court and the High Court vide order dated 12-4-2002 appointed the arbitrator. The arbitrators so appointed in their meeting on 8-5-2002 appointed the third arbitrator. A claim petition was filed before the Tribunal by MSK, appellant on 23-9-2002. The State submitted its reply to the claim petition on 7-12-2002.

7. The arbitral award was made in favour of MSK, appellant on 1-12-2003 according to which there had been delay on the part of the State of Rajasthan in issuing the notification and the State failed to implement the same and the contractor was entitled to collect toll fee even from the vehicles using Bharatpur-Deeg part of the road. The State of Rajasthan was directed to pay a sum of Rs 990.52 lakhs to MSK, appellant as loss due up to 31-12-2003 with 18% interest from 31-12-2003 onwards. The Tribunal further gave various other directions to the State in this regard.

8. Being aggrieved, the State of Rajasthan filed objections under Section 34 of the 1996 Act and while deciding the same, the District Judge vide order dated 17-1-2006 set aside the arbitral award on the grounds that there was no clause in the agreement to issue notification barring the entry of vehicles in the city of Bharatpur; and the Tribunal erred in taking the 1997 survey as basis for calculating the loss suffered by MSK, appellant. It held that MSK, appellant was not entitled to any monetary compensation under Clause 10 of the concession agreement, but only entitled to extension of concession period, and the rate of interest was reduced from 18% to 10%.

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9. Being aggrieved, MSK, appellant preferred an appeal before the High Court wherein the High Court vide impugned judgment and order dated 24-4-2007 held that Bharatpur-Deeg section was part of the project and the contractor could collect the toll fee from the users of this part of the road also. Clause 10 of the concession agreement was not attracted in the facts of the case. There was no agreement for issuance of notification by the State barring the use of the old route and directing the vehicles to use the new route alone. Therefore, the question of grant of compensation on that account for the traffic loss could not arise. The District Judge was justified in reducing the rate of interest from 18% to 10% in view of the provisions of Section 31(7)(*b*) of the 1996 Act and economic realities, whereby the rate of interest had been reduced by the banks in India. Hence, these two appeals.

10. Mr K.K. Venugopal, learned Senior Counsel appearing for the private appellant, has submitted that it was implied in the agreement and there has been an understanding between the parties that the State Government would issue a notification barring the vehicles being driven through the markets of Bharatpur City. This was not even an issue before the Tribunal and thus, could not be agitated by the State at all. Thus, the courts below erred in setting aside the award of the Arbitral Tribunal to that extent, and secondly, that the rate of interest as reduced from 18% to 10% by the District Court as well as the High Court is in contravention of the terms of contract between the parties which fixed the rate of interest at 20%. Further opposing the appeal by the State of Rajasthan, Shri Venugopal has submitted that Bharatpur-Deeg patch was an integral part of the project as there was only one composite contract of the entire bypass and, therefore, the private appellant was entitled to collect the toll fee from the users of that part of the road also.

11. Per contra, Dr. Manish Singhvi, learned Additional Advocate General for the State of Rajasthan, has submitted that arbitration proceedings could not be proceeded in contravention to the terms of agreement and statutory provisions. There was no obligation on the part of the State authorities to issue the notification restraining the entry of vehicles to the market side of the city. The rate of interest has rightly been reduced considering the prevailing rate of interest in banking transactions during the relevant period of contract. In support of the appeal of the State, it has been submitted that there was a clear understanding between the parties that the private appellant shall not collect any toll fee on the Bharatpur-Deeg patch and to that extent the Tribunal and the courts below committed an error.

12. It has further been submitted by Dr. Singhvi that the total contract had been for a sum of Rs 13.25 crores including interest. The project was to be executed in two phases. The second phase for a sum of Rs 3.24 crores had never been executed by the private appellant. The contractor could collect the compensation only on the basis of investment made by it. The concept of toll fee is compensatory in nature wherein the State which has spent a huge amount on construction of roads/bridges, etc. has a right to get the said amount reimbursed, and therefore, in such a contract the concept of profit which prevails in other forms of contract cannot be the relevant component.

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13. We have considered the rival submissions made on behalf of the parties and perused the record.

14. In the appeal filed by the private contractor, MSK Projects, two issues are involved; namely, whether it was mandatory/necessary in view of the agreement/contract or on the basis of pre-bid understanding that the State had to issue the notification barring the vehicles through the markets of Bharatpur City; and secondly, whether the rate of interest could be reduced from 18% to 10% by the courts below. In the State appeal, the only issue required to be considered is whether the private appellant had a right to collect the toll fee on the patch between Bharatpur-Deeg.

15. The issue regarding the jurisdiction of the Arbitral Tribunal to decide an issue not referred to is no more res integra. It is a settled legal proposition that special tribunals like Arbitral Tribunals and Labour Courts get jurisdiction to proceed with the case only from the reference made to them. Thus, it is not permissible for such tribunals/authorities to travel beyond the terms of reference. Powers cannot be exercised by the Tribunal so as to enlarge materially the scope of reference itself. If the dispute is within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute on the issue not referred to it. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award. (Vide *Grid Corpn. of Orissa Ltd.* v. *Balasore Technical School*[1] and *DDA* v. *R.S. Sharma and Co.*[2])

16. In *Associated Engg. Co.* v. *Govt. of A.P.*[3] this Court held that an umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside. Thus, an arbitrator cannot be allowed to assume jurisdiction over a question which has not been referred to him, and similarly, he cannot widen his jurisdiction by holding contrary to the fact that the matter which he wants to decide is within the submission of the parties.

17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by

1 (2000) 9 SCC 552 : AIR 1999 SC 2262
2 (2008) 13 SCC 80
3 (1991) 4 SCC 93 : AIR 1992 SC 232

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evidence extrinsic to the award. (See *Gobardhan Das* v. *Lachhmi Ram*[4], *Thawardas Pherumal* v. *Union of India*[5], *Union of India* v. *Kishorilal Gupta & Bros.*[6], *Alopi Parshad & Sons Ltd.* v. *Union of India*[7], *Jivarajbhai Ujamshi Sheth* v. *Chintamanrao Balaji*[8] and *Renusagar Power Co. Ltd.* v. *General Electric Co.*[9])

18. In *Kishore Kumar Khaitan* v. *Praveen Kumar Singh*[10] this Court held that when a court asks itself a wrong question or approaches the question in an improper manner, even if it comes to a finding of fact, the said finding of fact cannot be said to be one rendered with jurisdiction. The failure to render the necessary findings to support its order would also be a jurisdictional error liable to correction. (See also *Williams* v. *Lourdusamy*[11].)

19. In *Cellular Operators Assn. of India* v. *Union of India*[12] this Court held as under: (SCC pp. 211 & 216, paras 26 & 50)

> "*26.* As regards the issue of jurisdiction, it posed a wrong question and gave a wrong answer.
>
> * * *
>
> *50.* The learned TDSAT, therefore, has posed absolutely a wrong question and thus its impugned decision suffers from a misdirection in law."

20. This Court, in *ONGC Ltd.* v. *Saw Pipes Ltd.*[13] and *Hindustan Zinc Ltd.* v. *Friends Coal Carbonisation*[14], held that an arbitration award contrary to substantive provisions of law, or provisions of the 1996 Act or against the terms of the contract, or public policy, would be patently illegal, and if it affects the rights of the parties, it would be open for the court to interfere under Section 34(2) of the 1996 Act.

21. Thus, in view of the above, the settled legal proposition emerges to the effect that the Arbitral Tribunal cannot travel beyond the terms of reference; however, in exceptional circumstances where a party pleads that the demand of another party is beyond the terms of contract and statutory provisions, the Tribunal may examine by the terms of contract as well as the statutory provisions. In the absence of proper pleadings and objections, such a course may not be permissible.

22. Be that as it may, in the instant case, a reference to the Tribunal had been made on the basis of statement of facts, claims by the private appellant,

4 AIR 1954 SC 689
5 AIR 1955 SC 468
6 AIR 1959 SC 1362
7 AIR 1960 SC 588
8 AIR 1965 SC 214
9 (1984) 4 SCC 679 : AIR 1985 SC 1156
10 (2006) 3 SCC 312
11 (2008) 5 SCC 647
12 (2003) 3 SCC 186
13 (2003) 5 SCC 705 : AIR 2003 SC 2629
14 (2006) 4 SCC 445

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defence taken by the respondent State and rejoinder by the claimant. After completing the formalities of admission and denial by each party in respect of each other's documents and submission of draft proposed issues and respective oral evidence, the Tribunal on 4-1-2003 framed the following issues:

1. Whether the claimant as per agreement is entitled to recover its amount of claim of Rs 453.69 lakhs up to 31-12-2002 and onwards or not?

2. Whether there was delay on the part of the State Government in issuing notification for restriction of traffic through Bharatpur Town, which has affected the toll tax or not? If so, how much delay and delay in full rate of safe implementation as on date, or not? By virtue of it, is the claimant entitled to recover its claim of Rs 292.17 lakhs up to 31-12-2002 and thereafter onward or not; or merely by extension of concession period as averred by the respondent?

3. As a consequence of Issues 1 and 2, which party breached the contract?

4. Whether the claimant is entitled to claim interest on its any due claim amount as per decision of Issues 1 and 2? If so, from what date and at what rate of simple/compound interest?

5. Whether the claimant or respondent is entitled for cost of arbitration incurred and claimed by each party? If so, what amount and to which party?

6. Any other relief, if any, demanded by any party during the proceedings.

23. The Tribunal considered the relevant agreement provisions as well as the land lease deed, total package documents, minutes of pre-bid meetings and the deed authorising collection of toll fee, etc., and proceeded with the arbitration proceedings. The State of Rajasthan had not taken the defence that it was not agreed between the parties to issue the notification barring the traffic through the markets of Bharatpur City. The only issue remained as to whether there was delay in issuance of notification and implementation thereof. In such a fact situation and considering the settled legal propositions, we are of the view that the District Judge as well as the High Court fell in error considering the issue which was not taken by the State before the Tribunal during the arbitration proceedings.

24. Furthermore, it is a settled legal proposition that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure. [Vide *Thawardas Pherumal*[5], *Union of India* v. *Bungo Steel Furniture (P) Ltd.*[15],

15 AIR 1967 SC 1032

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Deptt. of Irrigation v. *Abhaduta Jena*[16], *Gujarat Water Supply & Sewerage Board* v. *Unique Erectors (Gujarat) (P) Ltd.*[17], *Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy*[18], *Hindustan Construction Co. Ltd.* v. *State of J&K*[19], *Dhenkanal Minor Irrigation Division* v. *N.C. Budharaj*[20], *Bhagawati Oxygen Ltd.* v. *Hindustan Copper Ltd.*[21] and *Indian Hume Pipe Co. Ltd.* v. *State of Rajasthan*[22].]

25. So far as the rate of interest is concerned, it may be necessary to refer to the provisions of Section 3 of the Interest Act, 1978, the relevant part of which reads as under:

> "**3. *Power of court to allow interest*.**—(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, *at a rate not exceeding the current rate of interest*...." (emphasis added)

Thus, it is evident that the aforesaid provisions empower the court to award interest at the rate prevailing in the banking transactions. Thus, impliedly, the court has a power to vary the rate of interest agreed by the parties.

26. This Court in *Krishna Bhagya Jala Nigam Ltd.* v. *G. Harischandra Reddy*[23], while dealing with the similar issue held as under: (SCC p. 724, para 11)

> "*11.* ... after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%."

27. In *HUDA* v. *Raj Singh Rana*[24] this Court considered various earlier judgments of this Court including *GDA* v. *Balbir Singh*[25], *Bihar State Housing Board* v. *Arun Dakshy*[26], *HUDA* v. *Manoj Kumar*[27], *HUDA* v. *Prem Kumar Agarwal*[28] and came to the conclusion: (*Raj Singh Rana case*[24], SCC p. 206, para 22)

> "*22.* ... the rate of interest is to be fixed in the circumstances of each case and it should not be imposed at a uniform rate without looking into

16 (1988) 1 SCC 418 : AIR 1988 SC 1520
17 (1989) 1 SCC 532 : AIR 1989 SC 973
18 (1992) 1 SCC 508 : AIR 1992 SC 732
19 (1992) 4 SCC 217 : AIR 1992 SC 2192
20 (2001) 2 SCC 721 : AIR 2001 SC 626
21 (2005) 6 SCC 462 : AIR 2005 SC 2071
22 (2009) 10 SCC 187 : (2009) 4 SCC (Civ) 115
23 (2007) 2 SCC 720 : AIR 2007 SC 817
24 (2009) 17 SCC 199 : (2011) 2 SCC (Civ) 136 : AIR 2008 SC 3035
25 (2004) 5 SCC 65 : AIR 2004 SC 2141
26 (2005) 7 SCC 103
27 (2005) 9 SCC 541
28 (2008) 17 SCC 607 : JT (2008) 1 SC 590

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the circumstances leading to a situation where compensation was required to be paid."

28. Be that as it may, the High Court while dealing with the rate of interest has relied upon the judgment of this Court in *Krishna Bhagya Jala Nigam Ltd.*[23] and thus, there is no scope for us to interfere with the rate of interest fixed by the courts below.

29. The issue raised by the State before this Court in its appeal as to whether the Bharatpur-Deeg patch was an integral or composite part of the project and the private appellant could collect the toll fee on that part also stands concluded by the High Court after considering the entire evidence on record.

30. It is evident from the record as well as the judgments of the courts below that the bid documents contained data collected on the flow of traffic on 14-4-1994 and 15-4-1994 to find out the viability and requirement of the establishment of Bharatpur bypass and it included the traffic flow on the Bharatpur-Deeg section also which indicates that this particular patch had also been an integral part of the project. In the pre-bid conference the interveners wanted a clarification as to whether the persons using this particular patch of road between Bharatpur and Deeg could be liable to pay toll fee. It was clarified by the respondent State authorities that the users of this patch would be required to pay the toll fee.

31. Clause 5 of the concession agreement also provided that the Government would levy and charge the fee from all persons using the project facilities. The project was not in parts rather it was a composite and integrated project which included the Bharatpur-Deeg section also. Hence, it was not permissible for the respondent State to take the plea that persons using such section of the road were not liable to pay the toll fee. We do not find any force in the submission made by Dr. Manish Singhvi, learned counsel for the State that it was not a newly constructed road. However, he is not in a position to deny that the said portion of road had been widened and strengthened by the private appellant and could not be termed as service road which could be used free of charge in view of Clause 7 of the concession agreement as a service road has been defined as any road constructed temporarily for use of traffic for short period during construction of the main road. Such a facility had to be provided in order to maintain the free flow of traffic during the construction of the road.

32. Thus, in view of the above, the issue raised by the State that Bharatpur-Deeg section of the road was out of the project and the private appellant was not entitled to collect the toll fee on that part of the road, stands settled in favour of the private appellant.

33. Determination of the aforesaid three issues brings us to the entitlement of the private appellant.

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34. The Court is not oblivious to the fact that the State authorities cannot be permitted to use the collection of toll fee as augmenting the State revenues. In *State of U.P.* v. *Devi Dayal Singh*[29] this Court defined "toll" as a sum of money taken in respect of a benefit arising out of the temporary use of land. It implies some consideration moving to the public either in the form of a liberty, privilege or service. In other words, for the valid imposition of a toll, there must be a corresponding benefit. The Court further held: (SCC p. 10, para 9)

> "9. Although the section has empowered the State Government to levy rates of tolls 'as it thinks fit', having regard to the *compensatory nature* of the levy, the rate of toll must bear a reasonable relationship to the providing of benefit. No doubt, by virtue of Section 8 of the Act, the tolls collected are part of the public revenue and may be absorbed in the general revenue of the State, nevertheless by definition a toll cannot be used *for otherwise augmenting the State's revenue*." (emphasis added)

35. In fact, the toll fee under the Tolls Act, 1851 is compensatory in nature wherein the Government can reimburse itself the amount which it had spent on construction of road/bridge, etc.

36. Clause IV(*a*) of the statutory Notification dated 10-2-1997 which entitled the Government to give the present road on toll is reproduced below:

> "IV(*a*). The toll of any of the aforesaid facilities/constructions shall be levied *only for so long as the total cost of its construction and maintenance including interest thereupon, and the total expenditure in realisation of toll has not been realised in full* or for a period of 30 years." (emphasis added)

It is evident that Clause IV(*a*) of the Notification dated 10-2-1997 envisages that toll can only be collected as long as the total cost of construction and maintenance including interest thereupon is recovered. A person is debarred by law and statutory inhibition as contained in Clause IV(*a*) of the notification from collection of toll beyond the recovery of the cost of construction.

37. Thus, from the abovereferred provisions, it is evident that toll fee is compensatory in nature and can be collected by the State to reimburse itself the amount it has spent on construction of the road/bridge, etc. The State is competent to levy/collect the toll fee only for the period stipulated under the statute or till the actual cost of the project with interest, etc. is recovered. However, it cannot be a source of revenue for the State.

38. In common parlance, "reimbursement" means and implies restoration of an equivalent for something paid or expended. Similarly, "compensation" means anything given to make the equivalent. (See *State of Gujarat* v. *Shantilal Mangaldas*[30], *TISCO Ltd.* v. *Union of India*[31], *GDA*[25] and *HUDA* v. *Raj Singh Rana*[24].) However, in *Dwaraka Das* v. *State of M.P.*[32] it was held

29 (2000) 3 SCC 5 : AIR 2000 SC 961
30 (1969) 1 SCC 509 : AIR 1969 SC 634
31 (2001) 2 SCC 41 : AIR 2000 SC 3706
32 (1999) 3 SCC 500 : AIR 1999 SC 1031

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that a claim by a contractor for recovery of amount as damages as expected profit out of contract cannot be disallowed on ground that there was no proof that he suffered actual loss to the extent of amount claimed *on account of breach of contract.*

39. In *A.T. Brij Paul Singh* v. *State of Gujarat*[33], while interpreting the provisions of Section 73 of the Contract Act, 1972, this Court held that damages can be claimed by a contractor where the Government is *proved to have committed breach by improperly rescinding the contract* and for estimating the amount of damages, the court should make a broad evaluation *instead of going into minute details.* It was specifically held that where in the works contract, the party entrusting the work committed *breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract.* Claim of expected profits *is legally admissible on proof of the breach of contract* by the erring party. It was further observed that: (SCC pp. 64-65, para 10)

> "*10.* ... What would be the measure of profit would depend upon the facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract *is guilty of breach of contract* cannot be gainsaid." (emphasis supplied)

40. In *BSNL* v. *Reliance Communication Ltd.*[34] this Court held as under: (SCC p. 428, para 53)

> "*53.* Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorise as penalties the clauses described as liquidated damages."

41. This Court further stated in *ONGC Ltd.* v. *Saw Pipes Ltd.*[13]: (SCC p. 740, para 64)

> "*64.* ... This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasises that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach."

42. Thus, the case requires consideration in the light of the aforesaid settled legal principles.

33 (1984) 4 SCC 59 : AIR 1984 SC 1703
34 (2011) 1 SCC 394 : (2011) 1 SCC (Civ) 192

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43. Undoubtedly, the total construction was for Rs 13.25 crores. It is evident from the bid documents filed by the private appellant that the work was to be executed in two phases and the relevant part thereof reads as under:

Phase I

Year	*Const. cost (in lakhs)*	*Supervision charges @ 10%*	*Total (in lakhs)*	*Interest @ 20%*	*Total investment of Strs*	*Up to date invest-ment (in lakhs)*
1998-1999						
6/98	75	7.5	82.50	4.12	86.62	86.62
9/98	80	8.0	88.00	8.52	92.52	183.14
12/98	80	8.0	88.00	12.92	100.92	284.06
3/99	80	8.0	88.00	17.32	105.32	389.32
Total	315	31.5	346.50	42.88	389.38	389.88
1999-2000						
6/99	110	11.0	121	23.37	144.37	533.75
9/99	120	12.0	132.0	29.97	161.97	695.72
12/99	120	12.0	132.0	36.57	168.57	864.29
3/2000	125	12.50	137.50	43.44	180.94	1045.23
Total	475	47.50	522.50	133.35	655.85	1045.23
Grand Total	790	79.0	869.0	176.23	1045.23	1045.23

Phase II

2005-2006						
6/2005	150	15.0	165	8.25	173.25	173.25
9/2005	150	15.0	165	16.50	181.50	354.75
Total	300	30.0	330	24.75	354.75	354.75

44. The bid documents further reveal that Phase II work was of worth Rs 354.75 lakhs and it included repairing, maintenance and second layer of bitumen on the entire road. Admittedly, this part of the contract had never been executed by the private appellant. More so, the chart filed by the State of Rajasthan shows that the estimated cost of the work had been recovered by the private appellant as the schedule prepared for repayment tally with the amount collected by the private appellant as toll fee within the stipulated period.

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45. In the first phase, the private appellant spent about Rs 10.45 crores and recovered the said amount with certain profit, though the actual figure i.e. the toll fee recovered has not been disclosed. So far as the second phase is concerned, admittedly, the amount of Rs 354.75 lakhs has not been spent by the private appellant. This issue has been agitated by the State of Rajasthan before this Court in its counter-affidavit wherein it is stated as under:

> "It is respectfully submitted that as per the terms of the agreement, the petitioner was required to complete the project in two phases. In the first phase investment of Rs 1045 lakhs and after 5 years in the second phase Rs 354.75 lakhs was to be made by the petitioner. However, the petitioner has not abided by the terms of the agreement and has not made any investment for the second phase and, therefore, it has breached the terms of the contract and, therefore, it is respectfully submitted that the contention of the petitioner that he is entitled to recover its investment, is erroneous and the petitioner is trying to give a wrong picture about the investment made and has not come to this Hon'ble Court with clean hands and, therefore, the present special leave petition is liable to be dismissed by the Hon'ble Court. The concession period has come to an end."

46. The aforesaid allegations have not been denied by the private appellant while submitting its rejoinder. The relevant part of the rejoinder-affidavit reads:

> "... the present contention as raised was not part of the arbitration proceeding, before the Arbitral Tribunal. It is further submitted that this contention was never raised before the District Court and as well as before the Hon'ble High Court of Rajasthan. The point as raised is subsequent to completion of the project and work to be done after the period of 5 years...."

Thus, there is no specific denial of the allegations/averments taken by the State as required by the principle enshrined in Order 8 Rule 5 of the Code of Civil Procedure, 1908.

47. It is strange that a person who has not complied with the terms of contract and has acted in contravention of the terms of agreement claims that he was entitled to earn more profit. The private appellant cannot be permitted to claim damages/compensation in respect of the amount of Rs 13.25 crores, as he did not spend the said amount stipulated in the terms of agreement. The private appellant cannot claim the amount of Rs 7.13 crores for a period of three years for a small patch of 1.25 km out of the total length of the road to the extent of 10.85 km.

48. In fact, the Tribunal has dealt with the issue in correct perspective only to the extent of the period of delay by which the notification barring the heavy vehicles through the market of Bharatpur had been issued stating as under:

> "The traffic survey conducted by the claimant on 17-4-2000, 18-4-2000 and 19-4-2000 has not been accepted by the respondent. The Arbitral

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Tribunal also feels that this survey, which has been done by the claimant alone, cannot be relied upon for this purpose, because the respondent is not a party to this survey. The claim lodged by the claimant on its own survey as per Para 12.3(*iii*) from 12-4-2000 to 30-9-2000 is for Rs 31.18 lakhs. In this regard the Tribunal is of the opinion that the traffic survey of 1997 as per agreement in which both parties bear consent of each other therefore can safely be relied upon for purpose of assessment of such losses to the claimant, because the occurrence of loss as such to the claimant has not been denied by the respondent, which otherwise is an established fact as per documentary evidence on record. The Tribunal has assessed this part of loss on the traffic survey of 1997 for commercial vehicles only as Rs 26.34 lakhs from 12-4-2000 to 30-9-2000."

As the notification had been issued, and it was not the responsibility of the State to establish a police chowki, etc. to implement the notification, there was no occasion for the Tribunal to proceed further. Therefore, any award in favour of the private appellant in that respect for non-issuance of notification beyond the date of the notification, cannot be held to be justified and the same is liable to be set aside.

49. The State authority had decided to establish a toll road as it was not having sufficient funds. In case the claim of the private appellant is allowed and as the State is not in a position to grant further facility to collect the toll fee at such a belated stage, the purpose of establishing the toll road itself stands frustrated. More so, the toll fee cannot be collected to recover the amount never spent by the contractor. It is evident from the discourse in pre-bid meetings of the parties that it had been decided that compensation would be worked out on the basis of investment made by contractor concerned. More so, the statutory Notification dated 10-2-1997 provided to recover the cost of construction and maintenance including interest thereon. Therefore, the question of non-execution of work of the second phase of the contract becomes very material and relevant to determine the real controversy. The State authorities for the reasons best known to them, did not make reference to the arbitration proceedings for non-execution of the work of the second phase of the contract. However, the relief claimed by the private appellant would prove to be a "windfall profit" without carrying out the obligation to execute the work just on technicalities. We have held in this very case, that the arbitrator cannot proceed beyond the terms of reference and, therefore, the question of considering the non-execution of work of the second phase of the work was neither permissible nor possible as it had arisen subsequent to the date of award in the arbitration proceedings.

50. Be that as it may, in order to do complete justice between the parties and protect the public exchequer, we feel that the matter requires adjudication and reconsideration on the following points by the Arbitral Tribunal:

(*i*) What amount could have been recovered by the private appellant for Bharatpur-Deeg part of the road from the vehicles using the road?

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(*ii*) What could be the effect on the contract as a whole for non-executing the work of the second phase?

In view of the fact that a long time has elapsed, we request the learned Tribunal to decide the case as early as possible after giving due opportunity to the parties concerned. The private appellant shall be entitled only for a sum of Rs 26.34 lakhs awarded by the Tribunal for delay in issuing the notification with 10% interest, if not paid already or it could be adjusted in the final accounts bills. With these observations, the appeals stand disposed of. No costs.

(2011) 10 Supreme Court Cases 591

(BEFORE DR. DALVEER BHANDARI AND DIPAK MISRA, JJ.)

JIGNESH ALIAS BANSI LAL NAVIN CHANDRA DESAI .. Appellant;

Versus

STATE OF GUJARAT .. Respondent.

Criminal Appeal No. 1921 of 2011†, decided on October 14, 2011

Criminal Procedure Code, 1973 — Ss. 437 and 439 — Bail — Conditional bail — Appellant had undergone 2 years and 2 months' imprisonment — In facts and circumstances of case bail granted conditionally that he shall fully cooperate with trial, immediately surrender his passport and not directly or indirectly try to influence the trial — Constitution of India — Art. 21 — Delay in trial — Conditional bail granted

J-D/48919/CR

ORDER

1. Leave granted. We have heard the learned counsel for the parties.

2. The appellant has already undergone actual sentence of about 2 years and 2 months. In the facts and circumstances of this case, we deem it appropriate to direct that the appellant be released on bail on the following conditions:

(*i*) The appellant shall furnish personal bond of rupees one lakh with two sureties each in the like amount, to the satisfaction of the trial court.

(*ii*) He shall surrender his passport before the trial court immediately.

(*iii*) He shall not influence the trial of the case, directly or indirectly and shall fully cooperate with the trial.

3. With the aforementioned observation and directions, this appeal is disposed of.

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† Arising out of SLP (Crl.) No. 1501 of 2011

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exposure, can be referred to Lok Adalat which can be specially created for resolving the issues between the banks and the borrowers. In fact, the Lok Adalat should be used as an effective machinery to resolve the issues and concentrate with reference to keeping the fine balance between the banks and borrowers.

24. If the agency system is inescapable, then the agency must be coupled with a licence issued after conducting examination. Appropriate training should be given to the agents who should have requisite qualification and maturity to handle delicate and sensitive situation. Merely because the agency system is convenient to the banks, and has been approved by RBI, it should not lead to lawlessness and conduct resulting in challenge to the rule of law.

25. While performance of the banks is always co-related with reference to its growth, its assets utilisation and finally profit in the balance sheet, that and that alone cannot be relied upon, with reference to a country like India, where there is enormous disparity in respect of various sections of the society. These are all positive steps that would bring in the overall balance in the working of all these institutions.

26. Whether it is a bank, which concentrates on higher segment of banking or it is a bank which concentrates upon middle class, lower middle class and such other segment of the Indian public who look to and require the banking comfort, it is not mere question of lending the money that matters, but also the consequences thereafter. The social responsibility is larger than the banks' profit and growth ratio alone.

27. Keeping in mind the social responsibility, it is absolutely necessary to appoint a Special Committee which will look into the disparity in working conditions, at least up to the managerial level and make such recommendations to RBI and the Union of India for all remedial actions.

28. In conclusion, we say that we are governed by the rule of law in the country. The recovery of loans or seizure of vehicles could be done only through legal means. The banks cannot employ goondas to take possession by force.

(2007) 2 Supreme Court Cases 720

(BEFORE DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.)

KRISHNA BHAGYA JALA NIGAM LTD. . . Appellant;

Versus

G. HARISCHANDRA REDDY AND ANOTHER . . Respondents.

Civil Appeal No. 149 of 2007†, decided on January 10, 2007

A. **Arbitration — Arbitration clause — Whether existed in the agreement — Whether the clause in question (Clause 29) was an arbitration clause — When a party consented to arbitration by the Arbitral Tribunal as**

† Arising out of SLP (C) No. 10418 of 2005. From the Final Judgment and Order dated 28-1-2005 of the High Court of Karnataka at Bangalore in MFA No. 1785 of 2002 (AA)

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per the arbitration clause and participated in the arbitration proceeding, it cannot later take the plea that there was no arbitration clause — So when both the parties accepted that arbitration clause existed in the agreement and they proceeded on that basis, appellant cannot thereafter raise the plea of "no arbitration clause" for the first time in first appeal before High Court under S. 37(1)(b) — Although a three-Judge Bench of Supreme Court in another case has referred the question involving interpretation of the said clause (29) to a Constitution Bench, but in view of the fact that appellant consented to the Chief Engineer acting as arbitrator and that there had been considerable delay in the litigation, no useful purpose would be served by keeping the matter pending awaiting decision of the Constitution Bench — Estoppel — Arbitration and Conciliation Act, 1996, S. 7

P. Dasaratharama Reddy Complex v. *Govt. of Karnataka*, CA No. 1586 of 2004, decided on 26-7-2005, *referred to*

B. **Arbitration — Interest — Award of, at the rate of 18% by arbitrator for pre-arbitration period, for pendente lite period and future interest — Held, should be reduced to 9% in view of substantial reduction of interest rate after economic reforms in the country — Arbitration and Conciliation Act, 1996, S. 31(7)** **(Para 11)**

C. **Arbitration — Award — Challenge to — Quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the award — Award of Rs 1.47 crores towards the idling charges, whether justified — Delay took place on account of non-supply of drawings and designs and in the meantime the establishment of respondent contractor stood standstill — Arbitrator awarded the said amount after excluding certain periods from calculation — Held, award of arbitrator fair and equitable — However, respondent agreed to reduce the amount awarded to Rs 1 crore on suggestion of Supreme Court keeping in mind the long standing dispute between the parties — Arbitration and Conciliation Act, 1996, Ss. 30 and 31**

Appeal partly allowed R-M/A/35624/C

Advocates who appeared in this case :
C.S. Vaidyanathan, Senior Advocate (Ms Lalit Mohini Bhat, Naveen R. Nath and Ms Hetu Arora, Advocates, with him) for the Appellant;
K.K. Venugopal and K.G. Raghavan, Senior Advocates (L.K. Bhushan and Ms Shiraz Contractor Patodia, Advocates, with them) for the Respondents.

Chronological list of cases cited ***on page(s)***

1. CA No. 1586 of 2004 decided on 26-7-2005, *P. Dasaratharama Reddy Complex* v. *Govt. of Karnataka* 724*d*

The Judgment of the Court was delivered by

S.H. KAPADIA, J.— Leave granted.

2. Two issues arise for determination in this civil appeal filed by Krishna Bhagya Jala Nigam Ltd. (for short "Jala Nigam") against the decision of the Division Bench of the Karnataka High Court dated 28-1-2005 in Miscellaneous First Appeal No. 1785 of 2002 dismissing the said appeal preferred by Jala Nigam under Section 37(1)(*b*) of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act").

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3. The first issue is: whether Jala Nigam could be allowed to raise the contention, on the facts and circumstances of this case, that clause 29 of the contract (agreement) is not an arbitration clause and due to want of jurisdiction of the Arbitral Tribunal to adjudicate upon the claims made by the contractor (Respondent 1), award dated 25-6-2000 published on 14-11-2000 was a nullity.

4. The second issue is regarding the merits of the claims made by the contractor.

5. The facts giving rise to the above civil appeal are as follows:

On 27-11-1993 agreement bearing No. 41/93 was entered into between Jala Nigam and the claimant (Respondent 1) concerning construction of Mulawad Lift Irrigation Scheme. The contract was for 36 months. It was to be completed by 26-11-1996. In the course of execution of the contract, Jala Nigam entrusted to the contractor, certain extra work vide two supplementary agreements dated 11-6-1996 and 7-11-1998. The contract was extended up to 31-12-2003. The claimant (contractor) raised disputes, said to have arisen out of the works entrusted under the contract. By letter dated 23-3-1998 the contractor called upon the Chief Engineer to act as an arbitrator under clause 29 of the contract which is reproduced hereinbelow:

> "Clause 29(*a*) If any dispute or difference of any kind whatsoever were to arise between the Executive Engineer/Superintending Engineer and the contractor regarding the following matters namely:
>
> (*i*) the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned,
>
> (*ii*) the quality of workmanship or materials used on the work, and
>
> (*iii*) any other question, claim, right, matter, thing whatsoever, in any way arising out of or relating to the contract, designs, or those conditions or failure to execute the same whether arising during the progress of the work or after the completion, termination or abandonment thereof the dispute shall, in the first place, be referred to the Chief Engineer who has jurisdiction over the work specified in the contract. The Chief Engineer shall within a period of ninety days from the date of being requested by the contractor to do so, give written notice of his decision to the contractor.
>
> (*b*) Subject to other form of settlement hereafter provided, the Chief Engineer's decision in respect of every dispute or difference so referred shall be final and binding upon the contractor. The said decision shall forthwith be given effect to and the contractor shall proceed with the execution of the work with all due diligence.
>
> (*c*) In case the decision of the Chief Engineer is not acceptable to the contractor, he may approach the law courts at ....(*) for settlement of dispute after giving due written notice in this regard to the Chief Engineer within a period of ninety days from the date of receipt of this written notice of the decision of the Chief Engineer.

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(*d*) If the Chief Engineer has given written notice of his decision to the contractor and no written notice to approach the law court has been communicated to him by the contractor within a period of ninety days from receipt of such notice, the decision shall be final and binding upon the contractor."

6. By letter dated 26-3-1998 the Chief Engineer refused to act as an arbitrator on the ground that the contract did not provide for arbitration. This led the contractor to file CMP No. 26 of 1999 under Section 11 of the Arbitration Act. By order dated 10-9-1999 the High Court directed the Chief Engineer to act as an arbitrator. By the said order the High Court directed both the parties to file their respective claims and counterclaims before the arbitrator. By letter dated 12-11-1999 the arbitrator entered upon the reference. He fixed the date of appearance of the parties. The arbitrator gave necessary directions to both sides to file statements and counter-statements. The contractor placed before the arbitrator, 11 claims in all. Jala Nigam filed its counter-statement. Ultimately, on the basis of the evidence produced by the parties, the arbitrator gave his award on 25-6-2000 and the same was published on 14-11-2000.

7. Aggrieved by the award, Jala Nigam filed a petition under Section 34(2)(*v*) of the Arbitration Act before the Principal Civil Judge (Senior Division), Bijapur vide Arbitration Case No. 1 of 2001. The award was confirmed by the said civil court vide judgment dated 15-12-2001. Aggrieved by the said decision, Jala Nigam carried the matter in first appeal filed under Section 37(1)(*b*) of the Arbitration Act to the High Court. Vide impugned judgment dated 28-1-2005 the appeal stood dismissed. Hence this civil appeal.

8. Mr C.S. Vaidyanathan, learned Senior Counsel for Jala Nigam, contended that the abovequoted clause 29 of the contract was not an arbitration clause and, therefore, the proceedings before the arbitrator stood vitiated for lack of jurisdiction. He contended that the proceedings before the arbitrator were without jurisdiction for want of arbitration agreement which cannot be cured by appearance of the parties, even if there was no protest or even if there was a consent of Jala Nigam, since consent cannot confer jurisdiction and, therefore, the impugned award was null and void. Learned counsel submitted that though the plea of "no arbitration clause" was not raised in the counter-statement before the arbitrator, such a plea was taken by Jala Nigam in CMP No. 26 of 1999 filed by the contractor and, therefore, Jala Nigam was entitled to raise the plea of "no arbitration clause". Learned counsel submitted that under the circumstances the courts below had erred in holding that Jala Nigam had waived its right to object to the award on the aforementioned grounds.

9. We do not find any merit in the above arguments. The plea of "no arbitration clause" was not raised in the written statement filed by Jala Nigam before the arbitrator. The said plea was not advanced before the civil court in Arbitration Case No. 1 of 2001. On the contrary, both the courts below on

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facts have found that Jala Nigam had consented to the arbitration of the disputes by the Chief Engineer. Jala Nigam had participated in the arbitration proceedings. It submitted itself to the authority of the arbitrator. It gave consent to the appointment of the Chief Engineer as an arbitrator. It filed its written statements to the additional claims made by the contractor. The Executive Engineer who appeared on behalf of Jala Nigam did not invoke Section 16 of the Arbitration Act. He did not challenge the competence of the Arbitral Tribunal. He did not call upon the Arbitral Tribunal to rule on its jurisdiction. On the contrary, it submitted to the jurisdiction of the Arbitral Tribunal. It also filed written arguments. It did not challenge the order of the High Court dated 10-9-1999 passed in CMP No. 26 of 1999. Suffice it to say that both the parties accepted that there was an arbitration agreement, they proceeded on that basis and, therefore, Jala Nigam cannot be now be allowed to contend that clause 29 of the contract did not constitute an arbitration agreement.

10. Before concluding on this issue, one clarification needs to be mentioned. On 26-7-2005 a three-Judge Bench of this Court has referred the question involving interpretation of clause 29 of the contract to the Constitution Bench in *P. Dasaratharama Reddy Complex* v. *Govt. of Karnataka*[1]. Placing reliance on the said order, learned counsel for Jala Nigam submitted that the hearing of this civil appeal be postponed pending disposal of the above reference by the Constitution Bench. We do not find any merit in this argument. As stated above, the plea that clause 29 of the contract was not an arbitration clause, was raised in the present case for the first time only in Miscellaneous First Appeal No. 1785 of 2002 filed under Section 37(1)(*b*) of the Arbitration Act before the High Court. As stated above, Jala Nigam, on the contrary, had consented to the Chief Engineer, acting as an arbitrator. For the aforestated reasons and particularly in view of the fact that there has been considerable delay in the litigation no useful purpose would be served in keeping the matter pending in this Court awaiting the decision of the Constitution Bench. Therefore, on the facts and circumstances of this case and in view of the conduct of the parties, we hold that Jala Nigam cannot be allowed to urge that clause 29 of the contract is not an arbitration clause.

11. On the merits of the claims made by the contractor we find from the impugned award dated 25-6-2000 that it contains several heads. The arbitrator has meticulously examined the claims of the contractor under each separate head. We do not see any reason to interfere except on the rates of interest and on the quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the award. Here also we may add that we do not wish to interfere with the award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.

1 CA No. 1586 of 2004 decided on 26-7-2005

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12. As far as idling charges are concerned, the arbitrator has awarded Rs 42,000 per day for the period 1-2-1994 to 17-12-1994 and from 1-6-1995 to 31-12-1995 excluding the period 18-12-1994 to 31-5-1995 and from 1-1-1996 to 12-11-1996. On this basis the idling charges awarded by the arbitrator was arrived at Rs 1.47 crores. It is contended that the contractor has not led any evidence to show the existence of the machinery at site and, therefore, he was not entitled to idling charges. We are of the view that the award of the arbitrator is fair and equitable. He has excluded certain periods from calculations, as indicated above. We have examined the records. The delay took place on account of non-supply of drawings and designs and in the meantime the establishment of the contractor stood standstill. We suggested to the learned counsel for the respondent (contractor) for reduction of the awarded amount under this head from Rs 1.47 crores to Rs 1 crore. Learned counsel for the respondent fairly accepted our suggestion. We suggested the aforestated figure keeping in mind the long-standing dispute between the parties. Therefore, the amount awarded under this head shall stand reduced from Rs 1.47 crores to Rs 1 crore.

13. Accordingly, the civil appeal stands allowed to the extent indicated above with no order as to costs.

(2007) 2 Supreme Court Cases 725

(BEFORE S.B. SINHA AND MARKANDEY KATJU, JJ.)

Civil Appeal No. 5814 of 2006†

A.P. STEEL RE-ROLLING MILL LTD. . . Appellant;

Versus

STATE OF KERALA AND OTHERS . . Respondents.

With

Civil Appeal No. 5816 of 2006‡

VICTORY PAPERS AND BOARDS INDIA LTD. . . Appellant;

Versus

STATE OF KERALA AND OTHERS . . Respondents.

Civil Appeals No. 5814 of 2006 with No. 5816 of 2006,
decided on December 14, 2006

A. **Electricity — Tariff — Concessional tariff — Entitlement to — Relevant scheme granting said benefit for five years to new industrial units from the date they commenced commercial production between 1-1-1992 and 31-12-1996 — Denial of said benefit to appellant unit — Propriety — Failure/negligence on the part of appellant to avail that benefit within the period prescribed therefor — Effect — Appellant failing/neglecting to comply with terms and conditions of scheme — It contributing to a large**

† Arising out of SLPs (C) Nos. 7972-73 of 2005. From the Final Judgment and Order dated 24-11-2003 of the High Court of Kerala at Ernakulam in OP No. 31033 of 2003 and dated 25-5-2004 in RP No. 286 of 2004

‡ Arising out of SLP (C) No. 6809 of 2005

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(2001) 2 Supreme Court Cases 721

(BEFORE G.B. PATTANAIK, S. RAJENDRA BABU, D.P. MOHAPATRA, DORAISWAMY RAJU AND SHIVARAJ V. PATIL, JJ.)

EXECUTIVE ENGINEER, DHENKANAL MINOR IRRIGATION DIVISION, ORISSA AND OTHERS . . Appellants;

Versus

N.C. BUDHARAJ (DECEASED) BY LRS. AND OTHERS . . Respondents.

Civil Appeals No. 3586 of 1984† with Nos. 710-11 of 1981, 6808-10, 10649 of 1983, 779 of 1982 and 2723 of 1981, decided on January 10, 2001

A. **Arbitration — Arbitration Act, 1940 — Ss. 13 and 29 — Interest for pre-reference period in respect of cases arising when Interest Act, 1839 was in force — Held (per majority), arbitrator, whether appointed with or without intervention of court, has power to grant interest in respect of pre-reference period, provided there is no stipulation or prohibition in the arbitration agreement excluding his jurisdiction — The forum of arbitration created by consent of parties, with or without intervention of court, being only a substitute for conventional civil courts, it is an unavoidable necessity that parties be deemed to have agreed by implication that arbitrator would have the power to award interest in the same way and same manner as a court — The fact that nothing in the Interest Act, 1839 indicates that its applicability is to be confined to proceedings before ordinary civil courts, cannot be ignored — Therefore an interpretation which makes provisions of the Act just, meaningful and purposeful ought to be adopted — Held, High Court rightly upheld the claim of respondent contractor — (Per Mohapatra, J., contra) Arbitrator appointed without judicial intervention does not have jurisdiction to award interest for pre-reference period unless (i) arbitration agreement itself expressly authorises him to do so; (ii) usage of trade having force of law so authorises; or (iii) provision of substantive law so authorises — (Per Pattanaik, J., contra agreeing with Mohapatra, J.) — To hold that arbitrator appointed without judicial intervention, has power to award interest for pre-reference period would amount to legislation by courts — Practice and Procedure — Prospective overruling — Principle of, applied — Constitution of India, Art. 142 — Complete and substantial justice between parties to arbitration**

B. **Interpretation of Statutes — Basic rules — Literal or strict construction — Held, ought to be scrupulously avoided if inevitably creates various anomalies and finally defeats the ends of justice**

C. **Constitution of India — Art. 14 — Classification rule/Discrimination — Arbitrators appointed by agreement of parties and those appointed by intervention of court — To deny arbitrators appointed directly by parties the right to award interest for the pre-reference period, while permitting arbitrators appointed after judicial intervention, to do so, held, would amount to applying different and discriminatory norms and standards to**

† From the Judgment and Order dated 15-5-1982 of the Orissa High Court in Misc. A. No. 254 of 1981

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situations where such application would not be justified — Further, held, parties going to arbitration directly cannot be considered to have given up any claim

D. **Interest Act, 1839 — Held, there is nothing in the Act to indicate that its applicability is to be confined to proceedings before the conventional civil courts**

E. **Arbitration — Arbitration Act, 1940 — Ss. 29 and 13 — Power of arbitrator to award interest for pre-reference period — Held, jurisdiction of arbitrator to award interest in respect of all periods, including pre-reference period, held, is subject only to S. 29 and the provisions and conditions of the arbitration agreement**

F. **Precedents — Generally — Ratio decidendi — Held, ratio of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal — Constitution of India, Art. 141 — Civil Procedure Code, 1908, S. 11**

G. **Jurisprudence — Substantive law — Held, is that part of the law which creates, defines and regulates rights and stands in contrast to adjective or remedial law, which provides the method or procedure for enforcing rights**

In *Executive Engineer, Dhankanal Minor Irrigation Division* v. *N.C. Budhiraj* (1999) 9 SCC 514 a three-Judge Bench referred the following question of law to a larger Bench of the Supreme Court for authoritative pronouncement:

> "In the absence of any prohibition to claim or grant interest under the arbitration agreement whether the arbitrator has no jurisdiction to award interest for the pre-reference period under the general law or on equitable principles, although such claim may not strictly fall within the provisions of the Interest Act, 1839?"

Dismissing the appeal, a majority of three Members of a five-Judge Bench

Held :

Per Rajendra Babu, Raju and Patil, JJ.

The arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in *Jena case* (1988) 1 SCC 418 taking a contraview does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitle any party nor shall it empower any court to reopen proceedings which have already become final, and shall apply only to any pending proceedings. (Para 26)

Executive Engineer (Irrigation) v. *Abhaduta Jena*, (1988) 1 SCC 418, *prospectively overruled*

Now, when the claim involved for consideration in *G.C. Roy case* (1992) 1 SCC 508 was only with reference to pendente lite interest it cannot be expected of the court to travel outside, except for analysing the general principles, to academically adjudicate the other aspects of the matter also decided by the Bench in *Jena case* (1988) 1 SCC 418 and overrule the same on such other points too. Be that as it may, the ratio or the basis of reasons and principles underlying a decision is distinct from the ultimate relief granted or manner of disposal adopted in a given case. (Para 22)

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It has been declared in unmistakable terms in the *G.C. Roy case* that the basic proposition that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, by whatever name it may be called, viz., interest, compensation or damages, "is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference". The efficacy and binding nature of this declaration of law cannot be either diminished or whittled down even on any known principle underlying the doctrine of "stare decisis". It cannot be legitimately contended that these principles would either vary or could be different in a case relating to the award of interest for the pre-reference period and to assume such a contra position in juxtaposition would not only be destructive in nature but also illogical and self-contradictory resulting in grave miscarriage of justice. (Para 22)

Secy., Irrigation Deptt, Govt. of Orissa v. *G.C. Roy*, (1992) 1 SCC 508, *relied on*

Jugal Kishore Prabhatilal Sharma v. *Vijayendra Prabhatilal Sharma*, (1993) 1 SCC 114; *State of Orissa* v. *B.N. Agarwala*, (1993) 1 SCC 140; *State of Orissa* v. *B.N. Agarwalla*, (1997) 2 SCC 469, *impliedly overruled*

Hindustan Construction Co. Ltd. v. *State of J&K*, (1992) 4 SCC 217; *Gujarat Water Supply and Sewerage Board* v. *Unique Erectors (Gujarat) (P) Ltd.*, (1989) 1 SCC 532; *Union of India* v. *A.L. Rallia Ram*, AIR 1963 SC 1685 : (1964) 3 SCR 164; *Union of India* v. *Watkins Mayor and Co.*, AIR 1966 SC 275, *referred to*

Some of the very reasons and principles which weighed with the Constitution Bench in *G.C. Roy case* to sustain the jurisdiction of the arbitrator to award pendente lite interest in a claim arising out of an agreement which does not also prohibit the grant of interest, would equally suffice and provide sound basis of reasoning for upholding the power of the arbitrator to award interest in respect of the pre-reference period, too. The further fact that the decisions of the Supreme Court, including the *Jena case*, envisaged four circumstances or contingencies wherein such interest for pre-reference period can be countenanced by the arbitrator, is by itself sufficient to confer jurisdiction upon the arbitrator to entertain and consider the said claim also, and consequently there is no justification to thwart the same even at the threshold denying the arbitrator power even to entertain the claim as such. (Para 22)

Secy., Irrigation Deptt, Govt. of Orissa v. *G.C. Roy*, (1992) 1 SCC 508, *relied on*

"Substantive law", is that part of the law which creates, defines and regulates rights in contrast to what is called adjective or remedial law which provides the method of enforcing rights. (Para 23)

Once it is construed and considered that the method of redressal of disputes by an alternative forum of arbitration as agreed to between the parties, with or without the intervention of court is only a substitute for the conventional civil courts by forums created by consent of parties, it is but inevitably necessary that the parties must be deemed to have by implication also agreed that the arbitrator shall have power to award interest the same way and in the same manner as courts do and would have done had there not been an agreement for arbitration. It is in this connection that the practice followed by English courts which came to be noticed and approved by the Supreme Court also lends support and strength to adopt such a construction in order to render complete and substantial justice between the parties. (Para 23)

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Secy., Irrigation Deptt., Govt. of Orissa v. *G.C. Roy*, (1992) 1 SCC 508; *Chandris* v. *Isbrandtsen Moller Co. Inc.*, (1951) 1 KB 240 : (1950) 1 All ER 768 (KB); *Edwards* v. *Great Western Rly. Co.*, (1851) 138 ER 603 : 11 CB 588 : 21 LJ CP 72; *Chandris* v. *Isbrandtsen Moller Co. Inc.*, (1951) 1 KB 255 : (1950) 2 All ER 618 (KB); *President of India* v. *La Pintada Compania Navigacion S.A.*, (1985) 1 AC 104 : (1984) 2 All ER 773 : (1984) 3 WLR 10 (HL); *Food Corporation of India* v. *Marastro Compania Naviera S.A. of Panama*, (1986) 3 All ER 500 : (1987) 1 WLR 134 (CA), *relied on*

Nachiappa Chettiar v. *Subramaniam Chettiar*, AIR 1960 SC 307 : (1960) 2 SCR 209; *Satinder Singh* v. *Umrao Singh*, AIR 1961 SC 908 : (1961) 3 SCR 676; *State of M.P.* v. *Saith Skelton (P) Ltd.*, (1972) 1 SCC 702 : AIR 1972 SC 1507 : (1972) 3 SCR 233; *State of Rajasthan* v. *Raghubir Singh*, (1979) 3 SCC 102; *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*, AIR 1967 SC 1030 : (1967) 1 SCR 105; *Union of India* v. *Bungo Steel Furniture (P) Ltd.*, AIR 1967 SC 1032 : (1967) 1 SCR 324; *Ashok Construction Co.* v. *Union of India*, (1971) 3 SCC 66; *Podar Trading Co. Ltd.* v. *Francois Tagher*, (1949) 2 All ER 62 : (1949) 2 KB 277 (KB), *referred to*

Seth Thawardas Pherumal v. *Union of India*, AIR 1955 SC 468 : (1955) 2 SCR 48; *Bengal Nagpur Rly. Co. Ltd.* v. *Ruttanji Ramji*, AIR 1938 PC 67 : 65 IA 66 : 1938 ALJ 169; *Union of India* v. *West Punjab Factories Ltd.*, AIR 1966 SC 395 : (1966) 1 SCR 580, *distinguished*

That there is nothing in the Interest Act, 1839 to confine its operation and applicability only to proceedings before ordinary and conventional courts, cannot also be ignored, in this connection. (Para 23)

Any such restricted and literal construction which is bound to create numerous anomalies and ultimately defeat the ends of justice should be scrupulously avoided. On the other hand, that interpretation which makes the text not only match the context but also makes a reading of the provisions of an Act, just, meaningful and purposeful and helps to further and advance the ends of justice must alone commend for the acceptance of courts of law. Adopting a different construction to deny a claimant who opts for adjudication of disputes by arbitral process alone and that too when recourse to such process is made without the intervention of court would amount to applying different and discriminatory norms and standards to situations which admit of no such difference and that too where there is no real distinction based upon any acceptable or tangible reason. (Para 23)

It is not in dispute that an arbitrator appointed in a pending suit or with the intervention of the court, will have all the powers of the court, in deciding the dispute and the dispute is only in respect of an arbitrator to whom the reference has been made by the parties, under the agreement without the intervention of the court. It would then mean that the parties have to be driven to vexatious litigation before courts by passing an agreement of arbitration, to be ultimately told to abide by it and have the matter formally referred by staying such proceedings before civil court to secure to the arbitrator power to award interest also. (Para 24)

By agreeing to settle all the disputes and claims arising out of or relating to the contract between the parties through arbitration instead of having recourse to civil court to vindicate their rights the party concerned cannot be considered to have frittered away and given up any claim which otherwise it could have successfully asserted before courts and obtained relief. By agreeing to have settlement of disputes through arbitration, the party concerned must be understood to have only opted for a different forum of adjudication with less cumbersome procedure, delay and expense and not to abandon all or any of its

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substantive rights under the various laws in force, according to which only even the arbitrator is obliged to adjudicate the claims referred to him. (Para 25)

Secy., Irrigation Deptt., Govt. of Orissa v. *G.C. Roy*, (1992) 1 SCC 508, *relied on*

As long as there is nothing in the arbitration agreement to exclude the jurisdiction of the arbitrator to entertain a claim for interest on the amounts due under the contract, or any prohibition to claim interest on the amounts due and become payable under the contract, the jurisdiction of the arbitrator to consider and award interest in respect of all periods subject only to Section 29 of the Arbitration Act, 1940 and that too the powers of the court thereunder, has to be upheld. The submission that the arbitrator cannot have jurisdiction to award interest for the period prior to the date of his appointment or entering into reference which alone confers upon him power, is too stale and technical to be countenanced for the simple reason that in every case the appointment of an arbitrator or even resort to court to vindicate rights could be only after disputes have cropped up between the parties and continue to subsist unresolved, and that if the arbitrator has the power to deal with and decide disputes which cropped up at a point of time and for the period prior to the appointment of an arbitrator, it is beyond comprehension as to why and for what reason and with what justification the arbitrator should be denied only the power to award interest for the pre-reference period. (Para 25)

Executive Engineer, Dhankanal Minor Irrigation Division v. *N.C. Budhiraj*, (1999) 9 SCC 514, *reference question answered*

Per Mohapatra, J. (dissenting)

From the discussion in the judgment in *G.C. Roy case* it is clear that the Constitution Bench confined its consideration to the question of pendente lite interest only. Therefore, this decision can be of little assistance in deciding the question raised in the present proceedings which relates to power of an arbitrator to award interest for the pre-reference period. A decision is an authority on the question that is raised and decided by the court. It cannot be taken as an authority on a different question though in some cases the reason stated therein may have a persuasive value. (Para 36)

Executive Engineer (Irrigation) v. *Abhaduta Jena*, (1988) 1 SCC 418; *Jugal Kishore Prabhatilal Sharma* v. *Vijayendra Prabhatilal Sharma*, (1993) 1 SCC 114; *Secy., Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy*, (1992) 1 SCC 508, *referred to*

The consistent view taken by the Supreme Court is that the decision in *Abhaduta Jena case*, so far as it relates to the aspect of pre-reference interest has not been overruled by the Constitution Bench. The question to be considered is whether the decision in *Abhaduta Jena case* should now be overruled on that aspect also. (Para 43)

Executive Engineer (Irrigation) v. *Abhaduta Jena*, (1988) 1 SCC 418; *Secy., Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy*, (1992) 1 SCC 508; *Jugal Kishore Prabhatilal Sharma* v. *Vijayendra Prabhatilal Sharma*, (1993) 1 SCC 114; *State of Orissa* v. *B.N. Agarwala*, (1993) 1 SCC 140; *Union of India* v. *West Punjab Factories Ltd.*, AIR 1966 SC 395 : (1966) 1 SCR 580; *State of Orissa* v. *B.N. Agarwalla*, (1997) 2 SCC 469; *Union of India* v. *Watkins Mayor and Co.*, AIR 1966 SC 275; *Bengal Nagpur Rly. Co. Ltd.* v. *Ruttanji Ramji*, AIR 1938 PC 67 : 65 IA 66 : 1938 ALJ 169; *Union of India* v. *West Punjab Factories Ltd.*, AIR 1966 SC 395 : (1966) 1 SCR 580; *Union of India* v. *Watkins Mayor and Co.*, AIR 1966 SC 275, *referred to*

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The period during which the proceeding was pending before the arbitrator (pendente lite) and the period before the arbitrator entered upon the reference (pre-reference), stand on different footing. While the former refers to a period when the arbitrator was seized of the matter for adjudication, the latter refers to the period before he (arbitrator) came into the picture. Further during the period when the arbitrator is seized of the proceeding the parties are aware of the claims made by the applicant against the opposite party and the matter is pending adjudication; but during the pre-reference period neither the claims are crystallised nor has the opposite party any notice that it may be required to pay a certain amount to the claimant depending on the adjudication of the dispute by the arbitrator. (Para 43)

An arbitrator is a creature of agreement between the parties. He is vested with the power of adjudication of disputes in terms of such agreement. He has to act in accordance with law. Though he discharges the functions of a court while adjudicating the dispute raised by the parties he cannot be said to be a substitute for the court in all respects. An arbitrator is not bound to follow the strict procedure applicable in a case before the court. In many cases the arbitrator, though nominated as a Judge by the parties, may not have the requisite experience in the field of law which a presiding officer of a court possesses. Therefore, it is necessary that in judging the claim of interest for the pre-reference period he should ascertain whether such claim is permitted under the terms of the contract between the parties or there is a usage of trade having force of law in support of such claim or there is any other provision of the substantive law enabling the award of such interest. In *Abhaduta Jena case* the Supreme Court did not rule that an arbitrator was not competent to award interest for the pre-reference period in any circumstance. The Supreme Court only held that award of such interest was not permissible unless any one of the conditions laid down in the decision is satisfied. The ratio of *Abhaduta Jena case* is based on sound legal principles which have been tested in the subsequent decisions in the light of the principles enunciated in *G.C. Roy case* also. (Para 44)

Executive Engineer (Irrigation) v. *Abhaduta Jena*, (1988) 1 SCC 418; *Secy., Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy*, (1992) 1 SCC 508, *referred to*

An arbitrator has no competence to award interest for the pre-reference period unless any of the conditions, namely — (*1*) if the agreement between the parties entitles the arbitrator to award interest; (*2*) if there is a usage of trade having the force of law for award of interest; and (*3*) if there are other provisions of the substantive law enabling the award of interest, is satisfied. Therefore, the question formulated in the reference order is answered in the negative. (Para 46)

Executive Engineer (Irrigation) v. *Abhaduta Jena*, (1988) 1 SCC 418, *referred to*

Pattanaik, J. (dissenting)

The arbitration proceeding has been a racket in this country and in construing the law in relation to the powers of the arbitrator, the courts must construe the provisions of the law rather strictly. To hold that an arbitrator possesses the power to award interest even for the pre-reference period, would tantamount to legislation in that respect. (Para 48)

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Suggested Case Finder Search Text (*inter alia*) :

arbitration interest "pre-reference" period

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Advocates who appeared in this case :

Gobind Das, Senior Advocate (Raj Kr. Mehta, Advocate, with him) for the Appellants;

Anil B. Divan, Senior Advocate (A.K. Panda, K.K. Patel, R.P. Wadhwani, Vinoo Bhagat and Radhashyam Jena, Advocates, with him) for the Respondents.

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The Judgments of the Court were delivered by

RAJU, J. (*for Rajendra Babu, J., himself and Patil, J.*)— The principal question arising in all these civil appeals and stand referred to for the consideration of the Constitution Bench is as to whether the arbitrator has got jurisdiction to award interest for the pre-reference period in cases which arose prior to the commencement into force on 19-8-1981 of the Interest Act, 1978, when the provisions of the Interest Act, 1839 were holding the field. The cases before us relate to the appointment of the arbitrators concerned by the specified authority, on a demand made therefor by the contractor concerned without the intervention of the court. The arbitrators concerned, while sustaining portions of the claim made in the awards also allowed on those amounts interest from the due date of the amount till the date of award. On the awards being made the rule of court, as per the determination made by the civil court, the State pursued the matter before the High Court unsuccessfully and the High Court sustained the claim of the contractor for interest from the due date up to the date of the award. Aggrieved, the above appeals came to be filed and entertained on certain limited and specified grounds, inclusive of the dispute relating to the award of interest for the period prior to the date of the award.

2. The Bench of three learned Judges, who heard the appeals initially, considered it necessary to refer to a larger Bench for an authoritative pronouncement, the following question of law:

> "In the absence of any prohibition to claim or grant interest under the arbitration agreement whether the arbitrator has no jurisdiction to award interest for the pre-reference period under the general law or on equitable principles, although such claim may not strictly fall within the provisions of the Interest Act, 1839?" (Since reported in as *Executive Engineer, Dhankanal Minor Irrigation Division* v. *N.C. Budhiraj*[1] at SCC pp. 521-22, para 15.)

3. The order of reference also further indicated that there is no clause in the agreement as regards the payment of interest for the pre-reference period

1 (1999) 9 SCC 514

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and that there is also no clause prohibiting the payment of interest for the pre-reference period.

4. Before adverting even to the respective contentions of parties on either side and undertaking a consideration of the same, it would be necessary to refer to some of the decisions of this Court and highlight the principles laid down therein, since the core of controversy centres around the efficacy and effect of those principles on the issue raised and stand referred to this Bench. The leading decision which undertook an analysis of the case-law on the subject and laid down certain propositions of law is reported in *Executive Engineer (Irrigation)* v. *Abhaduta Jena*[2] (to be referred to hereinafter as "*Jena case*"). In para 4 of the judgment, the general state of law is found stated as follows: (SCC pp. 424-25, para 4)

> "*4.* It is important to notice at this stage that both the Interest Act of 1839 and the Interest Act of 1978 provide for the award of interest up to the date of the institution of the proceedings. Neither the Interest Act of 1839 nor the Interest Act of 1978 provides for the award of pendente lite interest. We must look elsewhere for the law relating to the award of interest pendente lite. This, we find, provided for in Section 34 of the Civil Procedure Code in the case of courts. Section 34, however, applies to arbitrations in suit for the simple reason that where a matter is referred to arbitration in a suit, the arbitrator will have all the powers of the court in deciding the dispute. Section 34 does not otherwise apply to arbitrations as arbitrators are not courts within the meaning of Section 34 of the Civil Procedure Code. Again, we must look elsewhere to discover the right of the arbitrator to award interest before the institution of the proceedings, in cases where the proceedings had concluded before the commencement of the Interest Act of 1978. While under the Interest Act of 1978 the expression 'court' was defined to include an arbitrator, under the Interest Act of 1839 it was not so defined. The result is that while in cases arising after the commencement of Interest Act of 1978 an arbitrator has the same power as the court to award interest up to the date of institution of the proceedings, in cases which arose prior to the commencement of the 1978 Act the arbitrator has no such power under the Interest Act of 1839. It is, therefore necessary, as we said, to look elsewhere for the power of the arbitrator to award interest up to the date of institution of the proceedings. Since the arbitrator is required to conduct himself and make the award in accordance with law we must look to the substantive law for the power of the arbitrator to award interest before the commencement of the proceedings. If the agreement between the parties entitles the arbitrator to award interest no further question arises and the arbitrator may award interest. Similarly if there is a usage of trade having the force of law the arbitrator may award interest. Again if there are any other provisions of the substantive law enabling the award of interest the arbitrator may award interest. By way of an

2 (1988) 1 SCC 418

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illustration, we may mention Section 80 of the Negotiable Instruments Act as a provision of the substantive law under which the court may award interest even in a case where no rate of interest is specified in the promissory note or bill of exchange. We may also refer Section 61(2) of the Sale of Goods Act which provides for the award of interest to the seller or the buyer as the case may be under certain circumstances in suits filed by them. We may further cite the instance of the non-performance of a contract of which equity could give specific performance and to award interest. We may also cite a case where one of the parties is forced to pay interest to a third party, say on an overdraft, consequent on the failure of the other party to the contract not fulfilling the obligation of paying the amount due to them. In such a case also equity may compel the payment of interest. Loss of interest in the place of the right to remain in possession may be rightfully claimed in equity by the owner of a property who has been dispossessed from it."

5. After considering the earlier cases on the subject, it has been observed thus: (SCC pp. 432-34, paras 16-18)

"*16.* The question of award of interest by an arbitrator was considered in the remaining cases to which we have referred earlier. *Nachiappa Chettiar* v. *Subramaniam Chettiar*[3], *Satinder Singh* v. *Umrao Singh*[4], *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*[5], *Union of India* v. *Bungo Steel Furniture (P) Ltd.*[6], *Ashok Construction Co.* v. *Union of India*[7] and *State of M.P.* v. *Saith Skelton (P) Ltd.*[8] were all cases in which the reference to arbitration was made by the Court, of all the disputes in the suit. It was held that the arbitrator must be assumed in those circumstances to have the same power to award interest as the court. It was on that basis that the award of pendente lite interest was made on the principle of Section 34 of the Civil Procedure Code in *Nachiappa Chettiar* v. *Subramaniam Chettiar*[3], *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*[5], *Union of India* v. *Bungo Furniture (P) Ltd.*[6] and *State of M.P.* v. *Saith Skelton (P) Ltd.*[8] In regard to interest prior to the suit, it was held in these cases that since the Interest Act, 1839 was not applicable, interest could be awarded if there was an agreement to pay interest or a usage of trade having the force of law or any other provision of substantive law entitling the claimant to recover interest. Illustrations of the provisions of substantive law under which the arbitrator could award interest were also given in some of the cases. It was said, for instance, where an owner was deprived of his property, the right to receive interest took the place of the right to retain possession, and the owner of immovable property who lost possession of

3 AIR 1960 SC 307 : (1960) 2 SCR 209
4 AIR 1961 SC 908 : (1961) 3 SCR 676
5 AIR 1967 SC 1030 : (1967) 1 SCR 105
6 AIR 1967 SC 1032 : (1967) 1 SCR 324
7 (1971) 3 SCC 66
8 (1972) 1 SCC 702 : AIR 1972 SC 1507 : (1972) 3 SCR 233

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it was, therefore, entitled to claim interest in the place of right to retain possession. It was further said that it would be so whether possession of immovable property was taken away by private treaty or by compulsory acquisition. Another instance where interest could be awarded was under Section 61(2) of the Sale of Goods Act which provided for the award of interest to the seller or the buyer, as the case may be, under the circumstances specified in that section.

17. Section 80 of the Negotiable Instruments Act was mentioned as an instance of a provision of the substantive law under which interest prior to the institution of the proceedings could be awarded. Interest could also be awarded in cases of non-performance of a contract of which equity could give specific performance. *Seth Thawardas Pherumal*[9] was a case of direct reference to arbitration without the intervention of a court. Neither the Interest Act, 1839 nor the Civil Procedure Code applied as an arbitrator was not a court. Interest could, therefore, be awarded only if there was an agreement to pay interest or a usage of trade having the force of law or some other provision of the substantive law which entitled the plaintiff to receive interest. In that case, interest had been awarded on the ground that it was reasonable to award interest and the Court, therefore, held that the arbitrator was wrong in awarding the interest.

18. While this is the position in cases which arose prior to the coming into force of the Interest Act, 1978, in cases arising after the coming into force of the Act, the position now is that though the award of pendente lite interest is still governed by the same principles, the award of interest prior to the suit is now governed by the Interest Act, 1978. Under the Interest Act, 1978, an arbitrator is, by definition, a court and may now award interest in all the cases to which the Interest Act applies."

6. Thereupon, dealing with the cases before them, the general principles noticed were applied and they were disposed of in the following terms: (SCC pp. 434-35, para 20)

"*20.* Coming to the cases before us, we find that in Civil Appeals Nos. 120 and 121 of 1981 before the arbitrator, there was no answer to the claim for interest and we see no justification for us at this stage to go into the question whether interest was rightly awarded or not. Out of the remaining cases we find that all cases except two (Civil Appeals Nos. 6019-22 of 1983 and Civil Appeal No. 2257 of 1984), the reference to arbitration were made prior to the commencement of the new Act which was on 19-8-1981. In the cases to which the Interest Act, 1978 applies, it was argued by Dr Chitale, learned counsel for the respondents, that the amount claimed was a sum certain payable at a certain time by virtue of a written instrument and, therefore, interest was payable under the Interest

9 *Seth Thawardas Pherumal* v. *Union of India*, AIR 1955 SC 468 : (1955) 2 SCR 48

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Act for the period before the commencement of the proceedings. In support of his contention that the amount claimed was a sum certain payable at a certain time by virtue of a written instrument, the learned counsel relied upon the decision of this Court in *State of Rajasthan* v. *Raghubir Singh*[10]. The case certainly supports him and in the cases to which the 1978 Interest Act applies the award of interest prior to the proceeding is not open to question. In regard to pendente lite interest, that is, interest from the date of reference to the date of the award, the claimants would not be entitled to the same for the simple reason that the arbitrator is not a court within the meaning of Section 34 of the Civil Procedure Code, nor were the references to arbitration made in the course of suits. In the remaining cases which arose before the commencement of the Interest Act, 1978, the respondents are not entitled to claim interest either before the commencement of the proceedings or during the pendency of the arbitration. They are not entitled to claim interest for the period prior to the commencement of the arbitration proceedings for the reason that the Interest Act, 1839 does not apply to their cases and there is no agreement to pay interest or any usage of trade having the force of law or any other provision of law under which the claimants were entitled to recover interest. They are not entitled to claim pendente lite interest as the arbitrator is not a court nor were the references to arbitration made in suits. One of the submissions made on behalf of the respondents was that in every case, all disputes were referred to arbitration and the jurisdiction of the arbitrator to award interest under certain circumstances was undeniable. The award not being a speaking award, it was not permissible to speculate on the reasons for the award of interest and the court was not entitled to go behind the award and disallow the interest. It is difficult to agree with this submission. The arbitrator is bound to make his award in accordance with law. If the arbitrator could not possibly have awarded interest on any permissible ground because such ground did not exist, it would be open to the court to set aside the award relating to the award of interest on the ground of an error apparent on the record. On the other hand, if there was the slightest possibility of the entitlement of the claimant to interest on one or other of the legally permissible grounds, it may not be open to the court to go behind the award and decide whether the award of interest was justifiable. We do not want to enter into a discussion on the legality or propriety of a non-speaking award as we understand the question is now awaiting the decision of a seven-Judge Bench. In the light of what we have said above, Civil Appeals Nos. 120 and 121 of 1981 are dismissed, Civil Appeals Nos. 6019-22 of 1983 and Civil Appeal No. 2257 of 1984 are allowed to this extent that interest during the pendency of the arbitration proceedings is disallowed and the rest of the civil appeals are allowed to the extent that both interest prior to the proceedings and interest during the pendency of the proceedings are

10 (1979) 3 SCC 102

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disallowed. There will be no order as to costs. SLP No. 8640 of 1981 is disposed of on the same lines."

7. The decision, which equally needs a detailed reference, is that of the Constitution Bench reported in *Secy., Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy*[11] (hereinafter referred to as "*Roy case*"). Of the two issues raised in the appeal therein, the one which related to the jurisdiction of the arbitrator to award pendente lite interest when taken up for hearing before a Bench, the correctness of *Jena case*[2] insofar as it held that the arbitrator had no power to award interest pendente lite was contested and on the view taken by that Bench that the said question required further consideration by a larger Bench, the matter was placed before the Constitution Bench. Ultimately, the Constitution Bench held that the decision in *Jena case*[2] does not lay down good law and where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he will have the power to award interest pendente lite, for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore the parties refer all their disputes — or refer the dispute as to interest as such to the arbitrator — which he shall have power to decide. It was also emphasised therein that the matter being one within the discretion of the arbitrator — the same requires to be exercised in the light of all facts and circumstances of the case, keeping the ends of justice in view.

8. The Constitution Bench, which decided *Roy case*[11] after a critical analysis of the earlier decisions including the one is *Jena case*[2] held as follows: (SCC pp. 532-33, para 43)

> "*43*. The question still remains whether an arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of the aforementioned decisions, the following principles emerge:
>
> (*i*) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34 of the Civil Procedure Code and there is no reason or principle to hold otherwise in the case of an arbitrator.
>
> (*ii*) An arbitrator is an alternative form (*sic* forum) for resolution of disputes arising between the parties. If so, he must have the power

11 (1992) 1 SCC 508

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to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(*iii*) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of the Arbitration Act illustrate this point.) All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(*iv*) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit *and* a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. *Thawardas*[9] has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until *Jena case*[2] almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(*v*) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred."

9. While overruling *Jena case*[2] on the above principles, this Court applied the principle of prospective overruling making it clear that their decision shall not entitle any party nor shall it empower any court to reopen proceedings which have already become final and that the law declared shall apply only to pending proceedings.

10. The area of consideration and the questions which fell for the determination of the cases in *Jena case*[2] and *Roy case*[11] have been adverted to in *Roy case*[11] itself and in para 8 of the judgment it has been observed as follows: (SCC pp. 514-15)

"*8.* Generally, the question of award of interest by the arbitrator may arise in respect of three different periods, namely: (*i*) for the period commencing from the date of dispute till the date the arbitrator enters upon the reference; (*ii*) for the period commencing from the date of the arbitrator's entering upon reference till the date of making the award; and (*iii*) for the period commencing from the date of making of the award till the date the award is made the rule of the court or till the date of

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realisation, whichever is earlier. In the appeals before us we are concerned only with the second of the three aforementioned periods. In *Jena case*[2], two questions arose for consideration of the Court, namely: (*i*) the power of the arbitrator to award interest for the period prior to his entering upon reference, and (*ii*) the powers of the arbitrator to award interest for the period the dispute remained pending before him pendente lite. Since, the Court dealt with the second question in detail and held that the arbitrator had no jurisdiction or authority to award interest pendente lite, we think it necessary to consider the reasons for the decision. Justice Chinnappa Reddy, J. speaking for the Bench held that neither the Interest Act, 1839 nor the Interest Act, 1978 conferred power on the arbitrator for awarding interest pendente lite. The learned Judge observed that Section 34 of the Civil Procedure Code which provides for the same did not apply to an arbitrator inasmuch as an arbitrator is not a court within the meaning of the said provision. Consequently the arbitrator could not award interest pendente lite."

11. In *Jugal Kishore Prabhatilal Sharma* v. *Vijayendra Prabhatilal Sharma*[12] a Bench of three learned Judges to which B.P. Jeevan Reddy, J. was a party, observed that there was force in the contention that the decision in *Roy case*[11] did not affect the position of law relating to the power of the arbitrator in respect of the period prior to reference in respect of a pre-1978 Act period. B.P. Jeevan Reddy, J. who was also a Member of the Constitution Bench which decided *Roy case*[11] wrote a separate concurring opinion clarifying the position that *Roy case*[11] was concerned with the power of the arbitrator to award interest pendente lite unlike *Jena case*[2] which considered the question both for the pre-reference period as well as the pendente lite period and therefore, it may not be right to read the decision in *Roy case*[11] as overruling *Jena case*[2] insofar as it dealt with the power of the arbitrator to award interest for the pre-reference period. The learned Judge (Jeevan Reddy, J.) speaking for another Bench in the decision reported in *State of Orissa* v. *B.N. Agarwala*[13] reaffirmed the same position and even rejected a request for reference of the matter to a larger Bench of this Court. The decision in *State of Orissa* v. *B.N. Agarwalla*[14] also reaffirmed the above position.

12. In *B.N. Agarwalla case*[14] B.N. Kirpal, J., speaking for a Bench of three learned Judges of this Court, adverted to the earlier decisions some of which were rendered even after those noticed above and held as follows: (SCC pp. 477-78, para 18)

> "*18.* In view of the aforesaid decisions there can now be no doubt with regard to the jurisdiction of the arbitrator to grant interest. The principles which can now be said to be well settled are that the arbitrator

12 (1993) 1 SCC 114
13 (1993) 1 SCC 140
14 (1997) 2 SCC 469

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has the jurisdiction to award pre-reference interest in cases which arose after the Interest Act, 1978 had become applicable. With regard to those cases pertaining to the period prior to the applicability of the Interest Act, 1978, in the absence of any substantive law, contract or usage, the arbitrator has no jurisdiction to award interest. For the period during which the arbitration proceedings were pending in view of the decision in *G.C. Roy case*[11] and *Hindustan Construction Ltd. case*[15], the arbitrator has the power to award interest. The power of the arbitrator to award interest for the post-award period also exists and this aspect has been considered in the discussion relating to Civil Appeal No. 9234 of 1994 in the later part of this judgment."

13. As to what should happen for the post-award period, Section 29 of the Arbitration Act, 1940, itself provides clue for an answer by stipulating that where and insofar as an award is for the payment of money, the court may in the decree order interest from the date of the decree at such rate as the court deems reasonable to be paid on the principal sum as adjudged by the award and confirmed by the decree. This question has been specifically dealt with in *Hindustan Construction Co. Ltd.* v. *State of J & K*[15] by a Bench of three learned Judges and it was held therein as follows: (SCC pp. 220-21, para 5)

"5. The question of interest can be easily disposed of as it is covered by recent decisions of this Court. It is sufficient to refer to the latest decision of a five-Judge Bench of this Court in *Secy., Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy*[11]. Though the said decision deals with the power of the arbitrator to award interest pendente lite, the principle of the decision makes it clear that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure. Section 34 of the Code of Civil Procedure provides both for awarding of interest pendente lite as well as for the post-decree period and the principle of Section 34 has been held applicable to proceedings before the arbitrator, though the section as such may not apply. In this connection, the decision in *Union of India* v. *Bungo Steel Furniture (P) Ltd.*[6] may be seen as also the decision in *Gujarat Water Supply and Sewerage Board* v. *Unique Erectors (Gujarat) (P) Ltd.*[16] which upholds the said power though on a somewhat different reasoning. We, therefore, think that the award on Item 8 should have been upheld."

14. This aspect was also specifically dealt with and it was held in *B.N. Agarwala case*[14] as hereunder: (SCC p. 483, para 37)

15 *Hindustan Construction Co. Ltd.* v. *State of J&K*, (1992) 4 SCC 217
16 (1989) 1 SCC 532

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"*37.* When the arbitrator makes an award, it is not necessary that in every case the award has to be filed in a court and a decree, in terms thereof, is passed. It does happen that when an award is made, the party against whom it is made, may accept the award and comply with the same. It is rightly not disputed that from the date of passing of the award, future interest can be awarded by the arbitrator as held by this Court in the cases of *Unique Erectors (Gujarat) (P) Ltd.*[16] and *Hindustan Construction Co. Ltd.*[15] The correct procedure which should be adopted by the arbitrator is to award future interest till the date of the decree or the date of payment, whichever is earlier. The effect of this would be that if the award is voluntarily accepted, which may not result in a decree being passed, then payment of interest would be made from the date of award till the date of payment. Where, however, as in the present case, the award is filed in the court and a decree is passed in terms thereof, then Mr Sanyal has rightly contended that it is for the court to determine under Section 29 of the Arbitration Act as to whether interest should be ordered to be paid and if so at what rate."

15. It is in the above backdrop of the legal principles enunciated and considered holding the field that this reference came to be made for determining the jurisdiction of the arbitrator to award interest for the pre-reference period, in the circumstances stated in the very question of reference.

16. Shri Gobind Das, learned Senior Counsel for the appellants, submitted that having regard to the principles and ratio laid down in *Jena case*[2] and *B.N. Agarwala case*[13] and the other decisions wherein the position came to be reaffirmed and followed consistently, the arbitrator will have no jurisdiction to award interest for the pre-reference period in a matter relating to the pre-1978 Act period. The decision of this Court in *G.C. Roy case*[11], according to the learned counsel, has no relevance to the case pertaining to the "pre-reference" period, the same being only concerned with pendente lite period and, therefore, the authority of the *Jena case*[2] in respect of the pre-reference period holding that no interest is payable for the pre-reference period, never stood undermined or overruled by the decision of the Constitution Bench rendered in *G.C. Roy case*[11]. Emphasis has been laid to derive support to this stand on the decisions reported in *Bengal Nagpur Rly. Co. Ltd.* v. *Ruttanji Ramji*[17]; *Seth Thawardas Pherumal* v. *Union of India*[9]; *Union of India* v. *A.L. Rallia Ram*[18]; *Union of India* v. *Watkins Mayor and Co.*[19]; *Union of India* v. *West Punjab Factories Ltd.*[20]; *Ashok Construction Co. case*[7] and *State of M.P.* v. *Saith Skelton (P) Ltd.*[8] According to the learned counsel for the appellants, the principles laid down in *Jena case*[2] as affirmed in *G.C. Roy case*[11] and as clarified and declared in the subsequent

17 AIR 1938 PC 67 : 65 IA 66 : 1938 ALJ 169
18 AIR 1963 SC 1685 : (1964) 3 SCR 164
19 AIR 1966 SC 275
20 AIR 1966 SC 395 ; (1966) 1 SCR 580

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decisions of this Court including the one in *B.N. Agarwala case*[13] do not call for any change or modification or alteration and the reference should be answered in favour of the appellants.

17. Per contra, Shri Anil B. Divan, learned Senior Counsel spearheading the arguments on behalf of the respondents followed by Sarvashri V. Bhagat and A.K. Panda strenuously contended that the ratio or the reasons which formed the basis for the judgment and the principles laid down in *G.C. Roy case*[11] de hors their ultimate application to the actual case before court for according relief, renders the decision in *Jena case*[2] insofar as it related to award of interest for the pre-reference period also bad even for the very reasons on which the Court in *G.C. Roy case*[11] found the judgment in *Jena case*[2] bad or unsustainable in respect of award of interest for pendente lite period. The conclusions in *Jena case*[2] are said to be directly in conflict with the earlier three-Judge judgment of this Court and all these cases having been quoted with approval in *G.C. Roy case*[11], *Jena case*[2] must be held to be no longer good law even in respect of award of interest for the pre-reference period. Argued the learned Senior Counsel further that inasmuch as the principles laid down in the English cases (*Chandris case*[21], *Edwards case*[22]) came to be approved in *G.C. Roy case*[11], it becomes inevitably necessary to hold that the arbitrator has jurisdiction to award interest for pre-reference period as long as there is no specific prohibition as such in the agreement/contract between parties restraining the claim/payment of interest, on the principle of an implied term of the agreement between the parties, that the arbitrator could award interest in a case where the court could award it and, that as a consequence thereof, when the parties refer all their disputes or the dispute as to interest as such to the arbitrator, he shall have the necessary power to award interest — though such power may be exercised in his discretion in the light of all the facts and circumstances of the case and in the interests of justice. Our attention has also been invited in this regard to certain English cases: *Chandris* v. *Isbrandtsen Moller Co. Inc.*[23]; *President of India* v. *La Pintada Compania Navigacion S.A.*[24] and *Food Corporation of India* v. *Marastro Compania Naviera S.A. of Panama*[25] and those of the Supreme Court in *G.C. Roy case*[11] and some of the decisions referred to therein.

18. We have carefully considered the submissions of the learned counsel appearing on either side. The mere reference and reliance placed by the counsel for the appellants on the earlier decisions which have been already considered by this Court in deciding *Jena case*[2] and *G.C. Roy case*[11] and explained, does not help to improve the position of the appellants in any manner to sustain their plea. The Constitution Bench which dealt with *G.C.*

21 *Chandris* v. *Isbrandtsen Moller Co. Inc.*, (1951) 1 KB 240 : (1950) 1 All ER 768 (KB)
22 *Edwards* v. *Great Western Rly. Co.*, (1851) 138 ER 603 : 11 CB 588 : 21 LJ CP 72
23 (1951) 1 KB 255 : (1950) 2 All ER 618 (KB)
24 (1985) 1 AC 104 : (1984) 2 All ER 773 : (1984) 3 WLR 10 (HL)
25 (1986) 3 All ER 500 : (1987) 1 WLR 134 (CA)

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Roy case[11] while adverting to the English cases reported in *Edwards* v. *Great Western Rly. Co.*[22]; *Podar Trading Co. Ltd.* v. *Francois Tagher*[26]; *Chandris* v. *Isbrandsten Moller Co. Inc.*[21] observed, while quoting with approval the decision in *Ashok Construction Co. case*[7], that the principles laid down by this Court only accorded with the principles laid down in *Edwards case*[22] as understood in *Chandris case*[21]. Reference has also been made in *G.C. Roy case*[11] to the decision reported in *Union of India* v. *Bungo Steel Furniture (P) Ltd.*[6] wherein also this Court accorded approval to the principles laid down in the English cases, observing as follows: (SCC p. 526, para 26)

> "*26.* The above passages show that the Court laid down two principles: (*i*) it is an implied term of the reference that the arbitrator will decide the dispute according to existing law and give such relief with regard to interest as a court could give if it decides the dispute; (*ii*) though in terms Section 34 of the Code of Civil Procedure does not apply to arbitration proceedings, the principle of that section will be applied by the arbitrator for awarding interest in cases where a court of law in a suit having jurisdiction of the subject-matter covered by Section 34 could grant a decree for interest. It is also relevant to notice that this decision refers with approval to both the English decisions in *Edwards*[22] and *Chandris case*[21] besides the decision of this Court in *Firm Madanlal Roshanlal*[5]. It is noteworthy that the decision explains and distinguishes the decision in *Thawardas*[9] on the same lines as was done in *Firm Madanlal Roshanlal case*[5]."

19. The subsequent development and march of law in England, in this connection, also deserve to be noticed. In *President of India* v. *La Pintada Compania Navigacion S.A.*[24] the House of Lords approved the rule in *Chandris case*[21] as follows:

> "The true position in law is, in my opinion, not in doubt. It is this. Where parties refer a dispute between them to arbitration in England, they impliedly agree that the arbitration is to be conducted in accordance in all respects with the law of England, unless, which seldom occurs, the agreement of reference provides otherwise. It is on this basis that it was held by the Court of Appeal in *Chandris* v. *Isbrandtsen Moller Co. Inc.*[21] that, although Section 3(1) of the 1934 Act, by its terms, empowered only courts of record to include interest in sums for which judgment was given for damages or debt, arbitrators were nevertheless empowered, by the agreement of reference, to apply English law, including so much of that law as is to be found in Section 3(1) of the Act of 1934." (At p. 119.)

20. In *Food Corpn. of India* v. *Marastro Compania Naviera S.A. of Panama*[25] it was held by the Court of Appeal as hereunder:

> "Before Section 19-A there was no general statutory provision empowering arbitrators to award interest on the sums they awarded. But it was held by this court in *Chandris* v. *Isbrandtsen Moller Co. Inc.*[21]

26 (1949) 2 All ER 62 ; (1949) 2 KB 277 (KB)

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that, just as before the Act of 1934 came into force an arbitrator had been held entitled to award interest in the circumstances in which, under the Civil Procedure Act, 1833, a jury could have awarded interest, so equally, after the Act of 1934 came into force, an arbitrator had impliedly the power to award interest which Section 3 had conferred upon courts of record.

The decision in the *Chandris case*[21] was approved by the House of Lords in *President of India* v. *La Pintada Compania Navigacion S.A.*[24] There, Lord Brandon of Oakbrook said that, where parties refer a dispute between them to arbitration in England, they impliedly agree that the arbitration is to be conducted in accordance in all respects with the law of England, unless the agreement of reference provides otherwise. Thus, although Section 3 of the Act of 1934 by its terms empowered only courts of record to include interest in sums for which judgment was given for damages or debt, arbitrators were nevertheless empowered, by the agreement of reference, to apply English law, including so much of that law as was to be found in Section 3 of the Act of 1934.

In my judgment, this implied agreement in the arbitration agreement is naturally to be understood as empowering arbitrators to apply English law as it is from time to time during the course of the reference (and in particular in the context of the present case as it was at the time of the hearing and the award) and not as an agreement empowering the arbitrator to apply English law crystallised as at the date of the arbitration agreement. As it was put by Cohen, L.J., in the *Chandris case*[21] (KB at 264) (though admittedly without having his mind addressed to transitional problems):

> 'In my opinion, the right of arbitrators to award interest was not derived from Sections 28 and 29 of the Civil Procedure Act, 1833, but from the rule that arbitrators had the powers of the appropriate court in the matter of awarding interest. In my opinion, therefore, the effect of the Act of 1934 is that, after it came into force, an arbitrator had no longer the powers of awarding interest on damages conferred on juries by Sections 28 and 29 of the Civil Procedure Act, 1833, but he had the power conferred on the appropriate court, in the Act of 1934 described as a court of record.'

In the present case, the power of the court under Section 3 of the Act of 1934 to award interest on a judgment at the trial of proceedings which the arbitrator would by implication prospectively have had at the time of the arbitration agreement had been superseded by the time of the hearing, and a fortiori by the date of the award, by the wider powers of the court as a result of Section 15 of the Act of 1982. It is those wider powers which, by the *Chandris*[21] process of implication, the arbitrator would have had when he made the award if Section 19-A had not been inserted into the Arbitration Act, 1950. The purpose of Section 19-A is to make explicit powers to award interest which had previously rested on implication. There is thus a further strong pointer to holding that Section

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19-A has retrospective effect and applies to pending and future arbitrations under arbitration agreements whenever made, just as the powers of the High Court and of the county courts under Section 35-A of the Act of 1981 and Section 97-A of the Act of 1959 apply to proceedings whenever instituted." (At pp. 141 and 142)

The Constitution Bench in *G.C. Roy case*[11] also recognised and accorded approval to this principle in SCC para 43(*iii*) at p. 533 by stating, "the arbitrator must also act and make his award in accordance with the general law of the land and the agreement".

21. As for the reliance placed for the appellants upon the decisions reported in *Bengal Nagpur Rly.*[17]; *Thawardas*[9] and *West Punjab Factories Ltd.*[20], we are of the view that the observations contained in those judgments have to be construed in the factual context and nature of the claims involved therein and not in the abstract and out of their context. *Thawardas case*[9] is one where the arbitrator awarded interest on unliquidated damages for a period before the reference to arbitration as well as for the period subsequent to reference. *Bengal Nagpur Rly. Co. Ltd. case*[17] dealt with the claim of interest by way of damages under Section 73 of the Contract Act and it was observed therein that Section 73 is merely declaratory of the common law as to damages and that it was not available to the plaintiff therein. In *West Punjab Factories Ltd. case*[20] also the suit claim was for damages for loss of goods destroyed by fire, and Issue (*iv*) considered therein related to the question of awarding interest for the period before the suit on the amount of damages decreed. A careful analysis of the principles underlying those decisions would show that the claim of interest for the period prior to the commencement of proceedings was not countenanced in view of the settled and indisputable position of law that damages till quantified are not and cannot be said to be an ascertained or definite sum and until it is ascertained and crystallised into a definite sum and decreed, no question of payment of interest for the period prior to such quantification would either arise or be permissible in law, even if made before regular civil courts, in ordinary suits filed.

22. There can be no controversy over the position that the Constitution Bench of this Court in *G.C. Roy case*[11] while declaring that the decision in *Jena case*[2] does not lay down good law upheld, as a consequence the jurisdiction of the arbitrator to award only pendente lite interest, as explained and highlighted in the subsequent decisions of this Court. When the claim involved for consideration in *G.C. Roy case*[11] was only with reference to pendente lite interest it cannot be expected of the court to travel outside, except for analysing the general principles, to academically adjudicate the other aspects of the matter also decided by the Bench in *Jena case*[2] and overrule the same on such other points too. Be that as it may, the ratio or the basis of reasons and principles underlying a decision is distinct from the ultimate relief granted or manner of disposal adopted in a given case. While laying down Principle (*i*) in para 43, it has been in unmistakable terms

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declared (at SCC p. 533) that the basic proposition that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, by whatever name it may be called, viz., interest, compensation or damages, "is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference". The efficacy and binding nature of this declaration of law cannot be either diminished or whittled down even on any known principle underlying the doctrine of "stare decisis". The same is the position with reference to Principles (*ii*) and (*iii*). It cannot be legitimately contended that these principles would either vary or could be different in a case relating to the award of interest for the pre-reference period and to assume such a contra position in juxtaposition would not only be destructive in nature but also illogical and self-contradictory resulting in grave miscarriage of justice. Some of the very reasons and principles which weighed with the Constitution Bench in *G.C. Roy case*[11] to sustain the jurisdiction of the arbitrator to award pendente lite interest in a claim arising out of an agreement which does not also prohibit the grant of interest, in our view would equally suffice and provide sound basis of reasoning for upholding the power of the arbitrator to award interest in respect of the pre-reference period, too. The further fact that the decisions of this Court, including the *Jena case*[2], envisaged four circumstances or contingencies wherein such interest for pre-reference period can be countenanced by the arbitrator, is by itself sufficient to confer jurisdiction upon the arbitrator to entertain and consider the said claim also, and consequently there is no justification to thwart the same even at the threshold denying the arbitrator power even to entertain the claim as such.

23. What difference would it make and what consequences would follow, if Principle (*i*) is read along with Principle (*v*), be it even that, interest for the pre-reference period is a matter of "substantive", law unlike the interest for the period pendente lite, which ultimately came to be allowed applying the principles engrafted in Section 34 of the Code of Civil Procedure would next deserve our consideration. "Substantive law", is that part of the law which creates, defines and regulates rights in contrast to what is called adjective or remedial law which provides the method of enforcing rights. Decisions, including the one in *Jena case*[2] while adverting to the question of substantive law has chosen to indicate by way of illustration laws such as Sale of Goods Act, 1930 [Section 61(2)], Negotiable Instruments Act, 1881 (Section 80), etc. The provisions of the Interest Act, 1839, which prescribe the general law of interest and become applicable in the absence of any contractual or other statutory provisions specially dealing with the subject, would also answer the description of substantive law. This Act was excluded from consideration for the simple reason that unlike the inclusive definition of "court" in the 1978 Act so as to include an arbitrator, also the 1839 Act did not provide any "definition" clause much less an expansive one. Not only Section 1 of the Interest Act but even the provisions contained in the Sale of Goods Act and the Negotiable Instruments Act themselves only envisage and enable courts to grant or award interest. But on that ground alone it could not be

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reasonably postulated that such Acts applied only to proceedings before courts and not to proceedings before forums created in lieu of conventional civil courts. Once it is construed and considered that the method of redressal of disputes by an alternative forum of arbitration as agreed to between the parties, with or without the intervention of court is only a substitute of the conventional civil courts by forums created by consent of parties, it is but inevitably necessary that the parties must be deemed to have by implication also agreed that the arbitrator shall have power to award interest the same way and in the same manner as courts do and would have done had there not been an agreement for arbitration. It is in this connection that the practice followed by English courts which came to be noticed and approved by this Court also lend support and strength to adopt such construction in order to render complete and substantial justice between the parties. That there is nothing in the Interest Act, 1839 to confine its operation and applicability only to proceedings before ordinary and conventional courts, cannot also be ignored, in this connection. In our view, any such restricted and literal construction which is bound to create numerous anomalies and ultimately defeat the ends of justice should be scrupulously avoided. On the other hand, that interpretation which makes the text not only match the context but also make a reading of the provisions of an Act, just, meaningful and purposeful and help to further and advance the ends of justice must alone commend for the acceptance of courts of law. Adopting a different construction to deny a claimant who opts for adjudication of disputes by arbitral process alone and that too when recourse to such process is made without the intervention of court would amount to applying different and discriminatory norms and standards to situations which admit of no such difference and that too where there is no real distinction based upon any acceptable or tangible reason.

24. It is not in dispute that an arbitrator appointed in a pending suit or with the intervention of the court, will have all the powers of the court, in deciding the dispute and the dispute is only in respect of an arbitrator to whom the reference has been made by the parties, under the agreement without the intervention of the court. It would then mean that the parties have to be driven to vexatious litigation before courts by passing an agreement of arbitration, to be ultimately told to abide by it and have the matter formally referred by staying such proceedings before civil court to secure to the arbitrator power to award interest also. In *G.C. Roy case*[11] while emphasising the importance and need for availing arbitration process, it has been observed as follows: (SCC pp. 511-12, para 4)

> "*4.* A dispute between two parties may be determined by court through judicial process or by arbitrator through a non-judicial process. The resolution of dispute by court, through judicial process is costly and time consuming. Therefore, generally the parties with a view to avoid delay and cost, prefer alternative method of settlement of dispute through arbitration proceedings. In addition to these two known processes of settlement of dispute there is another alternative method of settlement of

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dispute through statutory arbitration. Statutory arbitrations are regulated by the statutory provisions while the parties entering into agreement for the resolution of their dispute through the process of arbitration are free to enter into agreement regarding the method, mode and procedure of the resolution of their dispute provided the same are not opposed to any provision of law. Many a time while suit is pending for adjudication before a court, the court with the consent of the parties, refers the dispute to arbitration. On account of the growth in the international trade and commerce and also on account of long delays occurring in the disposal of suits and appeals in courts, there has been tremendous movement towards the resolution of disputes through alternative forum of arbitrators. The alternative method of settlement of dispute through arbitration is a speedy and convenient process, which is being followed throughout the world. In India since ancient days settlement of disputes by Panches has been a common process for resolution of disputes in an informal manner. But now arbitration is regulated by statutory provisions."

25. If that be the position, courts which of late encourage litigants to opt for and avail of the alternative method of resolution of disputes, would be penalising or placing those who avail of the same in a serious disadvantage. Both logic and reason should counsel courts to lean more in favour of the arbitrator holding to possess all the powers as are necessary to do complete and full justice between the parties in the same manner in which the civil court seized of the same dispute could have done. By agreeing to settle all the disputes and claims arising out of or relating to the contract between the parties through arbitration instead of having recourse to civil court to vindicate their rights the party concerned cannot be considered to have frittered away and given up any claim which otherwise it could have successfully asserted before courts and obtained relief. By agreeing to have settlement of disputes through arbitration, the party concerned must be understood to have only opted for a different forum of adjudication with less cumbersome procedure, delay and expense and not to abandon all or any of its substantive rights under the various laws in force, according to which only even the arbitrator is obliged to adjudicate the claims referred to him. As long as there is nothing in the arbitration agreement to exclude the jurisdiction of the arbitrator to entertain a claim for interest on the amounts due under the contract, or any prohibition to claim interest on the amounts due and become payable under the contract, the jurisdiction of the arbitrator to consider and award interest in respect of all periods subject only to Section 29 of the Arbitration Act, 1940 and that too the powers of the court thereunder, has to be upheld. The submission that the arbitrator cannot have jurisdiction to award interest for the period prior to the date of his appointment or entering into reference which alone confers upon him power, is too stale and technical to be countenanced in our hands, for the simple reason that in every case the appointment of an arbitrator or even resort to court to vindicate rights could be only after disputes have cropped up

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between the parties and continue to subsist unresolved, and that if the arbitrator has the power to deal with and decide disputes which cropped up at a point of time and for the period prior to the appointment of an arbitrator, it is beyond comprehension as to why and for what reason and with what justification the arbitrator should be denied only the power to award interest for the pre-reference period when such interest becomes payable and has to be awarded as an accessory or incidental to the sum awarded as due and payable, taking into account the deprivation of the use of such sum to the person lawfully entitled to the same.

26. For all the reasons stated above, we answer the reference by holding that the arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in *Jena case*[2] taking a contraview does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitle any party nor shall it empower any court to reopen proceedings which have already become final, and apply only to any pending proceedings. No costs.

D.P. MOHAPATRA, J. (*dissenting*)— I have had the privilege of reading the draft judgment prepared by my learned Brother Justice Doraiswamy Raju. He has come to the conclusion that the arbitrator appointed with or without intervention of court, has jurisdiction to award interest on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. With respect, I am unable to agree with the said conclusion.

28. This case stood referred by a Bench of three learned Judges of this Court by the order dated 29-10-1999[1] for consideration by a larger Bench. In para 15 of the said order the question to be considered has been formulated as: (SCC pp. 521-22)

> "In the absence of any prohibition to claim or grant interest under the arbitration agreement whether the arbitrator has no jurisdiction to award interest for the pre-reference period under the general law or on equitable principles although such claim may not strictly fall within the provisions of the Interest Act, 1839?"

29. From the discussions in the reference order it appears that it was urged by Mr Anil Divan, learned Senior Counsel appearing for the respondents that in view of the judgments of this Court in *Secy., Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy*[11] (hereinafter referred to as "*G.C. Roy case*"), *Executive Engineer (Irrigation)* v. *Abhaduta Jena*[2] (hereinafter referred to as "*Abhaduta Jena case*") and in the case of *State of Orissa* v. *B.N. Agarwalla*[14] requires reconsideration.

30. The question of competence of an arbitrator to award interest has engaged the attention of this Court in umpteen cases. The claim of interest can be broadly split-up into 3 periods — (*a*) for the period before the

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arbitrator enters upon the reference, in other words, pre-reference period; (*b*) for the period during which the proceeding is pending before the arbitrator which is otherwise called pendente lite period; (*c*) for the period from the date of the award till the award is made rule of the court. The question to be considered in the present case is confined to the jurisdiction of the arbitrator to award interest for the pre-reference period only. After hearing the learned counsel appearing for the appellants and the respondents it appears to me that the moot question to be answered by this Bench is whether the decision in *Abhaduta Jena case*[2] holding that the arbitrator has no competence to award interest for the pre-reference period unless any of the three conditions is satisfied, namely — (*1*) if the agreement between the parties entitles the arbitrator to award interest; (*2*) if there is a usage of trade having the force of law for award of interest; and (*3*) if there are other provisions of the substantive law enabling the award of interest; requires reconsideration, particularly in view of the decision of the Constitution Bench in *G.C. Roy case*[11]. Therefore it will be convenient to notice at the outset the principles of law and the reasons which persuaded the learned Judges in *Abhaduta Jena case*[2] to hold as noted above. Therein this Court took note of the important changes brought in by the Interest Act, 1978 particularly the inclusion of an arbitrator in the definition of Section 2(*a*) which was absent in the Interest Act of 1839. This Court also took note of the position that Section 34 of the Civil Procedure Code applies to arbitration in a suit for the reason that where a matter is referred to arbitration in a suit the arbitrator will have all the powers of the court in deciding the dispute and that Section 34 does not otherwise apply to arbitration as arbitrators are not "courts" within the meaning of Section 34 CPC. As O. Chinnappa Reddy, J. speaking for the Court has observed: (SCC p. 425, para 4)

> "Again, we must look elsewhere to discover the right of the arbitrator to award interest before the institution of the proceedings, in cases where the proceedings had concluded before the commencement of the Interest Act of 1978."

In this regard the following observations in para 4 of the judgment may be noticed: (SCC pp. 424-25)

> "*4*. It is important to notice at this stage that both the Interest Act of 1839 and the Interest Act of 1978 provide for the award of interest up to the date of the institution of the proceedings. Neither the Interest Act of 1839 nor the Interest Act of 1978 provides for the award of pendente lite interest. We must look elsewhere for the law relating to the award of interest pendente lite. This, we find, provided for in Section 34 of the Civil Procedure Code in the case of courts. Section 34, however, applies to arbitrations in suits for the simple reason that where a matter is referred to arbitration in a suit, the arbitrator will have all the powers of the court in deciding the dispute. Section 34 does not otherwise apply to arbitrations as arbitrators are not courts within the meaning of Section 34 of the Civil Procedure Code. Again, we must look elsewhere to discover the right of the arbitrator to award interest before the institution of the

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proceedings, in cases where the proceedings had concluded before the commencement of the Interest Act of 1978. While under the Interest Act of 1978 the expression 'court' was defined to include an arbitrator, under the Interest Act of 1839 it was not so defined. The result is that while in cases arising after the commencement of the Interest Act of 1978 an arbitrator has the same power as the court to award interest up to the date of institution of the proceedings, in cases which arose prior to the commencement of the 1978 Act the arbitrator has no such power under the Interest Act of 1839. *It is, therefore necessary, as we said, to look elsewhere for the power of the arbitrator to award interest up to the date of institution of the proceedings. Since the arbitrator is required to conduct himself and make the award in accordance with law we must look to the substantive law for the power of the arbitrator to award interest before the commencement of the proceedings. If the agreement between the parties entitles the arbitrator to award interest no further question arises and the arbitrator may award interest. Similarly, if there is a usage of trade having the force of law the arbitrator may award interest. Again if there are any other provisions of the substantive law enabling the award of interest the arbitrator may award interest.* By way of an illustration, we may mention Section 80 of the Negotiable Instruments Act as a provision of the substantive law under which the court may award interest even in a case where no rate of interest is specified in the promissory note or bill of exchange. We may also refer to Section 61(2) of the Sale of Goods Act which provides for the award of interest to the seller or the buyer as the case may be under certain circumstances in suits filed by them. We may further cite the instance of the non-performance of a contract of which equity could give specific performance and to award interest. We may also cite a case where one of the parties is forced to pay interest to a third party, say on an overdraft, consequent on the failure of the other party to the contract not fulfilling the obligation of paying the amount due to them. In such a case also equity may compel the payment of interest. Loss of interest in the place of the right to remain in possession may be rightfully claimed in equity by the owner of a property who has been dispossessed from it."

(emphasis supplied)

31. This Court discussed a number of decisions of the Privy Council and Supreme Court including the case of *Bengal Nagpur Rly. Co. Ltd.* v. *Ruttanji Ramji*[17]; *Seth Thawardas Pherumal* v. *Union of India*[9]; *Nachiappa Chettiar* v. *Subramaniam Chettiar*[3]; *Satinder Singh* v. *Umrao Singh*[4]; *Union of India* v. *Watkins Mayor & Co.*[19]; *Union of India* v. *West Punjab Factories*[20]; *Ashok Construction Co.* v. *Union of India*[7] and *State of M.P.* v. *Saith & Skelton (P) Ltd.*[8]

32. After discussing in detail the facts and the principles laid down in the decided cases this Court summed up the position in the following words: (SCC pp. 432-33, paras 15-17)

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"*15. As a result of the discussion of the various cases, we see that Bengal Nagpur Rly. Co. Ltd.* v. *Ruttanji Ramji*[17], *Union of India* v. *West Punjab Factories*[20] and *Union of India* v. *Watkins & Co.*[19] *were cases of award of interest not by an arbitrator, but by the Court. It was laid down in those three cases that interest could not be awarded for the period prior to the suit in the absence of an agreement for the payment of interest or any usage of trade having the force of law or any provision of the substantive law entitling the plaintiff to recover interest.* Interest could also be awarded by the court under the Interest Act if the amount claimed was a sum certain payable at a certain time by virtue of a written instrument. In regard to pendente lite interest, the provisions of the Civil Procedure Code governed the same.

16. The question of award of interest by an arbitrator was considered in the remaining cases to which we have referred earlier. *Nachiappa Chettiar* v. *Subramaniam Chettiar*[3], *Satinder Singh* v. *Umrao Singh*[4], *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*[5], *Union of India* v. *Bungo Steel Furniture (P) Ltd.*[6], *Ashok Construction Co.* v. *Union of India*[7] and *State of M.P.* v. *Saith & Skelton (P) Ltd.*[8] *were all cases in which the reference to arbitration was made by the Court, of all the disputes in the suit. It was held that the arbitrator must be assumed in those circumstances to have the same power to award interest as the court. It was on that basis that the award of pendente lite interest was made on the principle of Section 34 of the Civil Procedure Code* in *Nachiappa Chettiar* v. *Subramaniam Chettiar*[3], *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*[5], *Union of India* v. *Bungo Furniture (P) Ltd.*[6] and *State of M.P.* v. *Saith & Skelton (P) Ltd.*[8] In regard to interest prior to the suit, it was held in these cases that since the Interest Act, 1839 was not applicable, interest could be awarded if there was an agreement to pay interest or a usage of trade having the force of law or any other provision of substantive law entitling the claimant to recover interest. Illustrations of the provisions of substantive law under which the arbitrator could award interest were also given in some of the cases. It was said, for instance, where an owner was deprived of his property, the right to receive interest took the place of the right to retain possession, and the owner of immovable property who lost possession of it was, therefore, entitled to claim interest in the place of right to retain possession. It was further said that it would be so whether possession of immovable property was taken away by private treaty or by compulsory acquisition. Another instance where interest could be awarded was under Section 61(2) of the Sale of Goods Act which provided for the award of interest to the seller or the buyer, as the case may be, under the circumstances specified in that section.

17. Section 80 of the Negotiable Instruments Act was mentioned as an instance of a provision of the substantive law under which interest prior to the institution of the proceedings could be awarded. Interest could also be awarded in cases of non-performance of a contract of which equity could give specific performance. *Seth Thawardas*

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Pherumal[9] was a case of direct reference to arbitration without the intervention of a court. Neither the Interest Act, 1839 nor the Civil Procedure Code applied as an arbitrator was not a court. Interest could, therefore, be awarded only if there was an agreement to pay interest or a usage of trade having the force of law or some other provision of the substantive law which entitled the plaintiff to receive interest. In that case, interest had been awarded on the ground that it was reasonable to award interest and the Court, therefore, held that the arbitrator was wrong in awarding the interest." (emphasis supplied)

33. The ultimate conclusions reached by the Court were summed up in these words: (SCC pp. 434-35, para 20)

"In regard to pendente lite interest, that is, interest from the date of reference to the date of the award, the claimants would not be entitled to the same for the simple reason that the arbitrator is not a court within the meaning of Section 34 of the Civil Procedure Code, nor were the references to arbitration made in the course of suits. *In the remaining cases which arose before the commencement of the Interest Act, 1978 the respondents are not entitled to claim interest either before the commencement of the proceedings or during the pendency of the arbitration. They are not entitled to claim interest for the period prior to the commencement of the arbitration proceedings for the reason that the Interest Act, 1839 does not apply to their cases and there is no agreement to pay interest or any usage of trade having the force of law or any other provision of law under which the claimants were entitled to recover interest.* They are not entitled to claim pendente lite interest as the arbitrator is not a court nor were the references to arbitration made in suits." (emphasis supplied)

34. The Constitution Bench of this Court in *G.C. Roy case*[11] considered the correctness of the decision in *Abhaduta Jena case*[2] so far as award of pendente lite interest is concerned. Indeed while stating the two grounds on which the award before the Court was challenged it was stated (at SCC p. 510, para 1) "(2) the arbitrator had no jurisdiction to award pendente lite interest". The conclusion on that point was stated in paragraphs 44-45 of the judgment in the following words: (SCC pp. 533-34)

"*44.* Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:

Where the agreement between the parties does not prohibit grant of interest *and* where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such — to the arbitrator, he shall have the power to award interest. This

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does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view.

45. For the reasons aforesaid we must hold that the decision in *Jena*[2], insofar as it runs counter to the above proposition, did not lay down correct law."

35. In the present proceedings we are not concerned with the competence of an arbitrator to award pendente lite interest.

36. From the discussion in the judgment in *G.C. Roy case*[11] it is clear that the Constitution Bench confined its consideration to the question of pendente lite interest only. Therefore, this decision can be of little assistance in deciding the question raised in the present proceedings which relates to power of an arbitrator to award interest for the pre-reference period. A decision is an authority on the question that is raised and decided by the court. It cannot be taken as an authority on a different question though in some cases the reason stated therein may have a persuasive value.

37. A Bench of three learned Judges of this Court in the case of *Jugal Kishore Prabhatilal Sharma* v. *Vijayendra Prabhatilal Sharma*[12] considered the question of power of an arbitrator to award interest for pre-reference period in a case where reference of a dispute to the arbitrator was made prior to coming into force of the Interest Act, 1978. The Bench had occasion to consider the decision in *Abhaduta Jena case*[2] and also *G.C. Roy case*[11]. The Bench rejected the contention that the decision in *Abhaduta Jena case*[2] had been overruled in *G.C. Roy case*[11] on the aspect of award of interest for pre-reference period also. B.P. Jeevan Reddy, J., in his concurring judgment specifically dealt with the question. The relevant portions of the judgment are quoted hereunder: (SCC p. 137, paras 35-36)

"During the course of arguments, two different interpretations were placed upon the principles enunciated by the Constitution Bench in *Secy., Irrigation Deptt.* v. *G.C. Roy*[11]. On one hand it was contended, relying upon the first of the five principles set out in para 43 that the said decisions lays down that even for the pre-reference period, interest can be granted in all cases and that the earlier decision of this Court in *Executive Engineer (Irrigation)* v. *Abhaduta Jena*[2] has been overruled in that behalf as well. On the other side, it was contended that it was not so and that so far as the pre-reference period is concerned, the Constitution Bench decision does not say anything contrary to what was said in *Jena*[2]. It is in view of the said contentions that I thought it appropriate to clarify the matter since I was a member of the Bench which decided *Secy., Irrigation Deptt.* v. *G.C. Roy*[11].

36. The decision in G.C. Roy[11] *was concerned only with the power of arbitrator to award interest pendente lite. It was not concerned with his power to award interest for the pre-reference period.* This was made clear at more than one place in the judgment. In para 2 it is stated that

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reference to the Constitution Bench was only for deciding the question whether the decision in *Jena*[2] was correct insofar as it held that arbitrator has no power to award interest pendente lite. In para 8 it is stated (SCC pp. 514-15)

> 'Generally, the question of award of interest by the arbitrator may arise in respect of three different periods, namely: (*i*) for the period commencing from the date of dispute till the date the arbitrator enters upon the reference; (*ii*) for the period commencing from the date of the arbitrator's entering upon reference till the date of making the award; and (*iii*) for the period commencing from the date of making of the award till the date the award is made the rule of the court or till the date of realisation, whichever is earlier. *In the appeals before us we are concerned only with the second of the three aforementioned periods.*' " (emphasis supplied)

38. A Bench of two learned Judges of this Court in the case of *State of Orissa* v. *B.N. Agarwala*[13] considered the question relating to the power of the arbitrator to award interest for the pre-reference period. While on behalf of the appellant the contention was raised that the arbitrator has no power to award interest for pre-reference period relying on the decision in *Abhaduta Jena case*[2]; the contention on behalf of the respondent was that the said decision was no longer good law in view of the Constitution Bench decision in *G.C. Roy case*[11]. This Court also declined to refer the matter to a larger Bench. The relevant observations in para 10 of the judgment are quoted hereunder: (SCC pp. 144-45)

> "We cannot agree with Shri Bhagat. Both of us were members of the Constitution Bench which decided *G.C. Roy*[11]. *It was confined to the power of the arbitrator to award interest pendente lite. It did not pertain to nor did it pronounce upon the power of the arbitrator to award interest for the period prior to his entering upon the reference (pre-reference period).* This very aspect has been clarified by one of us (B.P. Jeevan Reddy, J.) in his concurring order in *Jugal Kishore Prabhatilal Sharma* v. *Vijayendra Prabhatilal Sharma*[12]. *Accordingly, we hold following the decision in Jena*[2] *that the arbitrator had no power to award interest for the pre-reference period in this case inasmuch as the award was made prior to coming into force of the Interest Act, 1978.* (The Interest Act, 1978 came into force with effect from 19-8-1981.) So far as interest for the period during which the arbitration proceedings were pending (pendente lite interest) is concerned, the arbitrator does have the power to award the same as held in *G.C. Roy*[11]. A request is made by Shri Bhagat to refer the matter to a larger Bench to decide the question relating to the power of the arbitrator to award interest for the pre-reference period even in cases where the award is made before the coming into force of the Interest Act, 1978. *Jena*[2] was decided by a Bench of three Judges. We do not also feel persuaded to refer the matter to a larger Bench." (emphasis supplied)

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39. Again a Bench of three learned Judges in the case of *State of Orissa* v. *B.N. Agarwalla*[14] had occasion to deal with the question whether the decision in *Abhaduta Jena case*[2] was overruled in its entirety in the decision of the Constitution Bench in *G.C. Roy case*[11]. This Court held that the decision in *Abhaduta Jena case*[2] with regard to award of interest for pre-reference period was not overruled in *G.C. Roy case*[11]. The relevant observations made in para 12 of the judgment read as follows: (SCC p. 475)

> "*12*. The perusal of the aforesaid passages clearly shows that *Abhaduta Jena case*[2] was not overruled in its entirety by the decision in *G.C. Roy case*[11]. It is only with regard to the award of pendente lite interest that the Constitution Bench came to a conclusion which was contrary to the one arrived at in *Abhaduta Jena case*[2]. The decision in *Abhaduta Jena case*[2] with regard to award of interest for pre-reference period was not overruled in *G.C. Roy case*[11]."

40. On the question whether the arbitrator had jurisdiction to award pre-reference interest in case which arose prior to the applicability of the Interest Act, 1978 this Court held: (SCC p. 477, para 18)

> "With regard to those cases pertaining to the period prior to the applicability of the Interest Act, 1978, in the absence of any substantive law, contract or usage, the arbitrator has no jurisdiction to award interest."

41. In the case of *Seth Thawardas Pherumal* v. *Union of India*[9] a Bench of three learned Judges of this Court considered the question of validity of the award of interest by the arbitrator in the light of the provisions of the Interest Act, 1839 and Section 34 CPC. The views of the Court on that aspect were expressed in the following words:

> "The arbitrator held:
>
> 'The contractor's contention that his claims should have been settled by January 1948 is, in my opinion, reasonable. I therefore award interest at 6% for 16 months on the total amount of the awards given, i.e. Rs 17,363.'
>
> Then the arbitrator sets out the amounts awarded under each head of claim. A perusal of them shows that each head relates to a claim for an unliquidated sum. The Interest Act, 1839 applies, as interest is not otherwise payable by law in this kind of case (see *Bengal Nagpur Rly. Co.* v. *Ruttanji Ramji*[17]) but even if it be assumed that an arbitrator is a 'court' within the meaning of that Act, (a fact that by no means appears to be the case), the following among other conditions must be fulfilled before interest can be awarded under the Act:
>
> (*1*) there must be a debt or a sum certain;
>
> (*2*) it must be payable at a certain time or otherwise;
>
> (*3*) these debts or sums must be payable by virtue of some written contract at a certain time;
>
> (*4*) there must have been a demand in writing stating that interest will be demanded from the date of the demand.

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Not one of these elements is present, so the arbitrator erred in law in thinking that he had the power to allow interest simply because he thought the demand was reasonable."

42. In the case of *Union of India* v. *West Punjab Factories Ltd.*[20] a Constitution Bench of this Court considered the question of an award of interest for a period prior to filing of the suit and held that in the absence of any usage or contract, express or implied, or of any provision of law to justify the award of interest it is not possible to award interest by way of damages, and therefore, no interest should have been awarded in the present two suits up to the date of the filing of either of the suit. The relevant observations on that aspect read as follows:

> "The next contention is that no interest could be awarded for the period before the suit on the amount of damages decreed. Legal position with respect to this is well settled: (see *Bengal Nagpur Rly. Co. Ltd.* v. *Ruttanji Ramji*[17]). That decision of the Judicial Committee was relied upon by this Court in *Seth Thawardas Pherumal* v. *Union of India*[9]. The same view was expressed by this Court in *Union of India* v. *A.L. Rallia Ram*[18]. *In the absence of any usage or contract, express or implied, or of any provision of law to justify the award of interest, it is not possible to award interest by way of damages.* Also see recent decision of this Court in *Union of India* v. *Watkins Mayor & Co.*[19] In view of these decisions no interest could be awarded for the period up to the date of the suit and the decretal amount in the two suits will have to be reduced by the amount of such interest awarded." (emphasis supplied)

43. The discussions in the decisions referred to in the foregoing paragraphs show the conspectus of the views expressed on the question of competence of an arbitrator to award interest for a period before he enters upon a reference. The question has been examined in the light of the ratio in *Abhaduta Jena case*[2] even after the Constitution Bench decision in *G.C. Roy case*[11]. The consistent view taken by this Court is that the decision in *Abhaduta Jena case*[2], so far as it relates to the aspect of pre-reference interest has not been overruled by the Constitution Bench. The question to be considered is whether the decision in *Abhaduta Jena case*[2] should now be overruled on that aspect also. The contention was advanced before us by Shri Anil Divan learned Senior Counsel for the respondent that though *Abhaduta Jena case*[2] has not been expressly overruled on this aspect by the decision in *G.C. Roy case*[11] the reasons given in the judgment for overruling *Abhaduta Jena*[2] on the point of pendente lite interest should be applied in the present case and the said decision should be overruled on the aspect of pre-reference interest also. At the cost of repetition I may state here that this contention was not accepted by this Court in *Jugal Kishore Prabhatilal Sharma* v. *Vijayendra Prabhatilal Sharma*[12], *State of Orissa* v. *B.N. Agarwala*[13] and *State of Orissa* v. *B.N. Agarwalla*[14]. In my view this contention cannot be accepted for the reason that the two periods, the period during which the proceeding was pending before the arbitrator (pendente lite) and the period before the arbitrator entered upon the reference (pre-reference), stand on

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different footing. While the former refers to a period when the arbitrator was seized of the matter for adjudication, the latter refers to the period before he (arbitrator) came into the picture. Further during the period when the arbitrator is seized of the proceeding the parties are aware of the claims made by the applicant against the opposite party and the matter is pending adjudication; but during the pre-reference period neither the claims are crystallised nor has the opposite party any notice that it may be required to pay a certain amount to the claimant depending on the adjudication of the dispute by the arbitrator.

44. In *Abhaduta Jena case*[2] this Court held that the arbitrator has no competence to award interest for a period prior to reference unless agreement between the parties entitles the arbitrator to award interest or there is a usage or trade having the force of law for award of interest or there is any other provision of the substantive law enabling the award of interest. In that decision as I read it, this Court has emphasised the position that the claim for interest for pre-reference period can be made only if there is a firm basis giving the claimants a cause of action for claim of such interest and in the absence of such basis for such claim an arbitrator is not competent to award interest. The position is well settled that an arbitrator is a creature of agreement between the parties. He is vested with the power of adjudication of disputes in terms of such agreement. He has to act in accordance with law. Though he discharges the functions of a court while adjudicating the dispute raised by the parties he cannot be said to be a substitute for the court in all respects. An arbitrator is not bound to follow the strict procedure applicable in a case before the court. In many cases the arbitrator, though nominated as a Judge by the parties, may not have the requisite experience in the field of law which a presiding officer of a court possesses. Therefore, it is necessary that in judging the claim of interest for the pre-reference period he should ascertain whether such claim is permitted under the terms of the contract between the parties or there is a usage of trade having force of law in support of such claim or there is any other provision of the substantive law enabling the award of such interest. In *Abhaduta Jena case*[2] this Court did not rule that an arbitrator was not competent to award interest for the pre-reference period in any circumstance. This Court only held that award of such interest was not permissible unless any one of the conditions laid down in the decision is satisfied. The ratio of *Abhaduta Jena case*[2] is based on sound legal principles which have been tested in the subsequent decisions in the light of the principles enunciated in *G.C. Roy case*[11] also.

45. In this connection I may notice another contention which was raised by Shri Anil Divan, that the jurisdiction to award interest for the pre-reference period will only compel the claimant to a civil suit for interest and that would result in multiplicity of proceedings. This contention is based on the assumption that a civil court can award interest for a period prior to the institution of the suit without being satisfied that any of the conditions laid down in *Abhaduta Jena case*[2] is satisfied. This assumption, in my view is incorrect. The plaintiff in a suit has to base his claim on a cause of action in law and in the absence of a firm basis in law the court cannot entertain

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such a claim. The plaintiff has to lay a firm basis for the claim in the pleading. That position has only been reiterated by this Court in *Abhaduta Jena case*[2].

46. On the discussions in the foregoing paragraphs I am of the view that the decision in *Abhaduta Jena case*[2] lays down the correct position of law and does not require reconsideration. An arbitrator has no competence to award interest for the pre-reference period unless any of the conditions, namely — (*1*) if the agreement between the parties entitles the arbitrator to award interest; (*2*) if there is a usage of trade having the force of law for award of interest; and (*3*) if there are other provisions of the substantive law enabling the award of interest, is satisfied. Therefore, the question formulated in the reference order is answered in the negative. Accordingly, the appeals are allowed insofar as the award of interest for the pre-reference period is concerned. No costs.

PATTANAIK, J. (*dissenting*)— I have gone through the two judgments of two of my Brother Judges, on the question of the jurisdiction of the arbitrator to grant interest for the period prior to the reference. While Brother Justice Raju has come to the conclusion that the arbitrator does possess the said power, Brother Justice Mohapatra, has taken a contrary view. Having considered both the viewpoints, I have not been able to persuade myself to agree with the conclusion of Brother Raju, J., and I entirely agree with the conclusion of Brother Mohapatra, J. But in view of the importance of the point, I am tempted to indicate my views in few paragraphs.

48. The power of the arbitrator to award interest for the period prior to entertaining upon the reference as well as the period the reference was pending before him pendente lite was considered by this Court in *Thawardas*[9] and also by the Privy Council in *Bengal Nagpur Rly. Co. Ltd.* v. *Ruttanji Ramji*[17]. Between 1960 and 1972 in several decisions, which have been referred to by the Constitution Bench in *G.C. Roy case*[11], the question of power of the arbitrator to award interest has been considered but without any detailed discussion, it has been held that the arbitrator possesses the power since the reference to the arbitrator was made by the Court and all the disputes in the suit stood referred. This Court, therefore, came to the conclusion that on the application of the principle of Section 34 of the Civil Procedure Code, pendente lite interest could be awarded by the arbitrator. But so far as the power to award interest for the period prior to the reference is concerned, only in the case of *Ashok Construction Co.*[7] this Court, no doubt, held that the arbitrator has the power to award interest from the date the amount is due under the contract, on the ground that the arbitration agreement did not exclude the jurisdiction of the arbitrator but the earlier decision of the Court either in *Thawardas*[9] or in *Bengal Nagpur Rly.*[17], deciding to the contrary, had not been noticed and in fact the question had been disposed of in one sentence in para 6. While this was the position, for the first time, this Court made an in-depth examination of the question in *Jena case*[2]. Three learned Judges considered the competence of the arbitrator on reference made without intervention of the Court and came to the

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conclusion that in cases, which arose prior to the commencement of the Interest Act, 1978, the arbitrator did not have the power to grant interest either pendente lite or for the period prior to the reference. In this case, though several English cases have been cited, including the case of *Chandris*[21], but the Court refrained from referring, in view of the abundance of authoritative pronouncements of the Supreme Court. Since the Interest Act of 1839 did not confer power on the arbitrator to award interest, the Court looked elsewhere for that power of the arbitrator to award interest up to the institution of the proceeding but could not find any such power, and, therefore, ultimately came to the conclusion that the arbitrator did not possess any power to award interest for the pre-reference period. So far as the power of the arbitrator to grant interest pendente lite is concerned, the Court held that Section 34 of the Civil Procedure Code could be made applicable to arbitrations in suit and, therefore, when a dispute is referred to the arbitrator in suit, the arbitrator will have the power of the court in deciding the dispute, but not otherwise. In other words, in case of an arbitration proceeding, where a reference is made to the arbitrator, not by the court in a pending suit, but otherwise, in accordance with the arbitration clause in agreement, then the arbitrator also did not possess the power to award pendente lite interest as the arbitrator cannot be held to be a court. It is necessary to bear in mind, it was held in no uncertain terms that there is no substantive law which can be said to have conferred power on the arbitrator to award interest, before the commencement of the proceedings, that is for the pre-reference period. This decision of the three-Judge Bench, operated the field till the Constitution Bench decision in *G.C. Roy case*[11]. The Constitution Bench overruled the conclusion in *Jena case*[2] so far as it related to the power of the arbitrator pendente lite, is concerned. Even in *G.C. Roy case*[11] the Constitution Bench itself held that the earlier decisions of the Court in *Rallia Ram*[18], *Bengal Nagpur Rly.*[17] and *Thawardas*[9], what was held in relation to the power of the arbitrator to award interest for the pre-reference period is because of the fact, as a matter of substantive law, no such power was available and as such, the ratio in that case cannot have any relevance on the question of the arbitrator's power to award interest pendente lite. The Constitution Bench did record a finding that *interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference*. The Constitution Bench also very carefully expressed (SCC p. 533, para 43) — "Until *Jena case*[2] almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite." Even when the earlier constitutional Bench decision in the case of *Union of India* v. *West Punjab Factories Ltd.*[20] approving *Thawardas*[9], *Bengal Nagpur Rly. Co.*[17] and *Rallia Ram*[18] was brought to the notice of the Court, it was observed that not only the said case was not a case under the Arbitration Act but also it approved *Thawardas*[9] only so far as the power to grant interest prior to the institution of the suit and not so far as the power to award interest pendente lite is concerned. If the Constitution Bench in the case of *Union of India* v. *West Punjab Factories Ltd.*[20] approved *Thawardas*[9], *Bengal Nagpur Rly.*[17] and *Rallia Ram*[18] and held that even in a suit, interest prior to the institution of the suit cannot be granted, following

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the principles in *Thawardas*[9] and two others, which decided the power of the arbitrator in relation to the grant of interest for the pre-reference period, it is unimaginable on my part to think that an arbitrator does possess the power on the ground that otherwise it would lead to multiplicity of proceedings. It would be appropriate for me to indicate that in *G.C. Roy*[11] the ratio of *Thawardas*[9], *Bengal Nagpur Rly.*[17] and *Rallia Ram*[18] had not been doubted even, and possibly could not have been doubted in view of its acceptance by the earlier Constitution Bench decision in *Union of India* v. *West Punjab Factories Ltd.*[20] so far as the power of award of interest for the pre-reference period is concerned. Even subsequent to *Roy case*[11], there have been decisions of three-Judge Bench and two-Judge Bench, which have been noticed by Mohapatra, J. in his judgment, including the judgment of Justice Jeevan Reddy, who was a party to the Constitution Bench in *G.C. Roy*[11], reiterating the principle that an arbitrator does not possess the power to award interest for a pre-reference period. [See *Jugal Kishore*[12], *B.N. Agarwala*[13] (in this case both the learned Judges, Justice Jeevan Reddy and Justice G.N. Ray were party to the Constitution Bench decision in *G.C. Roy case*[11]) and *B.N. Agarwalla*[14].] The arbitration proceeding has been a racket in this country and in construing the law in relation to the powers of the arbitrator, the courts must construe the provisions of the law rather strictly. Courts would not be justified in construing the provisions and providing for something which is not there in the Act and it is in this context, I express my utter inability to construe the provisions of the Interest Act, 1839 and interpret the same to have a meaningful and purposeful object. To hold that an arbitrator possesses the power to award interest even for the pre-reference period, would tantamount to legislation in that respect and would be contrary to the well-reasoned and well-discussed decisions of this Court, starting from *Thawardas*[9] as well as the decision of the Privy Council in *Bengal Nagpur Rly.*[17], which decisions though noticed in *G.C. Roy case*[11], but have the approval of the Constitution Bench in *West Punjab Factories case*[20]. Though the case was not on arbitration but was of a five-Judge Bench decision and possibly, it would not be proper for this Bench to take a view contrary to the same. The fact that the arbitrator has the power to deal with and decide disputes which cropped up at a point of time, would certainly not clothe the arbitrator with any power, which neither any law confers upon him nor is there any usage of trade having the force of law nor is there any agreement between the parties conferring that power. It is difficult for me to conceive that such power could be conferred upon an arbitrator for the pre-reference period on the supposition that he must be presumed to have the power to grant interest as an accessory or incidental to the sum awarded as due and payable. It is not the question of absence of any specific stipulation in the contract but the correct criteria should be whether there is a positive provision in the contract, conferring the power to the arbitrator to award interest for the pre-reference period. I need not discuss any further in view of my concurrence with Brother Mohapatra, J. So, the appeals must be allowed.

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v. *State of J&K*[9] (SCC para 42) and *Board of Control for Cricket in India* v. *Netaji Cricket Club*[10] (SCC para 102).

25. Furthermore, this Court, with a view to do complete justice to the parties, would be entitled to pass any appropriate order in terms of Article 142 of the Constitution by referring to exercise its jurisdiction in a given case in equity or by implementing the doctrine of social justice.

26. For the reasons aforementioned, these appeals are dismissed with the aforementioned observations. There shall, however, be no order as to costs.

(2005) 6 Supreme Court Cases 462

(BEFORE RUMA PAL AND C.K. THAKKER, JJ.)

Civil Appeals Nos. 2412-13 of 2005†

BHAGAWATI OXYGEN LTD. .. Appellant;

Versus

HINDUSTAN COPPER LTD. .. Respondent.

With

Civil Appeal No. 2414 of 2005‡

HINDUSTAN COPPER LTD. .. Appellant;

Versus

BHAGAWATI OXYGEN LTD. .. Respondent.

Civil Appeals Nos. 2412-13 of 2005 with No. 2414 of 2005, decided on April 5, 2005

A. **Contract Act, 1872 — S. 63 — Waiver or abandonment of contractual rights — Inference of — Contract for supply of oxygen of particular purity and establishment of storage facilities for 50,000 litres of liquid oxygen — Appellant promisee (HCL) neither insisting on all aspects of contract being performed (establishment of VIST for storage of liquid oxygen) nor objecting thereto, and continuing to accept substandard oxygen or short-supply thereof without avoiding contract on ground of breach of agreement — Moreover, HCL neither suffering greater costs, nor a drop in production due to (short) supply of substandard oxygen by BOL, the respondent supplier — HCL, however withholding payment for gas supplied on ground of its being substandard — Arbitrator making award in favour of BOL allowing all its claims, including all unpaid dues for oxygen that had been supplied — Single Judge and Division Bench of High Court upholding BOL's claim for payment of dues etc. — Held, no case made out for interference**

9 (2004) 6 SCC 786

10 (2005) 4 SCC 741

† Arising out of SLPs (C) Nos. 16203 and 16204 of 2003. From the Judgment and Order dated 3-7-2003 of the Calcutta High Court in APOTs Nos. 721 and 736 of 2002

‡ Arising out of SLP (C) No. 20732 of 2003

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Declining to interfere, the Supreme Court

Held :

As per the contract, BOL had undertaken to provide a VIST for storage of liquid oxygen of 50,000 litres. However, the VIST was not established by BOL and there was no provision for storage of liquid oxygen. The arbitrator observed that HCL neither insisted on establishment of the VIST nor objected to its non-establishment. Regarding purity of oxygen, the arbitrator observed that HCL never complained regarding the fall of purity of oxygen during the relevant period. Referring to the letters written by HCL to BOL, the arbitrator observed that HCL continued to accept oxygen gas supplied by BOL without avoiding the contract on the ground that there was breach of agreement by BOL in respect of the quality of oxygen. The arbitrator observed that there was neither excess consumption of furnace oil nor drop in production by HCL. Following *Associated Hotels*, (1968) 2 SCR 548, and *Harsh Wardhan*, (1988) 1 SCC 454 the arbitrator held that even if it was the case of HCL that there was non-compliance with certain terms and conditions by BOL, there was waiver and abandonment of the rights conferred on HCL and it was not open to HCL to refuse to make payment to BOL. Since no such payment was made, BOL was right in making grievance regarding non-payment of the amount and accordingly an award was made in favour of BOL. The Single Judge as well as the Division Bench of the High Court upheld the award. In view of the finding recorded by the arbitrator and non-interference by the High Court no case has been made out by HCL as regards the claim allowed by the arbitrator in favour of BOL to the extent of ordering payment for supply of oxygen gas to HCL. Hence, the appeal filed by HCL deserves to be dismissed. (Paras 21 and 22)

Associated Hotels of India Ltd. v. *S.B. Sardar Ranjit Singh*, (1968) 2 SCR 548 : AIR 1968 SC 933; *Brijendra Nath Bhargava* v. *Harsh Wardhan*, (1988) 1 SCC 454, *impliedly followed*

B. **Arbitration Act, 1940 — S. 30 — Grounds for setting aside award — Nature and scope of jurisdiction under — Discussed — Held, court while exercising power under S. 30 cannot reappreciate evidence or examine correctness of conclusions arrived at by arbitrator — Contract for supply of oxygen — Clause 10.4 in contract [set out in para 4 herein] providing for reimbursement of costs incurred by buyer (HCL) in purchasing oxygen from other sources in case of supply of substandard oxygen or short-supply thereof by supplier (BOL) — HCL making some complaints about quantity and quality of oxygen supplied in certain letters, and expressing intention therein as to invocation of said cl. 10.4 — Later, HCL making a counterclaim for reimbursement under cl. 10.4 in arbitration proceedings — Arbitrator on consideration of said letters and other materials on record, concluding that cl. 10.4 had in fact not been invoked, and disallowing said claim — Single Judge of High Court on virtual reappreciation of evidence, holding that arbitrator had not considered said letters of complaint and thereby committed a misconduct, and allowing HCL's counterclaim — Propriety of — Held, inference to be drawn from said letters was in realm of appreciation of evidence — If in light thereof, arbitrator did not think it fit to allow HCL's counterclaim, it could not be said to be a case of misconduct covered by S. 30 — Hence Single Judge and Division Bench were not justified in interfering with the award**

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An arbitrator is a judge appointed by the parties and as such the award passed by him is not to be lightly interfered with. The court while exercising the power under Section 30, cannot reappreciate the evidence or examine correctness of the conclusions arrived at by the arbitrator. The jurisdiction is not appellate in nature and an award passed by an arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is equally possible. It is only when the court is satisfied that the arbitrator had misconducted himself or the proceedings or the award had been improperly procured or is "otherwise" invalid that the court may set aside such award. (Paras 31 and 25)

Union of India v. *A.L. Rallia Ram*, (1964) 3 SCR 164 : AIR 1963 SC 1685; *U.P. Hotels* v. *U.P. SEB*, (1989) 1 SCC 359; *Rajasthan State Mines & Minerals Ltd.* v. *Eastern Engg. Enterprises*, (1999) 9 SCC 283; *U.P. SEB* v. *Searsole Chemicals Ltd.*, (2001) 3 SCC 397; *Indu Engg. & Textiles Ltd.* v. *Delhi Development Authority*, (2001) 5 SCC 691; *Bharat Coking Coal Ltd.* v. *Annapurna Construction*, (2003) 8 SCC 154, *followed*

Hodgkinson v. *Fernie*, (1857) 140 ER 712 : 3 CBNS 189, *approved*

Halsbury's Laws of England, 4th Edn., Vol. 2, para 624, *referred to*

In the instant case, the arbitrator has considered the relevant evidence on record. He has observed that oxygen was supplied by BOL which was accepted by HCL. Certain letters were, no doubt, written by HCL to BOL complaining about the quantity and quality of oxygen gas. The arbitrator also observed that the evidence disclosed that verbal complaints were made regarding purity of gas. He, however, recorded a finding that clause 10.4 [set out in para 4 herein] which allowed HCL to purchase oxygen from other sources at the cost and consequence of BOL, was never invoked. The said clause which was "risk purchase" from elsewhere was not resorted to by HCL and hence it was not entitled to put forward the counterclaim in respect thereof. (Para 33)

The Single Judge virtually reappreciated the evidence by referring to several letters and observed that the arbitrator had not considered those letters and there was misconduct on his part. However, BOL is justified in submitting that really it was in the realm of appreciation and reappreciation of evidence. At the most all those letters go to show that HCL had some complaint against BOL and it had also disclosed its intention to purchase oxygen gas from other sources but as observed by the arbitrator, it was not proved that HCL had in fact purchased oxygen from other sources under clause 10.4. If in the light of such evidence, the arbitrator did not think it fit to allow counterclaim, it could not be said to be a case of misconduct covered by Section 30 of the Act. The Single Judge as also the Division Bench were, therefore, not justified in setting aside the award passed by the arbitrator dismissing the counterclaim. (Paras 34 and 35)

C. **Arbitration Act, 1940 — Ss. 13 and 29 — Interest — Power of arbitrator to award — Scope — Held, arbitrator has power to grant interest for all three stages, pre-reference, pendente lite and post-award, provided rate of interest is reasonable, and agreement does not provide for grant of interest nor prohibit such grant — Award of 18 per cent interest for all three stages — Sustainability — Factors to be considered — Rate at which earlier loan advanced by party against whom interest awarded, to other party, held, a germane and relevant factor — Interest Act, 1978 — Ss. 3 and 4 — Civil Procedure Code, 1908 — S. 34**

D. **Civil Procedure Code, 1908 — S. 34 — "Court" — Scope — Held, does not include arbitral tribunal — Hence S. 34 inapplicable to arbitration proceedings**

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Section 34 CPC has no application to arbitration proceedings since the arbitrator cannot be said to be a "court" within the meaning of the Code. But an arbitrator has power and jurisdiction to grant interest for all the three stages pre-reference period, *pendente lite* and post-award period, provided the rate of interest is reasonable and the agreement does not provide for grant of such interest nor does it prohibit such grant that is, where the agreement is silent as to award of interest. (Paras 37, 36 and 39)

Executive Engineer, Dhenkanal Minor Irrigation Division v. *N.C. Budharaj*, (2001) 2 SCC 721; *Secy., Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy*, (1992) 1 SCC 508; *Hindustan Construction Co. Ltd.* v. *State of J&K*, (1992) 4 SCC 217, *followed*

Thawardas Pherumal v. *Union of India*, (1955) 2 SCR 48 : AIR 1955 SC 468; *Executive Engineer (Irrigation)* v. *Abhaduta Jena*, (1988) 1 SCC 418, *cited*

The arbitrator awarded interest to BOL at the universal rate of eighteen per cent for all the three stages. It is not disputed that in the arbitration agreement there is no provision for payment of interest. The Single Judge as well as the Division Bench were right in observing that the arbitrator, in the facts and circumstances, could have awarded interest. It was within the power of the arbitrator to award interest. As far as the rate of interest is concerned, a relevant and germane factor weighed with the arbitrator in awarding eighteen per cent interest, that was the rate at which HCL had given an advance to BOL. In view of the said circumstance even that part of the award passed by the arbitrator did not deserve interference and the Single Judge and the Division Bench were not right in reducing the rate of interest. (Paras 36, 41 and 42)

State of Rajasthan v. *Nav Bharat Construction Co.*, (2002) 1 SCC 659, *distinguished*

D-M/ATZ/31690/C

Advocates who appeared in this case :

P.K. Ghosh, Senior Advocate (A. Datta and Praveen Swarup, Advocates, with him) for the Appellant;

D.A. Roychaudhary, Ms Nandini Mukherjee and Deba Prasad Mukherjee, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

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The Judgment of the Court was delivered by

C.K. THAKKER, J.— Leave granted.

2. All these appeals arise out of common judgment and order passed by the Division Bench of the High Court of Calcutta in APOTs Nos. 721 and 736 of 2002 on 3-7-2003 by which the Division Bench confirmed the order passed by learned Single Judge on 24-7-2002 in AP No. 369 of 2002. That AP was filed by Hindustan Copper Limited against the arbitration award passed by Justice L.M. Ghosh (Retd.) on 25-9-2000, under the Arbitration Act, 1940 (hereinafter referred to as "the Act").

3. To appreciate the controversy raised in the present appeals, relevant facts may be stated in brief. On 10-3-1988, Hindustan Copper Limited ("HCL" for short) invited tender for supply of oxygen for its plant at Ghatsila. The tender contained a condition that successful bidder would set up an oxygen plant in the vicinity of HCL. The tender of Bhagawati Oxygen Limited ("BOL" for short) was accepted and an agreement was entered into between HCL and BOL on 17-3-1990/14-4-1990. It was for a period of seven years from the date of commencement of supply of oxygen. The agreement stated that the supplier i.e. BOL will at its own cost install, operate and maintain an oxygen plant of 25 TPD capacity of pressure vacuum swing absorption type with suitable compressors for supply of high-purity oxygen gas to HCL. It also stated that the purity of oxygen would be 99 per cent. The agreement further stated: "The oxygen plant should have the capacity to supply not less than 1,25,000 mm^3 of gas of 99 per cent purity per week on a sustained basis as and when required by HCL." Clause 2.3 clarified that the minimum acceptable purity of the oxygen gas should be 85 per cent for both flash furnace and converter. Meter readings for invoicing billing purpose were to be taken jointly by authorised representatives of HCL and BOL as and when the plant stopped/started. Provision was also made for periodical checking and calibration of meters. It was the duty of BOL to erect plant and pipeline system. A right to inspection and review was conferred upon HCL. Requirement of gas and supply thereof had been mentioned in clause 2.1. Water supply required for the plant was to be arranged by BOL at its own cost but HCL agreed to supply water for operation of the plant. BOL had undertaken to erect and commission the plant and start supply of gas continuously to HCL within 18 months from the date of receipt of order or letter of intent whichever was earlier and the gas was to be made available to HCL in the requisite quality and quantity as per conditions agreed upon. Provisions had also been made with regard to price of gas and minimum off-take guaranteed. Time was of the essence of the contract and penalty had been provided for in case of breach of contract.

4. Clauses 10.4 and 10.5 are relevant and they read as under:

> "10.4. In case BOL fail to supply oxygen from the captive plant as per the contract terms after commissioning of the plant, it will be the responsibility of BOL to arrange liquid oxygen from other sources at contracted rates and keep HCL requirement feed uninterruptedly failing

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which HCL will have the right to procure the gas from elsewhere and the difference of such procurement cost and the agreed price subject to a limit of 80% of the total requirement as per NIT, will be recovered from BOL forthwith. However, HCL will give adequate chance to BOL to meet HCL's requirements by their own means from other sources at the contract price.

10.5. In case, for any period the quantity of gas supplied goes down below the guaranteed purity or pressure, no payment will be made for that period or quantity unless specifically prior acceptance is obtained from HCL."

5. A security deposit of Rs 20 lakhs (Rupees twenty lakhs only) had been made by BOL to HCL in the form of bank guarantee issued by the Central Bank of India, New Delhi. There was an arbitration clause being clause 12. The said clause reads thus:

"Except where it has been provided otherwise, any dispute or difference arising out of or in connection with the work or any operation covered by the contract and any dispute or difference arising out of or in connection with the agreement entered into between HCL and BOL including any dispute or difference relating to the interpretation of the agreement or any clause thereof, shall be referred to sole arbitration of a person appointed jointly by the Chairmen of HCL and BOL. The provisions of the Arbitration Act, 1940 and the rules thereunder and any amendment thereto from time to time shall apply. The award of the arbitrator shall be final, conclusive and binding to all the parties to the contract. The arbitrator shall be competent to decide whether any matter, dispute or difference referred to him falls within the purview of arbitration as provided for above."

6. In accordance with the terms and conditions of the contract, BOL set up its oxygen-producing plant on 31-7-1992 and commenced supply of oxygen to HCL. It is the case of BOL that it supplied oxygen to HCL from 10-2-1993 to 12-8-1993. According to BOL, however, no payment was made by HCL to BOL on the ground that oxygen supplied by BOL to HCL did not meet the purity standard as agreed between the parties. It was also alleged by BOL that bad water was supplied by HCL as a result of which the plant was damaged and ultimately was shut down on 12-8-1993. On 11-10-1993, a letter was written by HCL to BOL calling upon BOL to supply or to arrange for supply of oxygen to HCL on or before 26-10-1993. But the gas was not supplied by BOL to HCL. On 27-7-1994, an agreement was arrived at between the parties to refer the dispute to the arbitration of Justice L.M. Ghosh, retired Judge of the High Court of Calcutta. On 1-4-1995, arbitration commenced. BOL claimed Rs 1,80,81,402.93p.:

(*i*) Dues on account of unpaid bills;

(*ii*) Cost of repairing and overhauling its plant due to bad water supplied by HCL;

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(*iii*) Loss of revenue due to shutdown of the plant by reason of bad water supplied by HCL; and

(*iv*) Interest.

7. HCL, on the other hand, filed a counterclaim in the arbitration proceedings for Rs 2,66,26,023.14p. *inter alia* claiming:

(*i*) Recovery of excess amount paid to BOL;

(*ii*) Difference of price of oxygen purchased by HCL from other sources (risk purchase);

(*iii*) Extra expenditure due to consumption of excess furnace oil due to low purity of oxygen;

(*iv*) Loss of production by HCL; and

(*v*) Interest.

8. The arbitrator, after holding several meetings, gave an award on 25-9-2000. He held that the claim put forward by BOL was well founded and BOL was thus entitled to an amount of Rs 74,84,521.34p. He also held that HCL was unable to prove its case and counterclaim. The counterclaim, therefore, was liable to be dismissed. Regarding interest, he held that BOL was entitled to claim interest at the rate of eighteen per cent per annum for pre-reference period, *pendente lite* and from the date of award till the date of payment. According to the arbitrator, BOL was also entitled to an amount of Rs 1,50,000 (One lakh and fifty thousand only) on account of costs.

9. The award was challenged by HCL by filing AP No. 369 of 2000 under Sections 30 and 33 of the Act. A prayer was made to set aside the award. It was contended that the arbitrator had misconducted himself and the proceedings. It was also contended that the arbitrator had exceeded his jurisdiction and decided the questions not covered by clause 12 of the arbitration agreement and hence, the award was invalid. It was argued that the arbitrator ought not to have allowed the claim of BOL nor could have dismissed the counterclaim of HCL. Since there was breach of contract by BOL, it was not entitled to any amount. On the other hand, in view of non-compliance with the terms and conditions of the contract and breach of agreement, BOL was liable to pay and HCL was entitled to the amount claimed in the counterclaim. It was also urged that the arbitrator had no jurisdiction and had committed an error of law as well as of jurisdiction in awarding interest at the rate of eighteen per cent for pre-reference, *pendente lite* and post-award period.

10. The learned Single Judge heard the parties and held that so far as the claim of BOL was concerned, the arbitrator was right in allowing the said claim and no interference was called for. Regarding counterclaim, however, the learned Single Judge was of the opinion that clause 10.4 as extracted hereinabove was clear and it provided for "default". The learned Single Judge referred to several letters and communications by HCL to BOL and observed from those documents, that it was proved that objection was raised by HCL as to non-supply of oxygen gas by BOL and BOL was expressly intimated

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that HCL would be constrained to purchase oxygen gas at the cost and consequence of BOL. Since all those letters and communications had not been considered by the arbitrator, the award dismissing the counterclaim of HCL deserved to be interfered with. Accordingly, order dismissing the counterclaim by HCL was set aside by the learned Single Judge and the matter was remitted to the arbitrator to take an appropriate decision in accordance with law on that issue.

11. So far as the payment of interest to BOL on the claim which had been allowed by the arbitrator is concerned, the learned Single Judge was of the view that Section 61 of the Sale of Goods Act, 1930 did not provide rate of interest. Section 34 of the Code of Civil Procedure, 1908 had no application to arbitration proceedings. In absence of any contract between the parties with regard to the rate of interest payable, the learned Single Judge held that it would be appropriate if interest is awarded to BOL at the rate of six per cent *per annum*. For taking that view the learned Single Judge relied upon a decision of this Court in *State of Rajasthan* v. *Nav Bharat Construction Co.*[1] wherein this Court reduced the rate of interest awarded by the arbitrator from eighteen per cent to six per cent *per annum*. The learned Single Judge accordingly partly allowed the appeal and remitted the matter to the arbitrator to decide counterclaim of HCL.

12. Being aggrieved by the order passed by the learned Single Judge, HCL and BOL preferred appeals before a Division Bench of the High Court. The grievance of HCL was that the learned Single Judge ought to have allowed the appeal in its entirety and ought to have dismissed the claim of BOL by allowing counterclaim of HCL. The complaint of BOL, on the other hand, was that the learned Single Judge ought to have dismissed the counterclaim and should not have interfered with the rate of interest granted by the arbitrator in favour of BOL. In short, the learned Single Judge ought to have dismissed the application of HCL.

13. The Division Bench considered the rival contentions of the parties and dismissed both the appeals confirming the order passed by the learned Single Judge. The Division Bench observed that by confirming the claim of BOL, the learned Single Judge did not commit any error of law. Similarly, the learned Single Judge was also right in upholding the argument of HCL that the arbitrator was wrong in dismissing the counterclaim and he had not considered several communications to BOL. The order of the learned Single Judge thus did not call for interference. Regarding rate of interest, the Division Bench was of the view that learned Single Judge was right in observing that Section 61 of the Sale of Goods Act did not provide the rate of interest. It was also true that there was no indication in the contract as to payment of interest. In the opinion of the Division Bench, however, the learned Single Judge was right in reducing the rate of interest keeping in view the provisions of Section 34 of the Code of Civil Procedure and as such that part of the order also did not warrant interference. The Division Bench

1 (2002) 1 SCC 659

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thought it proper to dismiss the appeals and accordingly both the appeals were dismissed.

14. Both the parties i.e. HCL and BOL have approached this Court.

15. We have heard learned counsel for the parties.

16. Learned counsel for BOL submitted that the arbitrator was wholly right in passing the award and in allowing the claim of BOL. It was urged that the learned Single Judge as well as the Division Bench were totally wrong in partly setting aside the award passed by the arbitrator. The counsel contended that the jurisdiction of the court under Section 30 of the Act is extremely limited and an award can be set aside only on one or more grounds specified therein. Since none of the grounds existed, the court could not have interfered with the award nor the award could be set aside. According to the learned counsel, the arbitrator considered the evidence on record — documentary as well as oral — and came to the conclusion that no case was made out by HCL on the basis of which the counterclaim could be allowed and accordingly dismissed it. The learned Single Judge and the Division Bench reappreciated the evidence and set aside that part of the award by remitting the matter to the arbitrator to reconsider and decide afresh the counterclaim of HCL. It was not within the jurisdiction of the learned Single Judge or the Division Bench and the order deserves to be quashed and set aside. Regarding interest, the counsel submitted that the agreement did not contain any clause as to interest. Section 34 of the Code of Civil Procedure was not applicable. Section 61 of the Sale of Goods Act does not provide the rate of interest nor did it apply to the case on hand. If in the light of these facts, the arbitrator awarded interest to BOL at eighteen per cent considering the fact that that was the rate at which HCL had given advance to BOL, such an order could not be termed as unlawful or otherwise objectionable. Neither the learned Single Judge nor was the Division Bench justified in interfering with the rate of interest. It was, therefore, submitted that the appeal filed by HCL deserves to be dismissed and the appeal filed by BOL deserves to be allowed.

17. The learned counsel for HCL, on the other hand, supported the orders passed by the learned Single Judge and the Division Bench so far as they relate to remanding the matter to the arbitrator for deciding afresh the counterclaim of HCL. Regarding payment of interest at the rate of six per cent per annum to BOL, it was submitted that even that part of the order was not warranted and the claim of BOL was liable to be rejected. The arbitrator committed an error of law and misconducted himself as well as proceedings in allowing such claim. According to the learned counsel, there was breach of contract on the part of BOL, oxygen was not supplied as per the agreement entered into between the parties; purity of oxygen was not maintained; other terms and conditions were also not fulfilled by BOL and as such, BOL was not entitled to any relief. It was, therefore, prayed that the award passed by the arbitrator deserves to be quashed in its entirety by allowing the appeal of HCL.

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18. In the light of rival contentions of the parties, in our opinion, three questions arise for our consideration:

(*1*) Whether on the facts and in the circumstances of the case, the arbitrator was right in allowing the claim of BOL?

(*2*) Whether the arbitrator had misconducted himself in passing the impugned award and by dismissing the counterclaim of HCL and whether the learned Single Judge and the Division Bench of the High Court were right in setting aside that part of the award by directing the arbitrator to reconsider the matter and decide it afresh? and

(*3*) Whether the arbitrator had power to award interest at the rate of eighteen per cent per annum for pre-reference period, *pendente lite* and post-reference i.e. future interest from the date of award till the date of payment and whether the learned Single Judge and the Division Bench were justified in reducing the rate of interest from eighteen per cent to six per cent?

19. Now, so far as the first question is concerned, the arbitrator considered the matter in detail. He observed that after the agreement was entered into between the parties, BOL set up its plant and commenced supply of oxygen to HCL. It was the case of BOL that though oxygen was supplied to HCL, no payment was made by HCL. It was alleged by HCL that oxygen supplied by BOL did not meet the purity standard of 99 per cent nor the minimum standard of 85 per cent but it varied between 45 per cent to 65 per cent. BOL was, therefore, not entitled to payment for the supply. It was also contended that clause 10.5 (referred to earlier by us) specifically provided that in case quantity of gas supplied goes down below the guaranteed purity, no payment would be made. Since the purity of oxygen gas was below 85 per cent, HCL was justified in refusing payment. It was also submitted that as per agreement, BOL was required to establish a 50,000 litres vacuum insulated storage tank (VIST) evaporation-and-distribution system in the plant and was to maintain constant stock of 50,000 litres of liquid oxygen but BOL failed to establish it. There was thus breach of condition by BOL. Keeping that fact in view, payment was not made by HCL and it could not have been held that HCL was wrong in not making payment. BOL, in view of breach of condition could not have asked for payment. The arbitrator, it was therefore submitted, was wrong in allowing the claim of BOL.

20. Now, the arbitrator has considered the contentions of both the parties. He observed that as per the contract, BOL had undertaken to provide a VIST for storage of liquid oxygen of 50,000 litres. It was not disputed that VIST was not established by BOL and there was no provision for storage of liquid oxygen. He, however, observed that HCL neither insisted for establishing VIST nor objected for not establishing it.

21. Regarding purity of oxygen, the arbitrator observed that HCL never complained regarding the fall of purity of oxygen during the relevant period. Referring to the letters written by HCL to BOL, the arbitrator observed that HCL continued to accept oxygen gas supplied by BOL without avoiding the

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contract on the ground that there was breach of agreement by BOL. The arbitrator observed that there was neither excess consumption of furnace oil nor drop in production by HCL. Referring to the decisions of this Court in *Associated Hotels of India Ltd.* v. *S.B. Sardar Ranjit Singh*[2] and *Brijendra Nath Bhargava* v. *Harsh Wardhan*[3] the arbitrator held that even if it was the case of HCL that there was non-compliance with certain terms and conditions by BOL, there was waiver and abandonment of the rights conferred on HCL and it was not open to HCL to refuse to make payment to BOL on that ground. In view of waiver on the part of HCL, it was incumbent on HCL to make payment and since no such payment was made, BOL was right in making grievance regarding non-payment of the amount and accordingly an award was made in favour of BOL. The learned Single Judge as well as the Division Bench of the High Court considered the grievance of HCL so far as the claim of BOL allowed by the arbitrator was concerned and upheld it.

22. In view of the finding recorded by the arbitrator and non-interference by the High Court, we are of the view that no case has been made out by HCL as regards the claim allowed by the arbitrator in favour of BOL to the extent of supply of oxygen gas to HCL. Hence, the appeal filed by HCL deserves to be dismissed.

23. The grievance of the BOL is that the learned Single Judge and the Division Bench were not justified in setting aside the dismissal of counterclaim of HCL by the arbitrator and in remitting the matter to the arbitrator for fresh consideration. It was submitted that the High Court was not hearing an appeal from the order passed by the arbitrator. The jurisdiction of the Court in such matters is limited and an award can be set aside only on certain grounds specified in the Act. Since the case was not covered by any of the clauses of Section 30, the orders passed by the High Court are clearly without jurisdiction.

24. Section 30 of the Act enumerates grounds for setting aside an award passed by the arbitrator. It reads thus:

> "30. *Grounds for setting aside award.*—An award shall not be set aside except on one or more of the following grounds, namely—
>
> (*a*) that an arbitrator or umpire has misconducted himself or the proceedings;
>
> (*b*) that an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under Section 35;
>
> (*c*) that an award has been improperly procured or is otherwise invalid."

25. This Court has considered the provisions of Section 30 of the Act in several cases and has held that the court while exercising the power under Section 30, cannot reappreciate the evidence or examine correctness of the conclusions arrived at by the arbitrator. The jurisdiction is not appellate in

2 (1968) 2 SCR 548 : AIR 1968 SC 933
3 (1988) 1 SCC 454

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nature and an award passed by an arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is equally possible. It is only when the court is satisfied that the arbitrator had misconducted himself or the proceedings or the award had been improperly procured or is "otherwise" invalid that the court may set aside such award.

26. In the leading decision of *Hodgkinson* v. *Fernie*[4], Williams, J. stated: (ER p. 717)

> "The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying, '*You have constituted your own tribunal; you are bound by its decision.*'" (emphasis supplied)

27. In *Union of India* v. *A.L. Rallia Ram*[5] this Court said: (SCR pp. 175-76)

> "An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary courts. The Court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The Court has also power to remit the award when it has left some matters referred undetermined, or when the award is indefinite, where the objection to the legality of the award is apparent on the face of the award. The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or wilful deception. But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. *Wrong or right the decision is binding, if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement.*" (emphasis supplied)

4 (1857) 140 ER 712 : 3 CBNS 189

5 (1964) 3 SCR 164 : AIR 1963 SC 1685

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28. In *U.P. Hotels* v. *U.P. SEB*[6], after referring to *Halsbury's Laws of England*, 4th Edn., Vol. 2, para 624, Mukharji, J. (as his Lordship then was) stated that an award of an arbitrator may be set aside for error of law appearing on the face of it, though that jurisdiction is not to be exercised lightly. If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit it being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

29. In *Rajasthan State Mines & Minerals Ltd.* v. *Eastern Engg. Enterprises*[7] this Court after considering several decisions on the point, held that if an arbitrator has acted arbitrarily, irrationally, capriciously or beyond the terms of the agreement, an award passed by him can be set aside. In such cases, the arbitrator can be said to have acted beyond the jurisdiction conferred on him.

30. In *U.P. SEB* v. *Searsole Chemicals Ltd.*[8] this Court held that where the arbitrator had applied his mind to the pleadings, considered the evidence adduced before him and passed an award, the court could not interfere by reappraising the matter as if it were an appeal.

31. In *Indu Engg. & Textiles Ltd.* v. *Delhi Development Authority*[9] it was observed that an arbitrator is a judge appointed by the parties and as such the award passed by him is not to be lightly interfered with.

32. In *Bharat Coking Coal Ltd.* v. *Annapurna Construction*[10] this Court held that there is distinction between error within jurisdiction and error in excess of jurisdiction. The role of the arbitrator is to arbitrate within the terms of the contract and if he acts in accordance with the terms of the agreement, his decision cannot be set aside. It is only when he travels beyond the contract, that he acts in excess of jurisdiction in which case, the award passed by him becomes vulnerable and can be questioned in an appropriate court.

33. In the instant case, the arbitrator has considered the relevant evidence on record. He has observed that oxygen was supplied by BOL which was accepted by HCL. Certain letters were, no doubt, written by HCL to BOL complaining about the quantity and quality of oxygen gas. The arbitrator also observed that the evidence disclosed that verbal complaints were made

6 (1989) 1 SCC 359
7 (1999) 9 SCC 283
8 (2001) 3 SCC 397
9 (2001) 5 SCC 691
10 (2003) 8 SCC 154

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regarding purity of gas. He, however, recorded a finding that clause 10.4 which allowed HCL to purchase oxygen from other sources at the cost and consequence of BOL was never invoked. The said clause which was "risk purchase" from elsewhere was not resorted to by HCL. The arbitrator noted that in some of the letters, HCL stated that it would have no option but to purchase liquid oxygen at the cost of BOL during non-availability of oxygen from BOL, but ultimately it was by a letter dated 11-10-1993 that HCL informed BOL that if BOL would not supply oxygen by 26-10-1993, it would be constrained to purchase oxygen from other sources. Thus, time was granted up to 26-10-1993 in view of letter dated 11-10-1993. In the light of such letter the arbitrator concluded that HCL could not have purchased oxygen from other sources in August 1993 and hence it was not entitled to put forward counterclaim.

34. The learned Single Judge virtually reappreciated the evidence by referring to several letters and observed that the arbitrator had not considered those letters and there was misconduct on his part. According to the learned Single Judge, HCL informed BOL about the grievance and quantity and quality of oxygen supplied by BOL, about the "risk-purchase agreement" and also about its need, necessity and completion of purchase of oxygen gas from other sources. The learned Single Judge also has referred to some of those letters in which the said fact was referred to by HCL.

35. In our opinion, however, the learned counsel for BOL is justified in submitting that really it was in the realm of appreciation and reappreciation of evidence. At the most all those letters go to show that HCL has some complaint against BOL and it had also disclosed its intention to purchase oxygen gas from other sources but as observed by the arbitrator, it was not proved that HCL had in fact purchased oxygen from other sources under clause 10.4. If in the light of such evidence, the arbitrator did not think it fit to allow counterclaim, it could not be said to be a case of misconduct covered by Section 30 of the Act. The learned Single Judge as also the Division Bench were, therefore, not justified in setting aside the award passed by the arbitrator dismissing the counterclaim and hence the order of the learned Single Judge as confirmed by the Division Bench deserves to be set aside by restoring dismissal of counterclaim of HCL by the arbitrator.

36. The last question relates to payment of interest. The arbitrator awarded interest to BOL at the universal rate of eighteen per cent for all the three stages, pre-reference period, *pendente lite* and post-award period. It is not disputed that in the arbitration agreement there is no provision for payment of interest. The learned Single Judge as well as the Division Bench were right in observing that the arbitrator, in the facts and circumstances, could have awarded interest. The arbitrator had granted interest at the rate of eighteen per cent on the ground of loan so advanced by HCL to BOL at that rate.

37. Now Section 34 of the Code of Civil Procedure has no application to arbitration proceedings since the arbitrator cannot be said to be a "court" within the meaning of the Code. But an arbitrator has power and jurisdiction

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to grant interest for all the three stages provided the rate of interest is reasonable.

38. So far as interest for pre-reference period is concerned, in view of the conflicting decisions of this Court, the matter was referred to a larger Bench in *Executive Engineer, Dhenkanal Minor Irrigation Division* v. *N.C. Budharaj*[11]. The Court, by majority, held that an arbitrator has power to grant interest for pre-reference period provided there is no prohibition in the arbitration agreement excluding his jurisdiction to grant interest. The forum of arbitration is created by the consent of parties and is a substitute for conventional civil court. It is, therefore, of unavoidable necessity that the parties be deemed to have agreed by implication that the arbitrator would have power to award interest in the same way and same manner as a court.

39. Regarding interest *pendente lite* also, there was cleavage of opinion. The question was, therefore, referred to a larger Bench in *Secy., Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy*[12]. The Court considered several cases and laid down the following principles: (SCC pp. 532-33, para 43)

> "*43*. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:
>
> (*i*) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.
>
> (*ii*) An arbitrator is an alternative forum for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.
>
> (*iii*) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of the Arbitration Act

11 (2001) 2 SCC 721
12 (1992) 1 SCC 508

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illustrate this point.) All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(*iv*) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit *and* a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite, *Thawardas*[13] has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until *Jena case*[14] almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(*v*) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred."

40. As to post-award interest, the point is covered by the decision of this Court in *Hindustan Construction Co. Ltd.* v. *State of J&K*[15]. It was held there that an arbitrator is competent to award interest for the period from the date of the award to the date of decree or date of realisation, whichever is earlier.

41. In view of the aforesaid decisions, we hold that it was within the power of the arbitrator to award interest. As to the rate of interest, the contention of HCL is that it ought to have been at the rate of six per cent only. The learned counsel for HCL has strongly relied upon the decision of this Court in *Nav Bharat Construction Co.*[1] In that case, interest was awarded by the arbitrator at the rate of fifteen per cent. The said action was challenged by the State Government as well as the contractor. The contention of the State Government was that the arbitrator could not have awarded interest at the rate of fifteen per cent and it was exorbitant. The contractor, on the other hand, urged that interest ought to have been awarded at the rate of eighteen per cent. This Court held that it would be appropriate if interest at the rate of six per cent is awarded.

42. In our view, however, a relevant and germane factor weighed with the arbitrator in awarding eighteen per cent interest, that at that rate HCL had given advance to BOL. In view of the said circumstance, in our opinion, even that part of the award passed by the arbitrator did not deserve interference and the learned Single Judge and the Division Bench were not right in reducing the rate of interest.

13 *Thawardas Pherumal* v. *Union of India*, (1955) 2 SCR 48 : AIR 1955 SC 468
14 *Executive Engineer (Irrigation)* v. *Abhaduta Jena*, (1988) 1 SCC 418
15 (1992) 4 SCC 217

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43. For the foregoing reasons, the appeals filed by BOL deserve to be allowed and are accordingly allowed by setting aside the order passed by the learned Single Judge and confirmed by the Division Bench and by restoring the award passed by the arbitrator. In view of the order passed in the appeals of BOL, the appeal filed by HCL deserves to be dismissed and is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(2005) 6 Supreme Court Cases 478

(BEFORE RUMA PAL AND DR. AR. LAKSHMANAN, JJ.)

P.T. THOMAS .. Appellant;

Versus

THOMAS JOB .. Respondent.

Civil Appeal No. 4677 of 2005†, decided on August 4, 2005

A. **Legal Aid — Legal Services Authorities Act, 1987 — S. 21 — Nature and binding effect of Lok Adalat award — Held, though a Lok Adalat award is not the result of a contest on merits, it is as equal and on a par with a decree on compromise and will have the same binding effect and be conclusive — It is final and permanent, is equivalent to a decree executable, and is an ending to the litigation among the parties — Civil Procedure Code, 1908, Ss. 89, 11, 96(3) and Or. 23 R. 3 (Paras 25, 26 and 28)**

B. **Civil Procedure Code, 1908 — Or. 23 R. 3, Ss. 11 and 89 — Decree by consent or compromise — Binding effect of — Approach to be taken by court — Held, a judgment by consent is as effective an estoppel between the parties as a judgment whereby court exercises its mind on a contested case — Court's attempt should be to give life and enforceability to compromise award and not to defeat it on technical grounds (Paras 25, 26 and 28)**

Sailendra Narayan Bhanja Deo v. *State of Orissa*, 1956 SCR 72 : AIR 1956 SC 346; *Kinch* v. *Walcott*, 1929 AC 482 : 1929 All ER Rep 720 : 98 LJPC 129 (PC), *relied on*

South American and Mexican Co., ex p Bank of England, In re, (1895) 1 Ch 37 : (1891-94) All ER Rep 680 : 71 LT 594 (CA); *Secy. of State for India in Council* v. *Ateendranath Das*, ILR (1936) 63 Cal 550; *Bhaishanker Nanabhai* v. *Moraji Keshavji & Co.*, ILR (1912) 36 Bom 283 : 12 Bom LR 950; *Raja Kumara Venkata Perumal Raja Bahadur* v. *Thatha Ramasamy Chetty*, ILR (1912) 35 Mad 75 : 21 MLJ 709, *approved*

C. **Legal Aid — Legal Services Authorities Act, 1987 — S. 21(2) — Lok Adalat award — Final nature of — Lok Adalat award being passed with consent of parties, no appeal shall lie therefrom as provided under S. 96(3) CPC — Furthermore, the same cannot be challenged under any of the remedies available under law, including by invoking Art. 226 of the Constitution — Judicial review cannot be invoked in such awards, especially on grounds amounting to a challenge to the factual findings or appraisal of evidence — Civil Procedure Code, 1908 — Ss. 96(3), 114, 115 and 89 — Constitution of India — Art. 226 (Paras 16, 21 to 23)**

Punjab National Bank v. *Laxmichand Rai*, AIR 2000 MP 301; *Board of Trustees of the Port of Visakhapatnam* v. *Presiding Officer, Permanent, Lok Adalat-cum-Secy., District Legal Services Authority*, (2000) 5 An LT 577, *approved*

† Arising out of SLP (C) No. 20179 of 2003. From the Judgment and Order dated 27-8-2003 of the Kerala High Court in CRP No. 1136 of 2003(A)

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OMP (ENF.) (COMM.) 71/2017

Sunagro Seed Pvt. Ltd. v. National Seeds Corporation Ltd.

2018 SCC OnLine Del 13053

In the High Court of Delhi at New Delhi
(BEFORE RAJIV SHAKDHER, J.)

Sunagro Seed Pvt. Ltd. ..... Decree Holder;
Mr. Jasbir Bidhuri, Adv

v.

National Seeds Corporation Ltd. ..... Judgment Debtor.
Mr. Chirag Joshi with Mr. G. Joshi, Advs.

OMP (ENF.) (COMM.) 71/2017 & I.A. No. 12890/2017
Decided on December 3, 2018

The Judgment of the Court was delivered by

RAJIV SHAKDHER, J. (Oral)

Backdrop:

1. This is a petition seeking, in effect, the execution of the award dated 16.2.2015, as modified by judgment dated 1.2.2016 passed by the Division Bench.

1.1 Interestingly, the learned Arbitrator while passing the award dated 16.2.2015 had granted certain amounts both in favour of the Decree Holder and the Judgment Debtor.

1.2 The amount awarded in favour of the Judgment Debtor was a sum of Rs. 1,38,58,650/-

1.3 Insofar as the Decree Holder was concerned, the amount awarded in its favour was a sum of Rs. 23,90,898/-.

1.4 Therefore, the net amount which was payable as per the award then obtaining by the present Decree Holder to the Judgment Debtor was a sum of Rs. 1,14,67,752/-.

2. Since the Decree Holder was aggrieved, a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') was filed. This petition, however, was dismissed by the learned Single Judge vide judgment dated 6.5.2015.

3. The Decree Holder, consequently, carried the matter in appeal to the Division Bench.

3.1 The Division Bench vide judgment dated 1.2.2016 modified the award dated 16.2.2015.

3.2 The impact of the modification was that the amount awarded in favour of the Judgment Debtor which was, as indicated above, a sum of Rs. 1,38,58,650/- was scaled down to Rs. 6,12,900/-.

4. Insofar as the amount awarded in favour of the Decree Holder by the learned Arbitrator was concerned, which was a sum of Rs. 23,90,898/-, the same was sustained. Consequently, a role reversal happened.

5. The present Judgment Debtor was required to pay a net sum of Rs. 17,77,998/- to the Decree Holder.

6. I may also indicate that the Judgment Debtor carried the matter to the Supreme Court. The Special Leave Petition filed was dismissed in limine on 16.1.2017.

7. Continuing with the narrative, it would be relevant to note that the Judgment Debtor has paid a sum of Rs. 17,77,998/- to the Decree Holder.

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7.1 Furthermore, the Judgment Debtor has also paid interest at the Prime Lending Rate (PLR) plus 2% to the Decree Holder for the period commencing from 1.2.2016 till 31.5.2018. The amount paid towards interest is a sum of Rs. 3,59,440/-. This amount, I am told, was paid on 6.6.2018.

8. It appears that after the 34 petition was dismissed, the Judgment Debtor filed an Execution Petition bearing no. 376/2015.

8.1 This execution petition was dismissed as withdrawn after the Division Bench had delivered its judgment on 1.2.2016.

8.2 According to learned counsel for the parties, the two issues which this Court is required to decide in the captioned petition are:

(i) What would be the date from which interest will be payable by the Judgment Debtor?

(ii) What would be the rate at which interest would be payable by the Judgment Debtor?

Submissions of Counsel:

8.3 Incidentally, this Court in its order dated 6.8.2018, more or less captured these very issues for consideration.

9. Mr. Joshi, who, appears for the Judgment Debtor says that insofar as the first issue is concerned, interest would be payable by the Judgment Debtor from the date when the Division Bench passed its judgment i.e., 1.2.2016.

10. In support of this contention, Mr. Joshi relies upon the constitution bench judgment rendered in the matter of: *Gurpreet Singh* v. *Union of India*, (2006) 8 SCC 457.

11. Reliance is also placed by Mr. Joshi on another judgment of the Supreme Court titled: *Kunhayammed* v. *State of Kerala*, (2000) 6 SC 359.

12. As regards the second issue, that is, the rate at which interest is payable, Mr. Joshi says that since the matter was in play in Court on 23.10.2015, when the 1996 Act was amended, interest in terms of amended Section 31(7)(b)[1] would be payable.

13. In other words, the argument is that interest was payable at the rate of PLR plus 2%; PLR being the current rate of interest. As noted hereinabove, interest at this rate has already been paid by the judgment debtor.

14. In support of his contention that the amended provision would apply, Mr. Joshi seeks to place reliance on the judgment of the Supreme Court in *BCCI* v. *Kochi Cricket (P) Ltd.*, (2018) 6 SCC 287.

15. On the other hand, Mr. Jasbir Bidhuri, who, appears on behalf of the Decree Holder contends that since the Division Bench modified, *albeit*, by a reasoned judgment the award dated 16.2.2015, the same merged in the judgment of the Division Bench and, therefore, interest would be payable from the date of the award and not from the date of the judgment passed by the Division Bench.

16. As regards the other issue, that is, the rate at which interest is payable, learned counsel for the Decree Holder says that since the award is silent, interest will have to be paid at the rate of 18 per cent. In other words, what would be applicable will be the unamended provision of Section 31(7)(b) of the 1996 Act.

17. I have heard the learned counsel for the parties and perused the record.

Reasons:

18. In my view, insofar as the first issue is concerned, the counsel for the Decree Holder is right. The record shows that after the award was passed on 16.2.2015, a challenge was laid by the Decree Holder by way of a Section 34 petition which was rejected by a Single Judge of this Court on 6.5.2015.

18.1 The grievance of the Decree Holder, however, was, in a sense, addressed when

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the Division Bench modified the award by way of a reasoned judgment on 1.2.2016.

18.2 Therefore, in effect, what the Division Bench did was to correct the award on the date when it was passed. The decision of the Division Bench will, thus, to my mind, relate back to the date of the award as if the award always had to be framed in the manner in which the Division Bench passed the judgment.

18.3 This view is based on the doctrine of merger which the Supreme Court has applied in several judgments including in *Kunhayammed's case*.

18.4 *Kunhayammed's case* was followed by a judgement of a Division Bench of the Supreme Court in the matter of: *Chandi Prasad* v. *Jagdish Prasad*, (2004) 8 SCC 724.

18.5 Therefore, on the aspect of the doctrine of merger, it would be appropriate, in my view, to advert to the following observations of the Supreme Court in *Chandi Prasad's case* which notices, as indicated above, the earlier view taken in *Kunhayammed's case*:

> *"...21. It is axiomatic true that when a judgment is pronounced by a High Court in exercise of its appellate power upon entertaining the appeal and a full hearing in the presence of both parties, the same would replace the judgment of the lower court and only the judgment of the High Court would be treated as final. (See* U.J.S. Chopra *v.* State of Bombay *[AIR 1955 SC 633 : (1955) 2 SCR 94 : 1955 Cri LJ 1410]*
>
> *22. When an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intent and purport, the suit continues.*
>
> *23. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time.*
>
> *24. It is trite that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See* V.M. Salgaocar and Bros. (P) Ltd. *v.* CIT *[(2000) 5 SCC 373 : AIR 2000 SC 1623].*
>
> *25. The concept of doctrine of merger and the right of review came up for consideration recently before this Court in* Kunhayammed *v.* State of Kerala *[(2000) 6 SCC 359] wherein this Court inter alia held that when a special leave petition is disposed of by a speaking order, the doctrine of merger shall apply stating: (SCC p. 383, paras 41-43)*
>
> > *"41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the*

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same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42. 'To merge' means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-68.)

43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage."

26. In Kunhayammed [(2000) 6 SCC 359] it was observed: (SCC p. 370, para 12)

"12. ... Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

27. The said decision has been followed by this Court in a large number of decisions including Union of India *v.* West Coast Paper Mills Ltd. *[(2004) 2 SCC 747]..."*

(emphasis is mine)

19. Thus, while the aforementioned judgements of the Supreme Court referred to in paragraphs 18.3 to 18.5 on merger apply on all fours, the judgment rendered by the Supreme Court in the case of *Gurpreet Singh*, in my opinion, would have no application, as it relates to the execution of an award-decree under the Land Acquisition Act, 1894 (as amended by Act 68 of 1984) and not under Section 36 of the 1996 Act.

19.1 Given the aforesaid position, I have no hesitation in saying that the interest will be payable to the Decree Holder from the date of the award and not from the date of the judgment of the Supreme Court.

19.2 Accordingly, issue no. (i) is decided against the Judgment Debtor.

20. Insofar as the second issue is concerned, which is as to what ought to be the rate of interest, in my view, the counsel for the Judgment Debtor is right in the stand taken by him.

20.1 The reason I have come to this conclusion is that Section 26[2] of the Arbitration and Conciliation (Amendment) Act, 2015 (in short "Amendment Act") is bifurcated in two parts. The first part pertains to arbitral proceedings whose commencement is linked to the provisions of Section 21 of the 1996 Act. Section 21 of the 1996 Act provides that unless otherwise agreed to by the parties, the arbitral proceedings in respect of a particular dispute would commence on the date on which a request made in that behalf is received by the opposite party i.e. the respondent. This, of course, is subject to a caveat, which is that, the parties have the autonomy to agree otherwise. In other words, parties could agree that notwithstanding the request for

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referring the dispute to arbitration in terms of Section 21 of the 1996 Act being served prior to the commencement of the Amendment Act, the Amendment Act would apply to the arbitration proceedings.

20.2 The second part of Section 26 of the Amendment Act relates to arbitral proceedings, which are conducted in Court. The clue qua the same is available in the expression "in relation to" used in the second part of Section 26 of the Amendment Act. Therefore insofar as conduct of arbitration proceedings in Court is concerned the Amendment Act would apply. [See *Board of Control for Cricket in India* v. *Kochi Cricket Private Limited*, (2018) 6 SCC 287 at Pg.313, Para 37 to 39.]

"...37. What will be noticed, so far as the first part is concerned, which states—

"26. Act not to apply to pending arbitral proceedings.— Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree...."

is that: (1) "the arbitral proceedings" and their commencement is mentioned in the context of Section 21 of the principal Act;

(2) the expression used is "to" and not "in relation to"; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, "... but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act" makes it clear that the expression "in relation to" is used; and the expression "the" arbitral proceedings and "in accordance with the provisions of Section 21 of the principal Act" is conspicuous by its absence.

38. That the expression "the arbitral proceedings" refers to proceedings before an Arbitral Tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:

"Conduct of arbitral proceedings"

The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an Arbitral Tribunal. What is also important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to" making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no others, that form the subject-matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may "otherwise agree" and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force. [Section 29-A of the Amendment Act provides for time-limits within which an arbitral award is to be made. In Hitendra Vishnu Thakur *v.* State of Maharashtra, *(1994) 4 SCC 602 : 1994 SCC (Cri) 1087, this Court stated: (SCC p. 633, para 26) "26. ... (iii) Every litigant has a vested right in substantive law but no such right exists in procedural law. (iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished. (footnote 17 contd.)(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication." It is, inter alia, because timelines for the making of an arbitral award have been laid down for the first time in Section 29-A of the Amendment Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act.*

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This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into force.] In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable "in relation to" arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an Arbitral Tribunal, the second part refers to court proceedings "in relation to" arbitral proceedings, and it is the commencement of these court proceedings that is referred to in the second part of Section 26, as the words "in relation to the arbitral proceedings" in the second part are not controlled by the application of Section 21 of the 1996 Act.

39. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings — arbitral proceedings themselves, and court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force…"

(emphasis is mine)

20.3 If this construction is to be placed on Section 26 of the Amendment Act, which as indicated above, has received the imprimatur of the Supreme Court in *Board of Control for Cricket in India (BCCI)*, then, in my view, the amended Section 31(7)(b) of the 1996 Act would be applicable in this case. Pertinently both amended and unamended provisions of Section 31(7)(b) are *pari materia* to a large extent save an except with regard to the rate of interest. Section 31(7)(b) both before and after the amendment enables grant of interest (for the post award period) on the sum directed to be paid by an arbitral award, where the award is either silent or directs payment of interest at the rate different from that, which is provided in the provision itself.

20.4 It would be relevant to note at this stage the issue which often arises in such situations, that is, whether or not grant of interest for the post award period is a matter concerning substantive law or procedural law. This aspect has now been settled in a series of judgments, including the judgment of the Supreme Court in *MSK Projects (I) (JV) Ltd.* v. *State of Rajasthan*, (2011) 10 SCC 573. In fact, this was a case in which the District Court while exercising power under Section 34 of the 1996 Act, reduced the rate of interest from 18% to 10%. The argument advanced in the Supreme Court was that this was contrary to the provisions of (unamended) Section 31(7)(b) of the 1996 Act. The Supreme Court, though, not only held that grant of interest for the post award period was a matter of procedure but also ruled after taking into account the provisions of Section 3 of the Interest Act, 1978 that there was an implied power vested in the Court to vary the rate of interest. The relevant observation made in this behalf are extracted hereafter:

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"...24. Furthermore, it is a settled legal proposition that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure.

25. So far as the rate of interest is concerned, it may be necessary to refer to the provisions of Section 3 of the Interest Act, 1978, the relevant part of which reads as under:

"3. Power of court to allow interest.—(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest...."

(emphasis added)

Thus, it is evident that the aforesaid provisions empower the court to award interest at the rate prevailing in the banking transactions. Thus, impliedly, the court has a power to vary the rate of interest agreed by the parties..."

(emphasis is mine)

20.5 Furthermore, the Supreme Court cited with approval the following observations in the matter of *Krishna Bhagya Jala Nigam Ltd.* v. *G. Harischandra Reddy*, (2007) 2 SCC 720:

"11. ... after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%..."

20.6 Therefore, as held in *BCCI case*, procedural laws are always to be held to operate retrospectively, as no party has any vested right in procedure. (See pargraph 64-65 at page.329-330).

20.7 In this case, as noted above, while narrating the facts, the parties were agreed (and desired a ruling in that regard) that while interest had to be granted, since the award was silent on the aspect of post award interest, what was required to be determined by the executing court was the period and the rate at which interest had to be awarded. In this case, complexity arose on account of the fact that amendment to the 1996 Act was brought into force, while the matter was still in play before the Division Bench.

20.8 Therefore, the next question which crops up for consideration is whether the executing Court can vary the rate of interest based on equitable principles by taking into account the change in law.

20.9 That the executing court, in certain circumstances, can consider both change in law[3] and give relief by applying equitable principles[4] as embodied in existing statutes is backed by good authority.

20.10 Given the fact that Section 31(7)(b) of the Act relates to arbitration proceedings conducted in Court by virtue of Section 26 of the Amendment Act, it is the amended version which would apply. As per the amended version of Section 31(7)(b), the sum directed to be paid under the arbitral award is to carry interest at the rate which is 2% higher than the current rate of interest prevalent on the date of award. The explanation to this Section defines the expression "current rate of interest" as one which has the same meaning as assigned to it under Clause (b) of Section 2 the Interest Act, 1978. It has not been disputed before me that PLR does not

represent the current rate of interest.

20.11 Furthermore, another aspect of the matter which is required to be noticed is that when the Amendment Act kicked in, the matter was still pending adjudication before the Division Bench. The Amendment Act was brought into force on 23.10.2015, while the judgment of the Division Bench was rendered on 1.2.2016. The Amendment Act thus, even otherwise, can be read retrospectively as it aims to bring interest rates payable on awards, for the post award period, in public interest, in line with the current rate of interest. The rule against restrospectivity will not apply in this case.

21. The contrary submission made by the learned counsel for the Decree Holder that the award was silent on the aspect of Post award interest and, therefore, the unamended provision of Section 31(7)(b) should apply and, therefore, the interest should be paid at the rate of 18 per cent per annum, in my opinion, is untenable in the facts and circumstances of this case.

22. The facts obtaining in this case show that the judgment debtor voluntarily paid interest to the decree holder on the sum awarded at PLR plus 2%. The interest was, however, paid by the judgment debtor not from the date of the award, but from the date of the judgment of the Division Bench i.e. 1.2.2016.

23. If, as indicated above, the amended version of Section 31(7)(b) is to apply, then, interest had to be paid from the date of award i.e. 16.2.2015.

24. Consequently, the Judgment Debtor will pay a further interest at PLR plus 2% for the period commencing from the date of the award i.e., 16.2.2015 till the date of the Division Bench judgment i.e. 1.2.2016.

24.1 The needful will be done within two weeks from today.

25. The execution petition is disposed of.

26. Interest will be paid on or before 20.12.2018.

27. List the matter for compliance on 20.12.2018.

———

[1] 31. Form and contents of arbitral award.— (7)(a) Unless otherwise agreed by the parties, where and in so far 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.

[1] [(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two percent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment. Explanation.—The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]

[2] 26. Act not to apply to pending arbitral proceedings.- Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

[3] *Sri. Vidya Sagar* v. *Smt. Sudesh Kumari*, (1976) 1 SCC 115

[4] *Mohi-uddin* v. *Kashmiro Bibi*, AIR 1933 All 252 (FB); *Allavarapu Subbayya* v. *Jakka Peddayya*, AIR 1973 Mad 234

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THE SUPREME COURT CASES

(2009) 12 SCC

(2009) 12 Supreme Court Cases 1

(BEFORE R.V. RAVEENDRAN AND L.S. PANTA, JJ.)

STATE OF RAJASTHAN AND ANOTHER .. Appellants;

Versus

FERRO CONCRETE CONSTRUCTION PRIVATE LIMITED .. Respondent.

Civil Appeals No. 2764 of 2009† with No. 2767 of 2009‡, decided on April 22, 2009

A. **Arbitration Act, 1940 — S. 30 — Award not based on any evidence, if, amounts to legal misconduct — Quantum of evidence required — Arbitrator making award solely on the basis of claim statement considering claim itself as proof — Impermissibility — Held, arbitrator awarding claim equating it as proof without looking for or insisting on proof, held, is legal misconduct and error apparent on face of the award — Arbitration and Conciliation Act, 1996, S. 34**

B. **Contract and Specific Relief — Remedies for breach of contract — Damages — Measure/Quantification of Damages — Compensation for loss of profit — Evidence to be led and facts to be proved, discussed — Contract Act, 1872, S. 73**

Held :

An agreement was entered into between the employer and the contractor for the manufacture, laying, testing and commissioning of water pipeline of a length of about 38 km under a water supply scheme in Ajmer District. The value of the work as per the work order was about Rs 9.9 crores. 10% of the value of work (Rs 99.19 lakhs) agreed to be released as mobilisation advance, was released to the contractor. The contractor created an equitable mortgage over its plant by depositing its title deeds thereto as security for the mobilisation advance and agreed to keep the original title deeds in deposit with the employer till the entire

† Arising out of SLP (C) No. 10818 of 2007. From the Judgment and Order dated 5-2-2007 of the High Court of Rajasthan, Jaipur Bench, Jaipur in SB Civil Misc. Appeal No. 872 of 2003

‡ Arising out of SLP (C) No. 22565 of 2007

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amount of advance was repaid in full with interest. The contractor stopped the work after it had manufactured 15.26 km of pipes and had laid 11.6 km out of them and tested only 1.4 km of pipeline. The employer notified the contractor that if he did not resume the work, the balance of the work would be got executed through an alternative agency in terms of the contract, by treating the contract as having been abandoned, and recover the excess cost from the contractor. As the contractor did not resume the work, the employer initiated steps to get the balance work executed through an alternative agency.

On the matter being referred to arbitration, after considering the claims and counterclaims, the arbitrator inter alia in regard to Claim 37-A, directed the employer to pay Rs 12,072 per day from the date of award. In regard to Counterclaim 3 (Rs 79,87,846 towards refund of mobilisation advance with interest), the arbitrator awarded a sum of Rs 59,42,275 with interest at 18% per annum from 18-9-1990 up to the date or decree and directed that the amount be adjusted from the amounts awarded to the contractor and release title documents of plant and machinery. The arbitrator further directed the employer that in case of failure to release documents, the employer is liable to pay Rs 12,072 per day from the date of award.

The District Judge made the award a rule of court despite objections from the employer with a modification of Claim 37-A directing the employer to return the original title deeds to the contractor and pay the amounts awarded to the contractor after deducting the amount awarded by way of counterclaim (that is Rs 59,42,275 towards refund of mobilisation advance due with 18% interest) within 30 days from the date of decree.

The employer filed an appeal against the said judgment and decree. The contractor also filed an appeal aggrieved by the modification. The High Court dismissed the appeal filed by the employer but allowed the appeal filed by the contractor and restored the direction of the arbitrator that the payment of compensation at Rs 12,072 per day should be from the date of the award itself. The High Court also granted interest at 18% per annum from the date of the award. Feeling aggrieved the employer filed the present appeals by special leave.

Partially allowing the appeals, the Supreme Court

Held :

A sum of Rs 12,072 per day was claimed as damages by the contractor for loss of profits on the basis that the contractor would have manufactured 15 pipes per day of the value of Rs 1,20,000 and that the profit and overhead element out of it would have been 15% or Rs 18,000 per day. By taking the working days as 306 in a year and deducting 20% of labour component, the loss of profit per day was calculated to be Rs 12,072 per day. There is no evidence to show that the contractor was at any point of time manufacturing 15 pipes a day of the value of Rs 8000 each or that he would have made a profit of 15% on the cost thereof. The claim is made on the ground that it is disabled from manufacturing that many number of pipes elsewhere. (Para 52)

There is no evidence that the contractor had other contracts where it was required to manufacture that number of pipes or that it could not manufacture the required pipes for want of plant and machinery. Nor is there any evidence as to the value of the plant and machinery that had been mortgaged to the employer and what would be the cost of an alternative plant with a capacity to manufacture

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15 pipes per day. If the plant and machinery was of the value of say Rs 25 lakhs, or if the contractor could install another similar plant at a cost of Rs 25 lakhs, then the loss at best would be interest on Rs 25 lakhs and not anything more. (Para 53)

In fact even though there is no evidence, while making Claims 36 and 37 the contractor has given value of the plant and machinery as Rs 36,84,161. Even assuming the said figure to be true, at best the blocked up investment was only Rs 36,84,161 and the loss would be around 1% thereon per month by way of interest which would be Rs 36,841 per month. What is more strange is that nowhere in the award the arbitrator considers the validity of the claim of Rs 12,072 per day nor accepts the said claim as valid or correct. In a reasoned award if the claim of a contractor is equated to proof of the claim, then it is obviously a legal misconduct and an error apparent on the face of the award. (Para 54)

While the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. The entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable. (Para 55)

C. **Arbitration Act, 1940 — Ss. 33, 30 and 14 — Wrong conclusion of arbitrator, if ground for setting aside award — Reappreciation of evidence by court — Permissibility — Arbitrator reaching a wrong conclusion or failing to appreciate facts while making award, held, is not ground for setting aside of award — Court while considering challenge to award does not sit in appeal over the findings of arbitrator nor reappreciate evidence — When there is no allegation of moral misconduct against the arbitrator with reference to the award, award can be challenged only on grounds of legal misconduct of arbitrator and on error apparent on face of the award — Arbitration and Conciliation Act, 1996, Ss. 34 and 35**

(Paras 18, 20, 68, 69 and 72)

Champsey Bhara & Co. v. *Jivraj Balloo Spg. & Wvg. Co. Ltd.*, (1922-23) 50 IA 324 : AIR 1923 PC 66; *State of Rajasthan* v. *Puri Construction Co. Ltd.*, (1994) 6 SCC 485, *relied on*

D. **Arbitration Act, 1940 — S. 30 — Award of arbitrator — Legal misconduct — Terms of agreement — Overlooking of, by arbitrator, if constitutes legal misconduct — Bilateral agreement between parties providing for release of mobilisation advance in instalments subject to submission of guarantee bond and certificate of utilisation of previous instalment — Arbitrator awarding claim based on delay in release on part of employer, overlooking bilateral agreement — Held, arbitrator committed legal misconduct — On facts, there was no breach on part of employer and contractor himself was responsible for the delay — Hence question of compensating does not arise — Contract Act, 1872 — S. 73 — Arbitration and Conciliation Act, 1996, S. 34** **(Paras 39 and 40)**

E. **Contract and Specific Relief — Remedies for breach of contract — Damages for anticipatory breach — Pleading and proof necessary — Arbitrator suo motu building up a case for and awarding such damages —**

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Impermissibility — Award for "breach, if made in future" — Tenability — Held, in present case reasoning for directing such payment was strange — Awarding payment was not because of breach by employer but for "breach if made in future" — There was no such claim — Hence the award was beyond reference — Further, award and interest for mortgaged plant and machinery in favour of employer was given till date of award, whereas damages for non-utilisation of the same were awarded to contractor till release of documents — Hence, making of such an award is error apparent on face of the award and legal misconduct of arbitrator or proceedings — Arbitration and Conciliation Act, 1996 — S. 34 — Arbitration Act, 1940, S. 30

F. **Contract and Specific Relief — Remedies/Relief — Arbitration award — Adjustment of claims for ascertained sum against claims for unascertained sum — Tenability — Arbitration Act, 1940 — S. 30 — Arbitration and Conciliation Act, 1996 — S. 34 — Contract Act, 1872, S. 73**

Held :

The award under Claim 37-A i.e. a claim for compensation for loss of production in the factory from 13-1-1992 was made, not on account of any breach committed by the employer, but in respect of *a breach* if *made in future* after the date of the award. There was no such claim and the award was therefore beyond the reference. (Paras 48 and 46)

The reasoning of the arbitrator is very strange and is a classic case of an error apparent on the face of the award and a legal misconduct. The arbitrator rejected Claim 37-A for payment of Rs 12,072 as compensation for loss of production from 13-1-1992 (which was the subject-matter of the claim) on the ground that the plant had been mortgaged in favour of the employer by the contractor and therefore there was no justification for the contractor to claim that it should be permitted to remove and take away the plant when the mortgage subsisted. Having rejected the claim, the arbitrator evolved a strange reasoning that though there was a subsisting valid mortgage in respect of the mobilisation advance with interest in favour of the employer, because he had made an award in favour of the employer for Rs 59,42,275 plus interest, the mortgage came to an end and the employer became liable to return the documents and if it failed to return the documents, the contractor was entitled to damages of Rs 12,072 per day from the date of award. However, evidently, until the amount of Rs 59,42,275 with interest was paid by the contractor to the employer, the mortgage would continue. If the mortgage continued, there was no obligation on the part of the employer to return the documents; and if there was no obligation on the part of the employer to return the documents, the contractor could not complain that the documents were wrongly held by the employer nor could it claim loss of production as a result of the employer wrongly withholding the documents. This to say the least is legal misconduct and an error apparent on the face of the award. (Paras 49, 50, 51 and 41)

Moreover, the mobilisation advance amount was an ascertained sum due to the employer from the contractor, with a specific provision for interest. There was a specific contract for continuation of the mortgage until the said amount was paid. On the other hand the amounts that allegedly became due to the contractor under the award were mostly towards damages and escalation in prices, validity of which were under challenge and there was no provision in the

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contract for payment of interest thereon. At best the arbitrator could have directed return of the documents of title to the contractor and could not have directed payment of damages at the rate of Rs 12,072 per day. (Paras 56 and 57)

[**Ed.**: It is interesting to note that one can make a claim for damages for anticipatory breach: *see Jawahar Lal Wadhwa* v. *Haripada Chakroborty*, (1989) 1 SCC 76; though it would seem that it would be a sine qua non for the award of such of damages that a claim is brought by the promisee and the court or arbitrator cannot suo motu build up a case for and award such damages. *See also* **Avtar Singh: *Contract & Specific Relief*, 10th Edn.**, Eastern Book Company, pp. 448 et seq.; Treitel, G.H: *The Law of Contract*, 10th Edn., pp. 798-99; *Anson's Law of Contract*, 28th Edn. pp. 572-73.]

G. **Contract and Specific Relief — Performance of contract — Modes and order of performance — Binding effect of terms of contract — Breach of contract when made out — Claimant complying with terms of agreement for release of mobilisation advance in instalments but claiming damages for delay in release of mobilisation advance in instalments and not in single instalment — Delay in releasing of mobilisation advance, on facts, if could be fastened on employer and if amounted to a breach — Held, conduct of claimant suggests that terms in bilateral agreement were binding on parties and mobilisation advance was to be released in instalments — Hence, there was no delay or breach on part of employer — Evidence Act, 1872 — S. 115 — Contract Act, 1872, Ss. 50, 51 and 8** (Paras 36 to 38)

H. **Contract and Specific Relief — Variation, Rectification and Novation of Contract — Expressly/by renegotiation, etc. — Instances — Later bilateral agreement specifically incorporating modifications, held, would be binding — Contract Act, 1872, S. 62** (Paras 32 to 34)

I. **Arbitration Act, 1940 — S. 30 — Arbitral award — Awarding a claim which was not pleaded — Impermissibility — Arbitration and Conciliation Act, 1996, S. 34** (Paras 41 and 52)

J. **Arbitration and Conciliation Act, 1996 — S. 31(7) — Award of interest by arbitrator — Reiterated, in absence of any express bar in the contract in regard to interest, the arbitrator can award interest — Arbitration Act, 1940, S. 29** (Para 60)

Irrigation Deptt., Govt. of Orissa v. *G.C. Roy*, (1992) 1 SCC 508; *Dhenkanal Minor Irrigation Division* v. *N.C. Budharaj*, (2001) 2 SCC 721; *Bhagawati Oxygen Ltd.* v. *Hindustan Copper Ltd.*, (2005) 6 SCC 462, *relied on*

K. **Arbitration and Conciliation Act, 1996 — S. 31 — Award of interest by arbitrator — Pre-reference period (i.e. from due date up to date of reference) — Held, arbitrator empowered to allow interest if contract is silent as to payment of interest in regard to pre-reference period in terms of Interest Act, 1978 — Where contract provides for interest, it shall be paid in accordance with the contract and in case of express barring of payment of interest by contract, no interest shall be awarded — Arbitration Act, 1940 — S. 29 — Interest Act, 1978, S. 3** (Paras 63 to 65)

L. **Arbitration and Conciliation Act, 1996 — S. 31(7) — Award of interest — Pendente lite (date of institution of proceedings to date of award) and future interest (from the date of award to date of payment) — Held, award of interest for pendente lite and future periods will be governed by S. 34 CPC or law governing arbitration — Interest Act, 1978 is not**

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applicable — Arbitration Act, 1940 — S. 29 — Interest Act, 1978 — S. 3 — Applicability (Para 65)

M. **Arbitration Act, 1940 — S. 29 — Award of interest on damages — Permissibility — Conditions prerequisite — Change effected in the law by Interest Act, 1978 — Held, interest on damages can be awarded if: (i) contract specifically provides for it, or (ii) a written demand had been made for payment of interest on the damages before initiation of action — In case of unascertained or unquantified amounts, interest should be from date of demand or future date and for ascertained sums due, interest will be from date when they became due — In present case, interest awarded only from date of petition for appointment of arbitrator — Hence, no reason to interfere as to date of commencement of interest — Contract and Specific Relief — Remedies/Relief — Remedies for breach of contract — Interest — Interest Act, 1978 — S. 3 — Arbitration and Conciliation Act, 1996, S. 31(7) (Para 66)**

Iron & Hardware (India) Co. v. *Firm Shamlal & Bros.*, AIR 1954 Bom 423, *held, legislatively superseded*

N. **Arbitration Act, 1940 — S. 29 — Rate of interest — Pre-reference, pendente lite and future period — Appropriate rate of interest — Interest at 18% p.a. — Permissibility — Held, award of interest at 18% p.a. under Arbitration Act, 1940 was an error apparent on the face of the award — Pre-reference interest should be 9% in terms of Interest Act, 1978 — Thus, in present case, held, same rate appropriate for pendente lite and future interest — Arbitration and Conciliation Act, 1996, S. 31(7) (Para 67)**

N-D/43310/S

Advocates who appeared in this case :

Vijay Hansaria, Senior Advocate (Jatinder Kr. Bhatia, B.N. Jha and Ms Sneh Kalita, Advocates) for the Appellants;

Dushyant Dave, Ravindra Shrivastava and Kishore Shrivastava, Senior Advocates (Kunal Verma, Rajul Shrivastava, Aniruddh Rajput, Manish Chaudhary and C.G. Solshe, Advocates) for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2005) 6 SCC 462, *Bhagawati Oxygen Ltd.* v. *Hindustan Copper Ltd.* 22*f*
2. (2001) 2 SCC 721, *Executive Engineer, Dhenkanal Minor Irrigation Division* v. *N.C. Budharaj* 22*e-f*
3. (1994) 6 SCC 485, *State of Rajasthan* v. *Puri Construction Co. Ltd.* 11*f-g*
4. (1992) 1 SCC 508, *Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy* 22*e-f*
5. AIR 1954 Bom 423, *Iron & Hardware (India) Co.* v. *Firm Shamlal & Bros.* 22*h*
6. (1922-23) 50 IA 324 : AIR 1923 PC 66, *Champsey Bhara & Co.* v. *Jivraj Balloo Spg. & Wvg. Co. Ltd.* 11*c*

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J.— Leave granted. Heard learned counsel. The appellants (also referred to as "the employer") invited tenders for the manufacture, laying, testing and commissioning of water pipeline of a length of 37.41 km under a water supply scheme in Ajmer District. Tenders were received from various tenderers including the respondent (hereinafter referred to as "the contractor").

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2. As different tenderers had stipulated different terms and conditions, the tenderers were invited for discussions, and Common Terms of Reference (for short "CTR") were formulated on 22-2-1988 and the original tender conditions stood modified to the extent of the alterations in CTR. Thereafter the offer of the respondent was accepted and a work order dated 23-8-1988 was issued to him stipulating the period for completing the contract as two years from that date. There was an amendment to the work order on 8-11-1988.

3. The employer and the contractor entered into an agreement dated 11-1-1989 enumerating and stipulating the documents which will form part of the contract and the modifications agreed to in regard to certain terms. The value of the work as per the work order was Rs 9,91,94,602.50. Ten per cent of the value of work (Rs 99.19 lakhs) which was agreed to be released as mobilisation advance, was released to the contractor between 25-1-1989 and 5-5-1989. The contractor created an equitable mortgage over its plant by depositing its title deeds thereto as security for the mobilisation advance. By letter dated 15-12-1990, the contractor confirmed that the original title deeds will remain in deposit with the employer till the entire amount of advance was repaid in full with interest.

4. The contract (Clause 23 of the General Conditions of Contract) provided for settlement of disputes by arbitration. By letter dated 18-6-1990 the respondent invoked the provision for arbitration and sought appointment of an arbitrator to decide its claims aggregating to Rs 2,01,66,547 arising on account of certain alleged omissions and commissions of the employer. Another dispute was raised in respect of the rate payable for work done subsequent to the due date of completion (22-8-1990).

5. On 22-8-1990 the contractor stopped the work. By that date it had manufactured 15.26 km of pipes and had laid 11.6 km out of them and tested only 1.4 km of pipeline as against the total contracted quantity of 37.41 km. On 13-9-1990 the employer notified the contractor that if he did not resume the work, the balance of the work would be got executed through an alternative agency in terms of the contract, by treating the contract as having been abandoned on 22-8-1990, and recover the excess cost from the contractor.

6. The respondent contractor sent a reply dated 3-11-1990 stating its efforts to complete the work were rendered futile on account of the delays and breaches on the part of the employer; and it was necessary to enter into a fresh agreement as the tender was not accepted in the manner in which it ought to have been accepted. The contractor did not resume the work. The contractor's stand was that in the absence of an extension of time for completion by mutual consent before the stipulated date for completion, it was not liable to continue the work on the tendered rates.

7. The employer on 30-3-1991 made a final demand calling upon the contractor to state whether it was ready to restart and complete the remaining

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work and if so to submit a revised time schedule for such completion. As the contractor did not resume the work, the employer initiated steps to get the balance work executed through an alternative agency.

8. In the meanwhile the contractor filed a suit against the appellant in the District Court, Ajmer and obtained a temporary injunction restraining the employer from imposing liquidated damages. The contractor made an application to the District Court, Ajmer, under Section 20 read with Section 8 of the Arbitration Act, 1940 ("the Act", for short) for filing the arbitration agreement into the court and seeking appointment of an arbitrator.

9. The District Court, Ajmer by an order dated 27-4-1991 held that it had the jurisdiction to appoint an arbitrator but deferred the actual appointment to a future date. The contractor revised its claim to Rs 5,51,90,306 in the notice of appointment of an arbitrator. The employer challenged the order of the District Judge and the High Court allowed the appeal on 9-8-1991 and set aside the order of the District Judge. The contractor in turn approached this Court.

10. On 12-11-1991, this Court recorded the consent of parties for appointment of Mr B.L. Mathur as the sole arbitrator and directed the employer (Chief Engineer, Public Health Engineering Department, State of Rajasthan) to appoint him as the arbitrator. On being appointed, the arbitrator entered upon the reference and the contractor filed a claim statement before the arbitrator on 13-1-1992 making 43 claims aggregating to Rs 6,21,29,626. The employer filed its reply to the claim statement, and also made five counterclaims aggregating to Rs 8,63,46,505 before the arbitrator.

11. In the meanwhile, the employer having concluded the arrangements to get the work completed through an alternative agency, on the contractor's failure to resume the work, awarded the work to M/s Indian Hume Pipes Co. Ltd. on 10-8-1992. On the basis of the contract value in regard to the balance work, the employer revised its Counterclaim 2 relating to extra cost to Rs 6,66,62,000 and consequently the total of the counterclaims stood increased to Rs 11,55,98,388.

12. After considering the claims and counterclaims, the learned arbitrator made an award dated 21-9-1994. He rejected Claims 4, 7, 8, 10, 14, 21, 22, 23, 26, 36, 36-A, 37, 38, 39, 40, 41 & 41-A, 42 & 42-A and 43 of the contractor. He awarded the following amounts to the contractor in regard to the remaining claims:

Sl. Nos.	*Claim*	*Description of claim*	*Amount claimed Rs*	*Amount awarded Rs*
1.	1	Loss of profitability due to late release of mobilisation advance	83,49,913	33,06,500
2.	2 and 16	Refund of excess sales tax deducted	2,94,142	2,94,142

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a	*3.*	3 and 15	5% amount withheld for testing of pipeline	14,70,956	14,70,956
	4.	5 and 18	Excess recovery of security deposit	13,28,457	13,28,457
	5.	6 and 17	Price escalation	58,83,854	43,47,520
b	*6.*	9 and 19	Refusal of employer for redesigning pressure pipes from higher into lower	10,11,354	6,95,910
	7.	11 and 20	Slow progress due to reduction of width of trench	21,32,496	21,07,195
	8.	24	Refund of deduction for want of BG renewal	4,31,926	4,31,926
c	*9.*	27 and 28	Gas pipes fitted	2,60,200	67,098
	10.	29	Payment for 8 kg pipes but paid for 6 kg pipes	1,17,150	1,12,294
	11.	30	Refunds for paint of specials	9759	9759
	12.	31	Deduction from running bill for pipes	22,385	22,385
d	*13.*	32	Refund for deduction for insufficient refilling	46,569	46,569
	14.	33	Less measurement of pipe	1,15,738	1,15,738
	15.	35 with	Difference in final bill	1,47,00,000	23,74,458
		25	Less payment re: sand bedding	7,31,676	
e		34	Payment for excavation	2,50,740	
	16.	37-A	Idle charges for machinery, staff, etc.	12,072 per day from 13-1-1992	12,072 per day from date of award, if the factory was not released from mortgage security within 30 days.
f					
g	*17.*	12 and 13	Interest (pre-reference, pendente lite and future)	18% per annum	18% per annum

The arbitrator rejected Counterclaims 1, 2, 4 and 5 of the employer. In regard to Counterclaim 3 (Rs 79,87,846 towards refund of mobilisation advance with interest), the arbitrator awarded a sum of Rs 59,42,275 with interest at 18% per annum from 18-9-1990 up to the date or decree or payment, whichever was earlier.

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13. The contractor made an application for making the award, a rule of the court. The employer challenged the award by filing objections under Section 30 read with Section 33 of the Act. By an order dated 17-2-2003, the District Judge, Ajmer allowed the application of the contractor and made the award a rule of the court subject to a modification in regard to the award made on Claim 37-A.

14. In place of the award made by the arbitrator (direction to employer to pay Rs 12,072 per day from the date of the award), the District Judge directed that the employer shall return the original title deeds to the contractor and pay the amounts awarded to the contractor after deducting the amount awarded by way of counterclaim (that is Rs 59,42,275 towards refund of mobilisation advance due with 18% interest) within 30 days from the date of decree, failing which, the employer shall pay Rs 12,072 per day from the date of decree. The employer filed an appeal (Civil Miscellaneous Appeal No. 872 of 2003) against the said judgment and decree contending that the award ought to have been set aside. The contractor also filed an appeal (Civil Miscellaneous Appeal No. 910 of 2003) aggrieved by the modification by the learned District Judge directing compensation of Rs 12,072 per day only from the date of decree (instead of the date of award).

15. The High Court dismissed the appeal filed by the employer by judgment dated 5-2-2007. The High Court allowed the appeal filed by the contractor by judgment dated 30-5-2007 and restored the direction of the arbitrator that the payment of compensation at Rs 12,072 per day should be from the date of the award itself (21-9-1994). The High Court also granted interest at 18% per annum from the date of the award. Thus the High Court upheld the award. Feeling aggrieved, the employer has filed these two appeals by special leave. The first of the appeals [arising out of SLP (C) No. 10818 of 2007] is against the dismissal of its appeal on 5-2-2007. The second of the appeals [arising out of SLP (C) No. 22565 of 2007] is against the judgment dated 30-5-2007 allowing the contractor's appeal.

16. One of the contentions urged by the appellants before the court below was that the arbitrator did not have the jurisdiction to enter upon the reference and make an award, as the appointing authority under the arbitration clause had merely appointed the arbitrator, but had not *referred* any dispute to him for arbitration. The said contention was rejected by both the courts on the ground that when the authority competent to appoint the arbitrator appointed the arbitrator, in pursuance of the agreement reached before this Court to have the pending disputes of both parties settled by arbitration, the employer could not be permitted to raise a technical plea that the arbitrator had no jurisdiction to proceed with the arbitration, in the absence of a further specific reference by the employer. Realising the unsoundness of the said contention, the appellants did not press it before us.

17. On the contentions urged, the question that arises for consideration is whether there is any legal misconduct or error apparent on the face of the award, in regard to the award of the arbitrator in respect of:

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(*i*) Claims 1 and 37-A;

(*ii*) Claims 12 and 13;

(*iii*) Claims 2 and 16, 3 and 15, 5 and 18, 6 and 17, 9 and 19, 11 and 20, 24, 27 and 28, 29, 30, 31, 32, 33, 35 (with Claims 25, 34); and

(*iv*) Counterclaims 1, 2, 4 and 5.

18. Section 30 of the Act inter alia provides that an award can be set aside on the ground that an arbitrator had misconducted himself or the proceedings, or that the award had been improperly procured or is otherwise invalid. An error apparent on the face of the award, is a ground for setting aside the award under Section 30 or for remitting the award to the arbitrator under Section 16(1)(*c*) of the Act.

19. In *Champsey Bhara & Co.* v. *Jivraj Balloo Spg. & Wvg. Co. Ltd.*[1] the Privy Council explained the term "an error of law on the face of the award" thus: (IA p. 331)

> "... An error in law on the face of the award means ... that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

20. It was well settled that under the Arbitration Act, 1940, an award was not open to challenge on the ground that the arbitrator has reached a wrong conclusion or failed to appreciate facts, as under the law, the arbitrator is made the final arbiter of the dispute between the parties. While considering the challenge to an award, the court will not sit in appeal over the award nor reappreciate the evidence for the purpose of finding whether on the facts and circumstances, the award in question could have been made. When there is no allegation of moral misconduct against the arbitrator with reference to the award, and where the arbitration has not been superseded, there were only two grounds of attack. First was that there was legal misconduct on the part of the arbitrator in making the award. Second was that there was an error apparent on the face of the award.

21. This Court explained the principles relating to interference with awards under the 1940 Act in *State of Rajasthan* v. *Puri Construction Co. Ltd.*[2] thus: (SCC pp. 502-03, para 31)

> "*31.* ... Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a Judge by choice of the parties, and more often than not, a person with little or no legal background, the adjudication of disputes by an arbitration by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope

1 (1922-23) 50 IA 324 : AIR 1923 PC 66
2 (1994) 6 SCC 485

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and ambit of challenge to an award in the Arbitration Act. Over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the courts have disfavoured interference with arbitration award on account of error of law and fact on the score of misappreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of 'legal misconduct' of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidence intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis, it is a question of delicate balancing between the permissible limit of error of law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous."

22. Keeping the said principles in mind let us examine the various claims.

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Re: Claim 1

23. The contractor claimed that the mobilisation advance had to be released to it immediately on entrustment of work, to enable it to set up the factory for manufacturing the pipes. It was contended that prompt release of mobilisation advance was crucial and fundamental to the contract as manufacture of pipes depended upon setting up a factory for that purpose. Even assuming that the mobilisation advance could be released in three instalments, as per the modified terms and conditions, the contractor contended that there was inordinate delay on the part of the employer in releasing the instalments, that too, in five instalments.

24. The contractor further contended that if the mobilisation advance had been released immediately on award of the work, it would have set up a factory and commenced production within three months; that in view of the delay, it lost production for a period of eight months, that is, nearly one-third of the contract period, and that as a consequence they were not able to execute the work of the value of Rs 5,56,66,086 and the loss of profits and overheads on the said amount at a standard 15% was Rs 83,49,913 and it was entitled to that amount as compensation for the breach by the employer.

25. The calculation of the said loss of profit and overheads in Claim 1 was as follows:

Amount of contract (with ZVV)	Rs	9,91,94,602.00
Payment already received from the Department	Rs	2,88,28,516.00
Balance	Rs	7,03,66,086.00
Amount due to contractor against work done	Rs	1,47,00,000.00
Balance	Rs	5,56,66,086.00
Loss of profitability and overheads @ 15% (0.15 x 5,56,66,086)	Rs	83,49,913.00

26. The employer resisted the said claim contending that having regard to the relevant conditions in the work order and the contract agreement, the mobilisation advance had to be released in three instalments against bank guarantees; that the second and third instalments had to be released only on production of the certificate of a chartered accountant on the utilisation of the previously paid amount and on verification by the Department of the progress; and that the mobilisation advance was released in instalments in terms of the contract and there was no delay and no breach on their part.

27. We may refer to the relevant provisions of the contract in this behalf. Clause 8 of the Special Conditions relating to the establishment of factory at site provided thus:

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"*Establishment of factory at site*

The contractor, if he so desires, may establish the pipe factory at site to avoid transportation of pipes. All material and equipment and land required for the purpose shall be arranged by the contractor at his own cost. The Department may assist him in acquisition of land. However, the work should not be delayed on this account. The firm should commence and continue to supply the pipes, etc. from their existing set-up till the factory at site is established. As already stated, the supply of pipes, etc. should commence within 30 days, from the award of contract."

28. Clause 8 was superseded by Clause 3 of the Common Terms of Reference which is extracted below:

"*Mobilisation advance (for PSC pipes only)*

10% of the contract value shall be given against bank guarantee as mobilisation advance at a simple interest rate of 18%. Recovery of mobilisation advance shall be effected from 1st Running Bill on pro rata basis in a way that complete mobilisation advance is recovered by the time 75% work is complete. Interest shall also be recovered along with recovery of capital mobilisation advance. The assets built by the contractor out of mobilisation advance so made will be mortgaged to the Department. In case work is left incomplete, liquidated damages will be imposed as per the terms of the document and the assets built by the contractor for manufacturing pipes will become the property of the Department. Such assets can be used by the Department for the purpose of completing the remaining work."

In the subsequent work order issued on 23-8-1988, Clause 5.1 relates to mobilisation advance.

29. While Para (*a*) of Clause 5.1 was a reproduction of Clause 3 of the Common Terms of Reference, the following was added as Para (*b*) in Clause 5.1 of the work order:

"The mobilisation advance is being given for the establishment of factory at site. In case the factory is not established in 3 months' period the mobilisation advance shall be recovered by way of the bank guarantee given in lieu of the mobilisation advance."

30. By letter of amendment dated 8-11-1988 issued by the employer, several clauses of the work order including Clause 5.1(*b*) were amended/replaced. Clause 5.1(*b*) as replaced is extracted below:

"The mobilisation advance is being given for establishment of factory at site. The mobilisation advance shall be paid in three instalments of which the second and third instalments shall be paid on production of a certificate of the chartered accountant about utilisation of the previously paid amount and on verification by the Department of the progress towards setting up of the factory."

31. This was followed by an agreement executed by both the parties on 11-1-1989 and Clause 7 thereof extracted below dealt with mobilisation advance:

"*Mobilisation advance*

(*a*) 10% of the contract value shall be given as mobilisation advance @ 18% simple interest subject to production of bank guarantee from any

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nationalised bank equal to the amount of such advance. The recovery of such advance shall be effected from 1st Running Bill on pro rata basis in such a way that recovery of this advance is made by the time when 75% of the work is completed. Amount of interest is recoverable along with the recovery of principal amount.

(*b*) The assets built by the contractor out of the mobilisation advance shall be mortgaged with the Government. Such assets will not be mortgaged with any other agency for any purposes.

(*c*) In case the contractor fails to complete the work in specified time, the contractor shall pay the compensation as liquidated damages as per the terms and conditions of the contract and the assets built by the contractor for manufacturing of pipes will be the property of the Government and the Department will have right to use it as government property for completion of remaining work."

32. The arbitrator held that Clause 8 of the Special Conditions of Contract stood superseded by Clause 3 of the Common Terms of Reference which required the mobilisation advance to be released in one instalment and not in three instalments. He held that Clause 5.1(*b*) inserted by the amendment to the work order dated 8-11-1988 was an unilateral incorporation by the employer and was not binding on the contractor. He further held that the employer ought to have released the mobilisation advance along with the work order dated 23-8-1988, and the employer had abnormally delayed the release of mobilisation advance by a total period of 8.5 months by releasing it in instalments. He held that there was a clear delay of about 8 months and during that period the contractor could have executed one-third of the work of the value of Rs 3,30,64,867.50, and as the contractor was prevented from executing the said work on account of the delay, the contractor was entitled to 10% of the said amount, that is, Rs 33,06,500 as loss of profit. The said sum was therefore awarded to the contractor under Claim 1.

33. There is no doubt that Clause 8 of the Special Conditions of Contract has to be read with Clause 3 of CTR. It is true that Clause 3 of CTR did not contemplate the mobilisation advance being released in three instalments. But CTR was followed by the work order dated 23-8-1988 which was followed by an amendment dated 8-11-1988 which specifically stated that the mobilisation advance shall be paid in three instalments of which the second and third instalments shall be paid on production of a certificate of the chartered accountant about utilisation of the previously paid amounts and on verification by the Department towards progress of the factory. The arbitrator has held that the said clause was unilaterally introduced and therefore is not binding on the contractor. On the face of it this is erroneous.

34. After the work order, the parties have executed a bilateral agreement dated 11-1-1989 which specifically states at Para 2 and Para 6 that the work order dated 23-8-1988 and subsequent amendment to the work order dated 8-11-1988 shall be deemed to be a part of the contract and will bind both the

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parties. The agreement dated 11-1-1989 itself contains a detailed clause (Clause 7) relating to mobilisation advance in addition to what was earlier agreed in regard to mobilisation advance. Therefore obviously the clauses relating to mobilisation advance in the amendment to the work order dated 8-11-1988 and the agreement dated 11-1-1989 had to be read in addition to the earlier provision relating to mobilisation advance contained in CTR.

35. Clause 5.1(*b*) of the work order, as amended, specifically provided that the contractor had to provide a bank guarantee for the mobilisation advance. Sub-clause (*b*) of Clause 7 of the agreement dated 11-1-1989 provided that assets built by the contractor by utilising the mobilisation advance should be mortgaged to the employer. Sub-clause (*c*) of Clause 7 provided that if the contractor fails to complete the work, the assets built by the contractor would become the property of the employer and the Department could use it as government property for completion of the remaining work. Sub-clause (*d*) of Clause 7 provided that if the contractor failed to establish the factory within three months of payment of the mobilisation advance, the said advance would be recovered by enforcing the bank guarantee given in lieu of the mobilisation advance. Thus it is evident that the mobilisation advance had to be released only against a bank guarantee to be furnished by the contractor.

36. If according to the contractor, the mobilisation advance had to be released in a single instalment and if the contractor wanted the entire mobilisation money to be released in one lump sum instead of in three instalments, it ought to have given a single bank guarantee for the entire sum. But strangely the contractor did not give such a bank guarantee. It gave four bank guarantees for Rs 40 lakhs on 21-5-1989, Rs 25 lakhs on 1-2-1989, Rs 15 lakhs on 17-2-1989 and Rs 25 lakhs on 23-3-1989. It is thus evident that the contractor had also proceeded on the basis that the condition in Clause 5.1(*b*) of the work order amendment letter dated 8-11-1988 governed the payment of mobilisation advance.

37. We find that the mobilisation amount corresponding to first bank guarantee was released within two days; mobilisation amount corresponding to second guarantee was released in seven days; and mobilisation amount corresponding to third guarantee, was partly released in 12 days and the balance in two months. The amount corresponding to the second and third bank guarantees had to be released only after the contractor produced a certificate in regard to the utilisation of the earlier advance.

38. It is seen that in regard to the first mobilisation advance the certificate was produced on 7-2-1989 and on the same day the second instalment was released. Insofar as the third instalment is concerned, the certificate was only received on 4-4-1989. Therefore it cannot be said that there was delay or breach on the part of the employer in releasing the mobilisation advance. If at all there was any delay, the delay was on the part of the contractor.

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39. The fact that release of the mobilisation advance was governed by Clause 5.1(*b*) of the work order (as amended on 8-11-1988) and Clause 7 of the agreement dated 11-1-1989 was totally overlooked by the arbitrator by proceeding on the basis that mobilisation advance was governed by CTR alone. The arbitrator committed a legal misconduct by ignoring the terms of contract, that is, the agreement dated 11-1-1989, which specifically provided that in addition to CTR, the work order and amendment to work order dated 8-11-1988 would also form part of the contract.

40. The arbitrator also overlooked the fact that the additional provision regarding mobilisation advance was introduced in the agreement itself. Therefore the mobilisation advance was governed by the terms in CTR, the work order, the amendment to the work order dated 8-11-1988 and the agreement dated 11-1-1989 read together. If so read, it was clear that there was no breach on the part of the employer and the contractor was itself responsible for the delay. If so, the question of compensating the contractor on that score does not arise.

41. There is yet another aspect. The contractor claimed compensation on the basis that he could not do work of the value of Rs 5,56,66,086 in view of the delay and he was entitled to 15% thereof, namely, Rs 83,49,913 as compensation. But the arbitrator made an award in respect of the claim on the ground that there was delay in releasing the mobilisation advance and during that period of delay, one-third of the contract work could have been done and the value of the work that could have been done was Rs 3,30,64,867, and 10% thereof was the loss of profit. Firstly, there was no such plea. Secondly, we have already held that the delay relating to mobilisation advance was not on the part of the employer. Thirdly, even if there was delay, it was nobody's case that no work was done or that the contractor had suffered loss for non-execution of the work during the contract period. Therefore we are of the view that the award of compensation of Rs 33,03,500 towards Claim 1 is liable to be set aside.

Re: Claim 37-A

42. Claim 37-A was linked to mobilisation advance. The contractor claimed that it had mortgaged its pipe manufacturing unit in favour of the employer by deposit of title deeds as security for repayment of the mobilisation advance; that the machinery installed in the said factory had not been released by the employer in its favour and as a consequence, it could not be shifted to another place to enable it to start the manufacturing process elsewhere; and that on account of the failure on the part of the employer to release the plant, it had to keep the machinery idle and the employer was therefore liable to reimburse to the contractor the loss of production from 13-1-1992 at the rate of Rs 12,072 per day.

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43. The contractor contended that if it had been permitted to shift its plant and machinery, it would have produced 15 pipes per day valued at Rs 1,20,000, that out of which the overhead and profit element was 15% (that is Rs 18,000 per day); that as there were 306 working days in a year, the loss of profits/overheads would be 18,000 x 306/365 = Rs 15,090 per day; and that if 20% thereof (Rs 3018) was deducted therefrom towards labour component, the loss of profit per day on account of non-availability of plant and machinery was Rs 12,072 per day.

44. The employer resisted the claim by contending that there was no obligation to release the plant and its title deeds until the mobilisation advance was repaid with interest; that the contractor had not repaid the mobilisation advance and interest thereon in spite of the award; and therefore the question of compensating any "daily loss" on that account did not arise. The employer also contested the correctness of the assumptions made for calculating the loss.

45. The contractor deposited the title deeds relating to the plant by way of mortgage of deposit of title deeds, in terms of the contract and specifically agreed that the original deeds will remain in deposit with the employer till the entire mobilisation advance was repaid with interest. It is also not in dispute that though a mortgage security was created on the plant, it continued to be in the possession, enjoyment and control of the contractor, as the employer did not take over physical possession of the plant at any point of time.

46. The arbitrator considered Claim 37-A with three other Claims (36, 36-A and 37). The particulars of the said claims are:

Claim 36	
Compensation for idling machinery, labour, staff due to delay and wrong decisions (for the period up to 12-1-1992)	Rs 48.21 lakhs
Claim 36-A	
Compensation for idling machinery, staff and labour, etc. from 13-1-1992	Rs 6370 per day
Claim 37	
Compensation for loss of production in the factory (for the period up to 12-1-1992)	Rs 61.48 lakhs
Claim 37-A	
Compensation for loss of production in the factory from 13-1-1992	Rs 12,072 per day

The arbitrator held that none of the four claims were maintainable as the factory built out of the mobilisation advance had been mortgaged in favour of the employer. As a consequence he did not award any amount in respect of the four claims.

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47. But strangely the arbitrator directed payment of Rs 12,072 per day from the date of the award not because he held that there was any loss of production as a consequence of any breach by the employer, but on the following reasoning:

> "After perusal of the arguments of the parties and the evidence on record, I come to the finding that it is a case of real hardship to the claimants for having been denied the use of the factory and machinery elsewhere in their business venture, but *because of legalities involved, such as mortgage, the claimants cannot be given the benefit of any award.* Had the assets of the factory built out of mobilisation advance not being (*sic* been) mortgaged in favour of the respondent, I would have considered making an award in favour of the claimants. In view of the fact that I have allowed Counterclaim 3 of the respondent for balance amount of mobilisation advance in full along with interest, there is no reason why the assets built out of mobilisation advance should continue to remain mortgaged with the respondents. I therefore direct the respondent to release the documents relating to mortgage as mentioned above within a period of 30 days from the date of this award failing which the claimants shall be entitled to an award of Rs 12,072 per day from the date of this award till the date of release of mortgage. No award in favour of the claimants for the period I entered upon reference to the date of the publication of the award." (emphasis supplied)

48. Thus we find that the award under Claim 37-A was not made on account of any finding of breach on the part of the employer. It was made because the arbitrator had made an award against the contractor in favour of the employer for Rs 59,42,275 with interest. The arbitrator was of the view that if that sum was adjusted against the amounts due by the employer, there was no need for the mortgage of the plant to continue and therefore the employer should release the documents of title deposited by way of equitable mortgage, within 30 days from the date of the award; and that if the employer failed to do so, the employer should pay to the contractor Rs 12,072 per day from the date of the award till the date of release of the mortgage. Therefore, the said award under Claim 37-A was made, not on account of any breach committed by the employer, but in respect of *a breach* if *made in future* after the date of the award. There was no such claim and the award was therefore beyond the reference.

49. Further, the reasoning of the arbitrator is very strange and is a classic case of an error apparent on the face of the award and a legal misconduct. The arbitrator rejected Claim 37-A for payment of Rs 12,072 as compensation for loss of production from 13-1-1992 (which was the subject-matter of the claim) on the ground that the plant had been mortgaged in favour of the employer and therefore there was no justification for the contractor to claim that it should be permitted to remove and take away the plant when the mortgage subsisted. Having rejected the claim, the arbitrator

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evolved a strange reasoning that though there was a subsisting valid mortgage in respect of the mobilisation advance with interest in favour of the employer, because he had made an award in favour of the employer for Rs 59,42,275 plus interest, the mortgage came to an end and the employer became liable to return the documents and if it failed to return the documents, the contractor was entitled to damages of Rs 12,072 per day from the date of award.

50. The arbitrator noticed the fact that the plant and machinery was mortgaged by deposit of title deeds in favour of the employer and that the contract was that "the original documents will remain in deposit with the employer till the amount of advance is repaid with full interest". The arbitrator in fact makes an award for return of Rs 59,42,276 in favour of the employer with interest at 18% per annum from 1-9-1990 to 17-9-1990 and interest at 18% per annum on Rs 59,42,275 from 18-9-1990 till date of decree or payment, whichever was earlier. Therefore evidently until the amount of Rs 59,42,275 with interest was paid by the contractor to the employer, the mortgage would continue. If the mortgage continued, there was no obligation on the part of the employer to return the documents; and if there was no obligation on the part of the employer to return the documents, the contractor could not complain that the documents were wrongly held by the employer nor could it claim loss of production as a result of the employer wrongly withholding the documents.

51. It is of some interest to note that as per the award of the arbitrator, made under Claim 37-A, on a claim that was never made, the amount that would become due at Rs 12,072 from 21-9-1994 to date will be approximately Rs 6,42,70,000. We have a strange situation where the arbitrator makes an award in favour of an employer directing the contractor to refund to the employer Rs 59,42,275 with interest at 18% per annum from 18-9-1990 up to the date of decree/payment and then even though the said payment was not made, awards damages to the contractor which works out to Rs 6,42,70,000 to the contractor. This to say the least is legal misconduct and an error apparent on the face of the award.

52. We may also refer to another aspect. A sum of Rs 12,072 per day was claimed as damages by the contractor in a two-line calculation without any supporting evidence or document. As noticed above, the claim was on the basis that the contractor would have manufactured 15 pipes per day of the value of Rs 1,20,000 and that the profit and overhead element out of it would have been 15% or Rs 18,000 per day. By taking the working days as 306 in a year and deducting 20% of labour component, the loss of profit per day was calculated to be Rs 12,072 per day. There is no evidence to show that the contractor was at any point of time manufacturing 15 pipes a day of the value of Rs 8000 each or that he would have made a profit of 15% on the cost thereof. The claim is made on the ground that it is disabled from manufacturing that many number of pipes elsewhere.

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53. There is no evidence that the contractor had other contracts where it was required to manufacture that number of pipes or that it could not manufacture the required pipes for want of plant and machinery. Nor is there any evidence as to the value of the plant and machinery that had been mortgaged to the employer and what would be the cost of an alternative plant with a capacity to manufacture 15 pipes per day. If the plant and machinery was of the value of say Rs 25 lakhs, or if the contractor could install another similar plant at a cost of Rs 25 lakhs, then the loss at best would be interest on Rs 25 lakhs and not anything more.

54. In fact even though there is no evidence, while making Claims 36 and 37 the contractor has given value of the plant and machinery as Rs 36,84,161. Even assuming the said figure to be true, at best the blocked up investment was only Rs 36,84,161 and the loss would be around 1% thereon per month by way of interest which would be Rs 36,841 per month. What is more strange is nowhere in the award the arbitrator considers the validity of the claim of Rs 12,072 per day nor accepts the said claim as valid or correct. In a reasoned award if the claim of a contractor is equated to proof of the claim, then it is obviously a legal misconduct and an error apparent on the face of the award.

55. While the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable.

56. Learned counsel for the contractor submitted that though there was an award in favour of the employer for refund of mobilisation advance of Rs 59,42,275 with interest, there was a larger award in its favour aggregating to about Rs 1.67 crores and interest and it was legitimately entitled to adjust the sum of Rs 59,42,275 with interest towards the amount due by the employer under the award, namely, Rs 1.67 crores with interest and therefore as on the date of the award the liability towards mobilisation advance stood wiped out on account of the same being adjusted towards the amount claimed by him and therefore as on the date of the award, the liability to refund the mobilisation advance ceased. This contention is not sound.

57. The mobilisation advance amount was an ascertained sum due to the employer from the contractor, with a specific provision for interest. There was a specific contract for continuation of the mortgage until the said amount was paid. On the other hand the amounts that allegedly became due to the contractor under the award were mostly towards damages and escalation in prices, validity of which were under challenge and there was no provision in the contract for payment of interest thereon. As noticed above, at best the arbitrator could have directed return of the documents of title to the

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contractor and could not have directed payment of damages at the rate of Rs 12,072 per day.

58. We therefore hold that viewed from any angle, awarding Rs 12,072 per day as damages, from the date of award under Claim 37-A cannot be sustained and the same is liable to be set aside.

Re: Claims 12 and 13

59. The contractor claimed pre-reference interest at 18% per annum on all its claims from the date of the claim to the date of the arbitrator entering upon the reference (18-6-1990 to 15-12-1991), as also pendente lite interest from 16-12-1991 to 21-9-1994 and future interest from the date of award till the date of payment or decree, whichever was earlier. The arbitrator awarded the following interest:

(*a*) pre-reference interest on all sums awarded except Claim 1, from 3-9-1990 (date of the contractor's application under Sections 8 and 20 of the Act) to 15-12-1991 at 18% per annum;

(*b*) pendente lite interest on all sums awarded including Claim 1, from 16-12-1991 to 21-9-1994 at 18% per annum; and

(*c*) future interest on all sums awarded from 22-9-1994 till date of decree or payment, whichever is earlier, at the rate of 18% per annum.

The District Court did not award any post-decretal interest, but the High Court, however, granted interest from the date of decree till the date of payment at 18% per annum.

60. The appellants contend that there was no provision in the contract for payment of interest on any of the amounts payable to the contractor and therefore no interest ought to be awarded. But this Court has held that in the absence of an express bar, the arbitrator has the jurisdiction and authority to award interest for all the three periods—pre-reference, pendente lite and future (vide decisions of the Constitution Bench in *Irrigation Deptt., Govt. of Orissa* v. *G.C. Roy*[3], *Dhenkanal Minor Irrigation Division* v. *N.C. Budharaj*[4] and the subsequent decision in *Bhagawati Oxygen Ltd.* v. *Hindustan Copper Ltd.*[5]). In the present case as there was no express bar in the contract in regard to interest, the arbitrator could award interest.

61. The appellant next contended that in regard to the claims in the nature of damages, as contrasted from ascertained sums due, interest becomes payable only on quantification and therefore award of interest prior to the date of the arbitrator's award was illegal.

62. It is no doubt true that the position of law earlier was that in regard to award of damages, interest was not payable before quantification by a court. This was on the assumption that insofar as damages are concerned, there is no liability till determination of the quantum of damages. We may refer to a decision of the Bombay High Court in *Iron & Hardware (India) Co.* v. *Firm*

3 (1992) 1 SCC 508
4 (2001) 2 SCC 721
5 (2005) 6 SCC 462

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Shamlal & Bros.[6], where Chagla, C.J., speaking for the Bench, stated the principle thus: (AIR pp. 425-26, para 7)

> "*7.* ... In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.
>
> As already stated, the only right which he has is the right to go to a court of law and recover damages. Now, damages are the compensation which a court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the court. Therefore, no pecuniary liability arises till the court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant."

63. The legal position, however, underwent a change after the enactment of the Interest Act, 1978. Sub-section (1) of Section 3 of the said Act provided that a court (as also an arbitrator) can in any proceedings for recovery of any debt or damages, if it thinks fit, allow interest to the person entitled to the debt or damages at a rate not exceeding the *current rate of interest*, for the whole or part of the following period, that is to say,—

> "3. (1)(*a*) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;
>
> (*b*) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:"

64. Sub-section (3) of Section 3 made it clear that nothing in that section shall apply to any debt or damages upon which interest is payable as of right, by virtue of any agreement; or to any debt or damages upon which payment of interest is barred, by virtue of an express agreement. The said sub-section also made it clear that nothing in that section shall empower the court to award interest upon interest. Section 5 of the said Act provides that nothing in the said Act shall affect the provisions of Section 34 of the Code of Civil Procedure, 1908.

65. The position regarding award of interest after the Interest Act, 1978 came into force, can be stated thus:

6 AIR 1954 Bom 423

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(*a*) Where a provision has been made in any contract, for interest on any debt or damages, interest shall be paid in accordance with such contract.

(*b*) Where payment of interest on any debt or damages is expressly barred by the contract, no interest shall be awarded.

(*c*) Where there is no express bar in the contract and where there is also no provision for payment of interest then the principles of Section 3 of the Interest Act will apply in regard to the pre-suit or pre-reference period and consequently interest will be payable:

(*i*) where the proceedings relate to a debt (ascertained sum) payable by virtue of a written instrument at a certain time, then from the date when the debt is payable to the date of institution of the proceedings;

(*ii*) where the proceedings is for recovery of damages or for recovery of a debt which is not payable at a certain time, then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed, to date of institution of proceedings.

(*d*) Payment of interest pendente lite (date of institution of proceedings to date of decree) and future interest (from the date of decree to date of payment) shall not be governed by the provisions of the Interest Act, 1978 but by the provisions of Section 34 of the Code of Civil Procedure, 1908 or the provisions of the law governing arbitration as the case may be.

66. Therefore, even in regard to the claims for damages, interest can be awarded for a (*sic* period) prior to the date of ascertainment or quantification thereof if (*a*) the contract specifically provides for such payment from the date provided in the contract; or (*b*) a written demand had been made for payment of interest on the amount claimed as damages before initiation of action, from the date mentioned in the notice of demand (that is from the date of demand or any future date mentioned therein). In regard to claims for ascertained sums due, interest will be due from the date when they became due. In the present case, interest has been awarded only from 3-9-1990, the date of the petition under Section 20 of the Act for appointment of arbitrator. We find no reason to alter the date of commencement of interest.

67. In regard to the rate of interest, we are of the view that the award of interest at 18% per annum, in an award governed by the old Act (the Arbitration Act, 1940), was an error apparent on the face of the award. In regard to award of interest governed by the Interest Act, 1978, the rate of interest could not exceed the *current rate of interest* which means the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by Reserve Bank of India under the Banking Regulation Act, 1949. Therefore, we are of the view that pre-reference interest should be only at the rate of 9% per annum. It is appropriate to award the same rate of interest even by way of pendente lite interest and future interest up to the date of payment.

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Re: Claims 2 and 16, 3 and 15, 5 and 18, 6 and 17, 9 and 19, 11 and 20, 24, 27, and 28, 29, 30, 31, 32, 33, 35 (with 25 and 34) of the contractor

68. Claims 9 and 19, 27 and 28, 29, 33, 35 (with 25 and 35) are for payment for the work done by the contractor. Claims 2 and 16, 3 and 15, 5 and 18, 24, 30, 31 and 32 are for release/refund of amounts withheld or excess deductions. Claims 6 and 17 are for escalation in prices. Claims 11 and 20 are for compensation for slow progress due to reduction of width of trench. The arbitrator has awarded certain amounts against these claims by examining the material placed before him and the terms of contract. He has also assigned reasons for awarding the amount against these claims. Courts cannot sit in judgment over the award of the arbitrator, nor reappreciate the evidence.

69. The awards on these claims do not suffer from any infirmity which can be the basis for interference either under Section 30 or under Section 16 of the Arbitration Act, 1940. Neither want of jurisdiction, nor legal misconduct, nor any inconsistency nor error apparent on the face of the award are made out in regard to awards made in regard to these claims. The awards in regard to these claims are therefore upheld.

Re: Claims 4, 7, 8, 10 and 21, 14, 22, 23, 26, 38, 39, 40, 41 and 41-A, 42 and 42-A, 43 of the contractor

70. These claims of the contractor have been examined and rejected by the arbitrator and upheld by the courts below. No ground is made out to interfere with the same.

Re: Counterclaims of the employer

71. Out of the five counterclaims of the employer, the arbitrator has allowed only Counterclaim 3. Counterclaim 3 was for refund of mobilisation advance (Rs 79,87,846) with interest and the arbitrator has awarded Rs 59,42,275 with interest at the contract rate of 18% per annum up to the date of decree/payment, whichever was earlier. Counterclaims 1, 2, 4 and 5 made by the appellant against the contractor have been rejected. They are:

Counterclaim	*Brief description of counterclaim*	*Amount of counterclaim*
1.	Liquidated damages	Rs 99,19,460
2.	Extra cost in getting work completed through another agency	Rs 6,66,62,000
3.	* *	*
4.	Interest on payments made to the contractor and not utilised	Rs 2,17,42,168
5.	Costs	Rs 2,50,000

72. Counterclaims 1, 2 and 4 have been considered by the arbitrator and rejected by the arbitrator on the ground that the delays/breaches were on the

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part of the appellant and therefore, the question of claiming these amounts does not arise. Rejection of Counterclaim 5 is consequential. As noticed above, the court does not sit in appeal over the award of the arbitrator and cannot reappreciate the evidence to arrive at a different conclusion. The award on these items does not attract any of the grounds on which the award could be set aside. Therefore, rejection of these claims is also not open to interference.

73. We therefore allow these appeals in part and modify the judgments of the courts below as indicated above. Resultantly:

(A) The award of the arbitrator on Claim 1 (Rs 33,06,500) and Claim 37-A (Rs 12,072 per day from 21-9-1994 till date of payment) is set aside.

(B) The award of the arbitrator on Claims 2 and 16, 3 and 15, 5 and 18, 6 and 17, 9 and 19, 11 and 20, 24, 27 and 28, 29, 30, 31, 32, 33, 35 (with 25 and 24) aggregating to Rs 1,34,24,407 is upheld.

(C) Interest shall be payable at 9% p.a. on Rs 1,34,24,407 from 3-9-1990 till date of payment. The award on Claims 12 and 13 is modified accordingly.

(D) Award of Rs 59,42,275 in respect of Counterclaim 3 of the appellant with interest at the rate of 18% per annum from the respective dates of release up to the date of payment is upheld.

(E) The direction for adjustment of the amount due under Counterclaim 3 calculated as on 21-9-1994, against the amounts found due to the contractor calculated as on 21-9-1994 is upheld. Consequently, the appellant shall release the title deeds deposited in regard to the plant/machinery of the contractor. The contractor will be entitled to remove the plant, if it is not already done.

(F) Rejection of Claims 4, 7, 8, 10 and 21, 14, 22, 23, 26, 38, 39, 40, 41 and 41-A, 42 and 42-A and 43 of the contractor and Counterclaims 1, 2, 4, and 5 of the employer is upheld.

(G) Parties to bear their respective costs.

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(BEFORE R.V. RAVEENDRAN AND P. SATHASIVAM, JJ.)

SAYEED AHMED AND COMPANY .. Appellant;

Versus

STATE OF UTTAR PRADESH AND OTHERS .. Respondents.

Civil Appeal No. 4197 of 2009†, decided on July 9, 2009

A. **Arbitration and Conciliation Act, 1996 — S. 31(7) — Interest — Express bar in contract against claim for interest — Arbitrator's power —**

† Arising out of SLP (C) No. 15980 of 2008. From the Judgment and Order dated 27-2-2008 of the High Court of Uttarakhand at Nainital in AO No. 457 of 2006

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(2009) 17 Supreme Court Cases 199

(BEFORE ALTAMAS KABIR AND MARKANDEY KATJU, JJ.)

HUDA .. Appellant;

Versus

RAJ SINGH RANA .. Respondent.

Civil Appeal No. 4436 of 2008†, decided on July 16, 2008

A. Debt, Financial and Monetary Laws — Interest Act, 1978 — S. 3 — Applicability — Power of courts to determine interest not exceeding current rate of interest — Held, not applicable where interest rates are expressly provided in the agreement — Appellant [Haryana Urban Development Authority (HUDA)] transferred a plot of land to respondent (by taking tentative sale price and enhanced compensation) — Allotment letter expressly provided for 7% simple interest on total tentative sale price but not for additional price (enhanced compensation) on account of price variations — Consumer Fora determining rate of interest on additional price (enhanced compensation) as 7% on wrong assumption that such rate was stipulated in allotment letter — As no such rate was stipulated in allotment letter, held, court can determine interest rate as per provisions of S. 3(1) — Hence, setting aside said order of Consumer Fora, directed that HUDA will be entitled to impose simple interest on basis of prevailing current rate of interest — Civil Procedure Code, 1908 — S. 34 — Consumer Forums — Exercise of Power — Relief — Interest — Town Planning — Haryana Urban Development Authority Act, 1977 (13 of 1977) — S. 15

B. Debt, Financial and Monetary Laws — Interest Act, 1978 — S. 3(1) — Interest rate not exceeding current rate — Proper/Reasonable determination — Interest rates to be based on circumstances of each case and not at uniform rates — Courts should not also resort to arbitrary rates — Consumer Protection — Consumer Forums — Exercise of power — Relief — Interest — Consumer Protection Act, 1986 — Ss. 14, 17 and 21 — Civil Procedure Code, 1908 — S. 34

C. Town Planning — Allotment/Auction of Flats/Plots/Houses/Shops by Housing Board/Development Authority — Allotment — Interest payable by allottee on various amounts — Rate of interest — Policy imposing a deterrent rate on defaults committed by allottees (such rate not having been specified in the allotment order) — Permissibility — Such imposition, held, has to be made in keeping with S. 3 of Interest Act, 1978 and not in an unreasonable manner — It would be more pragmatic if a condition regarding charging of interest at prevailing banking rates were included in allotment letters — Debt, Financial and Monetary Laws — Interest Act, 1978 — S. 3(1)

† Arising out of SLP (C) No. 13644 of 2005. From the Final Order dated 19-11-2004 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No. 2217 of 2004

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Allowing the appeal, the Supreme Court

Held :

Where there is an agreement between the parties for payment of interest at a certain stipulated rate, the same will have precedence over the provision contained in Section 3(1) of the Interest Act, 1978. The concept of levying or allowing interest is available in almost all statutes involving financial deals and commercial transactions, but the provision empowering courts to allow interest is contained in the Interest Act, 1978. Section 3 of the said Act, inter alia, provides that the court may, if it thinks fit, allow interest, at a rate not exceeding the current rate of interest, for the whole or part of the periods indicated in the said section. In the instant case, the provision of the allotment letter dated 22-3-1974 appears to have been wrongly interpreted by the Consumer Fora since the stipulated 7% rate of interest only takes into consideration payment of the total tentative sale price. There is nothing in the agreement which provides for the rate of interest to be levied on the additional price on account of the enhancement of the acquisition cost. (Paras 18, 17 and 23)

While awarding interest, consumer fora are duty-bound to consider the circumstances of the case and keep in mind the provisions of Section 3, Interest Act, 1978. (Paras 21 and 25)

The rate of interest is to be fixed in the circumstances of each case and it should not be imposed at a uniform rate without looking into the circumstances leading to a situation where compensation is required to be paid. In the circumstances of the present case, even though the rate of interest indicated in the allotment letter dated 22-3-1974 may not have application as far as payment of the additional price is concerned, the District Forum erred on the side of reason in allowing interest at the rate of 7 per cent per annum upon holding that the demand made by the appellant at the higher rate was contrary to the mutual agreement contained in the allotment letter. Rates of interest fixed by the courts must not be arbitrary and should take into account the current bank rates which in recent years have shown a tendency to slide downwards. The order of the District Forum as affirmed by the State and National Commission is set aside and it is directed that the appellant will be entitled to impose simple interest on the basis of the prevailing current rate of interest. (Paras 27 and 22 to 25)

HUDA v. *Prem Kumar Agarwal*, (2008) 17 SCC 607; *Bihar State Housing Board* v. *Arun Dakshy*, (2005) 7 SCC 103; *HUDA* v. *Manoj Kumar*, (2005) 9 SCC 541; *Krishna Bhagya Jala Nigam Ltd.* v. *G. Harischandra Reddy*, (2007) 2 SCC 720, *relied on*

Ghaziabad Development Authority v. *Balbir Singh*, (2004) 5 SCC 65, *clarified*

Even though a policy may have been adopted by the appellant for imposing a deterrent rate of interest on defaults committed by allottees in payment of their dues, such imposition has to be in keeping with the provisions of Section 3 of the Interest Act, 1978 and not in an unreasonable manner. It may perhaps be even more pragmatic if a condition regarding charging of interest at the prevailing banking rates were included in the allotment letters, having regard to the provisions of Section 3(3) of the Interest Act, 1978. The rates of interest charged by the appellant, purportedly in accordance with its policy decisions, appear to have been influenced by the provisions of the Interest Act and also the Code of Civil Procedure on the supposition that the payment of additional price on account of enhancement of compensation was not covered by the provisions of the allotment letter relating to payment of interest. (Paras 26 and 20)

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1. (2008) 17 SCC 607, *HUDA* v. *Prem Kumar Agarwal* 206*f*
2. (2007) 2 SCC 720, *Krishna Bhagya Jala Nigam Ltd.* v. *G. Harischandra Reddy* 206*f-g*
3. (2005) 9 SCC 541, *HUDA* v. *Manoj Kumar* 206*f*
4. (2005) 7 SCC 103, *Bihar State Housing Board* v. *Arun Dakshy* 206*f*
5. (2004) 5 SCC 65, *Ghaziabad Development Authority* v. *Balbir Singh* 205*h*, 206*f*, 207*c-d*

The Judgment of the Court was delivered by

ALTAMAS KABIR, J.— Leave granted.

2. One Baldev Singh Nagar was allotted Residential Plot No. 718 (later on renumbered as 883) measuring 14 marlas in Sector 13 of the urban estate at Karnal under the provisions of the Punjab Urban Estate (Development and Regulation) Act, 1964, which was repealed by the Haryana Urban Development Authority Act, 1977. The said plot was subsequently transferred to the respondent herein, Shri Raj Singh Rana, as will be evident from the Letter dated 22-3-1974 addressed to the respondent by the Estate Officer, Urban Estate, Karnal.

3. In the said letter various conditions have been set out in respect of the said allotment, of which we are concerned with Conditions 1, 2, 3, 4, 8 and 15, which are reproduced hereinbelow:

"From

The Estate Officer,
Urban Estate,
Karnal

Transferred vide Memo No. E.O.(M)-76/5235 dated 1-10-1976 with Condition 16

To

Shri R.S. Rana
s/o Shri A.S. Rana,
VPO Garhi,
Distt. Sonepat

Memo No. 1664/718/14/E.O./K dated: 22-3-1974

Subject: Allotment of residential plot in the Urban Estate, Karnal.

Reference your application dated 25-9-1971 for the allotment of residential plot in the urban estate at Karnal.

1. Plot No. 718 measuring 14 marlas in Sector 13 of the urban estate at Karnal is hereby allotted to you. The total tentative sale price of said plot is ₹12,250 against which you have already deposited ₹6125 of the price mentioned in Part 1 above is Rs Nil.

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2. The plot is a preferential one and an additional price at the rate of 10 per cent of the price mentioned in Para 1 above is Rs Nil.

3. The total tentative sale price of this plot (normal plus preferential cost) is Rs Nil.

4. The above price of the plot is subject to variation with reference to the actual measurement of the plot as well as in case of enhancement of compensation of acquisition cost of land of this sector by the court or otherwise and you shall have to pay this additional price of the plot, if any, as determined by the Department within 30 days from the date of demand.

5.-7. * * *

8. Balance 50 per cent of the total tentative sale price shall be payable either in lump sum within 60 days from the date of issue of allotment letter without interest or in 2 equated instalments with interest at the rate of 7 per cent per annum. The first and remaining instalments of the balance amount together with interest at the rate of 7 per cent per annum on the unpaid amount of the total tentative sale price shall fall due to payment as under and no notice shall be served upon you to pay the same but in case an instalment is not paid on time, you will be served with a notice to pay the same within a month, together with a sum not exceeding the amount of the instalment as may be determined by the undersigned, by way of penalty. If the payment is not made within the said period of such extended period as may be determined by the undersigned, not exceeding three months in all from the date on which the instalment was originally due, the same will be recovered as an arrear or land revenue or action will be taken under Section 10 of the Punjab Urban Estate (Development and Regulation) Act, 1964:

No. of instalments	Due date on which the payment is to be made
First 2958.93 + 28.75 = 3387.68 (*sic* 2987.68)	21-3-1975
Second 3166.07 + 221.61 = 3387.68	21-3-1976
Third	
Fourth	
Fifth	
Sixth	

9.-14. * * *

15. This allotment is subject to the provisions of the Punjab Urban Estate (Development and Regulation) Act, 1964 and the Rules framed thereunder as amended from time to time and you shall have to accept and abide by them.

16.-17. * * *

sd/-
Estate Officer
Urban Estate
Karnal"

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4. There is no dispute that the entire amount, as initially computed as tentative sale price, was fully paid by the respondent, together with further amounts on account of enhanced compensation paid for the plot, on the basis of the demand notices issued to the respondent from time to time. The problem arose when in addition to the above, the Estate Officer, HUDA, Karnal, by his memo dated 15-6-2001 raised an additional demand of ₹71,800 by imposing simple interest @ 10 per cent per annum up to 31-3-1987, 15 per cent per annum up to 15-1-1988, compound interest @ 15 per cent up to 31-8-2000 and thereafter again simple interest @ 15% per annum up to 31-8-2001.

5. According to the respondent, the rate of interest as indicated in the allotment letter being 7 per cent simple interest per annum, the appellant had acted illegally in demanding interest at the higher rates indicated hereinabove and such demand being arbitrary could not be sustained.

6. Aggrieved by such demand, the respondent filed Complaint Case No. 591 of 2002 before the District Consumer Disputes Redressal Forum praying for refund of ₹35,200, which according to the respondent was the excess amount of interest charged over and above the rate of interest at 7 per cent indicated in the allotment letter. The respondent also prayed for interest @ 12 per cent on the refund amount from 2-11-2001, when the interest amount was demanded and paid under protest, until repayment.

7. The District Forum accepted the submissions made on behalf of the respondent herein and held that the appellants could charge interest only at the stipulated rate mentioned in the allotment letter, namely, 7 per cent per annum and directed the appellant to calculate the interest @ 7 per cent on the 3rd and 4th enhancements (*sic* instalments) and to refund the extra amount charged to the respondent complainant with interest at the rate of 7 per cent from the date of the complaint till its refund.

8. The decision of the District Forum was confirmed by the State Commission, and ultimately, the appellant herein took the matter in revision to the National Commission in RP No. 2217 of 2004. The National Commission, while confirming the view taken by the District Forum and the State Commission as to the rate of interest which could have been charged by the appellant, considered another aspect relating to charging of compound interest @ 15 per cent per annum from 16-1-1988 to 31-8-2000 and held that the appellant was not entitled to charge such compound interest.

9. It is against the said order of the National Commission that this appeal has been filed by the Haryana Urban Development Authority (hereinafter referred to as "HUDA").

10. On behalf of HUDA it was strenuously urged that the rate of interest @ 17 (*sic* 7) per cent per annum, as indicated in the allotment letter, was only with regard to default in payment of instalments for the tentative sale price and not as regards the additional amounts required to be paid in case of

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enhancement of compensation for acquisition cost of the land, for which no rate of interest had been stipulated.

11. It was submitted that on account of default in payment of the instalments of the enhanced compensation, on account of the low interest which was being charged, a decision was taken by HUDA on 15-1-1987 to increase the normal rate of interest to 10 per cent per annum and interest for the delayed payment of instalments to 18 per cent per annum, which would also include the normal interest of 10 per cent. It was submitted that it was on account of such revised policy that HUDA had charged interest at the rates indicated hereinbefore to ensure that instalments were paid in time. Apart from his aforesaid submissions, learned counsel for the appellant could not justify charging of compound interest as was done in the instant case.

12. It was urged that enhancement of rate of interest being a matter of policy to prevent default in payment of instalments the fora below had erred in co-relating the rate of interest mentioned in the allotment letter, which was only applicable in respect of default payment of instalments for the tentative price initially fixed, to the defaults committed in respect of the payment of the enhanced compensation on account of increase in the acquisition costs.

13. It was also submitted that since the rate of interest stipulated at 7 per cent per annum has no application to default in payment of enhanced compensation, the fora below had erred in directing that interest on the latter default be also charged at the stipulated rate of 7 per cent per annum. It is submitted that the understanding of the terms and conditions of the allotment letter and the decision rendered by the Consumer Forums on the basis thereof, was wholly erroneous and was liable to be set aside.

14. On behalf of the respondent it was contended that apart from the fact that the rate of interest demanded was arbitrary, it was also extremely high and ought not to have been levied from the date of allotment inasmuch as, the tentative sale price had been fully paid and such demand could not operate retrospectively; interest on the unpaid amount could, if at all, have been raised for periods only after the payment was made.

15. In addition it was submitted that it is well settled that when a contractual rate of interest has been agreed upon by the parties, no amount by way of interest in excess thereof could be raised. It was submitted that following the said principle, first the District Forum, and, thereafter, the State and National Commissions had awarded interests on the delayed instalments at the rate of 7 per cent per annum as mentioned in the allotment letter referred to above. It was contended that Condition 8 enumerated in the Letter dated 22-3-1974 written to the respondent by the Estate Officer, Karnal, would have to be considered and understood in such light. It is submitted that the orders of the Consumer Fora were in consonance with the provisions of the allotment letter and did not, therefore, warrant any interference by this Court and the appeal was liable to be dismissed.

16. Having heard learned counsel for the parties and having perused the documents relied upon by them, we are of the view that the width of the

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dispute is rather narrow, being confined only to the question as to whether it was within the competence of the appellant to charge interest on delayed payments at the rate at which it has been charged and whether compound interest could have been charged without there being any mutual agreement between the parties to that effect.

17. The concept of levying or allowing interest is available in almost all statutes involving financial deals and commercial transactions, but the provision empowering courts to allow interest is contained in the Interest Act, 1978, which succeeded and repealed the Interest Act, 1839. Section 3 of the said Act, inter alia, provides that in any proceeding for the recovery of any debt or damages or in any proceeding in which a claim for interest in respect of debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the periods indicated in the said section.

18. What is important is the mention of allowing the interest at a rate not exceeding the current rate of interest. Such a provision is, however, excluded in respect of the interest payable as of right by virtue of any agreement as indicated in sub-section (3) of Section 3. In other words, where there is an agreement between the parties to payment of interest at a certain stipulated rate, the same will have precedence over the provision contained in sub-section (1) which provides for the court to allow interest at a rate not exceeding the current rate of interest.

19. Yet another provision which is basic in its operation is contained in Section 34 of the Code of Civil Procedure which also, inter alia, provides that where and insofar as a decree is for the payment of money, the court may in the decree order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged, from the date of the suit, till the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding 6 per cent per annum as the court may deem reasonable on such principal sum from the date of the decree till the date of payment or to such earlier date as the court thinks fit.

20. The rates of interest charged by the appellant, purportedly in accordance with its policy decisions, appear to have been influenced by the provisions of the Interest Act and also the Code of Civil Procedure on the supposition that the payment of additional price on account of enhancement of compensation was not covered by the provisions of the allotment letter relating to payment of interest. The views expressed by the District Forum have been accepted by the State and National Commissions.

21. It is no doubt true that the law relating to allowing interest and the rates thereof has been considered and settled in *Ghaziabad Development Authority* v. *Balbir Singh*[1] which has since been followed in various subsequent decisions. The said decision was also one rendered under the

1 (2004) 5 SCC 65

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provisions of the Consumer Protection Act, 1986, though in the said case it was a reverse situation in which the authorities were held to be liable to compensate for misfeasance in public office. In the said case interest was allowed @ 18% per annum which was unacceptable to this Court which observed that the power to award compensation does not mean that irrespective of the facts of the case, compensation can be awarded in all matters at a uniform rate of 18 per cent per annum. This Court noticed that the National Forum had been awarding interest at a flat rate of 18 per cent per annum irrespective of the facts of each case. The same was held to be unsustainable. In the said state of facts this Court observed in para 8, as follows: (SCC p. 80)

> "8. However, the power and duty to award compensation does not mean that irrespective of facts of the case compensation can be awarded in all matters at a uniform rate of 18% per annum. As seen above, what is being awarded is compensation i.e. a recompense for the loss or injury. It therefore necessarily has to be based on a finding of loss or injury.... No hard-and-fast rule can be laid down, however, a few examples would be where an allotment is made, price is received/paid but possession is not given within the period set out in the brochure. The Commission/Forum would then need to determine the loss. Loss could be determined on basis of loss of rent which could have been earned if possession was given and the premises let out or if the consumer has had to stay in rented premises then on basis of rent actually paid by him. Along with recompensing the loss the Commission/Forum may also compensate for harassment/injury, both mental and physical. Similarly, compensation can be given if after allotment is made there has been cancellation of scheme without any justifiable cause."

Applying the aforesaid principle laid down in the aforesaid case, it was the duty of the Consumer Fora to consider the circumstances of the case and keep in mind the provisions of Section 3 of the Interest Act in awarding the high rate of interest, without linking the same to the current rate of interest.

22. As was mentioned in *Balbir Singh case*[1] and, thereafter in *HUDA* v. *Prem Kumar Agarwal*[2]; *Bihar State Housing Board* v. *Arun Dakshy*[3]; *HUDA* v. *Manoj Kumar*[4] and *Krishna Bhagya Jala Nigam Ltd.* v. *G. Harischandra Reddy*[5] the rate of interest is to be fixed in the circumstances of each case and it should not be imposed at a uniform rate without looking into the circumstances leading to a situation where compensation was required to be paid.

23. In the instant case, the provision of the allotment Letter dated 22-3-1974 appears to have been wrongly interpreted by the Consumer Fora since the stipulated rate of interest only takes into consideration payment of

2 (2008) 17 SCC 607 : (2008) 1 Scale 484
3 (2005) 7 SCC 103
4 (2005) 9 SCC 541
5 (2007) 2 SCC 720

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the total tentative sale price while Condition 4 of the allotment letter mentions that the total tentative sale price was subject to variation in certain circumstances and that the allottee would have to pay an additional price for the plot as a consequence thereof. It does not mention that interest at the rate of 7 per cent per annum would be payable also in respect of the additional price required to be paid on account of increase of the acquisition cost. The said position is further clarified by Condition 8 which also speaks of payment of the total tentative sale price and the rate of interest at 7 per cent per annum on the instalments to be paid in respect thereof. There is nothing further in the agreement which provides for the rate of interest to be levied on the additional price on account of the enhancement of the acquisition cost.

24. On such score we are inclined to agree with the learned counsel for the appellant that the appellant was entitled, even in terms of the allotment letter to charge interest on balance dues at a rate which was different from that stipulated in the allotment letter. At the same time, we are in agreement with the views expressed in *Balbir Singh case*[1] which give an indication of the matters which are required to be considered by the courts while granting interest where there is no mutual understanding or agreement with regard to the rate of interest that could be charged. While we also agree that for unpaid dues the appellant is entitled to charge interest, such an exercise will have to be undertaken within the parameters of circumstances and reason and the rate of interest should not be fixed arbitrarily. In the decisions referred to hereinabove, this Court has sounded a note of caution that rates of interest fixed by the courts must not be arbitrary and should take into account the current bank rates which in recent years have shown a tendency to slide downwards. In fact, in many of the aforesaid cases, the rate of interest has been reduced substantially.

25. In the aforesaid circumstances, even though the rate of interest indicated in the allotment Letter dated 22-3-1974 may not have application as far as payment of the additional price is concerned, the District Forum has erred on the side of reason and has allowed interest at the rate of 7 per cent per annum upon holding that the demand made by the appellant at the higher rate was contrary to the mutual agreement contained in the allotment letter.

26. In our view, even though a policy may have been adopted by the appellant for imposing a deterrent rate of interest on defaults committed by allottees in payment of their dues, such imposition has to be in keeping with the provisions of Section 3 of the Interest Act, 1978 and not in an unreasonable manner. It may perhaps be even more pragmatic if a condition regarding charging of interest at the prevailing banking rates were included in the allotment letters, having regard to the provisions of sub-section (3) of Section 3 of the said Act.

27. We, therefore, allow this appeal, set aside the order dated 10-3-2004 passed by the District Forum, Chandigarh in Complaint Case No. 591 of 2002, as affirmed by the State Commission, Chandigarh, on 9-7-2004 and the order passed in revision by the National Commission on 19-11-2004, which

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is the subject-matter of this appeal, and quash the additional demand of ₹71,800 raised on behalf of the appellant vide Memo No. E.O. 8682 dated 15-6-2001 and direct that the appellant will be entitled to impose simple interest on the basis of the prevailing current rate of interest for the purpose indicated in Para 6 of the complaint filed by the respondent (Complaint Case No. 591 of 2002) before the District Forum, Chandigarh. Such a computation is to be completed within a month from the date of receipt of this order. Since we have been informed at the Bar that the entire amount by way of additional demand has been deposited upon protest, any amount which is in excess of the amount to be computed on the basis of this order, shall be refunded to the respondent within two weeks of such computation.

28. In the facts and circumstances of the case, the parties will bear their own costs.

(2009) 17 Supreme Court Cases 208

(BEFORE DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.)

ABUTHAGIR AND OTHERS . . Appellants;

Versus

STATE REPRESENTED BY INSPECTOR OF POLICE, MADURAI . . Respondent.

Criminal Appeal No. 26 of 2007†, decided on May 8, 2009

A. **Penal Code, 1860 — S. 302 r/w S. 34, S. 120-B & S. 148 — Conviction confirmed — Accused alleged to have come on motorcycles and assaulted deceased with knives and sickles killing him on spot — PWs 3 and 4 who were eyewitnesses to occurrence identifying accused — PWs 3 and 4 were independent and natural witnesses and their testimony found credible — Incident occurred in broad daylight and they were witnesses to the occurrence from very near — Hence, no infirmity in their identification of accused — Recoveries at instance of accused proved by PWs 10, 19 and 22 — Minor discrepancy in evidence of PWs 3 and 4 as regards arrival of accused motor riders found trivial and not corroding their credibility — Hence, impugned judgment upholding conviction of appellants calls for no interference — Case law pertinent to criminal conspiracy discussed — Criminal Trial — Appreciation of evidence — Credibility of witness**
(Paras 30 to 33 and 38 to 40)

Kehar Singh v. *State (Delhi Admn.)*, (1988) 3 SCC 609 : 1988 SCC (Cri) 711; *State of Bihar* v. *Paramhans Yadav*, 1986 Pat LJR 688; *State of Maharashtra* v. *Som Nath Thapa*, (1996) 4 SCC 659 : 1996 SCC (Cri) 820; *Baburao Bajirao Patil* v. *State of Maharashtra*, (1971) 3 SCC 432 : 1971 SCC (Cri) 680; *Shivnarayan Laxminarayan Joshi* v. *State of Maharashtra*, (1980) 2 SCC 465 : 1980 SCC (Cri) 493, *cited*

B. **Criminal Trial — Appreciation of evidence — Generally — Held, in appreciating evidence approach of court must be integrated and not truncated or isolated — Court must analyse and assess the evidence by**

† From the Judgment and Order dated 10-7-2006 of the Hon'ble High Court of Madras, Madurai Bench in Crl. A. No. 953 of 2003