(2001) 09 BOM CK 0083

Bombay High Court

Case No: Arbitration Petition No. 379 of 1999

Oil and Natural Gas Commission, Mumbai		APPELLANT
	Vs	
Macqreqor-Navire Port Equipment, Mumbai		RESPONDENT

Date of Decision: Sept. 26, 2001

Acts Referred:

- Arbitration Act, 1940 - Section 13, 19
- Contract Act, 1872 - Section 74
- Interest Act, 1978 - Section 2

Citation: (2002) 1 BomCR 278 : (2002) 3 MhLj 313

Hon'ble Judges: F.I. Rebello, J

Bench: Single Bench

Advocate: D.R. Zaiwalla and V.V. Joglekar and S.A. Bhalwal, instructed by Vyas and Bhalwal, for the Appellant; V.K. Ramabhadran, Madhu M. and Puja Puri, for the Respondent

Judgement

F.I. Rebello, J.

The petitioners in this petition have challenged the Award dated 26th February, 1999. By the said Award the learned Arbitrator held that the amount of Rs. 6,50,000/- deducted as liquidated damages by the petitioners herein shall be paid to the respondents in the hands of their Constituted Attorney; interest was to be paid at the rate of 12.5% p.a. by the petitioners on the aforesaid amount from 17th February, 1988 till 28th February, 1999 which is the date of the Award again in the hands of the Power of Attorney.

The petitioners in the year 1985 had floated a tender for design, fabrication and erection of a floating link span. The respondents were the successful bidders. The petitioners by letter dated 16th October, 1985 accepted the respondents offer.

There is further a letter dated 19th February, 1985 whereby the respondents offer in the sum of Rs. 1,40,00,000/- was accepted. The respondents failed to deliver the link span within the contractual period of delivery, but delivered the same on 25th May, 1987. In between the respondents had sought extension of time from time to time. The petitioners had extended the time subject to their rights to claim liquidated damages. In terms of the contract, damages were quantified at Rs. 25,000/- per week of delay subject to maximum of 5% of the contracted price. The petitioners accordingly deducted from the respondents bill, liquidated damages quantified in a sum of Rs. 6.50 lakhs. The original date of completion was scheduled as 10th November, 1986. The link span was handed over on 25th May, 1987. There was thus delay of 196 days in completion of the work. Out of the said 196 days adjustment was given of 14 days on account of hindrance due to rain.

2. On 4th June, 1987 the respondents had by their letter informed the petitioner of various hindrances caused on account of power shut down by M.S.E.B. On 7th February, 1988 the petitioners wrote to the respondents claiming liquidated damages of Rs. 6.40 lakhs under Clause 2 of the agreement for the delay of 26 weeks in execution of the work. By letter of 21st March, 1988 the respondents raised various other grounds in respect of their contention that there was delay on account of various reasons. On 3rd October, 1988 the Competent Authority appointed by the petitioners rectified the aforesaid letter. Respondents were informed that there was no change.

In December, 1990 reference was made and the matter referred to Arbitration. The Arbitrator by award dated 1st December, 1991 held that no amount is refundable by the petitioners. The respondents aggrieved by the Award preferred a petition before this Court which was numbered as Arbitration Petition No. 155 of 1992. By order of 17th February, 1995 the petition was allowed and the impugned Award was set aside. The learned Single Judge of this Court noted that the delay was on account of 5 grounds. It was noted that the Respondents were not responsible for delay of 5 weeks caused by rain. Respondents conceded that they were not entitled to extension for delay due to power cut and as such only 3 grounds remained to be considered. The first was late supply of steel by Steel Authority of India. The learned Single Judge upheld the finding of the Arbitrator that the respondents were not entitled to get any extension on account of delay due to late supply of steel. The arbitrator had come to the conclusion that it was the responsibility of the respondents to procure the material.

The second challenge was in the matter of delay in issuance of import license by petitioners causing delay in import of Ci-Colet. The learned Single Judge held that the finding recorded was by importing personal knowledge and, therefore, the Arbitrator had travelled beyond his jurisdiction.

Insofar as the delay due to accident which occurred during the lowering Section of the Link Span, the learned Single Judge held that the issue before the Arbitrator was

the contention of negligence, but instead of answering that issue the Arbitrator had recorded finding on a totally different and baseless conclusion.

The Award was, therefore, set aside and the matter remitted.

3. Subsequent to the order of this Court by letter of 22nd February, 1995 the petitioners were requested to proceed with the matter. There was no response from the petitioner for more than a year. By further letter of 1st April, 1996 the respondents again reminded the petitioners to proceed with the Arbitration and/or to appoint another Arbitrator in place of Shri U. A. Siddiqui. The respondents then moved u/s 8 of the Act of 1940. Consequent to that Arbitrator was appointed.

4. The Arbitrator once again noted the delay caused in respect of 5 heads. The Arbitrator noted that the petitioners had granted extension of 14 days on account of hindrance due to rain as against claim of 135 days. Insofar as the power cut is concerned in view of the stand of the respondents the learned Arbitrator held that they were not in issue.

Insofar as steel is concerned, the Arbitrator noted the various contentions including the finding by this Court and noted that the point has been decided by this Court. However, accepted the contention of the respondents that as the Award was set aside it was open for the respondents to reargue the said contention. The learned Arbitrator thereafter gave a finding that as the material was not available from any other source in India and as the respondents was not allowed to import the material as the Government had not released Foreign Exchange extension should be granted and the period excluded.

Insofar as Ci-colet is concerned once again the finding was recorded that it was duty of the petitioners to issue letter for getting import license and as the letter was issued after the expiry of the contract period i.e. on 5th January, 1987 the respondents were entitled for extension and the period excluded.

Insofar as the accident is concerned, it was held that the respondents were entitled for extension as their case was covered by Clause 20.1 of the contract as it fell within the clause "beyond reasonable control".

The learned Arbitrator then considered the contention of the petitioners that it was not possible for them to estimate the actual loss they suffered arising out of the RO-RO from January, 1987. The contention of the respondents was also noted that even at the stage of hearing of the arbitration proceedings before the learned Arbitrator, that the link span or RO-RO facility was never commissioned or used. Various Judgments of the Apex Court were cited before the Arbitrator. The Arbitrator recorded a finding that the petitioners had not established any loss occasioned due to delay through any evidence and as such held that they were not entitled to deduct liquidated damages in a sum of Rs. 6,50,000/-.

Insofar as interest is concerned it was held that interest at the rate of 12.5% per annum was payable from 17th February, 1998 till 28th February, 1999 i.e. the date of the Award.

5. At the hearing of the petition on behalf of the petitioners the award is impugned on the following amongst other grounds :--

(1) It is contended that the Arbitrator went beyond the terms of the contract in allowing extension of time to the respondents insofar as (a) Steel, (b) Ci-Colet, and (c) accident.

(2) At any rate liquidated damages were claimed in terms of the agreement between the parties which was a reasonable pre-estimate. The Arbitrator in holding that the petitioners had not proved damages committed an error of law apparent on the face of the record, considering the arbitral clause and the law declared by the Apex Court.

(3) In awarding interest as awarded the learned Arbitrator has gone beyond Clause 29 of the Agreement and thus again has awarded interest contrary to the terms of the agreement.

(4) At any rate it is contended that the interest if payable would be in terms of the Interest Act, 1978 considering that there was no agreement between the parties for the pre-reference period, reference period and post reference period. The Arbitrator has awarded interest from 17th February, 1988. If the provisions of the Interest Act, Section 3(a) is concerned, interest can be awarded in the case of debt from the date of institution of proceedings and if covered by Section 3(b) if not a debt then from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings. Section 3(a) it is pointed out would not apply to any debt or damages upon which payment of interest is barred by virtue of an express agreement. On the other hand on behalf of the respondents it is contended that:--

(1) The Arbitrator has given a finding of fact considering the terms of the agreement and even if there be some error that error is within jurisdiction and hence not liable to be interfered by this Court.

(2) At any rate, it is pointed out that the Arbitrator has given a finding that the petitioner failed to prove any loss and as such even assuming that there was a clause in the agreement for liquidated damages, considering the judgments of the Apex Court it was incumbent on the petitioners to prove such losses. That has not been done. The Award, therefore, discloses no error warranting interference by this Court.

(3) Insofar as interest is concerned, it is contended that the Clause in the agreement created an embargo on the Arbitrator in awarding interest. That embargo would not

apply to an Arbitrator in awarding interest either for the pre-reference, pendente lite or subsequently till the award is made a decree of the Court.

(4) Insofar as Section 3 of the Interest Act is concerned, it is contended that, it was a debt inasmuch as it was the respondents money in the hands of the petitioner which has been deducted and considering that interest would be payable. Insofar as debt is concerned, it is pointed out that even if the earlier award was set aside the reference was not closed, That being the case the institution of the proceedings would be when the proceedings had first been initiated and not merely when the present Arbitrator commenced adjudication. Awarding of interest, therefore, it is contended, is not liable to be interfered with. At any rate it was within the discretion of the Arbitrator, who on the facts and circumstances has granted interest and as such considering Section 34 of the CPC no interference is warranted. Both parties have relied on judgments which will be adverted to in the course of discussion.

6. The first contention of the petitioners that needs to be dealt with are the findings of the Arbitrator that the respondents were entitled to extension of time on account of (a) Steel, (b) Ci-Colet, and (c) accident. They will be dealt with serial wise.

Insofar as steel is concerned, it was the subject matter of the first Award which was challenged before this Court. This Court has dealt with the challenge when it passed the order dated 17th February, 1995. Specifically dealing with this challenge this Court recorded as under:--

"The said Clause imposes responsibility to procure the material upon the petitioners and further provided that delay in supply of any of these materials etc. will not be taken as an excuse for not completing the contract within the stipulated period. Taking into consideration this the learned arbitrator came to the conclusion that the petitioners were not entitled to get any extension on this count. In my opinion, he is perfectly justified in coming to the said conclusion. When they entered into contract the petitioners knew that SAIL was the only agency manufacturing and supplying steel and thereafter entered into contract which contained Clause 15."

It was thus clear that the finding by the Arbitrator on this issue had been confirmed by this Court. It is no doubt true that the petition was allowed and the Award was set aside. The learned Arbitrator has proceeded to re-examine the issue on the ground that the award was set aside. In my opinion, apart from the Clause in the agreement, the learned Arbitrator would have been barred by the principle of "Issue estoppel". The issue was an issue before the Arbitrator. That issue was decided by this Court. The Award was set aside for other reasons. Merely because the award was set aside would not mean that the findings on that issue were once again available for re-determination. It can never be extended to mean that the issues which were in issue which were decided by this Court in respect of the same case were once again open for consideration. The finding on that issue concluded the dispute. To my mind, therefore, the learned Arbitrator clearly acted contrary to the

term of the contract as on the finding recorded by this Court on that issue it was not open to him to reopen an issue concluded when this Court confirmed the finding given by the Arbitrator thus resolving that dispute. The extension of time on that count, therefore, must clearly be held to be beyond the terms of the agreement and as such is liable to be set aside.

7. The next contention is in the matter of Ci-colet. This again was an issue before this Court when it decided the petition on 17th February, 1995. The finding of the Arbitrator against the respondent was set aside on the ground that the Arbitrator imported to himself knowledge based on letters which was not argued by any of the parties before the Arbitrator. The finding recorded by the Arbitrator is that the letter for getting import licence was issued by the petitioners to the respondents after the expiry of the contract period i.e. on 5th January, 1987 and after a delay of about 138 days and as such the Claimants cannot be held responsible for the delays. Let us advert to the Clause in the contract insofar as this aspect is concerned. In Clause 7, Scope of the Contract, it is provided as under :--

"The Contractor shall make separate application for each case for release of foreign exchange or for import licence in the format required by the Statutory Authorities. The release of foreign exchange will be arranged by the ONGC."

A bare perusal, therefore, of the said term of the contract would show that it was a duty cast on the Contractor to make separate applications on the one hand for release of foreign exchange or for import license. The Clause then set out that the release of foreign exchange will be arranged by ONGC. There is no such provision for import license. Once the Clause itself contemplated that release of foreign exchange was to be arranged by ONGC it is impossible to construe the said Clause as understood by the respondent to mean that even import licence had to be arranged for by the petitioners. The Clause itself contemplated that it is the contractor who had to make the application. The Clause did not provide or cast any obligation on the owner to make the application. The learned Arbitrator in proceeding on the basis of some correspondence has clearly gone beyond the terms of the clause. In my opinion, the finding that the respondent was entitled to extension on account of delay in giving an application is contrary to the terms of the agreement.

Insofar as the accident is concerned, the learned Arbitrator found in favour of the respondents relying on Clause 20 of the agreement. The relevant portion of the Clause reads as under :--

"The contractor shall complete the fabrication, tests, assembly and transport of the pontoon mounted link span arrangement and deliver and commission the same after satisfactory trials within the completion period stated by him in the officer (time being the essence of the contract) of within such extension of the said completion period as may be allowed by the Engineer in writing, provided that

should the progress of the work be delayed by strikes, lockouts, fire accidents or any cause beyond the reasonable control of the contractor or due to any variation ordered the Engineer a reasonable extension of the completion period shall be granted by the Engineer....."

Factually the accident took place when the respondents were doing the work. That again was an issue in the earlier award which was under challenge before this Court. This Court while accepting the respondents challenge on that count held that the issue argued before the learned Arbitrator was that the petitioners were not negligent and the accident was beyond their reasonable control, while the contention of the petitioners was that the respondents were guilty of negligence. This contention had not been considered by the Arbitrator who, the Court felt reached a totally different and baseless conclusion. In the Award under challenge the Arbitrator referred to Clause 20.1, referred to the judgment of this Court and went on to proceed to answer that extension of time should have been given under Clause 20.1 of the contract. The accident did not occur on account of the acts of the respondents or as contemplated in Clause 20 as is reproduced. The accident occurred in the course of the petitioners discharging their duties. Once that be the case and it did not either fall in the express term contained in the Clause or a term which could be read ejusdem generis with the other terms in the Clause it was beyond the terms of the contract and the finding of the arbitrator that the petitioners herein were liable to give extension to the respondents on account of the accident is clearly an error apparent on the face of the record. To my mind this also is clearly contrary to a reading of the Clause and, therefore, is liable to be set aside.

8. The real issue, however, is whether the petitioners on that count were entitled to deduct from the amount payable to the respondents a sum of Rs. 6,50,000/- as liquidated damages in terms of Clause 6 of Appendix to the contract which set out that liquidated damages vide Clause No. 26 condition of contract would be Rs. 25,000/- per week or part thereof, subject to a maximum of 5% of the contract price. It may be mentioned at the outset that the respondents did not raise any plea before the Arbitrator that the amount of liquidated damages quantified at Rs. 25,000/- per week was not a reasonable genuine pre-estimate. In the additional written statement filed by them on 11th September, 1998 it was specifically stated as under :--

"The claimants submit that the Link Span RO-RO facility which was constructed by the claimants was never commissioned and/or used by the Respondents till date. In any event, the respondents have not used the same the purpose for which the said Link Span was constructed and as such the Respondents have not suffered any loss whatsoever."

In answer to this the petitioners filed their additional written statement on 7th October, 1998. It was contended therein that Link Span was proposed to be put into

operation by the respondent by about November/December, 1986 and further that the same could not be achieved since the construction of the said Link Span was inordinately delayed by the Claimants. After the Link Span was actually delivered and installed on or about 25th May, 1987. However, due to slackness in the mooring ropes it was not in a proper position. Similarly other items were not in order. This was communicated to the respondents for rectifying the defects. The defects were rectified in October, 1987, but the Link Span could not be used prior to October, 1987. It is then set out that K. Juliana owned by Hede Ferrominas operated its Ro-Ro Ferry service by using the said Link Span facility. Therefore, it was denied that it was not being used.

9. The learned Arbitrator insofar as this aspect is concerned, has given the following findings :--

(a) That the petitioners herein could not produce any evidence to prove the utilisation of the facilities on their own. Ro-Ro vessel or hiring a Ro-Ro Vessel from completion till date.

(b) The respondents also could not produce any documents to prove that they were ready to award the contract for Ro-Ro Vessel during the delayed period of execution. They also could not produce any evidence for the loss suffered by them but stated that it is impossible to calculate the loss.

(c) It was then held that the petitioners had never utilised the facility which the respondents had constructed and never used it from the date of completion and as such the question of loss does not arise. The contention of the petitioners that it is not possible to assess the loss was held not to be correct and not acceptable. In view of the finding the learned Arbitrator held that deduction of L.D. in a sum of Rs. 6,50,000/- was not justified.

The issue argued over here was, therefore, in issue before the learned Arbitrator. The Arbitrator has given his finding on the issue. To my mind, therefore, it would not be open considering the challenges to an award to reopen the said finding on the ground that another view is also possible in the absence of any perversity in the findings.

10. What is further contended by the petitioners is that the law is settled by judgments of the Apex Court and this Court. The law as settled according to the petitioners is that the Court may proceed on assumption that the sum so named in the contract reflects the genuine pre-estimate of the parties, as to the probable losses, and such Clause was intended to dispense with the proof thereof; and it will always be open to the promises to show that no loss was suffered or that the estimate so made is falsified by the change in the situation or that in fact the loss so offered was far too less. In the instant case it is pointed out, therefore, once there was a genuine pre-estimate forming part of the contract, which pre-estimate has not been disputed or challenged the Clause was intended to dispense with proof.

On the facts of the present case the loss suffered or the damages which the petitioners could claim could not be quantified as the facility was meant for the use by the petitioners. The argument is sought to be sustained considering Section 74 of the Indian Contract Act as interpreted by various judgments of the Apex Court as also those judgments as considered by this Court.

11. Section 74 of the Indian Contract Act contemplates that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be. the penalty stipulated for. The judgments of the Apex Court may be considered in the context of this section. The first Judgment which may be adverted to is of the Constitution Bench of the Apex Court in the case of Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd., . In that case a suit had been filed for damages. The suit was dismissed. Appeal preferred was dismissed. SLP was filed before the Apex Court. There was a managing agency agreement between the parties. In terms of the agreement some amounts were due and payable monthly. It was further provided that if at the close of any year it was found that a total remuneration received in such year is less than 10% of the gross profits of the company for such year the company shall pay to the firm in respect of such year such additional sum by way of remuneration as will make the total sum received by the firm in and in respect of such year equal to 10 per cent of the gross profits of the company in that year. The Clause itself contained a stipulation for the amount of damages if the managing agency agreement was terminated before the expiry of the period for which it was made. Considering that the Apex Court observed as under :--
"Now, when parties name a sum of money to be paid as liquidated damages they must be deemed to exclude the right to claim an unascertained sum of money as damages." Proceeding further the Apex Court observed as under :--

"Again the right to claim liquidated damages is enforceable u/s 74 of the Contract Act and where such a right is found to exist no question of ascertaining damages really arise. Whether the parties have deliberately specified the amount of liquidated damages there can be no presumption that they, at the same time, intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach."

It may, however, be noted that what was essentially in issue in Chunilal V. Mehta was the issue as to what is a substantial issue of law. The issue of liquidated damages arose because there was a Clause providing for liquidated damages. The Apex Court held that such a Clause was enforceable but thereafter proceeded to

observe that once liquidated damages are specified then in case of breach a go-by cannot be given to the specified sum and instead claim a larger sum. That was what was being considered. The issue whether Section 74 dispenses with proof of damages was really not in issue, though in the judgment it is observed that when a right to claim liquidated damages arises no question of ascertaining damages really arise. The issue of proof of damages, therefore, must be considered in the context that it really was not in issue for consideration.

The next judgment relied upon is in the case of Fateh Chand Vs. Balkishan Das, . This again is another judgment of the Constitution Bench of the Apex Court. The Delhi Improvement Trust had granted leasehold rights for 90 years to one Dr. M. M. Joshi, to construct a building thereon. His widow as guardian of her minor son sold the leasehold rights together with the building to one Lala Balkrishna Das for a sum of Rs. 63,000/-. By an agreement the plaintiff contracted to sell his rights in the land and the building to Seth Fateh Chand, the defendant. The amount specified was Rs. 1,12,500/-. Rs. 1,000/- were paid as earnest money. The agreement stipulated that by a subsequent date another sum of Rs. 24,000/- had to be paid towards the sale price. The next Clause set out that if the Vendee fails to register the sale deed by a specific date the sum of Rs. 25,000/- shall be forfeited. In terms of the agreement the balance sum of Rs. 24,000/- was paid and possession delivered. The sale, however, was not completed before the expiry of the period stipulated. The plaintiff alleged that the agreement was rescinded as default had been committed by the defendant and forfeited the sum of Rs. 25,000/-. Hence the suit. The Trial Court held that the plaintiff had failed to put the defendant in possession of the land and directed the return of the sum of Rs. 25,000/- less Rs. 1,400/- being the amount of mesne profits and some other amounts towards future mesne profits. In Appeal the High Court allowed that the plaintiff to retain an amount of Rs. 11,250/- being compensation for loss suffered. Hence the SLP to the Apex Court. It was in these circumstances that the Apex Court considered Section 74 of the Indian Contract Act. The sum of Rs. 1,000/- which was paid as earnest money and forfeiture thereof was not in issue. The issue was of the forfeiture of the balance amount of Rs. 24,000/- on the ground that it was the stipulation in the nature of penalty and could be retained only if the plaintiff established that in consequence of the breach had suffered a loss. After considering Section 74 and the English Law the Apex Court noted that the section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. The Apex Court noted that under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties; a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature had sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle

applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty. Pausing here, therefore, the distinction under the English Common Law was noted which provided that a sum named as genuine pre-estimate was enforceable without further proof whereas a sum named by way of a penalty could not be enforced. Unless the aggrieved party proved loss then to award him reasonable compensation. This distinction the Apex Court noted had been done away in Section 74 of the Indian Contract Act where a uniform principle is being followed both in case of breach and stipulations by way of penalty. Considering Section 74 the Apex Court observed as under :--

"The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The Section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage", it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."

The following observations would be relevant:--

"In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty Clause but only to award reasonable compensation is statutorily imposed upon Courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture."

No doubt what was in issue was the issue of penalty. However, both aspects, damages and penalty have been considered. The only clarification noted is that in awarding damages in case of breach of contract is unqualified except as to the maximum stipulated, but compensation which has to be awarded must be reasonable. The Court also noted that such a Clause merely dispenses with proof of

actual loss or damage, it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things. To my mind therefore, reading this it is clear that even if there be a stipulation in the contract by way of liquidated damages as a genuine pre-estimate of the loss suffered, that does not mean that if there is a challenge or dispute that no damage in fact had been suffered, the Court considering the Clause has to award damages. This must be borne in mind considering the distinction noted by the Apex Court between the English Common Law which provides for such enforcement and Section 74, which has put both liquidated damages and penalty on the same footing. It may be noted that Fateh Chand (supra) did not consider the earlier judgment in Chunilal V. Mehta (supra).

We may next consider Maula Bux Vs. Union of India (UOI), . The facts may be necessary to be set out. There was a contract by the plaintiff with the Government of India to supply potatoes. For due performance it deposited an amount of Rs. 10,000/-, There was another contract to supply poultry and fish. The amount deposited was Rs. 8,500/- for due performance. Clause 8 of the contract provided that in case of rescission the security deposit (or such portion thereof) shall stand forfeited and be absolutely at the disposal of Government. The plaintiff had made persistent defaults. Consequent thereto the amounts were forfeited. Suit came to be filed. Suit was decreed on the ground that the rescission of the contract was justified, but there could be no forfeiture of the amounts of deposit, for they had not suffered any loss in consequence of the default. The High Court of Allahabad modified the decree. That is how the matter reached the Apex Court. The Apex Court noted the judgment in Mania Bux (supra). Insofar as forfeiture of earnest money is concerned, the Court held that it does pot fall u/s 74. But then it observed that forfeiture is in the nature of penalty and Section 74 applies. The Apex Court then observed as under:--

"It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "Whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him."

This judgment seems to indicate that there is slight departure from what had been earlier set out in Fateh Chand (supra) to the extent that if there was a clause which could be regarded as genuine pre-estimate that has to be taken into consideration as the measure of reasonable compensation. However, again it is only in the event the Court is unable to assess the compensation and the Court regards it as a genuine pre-estimate. What could be a genuine pre-estimate has not been spelt out. All these judgments came up for consideration before this Court in the case of The Kolhapur Sugar Mills Ltd. v. The Bhairava Vividha Karyakari Sahakari Society Ltd., (1975) 1 TLR 580. After considering all the judgments of the Apex Court this Court summed up the legal position in a claim for liquidated damages u/s 74 of the Contract Act as under :--

(1) no claim for such damages is maintainable unless the promisee is proved to have sustained any loss due to the default of the promissory

(2) Whatever the quantum of the loss so sustained, the claim can under no circumstances exceed the sum so named or stipulated in the contract;

(3) Section 74, contrary to the English common law rules, provides only for payment of reasonable sum as damages notwithstanding the stipulation for any stated sum. Reasonable sum in a given situation may, by implication, happen to be less than the so stipulated sum;

(4) what would be a reasonable sum must necessarily depend on facts and evidence in each case;

(5) Court may proceed on assumption that the sum so named in the contract reflects the genuine pre-estimate of the parties, as to the probable losses, and any such Clause was intended to dispense with the proof thereof; and

(6) it will always be open to the promissor to show that no loss was suffered or that the estimate so made is falsified by the change in the situation or that in fact the loss so offered as far too less."

A look at proposition five above would indicate that the amount reflected as genuine pre-estimate can be assumed by the Court as the probable loss occasioned and such a Clause was intended to dispense with the proof thereof. However, proposition six thereafter sets out that it would be open to the promissor to establish that no losses were suffered or that the estimate so made is falsified by the change in the situation or that in fact the loss so offered was far too less. In other words even if the sum specified in the contract is to be considered without proof as a genuine pre-estimate of the losses, if a plea is taken to the contrary and evidence is led to the contrary then the Court will be within its jurisdiction in the event loss is not proved or else loss is less to consider that evidence and award damages. The Division Bench of this Court had noted that the judgment in the case of AIR 1929 179 (Privy Council) where though there is not much discussion yet considering Section 74 the Privy Council

observed as under :--

"The effect of Section 74, Contract Act of 1872, is to disentitle the plaintiffs to recover simpliciter the sum of Rs. 10,000 whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered."

The Apex Court in the case of Union of India (UOI) Vs. Raman Iron Foundry, was again considering Section 74 of the Contract Act. While so considering the Apex Court has observed as under :--

"Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrarium is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit."

12. On behalf of the petitioners learned Counsel sought to contend that it is only in Sir Chunilal V. Mehta (supra) that the issue of liquidated damages was in issue and that in Fateh Chand (supra) and Maula Bux (supra) what was in issue was a Clause by way of penalty and that the Division Bench of this Court while considering the matter in Kolhapur Sugar Mills (supra) has considered all the three judgments and has formulated five propositions which include the proposition that once the liquidated damages form part of the contract the Court would assume that it is genuine pre-estimate as to the principal loss which the parties have agreed to. It is true that both in Fateh Chand (supra) and Maula Bux (supra) the case being considered was in respect of the penalty clause. However, insofar as liquidated damages are concerned, the matter was in issue in Bhai Panna Singh (supra) of the Privy Council and Union of India v. Roman Iron Foundry (supra) of the Apex Court. The paragraph from Raman Iron Foundry (supra) which has been reproduced makes it clear that even in case of liquidated damages the sum named is the outer limit beyond which the party cannot claim liquidated damages. Even in respect of the sum named a party complaining of breach of contract can recover the full amount only if it be reasonable compensation. Otherwise only reasonable compensation can be awarded, the sum named being the outer limit beyond which the Court will have no power to award damages even if proved.

Therefore, there is absolutely no doubt considering the distinction between English law and Section 74 of the Contract Act as first noticed by the Apex Court in Fateh Chand (supra) namely that whether it be liquidated damages or by way of penalty, a party must prove that they have suffered damages, unlike in English law, where in respect of liquidated damages a genuine pre-estimate of damages is binding on the parties. In fact the propositions 5 and 6 of the judgment of this Court in the case of Kolhapur Sugar Mills (supra) clearly reflects this position. The law, therefore, is clear that whether it be damages, liquidated damages or penalty there must be evidence before the Arbitrator to award damages. Section 74 merely limits the outer limit in case it is so provided. At the highest it is a genuine pre-estimate which if challenged, the burden is on the party claiming liquidated damages to prove damages.

Considering the facts of this case it was in issue before the learned Arbitrator as raised by the respondents that the petitioners have not suffered any damages by late delivery. It was also in issue before the Arbitrator that the contention of the petitioners herein that it was not possible to genuinely show what losses would be incurred as it was meant for their use. The Arbitrator however, has given a finding on the material available that the petitioners have not suffered any loss and as such are not entitled to claim damages. This was a finding given within jurisdiction. The finding is based on material before the learned Arbitrator. It cannot be said that the finding is perverse. The learned Arbitrator has also considered the judgments of the Apex Court cited before him. Considering that the first challenge in the matter of extension of time and withholding of a sum of a Rs. 6,50,000/- has to be rejected. The learned Arbitrator was right in arriving at a conclusion that the said amount could not be withheld as the petitioners had failed to prove any damages. Considering the above to my mind it is not necessary to deal with the judgment of the Apex Court in the case of Associated Engineering Co. Vs. Government of Andhra Pradesh and another, , for the proposition that whether the Umpire arrived at a conclusion by merely looking at the contract and not by construction of the contract and thereby exceeded jurisdiction, which would amount to an error going to the root of exercise of jurisdiction. Similarly, the judgment in the case of The Upper Ganges Valley Electricity Supply Company Ltd. Vs. The U.P. Electricity Board, , wherein the Apex Court held that a finding given ignoring material terms or evidence relevant to record the finding would amount to misconduct in law and Hindustan Tea Co. Vs. K. Sashikant Co. and Another, , where the Apex Court has held that where the matter in issue was the construction of a provision of law and once the Arbitrator has given his finding it would not be open to challenge, as also the judgment in the case of Indu Engineering and Textiles Ltd. Vs. Delhi Development Authority, for the proposition that once the view taken by the Arbitrator was a plausible view not suffering from any manifest error on the face of the award or wholly improbable or perverse it would not be open to challenge u/s 30 of the Arbitration Act, 1940.

13. We then come to the issue of award of interest. Insofar as interest, is concerned we may turn to Clause 29 to find out whether the Arbitrator was precluded from granting interest on the amount which has been withheld or deducted from the sum payable to the respondent. The relevant Clause reads as under:--

"Every effort will be made to make payments within two months of their becoming due but the Commission shall not be liable to pay interest on any payments which may for some reason be delayed beyond that period, or on, any other amounts which may be in their hands pending settlement of dispute or for any other reason whatsoever."

Based on this Clause it is sought to be contended that no interest would be payable considering Section 3(a)(ii) of the Interest Act or at any rate interest will be payable only after decision of the dispute by a proper forum. I do not find much merit in the first contention considering that such an issue had come up for consideration before the Apex Court and stands concluded by the judgment of The Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age, . The terminology may not be exactly be the same, but the two clauses conveyed the same meaning. There the Clause read as under :--

"No claim for interest will be entertained by the Commissioners with respect to any money or balance which may be in their hands owing to any dispute between themselves and the Contractor of with respect to any delay on the part of the Commissioners in making interim or final payment or otherwise."

It was argued there that this clause would be a bar on the grant of interest. That was answered by holding that such a clause merely prohibits the Commissioner from entertaining any claim for interest and does not prohibit the Arbitrator from awarding interest. The Apex Court so held explained relying on the judgment of the Constitution Bench in the case of Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, . A person who has a legitimate claim is entitled to payment within a reasonable time and if the payment has been delayed, beyond reasonable time he can legitimately claim to be compensated for that delay whatever nomenclature one may give to that claim in that behalf. Considering that, it would not be justifiable in reading the term of the contract referred to earlier as not providing for interest. Even strictly construed the term prohibits the Commissioner to payment to the contractor for delayed payment. But once the matter goes to arbitration, the discretion of the Arbitrator is not, in any manner restricted by this term of the Contract. A Similar Clause had come up for consideration in State of U.P. Vs. Harish Chandra and Others, where the language of the Clause was as unf der :--

"No claim for interest or damages will be entertained by the Government with respect to any moneys or balances which may be lying with Government owing to any dispute, difference; or misunderstanding between the Engineer-in-charge in

marking periodical or final payments or in any other respect whatsoever."

The Apex Court considering this language and the expression "or in any other respect whatsoever" held that:--

"It also referred to the dispute pertaining to the moneys or balances which may be lying with the Government pursuant to the agreement meaning thereby security deposit or retention money or any other amount which might have been with the Government and refund of which might have been withheld by the Government. The claim for damages or claim for payment for the work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government."

The Clause relied upon by the petitioners would also not attract Section 3(a)(ii) of the Interest Act. The Clause cannot be read to mean that payment of interest on damages or debt was barred. That Clause as interpreted was only a bar on the commission and not a bar on the Arbitrator.

The second part of the contention in respect of interest is that no interest would be payable and if at all payable, it could only be after decision of the dispute by appropriate forum. What in fact is being contended is that damages are not a debt. It becomes a debt only after it is ascertained and, therefore, when determined. Power to award interest, therefore, would be after it becomes a debt. If that be the case no interest either for pre-reference or pendente life could have been awarded. It is no doubt true that the law as settled in this country is that interest will be payable on the debt as ascertained. If authority is required reference need be made to the judgment of the Apex Court in the case of Union of India v. Roman Iron Foundry (supra) wherein the Apex Court observed that the claim for damages for breach of contract is not a claim for sum presently due and payable. In the same judgment the Apex Court has also noted that the claim for liquidated damages stands on the same footing as a claim for unliquidated damages. The Court observed that the claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. Therefore, when there is a breach of contract the party who commits the breach does not eo instanti incur any pecuniary obligations, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The following observations thereafter need to be reproduced as it represents the law as declared by the Apex Court on the issue:--

"The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we find it stated by Wightman, J. in Jones v. Thompson, "Exparte Charles and several other cases

decided that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed." It was held in this case that claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in O Driscoll v. Manchester Insurance Committee, Swinfen Eady L.J., said in reference to cases where the claim was for unliquidated damages; ".....in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given".

The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, Jabed Sheikh v. Taker Mallik, S. Milkha Singh v. N. K. Gopala Krishna Mudaliar and Iron and Hardware (India) Co., v. Firm Shamlal and Bros., Chagla, C. J. in the last mentioned case, stated the law in these terms ; (at pp. 425-26).

In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has in the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he was sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceed to assess what that liability is. But till that determination there is no liability at all upon the defendant.

This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled. In exercise of the right conferred upon it under Clause 18, to recover the amount of such claim by appropriating other sums due to the contractor."

A Division Bench of this Court in the case of Maharashtra State Electricity Board v. Bharat Conductors Pvt. Ltd., 1996 (2) Mh.L.J. 971 accepted the said contention by holding that no interest could be awarded on unascertained damages. A similar view has been taken by another learned Judge of this Court in the case of Municipal Corporation of Gr. Bombay and Another Vs. M/s. Kulkarni and Co. and Another, .

In State of Orissa v. B. N. Agarwalla, etc. (supra) the Apex Court, however, noted the provisions of the Interest Act, 1978 in the matter of awarding of interest before the

pre-reference period. In that case one of the aspect was whether interest could be payable in respect of retention money withheld by the State. Interest was allowed from the date when the Interest Act came into force. The Apex Court in respect of the amount retained upheld the grant of interest in respect of the amount which was withheld from the retention amount. The issue of awarding damages on interest, however, would be subject to the provisions of the Interest Act. Under the Interest Act, 1978 Court has been defined to include an Arbitrator. This was not the position under the Interest Act of 1839. Under the Interest Act of 1978 u/s 3, power has been conferred on the Court. Tribunal or Arbitrator to award interest also on damages for the whole or part of the period if it relates to a debt payable by virtue of written instrument on certain time even from the date when the debt is payable to the date of institution of the proceedings. If it does not relate any such debt then from the date mentioned in this regard in a written notice given by the person liable that interest will be claimed to the date of institution of the proceedings. In other words interest for that period of which may described as the preference period, would also payable even if it is not a debt if a written notice has been given by the person entitled or the person making the claim to the person liable. The exercise of this power is no doubt discretionary. This statutory provision, therefore, makes interest payable if otherwise was not payable considering that damages are not a debt until they are ascertained. The law thus would be that interest, if notice is given, would be payable even on damages whether liquidated or unliquidated under the Interest Act 1978 for the pre-reference period. On the facts of this case, however, it was an amount withheld on account of the purported deduction by the petitioners for what they claim to in the form of liquidated damages. This could not have been done.

14. We then come to the last aspect again based on the Interest Act, 1978. Under the Interest Act, 1978 "Court" has been defined u/s 2(a) to include a tribunal and an arbitrator. Current rate of interest has been defined u/s 2(b) as the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949. u/s 3 in any proceedings in which a claim for interest in respect of any debt or damages is made, the Court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part. If the proceedings relate to a debt payable by virtue of a written instrument then from the date when the debt is payable to the date of institution of the proceedings otherwise from the date mentioned in the written notice given by the person entitled. In the instant case terms of the contract the amount was ascertained and therefore a debt. The petitioners from the said amount deducted by way of liquidated damages a sum of Rs. 6,50,000/-. It would,

therefore, be a debt and as such in the absence of any contract or any statutory provisions would be covered by the provisions of the Interest Act and interest payable from the date it would have been payable on presentation of the final bill. The power to award interest for the pre reference period had been recognised by the Apex Court in the case of the Secretary Irrigation Department, Government of Orissa (supra). The matter came up again for consideration before the Apex Court in the case of State of Orissa Vs. B.N. Agarwalla, etc., . The Apex Court observed that the Interest Act, 1978 had come into force on 6th August, 1981 and observed as under :--

"..... The principles which can now be said to be well-settled are that the arbitrator has the jurisdiction to award pre-reference interest in cases which arose after the Interest Act, 1978 has become applicable. With regard to those cases pertaining to period prior to the applicability of the Interest Act, 1978. In the absence of any substantive law, contract or usage, the arbitrator has no jurisdiction to award interest. For the period during which the arbitration proceedings were pending in view of the decision in G. C. Roy''s case, AIR 1992 SCW 389 (supra) and Hindustan Constructions Limited case, AIR 7992 SCW 2647 (supra), the arbitrator has the power to award interest. The power of the arbitrator to award interest for the post-award period also exists and this aspect has been considered in the discussion relating to Civil Appeal No. 9234 of 1994 in the later part of this judgment."

In the case of State of U.P. Vs. Harish Chandra and Others, one of the questions was whether the awarding of interest prior to the date of reference was within the power and jurisdiction of the Arbitrator. The Court upheld jurisdiction in favour of the Arbitrator considering the judgment in the case of State of Orissa v. B. N. Agarwalla (supra) and earlier judgments. Next is the judgment of the Apex Court in the case of State of Jammu & Kashmir and Another Vs. Dev Dutt Pandit, of the judgment may be gainfully reproduced :--

"Under the Interest Act, 1978, which came into force on August 19, 1981, Court includes arbitrator. u/s 5 of the Interest Act Section 34 of the CPC would, therefore, apply to the arbitrator as well, Arbitrator is thus entitled to award interest pendente lite and further interest at the rate not exceeding the current rate of interest which has also been defined in Clause (b) of Section 2 of the Interest Act."

From this paragraph it is now clear that in case where the contract does not provide for any interest or there is no substantive law governing awarding of interest between the parties and the Interest Act is applicable, interest for the pre-reference, reference and post reference can only be awarded at the current rate of interest. Current rate of interest would be interest as defined in Section 2 of the Interest Act. A Division Bench of this Court in the case of pre-reference interest has followed the said principle in the case of U.P. Co-operative Federation Ltd. Vs. M/s. Three Circles, . The issue of grant of interest is an issue pertaining to jurisdiction of the Arbitrator in awarding interest. The Arbitrator can only award interest which in law he can award.

He cannot award interest contrary to the provisions of the Interest Act, 1978. If he so awards the interest as awarded would be an exercise without jurisdiction to the extent of the interest beyond the current rate of interest and, therefore, would be subject to the challenge u/s 30 of the Arbitration Act, 1940 which even if not pleaded can be considered by the Court in the suo motu exercise of power as was recognised by a Division Bench of this Court in Union of India Vs. M/s. Ajit Mehta and Associates, Pune and Others, , placing reliance on the judgment of the Apex Court.

15. Only one other aspect may be considered before we examine the issue of awarding of interest for the purpose of the expression "institution of the proceedings". In the instant case Arbitrator was appointed by Office Order dated 23rd October, 1989. The Arbitrator assumed jurisdiction when he issued notice to the parties on 1st November, 1989. An award came to be passed on 2ist December, 1991. That was challenged before this Court in Arbitration Petition No. 155 of 1992. The Award was set aside by order of this Court dated 17th February, 1995. Second Arbitrator came to be appointed by order dated 9th February, 1998. Arbitrator issued notices on 23rd March, 1998. These dates have been referred to as they are relevant for the purpose of deciding the expression "date of institution of the proceedings". It is contended on behalf of the petitioners that it would be only after the Arbitrator appointed in the present Award assumes jurisdiction. If that is considered it would be 23rd March, 1998. The case of the respondents, however, is that what must be considered is the order dated 1st November, 1989 as this Court when it set aside the Award did not close the proceedings. Arbitral Clause and the reference, it is contended, was in existence and it is in these circumstances that the second Arbitrator came to be appointed. To my mind the issue stands decided by the judgment of the Apex Court in the case of Juggilal Kamlapat Vs. General Fibre Dealers Ltd. (And Connected Appeal), . It was urged before the Apex Court that once the award is set aside the Arbitrator becomes functus officio and consequently there can be no further reference with respect to the dispute decided by the Award which is set aside. On consideration of Section 19 and other relevant Sections of the Arbitration Act, 1940 the Apex Court held that in Arbitration proceedings there are three stages. First is Arbitration Agreement, next comes the reference to arbitration and lastly the Award. Section 19 provides inter alia that where an Award has been set aside the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred. The Section, therefore, leaves it to the discretion of the Court when it decides to set aside an award, whether to supersede the reference at all in which case though the award may be set aside the reference will continue. But if it supersedes the reference it has also in consequence to order that the arbitration agreement on the basis of which the reference was made would cease to have effect with respect to the difference referred. It is only when the Court orders supersession of the reference that the consequence follows that the arbitration

agreement ceases to have effect with respect to the subject matter of the reference. It is thus clear from these observations that the Apex Court has held that unless the reference is closed the Arbitration agreement continues and also the reference. In the instant case a perusal of the judgment of this Court would show that only the Award was set aside. This Court did not superseded the reference. Once that be so the reference subsisted, only the arbitrator changed. Instead of the original Arbitrator a new Arbitrator came to be appointed. In these circumstances it will have to be held that the date for the purpose of interest for the pre-reference period and the expression date of institution of the proceedings would be the date on which the first Arbitrator entered on reference which is 1st November, 1989.

16. We now come to the facts of the case. The interest awarded is from 17th February, 1988 at the rate of 12.5% per annum on the sum of Rs. 6,50,000/-. As noted in the case of U. P. Co-operative Federation Ltd. (supra) this Court recognised that the current rate of interest for the period 1987-1989 on public deposits was Rs. 10%. The Arbitrator, therefore, could not have awarded interest of more than 10%. The awarding of interest, therefore, at the rate of 12.5% will have to be set aside and substituted by 10%. In the light of that the Award stands modified as set out below. In passing through not in issue here compound interest for the pre-reference period is barred by Section 3(3)(c). Similarly pendente lite or after the award of after decree can only award simple interest unless there is a statutory provision for payment of compound interest.

The sum of Rs. 6,50,000/- will carry interest at 10% per annum for the pre-reference period from 17th February, 1988 till 1st November, 1989. Similarly from 2nd November, 1989 to 26th February, 1999 at 10% p.a. and at the same rate on the principal amount till the date of decree. The amounts both principal and interest to be paid in the hands of Mr. S.R. Nusrath, Constituted Attorney of the respondent.

In the light of that petition made partly absolute in the terms of aforestated. Considering the above, the Award to be made a decree of the Court which will carry interest at 10% per annum on the principal amount till payment.

P. A. to give ordinary copy of this order to the parties.