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STATE OF ORISSA

v.

B.N. AGARWALLA

JANUARY 29, 1997

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[A.M. AHMADI, C.JI., S.P. BHARUCHA AND B.N. KIRPAL, JJ.]

Arbitration Act, 1940: Section 29.

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Interest—Award of—Pre-reference period i.e., for the period commencing from the date of dispute till the date arbitrator entered upon reference—Held: Arbitrator had jurisdiction to award Interest in cases which arose after the Interest Act, 1978 came into force i.e., after 19-8-1981—In regard to cases pertaining to period prior to applicability of Interest Act, in absence of any substantive law, contract or usage, arbitrator had no jurisdiction to award interest—Decision in Abhaduta Jena's case on this aspect not overruled in G.C.Roy's case—Stipulation in the contract that "no interest was payable on the amounts withheld under the item of the agreement" referred to the amount of the contractor withheld by the principal towards retention money for defect liability period and did not pertain to claim of contractor before arbitrator for interest on balance amount payable out of final bill w.e.f. date of completion of work till date of payment—Contractor entitled to interest w.e.f. 19-8-1981 when Interest Act came into force—The said stipulation in the contract did not relate to such interest—Interest Act, 1978.

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Interest—Award of—Pendente lite - for period during which arbitration proceedings were pending—Held: Arbitrator had jurisdiction to award interest.

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Interest—Award of—Future interest - for post-award period—Held: Arbitrator had jurisdiction to award future interest from date of passing of the award—When award filed in court and decree passed in terms thereof, court has to determine whether interest could be awarded from date of decree and what should be rate of interest.

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The appellant, in Civil Appeal No. 9233 of 1994, had invited tenders for construction of certain quarters. The respondent had submitted his tender, which was accepted. The respondent completed the work on 31-5-1977. As certain differences had arisen between the parties, an arbitrator

was appointed and disputes between the parties were referred to the said arbitrator. The arbitrator made his award whereby the appellant was liable to pay interest from 31-8-1977 till the date of payment on the principal sum or the date of decree, whichever was later. The High Court, however, restricted the grant of interest for the pre-reference period w.e.f. 19-8-1981, on which date the Interest Act, 1978 came into force.

The appellant in Civil Appeal No. 9234 of 1994, entered into an agreement with the respondent for improvement of a road. As disputes had arisen between the parties an arbitrator was appointed. The arbitrator awarded interest in respect of all the three periods, viz., pre-reference, *pendente lite* and future interest. In the appeal filed before the High Court, the appellant challenged the decision of the arbitrator in allowing *pendente lite* interest. The High Court dismissed the appeal on the ground that *pendente lite* interest could be granted by the arbitrator under the Interest Act, 1978.

The question before this Court was whether the Arbitrator had power to award interest.

On behalf of the appellants it was contended that as per the Special Terms and Conditions of the contract neither pre-reference interest nor *pendente lite* interest could be awarded on the amount withheld under the item of agreement; and that under Section 29 of the Arbitration Act, 1940 the Arbitrator had no jurisdiction to award interest for the period after the passing of the decree till the date of payment, i.e., future interest.

Dismissing the appeal, this Court

HELD: 1.1. Regarding Civil Appeal No. 9233 of 1994, the arbitrator has jurisdiction to award pre-reference interest, i.e., for the period commencing from the date of dispute till the date the arbitrator entered upon reference, in cases which arose after the Interest Act, 1978 has become applicable i.e., after 19-8-1981. With regard to those cases pertaining to period prior to the applicability of the Interest Act, 1978, in the absence of any substantive law, contract or usage, the arbitrator has no jurisdiction to award interest. The decision in *Abhaduta Jena's* case on this aspect is not overruled in *G.C. Roy's* case. [717-A-B]

1.2. The stipulation in the contract that "no interest is payable on

- A amount withheld under the item of the agreement" refers to the amount withheld by the appellant towards retention money for the defect liability period and did not pertain to the claim of the respondent before the arbitrator for interest on the balance amount payable out of the final bill with effect from the date of completion of the work till the date of payment. The respondent is entitled to Interest with effect from 19-8-1981, when the Interest Act, 1978 came into force. The aforesaid stipulation in the contract did not relate to such interest. [718-A-D]
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Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C. Roy, [1992] 1 SCC 508, followed.

- C *Executive Engineer (Irrigation) v. Abhaduta Jena*, [1988] 1 SCC 418; *Kishore Prabhatilal Sharma & Ors. v. Vijayendara Prabhatilal Sharma & Anr.*, [1993] 1 SCC 114; *State of Orissa v. Lal Chand Kapani*, [1994] Supp. 1 SCC 68 and *Sudhir Brothers v. Delhi Development Authority & Anr.*, [1996] 1 SCC 32, relied on.

- D *Seth Thawardas Pherumal v. Union of India*, [1955] 2 SCR 48, referred to.

2. For the period during which the arbitration proceedings were pending i.e., for the period commencing from the date the arbitrator entered upon reference till the date of making the award (*pendente lite* interest), the arbitrator has jurisdiction to award interest. [722-G]
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Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C.Roy, [1992] 1 SCC 508, followed.

- F *Hindustan Construction Co. Ltd. v. State of J & K*, [1992] 4 SCC 217, relied on.

Executive Engineer (Irrigation) v. Abhaduta Jena, [1988] 1 SCC 418, overruled.

- G 3.1. Regarding Civil Appeal No. 9234 of 1994, according to Section 29 of the Arbitration Act, 1940, where the award is for payment of money the Court may in the decree order interest from the date of the decree to the date of payment. This Section by its plain language expressly gives the Court the power to award interest from the date of the decree till the date of payment. When the arbitrator makes an award, it is not necessary that
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in every case the award has to be filed in a court and a decree, in terms thereof, is passed. It does happen that when an award is made, the party against whom it is made may accept the award and comply with the same. The correct procedure, which should be adopted by the arbitrator, is to award future interest till the date of the decree or the date of payment, whichever is earlier. The effect of this would be that if the award were voluntarily accepted, which may not result in a decree being passed, then payment of interest would be made from the date of award till the date of payment. [723-F-H, 724-A-B]

Gujarat W.S. & S.B. v. Unique Erectors (Gujarat) (P) Ltd., AIR (1989) SC 973, relied on.

3.2. Where, however, as in the present case, the award is filed in the court and a decree is passed in terms thereof, it is for the court to determine under Section 29 of the Arbitration Act as to whether interest should be ordered to be paid and if so at what rate. Under Section 29, the court can, even where the arbitrator has awarded interest from the date of the award till the date of payment, disallow interest from the date of the decree or determine a different rate at which the interest is to be paid or confirm the grant of interest as awarded in the award. When the Court does not modify the award with regard to rate of interest from the date of the award up to the date of payment, the effect would be as if the court itself has granted interest from the date of the decree till the date of payment at the rate which was determined by the arbitrator. The future interest should be regarded as having been ordered to be paid under Section 29 of the Arbitration Act when the court does not modify the award in this respect. [724-C-E]

3.3. In the instant case, the claim for interest even for the pre-reference period had arisen after the Interest Act, 1978 had come into force and, therefore, the arbitrator could award interest for all the three periods, viz., the pre-reference interest, the *pendente lite* interest and future interest. [724-F]

Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C. Roy. [1992] 1 SCC 508, followed.

Hindustan Construction Co. Ltd. v. State of J & K, [1992] 4 SCC 217, relied on.

A *Santokh Singh Arora v. Union of India & Ors.*, [1992] 1 SCC 492, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 471 of 1997 Etc.

B From the Judgment and Order dated 23.4.87 of the Orissa High Court in Misc. A. No. 74 of 1982.

C G.L. Sanghi, S.B. Sanyal, H.N. Salve, D.V. Sehgal, and R.N. Sachthey, R.K. Mehta, S.B. Upadhyay, Anil K. Jha, C.D. Singh, H. Munshi, Anip Sachthey, M. Mishra, S. Mandal, Vinoo Bhagat, Jaydeep Gupta, Raja Chatterjee, Ms. Aruna Banerjee, G.S Chatterjee, Ejaz Maqbool and M.K. Dua for the appearing parties.

The Judgment of the Court was delivered by

D KIRPAL, J. The main question which arises for consideration in these cases relates to the power of the Arbitrator to award interest.

E The contention on behalf of the appellants against whom interest has been awarded by the arbitrators, is that this Court held in *EXECUTIVE ENGINEER (IRRIGATION) v. ABHADUTA JENA*, [1988] 1 SCC 418 that the arbitrator has no power to award interest in respect of pre reference period in the absence of the claimant having a right under the contract or a provision of substantive law, to get interest. On the other hand, it is the submission on behalf of the claimants/respondents that the aforesaid decision in the case of Abhaduta Jena (supra) has been overruled by a Constitution Bench of this Court in the case of *SECRETARY, IRRIGATION DEPARTMENT, GOVERNMENT OF ORISSA AND OTHERS v. G.C. ROY*, [1992] 1 SCC 508 and it has been held that the arbitrator could award pre reference, *pendente lite* and future interest.

G Before dealing with the facts of each case it will be appropriate to examine the relevant decisions of this Court in order to determine the correct legal position with regard to the jurisdiction of the arbitrator to award interest in respect of the periods for which interest can be awarded namely - (i) for the period commencing from the date of dispute till the date Arbitrator entered upon the reference, or the pre-reference period; (ii) for the period commencing from the date the Arbitrator entered upon H reference till the date of making the award (*pendente lite* interest) 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, or the post award interest. A

The question with regard to power of the Arbitrator to award interest was considered at great length by this Court in *ABHADUTA JENA'S* case (supra). Two questions which arose for consideration of the Court in *Abhaduta Jena's* case (supra) were (i) the power of the Arbitrator to award interest for the period prior to his entering upon reference and; (ii) the power of the Arbitrator to award interest for the period the dispute remained pending before him. B

Chinnappa Reddy, J., speaking for the Court, considered all the earlier decisions of this Court including that of *SETH THAWARDAS PHERUMAL v. UNION OF INDIA*, [1955] 2 SCR 48 and, with regard to *pendente lite* interest, concluded that as the arbitrator was not a court within the meaning of Section 34 of Code of Civil Procedure, therefore, he could not award *pendente lite* interest. With regard to claim of interest for the period before the reference, it was held that the arbitrator could not award interest for pre-reference period in cases which arose prior to the commencement of the Interest Act, 1978 unless the claimant had a substantive right to get interest under the terms of a contract or under a provision of any law. C D E

In coming to this conclusion with regard to interest for pre-reference period, it was observed as follows :

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

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

The decision in *Jena's* case (supra) came up for consideration before this Court in the case of *GUJARAT W.S. & S.B. v. UNIQUE ERECTORS (GUJARAT) (P) LTD.*, AIR (1989) SC 973. In that case, the interest had been awarded in respect of all the three periods namely; (i) from 6.8.1981. When the Interest Act, 1978 came into force, to 21.8.1984, the date when reference was made to the arbitration; (ii) from 22.8.1984 to 19.7.1985 *pendente lite*; and (iii) 19.7.1985 to 17.6.1986 (date of award to date of decree). Following *Jena's* case (supra), it was held that the interest *pendente lite* could not be awarded but with regard to pre-reference interest, it was held that "since in this case the reference to arbitration was made after the commencement of the Interest Act, 1978, the arbitrator under Section 3(1)(a) of the said Act was entitled to award interest from 6.8.1981 till 21.8.1984 in view of this Court's decision in *Abhaduta Jena's* case". This Court also held that even though in *Abhaduta Jena's* case (supra), granting of interest for the period from the date of award had not been considered nevertheless interest should be allowed for that period on the principle that this Court could, once proceedings under Sections 15 to 17 of the Arbitration Act are initiated, grant interest pending the litigation before it i.e. from the date of award to the date of decree. B C D E

We may now consider the decision of the Constitution Bench in *SECRETARY, IRRIGATION DEPARTMENT, GOVERNMENT OF ORISSA AND OTHERS v. G.C. ROY*, [1992] 1 SCC 508. The contention of the counsels appearing on behalf of the respondents is that the decision in *Abhaduta Jena's* case (supra) was overruled in its entirety and it was held in *G.C. Roy's* case (supra) that the arbitrator could award interest for all the above-mentioned three periods, namely; pre-reference, *pendente lite* and post- award. On the other hand, it has been submitted by the learned counsels on behalf of the appellants that *G.C. Roy's* case was not concerned with the interest for the period prior to the making of the reference and it overruled the decision in *Jena's* case (supra) only insofar as award of *pendente lite* interest was concerned. It was submitted that the decision of *Abhaduta Jena's* case (supra), of the arbitrator not having the jurisdiction to award pre-reference interest, continues to hold the field and *G.C. Roy's* case (supra) has not ruled to the contrary in this regard. F G H

A A careful reading of G.C. Roy's case (supra) clearly shows that, insofar as award of interest is concerned, this Court was only required to consider whether the arbitrator had jurisdiction to award *pendente lite* interest. This is so stated in the judgment at more places than one. Apart from noting that the appellants had challenged the validity of the award on two grounds, one of which was that "arbitrator had no jurisdiction to award *pendente lite* interest", it was noted that the case had been referred by order dated 15.3.1991 by the Division Bench to the Constitution Bench as "the learned Judges were of the view that the correctness of the view taken by this Court in *Abhaduta Jena's* case (supra), insofar as it held that arbitrator has no power to award *pendente lite* interest, required consideration by a larger Bench". This Court, accordingly, considered the various decisions which had been referred to by Chinnappa Reddy, J. in *Abhaduta Jena's* case (supra) and also considered other decisions and at page 532 summarised its decision as follows :

D "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
E 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
F disputes is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

G (ii) An arbitrator is an alternative forum (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest
H *pendente lite*, the party claiming it could 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. A

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

(iv) Over the years, the English and the 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 has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena case 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. C D E

(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 period). For doing complete justice between the parties, such power has always been inferred." F

Applying the aforesaid principles the conclusion arrived at was as follows : G

"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 of 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 H

- A 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."
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- Finally it was observed that "for the reasons aforesaid we must hold that the decision in *Jena's* case (supra), insofar as it runs counter to the above proposition, did not lay down the correct law".
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- The perusal of the aforesaid passages clearly shows that *Abhaduta Jena's* case (supra) was not overruled in its entirety by the decision in *G.C. Roy's* case (supra). It is only with regard to the award of *pendente lite* interest that the Constitution Bench came to a conclusion which was contrary to the one arrived at in *Abhaduta Jena's* case (supra). The decision in *Abhaduta Jena's* case (supra) with regard to award of interest for pre reference period was not overruled in *G.C. Roy's* case (supra).
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- More recent decisions of this Court also indicate that *G.C. Roy's* case (supra) has been understood and followed as having overruled *Abhaduta Jena's* case (supra) only with regard to *pendente lite* interest and not with regard to pre reference interest. We may now refer to these decisions.
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- In *HINDUSTAN CONSTRUCTION CO. LTD. v. STATE OF J & K*, [1992] 4 SCC 217, the question which arose for consideration was whether the arbitrator was competent to award interest for the period from the date of the award to the date of payment. It was in that connection that reference was made to *G.C. Roy's* case (supra) and it was observed as follows :
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- "The question of interest can be easily disposed of as it is covered by recent decisions of this Court. It is sufficient to refer to the latest decision of a five Judge Bench of this Court in *Secretary, Irrigation Department, Govt. of Orissa v. G.C. Roy*. Though the said decision deals with the power of the arbitrator to award interest *pendente lite*, the principle of the decision makes it clear that the arbitrator is competent to award interest for the
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period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure."

Claim for interest for pre-reference period again came up for consideration before this Court in *JUGAL KISHORE PRABHATILAL SHARMA AND OTHERS v. VIJAYENDRA PRABHATILAL SHARMA AND ANOTHER*, [1993] 1 SCC 114. It was contended in that case that the arbitrator could not award interest for pre-reference period. While Ranganathan, J. with whom V. Ramaswamy, J. concurred, only observed that "there is some force in this contention" but B.P. Jeevan Reddy, J. who was one of the Members of the Bench which decided G.C. Roy's case (*supra*), in his concurring judgment dealt with this question at some length. After referring to some of the observations in the judgment of the Constitution Bench in G.C. Roy's case (*supra*), it was observed by B.P. Jeevan Reddy, J. at page 139 as follows :

"In the circumstances, it would not be correct to read the first of the five principles set out in para 43 as overruling Jena insofar as it dealt with the arbitrator's power to award interest for the pre-reference period. Principle No. (i) should be read along with principle No. (v) wherein it is clearly stated that the interest for the period anterior to the reference (pre-reference period) is a matter of substantive law unlike interest *pendente lite*. The conclusion in para 44 again deals only with the power of the arbitrator to award interest *pendente lite*. It is, therefore, not right to read the said decision as overruling Jena insofar as it dealt with the power of the arbitrator to award interest for the pre-reference period." Again in *STATE OF ORISSA v. LAL CHAND KAPANI*, [1994] SUPP. 1 SCC 68 after referring to the decision in Jena's and G.C. Roy's cases (*supra*), it was observed at page 69 s under:

"It is thus clear that before the 1978 interest Act came into force there was no provision under which the interest for the pre-reference period could be granted. In this case, the Supreme Court also held that the interest *pendente lite* i.e. from the date of reference to the date of the award, the claimants would not be

- A entitled to the same for the reason that arbitrator is not a court within the meaning of Section 34 CPC since the reference was not by a court in a pending suit. This view regarding the interest *pendente lite* however has been reversed in *Secretary, Irrigation Department, Government of Orissa v. G.C. Roy*. Regarding the
- B interest during the pre-reference period, the view taken in *Abhaduta Jena* case is not disturbed. Therefore, the interest during the pre-reference period can be awarded provided on the date of the award, 1978 Interest Act was in force."

- C In *SUDHIR BROTHERS v. DELHI DEVELOPMENT AUTHORITY AND ANOTHER*, [1996] 1 SCR 32, the question with regard to awarding interest for pre-reference period, but in a case arising after the commencement of Interest Act, 1978, came up for consideration and the legal position, emanating from earlier decisions of this Court including *G.C. Roy's* case (supra) and *Jena's* case (supra), was stated to be as follows :

- D "The Constitution Bench in *G.C. Roy* case was dealing with the question relating to the award of interest *pendente lite* and not with the question of the award of interest for the pre-reference period and it was in that context that the Constitution Bench held that the view expressed in *Jena* case with regard to award of *pendente*
- E *lite* interest could not be said to have laid down good law. The Constitution Bench did not deal with the question of pre-reference interest in cases coming after the enforcement of the Interest Act, 1978, which came in force from 19.8.1981. In *G.C. Roy* case itself, it is stated that the reference to the Constitution Bench had been
- F necessitated only for deciding the question whether the decision in *Jena* case was correct insofar as it held that arbitrator had no power to award interest *pendente lite*. On a doubt being raised whether the Constitution Bench in *G.C. Roy* case had overruled the law laid down in *Jena* case relating to the power of the arbitrator to award interest for the pre-reference period in the
- G post-Interest Act, 1978 era, the position was clarified by a three-Judge Bench in *Jugal Kishore Prabhatilal Sharma v. Vijayendra Prabhatilal Sharma*, wherein it was specifically held that the decision in *G.C. Roy* case was concerned only with the power of arbitrator to award *pendente lite* and that it was not concerned with
- H his power to award interest for the pre-reference period."

In view of the aforesaid decisions there can now be no doubt with regard to the jurisdiction of the arbitrator to grant interest. The principles which can now be said to be well-settled are that the arbitrator has the jurisdiction to award pre-reference interest in cases which arose after the Interest Act, 1978 has become applicable. With regard to those cases pertaining to period prior to the applicability of the Interest Act, 1978, in the absence of any substantive law, contract or usage, the arbitrator has no jurisdiction to award interest. For the period during which the arbitration proceedings were pending in view of the decision in *G.C. Roy's* case (supra) and *Hindustan Constructions Limited* case (supra), the arbitrator has the power to award interest. The power of the arbitrator to award interest for the post award period also exists and this aspect has been considered in the discussion relating to Civil Appeal No. 9234 of 1994 in the later part of this judgment.

Keeping the aforesaid principles in mind, we may now refer to the facts in each case.

CIVIL APPEAL NO. 9233 OF 1994

In Civil Appeal No. 9233 of 1994, the appellant had invited tenders for construction of certain quarters. The respondent Durga Parshad had submitted his tender which was accepted. The work was completed by him on 31.5.1977. As certain differences had arisen between the parties, *Durga Parshad*, the respondent herein, requested the appellant to make a reference of the disputes to an arbitrator as provided by the agreement. As no reference was made, Durga Parshad filed an application under Section 20 of the Arbitration Act whereupon the Court appointed an arbitrator as per the terms of the agreement and disputes between the parties were referred to the said arbitrator.

The arbitrator after hearing the parties and considering the evidence adduced before him made his award whereby the appellant was held to be liable to pay a sum of Rs. 2,73,136.82 to the respondent Durga Parshad. The arbitrator further held that the appellant was liable to pay simple interest @ 15% per annum from 31.8.1977 till the date of payment on the aforesaid amount or the date of decree, whichever is later.

On the award being filed in the court, the appellant filed objections. One of the objection was that the arbitrator had awarded interest but there

- A was a clear stipulation in the agreement that no interest was payable on the amount withheld under the agreement. The objections were not accepted and with regard to the claim of interest, the trial court held that this was not a case where interest was awarded on any amount having been withheld. It was, however, found that the claim for interest was referred to the arbitrator and, therefore, the award of interest was held to be valid.
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- In the appeal before the High Court, with reference to the award of interest, the contention which was raised on behalf of the appellant was that the arbitrator had no jurisdiction to award interest for the pre-reference period and that the rate of interest granted was excessive. In support of this contention, reliance was placed on the decision of this Court in the case of *Abhaduta Jena's* case (supra). The High Court, by its judgment under appeal, relied upon the decision of this Court in the case of *Unique Erectors* case (supra) and came to the conclusion that interest for the period prior to initiation of the proceedings could be granted in cases in which reference to arbitration was made after the commencement of the Interest Act, 1978. The High Court, therefore, restricted the grant of interest for the pre-reference period only w.e.f. 19.8.1981, on which date the Interest Act, 1978 had come into force. The Judgment and decree of trial court was, accordingly, modified with the result that the respondent Durga Prashad instead of being awarded interest for pre-reference period w.e.f. 31.8.77, was as a result of judgment under appeal, awarded interest w.e.f. 19.8.1981 till the date of payment.
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- It was contended by Mr. Salve, learned Senior Counsel appearing for the appellant, that clause (4) of the Special Terms and Conditions of the Contract did not allow the award of interest. He submitted that neither pre-reference interest nor pendente lite interest could be awarded because of the special stipulation in the agreement to the effect that no interest would be payable. Clause (4), on which reliance was placed, reads as under :
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G "RATES. MATERIALS AND WORKMANSHIP

The rates quoted shall be for finished work inclusive of all materials, labour, taxes, royalties, transportation etc.

- The Engineer in charge will have full and final authority to reject any material or work done due to defect therein and the contrac-
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tor/contractors shall forthwith remedy the defects at his/their own expense and no further work shall be done in connection with particular work or portion of the work till such time as the defect is removed to the entire satisfaction of the Engineer in charge.

All materials, tools and plants brought to site by the contractor/contractors shall be deemed to be held in lien by the BCCL and the contractor/contractors shall not have the right to remove the same from the site without the written permission of the Engineer in charge. However, the BCCL shall not be liable for any loss, theft or damage due to fire or other causes sustained during this period of lien.

No interest is payable on amounts with held under the item of the agreement.

The BCCL shall be at liberty to deduct from the security deposit or from any other sum due or to become due under this contract or under any other contract all sums that become due to the BCCL. All bills shall be per-audited before amounts and will be made by cheque only."

From the facts enumerated hereinabove it is clear that the reference in this case was made to the arbitrator by the court on an application having been filed under Section 20 of the Arbitration Act. As interest was one of the claims made by the respondent, the said dispute was referred to arbitrator. The arbitrator, therefore, had the jurisdiction to decide this issue. Inasmuch as reference to the arbitration was made after the Interest Act, 1978 had come into force w.e.f. 19.8.1981, the High Court rightly came to the conclusion that at least with effect from the date, interest could be awarded for the pre-reference period under Section 3 of the Interest Act, 1978. This conclusion of the High Court is in conformity with the decision of this Court in the cases of Unique Erectors & Sudhir Bros. (supra). The only question, therefore, is whether the aforesaid clause 4 of the Agreement negates any claim for interest being made. There can be no doubt that if the terms of the Contract expressly stipulate that no interest would be payable then, notwithstanding the provisions of the Interest Act, 1978, an arbitrator would not get the jurisdiction or right to award interest. In the present case, however, no such contention based on clause 4 was raised

A before the High Court. The judgment does not show that any argument was raised before the High Court to the effect that the contract prohibited the award of interest. It is no doubt true that reference to this clause was made before the trial court but, in appeal, the only contention which was raised before the High Court was that the arbitrator had no jurisdiction to

B award interest for pre-reference period. This contention was accepted and the judgment and decree was modified to the effect that interest was awarded not from 31.5.1977, as had been granted by the award and the decree of the trial court, but with effect from 19.8.1981 from which date the Interest Act, 1978 came into force. The contention based on clause 4

C having been given up before the High Court the appellant would normally not have been allowed to be agitated in this appeal but we find that there is no merit in this contention and the same had been rightly rejected by the trial court. According to clause 4, interest was not payable on the amount which was withheld. The learned counsel for the respondent has

D rightly contended that the said clause refers to the amount withheld by the appellant towards retention money for the defect liability period. It was submitted that the appellant had received a sum of Rs. 30,000 as security for the fulfilment of the contract to the satisfaction of the company and the respondent Durga Parsad has not claimed any interest on this amount as

E under aforesaid clause 4, no interest was payable on the amount so withheld. The claim which was made by Durga Parsad before the arbitrator was for the non-payment of the full amount as per final bill submitted by him. The claim on this account before the arbitrator was for a sum of Rs. 5,86,381.50 being the balance amount payable out of the final bill and

F interest thereon was claimed with effect from the date of completion of work (31.5.1977) till the date of payment. The claim of the respondent for a sum of Rs. 5,86,381.50 was upheld by the arbitrator only to the extent of Rs. 2,73,136.82 and the respondent was awarded interest on this amount. The interest so awarded is clearly not covered by the aforesaid clause 4 of

G the contract.

The decision of the High Court awarding pre-reference interest with effect from the date when the Interest Act, 1978 had come into force i.e. 19.8.1981 and the award of *pendente lite* interest, therefore, calls for no interference. In the result, the appeals of M/s. Bharat Coking Coal Ltd. are

H liable to be dismissed, but with no order as to costs.

CIVIL APPEAL NO. 472/97 (ARISING OUT OF S.L.P. (C) NO. 3630 OF 1987 & CIVIL APPEAL NO. 471/97 (ARISING OUT OF S.L.P. (C) NO. 15995/1987. A

Leave granted.

The parties in both these cases are the same and the material facts are not very dissimilar. In appeal arising out of S.L.P. (C) No. 3630/87, the respondent was entrusted with some civil work by the agreement made in the year 1974-75. Some disputes had arisen and an arbitrator was appointed on 4.7.1979. The arbitrator on 11.3.1981 gave an award for Rs. 1,82,860 including interest. As is evident from the judgment of the High Court the arbitrator had awarded a sum of Rs. 99009 as principal and interest of Rs. 68635 for the period 1.6.1975 to 10.3.1981 was also awarded. B C

This award of interest has been upheld by the trial court and the High Court.

The present appeal is confined only to the award of interest by the arbitrator. As far as pre-reference interest is concerned, in view of the settled legal position, pre-reference interest could not be awarded for the period prior to coming into force of the Interest Act, 1978 specially when the agreement between the parties did not provide for payment of interest. In other words, neither by contract nor under law was the respondent entitled to receive pre-reference interest for the period 1.6.1975 to 10.3.1981 which had been awarded to him. As far as future interest is concerned, it was within the jurisdiction of arbitrator to award the same. The appeal is allowed to the extent that the award of pre-reference interest to the sum of Rs. 68635 is set-aside and the decree will stand modified accordingly. In appeal arising out of S.L.P. (C) No. 15995 of 1987, an agreement between the parties was entered sometime in the year 1966-67. Work was completed on 31.12.1970 and thereafter the respondent gave notice to the Chief Engineer raising some claims. On 19.10.1976, the Chief Engineer appointed a sole arbitrator. The arbitrator entered upon the reference and thereafter on 12.5.1981 gave an award of Rs. 1,56,073.74 plus interest @7% from 1.4.1971 till the date of payment of decree. The award was made the rule of the Court and the High Court dismissed the appeal filed by the appellant. It is clear from the principle enunciated hereinabove that pre-reference interest could not have been awarded in favour of the respondent in the present case because the Interest Act, 1978 was not D E F G H

- A applicable and there was no term in the contract and nor was it established that under any law or usage any interest was payable. Applying the ratio of decisions of this Court in *Abhaduta Jena's* case (*supra*) and other cases, the appeal is allowed to the extent that the award of the arbitrator, insofar as it awards interest for the pre-reference period, is set aside. The decree would stand modified accordingly. Parties to bear their own costs.
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CIVIL APPEAL NO. 9234 OF 1994

- C On 27.5.1979, an agreement was entered into between the State Government, the appellant herein, and the respondent for improvement of Salai-Manoharpur Road. This was followed by a supplementary agreement dated 30.4.1982 for carting earth. The respondent made claims against the appellant in respect of above work allegedly done under the said agreements. On 19.5.1987, the respondent filed an application in the trial court for appointment of an arbitrator under Section 8 of the said Act. This application was allowed by the Court on 19.5.1987 and an arbitrator was
- D appointed who entered upon the reference on 10.6.1987. The arbitrator gave an award on 28.2.1988 and directed the payment of Rs. 30,21,047 towards the principal claim and interest @6% from 2.1.1984 to 25.2.1988 amounting to Rs. 8,26,811 and future interest @ 13% from the date of the award till the date of realisation. In this way, the arbitrator awarded
- E interest in respect of all the three periods, namely; pre- reference, *pendente lite* and future interest.

- When the award was filed in the court, the appellant herein, filed objections to the same. With regard to interest in the objection which was filed, the appellant only challenged the decision of the arbitrator in allowing *pendente lite* interest. The trial court came to the conclusion that
- F reference to the arbitration had been made in the course of a suit and the arbitrator was justified in allowing *pendente lite* interest.

- In appeal filed before the High Court it was contended that the claim of the respondent in respect of escalation of price had not been referred to arbitrator and therefore, he could not have given the award in respect of the said claim. The second contention which was raised, with which we are concerned in the present case, was that the arbitrator had no power to grant *pendente lite* interest. While upholding the decision of the trial court, in making the award the rule of the Court and passing the decree in term
- G thereof, with regard to *pendente lite* interest the High Court referred to the
- H

decisions of this Court in the cases of *SANTOKH SINGH ARORA v. UNION OF INDIA AND OTHERS*, [1992] 1 SCC 492 and *LALCHAND KAPANPS* case (supra) and came to the conclusion that *pendente lite* interest could be granted by the arbitrator under the interest Act, 1978. A

Mr. Sanval, the learned counsel for the appellant, contended that pre-reference interest could not be granted. He further submitted that the arbitrator had awarded the interest also from the date of award till the date of payment. It was submitted that this had the effect of awarding interest even for the period after the court passes a decree, making the award the rule of the court. Referring to Section 29 of the Arbitration Act the learned counsel submitted that the arbitrator had no jurisdiction to award interest for the period after the passing of the decree till the date of payment and, therefore, the award to that extent, at least, was liable to be set-aside. B C

From the facts enumerated hereinabove, it is clear that though the arbitrator had awarded interest in respect of all the three periods, the objections which were filed, and the contentions raised before the trial court as well as the High Court, related only to the award of *pendente lite* interest. In fact, the decision of the High Court upholding the award of *pendente lite* interest was not seriously challenged by Mr. Sanyal, obviously in view of the decision of the Constitution Bench of this Court in *G.C. Roy's* case (supra). Ordinarily, we would not be inclined to allow the appellant to raise a new point relating to the grant of post award interest for the first time in this Court, put as this is a pure question of law and in order to finally decide this issue we allowed the learned counsel to raise the same. E

We, however, do not find any merit in this submission. D

According to Section 29 of the Arbitration Act, where the award is for payment of money the Court may in the decree order interest from the date of the decree to the date of payment. This Section by its plain language expressly gives the Court the power to award interest from the date of the decree till the date of payment but would this imply that the arbitrator when making the award, has no jurisdiction to award interest from the date of the award till the date of payment. F G

When the arbitrator makes an award, it is not necessary that in every case the award has to be filed in a court and a decree, in terms thereof, is passed, it does happen that when a award is made, the party against whom it is made, may accept the award and comply with the same. It is rightly H

- A not disputed that from the date of passing of the award, future interest can be awarded by the arbitrator as held by this Court in the cases of Unique Erectors Gujarat (P) Ltd. (supra) and Hindustan Construction Co. Ltd. (supra). The correct procedure which should be adopted by the arbitrator is to award future interest till the date of the decree or the date of payment, whichever is earlier. The effect of this would be that if the award is voluntarily accepted, which may not result in a decree being passed, then payment of interest would be made from the date of award till the date of payment. Where, however, as in the present case, the award is filed in the court and a decree is passed in terms thereof, then Mr. Sanyal has rightly contended that it is for the Court to determine under Section 29 of the Arbitration Act as to whether interest should be ordered to be paid and if so at what rate.

- Under Section 29 of the Arbitration Act, the Court can, even where the arbitrator has awarded interest from the date of the award till the date of payment, disallow interest from the date of the decree or determine a different rate at which the interest is to be paid or confirm the grant of interest as awarded in the award. When the Court does not modify the award with regard to grant of interest from the date of the award upto the date of payment, the effect would be as if the court itself has granted interest from the date of the decree till the date of payment at the rate which was determined by the arbitrator. The future interest would be regarded as having been ordered to be paid under Section 29 of the Arbitration Act when the Court does not modify the award in this respect.

- In the instant case, the claim for interest even for the pre-reference period had arisen after the Interest Act, 1978 had come into force and, therefore, the arbitrator could award interest for all the three periods. C.A. No. 9234 of 1994 is accordingly dismissed, but with no order as to costs.

V.S.S.

Appeals dismissed.