

Hind Builders

Vs

Union of India

With

Union of India

Vs

Hind Builders

Civil Appeals Nos. 1280 and 1281 of 1988

(S. Ranganathan, A. M. Ahmadi JJ)

24.04.1990

JUDGMENT

RANGANATHAN, J. -

1. These are cross-appeals by M/s. Hind Builders (hereinafter referred to as 'the contractors') and the Union of India, from an order of Division Bench of the Calcutta High Court in an arbitration matter.

2. The contractors had been awarded contract for the execution of certain civil works in connection with the Metro Railway Project in Calcutta. Certain disputes arose between the Union and the contractors. These disputes were referred for decision to two arbitrators appointed by the High Court of Calcutta. The arbitrators entered upon the reference on June 27, 1983. The contractors had filed a claim before the arbitrators for a sum of Rs. 2,05,67,554. On March 26, 1984 the arbitrators awarded a sum of Rs. 57,47,198 to the contractors.

3. The claim of the contractors filed before the arbitrators was an itemised claim in respect of various items of works executed by them. The body of the award made by the arbitrators reads as follows :

"We ..... make and publish our award, as below :-

(i) that the respondent ..... shall pay ..... the contractors a sum of Rs. 57,47,198 .... only in full an final settlement of all their claims and dues under the abovementioned contract agreement. In addition, the three bank guarantees .... issued by Vijaya Bank, Cuttack, on behalf of the contractors, in favour of Metro Railway, Cuttack, shall be released by the respondent Railway, as detailed in the annexure to this award.

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The award shall be complied with within 60 (sixty) days from the date of publication of this award, failing which simple interest @ 11 per cent per annum on the amount

of the award (excluding interest vide Item (1) of the annexure i.e. Rs. 6,76,540) shall accrue till the date of payment of decree upon award whichever is earlier."

In the annexure to the award, the arbitrators tabulated the various items of the claim before them, the amount claimed against each item and the amount awarded against each item. Under Item (1) in the annexure, the arbitrators had awarded an interest of Rs. 6,76,540 and that is why the direction regarding interest by the arbitrators excluded this amount from the principle amount which was to bear interest. As stated earlier, the total amount awarded was Rs. 57,47,198 in respect of Items (a) to (q) of the award as against the claim of Rs. 2,05,67,554 made by the contractors.

4. On an application being made to the High Court of Calcutta on the original side for making the award a rule of court, the learned single Judge sitting on the original said confirmed the award except to the extent of Rs. 5,20,000. This is no longer in issue. The learned Judge, however, concluded his judgment with the following words :

"The principal sum awarded stands reduced by Rs. 5,20,000 as mentioned above. The respondent will be entitled to interest at the rate of 11 per cent per annum from the date of reference till the date of the award."

5. The Union of India preferred an appeal from the order of the learned single Judge. The Division Bench was of the opinion that the arbitrators were not justified in awarding a sum of Rs. 23,96,000 to the contractors (as against a claim of Rs. 42,65,957 made by them) in respect of item (c)(xii) viz. "cost towards consolidation of earth by ramming and rolling" and that they could have awarded under the contract only a sum of Rs. 2,39,600 in respect of this item. The amount awarded to the contractors was thus further reduced by the Division Bench by a sum of Rs. 21,56,400 (Rs. 23,96,000 - Rs. 2,39,600). The bench then observed that the principal sum to be awarded to the contractors would now stand at Rs. 30,70,798 and directed that the respondent contractor should be entitled to interest at the rate of 11 per cent per annum on the said amount from the date of the reference till the date of the award.

6. The contractors have appealed from the order of the Division Bench being aggrieved by the reduction of the amount awarded under Item (c)(xii) to Rs. 2,39,600 from Rs. 23,96,000. The Union of India has preferred an appeal contending principally that, since the principal amount on which the arbitrator awarded interest was not Rs. 57,47,198 but only Rs. 50,70,658 (i.e. Rs. 57,47,198 - Rs. 6,76,540), the contractors would be entitled to interest, after the judgment of the Division Bench, not on Rs. 30,70,798 as held by the Division Bench but only on Rs. 23,94,258. In addition, at the time of the hearing before us, counsel for the Union of India raised two further points :

(1) that the Division bench erred in awarding interest to the contractors from the date of the reference till the date of the award.

(2) that though the arbitrators had also awarded interest on the principal sum till the date of payment, the contractors should now be held entitled to interest only up to the date of the award because the learned Single Judge and the Division Bench have held so and the contractors have preferred no appeal therefrom.

7. Taking up the contractors' appeal first, the point raised falls within a very narrow compass and turns on the interpretation of Item No. 4.09 of the annexure to the contract containing the schedule of rates. This item reads as follows :

#Item No. Brief Approximate Unit of Rate of description Qty. payment payment in of work 'words' and "figures" Rs. P1 2 3 4 54.09(a) Earthwork 2,35,000 10 cubic Rs. 180 in open cubic metres meters (Rupees excavation One hundred for forming eighty only) garbage takes in all kinds and conditions of soils up to depths varying from 0 to 3 metres from the existing ground level and disposing of the spoils so as to raise land required for piling work, to fill up the existing low lying areas and ponds, to form embankments for roads, etc. of the car depot complex including spreading in layers, breaking clods, levelling, dressing, all lifts/descents and all leads etc. complete. Note : No extra payments will be made if wet excavation is met with or for baling/pumping out of water of all sorts including rain water.(b) Extra over 1,35,000 10 cubic Rs. 20 Items (a) cubic metres (Rupees above, for metres twenty only consolidation of the filled up areas or some of the top layers of the filled up areas or road embankment portions by watering and ramming/rolling as directed.##

In respect of these items the statement of claim filed on behalf of the contractor was in the following terms :

(b) Earthwork in excavation measured but not paid in full : That under agreement Item No. 4.09(a) the claimants as per instructions specifications and agreement excavated earthwork in open excavation for forming garbage tanks in all kinds of soil for a quantity of 2,15,000 cum and thereafter the contract was rescinded against which reduced quantity has been measured provisionally up to 17th CC bill for 2,09,523 cum measured on May 24, 1982 and as per the said measurements the claimants are yet to be paid for a quantity of 5477 cum over and above the payments already made upto 17th CC. The claimants claim payment for 5477 cum of excavation @ Rs. 18 per each cum amounting to Rs. 98,586.

Claim Amount Rs. 98,586

(c)(xii). Cost towards consolidation of earth ramming and rolling. - That as per agreement Item No. 4.09(b) the claimants are required to fill up the low lying areas etc. as specified under General Conditions of the Contract at para 3.05 with the excavated spoils obtained out of earthwork in excavation under agreement Item No. 4.09(a). The payment for earthwork in open excavation for work executed under agreement Item, No. 4.09(a) is to be made on sectional measurements calculated by level sections. The excavated earth obtained from garbage excavation, a quantity of 2,15,000 cum as per provisions made in agreement Item No. 4.09(b) was consolidated in differently areas as per instructions and approved plain. The claimants claim payment for this quantity of consolidation at Rs. 20 per cum i.e. Rs. 2 extra over Rs. 18 per cum as specified in agreement Item Nos. 4.09(a) and (b), amounting to Rs. 43,00,000 against which payment has been made in CC bills for reduced quantity and amount of Rs. 34,043. The claimants claim payment for the balance amount of Rs. 42,65,957 not paid for.

Claim Amount Rs. 42,65,957

In other words, the contractors claimed payment at the rate of Rs. 18 per cubic metre in respect of the excavation work done by them under Item No. 4.09(a). Again, in respect of the same quantity of 2,15,000 cubic metres, the contractors made a claim at Rs. 20 per cubic metre as the amount payable

to them in respect of the consolidation of excavated earth by ramming and rolling. The Division Bench was of the view that under Item No. 4.09 (b), the contractors were entitled to an additional payment of Rs. 2 only, since the contractors had already been paid at the rate of Rs. 18 per cubic metre in respect of the excavation done by them. The extra charges for ramming and rolling were payable only at the rate of Rs. 2 per cubic metre instead of Rs. 20 per cubic metre. The Division Bench accordingly scaled down the amount awarded by the arbitrator in this regard to one tenth of the amount awarded by him.

8. It is submitted on behalf of the contractors that the rate payable for the work under Item No. 4.09(b) of the contract was not at all in dispute between the parties at any stage. The Union has not raised any plea in this regard in its reply to the contractors' claim, in the objections to the award filed in the High Court or in the arguments before the learned Single Judge. Clearly, the Division Bench travelled beyond the limits permissible for the interference with an award by a court of law in reducing the amount awarded on this account. It is pointed out that the award itself is a non-speaking award. The award does not refer to the terms of the contract or incorporate the details of the claims made by the contractors. Though it is true that the arbitrators awarded a sum of Rs. 23,96,000 against Item (c)(xii), they have not given reasons therefore. The award neither shows that the amount has been worked out at the rate of Rs. 20 per cubic metre nor does it show that quantity in respect of which the amount has been worked out. There is no reference to the terms of the contract or to the Item No. 4.09 clause (a) or (b). No reasons have been given by the arbitrators for determining that a sum of Rs. 23,96,000 has to be paid to the contractors under Item (c)(xii). It is therefore submitted that there was no error apparent on the face of the record. Learned counsel vehemently contended that it is now settled law that an award cannot be said to suffer from a manifest error unless the error appears on the face of the award or of some document incorporated in the award. Reference is made to the decisions of this Court in the following cases : Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore ((1967) 1 SCR 105 : AIR 1967 SC 1030) Allen Berry & Co., Ltd. v. Union of India ((1971) 1 SCC 295 : (1971) 3 SCR 282), N. Chellappan v. Secretary, Kerala State Electricity Board ((1975) 1 SCC 289 : (1975) 2 SCR 811), Hindustan Tea Co. v. K. Shashikant Co. (1986 Supp SCC 506), Hindustan Steel Works Construction Ltd. v. C. Rajasekhar Rao ((1987) 4 SCC 93) and Sudarsan Trading Co. v. Government of Kerala ((1989) 2 SCC 38). According to the contractors, what the Division Bench has done is to give its own interpretation to Item Nos. 4.09(a) and (b) of the contract, to read an erroneous interpretation of the said item into that award made by the arbitrators and to substitute its opinion in the place of that given by the arbitrators. This, it is submitted, runs quite contrary to the principles enunciated in the above decisions and should, therefore, be set aside.

9. On the other hand, Shri Milon Banerjee, learned counsel for the Union of India submitted that the award is really a speaking award insofar as it does specifically the amount granted in respect of each item of claim. He submitted that the present case falls within the principle enunciated in Alopri Prasad & Sons Ltd. v. Union of India ((1960) 2 SCR 793 : AIR 1960 SC 588), which has been taken note of in the case of Sudarsan Trading Co. v. Government of Kerala ((1989) 2 SCC 38), at SCC p. 54 that an award which overlooks or ignores the terms of the contract is bad. He also made a reference to the decision of the Delhi High Court in Delhi Development Authority v. Bhagat Construction Co.(p) Ltd. (AIR 1984 Del 358 : (1983) 24 DLT 256), in this context. He also referred to a decision of the Punjab High Court in Union of India v. Bakhshi Ram ((1957) 59 Punj LR 572 (Punj HC)) holding that :

"... when there are pleadings in an arbitration and they are specifically referred to in the award so that it cannot be understood without reference to them, then those

pleadings are incorporated in the award and they must be included in the consideration whether there is any error apparent on the face of the award" and that "if a lump sum is awarded by an arbitrator and it appears on the face of the award or is proved by extrinsic evidence that in arriving at the lump sum matters were taken into account which the arbitrator has no jurisdiction to consider, the award is bad."

The contention of Shri Banerjee is that the annexure to the award clearly incorporates the statement of claim made by the contractors. Since in turn the statement of claim refers to the clauses of the contract, the contract should also have been treated as incorporated in the award. It is also apparent on the face of the award, insofar as it relates to Item No. (c)(xii), that the arbitrators have awarded payment at Rs. 20 per cubic metre under Item No. 4.09(b) whereas it must obviously be at Rs. 2 per cubic metre. According to the learned counsel, the decisions relied upon by him clearly show that as award which ignores or overlooks the express terms of a contract suffers from an error apparent on the face of the record and can be set aside by this Court. He submitted that the award, read with annexure, brings out the reasoning of the arbitrators and that an error therein can be rectified by the court. The arbitrators had no power to travel beyond the authority, of the contract and, in order to determine whether they had exceeded their authority, the contract can be looked into by the court. In support of this contention, the learned counsel also referred to a passage at page 421 in the Law of Arbitration by Bachawat (2nd edn.)

10. We have considered the respective contentions of the parties and we are of the opinion that the Division Bench erred in setting aside the award insofar as it related to the sum of Rs. 25,96,000. Though the annexure sets out the award of the arbitrators as against various items of claims, the mere enumeration of the heads of claim cannot be equated to an incorporation of the statement of claim by the contractors into the award. At any rate, the award does not relate the claims to the various clauses of the contract and the mere fact that the statement of claim refers to various items in the schedule to the contract does not result in the contract itself being incorporated as part of the award. No error can be found in the award unless one reads into it first the statement of claim and then the relevant clauses of the contract. But this cannot be done unless these documents are treated as incorporated in the award. This cannot be done. That apart even if the contract can be read into the award, we doubt whether this case can be treated as one of an error on the face of the award. All that the award has stated is that for the extra work involved in ramming and rolling, the contractors were to be paid a sum of Rs. 23,96,000. The award does not mention how this amount is arrived at. There is no mention of the quantity in respect of which this is awarded nor the rate at which the payment has been calculated. It is, however, pointed out that contractors had claimed payment at the rate of Rs. 20 per cubic metre in respect of 2,15,000 cubic metres and that, even if it is assumed that the ramming and rolling had been done in respect of the entire volume of 2,15,000 cubic metres, the contractors could have, on a proper construction of the contract, been awarded only a sum of Rs. 4,30,000 and nothing more. Obviously, the award is calculated at Rs. 20 per cubic metre in respect of 1,19,800 cubic metres. It is clear, says counsel for the Union, that the volume of the item for which payment has to be made has been cut down but the amount has been calculated at Rs. 20 per cubic metre which exceeds the amount of Rs. 2 stipulated in the contract and this is erroneous on the face of it.

11. We are afraid that, in putting forward this contention, the respondents are really trying to analyse the reasons of the arbitrator for making the award under this head when no such reasons have been stated in this award. In fact, it does not necessarily follow that the payment has been directed at the rate of Rs. 20 per cubic metre in respect of 1,19,800 cubic metre. Theoretically, it could have been awarded, in respect of the entire volume of 2,15,000 cubic metre, at the rate of Rs. 11 and odd per

cubic metre. It is, however, clear that the payment has been granted at a rate in excess of Rs. 2 per cubic metre. We shall, however, take it that the arbitrators have awarded at the rate of Rs. 20 per cubic metre in respect of this item of work for, as pointed out by Dr. Ghosh, the Union of India had never put forward the case either before the arbitrator or before the learned Single Judge that the contractors were not entitled to payment at the rate of Rs. 20 per cubic metre as claimed and it was before the Division Bench for the first time that a question arose that the payment for the item should be at Rs. 2 and not Rs. 20 per cubic metre. Whether the payment should be made at the rate of Rs. 20 per cubic metre or at Rs. 2 per cubic metre will depend upon a proper interpretation of the contract. It is argued that the main item of work viz. excavation and distribution of the excavated work has been paid for under Item No. 4.09(a) and that Item No. 4.09(b) envisages an additional payment of Rs. 2 per cubic metre if the excavated soil, instead of being loosely distributed, is rammed and rolled by applying some pressure. This seems, prima facie, a plausible interpretation of Item No. 4.09(b). But we cannot assume, in the absence of any evidence or expert knowledge, that the ramming and rolling was not an independent, heavy or cumbersome piece of work and merely involved a minor addition to the work under item No. 4.09(a). On the other hand, in the grounds of appeal filed by the contractors it is contended :

"The High Court failed to appreciate that the process of ramming and rolling is a very expansive specialized process as it has to be done layer by layer not exceeding six inches at a time and requires watering, breaking of clods and use of specialised road rollers, bulldozers and other equipment. The work of ramming and rolling is much more expensive than that of earth excavation provided for in Item No. 4.09(a). The High Court further failed to appreciate that in its reply to the statement of claim of the petitioner, respondent 1 had not disputed that the rate applicable for ramming and rolling was Rs. 20 per cubic metre. Respondent 1 had only raise a dispute with regard to the quantity of the ramming and rolling done by the petitioner. The High Court misinterpreted the contract and erred in reducing the award for ramming and rolling by erroneously applying the rate of Rs. 2 per cubic metre."

This may be right or wrong but this is also a plausible view. Unfortunately, this was an aspect not urged before, or considered by, the arbitrators. There was no evidence before the arbitrators or material adduced before the court as to the nature of these operations. It is difficult to say, by merely reading the terms of contract that the arbitrators have erroneously interpreted the terms of the contract. It is not without significance that the departmental officers did not dispute the rate of the claim. Equally, the arbitrators were experienced engineers and would not have passed, what is now said to be, an astounding claim without thought. It is difficult to assume that all these persons have overlooked that the contractor had already been paid at Rs. 18 under Item No. 4.09(a) especially when it is so stated on the face of the claim. This, therefore, is not a case where the arbitrators can be said to have ignored or overlooked a term of the contract; on the contrary, they have acted upon a particular interpretation of certain clauses of the contract on which two views are possible. This case certainly cannot be brought under the principle that the arbitrators have ex facie exceeded the authority or jurisdiction conferred on them by the contract. At worst, what can be said is that they may have committed an error in deciding the issue referred to them but the error is not apparent on the face of the award even if the contract is read a part of it both because the arbitrators have not given their reasoning and because the view taken by them of the relevant terms of the contract cannot be said to be clearly erroneous. In a matter on which the contract is open to two equally plausible interpretations, it is legitimate for the arbitrators to accept one or the other of the available interpretations and, even if the court may think that the other view is preferable, the court will not and should not interfere. This view is too well settled to need any reference to any precedent other

than Sudershan Trading Co. case ((1989) 2 SCC 38) referred to earlier. That is why we think that this case does not fall within the principle referred to by Shri Banerjee and that Dr. Ghosh is right in his submission that the Division Bench exceeded its jurisdiction in interfering with this part of the award.

12. Turning now to the appeal of the Union of India, there is really no dispute about the first contention regarding the amount on which interest is payable to the contractors. The correct computation should stand as follows in the light of our findings in the contractors appeal :

# Rs. Compensation awarded by 57,47,198 arbitrator Less : Interest element therein 6,76,540 [Item (1)] Net principal amount awarded 50,70,658 Less : Amount deleted by learned 5,20,000 Single Judge 45,50,658##

The contractors will be entitled to interest on this amount.

13. What is the period with reference to which interest would be payable on the above amount ? The arbitrators had allowed interest on the amount awarded by them from October 5, 1982 to March 26, 1984 under Item (1) and had also allowed interest from the date of the award till the date of payment or decree, whichever is earlier. Of this, the learned Single Judge had deleted the interest for the period October 5, 1982 to May 6, 1983 and what remains is the award of interest from May 6, 1983 till the date of payment. There are two disputes as to this. The first objection raised on behalf of the Union is that the counteracts will not be entitled to any interest for the period from the date of reference to arbitration (May 6, 1983) till the date of the award (March 26, 1984). On behalf of the contractors, Dr. Ghosh refutes this contention. He relies upon the decision of this Court in Executive Engineer v. Abhaduta Jena ((1988) 1 SCC 418) and contends that, in all cases where, as in this case, arbitrators are appointed by court and disputes referred to them for arbitrator, pendente lite interest can should be awarded by the arbitrator. He pints out that, though initially in Seth Thawardas case (Seth Thawardas pherumal v. Union of India, (1955) 2 SCR 48 : AIR 1955 SC 468) some doubts were raised about the competence of the arbitrator to award interest, this Court has subsequently consistently held that an arbitrator can do this : vide, Nachippa Chettiar v. Subramaniam Chettiar ((1960) 2 SCR 209 : AIR 1960 SC 307), Satinder Singh v. Amrao Singh ((1961) 3 SCR 676 : AIR 1961 SC 908), Furim Madanlal v. Hukamchand Mills Ltd. ((1967) 1 SCR 105 : AIR 1967 SC 1030), Union of India v. Bungo Steel Furniture P. Ltd. ((1967) 1 SCR 324 : AIR 1967 SC 1032), Ashok Construction Co. Ltd. v. Union of India ((1971) 3 SCC 66) and State surf M. P. v. Saith & Skelton P. Ltd. ((1972) 1 SCC 702 : (1972) 3 SCR 233) After referring to these and other cases, Chinnappa Reddy, J. in Abhaduta Jena ((1988) 1 SCC 418) summed up the position thus : (SCC pp. 432-34, Paras 15, 16 and 18)

"As a result of the discussion of the various cases, we see that Bengal Nagpur Railway Co. Ltd. v. Ruttanji Ramji (65 IA 66 : AIR 1938 PC 67), Union of India v. West Punjab Factories ((1966) 1 SCR 580 : AIR 1966 SC 395) and Union of India v. Watkins Mayor & Co. (AIR 1966 SC 275), 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 those 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 retrain instrument. In regard to pendente lite interest, the provision of the Civil Procedure Code governed the same.

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 ((1960) 2 SCR 209 : AIR 1960 SC 307), Satinder Singh v. Amrao Singh ((1961) 3 SCR 676 : AIR 1961 SC 908), Firm Madanlal Roshanlal Mahajan v. Hukamchand Mills Ltd. ((1967) 1 SCR 105 : AIR 1967 SC 1030), Union of India v. Bungo steel Furniture Pvt. Ltd. ((1967) 1 SCR 324 : AIR 1967 SC 1032), Ashok Construction Co. Ltd. v. Union of India ((1971) 3 SCC 66) and State of Madhya Pradesh v. Saith & Skelton Pvt. Ltd. ((1972) 1 SCC 702 : (1972) 3 SCR 233), were all cases in which the reference to arbitration was made by the court, of all 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 Civil Procedure Code in Nachiappa Chettiar v. Subramaniam Chettiar ((1960) 2 SCR 209 : AIR 1960 SC 307), Firm Madanlal Roshanlal Mahajan v. Hukamchand Mills Ltd. ((1967) 1 SCR 105 : AIR 1967 SC 1030) Union of India v. Bungo Steel Furniture Pvt. Ltd. ((1967) 1 SCR 324 : AIR 1967 SC 1032), and State of Madhya Pradesh v. Saith & Skelton Pvt. Ltd. ((1972) 1 SCC 702 : (1972) 3 SCR 233) 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.

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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."

14. Sri Milon Banerjee, appearing for the Union of India, however, contends that the above principle is applicable only in cases where an arbitrator is appointed on intervention of court as contemplated in Chapter IV of Arbitration Act. It is only in these cases that the arbitration proceedings can be considered to be a continuation of the court proceedings, empowering the arbitrator to do all that the court could do. For, even in cases arising after the Interest Act, 1978, the award of pendente lite interest can only be in terms of the provisions of Section 34 of the Code of Civil Procedure and this cannot be invoked in cases of arbitration except in cases falling under Chapter IV merely on the ground that the appointment of the arbitrator is made under Section 8, 12, or 20 of the said Act. Counsel submits that Chinnappa Reddy, J. has pointed out in Abhaduta Jena

case ((1988) 1 SCC 418) (SCC pp. 434-35) that in all cases whether arising before or after the Interest Act, the claimants would not be entitled to interest from the date of reference to the date of the award for the simple reason that "the arbitrator is not a court nor were the references to arbitration made in the course of suits". It is this; principle that has been reiterated in Food Corporation of India v. Surendra, Devendra & Mohendra Transport Co. ((1988) 1 SCC 547, 554 et seq) and Gujarat Water Supply & Sewage Board v. Unique Erectors (Gujarat) (P) Ltd. ((1989) 1 SCC 532)

15. There is force in the contention urged by Sri Banerjee. There are passages in Abhaduta Jena ((1988) 1 SCC 418) which indicate that the grant of pendente lite interest would be justified only when the reference to arbitration is made in the course of a suit : vide, the last sentence on page 428, the first sentence on page 429, the emphasis added in the extracts from earlier judgments on pages 430-31, and the summings up at pages 433 and 435. The principle indicated in these passages apparently is that since a court has, under Section 34, of the CPC, power to grant pendente lite interest in a suit, an arbitrator to whom reference to arbitration is made in the course of the suit would be clothed with all the powers of the court including the one to grant such interest. This is how this Court has also looked at the matter in a subsequent case. In State of Rajasthan v. R. S. Sharma & Co. ((1988) 4 SCC 353), the parties had entered into a compromise in certain proceedings in court agreeing that their disputes would be settled by arbitration but the arbitrators were appointed subsequently by the parties themselves and a reference made to them. A bench of this Court (of which one of us was member) reviewed the earlier cases and explained the decision in Abhaduta Jena ((1988) 1 SCC 418) thus : (SCC pp. 357-58, paras 12 and 13)

"This was awarding interest pendente lite. This is in violation of the principles enunciated by this Court in Executive Engineer (Irrigation), Basimela v. Abhaduta Jena ((1988) 1 SCC 418). Our attention was drawn by Shri Soli J. Sorabjee, counsel for the respondent, to the decision of this Court in Food Corporation of India v. Surendra, Devendra & Mohendra Transport Co. ((1988) 1 SCC 547, 554 et seq) where at pages 555-56 of the report, the court referred to certain decisions cited by Chinnappa Reddy, J. in Executive Engineer (Irrigation) ((1988) 1 SCC 418) in which he had expressed the view that those were cases in which the references to arbitration were made by the court or in court proceedings of the disputes in the suit. In that context it was held in those cases that the arbitrator had power to grant interest. It was contended before us that this was a similar case. There was a court proceeding in this case regarding the appointment of the arbitrator and, as such, on the same analogy it should be treated that the arbitrator had power to grant interest. We are unable to accept this.

What Mr. Justice O. Chinnappa Reddy meant to say by the latter judgment in Executive Engineer (Irrigation) case ((1988) 1 SCC 418), referred to in Food Corporation of India ((1988) 1 SCC 547, 554 et seq) was where the disputes regarding the merit of the case were pending in the court and such disputes instead of being decided by the court, adjudication had been referred to an arbitrator by the court, in such cases the arbitrators deciding in the place of court, would have the same powers to grant interest pendente lite as the courts have under Section 34 of the Civil Procedure Code. Instant case is not such a proceeding."

This principle would logically be applicable, as rightly contended by Shri Banerjee, only to cases where the reference to arbitration in rises in the course of a suit.

16. Dr. Ghosh, however, submits that, except for *Nachiappa Chettiar v. Subramaniam Chettiar* ((1960) 2 SCR 209 : AIR 1960 SC 307) and *Hukumchand Mills* ((1967) 1 SCR 105 : AIR 1967 SC 1030), the other cases referred to by Chinnappa Reddy, J. were all only cases in which an arbitrator had been appointed under Section 8 or Section 20 of the Arbitration Act. The principle enunciated, he submits, was actually a little wider than that contended for by Shri Banerjee. It is this that where an arbitrator is appointed by the court and a reference is made to him, he has all the powers of the court. He invites attention to the observation in *Hukumchand Mills* case ((1967) 1 SCR 105 : AIR 1967 SC 1030), reiterated (in the context of post-award interest) in *Union of India v. Bungo Steel Furniture P. Ltd.* ((1967) 1 SCR 324 : AIR 1967 SC 1032) (SCR p. 329) that it is "an implied term of the reference that the arbitrator will decide the dispute according to law and would give such relief with regard to pendente lite interest as court could give if it decided the dispute". He urges that *Abhaduta Jena* ((1988) 1 SCC 418) related to a batch of cases, arising out of references made prior to, and later than, the commencement of the Interest Act, 1978, but by the parties themselves under the terms of the contract, without reference to court and so it was held that pendente lite interest could not be granted. But that is not so in the present case. He says that this decision was simply followed in *State of Orissa v. Construction India* (1987 Supp SCC 708), in the *Food Corporation* case ((1988) 1 SCC 547, 554 et seq) and in *State v. Sharma & Co.* ((1988) 4 SCC 353) *The Gujarat Water Supply* case ((1989) 1 SCC 532) was, he urges, also a similar case (see para 5) though in that case there appear to have been some proceedings in court earlier. In short, he virtually submits that *Abhaduta Jena* ((1988) 1 SCC 418) and *Sharma* case ((1988) 4 SCC 353) have unduly restricted the grant of pendente lite interest and require reconsideration and that pendente lite interest should be awarded in all cases where the intervention of court is sought for the appointment of arbitrators, directly or indirectly, at any stage.

17. Generally speaking, it would only seem reasonable that the power to grant interest pendente lite should be treated as ancillary to the award of damages or compensation which, but for the delay in the litigation (whether in court or by way of arbitration), the claimant should have received much earlier. However, though pendente lite interest has been made available in court proceedings, its extension to arbitration law appears to have acquired some technical limitations resulting in denial of pendente lite interest in most cases of arbitration. Even if we accept the contention of Dr. Ghosh, pendente lite interest cannot still be awarded by an arbitrator appointed by the parties under private agreement for which there may be no justification in equity. These anomalies have arisen because formerly an arbitrator could not be treated as a court to which the Code of Civil Procedure applied and because now the Interest Act, 1978, while including arbitration proceedings within its ambit, has, apart from a reference to Section 34, omitted to provide specifically for pendente lite interest. This has been clearly brought out by Chinnappa Reddy, J. We have earlier referred to passages from *Abhaduta Jena* ((1988) 1 SCC 418) which outline the principle the learned Judge had in mind for permitting pendente lite interest by an arbitrator. It is interesting, in fact, to notice that the present contentions of Dr. Ghosh (based on certain earlier decisions of this Court) appear to have been advanced by him in the *Food Corporation* case ((1988) 1 SCC 547, 554 et seq) to support a glider contention pendente lite interest should be awarded even in an arbitration by private agreement (as in that case) so long as the terms of the arbitration agreement did not exclude the jurisdiction of the arbitrator to entertain such a claim. But the court did not accept the contention and followed *Abhaduta Jena* ((1988) 1 SCC 418). *Abhaduta Jena* ((1988) 1 SCC 418) has been followed in later cases also and its scope has been recently explained in *Sharma* case ((1988) 4 SCC 353). We may point out that in the latter case, a specific point was raised that since the court had been concerned with the appointment of the arbitrator at some stage it should be treated as a reference to arbitration by court warranting the grant of pendente lite interest but this contention was negated and the

principle confined only to cases where a reference to arbitration is made in the course of suits. The position was similar in the Gujarat Water Supply case ((1989) 1 SCC 532) but pendente lite interest was denied. In view of Abhaduta Jena ((1988) 1 SCC 418) and the clarification specifically set out in para 13 of Sharma case ((1988) 4 SCC 353), we are unable to accede to the contention of Dr. Ghosh,, attractive as it is as an equitable proposition.

18. The Division Bench of the High Court had no occasion to consider the above recent pronouncements of this Court. Further, it is seen that, before the Division Bench, the Union took an objection that under clause 16(2) of the general conditions of contract, the contractors could claim no interest on the amounts that may be determined as payable to them. The Division Bench met this contention by relying on a circular issued by the Government of India making the claim for interest entertainable in arbitration "if notice had been issued in this behalf by the arbitrator". There is, however, no finding and nothing on record brought to our notice to show that any specific notice, claiming interest, had been given as contemplated by the contract. Having regard to all these considerations, we are unable to uphold the order of the Division Bench on this issue.

19. This takes us to the second point urged on behalf of the Union in regard to interest. The contentions that the learned Single Judge had restricted it to the date of the award, and that this has become final as the contractors have preferred no appeal therefrom. The grounds of appeal before us by the Union are confined only to the mistake in not taking into account the sum of Rs. 6,76,540 and do not raise any question regarding post-award interest. It is, therefore, not open to Shri Banerjee to raise this question. That apart, on merits also the contention raised that post-award interest has been declined by the High Court is not correct. The contention overlooks the course of pleadings between the parties. The arbitrators had, in the annexure to the award, computed interest from October 5, 1982 to March 26, 1984 i.e. from the date of the termination of the contract till the date of the award and, in the award, had granted interest on the amount awarded from the date of award till the date of decree or payment. A point has been raised before the High Court in the memo of objections that the arbitrators had erred in awarding interest in the manner mentioned in the award but the objection urged by the Union before the learned Single Judge was a different one viz. that the arbitrators ought not to have granted interest for the period prior to the date of reference without any agreement of right in law to claim such interest. It is this contention that was accepted by the learned Single Judge who deleted the interest award prior to the date of the reference and held that the arbitrators had jurisdiction to award interest from the date of the reference till the date of the award. This did not affect the arbitrator's direction in the main part of the award, that interest will accrue on the amount of the award (if the said amount was not paid within 60 days) till the date of payment or decree, whichever is earlier. This part of the award was not questioned. In fact, the decree drawn up in consequence of the order of the learned Single Judge, specifically directs (a) interest on the awarded amount from May 6, 1983 (date of reference) to March 26, 1984 (date of the award); (b) "thereafter, interest on the amount awarded at 11 per cent from March 27, 1984 to December 11, 1984" (date of the decree); and (c) interest thereafter at 9 per cent per annum. The objection of the Union in the LPA on the question of interest was only that the arbitrators had erred in awarding interest from May 6, 1983 to March 26, 1984. It is this contention that was accepted by the Division Bench. The High Court had, therefore, not decided that the contractors were not entitled to interest beyond the date of the award. This contention of the Union, therefore, fails and is rejected.

20. In the result C.A. 1280 is allowed and C.A. 1281 of 1988 is allowed in part. There will be no order as to costs.

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