CASE NO.:
Appeal (civil) 3586 of 1984
Appeal (civil) 710-711 of 1981 Appeal (civil) 6808-6809 of 1983
Appeal (civil) 6810 of 1983 Appeal (civil) 10649 of 1983 Appeal (civil) 779 of 1982 Appeal (civil) 2723 of 1981

PETITIONER:
STATE OF PUNJAB

Vs.

RESPONDENT:
N.C. BUDHARAJ (DEAD) BY L.RS., ETC. ETC.

DATE OF JUDGMENT: 10/01/2001

BENCH:
S.R.Babu, Doraswamy Raju, S.P.Patil

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T..J

J U D G M E N T

RAJU, J.

The principal question arising in all these civil appeals and stand referred to for the consideration of the Constitution Bench is as to whether the Arbitrator has got jurisdiction to award interest for the pre-reference period in cases which arose prior to the commencement into force on 19.8.1981 of the Interest Act, 1978, when the provisions of the Interest Act 1839 was holding the field. The cases before us relate to the appointment of the Arbitrators concerned by the specified authority, on a demand made therefor by the contractor concerned without the intervention of the Court. The Arbitrators concerned, while sustaining portions of the claim made in the Awards also allowed on those amounts interest from the due date of the amount till date of Award. On the Awards being made the Rule of Court, as per the determination made by the Civil Court, the State pursued the matter before the High Court unsuccessfully and the High Court sustained the claim of the contractor for interest from the due date up to the date of the Award. Aggrieved, the above appeals came to be filed and entertained on certain limited and specified grounds, inclusive of the dispute relating to the Award of interest for the period prior to the date of the Award.

The Bench of three learned judges, who heard the appeals initially, considered it necessary to refer to a larger Bench for an authoritative pronouncement, the following question of law:

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 equitable principles, although such claim may not strictly fall within the provisions of Interest Act, 1839 ? (since reported in 1999 (9) SCC 514)

The order of reference also further indicated that there is no clause in the agreement as regards the payment of interest for the pre-reference period and that there is also no clause prohibiting the payment of interest for the pre- reference period.

Before adverting even to the respective contentions of parties on either side and undertaking a consideration of the same, it would be necessary to refer to some of the decisions of this Court and highlight the principles laid down therein, since the chore of controversy centres around the efficacy and effect of those principles on the issue raised and stand referred to this Bench. The leading decision which undertook an analysis of the case law on the subject and laid down certain propositions of law is reported in Executive Engineer (Irrigation), Balimela and Others vs Abhaduta Jena and Others [(1988) 1 SCC 418] (to be referred to hereinafter as Jenas Case). In paragraph 4 of the judgment, the general state of law is found stated as follows:

It is important to notice at this stage that both the Interest Act of 1839 and the Interest Act of 1978 provide for the award of interest up to the date of the institution of the proceedings. Neither the Interest Act of 1839 nor the Interest Act of 1978 provides for the award of pendente lite interest. We must look elsewhere for the law relating to the award of interest pendente lite. This, we find, provided for in Section 34 of the Civil Procedure Code in the case of courts. Section 34, however, applies to arbitrations in suit for the simple reason that where a matter is referred to arbitration in a suit, the arbitrator will have all the powers of the court in deciding the dispute. Section 34 does not otherwise apply to arbitrations as arbitrators are not courts within the meaning of Section 34 Civil Procedure Code. Again, we must look elsewhere to discover the right of the arbitrator to award interest before the institution of the proceedings, in cases where the proceedings had concluded before the commencement of the Interest Act of 1978. While under the Interest Act of 1978 the expression court was defined to include an arbitrator, under the Interest Act of 1839 it was not so defined. The result is that while in cases arising after the commencement of Interest Act of 1978 an arbitrator has the same power as the court to award interest up to the date of institution of the proceedings, in cases which arose prior to the commencement of the 1978 Act the arbitrator has no such power under the Interest Act of 1839. It is, therefore necessary, as we said, to look elsewhere for the power of the arbitrator to award interest up to the date of institution of the proceedings. Since the arbitrator is required to conduct himself and make the award in accordance with law we must look to the substantive law for the power of the arbitrator to award interest before the commencement of the proceedings. If the agreement between the parties entitles the arbitrator to award interest no further question arises and the arbitrator may award interest. Similarly if there is a usage of trade having the force of

law the arbitrator may award interest. Again if there are any other provisions of the substantive law enabling the award of interest the arbitrator may award interest. By way of an illustration, we may mention Section 80 of the Negotiable Instruments Act as a provision of the substantive law under which the court may award interest even in a case where no rate of interest is specified in the promissory note or bill of exchange. We may also refer Section 61 (2) of the Sale of Goods Act which provides for the award of interest to the seller or the buyer as the case may be under certain circumstances in suits filed by them. We may further cite the instance of the non-performance of a contract of which equity could give specific performance and to award interest. We may also cite a case where one of the parties is forced to pay interest to a third party, say on an overdraft, consequent on the failure of the other party to the contract not fulfilling the obligation of paying the amount due to them. In such a case also equity may compel the payment of interest. Loss of interest in the place of the right to remain in possession may be rightfully claimed in equity by the owner of a property who has been dispossessed from it.

After considering the earlier cases on the subject, it has been observed thus: 16. The question of award of@@ JJJJJ interest by an arbitrator was considered in the remaining cases to which we have referred earlier. Nachiappa Chettiar v. Subramaniam Chettiar, Satinder Singh v. Amrao Singh, Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Union of India v. Bungo Steel Furniture Pvt. Ltd., Ashok Construction Co. v. Union of India and State of Madhya Pradesh v. M/s Saith & Skelton Pvt. Ltd. were all cases in which the reference to arbitration was made by the court, of all the disputes in the suit. It was held that the arbitrator must be assumed in those 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 Section 34 Civil Procedure Code in Nachiappa Chettiar v. Subramaniam Chettiar, Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Union of India v. Bungo Furniture Pvt. Ltd. and State of Madhya Pradesh v. M/s Saith & Skelton Pvt. Ltd. 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 substantive 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, 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 Section 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 circumstances specified in that section.

17. Section 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 the 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.

18. 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.

Thereupon, dealing with the cases before them, the general principles noticed were applied and they were disposed of in the following terms:

20. 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 reference 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 applies, it was argued by Dr Chitale, learned counsel for 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 this Court in State of Rajasthan v. Raghubir Singh. 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 court within the meaning of Section 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 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. 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 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 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 propriety of a non- speaking award as we understand the question is now awaiting the decision of a Seven Judge 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.

The decision, which equally need a detailed reference, is that of Constitution Bench reported in Secretary, Irrigation Department, Government of Orissa and Others vs G.C. Roy [(1992) 1 SCC 508] (hereinafter referred to as Roys case). Of the two issues raised in the appeal therein, the one which related to the jurisdiction of the Arbitrator to award pendente lite interest when taken up for hearing before a Bench, the correctness of Jenas case (supra) insofar as it held that the Arbitrator had no power to award interest pendente lite was contested and on the view taken by that Bench that the said question required further consideration by a larger Bench, the matter was placed before the Constitution Bench. Ultimately, the Constitution Bench held that the decision in Jenas case (supra) does not lay down good law and 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 will have the power to award interest pendente lite, 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 the parties refer all their disputes - or refer the dispute as to interest as such to the Arbitrator- which he shall have power to decide. It was also emphasised therein that the matter being one within the discretion of the Arbitrator - the same requires to be

exercised in the light of all facts and circumstances of the case, keeping the ends of justice in view.

The Constitution Bench, which decided Roys case (supra) after a critical analysis of the earlier decisions including the one in Jenas case (supra), held as follows:

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, Civil Procedure Code 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 had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete

justice between the parties, such power has always been inferred.

While overruling Jenas case on the above principles, this Court applied the principle of prospective overruling making it clear that their decision shall not entitle any party nor shall it empower any Court to re-open proceedings which have already become final and that the law declared shall apply only to pending proceedings.

The area of consideration and the questions which fell for the determination of the cases in Jenas case and Roys case have been adverted to in Roys case itself and in para 8 of the judgment it has been observed as follows:

Generally, the question of award of interest by the arbitrator may arise in respect of three different periods, namely: (i) for the period commencing from the date of dispute till the date the arbitrator enters upon the reference; (ii) for the period commencing from the date of the arbitrators 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.

In Jugal Kishore Prabhatilal Sharma & Ors. vs Vijayendra P. Sharma & Anr.[(1993) 1 SCC 114] a Bench of three learned judges to which B.P. Jeevan Reddy, J. was a party observed that there was force in the contention that the decision in Roys case did not affect the position of law relating to the power of the Arbitrator in respect of the period prior to reference in respect of a pre 1978 Act period. B.P. Jeevan Reddy, J. who was also a member of the Constitution Bench which decided Roys case, wrote a separate concurring opinion clarifying the position that Roys case was concerned with the power of the Arbitrator to award interest pendente lite unlike Jenas case which considered the question both for the pre-reference period as well as the pendente lite period and therefore, it may not be right to read the decision in Roys case as overruling Jenas case insofar as it dealt with the power of the arbitrator to award interest for the pre-reference period. The learned Judge (Jeevan Reddy, J.) speaking for another Bench in the decision reported in State of Orissa vs B.N. Agarwala [(1993) 1 SCC 140] reaffirmed the same position and

even rejected a request for reference of the matter to a larger Bench of this Court. The decision in State of Orissa vs B.N. Agarwalla [(1997) 2 SCC 469], also reaffirmed the above position.

In B.N. Agarwallas case (supra) [(1997)2 SCC 469], B.N. Kirpal, J., speaking for a Bench of three learned judges of this Court, adverted to the earlier decisions some of which rendered even after those noticed above and held as follows:

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

As to what should happen for the post Award period, Section 29 of the Arbitration Act, 1940, itself provides clue for an answer by stipulating that where and insofar as an award is for the payment of money, the Court may in the decree order interest from the date of the decree at such rate as the Court deems reasonable to be paid on the principal sum as adjudged by the award and confirmed by the decree. This question has been specifically dealt with in Hindustan Construction Company Ltd. vs State of Jammu & Kashmir [(1992) 4 SCC 217] by a Bench of three learned judges and it was held therein as follows:

5. The question of interest can be easily disposed of as it is covered by recent decisions of this Court. It is sufficient to refer to the latest decision of a five Judge bench of this Court in Secretary, Irrigation Department, Govt. of Orisssa vs G.C. Roy. Though the said decision deals with the power of the arbitrator to award interest pendente lite, the principle of the decision makes it clear that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post- award period is a matter of procedure. Section 34 of Code of Civil Procedure provides both for awarding of interest pendente lite as well as for the post-decree period and the principle of Section 34 has been held applicable to proceedings before the arbitrator, though the section as such may not apply. In this connection, the decision in Union of India vs Bungo Steel Furniture (P) Ltd. may be seen as also the decision in Gujarat Water Supply & Sewerage Board vs Unique Erectors (Gujarat) P. Ltd. which upholds the said power though on a

somewhat different reasoning. We, therefore, think that the award on Item No.8 should have been upheld.

This aspect was also specifically dealt with and it was held in B.N. Agarwallas case (Supra), as hereunder:

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

It is in the above backdrop of the legal principles enunciated and considered holding the field that this reference came to be made for determining the jurisdiction of the Arbitrator to award interest for the pre- reference period, in the circumstances stated in the very question of reference.

Shri Gobind Das, learned senior counsel for the appellants, submitted that having regard to the principles and ratio laid down in Jenas case and B.N. Agarwalas case (Supra) and the other decisions wherein the position came to be re-affirmed and followed consistently, the Arbitrator will have no jurisdiction to award interest for the pre-reference period in a matter relating to the pre 1978 Act, period. The decision of this Court in G.C. Roys case, according to the learned counsel, has no relevance to the case pertaining to pre-reference period, the same being only concerned with pendente lite period and therefore the authority of the Jenas case in respect of the pre-reference period holding that no interest is payable for pre-reference period never stood undermined or overruled by the decision of the Constitution Bench rendered in G.C. Roys case. Emphasis has been laid to derive support to this stand on the decisions reported in Bengal Nagpur Railway Co. Ltd. vs Ruttanji Ramji and others [AIR 1938 PC 67]; Seth Thawardas Pherumal and another vs Union of India [AIR 1955 SC 468 = 1955(2) SCR 48]; Union of India vs A.L. Rallia Ram [(1964) 3 SCR 164]; Union of India vs Watkins Mayor & Co. [AIR 1966 SC 275]; Union of India vs West Punjab Factories Ltd. [(1966) 1 SCR 580 = AIR 1966 SC 395]; M/s Ashok Construction Companys case (Supra) and State of Madhya Pradesh vs M/s Saith & Skelton (P) Ltd. [(1972) 3 SCR 233]. According to the learned counsel for the appellants, the principles laid down in Jenas case as affirmed in G.C. Roys case and as clarified and declared in the subsequent decisions of this Court including the one in B.N. Agarwalas case (Supra), do not call for any change

or modification or alteration and the reference should be answered in favour of the appellants.

Per contra, Shri Anil B. Divan, learned Senior Counsel spear heading the arguments on behalf of the respondents followed by Sharvashri V.Bhagat and A.K. Panda strenuously contended that the ratio or the reasons which formed the basis for the judgment and the principles laid down in G.C. Roys case dehors their ultimate application to the actual case before court for according relief, renders the decision in Jenas case, insofar as it related to award of interest for pre-reference period also bad even for the very reasons on which the Court in G.C.Roys case found the judgment in Jenas case bad or unsustainable in respect of award of interest for pendente lite period. The conclusions in Jenas case are said to be directly in conflict with the earlier three judges judgment of this Court and all these cases having been quoted with approval in G.C.Roys case, Jenas case must be held to be no longer good law even in respect of award of interest for the pre-reference period. Argued the learned senior counsel further that inasmuch as the principles laid down in the English cases (Chandris case, Edwards case) came to be approved in G.C.Roys case, it becomes inevitably necessary to hold that the Arbitrator has jurisdiction to award interest for pre-reference period as long as there is no specific prohibition as such in the agreement/contract between parties restraining the claim/payment of interest, on the principle of an implied term of the agreement between the parties, that the Arbitrator could award interest in a case where the Court could award it and that as a consequence thereof when the parties refer all their disputes/ or the dispute as to interest as such - to the Arbitrator, he shall have the necessary power to award interest - though such power may be exercised in his discretion in the light of all the facts and circumstances of the case and in the interests of justice. Our attention has also been invited in this regard to certain English cases: Chandris Vs. Isbrandtsen Moller Co. Inc. (1950 (2) All England Law Reports 618); President of India Vs. La Pintada Compania Navigacion S.A. (Law Reports [1985] 1 A.C. 104); and Food Corporation of India Vs. Marastro Compania Naviera S.A. of Panama (1986 (3) All England Law Reports 500 = [1987] 1 Weekly Law Reports 134), and those of the Supreme Court in G.C. Roys case and some of the decisions referred to therein. We have carefully considered the submissions of the learned counsel appearing on either side. The mere reference and reliance placed by the counsel for the appellants on the earlier decisions which have been already considered by this Court in deciding Jenas case and G.C. Roys case and explained, does not help to improve the position of the appellants in any manner to sustain their plea. The Constitution Bench which dealt with G.C. Roys case while adverting to the English cases reported in Edwards vs Great Western Railway Company [(1851) 138 ER 603]; Podar Trading Co. Ltd. vs Francois Tagher [(1949) 2 All E.R. 62]; Chandris vs Isbrandsten- Moller Co. Inc. [1950 (1) All E.R. 768], observed, while quoting with approval the decision in Ashok Construction Companys case (supra), that the principles laid down by this Court it only accorded with the principles laid down in Edwards case (Supra) as understood in Chandris case (Supra). Reference has also been made in G.C. Roys case to the decision reported in Union of India vs Bungo Steel Furniture Pvt. Ltd. [AIR 1967 SC 1032] wherein also this Court accorded

approval to the principles laid down in the English cases, observing as follows:

26. The above passages show that the Court laid down two principles: (i) it is an implied term of the reference that the arbitrator will decide the dispute according to existing law and give such relief with regard to interest as a court could give if it decides the dispute; (ii) though in terms Section 34 of the Code of Civil Procedure does not apply to arbitration proceedings, the principle of that section will be applied by the arbitrator for awarding interest in cases where a court of law in a suit having jurisdiction of the subject matter covered by Section 34 could grant a decree for interest. It is also relevant to notice that this decision refers with approval to both the English decisions in Edwards and Chandris case besides the decision of this Court in Firm Madanlal Roshanlal. It is noteworthy that the decision explains and distinguishes the decision in Thawardas on the same lines as was done in Firm Madanlal Roshanlal case.

The subsequent development and march of law in England, in this connection also deserve to be noticed. In President of India vs La Pintada Compania Navigacion S.A. (supra), the House of Lords approved the rule in Chandris case as follows:

The true position in law is, in my opinion, not in doubt. It is this. Where parties refer a dispute between them to arbitration in England, they impliedly agree that the arbitration is to be conducted in accordance in all respects with the law of England, unless, which seldom occurs, the agreement of reference provides otherwise. It is on this basis that it was held by the Court of Appeal in Chandris vs Isbrandtsen-Moller Co. Inc.[1951] 1 K.B. 240 that, although section 3(1) of the Act 1934, by its terms, empowered only courts of record to include interest in sums for which judgment was given for damages or debt, arbitrators were nevertheless empowered, by the agreement of reference, to apply English law, including so much of that law as is to be found in section 3(1) of the Act of 1934. (At page 119.)

In Food Corporation of India vs Marastro Compania Naviera S.A. of Panama (supra), it was held by the Court of Appeal as hereunder:

Before section 19A there was no general statutory provision empowering arbitrators to award interest on the sums they awarded. But it was held by this court in Chandris vs Isbrandtsen-Moller Co. Inc. [1951] 1 K.B. 240 that, just as before the Act of 1934 came into force an arbitrator had been held entitled to award interest in the circumstances in which, under the Civil Procedure Act 1933, a jury could have awarded interest, so equally, after the Act of 1934 came into force, an arbitrator had impliedly the power to award interest which section 3 had conferred upon courts of record.

The decision in the Chandris case was approved by the House of Lords in President of India vs La Pintada Compania Navigacion S.A.[1985] A.C. 104. There, Lord Brandon of Oakbrook said that, where parties refer a dispute between them to arbitration in England, they impliedly agree that the arbitration is to be conducted in accordance in all

respects with the law of England, unless the agreement of reference provides otherwise. Thus, although section 3 of the Act of 1934 by its terms empowered only courts of record to include interest in sums for which judgment was given for damages or debt, arbitrators were nevertheless empowered, by the agreement of reference, to apply English law, including so much of that law as was to be found in section 3 of the Act of 1934.

In my judgment, this implied agreement in the arbitration agreement is naturally to be understood as empowering arbitrators to apply English law as it is from time to time during the course of the reference (and in particular in the context of the present case as it was at the time of the hearing and the award) and not as an agreement empowering the arbitrator to apply English law crystallised as at the date of the arbitration agreement. As it was put by Cohen L.J. in the Chandris case [1951] 1 K.B. 240, 264 (though admittedly without having his mind addressed to transitional problems):

In my opinion, the right of arbitrators to award interest was not derived from sections 28 and 29 of the Civil Procedure Act, 1833, but from the rule that arbitrators had the powers of the appropriate court in the matter of awarding interest. In my opinion, therefore, the effect of the Act of 1934 is that, after it came into force, an arbitrator had no longer the powers of awarding interest on damages conferred on juries by sections 28 and 29 of the Civil Procedure Act, 1833, but he had the power conferred on the appropriate court in the act of 1934 described as a 'court of record.

In the present case, the power of the court under section 3 of the Act of 1934 to award interest on a judgment at the trial of proceedings which the arbitrator would by implication prospectively have had at the time of the arbitration agreement had been superseded by the time of the hearing, and afortiori by the date of the award, by the wider powers of the court as a result of section 15 of the Act of 1982. It is those wider powers which, by the Chandris process of implication, the arbitrator would have had when he made the award if section 19A had not been inserted into the Arbitration Act 1950. The purpose of section 19A is to make explicit powers to award interest which had previously rested on implication. There is thus a further strong pointer to holding that section 19A has retrospective effect and applies to pending and future arbitrations under arbitration agreements whenever made, just as the powers of the High Court and of the county courts under section 35A of the Act of 1981 and section 97A of the Act of 1959 apply to proceedings whenever instituted. (At pages 141 & 142)

The Constitution Bench in G.C.Roys case also recognised and accorded approval to this principle in para 43 (iii) by stating, The Arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

As for the reliance placed for the appellants upon the decisions reported in AIR 1938 PC 67; AIR 1955 SC 468 and 1966 (1) SCR 580, we are of the view that the observations contained in those judgments have to be construed in the factual context and nature of the claims involved therein

and not in the abstract and out of their context. Thawardas case (Supra) is one where the Arbitrator awarded interest on unliquidated damages for a period before the reference to arbitration as well as for the period subsequent to reference. The Bengal Nagpur Railway Company Ltd. case (Supra) dealt with the claim of interest by way of damages under Section 73 of the Contract Act and it was observed therein that Section 73 is merely declaratory of the common law as to damages and that it was not available to the plaintiff therein. In West Punjab Factories Ltd. Case (Supra) also the suit claim was for damages for loss of goods destroyed by fire, and issue No. (iv) considered therein related to the question of awarding interest for the period before the suit on the amount of damages decreed. A careful analysis of the principles underlying those decisions would show that the claim of interest for the period prior to the commencement of proceedings was not countenanced in view of the settled and indisputable position of law that damages till quantified is not and cannot be said to be an ascertained or definite sum and until it is ascertained and crystalised into a definite sum and decreed, no question of payment of interest for the period prior to such quantification would either arise or be permissible in law, even if made before regular civil courts, in ordinary suits filed.

There can be no controversy over the position that the Constitution Bench of this Court in G.C. Roys case while declaring that the decision in Jenas case does not lay down good law upheld, as a consequence the jurisdiction of the Arbitrator to award only pendente lite interest, as explained and highlighted in the subsequent decisions of this Court. When the claim involved for consideration in G.C. Roys case was only with reference to pendente lite interest it cannot be expected of the Court to travel outside, except for analysing the general principles, to academically adjudicate the other aspects of the matter also decided by the Bench in Jenas case and overrule the same on such other points, too. Be that as it may, the ratio or the basis of reasons and principles underlying a decision is distinct from the ultimate relief granted or manner of disposal adopted in a given case. While laying down principle No. (i) in para 43, it has been in unmistakable terms declared that the basic proposition that a person deprived of the use of money to which he is legitimately entitled to has a right to be compensated for the deprivation, by whatever name it may be called viz., interest, compensation or damages, 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. The efficacy and binding nature of this declaration of law cannot be either diminished or whittled down even on any known principle underlying the doctrine of stare decisis. The same is the position with reference to the principle Nos. (ii) and (iii). It cannot be legitimately contended that these principles would either vary or could be different in a case relating to the award of interest for the pre-reference period and to assume such a contra position in juxta position would not only be destructive in nature but also illogical and self-contradictory resulting in grave miscarriage of justice. Some of the very reasons and principles which weighed with the Constitution Bench in G.C.Roys case to sustain the jurisdiction of the Arbitrator to award pendente lite interest in a claim arising out of an agreement which

does not also prohibit the grant of interest, in our view would equally suffice and provide sound basis of reasoning for upholding the power of the Arbitrator to award interest in respect of the pre- reference period, too. The further fact that the decisions of this Court, including the Jenas case, envisaged four circumstances or contingencies wherein such interest for pre-reference period can be countenanced by the Arbitrator, is by itself sufficient to confer jurisdiction upon the Arbitrator to entertain and consider the said claim also, and consequently there is no justification to thwart the same even at the threshold denying the Arbitrator power even to entertain the claim as such.

What difference it would make and consequences would follow, if principle No. (i) is read along with principle No. (v), be it even that, interest for the pre-reference period is a matter of substantive law unlike the interest for the period pendente lite, which ultimately came to be allowed applying the principles engrafted in Section 34 of the Code of Civil Procedure would next deserve our consideration. Substantive Law, is that part of the law which creates, defines and regulates rights in contrast to what is called adjective or remedial law which provides the method of enforcing rights. Decisions, including the one in Jenas case while adverting to the question of substantive law has chosen to indicate by way of illustration laws such as Sale of Goods Act, 1930 [Section 61(2)], Negotiable Instruments Act, 1881 (Section 80) etc. The provisions of the Interest Act 1839, which prescribes the general law of interest and becomes applicable in the absence of any contractual or other statutory provisions specially dealing with the subject, would also answer the description of substantive law. This Act was excluded from consideration for the simple reason that unlike the inclusive definition of Court in 1978 Act so as to include an Arbitrator, also the 1839 Act did not provide any definition clause much less an expansive one. Not only, Section 1 of the Interest Act but even the provisions contained in Sale of Goods Act and Negotiable Instruments Act themselves only envisage and enable courts to grant or award interest. But on that ground alone it could not be reasonably postulated that such Acts applied only to proceedings before Courts and not to proceedings before forums created in lieu of conventional Civil Courts. Once it is construed and considered that the method of redressal of disputes by an alternative forum of arbitration as agreed to between the parties, with or without the intervention of Court is only a substitute of the conventional Civil Courts by forums created by consent of parties, it is but inevitably necessary that the parties must be deemed to have by implication also agreed that the arbitrator shall have power to award interest, the same way and in the same manner as courts do and would have done, had there not been an agreement for arbitration. It is in this connection that the practice followed by English Courts which came to be noticed and approved by this Court also lend support and strength to adopt such construction in order to render complete and substantial justice between the parties. That there is nothing in the Interest Act, 1839 to confine its operation and applicability only to proceedings before ordinary and conventional Courts, cannot also be ignored, in this connection. In our view any such restricted and literal construction which is bound to create numerous anomalies and ultimately defeat the ends of justice should be scrupulously avoided. On the other hand, that

interpretation which makes the text not only match the context but also make a reading of the provisions of an Act, just, meaningful and purposeful and help to further and advance the ends of justice must alone commend for the acceptance of courts of law. Adopting a different construction to deny a claimant who opts for adjudication of disputes by arbitral process alone and that too when recourse to such process is made without the intervention of Court would amount to applying different and discriminatory norms and standards to situations which admits of no such difference and that too where there is no real distinction based upon any acceptable or tangible reason.

It is not in dispute that an Arbitrator appointed in a pending suit or with the intervention of the Court, will have all the powers of the Court, in deciding the dispute and the dispute is only in respect of an Arbitrator to whom the reference has been made by the parties, under the agreement without the intervention of the Court. It would then mean that the parties have to be driven to vexatious litigation before Courts by passing an agreement of arbitration, to be ultimately told to abide by it and have the matter formally referred by staying such proceedings before Civil Court to secure to the Arbitrator power to award interest also. In G.C. Roys case while emphasising the importance and need for availing arbitration process, it has been observed as follows:

4. A dispute between two parties may be determined by court through judicial process or by arbitrator through a non-judicial process. The resolution of dispute by court, through judicial process is costly and time consuming. Therefore, generally the parties with a view to avoid delay and cost, prefer alternative method of settlement of dispute through arbitration proceedings. In addition to these two known process of settlement of dispute there is another alternative method of settlement of dispute through statutory arbitration. Statutory arbitrations are regulated by the statutory provisions while the parties entering into agreement for the resolution of their dispute through the process of arbitration are free to enter into agreement regarding the method, mode and procedure of the resolution of their dispute provided the same are not opposed to any provision of law. Many a time while suit is pending for adjudication before a court, the court with the consent of the parties, refers the dispute to arbitration. On account of the growth in the international trade and commerce and also on account of long delays occurring in the disposal of suits and appeals in courts, there has been tremendous movement towards the resolution of disputes through alternative forum of arbitrators. The alternative method of settlement of dispute through arbitration is a speedy and convenient process, which is being followed throughout the world. In India since ancient days settlement of disputes by Panches has been a common process for resolution of disputes in an informal manner. But now arbitration is regulated by statutory provisions.

If that be the position, Courts which of late encourage litigants to opt for and avail of the alternative method of resolution of disputes, would be penalising or placing those who avail of the same in a serious disadvantage. Both logic and reason should counsel courts to lean more in favour of the Arbitrator holding to possess all the powers as are necessary to do complete and full

justice between the parties in the same manner in which the Civil Court seized of the same dispute could have done. By agreeing to settle all the disputes and claims arising out of or relating to the contract between the parties through arbitration instead of having recourse to Civil Court to vindicate their rights the party concerned cannot be considered to have frittered away and given up any claim which otherwise he could have successfully asserted before Courts and obtained relief. By agreeing to have settlement of disputes through arbitration, the party concerned must be understood to have only opted for a different forum of adjudication with less cumbersome procedure, delay and expense and not to abandon all or any of his substantive rights under the various laws in force, according to which only even the Arbitrator is obliged to adjudicate the claims referred to him. As long as there is nothing in the arbitration agreement to exclude the jurisdiction of the Arbitrator to entertain a claim for interest on the amounts due under the contract, or any prohibition to claim interest on the amounts due and become payable under the contract, the jurisdiction of the Arbitrator to consider and award interest in respect of all periods subject only to Section 29 of the Arbitration Act, 1940 and that too the powers of the Court thereunder, has to be upheld. The submission that the Arbitrator cannot have jurisdiction to award interest for the period prior to the date of his appointment or entering into reference which alone confers him power is too stale and technical to be countenanced in our hands, for the simple reason that in every case the appointment of an Arbitrator or even resort to Court to vindicate rights could be only after disputes have cropped up between the parties and continue to subsist unresolved and that if the Arbitrator has the power to deal with and decide disputes which cropped up at a point of time and for the period prior to the appointment of an Arbitrator, it is beyond comprehension as to why and for what reason and with what justification the Arbitrator should be denied only the power to award interest for the pre-reference period when such interest becomes payable and has to be awarded as an accessory or incidental to the sum awarded as due and payable, taking into account the deprivation of the use of such sum to the person lawfully entitled to the same. For all the reasons stated above, we answer the reference by holding that the Arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in Jenas case [1988 (1) SCC 418] taking a contra view does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitle any party nor shall it empower any Court to reopen proceedings which have already become final, and apply only to any pending proceedings. No costs.