Himachal Pradesh State Electricity ... vs R.J. Shah And Company on 15 April, 1999

Equivalent citations: AIRONLINE 1999 SC 78, (1999) 2 SCALE 570, (1999) 2 SCJ 237, (1999) 4 ANDH LD 68, (1999) 2 ARBI LR 316, (1999) 3 REC CIV R 81, (1999) 3 MAD LW 14, (1999) 3 MAD LJ 53, (1999) 2 CUR CC 52, 1999 (4) SCC 214, (1999) 3 JT 151, (1999) 4 SUPREME 161, 1999 ADSC 5 110, 1999 ALL CJ 2 1389, (1999) 3 JT 151 (SC)

Bench: B.N. Kirpal, D.P. Mohapatra

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           CASE NO.:
Appeal (civil)  712 of 1986

PETITIONER:
HIMACHAL PRADESH STATE ELECTRICITY BOARD

RESPONDENT:
R.J. SHAH AND COMPANY

DATE OF JUDGMENT: 15/04/1999

BENCH:
B.N. KIRPAL & D.P. MOHAPATRA

JUDGMENT:
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JUDGMENT 1999 (2) SCR 643 The Judgment of the Court was delivered by KIRPAL, J. Having failed before the High Court in getting the non-speaking award of the arbitrators set aside the appellant has filed the present appeal by special leave with the expectation that it will be successful in its aforsesaid endeavour.

With regard to the construction of Giri Hydel Electirc Project, in the State of Himachal Pradesh, item rate tenders were invited for certain works connected with the said project. On 2nd December, 1967 respondent's tender was accepted and it was given an order to commence work.

The formal contract between the parties for the execution of the said work was entered into on 2nd February, 1968. The said contract was awarded to the respondent for a sum of Rs.5,04,15,107 and terms and conditions, which were binding on the parties, were incorporated in the aforesaid contract. Even though the work was stipulated to be completed within three years, i.e., by 16th December, 1970, the same was, however, completed on 26th February, 1978.

The claim of the respondent, which gave rise to the arbitration proceedings with which we are concerned, was made in its letter dated 30th April, 1974 when it informed the Superintending Engineer that work in excess of Rs.540 lacs had been undertaken which was about Rs.36 lacs in

excess of the contract value. According to the respondent as the total work as provided in the contract had increased beyond the deviation limit of 20 per cent it was entitled to revision of rates in respect of the works which it had carried out beyond this deviation limit. According to the respondent the contract envisaged rates for extra itmes as consisting of two categories;

(a) item not included in the original tender; and (b) quantities in excess of the deviation limit for items included in the tender. For these items the rates had to be fixed by mutual agreement between the parties failing which they were to be fixed by reference to arbitration. According to the claimant it was entitled to revision of rates as the contract value had exceeded by 20 per cent and the claim was based on its interpretation of Clause 3.2(e) of the contract.

The aforesaid claim was refuted by the Superintending Engineer vide his letter dated 6th June, 1974 wherein he informed the respondent that as per Clause 12 of the contract the deviation limit of 20 per cent was applicable to individual items only and not to the total value of the contract. The Superintending Engineer further informed the respondent that its claim was untenable and that the rates based on Clause 12A were being paid for certain items which had crossed the deviation limit.

The essence of the dispute which had thus arisen between the parties was as to whether the revised rates based on market rates would be payable to the respondent when the total value of the work exceeded the deviation limit,i.e., the total contract value plus 20 per cent, as was contended by the repondent herein, or whether the revised rates/market raies would be payable against each item as and when the work performed against any item exceeded the deviation limit of 20 per cent, which is the case of the appellant herein. As agreement between the parties with regard to the aforesaid dispute could not be arrived at reference was made to arbitration in June, 1975.

Vide its letter dated 24th April, 1975 the respondent had written to the Chief Engineer of the appellant submitting a list of disputes for arbitration.

After the reference was made the respondent filed its claim before the arbitrators and wrote a letter dated 4th June, 1975 to them in which it was, inter alia, stated that aforesaid letter of 24th April, 1975 contained the items under disputes which were being referred to arbitration. Copy of the letter dated 24th April, 1975 was annexed to the letter dated 4th June, 1975 addressed to the arbitrators.

After the arbitrators entered upon the referene they considered the following items of dispute :

> "Dispute No. 1. Revision of rates for the different items of works and the time from which they should be applicable.
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> Dispute No. 2. The qunatities payable at the deviated rates, where quantities of individual items of work exceed the deviation limit.
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> Dispute No. 3. The items of work to be classified under foundation items and the deviation limits in case of items grouped together with foundation items.

> Dispute No. 4. The quantities to be considered for the purpose of deviation limit where original item of work is executed along with allied items of work for which rate is decided from tender schedules.
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> Dispute No. 5. The rates payable for the following items of work at different periods of time during the execution of the works.
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> (0 Structural steel work item No.6 of the schedule 5.2 of the contract.
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> (ii) Providing RCC 2500 p.s.i. in walls and cut offs-Item No.9 of Schedule 5.1 of the contract.
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> (iii) Providing RCC 2500 p.s.i. in wall and cut-offs-Item No.9 of Schedule 5.1 of the contract Dispute No. 6. The rate for excavation of the Tunlog Access Tunnel considering the revision of the rates for the excavation of the main tunnel. Dispute No, 7. Reimbursement of extra electrical charges recovered by the Respondents due to change in rates for electricity supply."

It would be appropriate at his stage to set out the clauses of the contract which were relied upon by the parties before the arbitrators in support of their rival contentions. As far as the respondent is concerned its claim for escalation, when the total value of the work exceeded 20 per cent of the total value was based on Clause 3.2 (e)(ii) which reads as follows :

> "Clause 3.2 (e)(ii) : Should this tender be accepted in whole or part, I/we hereby agree to (i)..... (ii) to execute all works refered to in the tender documents upon the terms and conditions contained or referred to therein and to carry out such deviations as may be ordered upto a maximum of 20 per cent, at the rates to be determined in accordacne with provisions contained in Clause 12A of the tender form.
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> `Works' has been defined under the Contract as "shall unless something either in the subject or context repugnant to such construction be construed and taken to mean the works by or by virtue of the contract contracted to be executed whether temporary or prmanent and whether original, altered, substituted or additional."

The contention of the appellant herein before the arbitrators was that the contract was an item rate contract but it is only in respect of those items that revise market rates are to be paid which crossed the deviation limit. The rate of work in excess of deviation limit, according to the appellant herein, was required to be determined only in accordance with the provisions contained in Clause 12A which reads as follows :

> Clause 12A : In the case of contract or substituted items which individually exceed the quantity stipulated in the contract by more than the deviation limit, excpt the items relating to foundation work, which the contractor is required to do under Clause 12

above, the contractor shall, within 7 days from the receipt of order, claim revision of the rates supported by proper analysis in respect of such items for quantities in execess of the deviation limit, notwithstanding the fact that the rates for such items exist. In the tender for the main work or can be derived in accordance with the provisions of sub-clause (ii) of Clause 12, and the Engineer-in-Charge may revise their rates, having regard to the prevailing .market rates and the contractor shall be paid in accordance with the rates so fixed. The Engineer-in-Charge shall, however, be at liberty to cancel his order to carry out such increased quantities or work by giving notice in witting to the contractor and arrange to carry it out in such manner as he may consider advisable. But, under no circumstances the contractor shall suspend the work on the plea of non-settlement of rates of items falling under this clause.

All the provisions of the preceding paragraph shall equally apply to the decrease in the rates of items for quantities in excess of the deviation limit, notwithstanding the fact that the rates for such items exist in the tender for the main work or can be derived in accordance with the provisions of sub-clause (ii) of the preceding Clasue 12 and the Engineer- in-Charge may revise such rates having regard to the prevailing market rates."

On 20th November, 1976 the arbitrators gave their award. Disputes no. 1,2 and 4 were dealt with together and the arbitrators, without assigning any reason, directed the appellant board to pay to the respondent a sum of Rs.47 lacs from the date of the deviation upto to 30th June, 1975, in addition to the payment already made. For the work done after 30th June, 1975, the appellant board was required to pay to the respondent for the items at the rate stated in the award. There were 22 items which wre listed for which the enhanced rate was to be given, though the respondent had made a claim in respect of 108 items. In respect of dispute No.7 the appellant herein was held to be entitled to recover only the variations in the electricity duty and not the variations in the tariffs effected after 1.3.1974. It is not necessary to refer to the award with regard to other items of dispute as the main challenge before us was with regard to the arbitrators decision relating to disputes 1,2 and 4.

When the award was filed in the Himachal Pradesh High Court the appellant herein filed its objections. After the pleadings were completed the following issues were framed :

"1. Whether the award is incomplete/O.P Objector.

2. Whether the award is in excess of the jurisdiction ? If so, what is its effect ? OP Objector.

3. Whether the award is otherwise also invalid and liable to be set aside ? OP Objector.

4. Whether the award sufferes from legal misconduct on the part of the arbitration ? If so, what is its effect. OP Objector. The contractor thereafter filed an application (B.N.P.No.35 of 1978) with a prayer that an additional issue be framed with the result that the following issue was framed on 24.4.1978 :

Whether or not the objection petition of the respondent is legally maintainable ? OP Parties"

The patties prodcued their evidence on the various issues and finally the learned single judge (C.R. Thakur, J.) vide his judgment dated 5.4.1979 held that except of the award pertaining to dispute No.7 the rest of the award did not suffer from any error apparent on the record.

The appellant then filed an appeal before the Division Bench which by its judgment dated 4th March, 1985 upheld the decision of the single judge. Hence this appeal.

On behalf of the appellant two main contentions had been urged by Sh. Maninder Singh. He submitted that on the correct interpretation of the contract and of Clause 12A in particular the arbitrators had no jurisdiction to revise the rates of any item merely becuse the overall value of the contract which was executed had been exceeded by 20 per cent. The submission was that the contract permitted increase only if there was a deviation in individual items by more than 20 per cent and no increase was permitted if there was an overall increase of 20 per cent without there being increase in individual items. He contended that even in the case of a non-speaking award as the arbitrators had exceeded their jurisdiction, the award was liable to be set aside. He further submitted that no claim had been made before the arbitrators for the award of interest and, therefore, award of interest by the arbitrators could also not be sustained.

Sh. Atul Chitale, learned counsel for the respondent, however, submitted that the claim of the respondent for revised rates was based on the interpretation of the contract and this point was specifically referred to the arbitrators and, therefore, the award of the arbitrators was final and binding and could not be set aside. He further submitted that implied term of the reference was that the arbitrators could award interest.

In support of his contention that the non-reasoned award was in excess of the authority given to the arbitrators by the express provisions of the contract and, therefore, the award was without jurisdiction and was liable to be set aside, Sh. Maninder Singh, learned counsel for the appellants, placed strong reliance on the judgments of this Court, namely, Associated Engineering Co. v. Government of Andhra Pradesh and Anr., [1991] 4 SCC 93 and New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corporation, [1997] 11 SCC 775. As we shall presently see these decisions are clearly distinguishable and do not help the appellant.

Mustill and Boyd in their book `Commercial Arbitration' Second Edition at page 554 have stated that "it is not always easy to distinguish between instances where there is a want of jurisdiction, and those where there is error of law or fact." This Court has, over the years, had occasions to deal with the cases of awards where there was want of jurisditction in contra distinction to the cases where

there was an error in exercise of jurisdiction. Series of decisions by differnent Benches of this Court have held that the award is liable to be set aside if there is error of jurisdiction but not if the error is committed in exercise of jurisdiction. We shall first refer to some of the decisions on this point given by different Division Benches consisting of two Judges before referring to decisions of larger benches.

In Tarapore and Company v. Cochin Shipyard Ltd., Cochin and Anr., [1984] 2 SCC 680 there is an elaborate discussion on the question as to when an award can be set aside referring to all the decisions on the point till then it was observed at page 718 that "the discussion leads to the inescapable conclusion that a specific question of law touching the jurisdiction of the arbitrator was specifically referred to the arbitrator and therefore the arbitrator's decision is binding on the parties and the award cannot be set aside on the sole ground that there was an error of law apparent on the face of the award." In U.P. Hotels and Ors. v. U.P. State Electricity Board, [1989] 1 SCC 359 it was observed as follows :

> "If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact the the decision is erroneous does not make the award bad on its face so as to permit it being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the fact of the award that the arbitrator has proceeded illegally, as for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award." Referrring to the aforesaid decision in Tarapore and Company's case itwas observed at page 371 in U.P. Hotels' case as follows :
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> "If a question of a law is specifically referred and it becomes evident that the parties desired to have a decision on the specific question from the arbitrator rather than one from the court, then the court will not interfere with the award of the arbitrator on the gorund that there was an error of law apparent on the face of the award even if the view of law taken by the the arbitrator did not accord with the view of the court. A long line of decisions was relied upon by this Court for that proposition."

On the facts of that case it was held that "a question of law arose certainly during the course of the proceedings. Such a question has been decided by the Umpire on a view which is a possible one to take. Even if there was no specific reference of a question of law referred to the Umpire, there was a question of law involved. Even on the assumption that such a view is not right, the award is not amenable to interference or correction by the courts of law as there is no proposition of law which could be said to be the basis of the award of the Umpire, and which is erroneous." In P. V. Subba Naidu and Ors. v. Government of A.P. Ors., [1998] 9 SCC 407, this Court was dealing with a case where the High Court had set aside a non-speaking award after construing the terms of the contract between the parties. While allowing the appeal this Court held that the High Court was not right in examining and interpreting the contract to see whether the claim was sustainable under the terms of

the contract.

The reading of the decision cited above shows that the principle followed was that by purporting to construe the contract the court could not take upon itself the burden of saying that the award was contrary to the contract and a such the arbitrators had acted beyond their jurisdiction.

The distinction between an error within the jurisdiction of the arbitrators and an error in excess of the jurisdiction of the arbitrator has been succinctly brought out in the decision of this Court in Sudersan Trading Company v. Government of Kerala, [1989] 2 SCC 38, where this Court held at page 56 as follows :

> "In Halsbury's Laws of England II. 4th Edn. Vol. 2 para 622 one of the misconducts enumerated, is the decision by the arbitrator on a matter which is not included in the agreement or reference. But in such a case one has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction.....Whether a particular amount was liable to be paid or damages liable to be sustained, was a decision within the competency of the arbitrator in this case. By purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. It has to be determined that there is a distinction btetween disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised.....
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> At page 57 in para 32 it is held ".....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."

Decisions of larger Benches of this Court have also taken a similar view. In Jivarajbhai Ujamshi Sheth and Ors. v. Chintamanrao Balaji and Ors., [1964] 5 SCR 480 at page 494 it was held that "The Court in dealing with an application to set aside an award has not to consider whether the view of the arbitrator on the evidence is justified. The arbitrator's adjudication is generally considered binding between the parties, for he is a tribunal selected by the parties and the power of the Court to set aside the award is restricted to cases set out in S.30. It is not open to the Court to speculated, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. On the assumption that the arbitrator must have arrived at his conclusion by a certian process of reasoning, the Court cannot proceed to determine whether the conclusion is right or wrong. It is not open the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclose by the terms of his award." In M/s Kapoor Nilokheri Co-op. Dairy Farm Society Ltd. v. Union of India and Ors., [1973] 1 SCC 708 at page 713 in paragraph 12 the Court held : "Mr. Nariman, the Additional Solicitor General appearing on behalf of the respondents also contended that the appellants having specifically stated that their claims are based on the agreement and on nothing else and all that the Arbitrator had to decide was as to the effect of the agreement, the Arbitrator had really to decide a question of law, i.e., of interpreting the document, the agreement of May 6,1953 and his decision is not open to challenge. We agree with

him : see the decisions in Durga Prasad v. Sewkishendas and Ghulam Filani v. Muhammad Hussain." In Hindustan Construction Co. Ltd. v. State of Jammu and Kashimr, [1992] 4 SCC 217 after referring to the Privy Council decision in the case of Champsey Bhara and Co. v. Jivaraj Balloo Spinning and Weaving Co. Ltd., AIR (1923) PC 66, this Court at page 222 in para 8 observed as follows :

> "The present case is precisely one of the same type as the one before the Judicial Committee. The arbitrators have just awarded amounts to the contractor, against its claims, on Item Nos. 2 and 5. They make no reference to the contract or any of its clauses. Yet the State contends that since these are items covered by certain terms of the contract, the Court should look at those terms and interpret them, if this done, it is said, the State's interpretation is bound to be accepted and that apparently accepted by the arbitrators will be found to be wrong. It is this contention that has been accepted. This cannot be done. Even if, in fact, the arbitrators had interpreted the relevant clauses of the contract in making their award on the impugned items and even if the interpretation is erroneous, the Cpurt cannot touch the award as it is within the jurisdiction of the arbitrators to interpet the contract. Whether the interpretation is right or wrong, the parties will be bound; only if they set out their line of interpretation in the award and that is found eroneous can the Court interfere." (emphasis added) A Two Judge Bench of this Court in K.R. Raveendranathan v. State of Kerala and Anr., [1996] 10 SCC 35 observed that on the question that whether the arbitrator had exceeded its jurisdiction, there appered to be a conflict between the decision of Sudersan Trading Company's case (supra) Associated Engineering Company's case (supra). By this order the case was referred to a larger bench. On reference a Division Bench of Three Judges in K.R. Raveendranathan's case, [1998] 9 SCC 410 held as follows :
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> "The learned counsel for the appellant points out that the question in issued in the present appeals is squarely covered by the decision of this Court in Hindustan Construction Co. Ltd. v. State of J & K. In particular, it drew our attention to para 10 of the judgment and the portion extracted from the decision in Sudarsan Trading Co. case , wherein it was said that by purporting to construe the contract the Court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiciton. That is exactly what the Court has done in the instant case. Therefore, the issue stands covered by this decision and the learned counsel for the respondents could not in the face of this decision argue otherwise." From the aforesaid decision of this Court, and the last one in particular, it is clear that when the arbitrator is required to construe a contract then merely because another view may be possible the court would not be jusitified in construing the contract in a different manner and then to set aside the award by observing that the arbitrator has exceeded the jurisdiction in making the award.
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> In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before

an arbitrator. If the answer is in the afirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim. On the other hand is the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiciton. In order to find whether the arbitrator has acted in excess of jurisdiction the Court may have to look into some documents including the contract as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings.

In this case the arbitration clause is widely worded. The dispute which was referred to the arbitrators, inter alia, related to the construction of the contract. The contract did visualise the contractor raising a claim for revision of rates. The dispute was as to when such a claim could be raised. According to the appellant herein this being an item rate contract the revision of rates could take place only in accordance with Clause 12A when there was a deviation of more than 20 per cent with regard to individual items. On the other hand the terms of contract, according to the claimant, permitted a claim being made of revision in rates if there was an increase of 20 per cent of the total value of the contract. The dispute before the arbitrators, therefore, clearly related to the interpretation of the terms of the contract. The said contract was being read by the parties differenly. The arbitrators were.therefore, clearly called upon to construe or interpret the terms of the contract. The decision thereon, even if it be erroneous, cannot be said to be without jurisdiction. It cannot be said that the award showed that there was an error of jurisdiction even though there may have been an error in the exercise of jurisdiciton by the arbitrators.

The decision in Associated Engineering Co. case relied upon by Sh. Maninder Singh does not in any way persuade us to take a view different than the view arrived at by the High Court. At page 103 Thommen, J. speaking for the Court observed as follows :

"The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interefered with unless he has given reasons for the award disclosing an error apparent on the face of it."

Applying the ratio to the present case it is not possible to say that the arbitrator in the present case travelled outside the bounds of the contract. Correspondence exchanged between the parties prior to the making of the reference shows that the arbitrators were called upon to construe the contract in

order to determine whether the contractor was entitle to claim revision of rates and if so what should be the revised rates. The construction placed on the contract by the contractor cannot be said to an implausible one. Even if the arbitrators construed the terms of the contract incorrectly it cannot be said that the award was in excess of their jurisdiction. Their jurisdiction clearly was to construe the terms of the contract and their decision thereon is final and binding on the parties.

New India Civil Erectors (P) Ltd., (supra) was a case relating to challenge to the non-speaking award. One of the disputes between the parties was with respect to the mode/method of measuring the constructed area. The term with regard to the mode of measurement clearly stated that the rate which was quoted excluded the balcony areas. It was not disputed that the plan of flats attached to the tender notice provided for balcony to be constructed. The claim of the appellant therein was that because balconies were in fact not constructed but were included in the constructed area, therefore, they were entitled to be paid in respect thereof. The high Court set aside the award of the arbitrators. While upholding the decision the Court observed that the arbitrators had over-stepped their award by including the area of balcony in the measurement of the built up area. The term of the contract clearly stipulated that in the total builtup area of the floor the balconies are to be excluded and not to be taken into account. The contractor, therefore, could not raise any claim in respect of this area. The contract prohibited payment in respect of the balconies as shown in the sanctioned plan. Merely because the balconies were enclosed did not permit any payment being made in respect thereof. It was in view of these facts that this Court held that the arbitrators had acted on the excess of their jurisdiction because the award was contrary to the term relating to the mode of measurement and in the interpretation of which term there was no dispute. In other words, construction of the contract was not in issue in the arbitration proceedings in that case. The interpretation of the term of contract did not arise in that case. The contract prohibited payment in respect of balconies but the award of the arbitrator had awarded an amount in respect thereof. Therefore, this was in excess of jurisdiction.

In our opinion the High Court was right in not setting aside the award relating to the decision of the arbitrators in respect of dispute No. 1,2 and 4 in the present case.

It was then submitted by Sh. Maninder Singh that the arbitrators had awarded a sum of Rs. 3,99,800 as interest with effect from 22nd December, 1976 till the date of payment as per the award. This interest, he submitted, could not be awarded. In view of the decision of this Court in Secretary, Irrigation Department, Government of Orissa and Ors. v. G.C. Roy, [1992] 1 SCC 508 and State of Orissa and Ors. v. B.N. Agarwalla, [1997] 2 SCC 469 we do not see any merit in this contention.

For the aforesaid reasons this appeal is dismissd. The parties shall, however, bear their own costs.