EXECUTIVE ENGINEER IRRIGATION GALIMALA & ORS. A

v.

ABAADUTA JENA

SEPTEMBER 22, 1987

[O. CHINNAPPA REDDY, M.H. KANIA AND B
K. JAGANNATHA SHETTY, JJ.]

Arbitration Act, 1940: Sections 14, 15, 30 and 33—Arbitrator—Competency of—To award interest on reference made without intervention of Court—Court whether entitled to go behind the award and decide whether award of interest justifiable. C

Interest Act 1839/Interest Act 1978.

Civil Procedure Code 1908, Section 34. Award of pendente lite interest by arbitrator. D

In the appeals by Special Leave to this Court the question for consideration was: whether an arbitrator to whom a reference was made without the intervention of the Court could award interest during the period prior to the reference and during the pendency of the arbitration: E

HELD: 1. The general statutory provisions in regard to the award of interest by the Court are contained in the Interest Act and the Civil Procedure Code. [258F]

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2. The Interest Act of 1839 was repealed and a new Interest Act incorporated in 1978. Both these Acts provide for the award of interest upto 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. [260D]

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3. The award of pendente lite interest is provided for in Section 34 of the Civil Procedure Code. Section 34 however, applies to arbitrations in suits 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 s. 34 Civil Procedure Code. [260E] H

A 4. While under the Interest Act of 1978 the expression 'court' was defined to exclude 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 the Interest Act of 1978 an arbitrator has the same power to award interest upto the date of institution of proceedings, in cases which arose prior to commencement of the 1978 Act the arbitrator has
B no such power under the Interest Act of 1839. [260G]

5. Since the arbitrator is required to conduct himself and make the award in accordance with law, the substantive law has to be looked into for the power of the arbitrator to award interest before the commencement of the proceedings. [260H-261A]

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6. 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 must award interest. [261B]

D 7. Again, there are other provisions of the substantive law enabling the award of interest by the arbitrator. Section 80 of the Negotiable Instruments Act 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, and Section 61(2) of the Sale of Goods Act which provides for the award of interest to the seller or the buyer under certain circum-
E stances in suits filed by them. [261C]

8. There is also the instance of non-performance of a contract of which equity could give specific performance and to award interest. [261C]

9. Where one of the parties is forced to pay interest to a third
F 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, equity may compel the payment of interest. [261C]

10. Loss of interest in the place of the right to remain in possession may be rightfully claimed in equity by the owner of a property who
G has been dispossessed from it. [261D]

11. In the instant appeals, in those cases in which the references to arbitration were made prior to the commencement of the new Act which was on August 19, 1981 and the amount claimed was a certain sum payable at a certain time by virtue of a written instrument, interest
H is payable under the Interest Act for the period before the commencement of the proceeding. [269H-270A]

12. In regard to pendente lite interest, that is, interest from the date of reference to the date of the award, the claimants would not be entitled to the same for the simple reason that the arbitrator is not a court within the meaning of s. 34 of the CPC, nor were the references to arbitration made in the course of suits. [270C]

13. In the remaining cases which arose before the commencement of the Interest Act, 1978, the respondents are not entitled to claim interest either before the commencement of the proceedings or during the pendency of the arbitration. They are not entitled to claim interest for the period prior to the commencement of the arbitration proceedings for the reason that the Interest Act, 1839 does not apply to their cases and there is no agreement to pay interest or any usage of trade having the force of law or any other provision of law under which the claimants were entitled to recover interest. They are not entitled to claim pendente lite interest as the arbitrator is not a court nor were the references to arbitration made in suits. [270D-E]

14. The arbitrator is bound to make his award in accordance with law. If the arbitrator could not 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 the award of interest on the ground of an error apparent on the record. On the other hand, if there was the slightest possibility of the entitlement of the claimant to interest on one or other of the legally permissible grounds, it may not be open to the court to go behind the award and decide whether the award of interest was justifiable. [270F-G]

Bengal Nagpur Railway Company Limited v. Ruttanji Ramji 65 Indian Appeals 66; Thawardas Pherumal v. The Union of India, [1955] 2 SCR 48; Union of India v. Prem Chand Satnam Das, AIR 1951 Patna 201; Nachiappa Chettiar v. Subramaniam Chettiar, [1960] 2 SCR 209; Satinder Singh v. Amrao Singh, [1961] 3 SCR 676; Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., [1967] 1 SCR 105; Union of India v. Bungo Steel Furniture Pvt. Ltd., [1967] 1 SCR 324 and State of Madhya Pradesh v. M/s. Saith & Skelton Pvt. Ltd., [1972] 3 SCR 233, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 6245-46 of 1983.

From the Judgment and Order dated 9.1.1981 of the Orissa High

A Court in Miscellaneous Appeal Nos. 285 and 286 of 1980.

G.L. Sanghi, D.P. Mohanty, R.K. Mehta, Inderjit Roy, P.N. Misra and R.N. Poddar for the Petitioners.

Probir Patil, Y.S. Chitale, Sankar Ghosh, Jitender Sharma, B Vinoo Bhagat, Arun Madan, P.N. Misra, D.N. Mukherjee, M.M. Kashtriya P.K. Banerjee, P.K. Mukherjee, Ms. Lily Thomes, Bagga Mrs. S.K. Bagga, B.P. Meheshwari, J.R. Das, Parijat Sinha, and M.A. Firoz for the Respondents.

The Judgment of the Court was delivered by

C **CHINNAPPA REDDY, J.** This group of appeals raises the question of award of interest by an arbitrator to whom a reference is made without the intervention of the court. Special leave to appeal was granted under Art. 136 of the Constitution limited to the question of award of interest during the period prior to the reference and during D the pendency of the arbitration proceedings. Special leave was not granted in regard to the award of interest subsequent to the date of the arbitrator's award. This question, therefore, does not concern us in these appeals.

The various references to arbitration in these cases were in regard E to work done by different contractors in excess of what was stipulated under the several contracts. The contracts generally contained a clause to the following effect:

> "Clause 11—The Engineer-in-charge shall have power to make any alterations in or additions to the original specifi- F cations, drawings, designs, and instructions that may appear to him to be necessary or advisable during the progress of the work, and the contractor shall be bound to carry but the work in accordance with any instructions which may be given to him in writing signed by the Engineer-in-charge, and such alteration shall not invalidate the G contract; and any additional work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work, and at the same rates as are specified in the tender for the main work. The time for the completion of H the work shall be extended in the proportion that the addi-

tional work bears to the original work bears to the original contract work and the certificate of the Engineer-in-charge shall be conclusive as to such proportion. And if the additional work includes any class of work, for which no rate is specified in this contract, then such class of work shall be carried out at the rates entered in the sanctioned schedule of rates of the locality during the period when the work is being carried on and if such last mentioned class of work is not entered in the schedule of rates of the district then the contractor shall within seven days of the date of his receipt of the order to carry out the work inform the Engineer-in-charge of the rate which it is his intention to charge for such class of work, and if the Engineer-in-charge does not agree to this rate he shall by notice in writing be at liberty to cancel his order to carry out such class of work and arrange to carry it out in such manner as he may consider advisable, provided always that if the contractor shall commence work order of any expenditure in regard thereof before the rates shall have been determined as lastly herinbefore mentioned, then and in such case he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rate as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-charge. In the event of a dispute, the decision of the Superintending Engineer of the circle will be final:

Provided always that the contractor shall not be entitled to any payment or any additional work done unless he has received an order in writing from the Engineer-in-charge for the additional work that the contractor shall be bound to submit his claim for any additional work done during any month on or before the 15th day of the following month accompanied by a copy of the order in writing of the Engineer-in-charge for the additional work, and that the contractor shall not be entitled to any payment in respect of such additional work if he fails to submit his claim within the aforesaid period."

All the contracts also contained a provision for a reference to arbitration in case of disputes. The clause of the contract enabling the reference was as follows:-

A "Clause 23—Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right matter, or thing whatsoever, in any B way arising out of, or relating to the contract, designs, drawings, specifications, estimates instructions, orders, or these conditions, or otherwise concerning the work or the execution, or failure to execute the same, where arising during the progress of the work, or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the State Public C Works Department unconnected with the work at any stage nominated by the concerned Chief Engineer. If there be no such Superintending Engineer it should be referred to the sole arbitration of the Chief Engineer concerned. If will be no objection to any such appointment that the arbitrator so D appointed is a Government servant. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to these contracts."

Pursuant to the clause in the contracts enabling the Chief Engineer to refer disputes to an arbitrator, references were made. For the purposes E of our decision, we are proceeding on the basis that in the notices of demand made by the contractors before the disputes were referred to arbitration interest on the amounts said to be payable was claimed.

The general statutory provisions in regard to the award of interest by a court are contained in the Interest Act and the Civil Proce- F dure Code. The Interest Act of 1839 contained only one section and it was as follows:

"1. It is, therefore, hereby enacted that, upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered G may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing H so as such demand shall give notice pay the debtor that

interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law." A

In 1978, the Interest Act of 1839 was repealed and a new Interest Act was enacted. The Statement of Objects and Reasons of the new Act recited, B

"The Law Commission of India in its sixty-third report had recommended the revision of the existing Interest Act, 1839. This Act is a very short one; besides a preamble, it contains only one section and a proviso. However, it is a statute of importance, since it prescribes the general law of interest which becomes applicable in the absence of any contractual or statutory provisions specifically dealing with the subject. According to the Commission, almost every phrase used in the Act has given rise to problems of interpretation and judicial decisions have disclosed divergence of views in respect of the same. The Commission has revised the Act comprehensively so as to make its provisions more precise, specific, unambiguous and juristically satisfactory. It is proposed to replace the existing Act by a new Act based on the recommendations of the Law Commission." The new Act has made some important changes. One of the important changes is that the expression 'court' is defined to include a tribunal and an arbitrator. Debt is defined as meaning any liability for an ascertained sum of money, including a debt payable in kind, but not including a judgment debt. Section 3(1) enables the court, if it so thinks fit, to award interest, in any proceeding for the recovery of any debt or damages or in any proceeding in which a claim for interest in respect of any debt or damages already paid is made, to the person entitled to the debt or damages or to the person making such claim, for the whole or part of the following period; (a) if the proceeding relates to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings; (b) if the proceeding does not relate to any such debt, then from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceeding. Section 3(3) provides that C D E F G H

A nothing in the section shall apply in relation to (i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or (ii) any debt or damages upon which payment of interest is barred by virtue of an express agreement. Section 3(3)(c) provides that nothing in the section shall empower the court to award interest upon in-
B terest. Section 4(1) provides, "notwithstanding anything contained in section 3, interest shall be payable in all cases in which it is payable by virtue of any enactment or other rule of law or usage having the force of law." Section 4(2) further provides notwithstanding anything as s. 4, the court shall allow interest in the class of cases specified in s. 4(2) from the dates stipulated to the dates stipulated in the pro-
C vision. Section 5 provides that nothing in the Act shall affect the provisions of s. 34 of the Code of Civil Procedure, 1908.

It is important to notice at this stage that both the Interest Act of
D 1839 and the Interest Act of 1978 provide for the award of interest upto 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 s. 34 of the Civil Procedure Code in the case of courts. Section 34, however,
E applies to arbitrations in suits 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 s. 34 Civil Procedure Code. Again, we must look elsewhere to discover the right of the arbitrator to award interest before the
F 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 the Interest Act of 1978 an arbitrator has the same power
G as the court to award interest upto 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 upto the date of institution of the proceedings. Since the arbitrator is required to conduct himself and
H make the award in accordance with law we must look to the substan-

tive 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 of the substantive law enabling the award of interest the arbitrator may award interest. By way of an illustration, we may mention s. 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 s. 61(2) of the Sale of Goods Act which provided for the award of interest to the seller or the buyer as the case may be under 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 to remain in possession may be rightfully claimed in equity by the owner of a property who has been dispossessed from it.

We may now refer to the case law. We may start the discussion of the topic with the case of *Bengal Nagpur Railway Company Limited* v. *Ruttanji Ramji* (65 Indian Appeals 66). There certain rates of payment under an agreement for the construction of a railway line were abandoned by mutual consent of the parties and the contractor was required to be paid at rates which were fair and reasonable for the work done. The question arose whether the contractor was entitled to be paid interest on the amount which the Railway Company was liable to pay. The Privy Council found that the railway was liable to pay to the plaintiff an amount of Rs.66,980-10-6 on July 26, 1925. The suit for recovery of the amount was filed on November 29, 1927. The Privy Council held that award of interest from the date of the institution of the suit was governed by s. 34 of the Code of Civil Procedure and went on to observe that the crucial question was whether the court had authority to allow interest for the period prior to the institution of the suit. They observed that the solution of the question depended not upon the Code of Civil Procedure out upon substantive law. Interest for the period prior to the date of suit may be awarded if there was an agreement for the payment of interest at a fixed rate or it was payable by the usage of trade having the force of law or under the provision of

any substantive law entitling the plaintiff to recover interest. Section 80 of the Negotiable Instruments Act was cited as a provision of the substantive law under which the court may award interest when no rate of interest is specified in the promissory note or bill of exchange. In the case before them however, they observed there was neither usage nor any contract, express or implied, to justify the award of interest. Interest was not payable by virtue of any provision of the law governing the case. Under the Interest Act of 1839, the court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But it was conceded that the amount claimed in the case was not a sum certain. Referring to the provisions of s. 1 of the Interest Act which stated that interest shali be payable in all cases in which interest was then payable by law, the Privy Council observed that the proviso applied to cases in which the court of equity exercised the jurisdiction to allow interest. But then they said that the case before them did not attract the jurisdiction of the court. An example of cases which attract the equitable jurisdiction of the court to award interest was given as the non-performance of a contract of which equity could give specific performance. Considering next the question whether interest could be awarded by way of damages, it was held that it could not be so done. It was categorically stated that interest could not be allowed by way of damages. It was also pointed out that in England, the law had been amended by the Law Reform Miscellaneous Provisions Act which empowered a court of record to award interest on whole or any part of damages. But there was no such amendment of the law in India (at that time).

Seth *Thawardas Pherumal* v. *The Union of India,* [1955] 2 SCR 48 was a case which arose out of a decision of the Patna High Court, which is reported in *Union of India* v. *Prem Chand Satnam Das*, AIR 1951 Patna 201. Some of the facts have been taken by us from the judgment of the Patna High Court as those facts were not evident from the judgment of this court. Pursuant to clause 14 of the contract between the Dominion of India and the contractor which provided that all disputes arising out of or relating to the contract should be referred to the Superintending Engineer, a reference was made on January 21, 1949 and an award followed on May 8, 1949. Before the arbitrator the contractor submitted a claim under 17 heads. Item No. 17 as mentioned in the Statement of claim before the arbitrator was "interest on the amount of money involved in this claim at the rate of six per cent—Rs.27,665. This work was finished in May 1946 and it was proper for the Department to have decided all our claims at least by

31st December, 1947 ..... But this was not done. Due to this, a heavy amount remained blocked and we were compelled to take money from our bankers on interest. We pray, therefore, for interest for 15 months from January 1, 1948 to March 31, 1949." The arbitrator held: "The contract's contention that his claims should have been settled by January 1948 is, in my opinion, reasonable. I, therefore, award interest at six per cent for sixteen months on the total amount of the awards given, that is, Rs.17,363". The question arose whether the arbitrator could award the interest? The Patna High Court noticed that the contractor did not include any claim for interest for the period March 31, 1947 to April 20, 1949 in the bill originally submitted by him to the Chief Engineer and that the claim was made for the first time before the arbitrator during the progress of the arbitration proceedings. The High Court also noticed that the Executive Engineer who appeared on behalf of the Union of India before the arbitrator did not seem to have submitted to the jurisdiction of the arbitrator to decide the question of interest. In those circumstances, the High Court held that it could not be said that the claim for interest was one of the matters referred to arbitration. The arbitrator, it was, therefore, held, had no jurisdiction to entertain the claim and award interest. In the appeal by the contractor, the Supreme Court noticed that the claim under each head on which interest was awarded was for an unliquidated sum and observed that in that kind of case, interest was not payable by law otherwise than by the application of the Interest Act. Reference was made to the *Bengal Nagpur Rly. Co.* v. *Ruttanji Ramji,* 65 I.A. 66 as an authority for that proposition. The Court then proceeded to say that even if an arbitrator could be assumed to be a court within the meaning of the Act, which he did not appear to be, none of the four conditions, which required to be fulfilled, was present in the case before them. It was then said that the arbitrator erred in thinking he had the power to allow interest simply because he thought the demand was reasonable. A further argument that interest could be awarded at least from the date of the suit on the analogy of sec. 34 of the Civil Procedure Code was repelled with the following observations: "It was suggested that at least interest from the date of suit could be awarded on the analogy of sec. 34 of the Civil Procedure Code, 1908. But sec. 34 does not apply because an arbitrator is not a court within the meaning of the Code nor does the Code apply to arbitrator, and, but for sec. 34 even a court would not have the power to give interest after the suit. This was, therefore, also rightly struck out from the award." These observations of Bose, J. gave rise to considerable difficulty in later cases, but in the series of cases, *Nachiappa Chettier* v. *Subramaniam Chettier,* [1960] 2 SCR 209; *Setinder Singh* v. *Amrao Singh,* [1961] 3

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SCR 676; *Firm Madanlal Roshanlal Mahajan* v. *Hukumchand Mills Ltd.*, [1967] 1 SCR 105; *Union of India* v. *Bungo Steel Furniture Pvt. Ltd.*, [1967] 1 SCR 324 and *State of Madhya Pradesh* v. *M/s. Saith & Skelton Pvt. Ltd.*, [1972] 3 SCR 233, these observations have been explained and it was held that the observations never intended to lay down the broad and unqualified proposition that they appeared to lay down on a first impression. We will presently refer to these cases. At this juncture, it is necessary to note that in *Seth Thawardas Pherumal's* case the question of payment of interest was not the subject matter of reference to the arbitrator and that the interest claimed before the arbitrator and awarded by the arbitrator related to the period prior to the reference to arbitration and the period during the pendency of the arbitration. It is also to be noted that the reference was not in the course of a suit.

Nachiappa Chettier v. *Subramaniam Chettier*, (supra) was a case of arbitration in a suit. The arbitrator made an interim award on August 1, 1944 and December 6, 1944. He awarded interest pendente lite as well as future interest until the date of payment. Relying on the observations in *Seth Thawardas Pherumal* v. *Union of India,* the award of interest was questioned. The court doubted whether the observations in *Seth Thawardas Pherumal's* case were intended to lay down such a broad and unqualified proposition, but did not pursue the matter further as that contention was not urged before the High Court.

Satinder Singh v. *Amrao Singh* (supra) was a case which arose under the East Punjab Acquisition and Requisition of Immovable Property (Temporary) Powers Act, 1948. The Act containd no provision for payment of interest. It was argued that in the absence of a provision providing for interest could be awarded. The court approved the observation of the Privy Council in 1928 A.C. 429 that where the owner is deprived of his property "the right to receive the interest takes the place of the right to retain possession and is within the rules." The court then observed, "it would thus be noticed that the claim for interest proceeds on the assumption that when the owner of immovable property loses possession of it he is entitled to claim interest in place of right to retain possession," and held that this general rule was not excluded by the 1948 Act. Referring then to the observations in *Seth Thawardas Pherumal* v. *Union of India*, (supra) what was said in *Nachiappa Chettier* v. *Subramaniam Chettier,* (supra) was reitereated that no broad and unqualified proposition was intended to be laid down in *Seth Thawards Pherumal* v. *The Union of India.* Referring to the Interest Act and the power of the Court to allow

interest, it was expressly noticed that the proviso to sec. 1 of the Interest Act, 1939 made it clear that interest shall be payable in all cases in which it was now payable by law. The power to award interest on equitable grounds or under any provisions of the law was held to be expressly saved by the proviso. The award of interest by the arbitrator was upheld on the ground that the right to receive interest in lieu of possession of immovable property taken away either by private treaty or by compulsory acquisition was generally regarded by judicial decisions as an equitable right.

In *Union of India* v. *Watkins & Co.* (AIR 1966 SC 275, the question arose when interest could be awarded for the period prior to the date of the institution of the suit. The suit there was for compensation for storage of over 600 tonnes of iron sheets for a period of about five years. It was held that interest could not be awarded for the period prior to the suit as there was no agreement for the payment of interest nor was their any usage of trade having the force of law or any provision of the substantive law which entitle the plaintiff to recover interest. Under the Interest Act, 1839, the court could allow interest if the amount claimed was a sum certain, payable at a certain time, by virtue of a written instrument. The compensation for an unliquidated amount was not a sum certain. Interest prior to the institution of the suit was not awardable.

In *Union of India* v. *West Punjab Factories,* [1961] 1 SCR 580, it was held, that in a suit, interest by way of damages could not be awarded in the absence of any usage or contract, express or implied, or of any provision of law. *Bengal Nagpur Railway Co.* v. *Ruttanji Ramji*, (supra) and *Seth Thawardas Pherumal* v. *Union of India,* (supra) were relied on.

Firm Madanlal Roshanlal Mahajan v. *Hukumchand Mills Ltd.* (supra) was a case where the arbitration was in a suit. Before the arbitrator, no claim was made for interest prior to the institution of the suit, but interest was claimed from the date of institution of the suit till recovery of the amount. The arbitrator awarded interest on the sum determined by him from the date of the award till the date of payment. The award was then filed in the court. One of the objections was to the grant of interest during the pendency of the suit relying on the observations of *Seth Thawardas Pherumal* v. *Union of India,* (supra) that sec. 34 CPC did not apply to arbitration proceedings. The court observed that the observations lent colour to the argument that the arbitrator had no power to award pendente lite interest, but the obser-

A vations were not intended to lay down such a broad and unqualified proposition. A reference was made to *Nachiappa Chettier* v. *Subramaniam Chettier,* (supra) and *Satinder Singh* v. *Amrao Singh,* (supra). It was further observed "In the present case, *all the disputes in the suit were* referred to the arbitrator for his decision. One of the disputes in the suit was whether the respondent was entitled to pendente lite interest. B The arbitrator could decide the dispute and we could award pendente lite interest just as a court could do so under sec. 34 of the Civil Procedure Code. Though, in terms, s. 34 of the Code of Civil Procedure does not apply to arbitrations, it was an implied term of the reference in the suit that the arbitrator would decide the dispute according to law and would give such relief with regard to pendente lite C interest as the court could give if it decided the dispute. This power of the arbitrator was not fettered either by the arbitration agreement or by the Arbitration Act, 1940. The condention that in *an arbitration in a suit* the arbitrator had no power to award pendente lite interest must be rejected." Thus while the court did not dispute the proposition that the arbitrator was not a court, it held that in a case where the reference D was made to arbitration in a suit, the arbitrator would have the same power as the court to award interest.

In *Union of India* v. *Bungo Steel Furniture Private Limited,* [1957] 1 SCR 324, certain disputes between the Union of India and a contractor in respect of certain contracts for the supply of bedsteads E were referred to arbitration. The question arose whether the arbitrator had jurisdiction to award interest on the amount found due by the arbitrator from the date of the award till the date of the decree. This of course is not the question before us. But even so we must say that the observations made therein appear prima facie to justify the view that interest may be awarded by the arbitrator pendente lite. Ramaswamy, F J. who spoke for the court, observed that the observations of Bose, B. in *Seth Thawardas Pherumal's* case (supra) were not intended to lay down any broad and unqualified proposition and that though sec. 34 of the Code of Civil Procedure did not apply in terms to arbitration proceedings, the principle of that section would be applied by the arbitrator for awarding interest in the classes of cases where the court G having jurisdiction in a suit over the subject matter or the proceeding would be competent to award interest. It was said "In the present case, all *the disputes in the suit,* including the question of interest were referred to the arbitrator for his decision. In our opinion, the arbitrator had jurisdiction, in the present case, to grant interest on the amount of the award from the date of the award till the date of the H decree." The words emphasised by us clearly show that in this case

too, the arbitration was in a suit and it was, therefore, held that the arbitrator had the same power to award interest as the court would have.

In *M/s. Ashok Construction Company* v. *Union of India,* [1971] 3 SCC 66, there was an arbitration on the intervention of the Court (Deputy Commissioner). Before the arbitrator, a total claim for Rs.4,41,440.20p was made consisting of a claim of Rs.64,006.71 for works done, a claim for Rs.1,83,393.77p for damages at 13 per cent per annum and a claim for Rs.1,91,097.88p for depreciation of the value of money. The arbitrator made an award for a sum of Rs.1,79,843,80p. He gave no reasons for his award. The last item of the claim was wholly unjustified, but there was nothing to show that the arbitrator had taken that claim of account in making the award. Considering the question of award of interest by way of damages, the court referred to the arbitration agreement and on its interpretation held that the terms of the arbitration agreement did not exclude the jurisdiction of the arbitrator, to entertain a claim for interest, award amount due under the contract.

In *State of Madhya Pradesh* v. *M/s. Saith & Skelton P. Limited,* [1972] 3 SCR 233, with the consent of the parties, the Court appointed an arbitrator and referred all the disputes to him. The arbitrator awarded interest from the date when the amount became payable till the date of the decree. The question arose whether the arbitrator had the power to do so. It was held that, in the case before them, interest prior to the suit could be awarded under sec. 61(2) of the Sale of Goods Act, 1930 which expressly provides for the award of interest to the seller in any suit by him for the amount of the price—from the date of the tender of the goods or from the date on which the price was payable and to the buyer in a suit by him for the refund of the price in a case of the breach of contract on the part of the seller—from the date on which the payment was made. In view of the provision of substantive law which enabled the award of interest it was held that interest prior to the suit could be awarded by the arbitrator. In regard to pendente lite interest, it was held that since all the disputes were referred to arbitration by the court, the arbitrator had the same power as the court to award the pendente lite interest.

As a result of the discussion of the various cases, we see that *Bengal Nagpur Railway Company Ltd.* v. *Ruttanji Ramji,* (supra), *Union of India* v. *West Punjab Factories,* (supra) and *Union of India* v. *Watkins & Co.* (supra) were cases of award of interest not by an

A arbitrator, but by the court. It was laid down in these three cases that interest could not be awarded for the period prior to the suit in the absence of an agreement for the payment of interest or any usage of trade having the force of law or any provision of the substantive law entitling the plaintiff to recover interest. Interest could also be awarded by the court under the Interest Act if the amount claimed was
B a sum certain payable at a certain time by virtue of a written instrument. In regard to pendente lite interest, the provisions of the Civil Procedure Code governed the same.

The question of award of interest by an arbitrator was considered in the remaining cases to which we have referred earlier. *Nachiappa Chettier* v. *Subramanian Chettier,* (supra) *Sattinder Singh* v. *Amrao*
C *Singh* (supra), *Firm Madanlal Roshanlal Mahajan* v. *Hukum Chand Mills Ltd.* (supra) *Union of India* v. *Bungo Steel Furniture Private Limited* (supra), *Ashok Constructon Company* v. *Union of India,* (supra) and *State of Madhya Pradesh* v. *M/s. Saith & Skelton Private Limited* were all cases in which the reference to arbitration was made
D by the court, of all the disputes in the suit. It was held that the arbitrator must be assumed in these circumstances to have the same power to award interest as the court. It was on that basis that the award of pendente lite interest was made on the principle of s. 34 Civil Procedure Code in *Nachiappa Chettier* v. *Subramaniam Chettier* (supra), *Firm Madanlal Roshanlal Mahanan* v. *Hukamchand Mills*
E *Limited,* (supra), *Union of India* v. *Bungo Furniture Private Limited,* (supra) and *State of Madhya Pradesh* v. *M/s. Saith & Skelton Private Limited,* (supra). In regard to interest prior to the suit, it was held in these cases that since the Interest Act, 1839 was not applicable, interest could be awarded if there was an agreement to pay interest or a usage of trade having the force of law or any other provision of sub-
F stantive law entitling the claimant to recover interest. Illustrations of the provisions of substantive law under which the arbitrator could award interest were also given in some of the cases. It was said, for instance, where an owner was deprived of his property, the right to receive interest took the place of the right to retain possession, and the owner of immovable property who lost possession of it was, therefore,
G entitled to claim interest in the place of right to retain possession. It was further said that it would be so whether possession of immovable property was taken away by private treaty or by compulsory acquisition. Another instance where interest could be awarded was under s. 61(2) of the Sale of Goods Act which provided for the award of interest to the seller or the buyer, as the case may be, under the
H circumstances specified in that section.

Sec. 80 of the Negotiable Instruments Act was mentioned as an instance of a provision of the substantive law under which interest prior to the institution of the proceedings could be awarded. Interest could also be awarded in cases of non-performance of a contract of which equity could give specific performance. Seth Thawardas Pherumal was a case of direct reference to arbitration without the intervention of a court. Neither the Interest Act, 1839 nor the Civil Procedure Code applied as an arbitrator was not a court. Interest could, therefore, be awarded only if there was an agreement to pay interest or a usage of trade having the force of law or some other provision of the substantive law which entitled to plaintiff to receive interest. In that case, interest had been awarded on the ground that it was reasonable to award interest and the court, therefore, held that the arbitrator was wrong in awarding the interest.

While this is the position in cases which arose prior to the coming into force of the Interest Act, 1978, in cases arising after the coming into force of the Act, the position now is that though the award of pendente lite interest is still governed by the same principles, the award of interest prior to the suit is now governed by the Interest Act, 1978. Under the Interest Act, 1978, an arbitrator is, by definition, a court and may now award interest in all the cases to which the Interest Act applies.

We were referred to certain English cases: *London Chatham and Dover Rly. Co.* v. *South Eastern Rly. Co.,* [1893 AC 429], *Chandris* v. *Isbrandtsen Mollar Co.,* [1951] 1 KB 240, *Timber Shipping Co. v. London & Overseas Freighters Ltd.,* [1972] AC 1 and *President of India* v. *La Pintada Cia Navegacion,* [1984] 2 All Eng. Law Reports. Passages from Halsbury's Laws of England and Russell's Arbitration were also read out. We have read them out we refrain from referring to those cases and passages because of the abundance of authoritative pronouncements of the Supreme Court of India.

Coming to the cases before us, we find that in Civil Appeal Nos. 120 and 121 of 1981 before the arbitrator, there was no answer to the claim for interest and we see no justification for us at this stage to go into the question whether interest was rightly awarded or not. Out of the remaining cases we find that in all cases except two (Civil Appeal Nos. 6019-22 of 1983 and Civil Appeal No. 2257 of 1984, the references to arbitration were made prior to the commencement of the new Act which was on August 19, 1981. In the cases to which the Interest Act, 1978 applied, it was argued by Dr. Chitale, learned counsel for

A the respondents, that the amount claimed was a sum certain payable at a certain time by virtue of a written instrument and, therefore, interest was payable under the Interest Act for the period before the commencement of the proceedings. In support of his contention that the amount claimed was a sum certain payable at a certain time by virtue of a written instrument, the learned counsel relied upon the decision of B this court in *State of Rajasthan* v. *Raghubir Singh*, [1979] 3 SCR 6. The case certainly supports him and in the cases to which the 1978. Interest Act applies the award of interest prior to the proceeding is not open to question. In regard to pendente lite interest, that is, interest from the date of reference to the date of the award, the claimants would not be entitled to the same for the simple reason that the arbitrator is not a C court within the meaning of sec. 34 of the CPC, nor were the references to arbitration made in the course of suits. In the remaining cases which arose before the commencement of the Interest Act, 1978, the respondents are not entitled to claim interest either before the commencement of the proceedings or during the pendency of the arbitration. They are not entitled to claim interest for the period prior to the D commencement of the arbitration proceedings for the reason that the Interest Act, 1839 does not apply to their cases and there is no agreement to pay interest or any usage of trade having the force of law or any other provision of law under which the claimants were entitled to recover interest. They are not entitled to claim pendente lite interest as the arbitrator is not a court nor were the references to arbitration E made in suits. One of the submissions made on behalf of the respondents was that in every case, all disputes were referred to arbitration and the jurisdiction of the arbitrator to award interest under certain circumstances was undeniable. The award not being a speaking award, it was not permissible to speculate on the reasons for the award of interest and the court was not entitled to go behind the award and F disallow the interest. It is difficult to agree with this submission. The arbitrator is bound to make his award in accordance with law. If the arbitrator could not 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 the award of interest on the ground of an error apparent on the record. On the other hand, if there G was the slightest possibility of the entitlement of the claimant to interest on one or other of the legally permissible grounds, it may not be open to the court to go behind the award and decide whether the award of interest was justifiable. We do not want to enter into a discussion on the legality or properiety of a non-speaking award as we understand the question is now awaiting the decision of a Seven Judge H Bench. In the light of what we have said above, Civil Appeal Nos. 120

and 121 of 1981 are dismissed, Civil Appeal Nos. 6019-22 of 1983 and Civil Appeal No. 2257 of 1984 are allowed to this extent that interest during the pendency of the arbitration proceedings is disallowed and the rest of the civil appeals are allowed to the extent that both interest prior to the proceedings and interest during the pendency of the proceedings are disallowed. There will be no order as to costs. S.L.P. 8640/81 is disposed of on the same lines. A B

N.V.K.