

A EXECUTIVE ENGINEER, DHANKANAL MINOR IRRIGATION
DIVISION, ORISSA

v.

N.C. BUDHIRAJ (DEAD) BY LRS. ETC.

OCTOBER 29, 1999

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[S.P. KURDUKAR, M. JAGANNADHA RAO AND
U.C. BANERJEE, JJ.]

Arbitration Act, 1940:

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*Arbitrator—Power to award interest under the Interest Act, 1839 for
the pre-reference period—Matter referred to larger Bench—Interest Act, 1839.*

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*State of Orissa v. G.C. Roy, [1992] 1 SCC 508; Executive Engineer
(Irrigation) Balimela & Ors. v. Abhaduta Jena & Ors., [1988] 1 SCC 418;
State of Orissa v. B.N. Agarwalla, [1997] 2 SCC 469; Bengal Nagpur Railway
Co. v. Ruttanji Ranji, 65 1A 66; Seth Thawardas Pherumal v. UOI, [1955] 2
SCR 48; UOI v. A.L. Rallia Ram, [1964] 3 SCR 164; UOI v. Watkins Mayor &
Co., AIR (1966) SC 275; U.O.I. v. West Punjab Factories Ltd., [1966] 1 SCR
580; Jugal Kishore Prabhatilal Sharma & Ors. v. Vijayendra Prabhatilal
Sharma & Anr., [1993] 1 SCC 114; M/s. Ashok Construction Company v.
Union of India, [1971] 3 SCC 66; State of Madhya Pradesh v. M/s. Saith &
Skelton (P) Ltd., [1972] 1 SCC 702; Union of India v. Bungo Steel Furniture
Pvt. Ltd., [1967] 1 SCR 324 and Firm Madanlal Roshanlal Mahajan v.
Hukumchand Mills Ltd., AIR (1967) SC 1030, referred to.*

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*Edwards v. G.W. Rly. Co., [1851] 138 ER 603; Chandris v. Isbrandsten-
Moller Co. Inc., [1951] 1 KB 240; President of India v. La Pintada Cia
Navegacion SA, [1984] 2 All England Report 773 and Panchaud v. Pagnan,
(1974) 1 Lloyd's Law Report 394, referred to.*

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Russell on the law of Arbitration page 324, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3586 of
1984 Etc.

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From the Judgment and Order dated 15.5.82 of the Orissa High Court
in Misc. A.No. 254 of 1981.

Raj Kumar Mehta, Ms. Mana Chakraborty and Ms. M. Sarada for the Appellant. A

A.B. Diwan, A.K. Panda, G.L. Sanghi, Vinoo Bhagat, S. Misra, R.P. Wadhvani and R.S. Jena for the Respondents.

The following Order of the Court was delivered :

In this batch of civil appeals the principal question that arises for consideration is as to whether the Arbitrator has got jurisdiction to award interest for the pre-reference period in cases which arose prior to commencement of the Interest Act, 1978. The Interest Act, 1978 came into force w.e.f. 19.8.1981. Before enforcement of this, the Interest Act, 1839 was holding the field. Under the impugned judgment, the High Court has awarded interest for the pre-reference period and this is how the State of Orissa has filed all these appeals. B C

Mr. Raj Kumar Mehta, learned Advocate appearing in support of these appeals urged that the question of payment of interest for the pre-reference period is no more resintergra as the said question has been answered in the negative by this Court in catena of judgments. However, Mr. Anil Diwan, the learned Senior Counsel appearing for the respondents, urged that in view of judgment of this Court in *State of Orissa v. G.C. Roy*, [1992] 1 S.C.C. 508, the judgment in *Executive Engineer (Irrigation) Balimela & Ors. v. Abhaduta Jena & Ors.*, [1988] 1 SCC 418, and *State of Orissa v. B.N. Agarwalla*, [1997] 2 SCC 469, require reconsideration. Some English decisions as well as decisions of this Court were also relied upon. D E

Mr. Mehta drew our attention to various judgment of this Court including the Privy Council to support his submission. A strong reliance has been placed by him on two decisions rendered by the three-Judge Bench, (1) *Executive Engineer (Irrigation) Balimela & Ors. v. Abhaduta Jena & Ors.*, [1988] 1 SCC 418, (2) *State of Orissa v. G.C. Roy*, [1992] 1 SCC 508 and *State of Orissa v. B.N. Agarwalla*, [1997] 2 SCC 469. He also drew our attention to the following decisions and urged that cases governed by the Interest Act, 1839 the arbitrator has no jurisdiction to award pre-reference interest in the absence of any custom or usage of trade having the force of law or any other provision of substantive law entitling the claimant to recover interest. F G

1. *Bengal Nagpur Railway Co.*, 65 IA 66.

2. *Seth Thawardas Pherumal v. UOI*, [1955] 2 SCR 48. H

- A 3. *UOI v. A.L. Rallia Ram*, [1964] 3 SCR 164.
4. *UOI v. Watkins Mayor & Co.*, AIR (1966) SC 275.
5. *UOI v. West Punjab Factories Ltd.*, [1966] 1 SCR 580.

B In *Executive Engineer v. Abhaduta Jena & Ors.*, the 3-Judge Bench has held that the Arbitrator has no jurisdiction to award interest for the pre-reference period where provisions of the Interest Act, 1839 apply as also pendente lite. Later on the Constitution Bench of this Court in the *State of Orissa v. G.C. Roy*, [1992] 1 SCC 508, was required to consider the correctness of the view taken by this Court in *Jena's* case so far it held that the Arbitrator

C has no power to award pendente lite interest.

Reverting back to the judgment in *Abhaduta Jena*, a three-Judge Bench judgment held that the interest is not payable either for the pre-reference period or pendente lite. There the question arose under the Interest Act of 1839. It is true that the Constitution Bench in *G.C. Ray's* case was principally

D concerned as to whether the decision in *Abhaduta Jena's* case rejecting the claim of pendente lite interest was correctly decided or not. The Constitution Bench in paragraph 44 and 45 held as under:

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

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite.

F 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

G 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."

Paragraph 45 :

H "For the reasons aforesaid we must hold that the decision in *Jena*,

in so far as it runs counter to the above proposition, did not lay down correct law.” A

Later on in *Jugal Kishore Prabhatilal Sharma & Ors. v. Vijayendra Prabhatilal Sharma & anr.*, [1993] 1 SCC 114, again a three-Judge Bench has clarified the judgment in *Jena's case* holding that in *G.C. Roy's case* the only question that was concluded by the Constitution Bench was relating to pendente lite interest and not awardability of interest for the pre-reference period prior to the enforcement of the Interest Act, 1978. This clarification was given by Jeeven Reddy, J. while disposing of this appeal. Incidentally it may be mentioned that Jeevan Reddy, J. was also a member of the Constitution Bench. B

Again a question was raised before a 3-Judge Bench in *State of Orissa v. B.N. Agarwala*, [1997] 2 SCC 469, as to whether decision in *Jena's case* has been overruled also as regards awardability of interest for the pre-reference period under the Interest Act, 1839 and it was held that the said decision has been overruled only as regards pendente lite interest. Mr. Mehta, learned counsel for the appellant, therefore, urged that the decision in *Jena's case* holds the field and the issue of awardability of interest for the pre-reference period under the Interest Act, 1839 stands concluded. He also drew our attention to many reported and un-reported decisions of this Court disposing of the appeals on the basis of *Jena's decision*. In view of this settled position of Law, he urged that all these appeals be allowed. C D E

Mr. Anil Diwan, the learned senior Counsel could not dispute that in *Jena's case* the claim for award of interest for the pre-reference period under the Interest Act, 1839 has been rejected. He, however, strongly relied upon the observations/findings recorded by the Constitution Bench in *G.C. Roy's case* in paragraph 43, which read as under : F

“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 : G

- (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 H

- A it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.
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- (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.
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- (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.
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- (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 had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.
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- (v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period).
- H For doing complete justice between the parties, such power has

always been inferred.”

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Relying upon these paragraphs, he urged that the amount payable to the claimants if found was unauthorisedly withheld, it is nothing but a debt and for such deprivation why interest be not paid particularly when the agreement between the parties does not prohibit award of interest. Shri Diwan then contended that the Indian Interest Act, 1839 no doubt does not expressly cover the arbitrator as does the Interest Act, 1978. But the Interest Act, 1839 corresponds almost *verbatim* to the English Civil Procedure Act, 1833. Under that Act, interest was awarded in England for the pre-reference period in *Edwards v. G.W. Rly. Co.*, (1851) 138 ER 603. This case was approved in *Chandris v. Isbrandsten—Moller Co. Inc.*, (1951) 1 KB 240 on the principle that the arbitrator was bound to apply the substantive law as administered by the ordinary courts of the land unless prohibited by contract or statute. It was these English cases that have been relied upon in *G.C. Roy* to hold that the arbitrator has power to grant *pendente lite* interest as does the ordinary Court. That is why in para 44(i) (p. 532-533) of *G.C. Roy* it is stated : “This basic consideration is as valid for the period the dispute is pending before the arbitrator *as it is valid for the period prior to the arbitrator entering upon the reference.*” If that is the basis of *G.C. Roy* for holding that arbitrator can award *pendente lite* interest, then *afortiori* when the question of pre-reference interest directly arises, the answer must only be that the arbitrator can award interest for the pre-reference period if in a similar situation, a court of law grants interest for the period before suit. Mr. Diwan contends that this aspect is fundamental and has not been considered in *State of Orissa v. B.N. Aggarwal*, [1997] 2 SCC 469. There this Court merely held that *G.C. Roy* was not concerned with pre-reference interest. That may be true but the result in *G.C. Roy* was based on a principle relating to grant of interest for the pre-reference period under general law in England. It would be most equitable to adopt such course to avoid multiplicity of proceedings.

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He, therefore, urged that the correct reading of the judgment in *G.C. Roy* would be that the said judgment has overruled the judgment in *Jena's* case on both the issues, namely, award of interest for the pre-reference period under the Interest Act, 1839 as also the *pendente lite* interest. The observations in paragraph 8 according to the learned counsel support his contention. Paragraph 8 thereof reads as under :

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“8. Generally, the question of award of interest by the arbitrator may arise in respect of three different periods, namely : (i) for the period commencing from the date of dispute till the date the arbitrator

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A 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* case, 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*."

E The Constitution Bench placed reliance on the English decision including the decision in *Chandris v. Isbrandsem-Moller Co. Inc.*, (1951) 1 KB 240 : (1950) All ER 768. Certain Indian decisions were also referred to in the said paragraph. He also relied upon the decision of the English Court in *President of India v. La Pintada Cia Navegacion SA* (1984) 2 All England Report 773. This is a case where the power of Arbitrator to award interest for the pre-reference period was directly involved and it was answered accordingly in favour of the claimants. He also drew our attention to the passage from the decision in *Panchaud v. Pagnan* (1974) 1 Lloyd's Law Reports 394 at page 411. In addition to this he relied upon the statement of law from the book Russell on the Law of Arbitration page 324 which reads thus :

G "A distinction must be drawn between the power of an arbitrator to award interest up to the date when he makes his award, and his power to award interest on his award.

H As concerns his power to award interest up to the date of his award it was always considered that he had power to do so, by virtue

of his implied authority to follow the ordinary rules of law, and he not only has the power but he should normally exercise it in the absence of a cogent objection. A

“In a commercial transaction if the plaintiff has been out of his money for a period, the usual order is that the defendant should pay interest for the time for which the sum has been outstanding. No exception should be made except for good reason.” B

Mr. Anil Diwan, learned Senior Counsel, then drew our attention to Paragraph 13 in *G.C. Roy's* case wherein it observed as under :

“The question with which we are faced has been considered by the Indian and English courts in details. 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 the courts in England. In *Edwards v. Great Western Railway Company*, the question raised before the court was whether the arbitrator is empowered to award interest on the amount awarded by him if he thinks such a course proper. The plaintiff's case was that he was entitled to such interest whereas the defendant company disputed the power of the arbitrator. The Company's case was that inasmuch as the notice of action did not demand interest, the plaintiff was not entitled to claim interest. This argument was repelled by Jarvis C.J. in the following words : C
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“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.” F
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Mr. Anil Diwan urged that in none of the judgments relied upon by the appellants the attention of this Court was drawn to the decisions of the English Courts and some judgments of the Indian Courts, namely, *M/s Ashok Construction Company v. Union of India*, [1971] 3 SCC 66, *State of Madhya H*

A *Pradesh v. M/s Saith & Skelton (P) Ltd.*, [1972] 1 SCC 702, *Union of India v. Bungo Steel Furniture Pvt. Ltd.*, [1967] 1 SCR 324, *Firm Madanlal Roshanlal Mahajan v. Hukum Chand Mills Ltd.*, AIR (1967) SC 1030. He therefore, urged that it would be appropriate to refer to all these appeals involving the issue as regards awardability of interest under the Interest Act 1839 for the pre-reference period to a larger Bench for authoritative pronouncement.

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We have heard the learned counsel for the parties at great length and perused the decisions of this Court as well as the English Court referred to in above. In our opinion the observations made by the Constitution Bench in *G.C. Roy's* case referred to herein above, *prima facie* support the contention raised on behalf of the respondents. But in view of the decisions of this Court by three-Judge Bench in *Jena's* case and *B.N. Agarwalla's* case (supra) which had rejected the claim of the claimants for the interest under the Interest Act, 1839 for the pre-reference period, it would be appropriate to refer the following issue to a larger Bench for authoritative pronouncement.

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The question that needs to be considered is :

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

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It may be mentioned that there is no clause in the agreement as regards the payment of interest for the pre-reference period but there is also no clause prohibiting the payment of interest for the pre-reference period.

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The Registry is directed to place the papers before the Learned Chief Justice for appropriate directions.

R.P.

Appeals Still pending.