

CASE NO.:

Appeal (civil) 3586 of 1984.

Appeal (civil) 710-711 of 1981

Appeal (civil) 6808-009

of 1983

Appeal (civil) 6810 of 1983

Appeal (civil) 10649 of 1983

Appeal (civil)

l) 779 of 1982

Appeal (civil) 2723 of 1983

PETITIONER:

DIVISION ETC. ETC.

Vs.

RESPONDENT:

N.C.BUDHARAJ(DEAD) BY L.RS.ETC.ETC.

DATE OF JUDGMENT: 10/01/2001

BENCH:

G.B.Pattanaik

JUDGMENT:

PATTANAIAK, J.

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

I have gone through the two judgments of two of my Brother Judges, on the question of the jurisdiction of the Arbitrator to grant interest for the period prior to the reference. While Brother Justice Raju has come to the conclusion that the arbitrator does possess the said power, Brother Justice Mohapatra, has taken a contrary view. Having considered both the view points, I have not been able to persuade myself to agree with the conclusion of Brother Raju, J, and I entirely agree with the conclusion of Brother Mohapatra, J. But in view of the importance of the point, I am tempted to indicate my views in few paragraphs.

The power of the arbitrator to award interest for the period prior to entertaining upon the reference as well as the period the reference was pending before him pendente lite was considered by this Court in Thowardas, 1955(2) SCR 48, and also by the Privy Council in Bengal Nagpur Railway co. Ltd. vs. Ruttanji Ramji, 65 IA 66. Between 1960 and 1972 in several decisions, which have been referred to by the Constitution Bench in G.C.Roys case, 1992(1)SCC 508, the question of power of the arbitrator to award interest has been considered but without any detailed discussion, it has been held that the arbitrator possesses the power since the reference to arbitrator was made by the Court and all the disputes in the suit stood referred. This Court, therefore, came to the conclusion that on the application of the principle of Section 34 of the Civil Procedure Code, pendente lite interest could be awarded by the arbitrator. But so far as the power to award interest for the period prior to the reference is concerned, only in the case of Ashok Construction Co., 1971(3) SCR 66, this court no doubt held that the arbitrator has the power to award interest from the date the amount is due under the contract, on the ground that the arbitration agreement did not exclude the jurisdiction of the arbitrator but the earlier decision of

the Court either in Thawardas or in Bengal Nagpur Railway, deciding to the contrary, had not been noticed and in fact the question had been disposed of in one sentence in paragraph(6). While this was the position, for the first time, this Court made an in- depth examination of the question in Jenas case, 1988(1) SCC 418. Three learned judges considered the competence of the arbitrator on reference made without intervention of the Court and came to the conclusion that in cases, which arose prior to the commencement of the Interest Act, 1978, the arbitrator did not have the power to grant interest either pendente lite or for the period prior to the reference. In this case, though several English cases have been cited, including the case of Chandris, but the Court refrained from referring, in view of the abundance of authoritative pronouncement of the Supreme Court. Since the Interest Act of 1839 did not confer power on the arbitrator to award interest, the Court looked elsewhere for that power of the arbitrator to award interest up to the institution of the proceeding but could not find any such power, and, therefore, ultimately came to the conclusion that the arbitrator did not possess any power to award interest for the pre-reference period. So far as the power of arbitrator to grant interest pendente lite is concerned, the Court held that Section 34 of the Civil Procedure Code could be made applicable to arbitrations in suit and, therefore, when a dispute is referred to arbitrator in suit, the arbitrator will have the power of the Court in deciding the dispute, but not otherwise. In other words, in case of an arbitration proceeding, where a reference is made to the arbitrator, not by the Court in a pending suit, but otherwise, in accordance with the arbitration clause in agreement, then the arbitrator also did not possess the power to award pendente lite interest as the arbitrator cannot be held to be a Court. It is necessary to bear in mind, it was held in no uncertain terms that there is no substantive law which can be said to have conferred power on the arbitrator to award interest, before the commencement of the proceedings, that is for the pre-reference period. This decision of the three Judge Bench, operated the field till the Constitution Bench decision in G.C.Roys case, 1992(1) SCC 508. The Constitution Bench over-ruled the conclusion in Jenas case, so far as it related to the power of the arbitrator pendente lite is concerned. Even in G.C.Roys case, the Constitution Bench, itself held that the earlier decisions of the Court in Rallia Ram, 1964(3) SCR, 164, Bengal Nagpur Railway, 65 IA 66, AND Thawardas, 1955(2) SCR 48, what was held in relation to the power of the arbitrator to award interest for pre-reference period is because of the fact, as a matter of substantive law, no such power was available and as such, the ratio in that case cannot have any relevance on the question of arbitrators power to award interest pendente lite. The Constitution Bench did record a finding that interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference. The Constitution Bench also very carefully expressed Untill Jenas case, almost all the Courts in the country had upheld the power of the arbitrator to award interest pendente lite. Even when the earlier Constitution Bench decision in the case of Union of India vs. West Punjab Factories Ltd., 1966(1) SCR 580, approving Thawardas, Bengal Nagpur Railway Co.,and Rallia Ram, was brought to the notice of the Court, it was observed that not only the said case was not a case under Arbitration Act but also it approved Thawardas only so far as the power to grant interest prior to the institution

of the suit and not so far as the power to award interest pendente lite is concerned. If the Constitution Bench in the case of Union of India vs. West Punjab Factories Ltd., approved Thawardas, Bengal Nagpur Railway and Rallia Ram and held that even in a suit, interest prior to the institution of the suit cannot be granted, following the principles in Thawardas and two others, which decided the power of the arbitrator in relation to the grant of interest for pre-reference period, it is unimaginable on my part to think that an arbitrator does possess the power on the ground that otherwise it would lead to multiplicity of proceedings. It would be appropriate for me to indicate that in G.C.Roy, the ratio of Thawardas, Bengal Nagpur Railway and Rallia Ram had not been doubted even, and possibly could not have been doubted in view of its acceptance by the earlier Constitution Bench decision in Union of India vs. West Punjab Factories Ltd., so far as the power of award of interest for the pre-reference period is concerned. Even subsequent to Roys case, there have been decisions of three Judge Bench and two Judge Bench, which have been noticed by Mohapatra, J in his judgment, including the judgment of Justice Jeevan Reddy, who was a party to the Constitution Bench in G.C.Roy, reiterating the principle that an arbitrator does not possess the power to award interest for a pre-reference period. [see Jugal Kishore, 1993(1) SCC 114, B.N.Agarwala, 1993(1) SCC 140(in this case both the learned judges, Justice Jeeval Reddy and Justice G.N. Ray were party to the Constitution Bench decision in G.C.Roy's case) and B.N.Agarwala, 1997(2) SCC 469]. The arbitration proceeding has been a racket in this country and in construing the law in relation to the powers of the arbitrator, the Courts must construe the provisions of the law rather strictly. Courts would not be justified in construing the provisions and providing for something which is not there in the Act and it is in this context, I express my utter inability to construe the provisions of the Interest Act, 1839 and interpret the same to have a meaningful and purposeful object. To hold that an arbitrator possesses the power to award interest even for the pre-reference period, would tantamount to legislation in that respect and would be contrary to the well reasoned and well discussed decisions of this Court, starting from Thowardas as well as the decision of Privy Council in Bengal Nagpur Railway, which decisions though noticed in G.C.Roys case, but have the approval of the Constitution Bench in West Punjab Factories case, though the case was not on arbitration but was of a five Judge Bench decision and possibly, it would not be proper for this Bench to take a view contrary to the same. The fact that the arbitrator has the power to deal with and decide disputes which cropped up at a point of time, would certainly not clothe the arbitrator with any power, which neither any law confers upon him nor there is any usage of trade having the force of law nor is there any agreement between the parties conferring that power. It is difficult for me to conceive that such power could be conferred upon an arbitrator for the pre-reference period on the supposition that he must be presumed to have the power to grant interest as an accessory or incidental to the sum awarded as due and payable. It is not the question of absence of any specific stipulation in the contract but the correct criteria should be whether there is a positive provision in the contract, conferring the power to the arbitrator to award interest for pre-reference period. I need not discuss any

further in view of my concurrence with Brother Mohapatra, J. So, the appeals must be allowed.

JUDIS