

Secretary, Irrigation Department, Government of Orissa and others

Vs

G. C. Roy

(CJI K. N. Singh, P. B. Sawant, N.M. Kasliwal, B. P. Jeevan Reddy G.N. Ray JJ)

12.12.1991

JUDGEMENT

K. N. SINGH, CJI:-

1. 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, (1989) 2 SCC 721 : (AIR 1990 SC 1426). 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, Galimala v. Abnaduta Jena, (1988) 1 SCR 253: (AIR 1988 SC 1520), 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 15th March, 1991, as the learned Judges were of the view that the correctness of the view taken by this Court in Jena's case in so far 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. 1403/86. On 27-4-1977, 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:

"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 20-2-1980. 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 6-8-1982. 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% on the awarded amount from 20-3-1980 till the date of payment or decree whichever was earlier. It appears that 20-3-1980 was evidently the date on which the amount claimed by G. C. Roy became due to him as the work was completed on 20-2-1980. 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 29-11-1982 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. 2565/91. 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 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 Schedule II 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 :

"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.

Section 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 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 give 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.

8. 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 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 Sec. 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.

9. 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. In Jena's case (AIR 1988 SC 1520), 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.

10. For this proposition, the learned Judge relied upon the decision in Thawardas, (1955) 2 SCR 48

: (AIR 1955 SC 468). The learned Judge pointed out that in Thawardas "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 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, (1960) 2 SCR 209 : (AIR 1960 SC 307), Satinder Singh, (1961) 3 SCR 676: (AIR 1961 SC 908), Madan Lal Roshanlal, (1967) 1 SCR 105: (AIR 1967 SC 1030), Bungo Steel, (1967) 1 SCR 324: (AIR 1967 SC 1032), Ashok Construction, (1971) 3 SCC 66 and Saith and Skelton, (1972) 3 SCR 233 : (AIR 1972 SC 1507), 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 in so far as they are relevant (AIR 1988 SC 1520, Para 18).

"The question of interest by an arbitrator was considered in the remaining cases to which we have referred earlier. Nachiappa Chettiar v. Subramaniam Chettiar (supra), Satinder Singh v. Amrao Singh (supra), Firm Madanlal Roshanlal Mahajan v. Hukum Chand Mills Ltd. (supra), Union of India V. Bungo Steel Furniture Private Limited (supra), Ashok Construction Company v. Union of India (supra) and State of Madhya Pradesh v. M/s. Saith & Skelton Private Limited 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 pendent lite interest was made on the principle of S. 34, Civil Procedure Code, in Nachiappa Chettiar v. Subramaniam Chettiar (supra), Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Limited (supra), Union of India v. Bungo Furniture Private Limited (supra) and State of Madhya Pradesh v. M/s. Saith and Skelton Private Limited (supra)."

11. Certain English decisions including the decisions in Chandris, (1951) 1 KB 240 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's case (AIR 1988 SC 1520) 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. 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 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.

12. Shri Soli 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, C.P.C. does not apply to arbitrators, its principle does. To the same effect is the submission of Shri R. K. Garg.

13. 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, 65 Ind App 66 : (AIR 1938 PC 67). This indeed is the basis of the judgment of this Court in Seth Thawardas Pherumal v. Union of India, (1955) 2 SCR 48 : (AIR 1955 SC 468). 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 arbitrator has the power to award interest pendente lite on the ground that principle of Section 34, C.P.C. 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 as by extending the same analogy. This would indeed amount to legislation by this Court which it ought to desist from doing.

14. 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. The Great Western Railway Company, (1851) 138 English Reports 603, 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 Jervis, 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."

15. 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.

16. In *Podar Trading Co. Ltd. v. Francois Tagher*, (1949) 2 All ER 62, 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, the 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 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*. 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 appeal, 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.

17. In *Chandris v. Isbrandtsen Moller Co. Inc.*, (1951) 1 KB 240, 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* (1949 (2) All ER 62) 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* was wrongly decided and that the High Court was wrong in *Podar Trading* in assuming that the decision in *Edwards* (1851 (138) ER 603) was based upon the Civil Procedure Act of 1833. The ratio of *Edwards* 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:-

"But I agree with Mr. Mocatta that the real basis of *Edwards v. Great Western Ry.*,

(1851 (138) ER 603) 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*, (1949 (2) All ER 62) should on this point be overruled.

18. Cohen J. who delivered a concurring opinion observed that the Law Reform (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* 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.

19. In *Thawardas*, (AIR 1955 SC 468) (supra) 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% 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 I 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, C.P.C. 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 P. C. 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 (Para 31):

"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."

20. In *Nachiappa Chettiar v. Subramaniam Chettiar*, (1960) 2 SCR 209 : (AIR 1960 SC 307) 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's* case. This objection was overruled by Gajendragadkar, J. in the following words (para 44 of AIR):-

"The 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*, (AIR

1955 SC 468). 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 S. 34 of the C. P. C., 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 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 the income from the property and there is a hearing. Under these circumstances, we do not think we would be justified in allowing this point to be raised before us."

21. 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 relied upon by Sri Vishwanatha Sastri were intended to lay down any such broad and unqualified proposition as was contended for before them.

22. *Satinder Singh v. Amrao Singh*, (1961) 3 SCR 676: (AIR 1961 SC 908) 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*, (AIR 1988 SC 1520) along with *Nachiappa*, (AIR 1960 SC 307) 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 Sec. 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. 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 (at pp. 915-16 of AIR):

"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 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*, (1925 AC 520), 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."

23. The Court then referred to the decision of the House of Lords in *Swift and Co. v. Board of Trade*, 1925 AC 520 and of the Privy Council in *Inglewood Pulp and Paper Co. Ltd. v. New Brunswick Electrical Power Commission*, 1928 AC 492 and observed (at p. 916 of AIR 1961 SC):

"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."

24. The decision of this Court in *Firm Madanlal Roshan Lal Mahajan v. Hukumchand Mills Ltd.*, (1967) 1 SCR 105 : (AIR 1967 SC 1030) 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 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*, (AIR 1955 SC 468) quoted earlier. This Court (K.N.Wanchoo, J. C.Shah and R. S. Bachawat, JJ.) dealt with the said observations in the following words (para 4 of AIR):

"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's case*, (AIR 1955 SC 468) were not intended to lay down such a broad and unqualified proposition. The relevant facts regarding the claim for interest in *Seth Thawardas's case*, (1955 (2) SCR 48 : AIR 1955 SC 468) will be found at pp. 64 to 66 of the Report, (SCR) : (at pp. 477, 478 of AIR) and in paragraphs 217 and 24 of the judgment of the Patna High Court reported in *Union of India v. Premchand Satram Das*, (AIR 1951 Patna 201 at pp.204-05). 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 S. 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's case* 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 S. 34 of the Code of Civil Procedure. Though, in terms, S. 34 of the Code of Civil Procedure does not apply to arbitration, 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."

25. 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* (AIR 1955 SC 468) was explained and distinguished. In fact, the learned Judges looked into the High Court record too to ascertain the correct formal position.

26. The next decision is in *Union of India v. Bungo Steel Furniture Pvt. Ltd.*, (1967) 1 SCR 324 (325) : (AIR 1967 SC 1032). 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*, (AIR 1955 SC 468) but the objection was rejected by the Court. Ramaswami, J. speaking for the three Judge Bench, observed (at pp. 1035-36 of AIR):

"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*, (AIR 1955 SC 468) were not intended to lay down such a broad and unqualified proposition. In *Seth Thawardas Pherumal v. Union of India*, 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 S. 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's* case 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, S. 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 S. 34 could grant a decree for interest. In *Edwards v. Great Western Ry.*, (1851 (138) ER 603) one of the questions at issue was whether an arbitrator could or could not award interest in a case which was within S. 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 or 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 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. Isbrandtser Moller Co. Inc.*, (1951 (1) KB 240) and it was held, that though in terms S. 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 Reform (Miscellaneous Provisions) Act, 1934, which repealed S. 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 *Bhawanidas Ramgobind v. Harasukhdas Balkishandas* (AIR 1924 Cal 524) the Division Bench of the Calcutta High Court consisting of Rankin and Mookerjee, JJ. held that 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 Ry.*, (1851 (11) CB 588: 138 ER 603), *Sherry v. Okes*, (1835 (3) Dowl 349: 1 H and W 119) and *Behan v. Wolfe*, (1832 (1) Al and Na 233). The same view has been expressed by this Court. in a recent judgment in *Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore*, (AIR 1967 SC 1030). 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."

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 and Chandris case besides the decision of this Court in Firm Madanlal Roshanlal. It is noteworthy that the decision explains and distinguishes the decision in Thawardas on the same lines as was done in Firm Madanlal Roshanlal's case.

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 above quoted 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. *M/s. Ashok Construction Co. v. Union of India*, (1971) 3 SCC 66 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:

"..... 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."

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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 as understood in Chandris case.

30. In *State of Madhya Pradesh v. Saith & Skelton (P) Ltd.*, (1972) 3 SCR 233: (AIR 1972 SC 1507), 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 (AIR 1938 PC 67) and of this Court in Thawardas and other decisions were relied upon. This Court referred to the decision in Bungo Steel (AIR 1967 SC 1032) and Firm Madanlal Roshanlal (AIR 1967 SC 1030) and pointed out that the decision in Thawardas (AIR 1955 SC 468) was distinguished in Firm Madanlal Roshanlal "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 (AIR 1967 S C 1030), the Court observed thus (AIR 1972 SC 1507, Paras 33 and 34):

"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 p. The arbitrator has further found that this amount became 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) Section 61, which is material 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, it 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 (AIR 1963 SC 1685) which related to an arbitration proceeding, under sub-section (2) of S. 61, in the absence of a contract to the contrary, the seller is eligible to be awarded interest on the amount 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 (Para 35):

"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. (1971 (3) SCC 66), Edwards (1851 (138) ER 603) and Chandris (1951 (1) KB 240).

33. Sri Milon Banerji urged that in Jena's case (AIR 1988 SC 1520) Justice Chinnappa Reddy 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 (AIR 1960 SC 307) and Firm Madanlal Roshanlal (AIR 1967 SC 1030) were cases in which reference to arbitration was made in pending suits whereas the other four cases namely Satinder Singh (AIR 1961 SC 908), Bungo Steel (AIR 1967 SC 1032), Ashok Construction (1971 (3) SCC 66) and Saith and Skelton (AIR 1972 SC 1507) 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 dealt with interest for all three periods, viz. pre-reference, pendente lite and post-award, whereas Firm Madanlal Roshanlal dealt with pendente lite interest alone. Satinder Singh's case 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 dealt with the interest for the post-award period while Ashok Construction 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 dealt with power of the arbitrator to award interest for the period prior to reference.

34. The High Court of Australia too considered this question in Government Insurance Office of NSW v. Atkinson-Leighton Joint Venture, 146 CLR 206. 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 Justices), on a consideration of the decisions in *Chandris* (1951 (1) KB 240), *Edwards* (1851 (138) ER 603) and *Podar Trading* (1949 (2) All ER 62) 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)."

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

36. Haisbury's Laws of England Vol. 2, page 273 (para 534) states:

"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 dealing with the award of interest, it reads:

"An 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 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:

"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 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."

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.* (1966) 1 SCR 580: (AIR 1966 SC 395). He referred to the passage at Page 590 to contend that the Constitution Bench in this case has approved decision in *Thawardas* (AIR 1955 SC 468). 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*, as laying down the correct law in that behalf, along with *Bengal Nagpur Railway* (AIR 1938 PC 67) (supra) and *Union of India v. A. L. Rallia Ram*, (1964) 3 SCR 164: (AIR 1963 SC 1685). It is not possible to read this paragraph as approving or affirming the decision of *Thawardas* 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* (supra) 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* and the decision of this Court in *Thawardas* 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 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 S.34, C.P.C., and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative form 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 S.41 and S.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 generallaw 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 (AIR 1955 SC 468) 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's case (AIR 1988 SC 1520) 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 considerations, we think that the following is the correct principle which should be followed in this behalf:

45. 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.

46. For the reason afore said we must hold that the decision in Jena (AIR 1988 SC 1520), insofar as it runs counter to the above proposition, did not lay down correct law.

47. 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's case (AIR 1988 SC 1520) 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.

48. As regards the C. A. No. 2565 of 1991 and S. L. P. No. 5428 of 1990 the same shall be placed before an appropriate Bench for decision in the light of this judgment.

Appeals dismissed.

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