
(2000) 02 BOM CK 0042

In the Bombay High Court

Case No : Appeal No. 956 of 1994 in Arbitration Petition No. 219 of 1989 in
Arbitration Award No. 166 of 1989

U.P. Co-operative Federation Ltd.

APPELLANT

Vs

M/s. Three Circles

RESPONDENT

Date of Decision : 11-02-2000

Acts Referred:

Arbitration Act, 1940 — Section 29, 30, 39, 41
Civil Procedure Code, 1908 (CPC) — Section 34, 35(3)
Interest Act, 1978 — Section 2, 3
Partnership Act, 1932 — Section 37

Citation : (2000) 3 ALLMR 608 : (2000) 3 BomCR 360 : (2000) 3 BOMLR 430 :
(2000) 3 MhLj 730

Hon'ble Judges : S. Radhakrishnan, J;B.N. Srikrishan, J

Bench : Division Bench

Advocate : Virendra V. Tulzapurkar and H.N. Thakore, instructed by Thakore Jariwala and Associates, for the Appellant; Shiraz Rahimtoola, instructed by . Apex Juris, for the Respondent

Judgement

B.N. Srikrishna, J.—This appeal u/s 39(vi) of the Arbitration Act, 1940 (hereinafter referred to as "the Act") is directed against the judgment and. order of the learned Single Judge dated 19th October 1994 refusing to set aside an Arbitration Award No. 166 of 1989 dated 20th October 1989.

2. Some time in 1983, the appellant had floated tenders for construction of 14,000 M.T. cold storage at Vashi, New Mumbai. The respondent, a construction firm, had tendered for the work and was awarded the contract for the said construction work. The contract was signed some time in 1984. Some time during the year 1986, disputes arose between the appellant and the respondent. The respondent filed Arbitration Suit No. 3219 of 1986 under the Act for appointment of an arbitrator. There was protracted litigation between the parties which even went to the Supreme Court and came back. We are not concerned with the details of the said litigation except that as a result of certain directions

made by the Supreme Court, this Court ultimately appointed one S.N. Mishra, as the sole arbitrator by an order dated 2nd November 1988. The arbitrator entered upon the reference on 1st March 1989. The respondent filed its statement of claim on 2nd March 1989 which was replied by the written statement of the appellant filed on 16th March 1989. A rejoinder was filed on 28th March 1999 and the award came to be made on 20th October 1989. The arbitrator by his award directed the appellant to pay a sum of Rs. 32,68,805.80 ps. to the respondent and further directed that if the appellant failed to pay the said sum to the respondent on or before 15th December 1989, then the said sum was to carry interest at 18% p.a. upto the date of final payment.

3. Being aggrieved by the said arbitration award, the appellant filed Arbitration Petition No. 219 of 1989 u/s 30 of the Arbitration Act, 1940. This petition was dismissed by the judgment of the learned Single Judge dated 19th October 1994. Hence, this appeal.

4. Although a number of issues were canvassed in the petition and before the learned Single Judge, Mr. Tulzapurkar, the learned Counsel appearing for the appellant, has confined the appeal only to the following grounds:-

(i) That there is an error apparent on the face of the award on the issue of "balance steel recovery" inasmuch as, having found that the respondent had failed to return certain quantity of steel supplied by the appellant which had remained unutilised, the arbitrator ought to have permitted the appellant to claim penal interest on its value at twice the issue rate, as agreed under the contract. Since the arbitrator awarded interest only at single rate, the arbitrator has acted contrary to the express terms of the contract to do which he had no jurisdiction.

(ii) Certain claims were not arbitrable and were left to the sole decision of the Managing Director of the appellant. Hence, the arbitrator had no jurisdiction to entertain those claims or make any award thereon.

(iii) The arbitrator acted beyond jurisdiction in not awarding at the C.P.W.D. rates for extra items.

(iv) The arbitrator acted contrary to law in directing payment of interest at the rate of 15% p.a. as there was no agreement on the rate of interest and the rate of 15% p.a. is far in excess of what is contemplated even under the Interest Act, 1978.

(v) The arbitrator erred in granting interest on interest on two of the claims.

(vi) Finally, the arbitrator erred in directing interest of costs of arbitration awarded.

Ground (i)

5. The first issue is the issue which was dealt with by the arbitrator as Issue No. 4. Under the terms of the contract, Clause No. 15.2.6 provided as follows:

"If on completion of work, the contractor fails to return surplus materials out of those supplied by the federation, then, in addition to any other liability which the contractor would incur, the Engineer Incharge may, by a written notice to the contractor, require him to pay within a fortnight of receipt of the notice, for such unreturned surplus materials at double the issue rates."

6. The case of the appellant before the arbitrator was that it had issued certain quantity of steel to the respondent for facilitating the construction. After the work was completed, the respondent failed to hand back the remaining quantity of steel. Hence the respondent was liable to pay to the appellant at the penal rate of twice the issue rate on the unconsumed quantity of steel appropriated by him after the completion of the contract. The appellant claimed that it was entitled to deduct this amount from the final bill of the respondent.

7. The parties led evidence before the arbitrator and upon consideration of the said evidence, the arbitrator was of the view that the evidence was unsatisfactory. The finding of the arbitrator is: "However, there is no clear evidence by either side as to what happened to the balance steel. Under the circumstances, I decide that claimants to pay for the balance steel at the issued rate and not at the penal rate." Though this was the finding made by the arbitrator in the main body of the award, in Appendix C, while indicating detailed calculation on this issue, the arbitrator has given certain deductions under the head "Recoveries" and deducted the following amounts:-

Steel:

(a) M.S- 10.36 MT @ Rs. 5000/- Rs. 51,805.00

(b) Tor Steel 169.976 mt @ Rs. 5200.00 Rs. 8,83,875.20

(c) Tor Steel 10.29 mt. @ Rs. 5200 p. Rs. 53,456.00

Rs. 9,89,136.20

8. It is contended by Mr. Tulzapurkar that the appendices are part of the award itself. The award has to be interpreted by reading Appendix C in conjunction with the main body of the award. Once this is done, it becomes clear that the arbitrator has come to a finding that the aforesaid quantities of steel under the three heads were still lying unutilised with the respondent and were unaccounted by him. Hence, the arbitrator was bound to apply the penal interest in the contractual term i.e. Clause 15.2.6 and permit recoveries at double the issue rates. Since the arbitrator has expressly directed in the award that the balance steel should be paid for at the issued rate and not at the penal rate, he has acted contrary to the specific term of the contract and, hence, the said direction in the award was liable to be interfered with.

9. Mr. Rahimtoola, the learned Counsel appearing for the respondent, however, contends that a fair reading of the award suggests that, in view of the extremely unsatisfactory nature of the evidence led by both the parties, the arbitrator was

unable to give a clear cut finding that there was any unaccounted balance steel available in the hands of the respondent. Once this was the finding of the arbitrator, he had no jurisdiction whatsoever to award any amount towards the recovery for balance steel. It is true that the arbitrator has awarded certain amounts on the basis of certain calculations. If at all anyone was aggrieved thereby, it was the respondent who would be aggrieved. The respondent did not think it worthwhile to incur further litigation costs and, therefore, did not challenge the said part of the award. This, however, does not give a right to the appellant to contend that there is a finding of balance steel unutilised in the hands of the respondent and that the recovery ought to be permitted at penal rate of double the issue rate.

10. Having bestowed careful consideration to the rival argument, we are inclined to accept the respondent's contention. It is true that the award is not happily worded, but a fair reading of the main body of the award on Issue No. 4 does not suggest that the arbitrator had found that the respondent had retained any unused balance steel. In fact, the reference to the photograph produced by the respondent showing unutilised steel lying at site on the day of the inauguration coupled with the reference to gate-passes which showed only scrap steel having been removed, fortify this conclusion. The arbitrator, without mincing words, said that there was no clear evidence led by either side as to what happened to the balance steel. Going by Clause 15.2.6 of the contract, the arbitrator could not have awarded recovery at penal rates of double the issue rates unless he gave clear cut findings on the following issues:

- (a) that some amount of issued steel remained in balance without consumption;
- (b) that it had been retained in the hands, of the respondent; and
- (c) that the respondent had failed to pay therefore .

11. After having scanned the award on Issue No. 4, we find no such clear cut findings made by the arbitrator. It is true that the arbitrator has awarded certain amount as payable to the appellant by the respondent and he has also given some calculations as seen from Appendix C. From this, however, we are unable to come to a conclusion that the arbitrator has given a positive finding that such quantum of steel was unutilised and had been appropriated by the respondent even after completion of the contract. The learned Judge therefore has rightly rejected the argument of the appellant and we find ourselves in agreement with the view taken by the learned Single Judge on this issue.

12 Mr. Tulzapurkar cited in his support the following authorities:-

- (1) Associated Engineering Co. Vs. Government of Andhra Pradesh and another, .
- (2) Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, .
- (3) Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor, .

- (4) State of U.P. Vs. M/s. Ram Nath International Const. Pvt. Ltd., .
- (5) New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation, .
- (6) Sudarsan Trading Co. Vs. Government of Kerala and Another, .

He cites them in support of the legal proposition canvassed by him that where the terms of the contract are clear and there is no question of any interpretative exercise on the part of the arbitrator, the arbitrator is bound to apply the express terms of the contract. There can be no quibbling with this legal proposition. We are, however, not satisfied that the arbitrator has made a finding on the quantum of steel lying unutilised and appropriated by the respondents. Hence, these judgements are of no assistance to us here.

Ground (ii)

13. The next issue canvassed by Mr. Tulzapurkar is Issue No. 9 before the arbitrator. The contention of the appellant was that there was inferior quality of workmanship as a result of which the appellants were entitled to make certain deductions from the bills. The arbitrator pointed out that, under the contract, the respondent was obliged to use local materials including local bricks, that the bricks in the Bombay Region were of inferior quality and further that all the bills presented had been passed by the Architect of the appellant without demur or comment and paid. On these grounds, the arbitrator took the view that the appellants were estopped from raising this issue and that no such recovery could be permitted.

14. Mr. Tulzapurkar, however, contends that, under the contract, this is an issue which is left to the sole discretion of the Managing Director of the appellant. Consequently, the issue was not arbitrable at all, and, therefore, the arbitrator acted beyond his jurisdiction. Mr. Tulzapurkar relies on Clauses 10(b), (c) and (f) and Clause 11 of the Articles of Agreement. We are unable to agree with the contention of the learned Counsel. Clause 10(b) merely provides that all special losses and damages suffered by the Employer, as certified by the certificate of the Engineer-in-charge, shall be final, conclusive and binding. Clause 10(c) of the contract similarly makes "losses suffered by the employer or damages due to negligence or lack of proper care" on the part of the contractor shall be liable to be reimbursed and the certificate of the Engineer-in-charge as to the extent of damage and its value is declared to be final, conclusive and binding upon the contractor. Clause 10(f) provides that all disputes and differences arising out of the contract as contained in the proceedings in paragraphs (a) to (f) of Clause 10 shall be referred to the Managing Director of Employer whose decision shall be final conclusive and binding and shall not be referred to arbitration or to any Court of law. The expression "employer" used in the contract denotes the present appellant. Now, upon a fair reading of these clauses, we are unable to agree with the contention with regard to bad workmanship. Mr. Tulzapurkar emphasized Clause 10(c) and contended that the expression "negligence or lack of proper care" is synonymous with bad workmanship. We are unable to agree. There may

be negligence or lack of proper care on the part of the contractor even with good workmanship and, conversely, there may be bad workmanship even in the absence of negligence or lack of proper care. The two are not synonymous. The arbitrator has considered the claim and given good reasons for his award. We agree with the finding of the learned Single Judge that this was not an issue which could be judicially reviewed u/s 30 of the Act. We are, therefore, of the view that the dispute as to recovery for bad workmanship was not non-arbitrable under the contract. The arbitrator had, at any rate, jurisdiction to deal with this issue. The award is therefore not liable to be interfered with on this ground.

Ground (iii)

15. It is contended that the award is beyond the terms of the contract with regard to Issue No. 2 for having granted rates other than C.P.W.D. rates for extra items.

16. Issue No. 2 before the arbitrator pertained to certain extra items. Both parties admitted before the arbitrator that the format to be used for analysis of extra items shall be the C.P.W.D. format. Both parties indicated to the arbitrator that there was no difference between them as to the format used by them in analysing extra items. The parties were, however, not at ad idem on the actual rates to be taken for labour and material, referred to in the format. While the appellant insisted that the rates prescribed by C.P.W.D. in respect of the labour and material had to be used, the respondent insisted that local rates would have to be used. This appears to have been resolved in a meeting of 6th March 1986 where the Architect approved extra Items 1 to 6 at the rates that were put forward by the respondent. With regard to extra Items 7 & 8 the rate analysis put forward by the appellant was not even contested by the respondent. With regard to the analysis of Item No. 9 pertaining to transportation and wages, the arbitrator denied the claim of the respondent. With regard to Item No. 10, the rate put forward by the appellant was accepted by the arbitrator. In these circumstances, it is not possible to accept the contention that there was any requirement that the C.P.W.D. rates had to be accepted and that no deviation therefrom was permissible under the contract. We are unable to agree that the arbitrator has acted beyond the terms of the contract while making his findings on the extra items on rates other than the C.P.W.D. rates also. The contention has no merit and has been rightly rejected by the learned Single Judge.

Ground (iv)

17. The next item pertains to interest. There are three limbs to the argument and we shall deal with them separately.

18. As already pointed out, the arbitrator entered upon the reference on 1st March 1989. The arbitrator having found that the appellant was liable to pay total sum of Rs. 32,68,805.80 ps., directed that if the said amount is not paid by the appellant to the respondent upto 15th December 1989, the same would carry interest @ 15% p.a. till the date of payment. This total amount of Rs.

32,68,805.80 includes the following three claims :

Claim No. 1 : Rs. 17,36,994-97 Claim No. 2 : Rs. 2,40,615-96 Claim No. 3 : Rs. 2,68,000-00 It is urged that, examining the manner in which each of these three claims were awarded, it would be seen that with regard to Claim No. 1 (Rs. 17,36,994-97), the arbitrator had found that what was due was Rs. 13,62,349/- to which he added interest from January 1987 to October 1989 (22 months) at 15% which worked out to Rs. 3,74,645-97. Thus the total amount in respect of Claim No. 1 works out to Rs. 17,36,645-97. (There is an apparent inconsistency in the figures of Claim No. 1 reproduced on page 104 of the abstract of the award and the detailed calculation of Claim No. 1 on page 109 of the paperbook. One thing however is certain, the arbitrator calculated interest @ 15% for the period January 1987 to October 1989 and added it to make up Claim No. 1).

19. A similar exercise was carried out with regard to Claim No. 2, where also, having found that a total sum of Rs. 1,88,718.40 p. was due, the arbitrator added interest for the period January 1987 to October 1989 at 15% equal to Rs, 51,897-56 p., making the total, under the head of C.P.W.D. as Rs. 2,40,615-96 p.

20. Claim No. 8 preferred by the respondent was that under the contract the bill had to be paid within 3 weeks and there was failure to honour this contractual obligation on the part of the appellant. So, far all such delayed payment, the respondent claimed interest @ 22% amounting to Rs. 3,93,626-02 p. The arbitrator recalculated the amount of interest and awarded Rs. 2,68,000/- interest on delayed payment. On this amount also, in the final analysis, interest had been allowed at 15% p.a.

21. The contention of the learned Counsel for the appellant is that for the period prior to 1st March 1989 (i.e. pre-reference), the arbitrator would have jurisdiction to award interest only if there was a provision in the agreement between the parties or there was a substantive law which empowered such interest being awarded. With regard to the power of the arbitrator to award interest for pre-reference period, the position in law is crystalised in *Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others*, . The Supreme Court took the view, that interest could be awarded only if there was an agreement to pay interest or usage of trade having the force of law or some other provision of substantive law which entitled the claimant to receive interest. The Supreme Court pointed out that this was the position in cases which arose prior to the coming into force of the Interest Act, 1978. This was in view of the fact that under the earlier Act of Interest Act, 1839, the arbitrator was not included within the definition of Court. In cases arising after the coming into force of Interest Act, 1978, the Supreme Court held that though the award of pendente lite interest was governed by the same principles, the award of interest prior to the suit would be governed by the Interest Act, 1978 since, under the 1978 Act, an arbitrator is, by definition, a Court and had power to award interest in all cases to which Interest Act applied. The Supreme Court also observed in this judgement that the arbitrator is bound to make his award in accordance with

law and that if the arbitrator could not have possibly have awarded interest on any permissible ground, because such ground did not exist, it would be open to the Court to set aside the award relating to interest on the ground of an error apparent on the face of the award.

22. In *Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy*, , the Constitutional Bench of the Supreme Court took the view, that an arbitrator had jurisdiction to award pendente lite interest even when the agreement was silent as to the award of interest. The Supreme Court was of the view that where the agreement between parties does not prohibit grant of interest, and where a party claims interest and that dispute along with claim for the principal amount or independently is referred to the arbitrator, the arbitrator has the power to award interest pendente lite. This was for the reason that in such a case it must be presumed that interest is an implied term of the agreement between the parties and, therefore, when the parties refer all the disputes, or refer the dispute as to interest as such to the arbitrator, the arbitrator shall have the power to award interest. The awarding of interest in such cases is, of course, within the discretion of the arbitrator which must be exercised in the light of the facts and circumstances of the case keeping the ends of justice in view. In para 43 of the judgement, the Supreme Court laid down the following propositions of law with regard to the power of the arbitrator to award interest:

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

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of section 34, CPC and there is no reason or principle to hold otherwise in the case of arbitrator.

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

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow as they think fit, so long as they are not opposed to law. (The proviso to section 41

and section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas 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 have 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."

23. Finally, in para 44, the Supreme Court observes as follows :---

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

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

The Supreme Court also declared that the decision in Jena's case (supra), insofar as it runs counter to the above propositions, did not lay down the correct law.

24. Thus, the crystalized position in law is that an arbitrator has power to award interest pendente lite and, where the contract is silent as to the awarding of interest, the arbitrator has power to award interest for the pre-reference period if there is a substantive law which empowers him to do so, or if there is a usage of trade for payment which has the force of law.

25. In the instant case, there is no usage of trade. The only substantive law which empowers the arbitrator to award interest is the Interest Act, 1978. It is

not in dispute that the arbitration was after coming into force of the 1978 Act i.e. from the year 1981. Thus, we are of the view that the arbitrator had power to award interest in view of section 3 of the Interest Act, 1978.

26. The learned Counsel for the appellant, however, contended that even if the arbitrator had the power to direct payment of interest in view of section 3 of the Interest Act, 1978, there cannot be an enlargement of this power beyond what was conferred by the provisions of Interest Act, 1978. He urges that though section 2(a) of the Interest Act, 1978 defines the expression "Court" as inclusive of an arbitrator, the power of the arbitrator or Court to allow interest u/s 3 is at a rate "not exceeding current rate of interest" and that the expression "current rate of interest" has been defined in section 2(b) to mean that the maximum rate at which the interest may be paid on different classes of deposits by Scheduled Banks in accordance with the directions given or issued to Banking Companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949. Mr. Tulzapurkar contends that the only source of power of the arbitrator to award interest is traceable to section 3 of the Interest Act, 1978 and if this is the source of the power, the power cannot be larger than what is conferred by the source. In other words, if section 3 empowers the arbitrator to award interest for pre-reference period at not more than "current rate of interest" as defined in section 2(c) of the Act, the arbitrator has no power to grant larger rate of interest for the pre-reference period. The contention has merit and needs to be accepted. All empowerment by statute must necessarily be within the limitations prescribed by the statute. The only substantive law which is pleaded for empowering the arbitrator to award interest for pre-reference period in the present case is Interest Act, 1978. Indubitably, section 3 of the Act places an embargo upon the power of the arbitrator by the words "not exceeding the current rate of interest". Hence, we are of the view that, as far as pre-reference period was concerned, i.e. the period prior to 1st March 1989, the arbitrator had no power to award interest at a rate higher than the current rate of interest. The parties are agreed that the maximum rate permitted by the Reserve Bank of India on public deposits during the period 1987-89 was 10% p.a. Thus, the appellant's contention is justified to this extent and we hold that the arbitrator acted in excess of jurisdiction and contrary to law in awarding interest in excess of 10% for the period 1987-89.

27. Mr. Tulzapurkar brought to our notice the judgment of the Supreme Court in *Nirmalabai Narayan Datar and Others Vs. Girijabai Gangadhar Gadre and Others*, which (para 4) beautifully sums up the situation. This was a case which had arisen under the Partnership Act, 1952. Section 37 of the Partnership Act, 1952 prescribes a maximum rate of interest at 6% p.a. on the amount of share of the property of the firm. The dispute having been referred to arbitration, the arbitrator granted interest at 9% p.a. instead of 6%. The Supreme Court reduced the interest to 6% as permitted under the relevant substantive law. In the instant case, the substantive law being the Interest Act 1978, interest would have to be scaled down to 10% for the period prior to 1st March 1989.

28. Mr. Tulzapurkar then contended that, with regard to Claim Nos. 1 & 2, since the ascertainment of the components of the claim itself indicated that there was an element of interest added, the arbitrator erred and acted contrary to law in awarding interest on the total amount awarded at 15% p.a. He also contends that on Item No. 12 pertaining to the cost of arbitration, the arbitrator acted without jurisdiction in awarding interest on the amount of Rs. 1 lac.

Ground (v)

29. It appears to us that the contention urged by the learned Counsel is no longer *res integra* in view of the judgement of the Supreme Court in *Oil & Natural Gas Commission v. M/s. M.C. Clelland Engineers S.A.* 1999(3) Bom.C.R. (S.C.)537 :A.I.R 1999 . S.C.W. 1224. This was a case where the claim before the arbitrator was in respect of certain amounts claimed in U.S. dollars together with interest at 12% p.a. thereupon. After having awarded the said claim, the arbitrator also directed interest to run from the date of the award. The argument before the Supreme Court was that this amounted to payment of interest on interest, somewhat similar to what the learned Counsel..... for the appellant herein contends. The Supreme Court negated the contention by observing as follows (vide paragraph 4) :

"4. There cannot be any doubt that the Arbitrators have powers to grant interest akin to section 34 of the C. P.C. which the power of the Court in view of the section 29 of the Arbitration Act, 1940. It is clear that interest is not granted upon interest awarded but upon the claim made. The claim made in the proceedings is under two heads-one is the balance of amount under invoices and letter dated February 10, 1981 and the amount certified and paid by the appellant and the second is the interest on delayed payment. That is how the claim for interest on delayed payment stood crystalized by the time the claim was filed before the Arbitrators. Therefore, the power of the arbitrators to grant interest on the amount of interest which may, in other words, be termed as interest on damages or compensation for delayed payment which would also become part of the principal. If that is the correct position in law, we do not think that section 3 of the Interest Act has any relevance in the context of the matter which we are dealing with in the present case. Therefore, the first contention raised by Shri Datta, though interesting, deserves to be and is rejected."

30. We may reiterate here the observation of the Supreme Court in *G.C. Roy (supra)* where it was, highlighted that 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, interest, compensation or damages. The Supreme Court emphasized that 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 and emphasized that this was the principle also u/s 34 of the CPC and that there was no reason or principle to hold otherwise in the case of an arbitrator

31. Apart from the precedent, on principle also, the contention of the appellant must fail. There is no doubt that on the two items, namely claim Nos. 1 & 2, the respondent had claimed before the arbitrator that a certain principal amount was due at a particular point of time and that, on account of failure of the appellant to discharge its obligation, the said amount had to be paid together with interest. This was the claim before the arbitrator. Thus, if the claimed amounts were to be paid over on the date of the award itself, the claims would have included a component of principal sum together with interest thereupon. Instead of paying over the amount as on the date of the award, the appellant carried forward the litigation resulting in lapse of time. We therefore see no reason as to why the party entitled to the amount inclusive of the interest, as on the date of the award, should not be awarded interest on the entire awarded amount inclusive of interest. Thus, in our view, the direction in the award for payment of interest on the entire amount inclusive of interest as made in the award, is perfectly justified both in principle and on precedent. We see no error of law committed by the arbitrator and, therefore, reject the contention of the appellant.

Ground (vi)

32. Finally, Mr. Tulzapurkar contended that the arbitrator erred in directing payment of interest on the share of arbitration cost of Rs. 1 lac. We find no principle or precedent to oppose this direction of interest on costs. Mr. Tulzapurkar however, drew our attention to section 35(3) of the CPC which was deleted by an amendment of 1956. He contended that sub-section (3), before its deletion empowered the Court to award interest on costs also. He contends that the legislature by deletion of this provision has indicated that courts should henceforth not award interest on costs. This principle should equally apply to arbitrators in the submission of the learned Counsel. We are unable to accept the contention that the power of the arbitrator to award interest, pendente lite or in future, is referable strictly to the provision of section 34 of the Code of Civil Procedure. We have also dealt with the judgements of the Supreme Court (*supra*) which say, that the arbitrator's power, though akin to the power of the Court u/s 34 of CPC is not identical with it. The changes brought out in section 34 of CPC by deletion of sub-section (3) of section 35 have no relevance to the power of the arbitrator, in our view. The arbitrator's power to award compensation for deprivation of use of money and for failure to pay money on the due date has been sufficiently upheld by the Supreme Court in the judgement of G.C. Roy (*supra*). On the same principle, we are of the view that the share of the arbitration cost of Rs. 1 lac ought to have been handed over to the respondent on the date of the award. If it was not done, there is no reason why the respondent should not be entitled to claim compensation for being deprived of its use. Hence, this contention is also rejected.

33. In the result, the Appeal partly succeeds. The order of the learned Single Judge and the decree are modified as under :

34. There shall be a decree in favour of the respondent, and against the

appellant in the sum of Rs. 30,35,942.75. (The parties are agreed on this figure calculated on the footing that the maximum interest rate permissible was 10% p.a. for the pre-reference period in respect of Claims 1, 2 & 8).

35. Decree accordingly. There shall also be a decree for payment of interest at 18% p.a. on the principal sum of Rs. 28,40,388.20 from 19th October 1994. Appeal accordingly partly allowed as aforesaid.

36. No order as to costs.

37. Appeal partly allowed.