CASE NO.:
Appeal (civil) 2412-2413 of 2005

PETITIONER:
Bhagawati Oxygen Ltd.

RESPONDENT:
Hindustan Coper Ltd.

DATE OF JUDGMENT: 05/04/2005

BENCH:
RUMA PAL & C.K. THAKKER

JUDGMENT:
JUDGMENT

C.K. Thakker, J.

Leave granted.

All these appeals arise out of common judgment and order passed by the Division Bench of the High Court of Calcutta in APOT Nos. 721 of 2002 and 736 of 2002 on July 03, 2003 by which the Division Bench confirmed the order passed by learned single Judge on July 24, 2002 in A.P. No. 369 of 2002. That A.P. was filed by Hindustan Copper Limited against Arbitration award passed by Justice L.M. Ghosh (Retd.) on September 25, 2000, under the Arbitration Act, 1940 (hereinafter referred to as 'the Act').

To appreciate the controversy raised in the present appeals, relevant facts may be stated in brief. On March 10, 1988, Hindustan Copper Limited ('HCL' for short) invited tender for supply of oxygen for its plant at Ghatsila. The tender contained a condition that successful bidder will set up an oxygen plant in the vicinity of HCL. The tender of Bhagwati Oxygen Limited ('BOL' for short) was accepted and an agreement had been entered into between HCL and BOL on March 17/April 14, 1990. It was for a period of seven years from the date of commencement of supply of oxygen. The agreement stated that the supplier i.e. BOL will at its own cost install, operate and maintain an oxygen plant of 25 TPD capacity of pressure vacuum swing absorption type with suitable compressors for supply of high purity oxygen gas to HCL. It also stated that the purity of oxygen would be 99 per cent. The agreement further stated; ''The oxygen plant should have the capacity to supply not less than 1,25,000 mm3 of gas of 99 per cent purity per week on a sustained basis as and when required by HCL. Clause 2.3 clarified that the minimum acceptable purity of the oxygen gas should be 85 per cent for both flash furnace and converter. Meter readings for invoicing billing purpose were to be taken jointly by authorized representatives of HCL and BOL as and when the plant stopped/started. Provision was also made for periodical checking and calibration of meters. It was the duty of BOL to erect plant and pipe line system. A right to inspection and review was conferred upon HCL. Requirement of gas and supply thereof had been mentioned in Clause 2.1. Water supply required for the plant was to be arranged by BOL at its own cost but HCL agreed to supply water for operation of the plant. BOL had undertaken to erect and commission the plant and start supply of gas continuously to HCL within 18 months from the date of receipt of order or letter of intent whichever was earlier and the gas was to be made available to HCL in the requisite quality and quantity as per conditions agreed upon. Provisions had also been made with regard to price of gas and minimum off-take guaranteed. Time was the essence of the contract and penalty had been provided for in case of breach of contract.

Clauses 10.4 and 10.5 are relevant and they read as under :-

"10.4. In case BOL fail to supply oxygen from the Captive plant as per the

contract terms after commissioning of the plant, it will be the responsibility of BOL to arrange liquid oxygen from other sources at contracted rates and keep HCL requirement feed uninterruptedly failing which HCL will have the right to procure the gas from elsewhere and the difference of such procurement cost and the agreed price subject to a limit of 80% of the total requirement as per NIT, will be recovered from BOL forthwith. However, HCL will give adequate chance to BOL to meet the HCL's requirements by their own means from other sources at the contract price.

"10.5. In case, for any period the quantity of Gas supplied goes down below the guaranteed purity or pressure, no payment will be made for that period or quantity unless specifically prior acceptance is obtained from HCL.''

A security deposit of Rs. 20 lacs (Rupees twenty lacs only) had been made by BOL to HCL in the form of bank guarantee issued by the Central Bank of India, New Delhi. There was an arbitration clause being Clause No.12. The said clause reads thus:

"Except where it has been provided otherwise, any dispute or difference arising out of or in connection with the work or any operation covered by the contract and any dispute or difference arising out of in connection with the agreement entered into between HCL and BOL including any dispute or difference relating to the interpretation of the agreement or any clause thereof, shall be referred to sole arbitration of a person appointed jointly by the Chairman of HCL and BOL. The provisions of the Arbitration Act, 1940 and the rules thereunder and any amendment thereto from time to time shall apply. The award of the arbitrator shall be final, conclusive and binding to all the parties to the contract. The arbitrator shall be competent to decide whether any matter, dispute of difference referred to him falls within the purview of arbitration as provided for above."

In accordance with the terms and conditions of the contract, BOL set up its oxygen producing plant on 31st July, 1992 and commenced supply of oxygen to HCL. It is the case of BOL that it supplied oxygen to HCL from 10th February, 1993 to 12th August, 1993. According to the BOL, however, no payment was made by HCL to BOL on the ground that oxygen supplied by BOL to HCL did not meet the purity standard as agreed between the parties. It was also alleged by BOL that bad water was supplied by HCL as a result of which the plant was damaged and ultimately was shut down on August 12, 1993. On October 11, 1993, a letter was written by HCL to BOL calling upon BOL to supply or to arrange for supply of oxygen to HCL on or before August 26, 1993. But the gas was not supplied by BOL to HCL. On July 27, 1994, an agreement was arrived at between the parties to refer the dispute to the Arbitration of Justice L.M. Ghosh, retired Judge of the High Court of Calcutta. On 1st April, 1995, arbitration commenced. BOL claimed Rs. 1,80,81,402.93 ps. :

(i) Dues on account of unpaid bills;

(ii) Cost of repairing and over hauling its plant due to bad water supplied by HCL;

(iii) Loss of revenue due to shut down of the plant by reason of bad water supplied by HCL; and

(iv) Interest.

HCL, on the other hand, filed a counter claim in the arbitration proceedings for Rs. 2,66,26,023.14 ps. inter alia claiming :

(i) Recovery of excess amount paid to BOL;

(ii) Difference of price of oxygen purchased by HCL from other sources (risk purchase);

(iii) Extra expenditure due to consumption of excess furnace oil due to low purity of oxygen;

(iv) Loss of production by HCL; and

(v) Interest.

The Arbitrator, after holding several meetings, gave an award on September 25, 2000. He held that the claim put forward by BOL was well founded and BOL was thus entitled to an amount of Rs. 74,84,521.34 ps. He also held that HCL was unable to prove its case and counter claim. The counter claim, therefore, was liable to be dismissed. Regarding interest, he held that BOL was entitled to claim interest at the rate of eighteen per cent per annum for pre-reference period, pendente lite and from the date of award till the date of payment. According to the Arbitrator, BOL was also entitled to an amount of Rs. 1,50,000 (One lakh and fifty thousand only) on account of costs.

The award was challenged by HCL by filing A.P. No. 369 of 2000 under Sections 30 and 33 of the Act. A prayer was made to set aside the award. It was contended that the Arbitrator had misconducted himself and the proceedings. It was also contended that the Arbitrator had exceeded his jurisdiction and decided the questions not covered by Clause 12 of the Arbitration agreement and hence, the award was invalid. It was argued that the Arbitrator ought not to have allowed the claim of BOL nor could have dismissed the counter claim of HCL. Since there was breach of contract by BOL, it was not entitled to any amount. On the other hand, in view of non-compliance with the terms and conditions of the contract and breach of agreement, BOL was liable to pay and HCL was entitled to the amount claimed in the counter claim. It was also urged that the Arbitrator had no jurisdiction and had committed an error of law as well as of jurisdiction in awarding interest at the rate of eighteen per cent for pre-reference, pendente lite and post award period.

The learned single Judge heard the parties and held that so far as the claim of BOL was concerned, the Arbitrator was right in allowing the said claim and no interference was called for. Regarding counter claim, however, the learned single Judge was of the opinion that Clause 10.4 as extracted hereinabove was clear and it provided for ‘‘default’’. The learned single Judge referred to several letters and communications by HCL to BOL and observed that from those documents, it was proved that objection was raised by HCL as to non supply of oxygen gas by BOL and BOL was expressly intimated that HCL would be constrained to purchase oxygen gas at the cost and consequences of BOL. Since all those letters and communications had not been considered by the Arbitrator, the award dismissing the counter claim of HCL deserved to be interfered with. Accordingly, order dismissing the counter claim by HCL was set aside by the learned single Judge and the matter was remitted to the Arbitrator to take an appropriate decision in accordance with law on that issue.

So far as the payment of interest to BOL on the claim which had been allowed by the Arbitrator is concerned, the learned single Judge was of the view that Section 61 of the Sale of Goods Act, 1930 did not provide rate of interest. Section 34 of the Code of Civil Procedure, 1908 had no application to arbitration proceedings. In absence of any contract between the parties with regard to the rate of interest payable, the learned single Judge held that it would be appropriate if interest is awarded to BOL at the rate of six per cent per annum. For taking that view the learned single Judge relied upon a decision of this Court in State of Rajasthan v. Nav Bharat Construction Co., [2002] 1 SCC 659 wherein this Court reduced the rate of interest awarded by the Arbitrator from eighteen per cent to six per cent per annum. The learned single Judge accordingly partly allowed the appeal and remitted the matter to the Arbitrator to decide counter claim of HCL.

Being aggrieved by the order passed by the learned single Judge, HCL and BOL preferred appeals before a Division Bench of the High Court. The grievance of HCL was that the learned single Judge ought to have allowed the appeal in its entirety and ought to have dismissed the claim of BOL by allowing counter claim of HCL. The complaint of BOL, on the other hand, was that the learned single Judge ought to have dismissed the counter claim and should not have interfered with the rate of interest granted by the Arbitrator in favour of BOL. In short, the learned single Judge ought to have dismissed the application of HCL.

The Division Bench considered the rival contentions of the parties and dismissed both the appeals confirming the order passed by the learned single Judge. The Division Bench observed that by confirming the claim of BOL, the learned single Judge did not commit any error of law. Similarly, the learned single Judge was also right in upholding the argument of HCL that the Arbitrator was wrong in dismissing the counter claim and he had not considered several communications to BOL. The order of the learned single Judge thus did not call for interference. Regarding rate of interest, the Division Bench was of the view that learned single Judge was right in observing that Section 61 of Sale of Goods Act did not provide the rate of interest. It was also true that there was no indication in the contract as to payment of interest. In the opinion of the Division Bench, however, the learned single Judge was right in reducing the rate of interest keeping in view the provisions of Section 34 of the Code of Civil Procedure and as such that part of the order also did not warrant interference. The Division Bench thought it proper to dismiss the appeals and accordingly both the appeals were dismissed.

Both the parties, i.e. HCL and BOL have approached this Court.

We have heard learned counsel for the parties.

Learned counsel for BOL submitted that the Arbitrator was wholly right in passing the award and in allowing the claim of BOL. It was urged that learned single Judge as well as the Division Bench were totally wrong in partly setting aside the award passed by the Arbitrator. The counsel contended that the jurisdiction of the court under Section 30 of the Act is extremely limited and an award can be set aside only on one or more grounds specified therein. Since none of the grounds existed, the court could not have interfered with the award nor the award could be set aside. According to the learned counsel, the Arbitrator considered the evidence on record - documentary as well as oral - and came to the conclusion that no case was made out by HCL on the basis of which counter claim could be allowed and accordingly dismissed it. The learned single Judge and the Division Bench re-appreciated the evidence and set aside that part of the award by remitting the matter to the Arbitrator to reconsider and decide afresh the counter claim of HCL. It was not within the jurisdiction of the learned single Judge or the Division Bench and the order deserves to be quashed and set aside. Regarding interest, the counsel submitted that the agreement did not contain any clause as to interest. Section 34 of the Code of Civil Procedure was not applicable. Section 61 of the Sale of Goods Act does not provide rate of interest nor it applied to the case on hand. If in the light of these facts, the Arbitrator awarded interest to BOL at eighteen per cent considering the fact that that was the rate at which HCL had given advance to BOL, such an order could not be termed as unlawful or otherwise objectionable. Neither the learned single Judge nor the Division Bench was justified in interfering with the rate of interest. It was, therefore, submitted that the appeal filed by HCL deserves to be dismissed and appeal filed by BOL deserves to be allowed.

The learned counsel for HCL, on the other hand, supported the orders passed by the learned single Judge and the Division Bench so far as they relate to remanding the matter to Arbitrator for deciding afresh the counter claim of HCL. Regarding payment of interest at the rate of six per cent per annum to BOL, it was submitted that even that part of the order was not warranted

and the claim of BOL was liable to be rejected. The Arbitrator committed an error of law and has misconducted himself as well as proceedings in allowing such claim. According to the learned counsel, there was breach of contract on the part of BOL, oxygen was not supplied as per the agreement entered into between the parties; purity of oxygen was not maintained; other terms and conditions were also not fulfilled by BOL and as such, BOL was not entitled to any relief. It was, therefore, prayed that the award passed by the Arbitrator deserves to be quashed in its entirety by allowing the appeal of HCL.

In the light of rival contentions of the parties, in our opinion, three questions arise for our consideration :

(1) Whether on the facts and in the circumstances of the case, the Arbitrator was right in allowing the claim of BOL?

(2) Whether the Arbitrator had misconducted himself in passing the impugned award and by dismissing the counter claim of HCL and whether the learned single Judge and the Division Bench of the High Court were right in setting aside that part of the award by directing the Arbitrator to re-consider the matter and decide it afresh? and

(3) Whether the Arbitrator had power to award interest at the rate of eighteen per cent per annum for pre-reference period, pendente lite and post reference, i.e. future interest from the date of award till the date of payment and whether the learned single Judge and the Division Bench were justified in reducing the rate of interest from eighteen per cent to six per cent?

Now, so far as the first question is concerned, the Arbitrator considered the matter in detail. He observed that after the agreement was entered into between the parties, BOL set up its plant and commenced supply of oxygen to HCL. It was the case of BOL that though oxygen was supplied to HCL, no payment was made by HCL. It was alleged by HCL that oxygen supplied by BOL did not meet the purity standard of 99 per cent nor the minimum standard of 85 per cent but it varied between 45 per cent to 65 per cent. BOL was, therefore, not entitled to payment for the supply. It was also contended that Clause 10.5 (referred to earlier by us) specifically provided that in case quantity of gas supplied goes down below the guaranteed purity, no payment would be made. Since the purity of oxygen gas was below 85 per cent, HCL was justified in refusing payment. It was also submitted that as per agreement, BOL was required to establish a 50,000 Litres Vacuum Insulated Storage Tank (VIST) evaporation and distribution system in the plant and was to maintain constant stock of 50,000 Litres of liquid oxygen but BOL failed to establish it. There was thus breach of condition by BOL. Keeping that fact in view, payment was not made by HCL and it could not have been held that HCL was wrong in not making payment. BOL, in view of breach of condition could not have asked for payment. The Arbitrator, therefore, was wrong in allowing the claim of BOL.

Now, the Arbitrator has considered the contention of both the parties. He observed that as per the contract, BOL had undertaken to provide a VIST for storage of liquid oxygen of 50,000 litres. It was not disputed that VIST was not established by BOL and there was no provision for storage of liquid oxygen. He, however, observed that HCL neither insisted for establishing VIST nor objected for not establishing it.

Regarding purity of oxygen, the Arbitrator observed that HCL never complained regarding the fall of purity of oxygen during the relevant period. Referring to the letters written by HCL to BOL, the Arbitrator observed that HCL continued to accept oxygen gas supplied by BOL without avoiding the contract on the ground that there was breach of agreement by BOL. The Arbitrator observed that there was neither excess consumption of furnace oil nor drop in production by HCL. Referring to the decisions of this Court in Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh,

[1968] 2 SCR 545 and Brijendra Nath Bhargava and Anr. v. Harsh Vardhan and Ors., [1988] 1 SCC 454, the Arbitrator held that even if it was the case of HCL that there was non-compliance of certain terms and conditions by BOL, there was waiver and abandonment of the rights conferred on HCL and it was not open to HCL to refuse to make payment to BOL on that ground. In view of waiver on the part of HCL, it was incumbent on HCL to make payment and since no such payment was made, BOL was right in making grievance regarding non-payment of the amount and accordingly an award was made in favour of BOL. The learned single Judge as well as the Division Bench of the High Court considered the grievance of HCL so far as the claim of BOL allowed by the Arbitrator and upheld it.

In view of the finding recorded by the Arbitrator and non-interference by the High Court, we are of the view that no case has been made out by HCL as regards the claim allowed by the Arbitrator in favour of BOL to the extent of supply of oxygen gas to HCL. Hence, the appeal filed by HCL deserves to be dismissed.

The grievance of the BOL is the learned single Judge and the Division Bench were not justified in setting aside the dismissal of counter claim of HCL by the Arbitrator and in remitting the matter to the Arbitrator for fresh consideration. It was submitted that the High Court was not hearing an appeal from the order passed by the Arbitrator. The jurisdiction of the Court in such matters is limited and an award can be set aside only on certain grounds specified in the Act. Since the case was not covered by any of the clauses of Section 30, the orders passed by the High Court are clearly without jurisdiction.

Section 30 of the Act enumerates grounds for setting aside an award passed by the Arbitrator. It reads thus :

"30. Grounds for setting aside award. - An award shall not be set aside except on one or more of the following grounds, namely :

(a) that an arbitrator or umpire has misconducted himself or the proceedings ;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Sec. 35;

(c) that an award has been improperly procured or is otherwise invalid."

This Court has considered the provisions of Section 30 of the Act in several cases and has held that the court while exercising the power under Section 30, cannot re-appreciate the evidence or examine correctness of the conclusions arrived at by the Arbitrator. The jurisdiction is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, other view is equally possible. It is only when the court is satisfied that the Arbitrator had misconducted himself or the proceedings or the award had been improperly procured or is ‘otherwise’ invalid that the court may set aside such award.

In the leading decision of Hodgkinson v. Fernie, (1857) 140 ER 712, Williams, J. stated;

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying, ‘You have constituted your own tribunal; you are bound by its decision."

(emphasis supplied)

In Union of India v. Rallia Ram, AIR (1963) SC 1685, this Court said;

"An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary Courts. The Court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The Court has also power to remit the award when it has left some matters referred undetermined, or when the award is indefinite, or where the objection to the legality of the award is apparent on the face of the award. The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or willful deception. But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievance in the manner provided by the arbitration agreement." (emphasis supplied)

In U.P. Hotels v. U.P. State Electricity Board, [1989] 1 SCC 359, after referring to Halsbury's Laws of England, 4th edition, Vol. 2, para 624, Mukharji, J. (as his Lordship then was) stated that an award of an arbitrator may be set aside for error of law appearing on the face of it, though that jurisdiction is not lightly to be exercised. If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit it being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

In Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises and Anr., [1999] 9 SCC 283, this Court after considering several decisions on the point, held that if an Arbitrator has acted arbitrarily, irrationally, capriciously or beyond the terms of the agreement, an award passed by him can be set aside. In such cases, the Arbitrator can be said to have acted beyond the jurisdiction conferred on him.

In U.P. State Electricity Board v. Searsole Chemcials Ltd., [2001] 3 SCC 397, this Court held that where the Arbitrator had applied his mind to the pleadings, considered the evidence adduced before him and passed an award, the court could not interfere by reappraising the matter as if it were an appeal.

In Indu Engineering & Textiles Ltd. v. Delhi Development Authority, [2001] 5 SCC 691, it was observed that an Arbitrator is a Judge appointed by the parties and as such the award passed by him is not to be lightly interfered with.

In Bharat Coking Coal Ltd. v. M/s. Annapurna Construction, [2003] 8 SCC 154, this Court held that there is distinction between error within

jurisdiction and error in excess of jurisdiction. The role of the Arbitrator is to arbitrate within the terms of the contract and if he acts in accordance with the terms of the agreement, his decision cannot be set aside. It is only when he travels beyond the contract that he acts in excess of jurisdiction in which case, the award passed by him becomes vulnerable and can be questioned in an appropriate court.

In the instant case, the Arbitrator has considered the relevant evidence on record. He has observed that oxygen was supplied by BOL which was accepted by HCL. Certain letters were, no doubt, written by HCL to BOL complaining about the quantity and quality of oxygen gas. The Arbitrator also observed that the evidence disclosed that verbal complaints were made regarding purity of gas. He, however, recorded a finding that Clause 10.4 which allowed HCL to purchase oxygen from other sources at the cost and consequence of BOL was never invoked. The said clause which was ''risk purchase'' from elsewhere was not resorted to by HCL. The Arbitrator noted that in some of the letters, HCL stated that it would have no option but to purchase liquid oxygen at the cost of BOL during non-availability of oxygen from BOL, but ultimately it was a letter dated October 11, 1993 that HCL informed BOL that if BOL would not supply oxygen by October 26, 1993, it would be constrained to purchase oxygen from other sources. Thus, time was granted up to October 26, 1993 in view of letter dated October 11, 1993. In the light of such letter the Arbitrator concluded that HCL could not have purchased oxygen from other sources in August, 1993 and hence it was not entitled to put forward counter claim

The learned single Judge virtually reappreciated the evidence by referring to several letters and observed that the Arbitrator had not considered those letters and there was misconduct on his part. According to the learned single Judge, HCL informed BOL about the grievance and quantity and quality of oxygen supplied by BOL, about the 'risk purchase agreement' and also about its need, necessity and completion of purchase of oxygen gas from other sources. The learned single Judge also has referred to some of those letters in which the said fact was referred by HCL.

In our opinion, however, the learned counsel for BOL is justified in submitting that really it was in realm of appreciation and re-appreciation of evidence. At the most all those letters go to show that HCL had some complaint against BOL and it had also disclosed its intention to purchase oxygen gas from other sources but as observed by the Arbitrator, it was not proved that HCL had in fact purchased oxygen from other sources under Clause 10.4. If in the light of such evidence, the Arbitrator did not think it fit to allow counter claim, it could not be said to a case of misconduct covered by Section 30 of the Act. The learned single Judge as also the Division Bench were, therefore, not justified in setting aside the award passed by the Arbitrator dismissing the counter-claim and hence the order of the learned single Judge as confirmed by the Division Bench deserves to be set aside by restoring dismissal of counter-claim of HCL by the Arbitrator.

The last question relates to payment of interest. The Arbitrator awarded interest to BOL at the universal rate of eighteen per cent for all the three stages, pre-reference period, pendente lite and post award period. It is not disputed that in the arbitration agreement there is no provision for payment of interest. The learned single Judge as well as the Division Bench were right in observing that the Arbitrator, in the facts and circumstances, could have awarded interest. The Arbitrator had granted interest at the rate of eighteen per cent on the ground of loan so advanced by HCL to BOL at that rate.

Now Section 34 of the Code of Civil Procedure has no application to arbitration proceedings since Arbitrator cannot be said to be a 'court' within the meaning of the Code. But an Arbitrator has power and jurisdiction to grant interest for all the three stages provided the rate of interest is reasonable.

So far as interest for pre-reference period is concerned, in view of the conflicting decisions of this Court, the matter was referred to a larger Bench in Executive Engineer, Dhenkanal Minor Irrigation Dvision and Ors. v. N.C. Budhraj (Deceased) by Lrs and Ors., [2001] 2 SCC 721. The Court, by majority, held that an arbitrator has power to grant interest for pre-reference period provided there is no prohibition in the arbitration agreement excluding his jurisdiction to grant interest. The forum of arbitration is created by the consent of parties and is a substitute for conventional civil court. It is, therefore, of unavoidable necessity that the parties be deemed to have agreed by implication that the Arbitrator would have power to award interest in the same way and same manner as a court.

Regarding interest pendente lite also, there was cleavage of opinion. The question was, therefore, referred to a larger Bench in Secretary, Irrigation Department, Government of Orissa and Ors. v. G.C. Roy, [1992] 1 SCC 508. The Court considered several cases and laid down following principles;

> "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 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). 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 high 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.''

As to post-award interest, the point is covered by the decision of this Court in Hindustan Construction Co. Ltd. v. State of Jammu & Kashmir, [1992] 4 SCC 217. It was held there that an arbitrator is competent to award interest for the period from the date of the award to the date of decree or date of realization, whichever is earlier.

In view of the aforesaid decisions, we hold that it was within the power of Arbitrator to award interest. As to the rate of interest, the contention of HCL is that it ought to have been at the rate of six per cent only. The learned counsel for HCL has strongly relied upon the decision of this Court in Nav Bharat Construction Co. In that case, interest was awarded by the Arbitrator at the rate of fifteen per cent. The said action was challenged by the State Government as well as the Contractor. The contention of the State Government was that the Arbitrator could not have awarded interest at the rate of fifteen per cent and it was exorbitant. The Contractor, on the other hand, urged that interest ought to have awarded at the rate of eighteen per cent. This Court C.K. Thakker, J. Leave granted.

All these appeals arise out of common judgment and order passed by the Division Bench of the High Court of Calcutta in APOT Nos. 721 of 2002 and 736 of 2002 on July 03, 2003 by which the Division Bench confirmed the order passed by learned single Judge on July 24, 2002 in A.P. No. 369 of 2002. That A.P. was filed by Hindustan Copper Limited against Arbitration award passed by Justice L.M. Ghosh (Retd.) on September 25, 2000, under the Arbitration Act, 1940 (hereinafter referred to as 'the Act').

To appreciate the controversy raised in the present appeals, relevant facts may be stated in brief. On March 10, 1988, Hindustan Copper Limited ('HCL' for short) invited tender for supply of oxygen for its plant at Ghatsila. The tender contained a condition that successful bidder will set up an oxygen plant in the vicinity of HCL. The tender of Bhagwati Oxygen Limited ('BOL' for short) was accepted and an agreement had been entered into between HCL and BOL on March 17/April 14, 1990. It was for a period of seven years from the date of commencement of supply of oxygen. The agreement stated that the supplier i.e. BOL will at its own cost install, operate and maintain an oxygen plant of 25 TPD capacity of pressure vacuum swing absorption type with suitable compressors for supply of high purity oxygen gas to HCL. It also stated that the purity of oxygen would be 99 per cent. The agreement further stated; ''The oxygen plant should have the capacity to supply not less than 1,25,000 mm3 of gas of 99 per cent purity per week on a sustained basis as and when required by HCL. Clause 2.3 clarified that the minimum acceptable purity of the oxygen gas should be 85 per cent for both flash furnace and converter. Meter readings for invoicing billing purpose were to be taken jointly by authorized representatives of HCL and BOL as and when the plant stopped/started. Provision was also made for periodical checking and calibration of meters. It was the duty of BOL to erect plant and pipe line system. A right to inspection and review was conferred upon HCL. Requirement of gas and supply thereof had been mentioned in Clause 2.1. Water supply required for the plant was to be arranged by BOL at its own cost but HCL agreed to supply water for operation of the plant. BOL had undertaken to erect and commission the plant and start supply of gas continuously to HCL within 18 months from the date of receipt of order or letter of intent whichever was earlier and the gas was to be made available to HCL in the requisite quality and quantity as per conditions agreed upon. Provisions had also been made with regard to price of gas and minimum off-take guaranteed. Time was the essence of the contract and penalty had been provided for in case of breach of contract.

Clauses 10.4 and 10.5 are relevant and they read as under :-

"10.4. In case BOL fail to supply oxygen from the Captive plant as per the contract terms after commissioning of the plant, it will be the responsibility of BOL to arrange liquid oxygen from other sources at contracted rates and keep HCL requirement feed uninterruptedly failing which HCL will have the right to procure the gas from elsewhere and the difference of such procurement cost and the agreed price subject to a limit of 80% of the total requirement as per NIT, will be recovered from BOL forthwith. However, HCL will give adequate chance to BOL to meet the HCL's requirements by their own means from other sources at the contract price.

"10.5. In case, for any period the quantity of Gas supplied goes down below the guaranteed purity or pressure, no payment will be made for that period or quantity unless specifically prior acceptance is obtained from HCL.''

A security deposit of Rs. 20 lacs (Rupees twenty lacs only) had been made by BOL to HCL in the form of bank guarantee issued by the Central Bank of India, New Delhi. There was an arbitration clause being Clause No.12. The said clause reads thus:

"Except where it has been provided otherwise, any dispute or difference arising out of or in connection with the work or any operation covered by the contract and any dispute or difference arising out of in connection with the agreement entered into between HCL and BOL including any dispute or difference relating to the interpretation of the agreement or any clause thereof, shall be referred to sole arbitration of a person appointed jointly by the Chairman of HCL and BOL. The provisions of the Arbitration Act, 1940 and the rules thereunder and any amendment thereto from time to time shall apply. The award of the arbitrator shall be final, conclusive and binding to all the parties to the contract. The arbitrator shall be competent to decide whether any matter, dispute of difference referred to him falls within the purview of arbitration as provided for above."

In accordance with the terms and conditions of the contract, BOL set up its oxygen producing plant on 31st July, 1992 and commenced supply of oxygen to HCL. It is the case of BOL that it supplied oxygen to HCL from 10th February, 1993 to 12th August, 1993. According to the BOL, however, no payment was made by HCL to BOL on the ground that oxygen supplied by BOL to HCL did not meet the purity standard as agreed between the parties. It was also alleged by BOL that bad water was supplied by HCL as a result of which the plant was damaged and ultimately was shut down on August 12, 1993. On October 11, 1993, a letter was written by HCL to BOL calling upon BOL to supply or to arrange for supply of oxygen to HCL on or before August 26, 1993. But the gas was not supplied by BOL to HCL. On July 27, 1994, an agreement was arrived at between the parties to refer the dispute to the Arbitration of Justice L.M. Ghosh, retired Judge of the High Court of Calcutta. On 1st April, 1995, arbitration commenced. BOL claimed Rs. 1,80,81,402.93 ps. :

(i) Dues on account of unpaid bills;

(ii) Cost of repairing and over hauling its plant due to bad water supplied by HCL;

(iii) Loss of revenue due to shut down of the plant by reason of bad water supplied by HCL; and

(iv) Interest.

HCL, on the other hand, filed a counter claim in the arbitration proceedings for Rs. 2,66,26,023.14 ps. inter alia claiming :

(i) Recovery of excess amount paid to BOL;

(ii) Difference of price of oxygen purchased by HCL from other sources

(risk purchase);

(iii) Extra expenditure due to consumption of excess furnace oil due to low purity of oxygen;

(iv) Loss of production by HCL; and

(v) Interest.

The Arbitrator, after holding several meetings, gave an award on September 25, 2000. He held that the claim put forward by BOL was well founded and BOL was thus entitled to an amount of Rs. 74,84,521.34 ps. He also held that HCL was unable to prove its case and counter claim. The counter claim, therefore, was liable to be dismissed. Regarding interest, he held that BOL was entitled to claim interest at the rate of eighteen per cent per annum for pre-reference period, pendente lite and from the date of award till the date of payment. According to the Arbitrator, BOL was also entitled to an amount of Rs. 1,50,000 (One lakh and fifty thousand only) on account of costs.

The award was challenged by HCL by filing A.P. No. 369 of 2000 under Sections 30 and 33 of the Act. A prayer was made to set aside the award. It was contended that the Arbitrator had misconducted himself and the proceedings. It was also contended that the Arbitrator had exceeded his jurisdiction and decided the questions not covered by Clause 12 of the Arbitration agreement and hence, the award was invalid. It was argued that the Arbitrator ought not to have allowed the claim of BOL nor could have dismissed the counter claim of HCL. Since there was breach of contract by BOL, it was not entitled to any amount. On the other hand, in view of non-compliance with the terms and conditions of the contract and breach of agreement, BOL was liable to pay and HCL was entitled to the amount claimed in the counter claim. It was also urged that the Arbitrator had no jurisdiction and had committed an error of law as well as of jurisdiction in awarding interest at the rate of eighteen per cent for pre-reference, pendente lite and post award period.

The learned single Judge heard the parties and held that so far as the claim of BOL was concerned, the Arbitrator was right in allowing the said claim and no interference was called for. Regarding counter claim, however, the learned single Judge was of the opinion that Clause 10.4 as extracted hereinabove was clear and it provided for ‘‘default’’. The learned single Judge referred to several letters and communications by HCL to BOL and observed that from those documents, it was proved that objection was raised by HCL as to non supply of oxygen gas by BOL and BOL was expressly intimated that HCL would be constrained to purchase oxygen gas at the cost and consequences of BOL. Since all those letters and communications had not been considered by the Arbitrator, the award dismissing the counter claim of HCL deserved to be interfered with. Accordingly, order dismissing the counter claim by HCL was set aside by the learned single Judge and the matter was remitted to the Arbitrator to take an appropriate decision in accordance with law on that issue.

So far as the payment of interest to BOL on the claim which had been allowed by the Arbitrator is concerned, the learned single Judge was of the view that Section 61 of the Sale of Goods Act, 1930 did not provide rate of interest. Section 34 of the Code of Civil Procedure, 1908 had no application to arbitration proceedings. In absence of any contract between the parties with regard to the rate of interest payable, the learned single Judge held that it would be appropriate if interest is awarded to BOL at the rate of six per cent per annum. For taking that view the learned single Judge relied upon a decision of this Court in State of Rajasthan v. Nav Bharat Construction Co., [2002] 1 SCC 659 wherein this Court reduced the rate of interest awarded by the Arbitrator from eighteen per cent to six per cent per annum. The learned single Judge accordingly partly allowed the appeal and remitted the matter to the Arbitrator to decide counter claim of

HCL.

Being aggrieved by the order passed by the learned single Judge, HCL and BOL preferred appeals before a Division Bench of the High Court. The grievance of HCL was that the learned single Judge ought to have allowed the appeal in its entirety and ought to have dismissed the claim of BOL by allowing counter claim of HCL. The complaint of BOL, on the other hand, was that the learned single Judge ought to have dismissed the counter claim and should not have interfered with the rate of interest granted by the Arbitrator in favour of BOL. In short, the learned single Judge ought to have dismissed the application of HCL.

The Division Bench considered the rival contentions of the parties and dismissed both the appeals confirming the order passed by the learned single Judge. The Division Bench observed that by confirming the claim of BOL, the learned single Judge did not commit any error of law. Similarly, the learned single Judge was also right in upholding the argument of HCL that the Arbitrator was wrong in dismissing the counter claim and he had not considered several communications to BOL. The order of the learned single Judge thus did not call for interference. Regarding rate of interest, the Division Bench was of the view that learned single Judge was right in observing that Section 61 of Sale of Goods Act did not provide the rate of interest. It was also true that there was no indication in the contract as to payment of interest. In the opinion of the Division Bench, however, the learned single Judge was right in reducing the rate of interest keeping in view the provisions of Section 34 of the Code of Civil Procedure and as such that part of the order also did not warrant interference. The Division Bench thought it proper to dismiss the appeals and accordingly both the appeals were dismissed.

Both the parties, i.e. HCL and BOL have approached this Court.

We have heard learned counsel for the parties.

Learned counsel for BOL submitted that the Arbitrator was wholly right in passing the award and in allowing the claim of BOL. It was urged that learned single Judge as well as the Division Bench were totally wrong in partly setting aside the award passed by the Arbitrator. The counsel contended that the jurisdiction of the court under Section 30 of the Act is extremely limited and an award can be set aside only on one or more grounds specified therein. Since none of the grounds existed, the court could not have interfered with the award nor the award could be set aside. According to the learned counsel, the Arbitrator considered the evidence on record - documentary as well as oral - and came to the conclusion that no case was made out by HCL on the basis of which counter claim could be allowed and accordingly dismissed it. The learned single Judge and the Division Bench re-appreciated the evidence and set aside that part of the award by remitting the matter to the Arbitrator to reconsider and decide afresh the counter claim of HCL. It was not within the jurisdiction of the learned single Judge or the Division Bench and the order deserves to be quashed and set aside. Regarding interest, the counsel submitted that the agreement did not contain any clause as to interest. Section 34 of the Code of Civil Procedure was not applicable. Section 61 of the Sale of Goods Act does not provide rate of interest nor it applied to the case on hand. If in the light of these facts, the Arbitrator awarded interest to BOL at eighteen per cent considering the fact that that was the rate at which HCL had given advance to BOL, such an order could not be termed as unlawful or otherwise objectionable. Neither the learned single Judge nor the Division Bench was justified in interfering with the rate of interest. It was, therefore, submitted that the appeal filed by HCL deserves to be dismissed and appeal filed by BOL deserves to be allowed.

The learned counsel for HCL, on the other hand, supported the orders passed by the learned single Judge and the Division Bench so far as they relate to remanding the matter to Arbitrator for deciding afresh the counter claim of

HCL. Regarding payment of interest at the rate of six per cent per annum to BOL, it was submitted that even that part of the order was not warranted and the claim of BOL was liable to be rejected. The Arbitrator committed an error of law and has misconducted himself as well as proceedings in allowing such claim. According to the learned counsel, there was breach of contract on the part of BOL, oxygen was not supplied as per the agreement entered into between the parties; purity of oxygen was not maintained; other terms and conditions were also not fulfilled by BOL and as such, BOL was not entitled to any relief. It was, therefore, prayed that the award passed by the Arbitrator deserves to be quashed in its entirety by allowing the appeal of HCL.

In the light of rival contentions of the parties, in our opinion, three questions arise for our consideration :

(1) Whether on the facts and in the circumstances of the case, the Arbitrator was right in allowing the claim of BOL?

(2) Whether the Arbitrator had misconducted himself in passing the impugned award and by dismissing the counter claim of HCL and whether the learned single Judge and the Division Bench of the High Court were right in setting aside that part of the award by directing the Arbitrator to re-consider the matter and decide it afresh? and

(3) Whether the Arbitrator had power to award interest at the rate of eighteen per cent per annum for pre-reference period, pendente lite and post reference, i.e. future interest from the date of award till the date of payment and whether the learned single Judge and the Division Bench were justified in reducing the rate of interest from eighteen per cent to six per cent?

Now, so far as the first question is concerned, the Arbitrator considered the matter in detail. He observed that after the agreement was entered into between the parties, BOL set up its plant and commenced supply of oxygen to HCL. It was the case of BOL that though oxygen was supplied to HCL, no payment was made by HCL. It was alleged by HCL that oxygen supplied by BOL did not meet the purity standard of 99 per cent nor the minimum standard of 85 per cent but it varied between 45 per cent to 65 per cent. BOL was, therefore, not entitled to payment for the supply. It was also contended that Clause 10.5 (referred to earlier by us) specifically provided that in case quantity of gas supplied goes down below the guaranteed purity, no payment would be made. Since the purity of oxygen gas was below 85 per cent, HCL was justified in refusing payment. It was also submitted that as per agreement, BOL was required to establish a 50,000 Litres Vacuum Insulated Storage Tank (VIST) evaporation and distribution system in the plant and was to maintain constant stock of 50,000 Litres of liquid oxygen but BOL failed to establish it. There was thus breach of condition by BOL. Keeping that fact in view, payment was not made by HCL and it could not have been held that HCL was wrong in not making payment. BOL, in view of breach of condition could not have asked for payment. The Arbitrator, therefore, was wrong in allowing the claim of BOL.

Now, the Arbitrator has considered the contention of both the parties. He observed that as per the contract, BOL had undertaken to provide a VIST for storage of liquid oxygen of 50,000 litres. It was not disputed that VIST was not established by BOL and there was no provision for storage of liquid oxygen. He, however, observed that HCL neither insisted for establishing VIST nor objected for not establishing it.

Regarding purity of oxygen, the Arbitrator observed that HCL never complained regarding the fall of purity of oxygen during the relevant period. Referring to the letters written by HCL to BOL, the Arbitrator observed that HCL continued to accept oxygen gas supplied by BOL without avoiding the contract on the ground that there was breach of agreement by BOL. The Arbitrator observed that there was neither excess consumption of

furnace oil nor drop in production by HCL. Referring to the decisions of this Court in Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh, [1968] 2 SCR 545 and Brijendra Nath Bhargava and Anr. v. Harsh Vardhan and Ors., [1988] 1 SCC 454, the Arbitrator held that even if it was the case of HCL that there was non-compliance of certain terms and conditions by BOL, there was waiver and abandonment of the rights conferred on HCL and it was not open to HCL to refuse to make payment to BOL on that ground. In view of waiver on the part of HCL, it was incumbent on HCL to make payment and since no such payment was made, BOL was right in making grievance regarding non-payment of the amount and accordingly an award was made in favour of BOL. The learned single Judge as well as the Division Bench of the High Court considered the grievance of HCL so far as the claim of BOL allowed by the Arbitrator and upheld it.

In view of the finding recorded by the Arbitrator and non-interference by the High Court, we are of the view that no case has been made out by HCL as regards the claim allowed by the Arbitrator in favour of BOL to the extent of supply of oxygen gas to HCL. Hence, the appeal filed by HCL deserves to be dismissed.

The grievance of the BOL is the learned single Judge and the Division Bench were not justified in setting aside the dismissal of counter claim of HCL by the Arbitrator and in remitting the matter to the Arbitrator for fresh consideration. It was submitted that the High Court was not hearing an appeal from the order passed by the Arbitrator. The jurisdiction of the Court in such matters is limited and an award can be set aside only on certain grounds specified in the Act. Since the case was not covered by any of the clauses of Section 30, the orders passed by the High Court are clearly without jurisdiction.

Section 30 of the Act enumerates grounds for setting aside an award passed by the Arbitrator. It reads thus :

"30. Grounds for setting aside award. - An award shall not be set aside except on one or more of the following grounds, namely :

(a) that an arbitrator or umpire has misconducted himself or the proceedings ;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Sec. 35;

(c) that an award has been improperly procured or is otherwise invalid."

This Court has considered the provisions of Section 30 of the Act in several cases and has held that the court while exercising the power under Section 30, cannot re-appreciate the evidence or examine correctness of the conclusions arrived at by the Arbitrator. The jurisdiction is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, other view is equally possible. It is only when the court is satisfied that the Arbitrator had misconducted himself or the proceedings or the award had been improperly procured or is 'otherwise' invalid that the court may set aside such award.

In the leading decision of Hodgkinson v. Fernie, (1857) 140 ER 712, Williams, J. stated;

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a

competent one. The court has invariably met those applications by saying, 'You have constituted your own tribunal; you are bound by its decision." (emphasis supplied)

In Union of India v. Rallia Ram, AIR (1963) SC 1685, this Court said;

"An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary Courts. The Court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The Court has also power to remit the award when it has left some matters referred undetermined, or when the award is indefinite, or where the objection to the legality of the award is apparent on the face of the award. The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or willful deception. But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievance in the manner provided by the arbitration agreement." (emphasis supplied)

In U.P. Hotels v. U.P. State Electricity Board, [1989] 1 SCC 359, after referring to Halsbury's Laws of England, 4th edition, Vol. 2, para 624, Mukharji, J. (as his Lordship then was) stated that an award of an arbitrator may be set aside for error of law appearing on the face of it, though that jurisdiction is not lightly to be exercised. If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit it being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

In Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises and Anr., [1999] 9 SCC 283, this Court after considering several decisions on the point, held that if an Arbitrator has acted arbitrarily, irrationally, capriciously or beyond the terms of the agreement, an award passed by him can be set aside. In such cases, the Arbitrator can be said to have acted beyond the jurisdiction conferred on him.

In U.P. State Electricity Board v. Searsole Chemcials Ltd., [2001] 3 SCC 397, this Court held that where the Arbitrator had applied his mind to the pleadings, considered the evidence adduced before him and passed an award, the court could not interfere by reappraising the matter as if it were an appeal.

In Indu Engineering & Textiles Ltd. v. Delhi Development Authority, [2001] 5 SCC 691, it was observed that an Arbitrator is a Judge appointed by the parties and as such the award passed by him is not to be lightly interfered with.

In Bharat Coking Coal Ltd. v. M/s. Annapurna Construction, [2003] 8 SCC 154, this Court held that there is distinction between error within jurisdiction and error in excess of jurisdiction. The role of the Arbitrator is to arbitrate within the terms of the contract and if he acts in accordance with the terms of the agreement, his decision cannot be set aside. It is only when he travels beyond the contract that he acts in excess of jurisdiction in which case, the award passed by him becomes vulnerable and can be questioned in an appropriate court.

In the instant case, the Arbitrator has considered the relevant evidence on record. He has observed that oxygen was supplied by BOL which was accepted by HCL. Certain letters were, no doubt, written by HCL to BOL complaining about the quantity and quality of oxygen gas. The Arbitrator also observed that the evidence disclosed that verbal complaints were made regarding purity of gas. He, however, recorded a finding that Clause 10.4 which allowed HCL to purchase oxygen from other sources at the cost and consequence of BOL was never invoked. The said clause which was ''risk purchase'' from elsewhere was not resorted to by HCL. The Arbitrator noted that in some of the letters, HCL stated that it would have no option but to purchase liquid oxygen at the cost of BOL during non-availability of oxygen from BOL, but ultimately it was a letter dated October 11, 1993 that HCL informed BOL that if BOL would not supply oxygen by October 26, 1993, it would be constrained to purchase oxygen from other sources. Thus, time was granted up to October 26, 1993 in view of letter dated October 11, 1993. In the light of such letter the Arbitrator concluded that HCL could not have purchased oxygen from other sources in August, 1993 and hence it was not entitled to put forward counter claim

The learned single Judge virtually reappreciated the evidence by referring to several letters and observed that the Arbitrator had not considered those letters and there was misconduct on his part. According to the learned single Judge, HCL informed BOL about the grievance and quantity and quality of oxygen supplied by BOL, about the 'risk purchase agreement' and also about its need, necessity and completion of purchase of oxygen gas from other sources. The learned single Judge also has referred to some of those letters in which the said fact was referred by HCL.

In our opinion, however, the learned counsel for BOL is justified in submitting that really it was in realm of appreciation and re-appreciation of evidence. At the most all those letters go to show that HCL had some complaint against BOL and it had also disclosed its intention to purchase oxygen gas from other sources but as observed by the Arbitrator, it was not proved that HCL had in fact purchased oxygen from other sources under Clause 10.4. If in the light of such evidence, the Arbitrator did not think it fit to allow counter claim, it could not be said to a case of misconduct covered by Section 30 of the Act. The learned single Judge as also the Division Bench were, therefore, not justified in setting aside the award passed by the Arbitrator dismissing the counter-claim and hence the order of the learned single Judge as confirmed by the Division Bench deserves to be set aside by restoring dismissal of counter-claim of HCL by the Arbitrator.

The last question relates to payment of interest. The Arbitrator awarded interest to BOL at the universal rate of eighteen per cent for all the three stages, pre-reference period, pendente lite and post award period. It is not disputed that in the arbitration agreement there is no provision for payment of interest. The learned single Judge as well as the Division Bench were right in observing that the Arbitrator, in the facts and circumstances, could have awarded interest. The Arbitrator had granted interest at the rate of eighteen per cent on the ground of loan so advanced by HCL to BOL at that rate.

Now Section 34 of the Code of Civil Procedure has no application to arbitration proceedings since Arbitrator cannot be said to be a 'court' within the meaning of the Code. But an Arbitrator has power and

jurisdiction to grant interest for all the three stages provided the rate of interest is reasonable.

So far as interest for pre-reference period is concerned, in view of the conflicting decisions of this Court, the matter was referred to a larger Bench in Executive Engineer, Dhenkanal Minor Irrigation Dvision and Ors. v. N.C. Budhraj (Deceased) by Lrs and Ors., [2001] 2 SCC 721. The Court, by majority, held that an arbitrator has power to grant interest for pre-reference period provided there is no prohibition in the arbitration agreement excluding his jurisdiction to grant interest. The forum of arbitration is created by the consent of parties and is a substitute for conventional civil court. It is, therefore, of unavoidable necessity that the parties be deemed to have agreed by implication that the Arbitrator would have power to award interest in the same way and same manner as a court.

Regarding interest pendente lite also, there was cleavage of opinion. The question was, therefore, referred to a larger Bench in Secretary, Irrigation Department, Government of Orissa and Ors. v. G.C. Roy, [1992] 1 SCC 508. The Court considered several cases and laid down following principles;

> "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 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). 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 high 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.''

As to post-award interest, the point is covered by the decision of this Court in Hindustan Construction Co. Ltd. v. State of Jammu & Kashmir, [1992] 4 SCC 217. It was held there that an arbitrator is competent to award interest for the period from the date of the award to the date of decree or date of realization, whichever is earlier.

In view of the aforesaid decisions, we hold that it was within the power of Arbitrator to award interest. As to the rate of interest, the contention of HCL is that it ought to have been at the rate of six per cent only. The learned counsel for HCL has strongly relied upon the decision of this Court in Nav Bharat Construction Co. In that case, interest was awarded by the Arbitrator at the rate of fifteen per cent. The said action was challenged by the State Government as well as the Contractor. The contention of the State Government was that the Arbitrator could not have awarded interest at the rate of fifteen per cent and it was exorbitant. The Contractor, on the other hand, urged that interest ought to have awarded at the rate of eighteen per cent. This Court held that it would be appropriate if interest at the rate of six per cent is awarded.

In our view, however, a relevant and germane factor weighed with the Arbitrator in awarding eighteen per cent interest that at that rate HCL had given advance to BOL. In view of the said circumstance, in our opinion, even that part of the award passed by the Arbitrator did not deserve interference and learned single Judge and the Division Bench were not right in reducing the rate of interest.

For the foregoing reasons, the appeals filed by BOL deserve to be allowed and are accordingly allowed by setting aside the order passed by the learned single Judge and confirmed by the Division Bench and by restoring the award passed by the Arbitrator. In view of the order passed in the appeals of BOL, the appeal filed by HCL deserves to be dismissed and is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.