The Punjab State Vs Amar Nath Aggarwal, Constructions (P) Ltd. and Another

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Nov. 8, 1993

Acts Referred: Arbitration Act, 1940 â€" Section 13, 20, 30
Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 2
Contract Act, 1872 â€" Section 70
Interest Act, 1978 â€" Section 3(3), 4

Citation: (1993) 105 PLR 1

Hon'ble Judges: A.P. Chowdhri, J

Bench: Single Bench

Advocate: G.K. Chatrath, AG and S.S. Saron, Dy. A.G, for the Appellant; R.S. Mittal and R.L. Seghal, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

A.P. Chowdhri, J.
This Judgment would dispose of these appeals which arise in identical circumstances and raise common question of fact

and law.

2. FAO No. 1122 of 1991 is directed against order and decree dated April 26, 1991, of Senior Subordinate Judge, Ropar, dismissing objections

filed by the applicant under Sections 30 and 33 of the Act against the award dated June 9, 1990, and making the same rule of the Court.

3. Before dealing with the various points raised in the appeal, brief facts of the case may be set out as under :-

4. The respondent-company, hereinafter referred to as the contractor, was awarded contract by the State of Punjab vide agreement No. 6/86

dated. January 25, 1986, for executing work for the construction of Sutlej Yamuna Link Canal (Irrigation), Punjab portion in reach RD 47000 to

48400 KM (hereinafter called SYL); Disputes or differences having arisen between the parties, the matter was referred by the Chief Engineer,

Construction, SYL vide order dated July 28, 1989 to Mr. K.C. Verma, Chief Engineer. Hydel Design, Punjab State Electricity Board,

Chandigarh, by name, who was constituted sole arbitrator in terms of Clause 63 of the General Conditions of Contract which was an integral part

of the said agreement. The contractor submitted its claims before the arbitrator. Reply on behalf of the Department was filed, followed by rejoinder

and further rejoinders thereto. The parties produced their evidence mostly in the form of documents about which there was no dispute. Arguments

were concluded before the Arbitrator on May 28, 1990, and decision was reserved. Both parties gave their written consent before the Arbitrator

for extension of the time for giving the award upto July 8, 1990. The Arbitrator gave his award on June 9, 1990. On behalf of the department,

objections under Sections 30 and 33 of the Act were filed for setting aside the award. The Contractor contested those objections and prayed for

making the award rule of Court. The learned Senior subordinate Judge framed the following issues:-

1. Whether the award is liable to be set aside for the reasons stated in the objection petition? OPR.

2. Whether the award is liable to be made a rule of the Court? OPA.

3. Relief.

By order dated April 26, 1991, the learned Senior Subordinate Judge, Ropar, dismissed the objections, and made the award rule of the Court.

Hence this appeal.

5. The first contention of Mr. S.S. Saron, Deputy Advocate-General, appearing for the State, is that the award is null and void as on the material

date the Arbitrator had ceased to hold office as a public servant in terms of Clause 63 of the General Conditions of Contract. Facts bearing on this

point are that Mr. K.C. Verma, Chief Engineer, PSEB, who was appointed sole arbitrator, was prematurely retired by the Punjab State Electricity

Board under the PSEB Services (Premature Retirement) Regulations, 1982, by order dated May 30, 1990, with immediate effect after he had

crossed the age of 55 years. The relevant part of Clause 63 provides:-

If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another

sole arbitrator shall be appointed as aforesaid.

It was submitted that proceedings held by the Arbitrator after May 30, 1990, were non est. In other words, proceedings dated June 4, 1990, was

without jurisdiction.

6. In reply, Mr. R.S. Mittal, Senior Advocate, on behalf of the Contractor, made a two fold submission: one, that the order of premature

retirement was quashed by this Court in CWP No. 6529 of 1990 decided on September 5, 1990 and it was specifically directed that ""the

petitioner would be deemed to be continuing in service since the date of his premature retirement i.e. 30th May, 1990, with all consequential

benefits."" Mr. Mittal placed reliance on Hari Dutt Bhardwaj Vs. Haryana State Agriculture Marketing Board, Punchkula and Another, and

Devendra Pratap Narain Rai Sharma Vs. State of Uttar Pradesh, . The second reason given by Mr. Mittal is that by taking part in the proceedings,

despite order of premature retirement, the Department acquiesced in and waived its objection to the jurisdiction of the Arbitrator. Reference in this

connection was made by the learned counsel to the fact that Mr. Gurdip Singh, Executive Engineer, Kharar Division, who appeared for the

department before the Arbitrator on June 4, 1990, signed the proceedings held on that day.

7. After a careful consideration of the respective submissions, I am of the view that the objection is untenable.

8. The effect of the order in CWP No. 8529 of 1990 quashing the premature retirement is as if order of premature retirement was never passed.

This legal implication was made explicit in the order of the Court by using the words already quoted. The principle of law laid down in Devendra

Pratap Narain Rai Sharma Vs. State of Uttar Pradesh, fully applies to this case. That was a case of Government servant governed by Fundamental

Rules framed by the State of Uttar Pradesh. He was dismissed from service. The dismissal was set aside by the High Court. The contention on

behalf of the State was that under Fundamental Rule 54, the competent authority was empowered to order reinstatement and make a specific

order regarding pay and allowances. Dealing with the contention their Lordships of the Supreme Court pointed out the vital distinction between a

case where dismissal is set aside in departmental appeal on the one hand and a case where dismissal is set aside by order of the Civil Court on the

other hand In the latter category of cases i.e. where the order of dismissal is set aside by the Civil Court, the effect was that the employee

concerned was never to be deemed to have been lawfully dismissed from service and the order of reinstatement was superfluous. It was further

laid down that the effect of the adjudication of the Civil Court is to declare that the appellant had been wrongfully prevented from attending to his

duties as a public servant (vide observations in paragraph 11 at p. 1337). The effect of ''legal fiction'' was considered by the apex Court in Builders

Association of India and Others Vs. Union of India (UOI) and Others, . In paragraph 361 at page 1391 column 1 the following observations

occur:-

When the law creates a legal fiction, such fiction should be carried to its logical end There should not be any hesitation in giving full effect to it

Though these observations were made in a different context, they apply with full force in the present case. Moreover, the present case is covered

by decision of the Supreme court in Hari Dutt Bhardwaj Vs. Haryana State Agriculture Marketing Board, Punchkula and Another,). In that case,

the facts were that one Shri D.P. Gupta, Superintending Engineer of the Marketing Board, was appointed Arbitrator on March 11, 1983. While

the Arbitrator was seized of the dispute between the parties, the Chairman of the Board purported to revert him to his parent department. On April

6, 1984, the Arbitrator made his award. On May 24, 1984, the State Government passed an order that Shri D.P. Gupta continued in his post as

Superintending Engineer in the Marketing Board On February 28, 1985, the Marketing Board passed a resolution giving effect to the aforesaid

direction of the Government extending the deputation, tenure of Shri D.P. Gupta till September 3, 1985. On July 30, 1985, the trial Court made

the award a rule of the Court. It was urged before the High Court that on April 6, 1984, the date on which the Arbitrator made his award, the

Arbitrator had lost jurisdiction since he had been transferred on April 4, 1984, from the post Superintending Engineer of the Marketing Board The

High Court accepted the plea and set aside the award made by Sh. D.P. Gupta. Allowing the appeal, the Supreme Court held that Shri D.P.

Gupta was on deputation with the Board upto September 4, 1984, and he was prematurely required by the Chairman by order dated April 4,

1984, to revert to his parent department It was pointed out that admittedly Shri Gupta rejoined the Board following the order of the State

Government. In fact, he had not resumed his post in his parent department. It was further held that the necessary consequence of the order of the

State Government to continue him on deputation with the Marketing Board was to nullify the order dated April 4, 1984, passed by the Chairman

purporting to revert Shri Gupta to his parent department. It was further pointed out that Shri Gupta was paid his salary by the Marketing Board for

the entire month of April 1984. It was, therefore, held that Shri Gupta must be deemed to have enjoyed jurisdiction as Arbitrator on April 6, 1984,

when he made the award (vide paragraph 5 at page 1671).

9. Mr. Saron sought to distinguish the above authority in Hari Dutt''s case by pointing out that in the present case the order of premature retirement

came into effect when it was put in course of transmission. In Hari Dutt''s case, the officer had not rejoined the parent department in compliance

with the order of reversion from deputation. He referred to State of Punjab Vs. Khemi Ram, for the proposition that once the order is put in the

course of transmission, it should be deemed to have come into effect. I do not agree. The material question in this case is not whether it came into

force or not. Rather the question involved is as to the legal effect of quashing the order by this Court. Viewed in this light, the irresistible conclusion

is that Mr. K.C. Verma must be deemed to have continued to hold the office of Chief Engineer as if no order of premature retirement had been

passed at any stage. With regard to the second submission of Mr. Mittal also, it may be pointed out that there is no dispute about the department

having taken part in the proceedings on June 4, 1990, without raising any objection regarding jurisdiction.

10. For these reasons, the objection regarding lack of jurisdiction of the Arbitrator is untenable and the same is repelled.

11. It is necessary to notice the relevant provisions of the Act and the case law which was cited during the course of arguments to delineate the

broad parameters in which the Court can interfere against an order making award of the arbitrator rule of the Court.

12. The Act contains only two provisions, namely, Sections 16 and 30, under which an award can be remitted or set aside. Section 16 empowers

the Court to remit the award to the arbitrator in three situations which are laid down in Clauses (a) to (c) of Sub-section (1) of Section 16. Under

Clause (a), the award can be remitted if the arbitrator has left undetermined any matter has determined a matter which was not referred to him and

such matter cannot be separated without affecting a determination of matters referred to the arbitrator. Clause (b) relates to a case where the

award is so indefinite as to be incapable of execution. Clause (c) deals with an objection to the legality of award, which is apparent on the face of

it. The admitted case of the appellants in these appeals is that there is no case made out for remitting the award under any of the aforesaid clauses

of Section 16. The only provision under which the Court can set aside an award is Section 30, which reads as under:-

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 u/s 35.

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

The clear mandate of the legislature is that an award shall not be set aside except on one or more of the grounds mentioned in Section 30. This

mandate has been expressly laid down in Sections 33 and 32 on the one hand and the language of the pending part of Section 30 itself, on the

other hand. Section 33 lays down that the validity of an award can be challenged only by making an application under that section. Section 32 bars

institution of a suit to challenge the validity of an award. The opening words of Section 30 are very significant To put the matter beyond any doubt

or debate, it has been expressly laid down that an award shall not be set aside except on one or more of the grounds laid down in Section 30 itself.

Admittedly, Clauses (b) and (c) of Section 30 are not attracted to the facts in these appeals. In so far as Clause (a) is concerned, the key word is

''misconduct''. The word ''misconduct'' has not been defined by the Act. The connotation of that word is, however, well understood as a result of a

long line of decisions. It is rather easy to understand ''misconduct'' in relation to moral turpitude. In law relating to arbitration, it is also considered

''misconduct'' if the arbitrator travels beyond the terms of reference or gives an award in contravention of any of the terms of the agreement

between the parties under which he has been appointed. In fact, the very basis which invests the arbitrator with jurisdiction to decide the dispute

between the parties is the agreement between the parties. The uninformed prevalent impression is that the Civil Court in exercise of its plenary

powers can correct the errors both on questions of fact and law, committed by the arbitrator. The main basis for this impression is that it is the Civil

Court which is competent to hear objections against the award and to make the award effectual by making it rule of the court. The court can

interfere only if the arbitrator has misconducted himself or the proceedings or there is an error of law apparent on the face of the record. The scope

for interference is thus limited. Reference may now be made to decisions in point.

13. In Champasey Bhara and company v. Jivraj Balloo Spinning and Weaving Company Ltd. AIR 1923 5 Privy Council 66, the law on the

subject has been stated at page 68 in these words:-

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 a

lawyer or a layman, he is constituted the sole and final judge of all questions both of law and fact. ... The only exception to that rule are cases

where the award is the result of corruption or fraud and one other, which though it is to be regretted, is now, I think firmly established viz. Where

the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the

propriety of this latter may very well be doubted, I think it may be considered as established. (vide Williams, J. in Hagikinson v. Femie (1857) 3

C.B.N.S. 189).

This decision and the ratio on the proposition of law has already been accepted by the courts of this country and is well settled (See Sudarsan

Trading Co. Vs. Government of Kerala and Another, vide paragraph 28 at page 900 of the report).

14. Again, our Supreme Court in Allen Berry and Co. Pvt. Ltd. Vs. The Union of India (UOI), New Delhi, , reviewed the case law beginning from

Hodgkinson and laid down the general rate in these words:-

Once there is no depute as to the contract, what is the interpretation of that contract, is a matter for the arbitrator and on which court cannot

substitute its own decision. If on a view taken of a contract the decision of the arbitrator on certain amounts awarded, is a possible view, the award

cannot be examined by the court Therefore, the High Court had no jurisdiction to examine the different items awarded clause by clause by the

arbitrator and to hold that under the contract these were not sustainable in the facts found by the arbitrator.

It was farther laid down that the question whether a contract or a clause of it is incorporated in the award is a question of construction of the

award. The test is, does the arbitrator come to a finding on the wording of the contract. If he does, he can be said to have rightly incorporated the

contract or the clause in it, whichever be the case. It was further observed that a mere general reference to the contact in the award is not to be

held as incorporating it. A word of caution was added that the principle of reading contract or other documents into the award is not to be

encouraged or extended. (See observations in paragraph 9 in Allen Berry & Co."s case (supra) at page 699 of the report).

15. In Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, , after noticing the relevant case law, it was observed by their

Lordships that a decision on question of law may be given by the arbitrator in two different and distinct situations: -

(a) where the parties frame a specific question of law and refer it to the arbitrator for his decision; and (2) where, while deciding the question

referred, a question of law incidentally arises and has to be decided. The law on the subject has been stated in these words:-

On a conspectus of these decision, it clearly transpires that if a question of law is specifically referred and it becomes evident that the parties

desired to have a decision on the specific question from the arbitrator about that rather than one from court, then the court will not interfere with the

award of the arbitrator on the ground that there is an error of law apparent on the face of the award even if the view of the law taken by the

arbitrator does not accord with the view of the court.....

Even if the decision of the arbitrator does not accord with the view of the court, the award cannot be set aside on the sole ground that there is an

error of law apparent on the face of it.

16. In Hindustan Tea Co. Vs. K. Sashikant Co. and Another, it was laid down that under the law, the arbitrator is made the final arbiter of the

dispute between the parties. The award is not open to challenge on the ground that the arbitrator has readied a wrong conclusion or has failed to

appreciate the facts.

17. In Coimbatore District Podu Thozillar Samgam Vs. Balasubramania Foundry and Others, (in paragraph 2046) their Lordships referred to an

earlier decision of the Supreme Court in Union of India (UOI) Vs. A.L. Rallia Ram, and summarised the law in these words:-

.. The award was the decision of a domestic tribunal chosen by the parties, and the civil courts which were entrusted with the power to facilitate

arbitration and to effectuate the awards, could not exercise appellate powers over the decision. Wrong or right the decision was binding, if it be

reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement

Two points are clearly discernible from the above statement of law. These are:-

(i) That Civil Courts are there to effectuate the award and they do not exercise appellate powers over the decision of the arbitrator; and

(ii) even if a decision given by the arbitrator is wrong, the same cannot be interfered with if the decision has been reached fairly and after giving

adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement.

18. In Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, , it was laid down:-

.... Appraisement of evidence by the arbitrator is ordinarily never a matter which the Court questions and considers. The parties have selected

their own forum and the deciding forum must be conceded the power of appraisement of the evidence.....It may be possible that on the same

evidence the Court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground in our view

for setting aside the award of an arbitrator.

Their Lordships proceeded to recall the words of Lord Goddard. C.J. in Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics

Limited.,13 (1948) 2 A.L.L. E.R. 186 and underlined the fact that the arbitrator is expected to have acted on his knowledge and experience. It

was pointed out that the modern tendency is to endeavour to uphold awards of the skilled persons that the parties themselves have selected to

decide the questions at issue between them. A word of caution was, therefore, administered that if an arbitrator has acted within the terms of his

submission and has not violated any rules of natural justice, the Courts should be slow indeed to set aside his award.

19. In Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd., it was laid down that even if it be held that it is obligatory to state the reasons, it is not

obligatory to give a detailed Judgment. Arbitration procedure, it was observed, should be quick and that quickness of the decision can always be

ensured by insisting that short intelligible indications of the grounds could be available to find out the mind of the arbitrator for his action. To the

same effect is the law laid down in Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, . In the

above case, it was further laid down that reasonableness of such an award, unless the award is prepostorous or absurd, is not a matter for the

Court to consider.

20. In Puri Construction Pvt. Ltd. Vs. Union of India (UOI), the observations made by their Lordships of the apex Court on three points deserve

to be referred to here. These are:-

(1) When a Courts is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the Court is limited, as

expressly indicated in the Arbitration Act, and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits (See

paragraph 7 of report at page 780).

(2) It is not necessary to examine the merits of the award with reference to materials produced before the arbitrator for upholding the same. This is

for the reason that the Court cannot sit in appeal over the view of the Arbitrator by re-examining and re-assessing the materials (vide paragraph 14

at page 783 of the report).

(3) It is necessary to bear in mind that the arbitrator was a highly qualified engineer, fully conversant with the nature of the work and should be

presumed to correctly evaluate the additional work done.

21. The observations made by their Lordships in Sudarsan Trading Co. Vs. Government of Kerala and Another,)on the following points deserve

to be set out:-

(1) The arbitrator is the sole judge of the quality as well as quantity of evidence and it will not be for the Court to take upon itself the task of being

a judge on the evidence before the arbitrator.

(2) Once there is no dispute as to the contract, what is the interpretation of that contract, is a matter for the arbitrator and on which court cannot

substitute its own decision. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded, is a possible view, though

perhaps not the only correct view, the award cannot be examined by the Court. It was further held that the High Court had no jurisdiction to

examine" the different items awarded clause by clause by the arbitrator and to hold that under the contract these were not sustainable in the facts

found by the arbitrator.

Further, in Food Corporation of India Vs. M/s. Veshno Rice Millers, , their Lordships observed as under: -

(1) It is difficult to give an exhaustive definition as to what may amount to a misconduct on the part of the arbitrator. It was, however, laid down

that it is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law, and whether or not

his findings of fact are supported by evidence. (Vide paragraph 7 of the report).

(2) Unless it is demonstrated to the court that such reasons are erroneous as such as propositions of law or a view which the arbitrator has taken is

a view which could not possibly be sustained on any view of the matter, the challenge to the award of an arbitrator cannot be sustained. It was

added that the arbitrator had construed the effect of particular clause of the contract. It was observed that it cannot be said that such a construction

is a construction which is not conceivable or possible. If that is the position assuming even for the sake of argument that there was some mistake in

the construction, such mistake is not amenable to be corrected in respect of the award by the court. (Vide paragraphs 9 and 10 of the report).

21. To sum up, the correct legal position is as under: -

(1) The arbitrator is the final Judge of all questions, both of law and of fact. The only exceptions to this rule are cases of corruption or fraud or

where the basis of the award is a proposition of law which is erroneous. (Champsey Bhara and Company v. Jivraj Balloo Spinning and Weaving

Company Ltd.,5 AIR 1923 P.C. 66).

(2) The arbitrator is the sole judge of quality as well as quantity of evidence. (Sudarsan Trading Co. Vs. Government of Kerala and Another, and

Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another,). It is not open to the Court to re-examine and reappraise the

evidence considered by the arbitrator to hold that the conclusion reached by the arbitrator is wrong. State of Orissa and Another Vs. Kalinga

Construction Co. (P) Ltd.,).

(3) The Court cannot sit in appeal Over the view of the arbitrator by re-examining and reappraising the materials. (Puri Construction Pvt. Ltd. Vs.

Union of India (UOI),).

(4) Where two views are possible, the Court is not justified in interfering with the award by adopting its own interpretation. (M/s. Hind Builders

Vs. Union of India,).

(5) An award is not invalid if by a process of reasoning it may be demonstrated that the arbitrator has committed some mistake in arriving at his

conclusion. (Subhas Chandra Das Mushib Vs. Ganga Prosad Das Mushib and Others, and Hindustan Tea Co. Vs. K. Sashikant Co. and

Another,).

(6) Though it is not possible to give an exhaustive definition as to what may amount to misconduct, it is not a misconduct on the part of the

arbitrator to come to an erroneous decision, whether his error is one of fact or law and whether or not his findings of fact are supported by

evidence. (Food Corporation of India Vs. M/s. Veshno Rice Millers,).

(7) Assuming that there is an error of construction of the agreement by the arbitrator, it is not amenable to correction even in a reasoned award. (

U.P. Hotels and Others Vs. U.P. State Electricity Board,).

(8) Even in cases where the arbitrator is required to give his reason, it is not obligatory to give a detailed Judgment. (Indian Oil Corporation Ltd.

Vs. Indian Carbon Ltd.,).

(9) Reasonableness of an award is not a matter for the Court to consider unless the award is preposterous or absurd (Gujarat Water Supply and

Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another,). The amount awarded being quite high does not per se vitiate the award. (

State of Orissa Vs. Dandasi Sahu, .

(10) It is necessary to bear in mind that the arbitrator was a highly qualified engineer, fully conversant with the nature of work and should be

presumed to correctly evaluate the additional work done. (Puri Construction Pvt. Ltd. v. Union of India,16 AIR 1988 S.C 777).

(11) Where additional work is done under a building contract, Section 70 of the Contract Act applies. (V.R. Subramanyam Vs. B. Thayappa and

Others, , P. Hanumanthiah & Co. v. Union of India,24 U J. (S.C.) 134 (69).

22. It is within these parameters that the matters in controversy have to be examined.

23. This brings me to a consideration of claim made under various heads by the contractor, which were either allowed or rejected by the

arbitrator.

Claim No. 1: Jungle Clearance.

24. Under this head, the contractor claimed a sum of Rs. 11,20,700/-, besids interest. This was on two counts:-

(a) It was claimed that hydraulic excavator, which has been referred to in the record and the award of the arbitrator by its trade name "poclain"

was used. It was further claimed that poclain had been used for 280 hours and the hiring charges were Rs. 800/- per hour. The contractor,

therefore, claimed Rs. 2,24,000/- under this sub-head.

(b) The other sub-head was on account of earth work filling due to depressions created as a result of clearing of the stumps, roots and other wild

growth. The average depression caused in the area was to the extent of 1 metre. The amount claimed under this sub-head was Rs. 9,86,700/-.

During the proceedings before the arbitrator, the contractor submitted detailed calculations P-4 in which total amount of Rs. 9,70,293/- besides

interest from October 1986 was claimed under sub-head (b).

25. The stand of the department in reply was that the contractor was never asked to use poclain. The claim put forward by the contractor for the

use of poclain on hourly basis was beyond the provisions of the agreement. If at all, jungle clearance was payable as an extra item under Clause 39

of the General Conditions of the Contract. It was so treated and already paid. It was denied that there was a depression of 1 metre caused on

account of removal of roots, stumps etc. The amount claimed was assailed as without basis and imaginary.

26. In order to appreciate the facts and various documents placed before the arbitrator, he inspected the spot on May 5, 1990, in the presence of

representatives of both the parties. He found that there was thick growth of Jungle, especially on the right side of the SYL, which was a common

bank with Bhakra Mainline. The arbitrator held as under:-

(i) For jungle clearance, deployment of poclain was necessary.

(ii) In the process of clearing the jungle, depression of 1 metre depth must have been caused.

(iii) The quantity allowed was 29,750 cum as against the quantity claimed by the contractor to the tune of 35,000 cum. This was after deducting

5250 cum on account of stripping. The rate allowed by the arbitrator was Rs. 25,62 per cum.

(iv) The use of poclain having been held to be necessary, the arbitrator allowed rate of Rs. 750/- per hour as against the claimed rate of Rs. 800/-

per hour. With regard to the duration for which the poclain was held to have been used as against the claim of 280 hours, the arbitrator held that

the poclain must have been used for 250 hours. He thus concluded that the contractor was entitled to the payment of Rs. 1,87,500/-under this

head.

(v) He allowed interest at the rate of 15 per cent per annum for a period of 2-1/2 years. In this connection, it was pointed out by the arbitrator that

it was agreed by both the parties before him that the site was handed over to the contractor in September 1986 and the work actually commenced

towards the end of September and the excavation work was completed in October 1986. The payment on this account, therefore, fell due in

November/December 1986. With regard to the rate of interest, it was observed that the Government was charging interest at the same rate on

advance for mobilisation, plant etc.

27. Mr. Saron contended that jungle clearance could not be treated an extra item and, in fact, the contractor had been duly paid for this work. I

am unable to accept this contention. A perusal of items (1) to (5) relating to earth work excavation in Schedule-I shows that jungle clearance is not

included in any of those items. On the contrary, the official publication tided Punjab P.W.D. Specifications No. 6.2 - Earth Work Excavation,

Embankments and Cuttings, it is clearly stated that the rate shall not include jungle clearance and cutting down the trees which shall be measured

and paid for separately.

28. It was not disputed before me that jungle clearance was not covered under any of the items of Schedule-I to the agreement and it was,

therefore, required to be paid for as an extra item.

29. In the Common Schedule of Rates, Item No. 26, 36 relates to jungle clearance. Under the said entry, there are three notes given. The purport

of these notes is that the rates mentioned in entry 2636 was for estimating purposes only and that the work will be got done departmentally. Note-

2 makes it clear that the Executive Engineer will decide the rate according to the density of the jungle to be cleared. Nothing was brought to my

notice to show that in pursuance of Schedule-II, the Chief Engineer/S.E. had fixed the rate for the said extra item in accordance with the provisions

of Schedule-II, the same would not operate as final and conclusive. It will be seen that Clause 62 of the General Conditions of Contract provides a

mechanism under which the contractor can file an appeal to the Superintending Engineer and the matter becomes final and conclusive only if the

contractor is not dissatisfied with the order passed by the Superintending Engineer. The ultimate remedy of the contractor is by raising a dispute

and having the same referred in terms of the arbitration clause, namely, Clause 63 of the General Conditions of Contract, and this is what the

contractor has done in the present case.

30. It was next contended by Mr. Saron that the contractor was not entitled to any payment on this account, because of the non-compliance of the

provisions of Clause 39. The latter part of Clause 39 lays down that the contractor shall submit a return by the 10th day of each month with regard

to any additional work. This contention is untenable for the simple reason that the department without insisting on the submission of the return itself

paid a certain amount on account of this item. In other words, the department waived the submission of the monthly return. Moreover, it is settled

law that if a certain work has been done, the person doing the work is entitled to reasonable compensation unless it was intended that the work

was being done gratis. Section 70 of the Contract Act clearly applies and, therefore, the claim of the contractor cannot be negatived simply on the

ground that he failed to file the requisite returns.

31. It would be appropriate to refer to a recent decision of the Supreme Court in Central Inland Water Transport Corporation Limited and

Another Vs. Brojo Nath Ganguly and Another, . After referring to the recent developments in this branch of the law of contract and the

developments in some of other countries of the world, it was stated in paragraph 19 at page 1610 that the principle is that the courts will not

enforce and will, when called upon to do so, strike down an unfair and unreasonable contract or an unfair and unreasonable clause in a contract

entered into between the parties who are not equal in bargaining power. It was further observed that it will also apply where a man has no choice

or rather no meaningful choice but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of

rules as part of the contract however unfair unreasonable and unconscionable a clause in that contract or form or rules may be if just the

requirement of submission of monthly returns is strictly applied, as suggested, so as to deprive any claim being put forward, where admittedly work

had been done and actually the department itself had paid for the same or tried to pay for the same, there is no manner of doubt that the clause

would be tendered totally unreasonable and unfair. It is not possible to uphold such a clause in the sense already explained. The only intention

behind making the provision for submission of monthly return is that while the work is in progress, the nature and quantity of work comes on

record, so that the matter can be dealt with satisfactorily. The arbitrator in the present case has given his finding on the basis of material placed

before him by both the parties and there is no reason to interfere with that finding. No case is, therefore, made out for interference under this claim.

32. Mr. Saron placed reliance on M/s. Prabartak Commercial Corporation Ltd. Vs. The Chief Administrator Dandakaranya Project and another,

. In the above referred case, the appellant entered into a contract with the respondent for the supply of hard granite chips for the construction of

H.M/43 at four reaches. Hard granite chips were not available and it was agreed between the parties that the appellant would instead supply hard

stone chips. Later on the contractor claimed to be paid at the rate prescribed under the contract for hard granite chips. The matter was referred to

the arbitrator and an award given by him. Clause 13-A of the agreement in that case provided that in the even of a dispute, the decision of the

Superintending Engineer of the Circle shall be final. Clause 14 of the agreement contained the arbitration clause and the said arbitration clause

specifically excluded any dispute arising under Clause 13-A. It was, therefore, contended that since the dispute related to the rate, which was

squarely covered within the ambit of Clause 13-A, it was not referable to the arbitrator and accordingly the arbitrator has misconducted himself in

giving the award. This contention was accepted by the High Court and their Lordships of the Supreme Court agreed with the reasoning and

conclusion reached by the High Court. After careful consideration, I find that the terms and conditions in the present agreement are vitally different

from the ones in the aforesaid case. The opening part of the arbitration clause in the present case may be set out in extenso. It reads as follows:-

All the disputes or differences in respect of which the decision has not been final and conclusive shall be referred for arbitration to a sole,

arbitrator appointed as follows.

The words used are ""final and conclusive."" Further to appreciate the significance of these words, it is necessary to read Clause 62. The concluding

part of Clause 62 is in these words:-

If the Contractor is dissatisfied with this decision, the Contractor within a period of thirty days from receipt of the decision shall indicate his

intention to refer the dispute to arbitration failing which, the said decision shall be final and conclusive.

33. A conjoint reading of the said two provisions in Clauses 62 and 63 leads to the irresistible conclusion that in order that the decision becomes

final and conclusive, it has to be accepted by the claimant. In other words, if he is not satisfied with the rate determined, it is open to him to refer

the matter within the prescribed time limit under Clause 63 for decision by the arbitrator. It may be added that the idea of making terms of

Schedule-II is to provide a mechanism for working out the rates of extra items, which have not been contemplated and provided for in the

Schedule. It cannot always be said the rates worked out in terms of Schedule-II will never be acceptable to the contractor. Clause 62 lays down

the procedure where the contractor is not satisfied with the decision. He is entitled to take recourse to the provisions of Clause 62 and if he is still

not satisfied, the mater is referable to arbitration in terms of Clause 63. It will, therefore, be seen that the provisions of the agreement in the instant

case are materially different from the provisions in the aforesaid decision of the Supreme Court and, therefore, the said authority is of no assistance

to the appellant.

Claim No. 2:

34. The contractor carried out earth work of fill placement and the quantity of work was duly measured and paid for. Later on, from the aforesaid

quantity a deduction on account of 10310 cum was made apparently on the ground that was the quantity of earth which was supposed to have

become available on account of the stripping operation which had been carried out by the contractor and in terms of item No. 1 of the schedule, a

certain portion of that earth was required to be used for fill placement. The aforesaid quantity of earth work was, therefore, deducted at a later

stage. The claim of the contractor is that the deduction was not at all justified and he was entitled to the payment as made by the department in the

first instance. The arbitrator accepted the claim of the contractor and held that there was no justification for deducting the aforesaid quantity from

the fill placement and allowed the said quantity to be added back paid for at the rate of Rs. 26.62 per cum. In addition, the arbitrator also allowed

interest at the rate of 15 per cent per annum for a period of 2-1/2 years on the aforesaid amount. Thus, the total amount paid under this head was

Rs. 3,63,195/- including Rs. 99,053/- on account of interest. In support of his conclusion, the arbitrator referred to a decision of the Chief

Engineer, SYL Canal, taken in a meeting held on December 17, 1987, with regard to the disposal of the earth work, which became available as a

result of stripping, making it clear that the same was not to be used for formation of banks in the circumstances prevailing at the site. It was

contended by Mr. Saron that accor1ding to item-1 of Schedule-I to the contract, 1/3rd quantity of earth work becoming available as a result of

stripping was to be used in the service road and the balance 2/3rd in the random zone. The contention, therefore, is that the contractor was

required to use the said earth in the formation of the random zone and the department was, therefore, justified in making deduction of the said

quantity while taking measurements of the earth work in the random zone. No doubt, item-1 of the schedule does provide the manner of disposal

or use of the earth becoming available on account of stripping, in the facts and circumstances of this case, that earth was obviously not considered

fit and the stand of the contractor was totally vindicated by a later decision rendered by the Chief Engineer. The provision in item-1 in the schedule

is based on the supposition that the earth becoming available on a account of stripping would be useable in the formation of the banks but if the

earth is not considered fit for that use, it stands to reason that the same was not permitted to be used and could not be counted as earth becoming

available on account of stripping. The decision of the Chief Engineer was taken in December 1987, but the fact remains that it was acknowledged

that the earth becoming available on account of stripping of earth was not considered fit for the formation of the banks and it was, therefore, not

required to be used for that purpose. The only other contention under this head was with regard to interest allowed by the arbitrator. This shall be

discussed towards the end of this Judgment in the context of the interest allowed under the preceding item of claim:

35. Claim No. 3 was rejected by the arbitrator and the same does not arise for consideration.

Claim No. 4:

36. Under this claim, the contractor claimed that for lip cutting he had done extra filling of one metre for which the quantity of earth work involved

was to the tune of 11,310 cum. He claimed to be paid at the rate of Rs. 25.62 per cum and thus claimed a sum of Rs. 2,89,762/- under this head.

The department had made the payment on this account in the first instance, but later on deducted the aforesaid quantity of 11,310 cum from the

overall fill measurements. It was apparently done on the ground that the tendered rate in item No. 6 relating to lining of the canal was inclusive of lip

cutting. The arbitrator held that the contractor was entitled to the quantity of earth work becoming available on account of lip cutting, which had

been initially allowed by the department i.e. 11,310 cum. From out of the said-quantity, he deducted the earth work which was used in the

construction of dowel. This was admittedly 2555 cum and thus he allowed payment on account of 8755 cum at the rate of Rs. 25.62 and came to

the figure of Rs. 2,24,303/-.

37. Further claim of the contractor was that he was made to keep an actual provision for lip cutting to the extent of 1000 mm. It was conceded on

behalf of the department before the arbitrator that they had got done earth work for lip cutting to the extent of 450 mm. The figure quoted by the

department was accepted by the arbitrator, especially because it was consistent with the specification in Clause 7.62 of the specifications for earth

work, which laid down that a plus margin of 450 mm will be given on the inter phase of the embankment. The arbitrator then referred to note 5 at

the foot of Schedule-I to the agreement, which laid down that in filling reaches 275mm on side slopes and 150mm in bed shall be laid extra for lip

side cutting. He further held that the aforesaid quantities were included in the tendered rate under item No. 6 of Schedule-I to the agreement. He,

therefore, deducted the said quantity of 275 mm from out of the quantity of 450 mm to arrive at the figure of 175 mm and pointed out that this

quantity was conceded to be correct vide D-1 by the department. The arbitrator further pointed out that the respondent-department had admitted

a claim of 2582 cum quantity and had made payment at the rate of Rs. 7.50 per cum. It was further added that the contractor had claimed rate of

Rs. 16/- per cum for lip cutting and disposal thereof. The arbitrator found the rate of Rs. 16/- per cum to be reasonable and, therefore, allowed

additional payment on the said quantity of 2583 cum at the rate of Rs. 16/- per cum. After adjusting the amount already paid he held a balance of

Rs. 21,955/- as payable to the contractor. Adding the two amounts awarded under this head i.e. Rs. 2,24,303/- and Rs. 21,953/- the total came

to Rs. 2,46,258/-.

38. The contractor had claimed interest under this head from March 1986 onwards on the ground that the lining work was completed in March

1986. The rate of interest allowed by the arbitrator was 15 per cent per annum and the period for which the interest was allowed was one year.

The amount worked out on this count came to Rs. 36,938/-. The total amount awarded thus came to Rs. 2,83,196/-.

39. The department made the deduction on the basis of the provisions of item-6 of Schedule-I on the one hand and para 4 of the specifications,

which was also a part of the agreement, on the other hand. The portion of item-6 of Schedule-I relied upon by the department is that lip cutting,

dressing of bed and side slopes and preparation of sub-grade for lining, complete in all respects, as per specifications, is part of the rate quoted

against item-6. He had specification for cement concrete lining. The provision relied upon by the department is contained in the later portion of

paragraph 4 under the main heading "Preparation of sub-grade and sub-heading 4.2 (general). Sub para 3 reads as under:-

The earth work reclaimed as a result of lip cutting of the sides and levelling of the bed, shall be used for the construction of dowel, completion of

the unfinished banks and outer slopes. In cutting reaches the earth so reclaimed shall be used either for widening or raising the spoils, as may be

directed by the officer designated as Inspector.

40. The arbitrator has given the following reasoning for the decision rendered by him.

(i) Item No. 6 of Schedule-I does not lay down that quantity of lip cutting would be deducted. As such, for construction of embankment full

section with lip cutting allowance has to be provided and paid for.

(2) Specification only narrates the mode of disposal.

(3) Lining is undertaken last of all in canal construction. Lip cutting is done immediately preceding cement concrete lining. Embankments are made

much earlier so that they are available for the movement of vehicles. The earth becoming available on account of lip cutting cannot go into forming

embankment. The same can, at the most, be used for making dowel.

The provision of para 4 of the specification for lining, quoted above, does support the line of reasoning adopted by the arbitrator. The said

paragraph unmistakeably shows that the earth work reclaimed as a result of lip cutting is required to be used for construction of dowel and

completion of unfinished banks and outer slopes. This clearly shows that such earth is not contemplated to be used for the construction of

embankments properly so-called. It has to be remembered that dowel is something which is made by putting earth on the embankments which is

already complete. For the reasons given by him and in view of the relevant provisions, which have been noticed, it cannot be said that the view

taken by the arbitrator is not a reasonable or possible one. On the basis of the material and for the reasons already stated above, I find the view

taken by the arbitrator to be quite reasonable and acceptable.

41. Mr. Saron assailed the rate of Rs. 16/- per cum awarded by the arbitrator as being totally arbitrary and without any intelligible basis. Mr.

Mittal, however, justified it firstly by submitting that the arbitrator was not required to give a arithmetic computation. He relied on the observations

occurring in Narain Dass R. Asrani v. Union of India,27 (1993) 103 PLR (Delhi Section) 50, and several other authorities, referred to therein. It is

settled law that when the requirement is that the arbitrator shall record reasons, he cannot be expected to write a detailed Judgment as the Courts

are expected to do. Nor is he required to give any arithmetic computation. Mr. Mittal also submitted that the arbitrator being himself a

Superintending Engineer dealing with these matters in the course of his duties, heard the detailed justification in support of the claim put forward by

the contractor. He is acquainted with the nature of the work involved. As against the rate of Rs. 7.50 per cum given by the department, the

arbitrator accepted the rate of Rs. 16/- per cum urged by the contractor. It was further submitted by Mr. Mittal that at the most the award on this

point may be somewhat erroneous, but the view taken by the arbitrator is a possible one and where the view taken by the arbitrator is found to be

a possible view, the court is not expected to interfere therewith.

42. The question with regard to payment of interest under this head will be discussed towards the end of this Judgment.

43. No case for interference under this head has been made out.

44. Claims 5 and 6 were rejected and they do not survive consideration.

Claim No. 7:

45. Claim No. 7 was considered under two sub-heads. Sub-Head (a) related to the claim of the contractor to waive off interest charged on

mobilisation advance for the period for which the department failed to acquire the land on which work was to be executed. This was rejected by

the arbitrator on the ground that admittedly the money remained with the claimant during that period. Under sub-head(b) the contractor claimed a

refund of Rs. 18,797/- which had been deducted by the department as compound interest on advances for mobilisation and plant, machinery etc.

under Clause 8 of the General Conditions of Contract. The case of the contractor was that under the said clause all he was entitled to pay was

simple interest at the rate of 15 per cent per annum. Over and above that interest, the department had deducted compound interest aggregating to

the amount already mentioned.

46. Before the arbitrator, the factual position was not disputed. But what was stated was that this had been done under instructions of the Chief

Engineer, Construction, SYL Canal. The arbitrator held that Clause 8 of the General Conditions of Contract only meant that simple interest was

chargeable and, therefore, deduction of compound interest on the amount was not justified and he accordingly held that the contractor was entitled

to the refund of the said amount of Rs. 18,797/-. The last sentence in Clause 8 relating to advances for mobilisation and plant, machinery under

heading of General Conditions of Contract, which relates to interest reads:-

The above advance shall bear interest at the rate of 15 percent (fifteen percent) per annum.

at the time of hearing, it was not disputed by Mr. Saron that according to this provision, only simple interest could be charged.

47. Admittedly, the advances were made in driblets from time to time and so were the deductions for repayment made and, therefore, it is directed

that the department shall calculate simple interest on the amount of advances at the rate of 15 per cent per annum and if anything over and above

the simple interest has been charged or deducted, the same shall be refunded to the contractor.

Claim No. 8.

48. Under claim No. 8, the contractor claimed a sum of Rs. 16,20,000/-on account of escalation of cost of material, labour and losses due to

delay on account of non-acquisition of land by the department. According to the contractor, the acquisition of land and handing over site for the

work to be carried out was delayed by a period of 11 months from the letter of allotment dated October 4, 1985, and 8 months from the date of

signing of the agreement dated January 25, 1986. It was not disputed on behalf of the department that there was delay on account of late

acquisition of the land. This was because of agitation of Bharat Kisan Union against acquisition. On behalf of the department a letter was placed on

record dated August 24, 1986, P-1/4, according to which the site had been handed over to the contractor and he was asked to commence the

work. The contractor also relied on the circumstance that there was a tight schedule for completion of the SYL Canal and the contractor had,

therefore, moblised all his resources in order to complete the work in time. Reliance was also placed by the contractor on a decision taken by a

high powered committee presided over by the Chief Secretary of the State dated June 9, 1987. The meeting was, amongst others, attended by the

Chief Engineer, SYL Construction and the Chief Engineer, SYL Design, besides other officers. Minutes of the meeting are P-4/2. The minutes

show that the Chief Engineer, SYL Construction explained that the rate of raw material like shingle had increased from Rs. 30/- per cum to Rs.

70.63 per cum. He further explained that escalation formula given in the contract did not adequately compensate the contractor for the

unprecedented rise in the cost of materials. According to the Chief Engineer, the overall increase in cement concrete lining was to the tune of 18.05

per cent and for drainage behind lining it was to the tune of 10.5 per cent, during the period from March 1985 to December 1986.

49. The aforesaid claim of the contractor was resisted mainly on the ground that the contractor was not entitled to be paid over and above the

escalation, if any, which is to be worked out in terms of the express provisions made in Clause 40 under the title ''Prince adjustment''. The

arbitrator accepted the plea of the contractor and allowed escalation cost for course aggregate for lining at the rate of Rs. 25/- per cum, for sand at

the rate of Rs. 10/- and for filter material at the rate of Rs. 15/- per cum. He thus allowed a total claim aggregating Rs. 3,35,565/-.

50. Under sub-head (b), further claim of the contractor for longer lead of carriage due to change in the quarry was held not proved and was

disallowed.

51. Under sub-head (c) claim with regard to loss of interest on FDRs of the bank guarantees and security deposits, the same was also rejected by

the arbitrator.

52. Under this head, as against claim of Rs. 16,20,000/- the arbitrator allowed Rs. 3,35,565/-.

53. Mr. Saron has put forward a two-fold contention. He has relied on Associated Engineering Co. Vs. Government of Andhra Pradesh and

another, for the proposition that where the agreement between the parties proves for a formula to work out escalation it is not permissible for the

arbitrator to travel beyond or outside that formula or to deviate therefrom. Doing so would amount to misconduct. His second submission is that

the contractor cannot take advantage of the meeting decision which was admittedly held long after the relevant period in question.

54. I have considered both these contentions. I am unable to accept them. The authority relied on by Mr. Saron is distinguishable on the simple

ground that in that case the Government had not taken any such decision as was taken in the present case. In law relating to arbitration, the

agreement between the parties plays a pivotal role. Where a matter is agreed to between the parties, the terms of contract can be revised or

modified as per the agreement. The State Government cannot be permitted to approbate and reprobate at the same time. With regard to the

decision having been taken much later than the time to which the work relates, it is sufficient to point out that the escalation noted was for the

relevant period. For these reasons, there is no case for interference made out on this count.

55. The arbitrator did not chose to make an award under claim No. 9 which, therefore, does not arise for consideration.

56. On behalf of the State, a counter claim of Rs. 2,87,757/- in respect of alleged excess payment on account of extra for compaction allowance

of 11329 cum in respect of items 4 and 5-A of Schedule-I was made before the arbitrator. The arbitrator held that the counter claim was not

sustainable and accordingly rejected the same. The contention of Mr. Saron, learned counsel for the State, is that once the disputes are referred to

the arbitrator at the instance of one party, the other party has a right to prefer counter claim and it is the duty of the arbitrator to consider the same.

The arbitrator having failed to do so in this case was guilty of misconduct and the award was, therefore, liable to be set aside. He placed reliance

on C.L. Misra Vs. Nehru Bhawan Trust, . In this decision relying on an earlier decision of the same Court in Laminated Packings v. Union of

India,30 1983 Rajdhani Law Reporter (Note) 8, it was held that once the disputes are referred to the arbitrator under a petition filed by one of the

parties u/s 20 of the Arbitration Act, the opposite party has a right to file the counter claim before the arbitrator. It was, therefore, held that the

counter claim could be entertained by the arbitrator.

57. I am unable to accept this contention. The order of reference made in this case, in so far as material, reads:-

Mr. K.C. Verma, Chief Engineer (Civil) PSEB is hereby appointed to act as sole arbitrator under Clause 63 of the contract agreement to

adjudicate in respect of disputes rejected by the Superintending Engineer, Construction, Circle No. III/SYL Canal Project, Punjab, Chandigarh

vide his letter No. 1644-45/4-A (37.000-48.400) dated 23.2.89 for the work of construction of RD 47000-48400 KM of SYL Canal being

executed by Messers Amar Nath Aggarwal Construction (Private) Limited, Panchkula.

The order of reference thus make it clear that only disputes which had been rejected by the Superintending Engineer vide his letter referred to in

the order of reference had been referred for adjudication to the arbitrator. Admittedly, the counter claim had not been made before the

Superintending Engineer, nor it was rejected by him, nor was the same referred for adjudication by the Chief Engineer. In Orissa Mining

Corporation Ltd. Vs. Prannath Vishwanath Rawlley, it was held that where order of reference is made u/s 20(4) of the Arbitration Act, then the

claim as a result of the order of reference is limited to a particular relief and the arbitrator cannot enlarge the scope of the reference and entertain

fresh claims without a further order of reference from the Court. The theoretical basis for this conclusion, it was pointed out, was that the arbitrator

cannot enlarge the scope of reference. If he entertains a fresh claim put before him, he exceeds his jurisdiction and is guilty of misconduct. The

same view was taken by a learned Single Judge of Delhi High Court in a recent decision in Food Corporation of India v. T. R. Bahl and

Company,32 1992(2) Arbitration Law Reporter 456, in which reliance was placed on Orissa Mining Corporation''s case (supra). For these

reasons, no case for interference is made out.

58. The arbitrator allowed interest at the rate of 15 per cent per annum on the amounts found to be payable under items No. 1 and 2 for a period

of 2-1/2 years. Interest was similarly awarded at the same rate for a period of one year on the amount found to be due under item No. 4. In

addition to the above, the arbitrator further awarded interest at the rate of 15 per cent per annum from the date of the award till the date of decree

i.e. June 9, 1990 to April 26, 1991. While passing the decree in terms of the award, the Court upheld interest awarded by the arbitrator and

further directed future interest at the rate of 12 per cent per annum on the awarded amount of Rs. 22,84,718/- till date of payment. The question of

arbitrator''s powers to award interest would be dealt with at the end of this Judgment.

FAC No. 1087 of 1992.

59. The same company M/s Amar Nath Aggarwal Construction (P) Limited entered into argument No. 7 of 1986 dated January 25, 1986, for

construction of another reach from RD 48.400 to RD 50.000 KM of SYL Canal. This reach was down -stream adjoining the reach RD -47.000-

48.400 KM, which was concerned in the above discussed FAO No. 1122 of 1991. The contractor raised several claims which are rejected by

the superintending Engineer by order dated February 25, 1989, in terms of Clause 62 of the General Conditions of the contract. Accordingly, the

contractor feeling dissatisfied with the order of the Superintending Engineer requested the Chief Engineer to refer the matter to the arbitrator in

terms of Clause 63. Accordingly, the Chief Engineer by order dated September 29, 1989, appointed Mr. Lakshbir Gupta, Superintending

Engineer (Civil), PSEB, as the sole arbitrator and referred the claims, which were earlier rejected by the Superintending Engineer, SYL, by order

referred to earlier. The contractor filed their claims before the arbitrator. The written statement was filed on behalf of the department, to which

replication and further rejoinder were filed. Both the parties produced documents in support of their pleas. They were given full hearing by the

arbitrator, who gave an award dated March 16, 1991, for a sum of Rs. 30,26,523.25 besides interest at the rate of 15 per cent per annum from

March 16, 1991, till the date of decree and at the rate of 12 per cent per annum from March 29, 1992 till date of payment. The contractor made

an application before the Subordinate Judge Ist Class, Ropar, for making the award rule of the Court. On behalf of the State, objections under

Sections 30 and 33 of the Arbitration Act were filed. The Subordinate Judge Ist Class, Ropar, by order dated March 28, 1991, dismissed the

objections filed by the State and made the aforesaid award rule of the Court. The present appeal is directed against the said order and decree.

60. As stated above, these two appeals arise out of construction of two adjoining reaches of SYL Canal. The nature of claims arising in respect of

both these cases and the manner in which these have been dealt with, even though by two different arbitrators, is strikingly similar.

61. The law with regard to the scope of interference in the decree based on award of the arbitrator has been adverted to while dealing with FAO

No. 1122 of 1991 in the earlier part of this Judgment and requires no repetition.

Claim No. 1.

62. This relates to jungle clearance and refilling. The contractor claimed a sum of Rs. 12,81,526/- besides interest on that amount at the rate of 18

per cent per annum from October 1986 onwards. The arbitrator awarded a sum of Rs. 11,13,046/- besides interest at the rate of 15 per cent per

annum from January 1, 1987, to September 20, 1989, amounting to Rs. 4,54,493/-, thus making a total of Rs. 15,67,539/-. The case of the

contractor was that it had deployed hydraulic excavator referred to by the arbitrator, by its trade name "Poclain" to clear stumps, roots and other

wild growth which existed at the site of work. Further it was stated that the Poclain had been used for 320 hours and the hiring charges of the same

were Rs. 800/- per hour. On behalf of the department, it was not disputed that the land in question had thick growth of jungle. It was, however,

stated that the trees standing in the area were got cut from the Forest Department. It is further not disputed that the area involved is 4.17 hectares

= 41700 square meters. Having regard to the nature and volume of work involved the arbitrator held that the contractor was entitled to payment

for using poclain for 300 hours against the claim of 320 hours and allowed rate of Rs. 700/- per hour as against the claimed rate of Rs. 800/-per

hour. After adjusting the amount already paid under this head, the arbitrator awarded a further amount of Rs. 1,94,446/- under this claim.

63. The arbitrator stated that the area involved was 4.17 hectares. The girth of the trees varied from 2 feet to 4 feet. He further observed that

depressions varying 3 feet to 12 feet must have been caused on account of the clearing of the land of stumps, roots etc. and as a result the area

taken as a whole required a minimum filling of 3 feet. He further pointed out that the department had taken a figure of 40000 square metres for

purposes of stipping. Instead of taking the area to be 41,700 square metres, the arbitrator took the said figure of 40,000 square metres, admitted

by the department for purposes of stipping, for calculating the filling which was required in this case. The volume of earth work was worked out by

multiplying the said area of 40,000 square metres by 90 cm, which gave the total volume to be 36,000 cum. Out of this volume he deducted 6000

cum, which had been accounted for and paid for under stripping and thus the balance left was 36000-6000 = 30000 cum. He further held that the

contractor was entitled to a rate of Rs. 30.62 per cum, which was allowed in similar item of work and awarded a sum of Rs. 9,18,600/- under this

sub-head. Thus, a total amount of Rs. 11,13,046/- was awarded under sub-heads (a) and (b) if this claim.

64. The contractor had claimed interest at the rate of 18 per cent per annum from October 1986 onwards. The arbitrator held that the contractor

was entitled to 15 per cent simple interest per annum with effect from January 1, 1987, till date of reference, which was taken to be September 20,

1989. The rate of interest, namely, 15 per cent, was fixed on the basis of the clause in the agreement, whereby the department was charging the

same rate of interest on advances for mobilisation etc. The amount thus worked out on account of interest came to Rs. 4,54,493/- and thus the

total amount including interest worked out to Rs. 15,67,539/-

65. The contentions raised in support of and against the award under this head are substantially the same as in the case of claim No. 1 in FAO No.

1122 of 1991 dealt with in the earlier part of this Judgment and, therefore, the same ground need not be covered again.

66. The question of interest is proposed to be dealt with towards the end of this Judgment.

67. For the foregoing reasons, no case for interference is made out under this claim.

Claim No. 2.

68. The next claim relates to stripping. The department deducted payment on account of a certain quantity of earth work from the random zone,

which had been paid for at an earlier stage. According to the contractor, the quantity deducted was 15,662 cum, while according to the

department it was 12,300 cum. The arbitrator decided to accept the quantity alleged by the department, namely, 12300 cum. He applied the rate

of Rs. 30.62 per cum, which is the quoted rate, and allowed a sum of Rs. 3,76,626/-. On the said amount, he allowed interest at the rate of 15 per

cent per annum from January 1, 1987, to the date of reference, namely, September 20, 1989. The amount of interest worked out to Rs.

1,53,776/-, thus making a total of Rs. 5,30,402/-.

69. In support of his conclusion, the arbitrator referred to decision taken in a meeting by the Chief Engineer dated December 17,1987, in which it

was decided not to deducted these quantities from the earth work to be paid for filling random zone.

70. The contentions raised for and against by learned counsel for the parties in respect of this claim are substantially similar to the ones addressed

while dealing with identical item stripping as claim No. 2 in FAO No. 1122 of 1991 dealt with in the earlier part of this Judgment and need not be

repeated. For these reasons, no case for interference has been made out.

71. Claim No. 3 was rejected by the arbitrator and the same does not arise for consideration.

Claims No. 4 and 5.

72. Claims No. 4 and 5 were dealt with together by the arbitrator. It will be seen that they are exactly identical with claim No. 4 which has been

dealt with in necessary detail while dealing with FAO No. 1122 of 1991 in the earlier part of this Judgment. In order to appreciate how various

amounts have been worked out by the arbitrator, it will, therefore, be sufficient to go through the discussion under claim No. 4 of the aforesaid

FAO No. 1122 of 1991.

73. There is, however, difference in the figures under these claims. In this case, the contractor claimed a sum of Rs. 6,94,265/- and the arbitrator

awarded a sum of Rs. 4,21,640/-. Though the contractor had claimed interest at the rate of 18 per cent per annum on the said amount with effect

from March 1988, the same was disallowed by the arbitrator.

74. The details of the amount awarded by the arbitrator have been worked out by him as followed:-

(i). It was held by the arbitrator that the quantity of lip cutting cannot be deducted from random zone fill. The quantity deducted by the department

was 12025 cum and allowing the rate of Rs. 30.62 as per the quoted rate the amount worked out to Rs. 3,95,763/-.

(ii). In this case, the extra lip cutting, which the contractor was made to do was 450mm. Out of this 275mm as per item of the schedule was

deducted, leaving the extra lip cutting done by the contractor to be 175mm. The quantity of extra lip cutting thus worked out to 4705 cum. The

department had allowed the rate Rs. 7.50 per cum. The contractor had claimed rate of Rs. 16/- per cum. After considering the material oh record,

the arbitrator allowed the rate of 13/- per cum and thus worked out the amount under this head to be: 4705 x 30 = 61,165/-. The contractor had

already been paid Rs. 35,288/- leaving a balance of Rs. 25,877/-. This amount was added to the amount granted under (i) above and the grand

total under (i) and (ii) thus became Rs. 4,21,640/-.

75. Claim in respect of disposal of earth work on account of lip cutting was disallowed by the arbitrator. For the reasons already discussed in

detail while dealing with claim No. 4 in FAO No. 1122 of 1991 above, no case for interference is made out.

76. Claims No. 6 and 7 were disallowed by the arbitrator and do not survive consideration.

Claim No. 8.

77. The contractor claimed Rs. 21.83 lacs, besides interest, under this head. For the reasons to be shortly mentioned below, the arbitrator allowed

Rs. 5,06,942.25 paise. Claim for interest under this head was, however, rejected. It will be seen that the claim under this head is strikingly identical

with claim No. 8 dealt with under FAO No. 1122 of 1991 above. The common features are that there was delay in handing over the site for the

execution of the work in both the cases and this fact was not disputed. It was further not disputed in both the cases that there was a high powered

Committee presided over by the Chief Secretary of the State, which in its meeting dated June 9, 1987, further acknowledged the fact that prices of

aggregates had gone up from Rs. 30/- to Rs. 70.62 per cum, meaning thereby an increase of more than 130 per cent, and that the escalation

formula provided in the agreement did not cover that much rise in the prices. The unprecedented increase in the price of raw material resulted in the

increase of cost of lining by 18.05 per cent and that of drainage behind lining at 10.54 per cent. It was further acknowledged that the escalation

payable to the contractor as per contract-agreement gave only 1.5 per cent relief, which was totally unrealistic. In view of the above facts and

development, the arbitrator allowed escalation at the rate of 7 per cent for work of filter drainage behind lining and at the rate of 12 per cent for

work of cement concrete lining. All these amounts worked out to an aggregate sum of Rs. 5,06,942.25 Paise.

78. Further claim on account of extra lead involved in the carriage of the material and loss on account of interest of FDS and bank guarantees

were, however, rejected by the arbitrator.

79. There is nor reason to repeat the discussion which was held while dealing with claim No. 8 in FAO No. 1122 of 1991 and no case for

interference is made out.

COUNTER CLAIM:

80. In the written statement filed to the claim preferred by the contractor before the arbitrator, the department put forward a counter claim in the

sum of Rs. 4,56,318/-. The case pleaded was that then though 10 per cent compaction allowance was included in the tendered rate under item

No. 4-B of Schedule-I, even then inadvertently earth work quantity measuring 15060 cum had been taken into consideration and payment made

on account of compaction allowance at the rate of Rs. 30.62 per cum, the counter claim was resisted by the contractor. The arbitrator held that the

counter claim was not tenable on the ground that the Engineer Incharge had recommended the payment to the competent authority vide his letter

dated March 18, 1988, and competent authority had approved the payment by letter dated March 24, 1988, and the competent authority had

approved the payment by letter dated March 24, 1988. In the letter dated March 24, 1988, the superintending Engineer had, while accepting the

recommendation of the Executive Engineer, states as follows:-

Ten per cent additional quantity (on account of compaction) had already been provided in item No. 4 of the NIT. This has taken care of the

placed earth according to the specifications i.e. the measurements from the banks multiplied by the ratio of the average dry bulk density of the

compacted fill to the average dry bulk density of the soil in the natural conditions. This ratio in item No. 4 had been taken as 10 per cent.

Therefore, the recommendation sent by you is hereby approved.

In other words, the arbitrator accepted the above technical explanation which had prevailed with the Superintending Engineer in accepting the

recommendation of the Engineer Incharge in allowing compaction allowance to the contractor.

81. Mr. Mittal invited my attention to the order dated September 20, 1989, by which the chief Engineer, constructions SYL Canal Project, had

referred the disputes to the arbitrator. The material part of the said order reads as under :-

Shri Lakshbir Gupta, Director, Hydel Design, PSEB, is hereby appointed to act as sole arbitrator under Clause 63 of the contract agreement to

adjudicate in respect of disputes rejected by the Superintending Engineer, Construction Circle No. III SYL Canal Project, Punjab, Chandigarh,

vide his letter No. 1646-47/6-A (48.400-50.000) dated 25.2.1989) for the work of construction of RD 48.400 to 50.000 of SYL Canal being

executed by M/s Amar Nath Aggarwal Construction (P) Ltd. Panchkula.

Along with order Annexure "A" giving items of work relating to construction of the a said work, which was referred to arbitration under Clause 63

and the annexure contains items (I) to (8) the last item No. 9 relates to interest. In other words, there is no mention of the counter claim, which, as

stated above, was put forward before the arbitrator for the first time without having the said dispute referred from the Chief Engineer.

82. Exactly the same thing happened in so far as counter claim under FAO No. 1122 is concerned and necessary discussion may be seen while

dealing under this head in the earlier part of this Judgment relating to FAO No. 1122 above. For the reasons mentioned therein, it was not open to

the arbitrator to have entertained the counter claim unless the same had been referred to him by the Chief Engineer. This having not been done, no

fault can be found with the conclusion reached by the arbitrator that the counter claim was not tenable. It is, therefore, not necessary to go into the

further question whether on merits the counter claim could be entertained or not. No case for interference is thus made out.

INTEREST:

83. With regard to interest, Mr. Saron, learned counsel appearing for the appellant state, has raised these contentions:-

84. Under claims 1, 2 and 4, the arbitrator has allowed pre-reference interest which was beyond his jurisdiction. In any case, it is further

contended that the arbitrator could allow interest only for the period after notice in writing u/s 3(1)(b) of the Interest Act, 1978, had been served

on the department. Mr. Saron placed reliance on the clarifactory observations appearing in paragraph 38 of the concurring but separate Judgment

in Jugal Kishore Prabhatilal Sharma and others Vs. Vijayendra Prabhatilal Sharma and another, . Therein it was observed that principle No. 1 in

G.C. Roy"s case should be read alongwith principle No. 5, wherein it is clearly stated that interest for a period anterior to the reference (pre-

reference period) is a matter of substantive law unlike interest pendente lite. It was further observed that the conclusion in paragraph 44 in G.C.

Roy"s case deals only with the power of the arbitrator to award interest pendente lite. It was, therefore, not right to read the said decisions as

overruling Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others,) in so far as it dealt with the power of the

arbitrator to award interest for the pre-reference period. Lastly, it was submitted that the arbitrator had granted interest upon interest, in that

interest was granted on the three heads of claim noticed above, and on the entire amount including the interest component future interest had been

allowed by the Court. This was against the express provision of Section 3(3)(c) of the Interest Act, 1978, which lays down that interest upon

interest cannot be allowed.

85. On behalf of the contractor, a preliminary objection was raised that the objection regarding interest had not been taken into the objections filed

under Sections 30/33 of the Arbitration Act before the Court, nor was any such objection raised during the arguments before the learned

Subordinate Judge, nor was such an objection taken in the grounds of appeal in this Court and it was, therefore, not open to the State to raise

objection with regard to grant of interest for the first time in this Court. Mr. Mittal next submitted that no doubt a question of law may be permitted

to be raised, the acid test for deciding the same was as to whether new facts except those already on record were required to be gone into. In that

sense, the question in hand had is one of a mixed question of law and fact and no opportunity having been given to the contractor to prove whether

the requisite notice had been served, such a question ought not to be permitted to be raised at this stage. In any case, Mr. Mittal placed on record

a copy of the notice dated December 21, 1987, which was served by the contractor on the department, claiming interest in this case. Mr. Mittal

further submitted that Jena''s case no where laid down that service of notice in terms of the Interest Act is a condition precedent for claiming

interest. All it laid down a was that the arbitrator was competent to award interest for pre-reference period, where reference to the arbitrator was

made after coming into force of the Interest Act, 1978. He further submitted that the present case is clearly covered under principle No. 1 laid

down by the Constitution Bench in G.C. Roy''s case. Further contention of Mr. Mittal is that the present case falls within the meaning of ''other rule

of law'' in terms of Section 4(1) of the Interest Act, 1978. He submitted that Section 4 had been given an over-riding effect over Section 3 of the

Interest Act, 1978, and, secondly, expression ''other rule of law'' is used in juxta-position with ''any enactment'' implying any rule of law as

enunciated by the courts, which, in other words, means a rule contained otherwise than in any enactment. According to Mr. Mittal, principle No. 1

enunciated by the Constitution Bench in G.C. Roy''s case was one such rule of law. Mr. Mittal clarified that the courts do not purport to lay down

the law or legislate. They only enunciate or expound the law as it has always existed. Principle No. 1 has, therefore, to be taken as the law as

declared by the highest court of the land and it is binding on all courts by virtue of Article 141 of the Constitution.

86. With regard to Jugal Kishore''s case (supra), Mr. Mittal submitted that was a case relating to a dispute arising out of various partners. There

was a written deed of dissolution. One of the terms of the deed of dissolution was that the retiring partner was entitled to 15 per cent interest from

the date of dissolution. In terms of Clause (iii) of the deed of retirement, Exhibit 3 in that case, the arbitrator had awarded interest at the rate of 15

per cent per annum from January 1, 1980. In the facts and circumstances of the case, that order was modified and it was held that interest was

liable to be paid from the date which was considered to be reasonable for evaluation of various assets and that date was held to be January 1,

1983, onwards. In other words, according to Mr. Mittal, the question of the power of the arbitrator to award pre-reference period interest did not

arise directly in that case.

87. After considering the respective submissions of the learned counsel for both the parties, I am of the view that the objection regarding payment

of interest should be allowed to be raised, as primarily it is a question of law. Though under Order 41 Rule 2 of the CPC the party is not entitled to

raise that question as of right, but the court is entitled to permit such a question to be raised, especially when the matter can be decided on the

basis of material already on record.

88. In Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, , the question before the Supreme Court was whether

the arbitrator was empowered to award interest for (a) pre-reference period, and (b) during the pendency of the arbitration proceedings. Their

Lordships noticed the relevant provisions of the Interest Act, 1978, and reviewed the case law and with regard to the pre-reference period the

conclusion was stated in paragraph 20 at page 1528 of the report, to the effect that 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.

89. In Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, , a Constitution Bench of the Supreme Court examined

the question of payment of interest on first principles. The relevant case law was reviewed starting from Seth Thawardas Pherumal Vs. The Union

of India (UOI),). On a conspectus of the relevant decisions their Lordships of the Constitution Bench laid down the following principles:-

(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 C.P.C., and there is no reason

or principle to hold otherwise in the case of arbitrator.

(ii). an arbitrator is an alternative form 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 powers to award interest pendente lite. Seth Thawardas Pherumal Vs. The Union

of India (UOI),) 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. Executive Engineer (Irrigation), Balimela and

Others Vs. Abhaduta Jena and Others,) 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 matter of substantive law, like interest for the period anterior to reference (pre-referece period). For doing

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

90. It will be seen that the underlying principle in five propositions extracted above is that where a person is 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. Pendente lite interest was held payable under

proposition No. (5) even though there was no substantive law to support it. Again the principle relied upon was that it had been so inferred in

order to do complete justice between the parties. There is force in the contention of Mr. Mittal that the law laid down by the Constitution Bench in

G.C. Roy''s case is binding on this Court by virtue of Article 141 of the Constitution. I am further of the view that there is also force in the

contention of Mr. Mittal that the present case falls within the meaning of ''other rule of law u/s 4(1) of the Interest Act, 1978. It has already been

stated that Section 4 has been given an over-riding effect over Section 3 and the expression ''other rule of law'' is used in juxta-position with any

enactment, implying a rule of law enunciated by the Courts. Principle No. 1 enunciated by the Constitution Bench is one such rule of law. In this

view of the matter also u/s 4 of the Interest Act, 1978 read with the first proposition enunciated by the Constitution Bench, the decision of the

court of first instance must be upheld. The argument that interest upon interest cannot be awarded in view of the provisions of Section 3(3)(c) of

the Interest Act, 1978, does not hold ground for the reason that it is u/s 4 that interest has been awarded or should be deemed to have been

awarded.

91. For the foregoing reasons, there is no merit in these appeals. They are accordingly dismissed, leaving the parties to bear their own costs.