Supreme Court of India
Food Corporation Of India vs Surendra, Devendra & Mohendra ... on 10 December, 1987
Equivalent citations: 1988 AIR 734, 1988 SCR (2) 327
Author: S Mukharji
Bench: Mukharji, Sabyasachi (J)

PETITIONER:
FOOD CORPORATION OF INDIA

Vs.

RESPONDENT:
SURENDRA, DEVENDRA & MOHENDRA TRANSPORT CO.

DATE OF JUDGMENT10/12/1987

BENCH:
MUKHARJI, SABYASACHI (J)
BENCH:
MUKHARJI, SABYASACHI (J)
RANGNATHAN, S.

CITATION:
1988 AIR 734 1988 SCR (2) 327
1988 SCC (1) 547 JT 1988 (1) 57
1988 SCALE (1)21
CITATOR INFO :
R 1990 SC1340 (14,16,17)

ACT:
Arbitration Act, 1940 Challenge to award of the arbitration under section 30, 33-of.

HEADNOTE:
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The respondent was appointed a transport and handling Contractor by the appellant subject to the terms and conditions mentioned in three successive written agreements entered into by both the parties. After disputes arose between the parties, an arbitrator was appointed as per the arbitration clause to adjudicate upon the disputes. The arbitrator made and published an award which was a speaking one. He did not allow the appellant's claim for demurrage and wharfage charges paid to the Railways amounting to Rs.15,63,863.02 by reason of the alleged wrongful conduct of the respondent but awarded only 25% of the claim. The arbitrator also did not allow the appellant's claim for shortage in transit but reduced the claim by 40% and allowed only 60% of it amounting to Rs.52,971.99. The arbitrator awarded to the respondent Rs.12,64,175.97 and pendente lite

interest at 6% per annum.

The appellant filed objections in the High Court under sections 30 and 33 of the Arbitration Act, 1940 ('The Act') for setting aside the award. The High Court (Single Judge) set aside the award. The respondent filed an appeal to the Division Bench of the High Court which allowed the same, setting aside the judgment of the learned single judge and upholding the award. Being aggrieved by the decision of the High Court, the appellant appealed to This Court for relief by special leave under Article 136 of the Constitution.

Disposing of the appeal, this Court,

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HELD: While issuing notice on the application under Article 136 of the Constitution, it was indicated that only three questions would be adjudicated upon in this appeal, viz, Rs.13,94,982.46 being the amount allowed on account of demurrage and wharfage charges mentioned in the award, secondly, the sum of Rs.2,35,769.46 and lastly, the question of interest. [332G]

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So far as the second question was concerned, counsel for the appellant did not make any submission before the Court. The Court also could not find any substance in this aspect. Therefore, it was not necessary to deal with this aspect of the matter. [332H; 333A]

So far as the amount of Rs.13,94,982.46 on account of demurrage and wharfage was concerned, which was allowed, it appeared that the total demurrage and wharfage charges paid by the Corporation to the Railways in respect of the wagons cleared by the claimant firm, respondent herein, after obtaining such waiver as the Railways were persuaded to make were Rs.15,63,863.21. There was no dispute about the actual payment of the charges. The appellant's case was that it was entitled to recover the entire amount it had to pay on account of the demurrage and wharfage charges from the respondent under clause 9(a) of the agreement. [333B-C]

Under clause 9(a) according to the appellant, the Agent was liable to make good any compensation/demurrage/wharfage as per Railway rates in force during the period of contract and other charges or expenses that might be incurred by the Corporation on account of delay in loading/unloading of trucks/carts and unloading/loading of wagons unless the delay was for reasons beyond the Agent's control. It appeared that the appellant had periodically served notices upon the respondent of firm calling upon it to pay demurrage and wharfage charges with liberty prefer objections. Such objections as the respondent-firm preferred were disposed of by the District Manager. This procedure continued till the end of November, 1975. Then the respondent-firm went to the Civil Court and obtained discontinuance of all proceedings for the recovery of demurrage and wharfage charges. The arbitrator noted that as a result of the hearings by the Corporation upto November, 1975, relief to the tune of

Rs.1,21,884.55 was granted to the respondent-firm and the recovery of Rs.45,996.20 was made from the respondent-firm's bills. The Corporation, therefore, claimed before the arbitrator recovery of the remaining or the claim of Rs.13,94,982.46. Counsel for the appellant drew this Court's attention to clauses 9(a) and (b) of the agreement and submitted that the adjudication made by the Manager was final and there was no dispute thereafter. According to him, no further deduction was possible from what had been granted by the Manager for determination on account of demurrage and wharfage charges, nor was it arbitrable because it was final. [334B-E]

It appears on the facts as recorded by the arbitrator in his award that there was adjudication really by the Manager of the claims upto
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November, 1975. Thereafter, there could be no adjudication as a result of injunction obtained from the Court. Therefore, it appeared that there was in fact no adjudication of all the disputes. The remaining points were arbitrable because of the amplitude of the arbitration clause. It was not brought to the notice of the Court that there was an adjudication by the Manager of the claim for the period beyond November, 1975, as mentioned hereinbefore. Therefore, the arbitrator was not in error in proceeding in the manner he did. There was no other aspect of law on this aspect of the matter to which the attention of the Court was drawn. The submission on this aspect was, therefore, negatived and the challenge to the award on this aspect must fail. [337C-D; 338B]

So far as the grant of interest pendente lite in the award was concerned, reliance was placed on various decisions of this Court. In deference to the latest pronouncement of this Court, which is a pronouncement of three learned Judges, in Executive Engineer Irrigation Galimala & Ors. v. Abaadute Jena, (J.T. 1987 4 S.C. 8), the Court held that the grant of pendente lite interest in this case was was not justified. Though the award in this case was a speaking award, it was not made clear on what basis the interest was awarded. The arbitrator was in error in granting the interest in the manner he did . It was true that in specific terms there was no denial on this right to grant interest, but there was denial as to get it in accordance with law.[338C-D; 340E-F]

In awarding the interest the arbitrator committed an error of law. With this modification, the judgment and order of the High Court were affirmed. [340F-G]

Wadsworth v. Smith, L.R. Vol. VI Q.B. 332; State of Orissa and others, v. Construction India, J.T. [1987] 4 S.C. 588; Executive Engineer Irrigation Galimala & Ors. v. Abaaduta Jena, J.T. 1987 4 S.C. 8, Firm Madan lal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore, [1987] 1 S.C.R. 105; State of Madhya Pradesh v. M/s. Saith & Skelton (P)

Ltd., [1972] 3 S.C.R. 233; M/s. Ashok Construction Company v. Union of India, [1971] 3 S.C.C. 66 and M/s. Alopi Parshad JUDGMENT:

referred to.

& CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4096 of 1987.

From the Judgment and order dated 2.6.1987 of the Calcutta High Court in Appeal NQ. 344 of 1980.

A.K. Sen, S.k. Gambhir and Vivek Gambhir for the Appellant.

Dr. Shankar Ghosh and Rathin Das for the Respondent. The Judgment of the Court was delivered by SABYASACHI MUKHARJI, J. Special leave granted. The respondent was appointed a transport and handling contractor by the appellant subject to the terms and conditions mentioned in three successive agreements in writing entered into by both the parties. After disputes arose between the parties, as per the terrns of arbitration clause an arbitrator was appointed to adjudicate upon the disputes. Both the respondent and the appellant filed their respective claims and counter-claims before the arbitrator. After considering the documents and evidence filed before the arbitrator, he made and published an award which was a speaking one. The arbitrator did not allow the appellant's claim for demurrage and wharfage charges paid to Railways amounting to Rs.15,63,863.02 by reason of the alleged wrongful conduct of respondent but the arbitrator awarded only 55% of the claim. The arbitrator also did not allow the appellant's claim for shortage in transit but reduced the claim by 40% and allowed only 60% of it amounting to Rs.52,971.99. By the award the arbitrator awarded to the respondent Rs.12,64,175.97 and pendente lite interest at 6% per annum. The appellant filed objections in the High Court of Calcutta under sections 30 and 33 of the Arbitration Act, 1940 (hereinafter called 'the Act') for setting aside the award. On 18th September, 19.80, the learned single judge of the High Court by his judgment and order set aside the award. There was an appeal to the Division Bench of the High Court. On 2nd June, 1987 the Division Bench of the High Court allowed the respondent's appeal by its judgment and order and set aside the judgment of the learned single judge and upheld the award. Being aggrieved thereby the appellant has come up before this Court by special leave under Article 136 of the Constitution. While issuing notice on the application under Article 136 of the Constitution it was indicated that only three questions will be adjudicated upon in this appeal viz. Rs.13,94,982.46 which was the amount allowed on account of demurrage and wharfage charges mentioned in the award and secondly, the sum of Rs.2,35,769.46 and lastly on the question of interest.

So far as the second question of the matter is concerned Sree A.K. Sen, counsel appearing for the appellant has not made any sub mission before us. We also cannot find any substance in this aspect. Therefore, it is not necessary for us to deal with this aspect of the matter.

So far as the amount of Rs. 13,94,982.46 on account of demurrage and wharfage is concerned, which was allowed, the award dealt with the question as set out in the paper-book. It appears that the total demurrage and wharfage charges paid by the Corporation to the Railways, in respect of the wagons cleared by the claimant firm, respondent herein, after obtaining such waiver as the Railways were

persuaded to make was for Rs.15,63,863.21. The charges were alleged to have been paid under Credit Notes which were produced before the arbitrator. There was no dispute about the actual payment of the charges. The appellant's case was that it was entitled to recover the entire amount it had to pay on account of the demurrage and wharfage charges from the respondent under clause 9(a) of the agreement.

Clauses 9, 9(a) and 9(b) of the agreement are as follows:

> 9. The Agent shall commence to load and/or unload all the wagons and trucks as well as all streamers, flats, barges and boats or any other conveyance on the day of these arrival and shall carry out the orders and directions of the Manager with all possible despatch and shall be responsible for and make good all demurrage or other waiting charges and expenses that may accrue and all other charges that may in the opinion of the Manager be payable because of or through any reasonable detention or delay."
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> "9(a) The Agent shall be responsible for unloading/loading the wagons within the free period allowed by the Railways and also for loading/unloading for trucks/carts or any other transport vehicles expeditiously. The Agent shall be liable to make good any compensation/demurrage/wharfage as per Railway rules in force during the period of contract other charges or expenses that may be incurred by the Corporation on account of delay in loading/unloading of truck/carts and unloading/loading of Wagons unless the delay is for reason beyond the Agents' control. The decision of the manager in this respect shall be final and binding on the Agent."
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> "9(b) The Agent be present himself or send his duly authorised representative to be present at all weighments A with which the Agent is concerned under this Agreement and in case he fails or chooses not to do so, no claim what soever shall lie against the Corporation in this regard."

Under clause 9(a), according to the appellant, the Agent was liable to make good any compensation/demurrage/wharfage as per Railway rates in force during the period of contract, other charges or expenses that might be incurred by the Corporation on account of delay in loading/unloading of trucks/carts and unloading/loading or wagons unless the delay was for reasons beyond the Agent's control. It appears that the appellant and periodically served notices upon the respondent firm calling upon it to pay demurrage and wharfage charges with liberty to prefer objections. Such objections as the respondent-firm preferred were heard and disposed of by the District Manager. This procedure continued till the end of November, 1975. Then the respondent-firm went to the Civil Court and obtained discontinuance of all proceedings for recovery of demurrage and wharfage charges. The arbitrator noted that as a result of the hearings by the Corporation upto November, 1975 relief to the tune of Rs.1,21,884.55 was granted to the respondent-firm and recovery of Rs.46,996.20 was made from the respondent-firm's bills. The Corporation, therefore, claimed before the arbitrator recovery of remaining of the claim of Rs.13,94,982.46.

The respondent on the other hand claimed refund of the amount already deducted from the bills on the ground that it was not liable for any part of the demurrage and wharfage charges. The claim of the respondent was that the demurrage and wharfage charges accrued invariably in circumstances beyond its control and accordingly under clause 9(a) of the agreement it could not be made liable for such charges. The arbitrator noted that the respondent-firm had impressive documentary evidence in support of its case. It had produced numerous letters in which it fully explained to the authorities concerned the difficulties it was experiencing in timely clearance of goods from railway wagons and sheds. It was claimed that it had produced month-wise report of its work accounting for nearly all cases of demurrage and wharfage. On 9th of October, 1975 the respondent had informed the Corporation by a letter Exhibit 128 which inadvertently was not marked exhibit that it was resuming work (there had been a break in his contract) on the condition that it would not be required to clear more than 10 c.c. Or 4 box wagons, i.e. 200 m.t. approximately daily. This is a belated and rather grudging acceptance of this condition by the letter, Exhibit 44 dated 3rd of August, 1976.

The Arbitrator noted that from the letters and reports it appeared that timely clearance was hampered, and often made impossible by arrival of too many wagons at a time, congestion at the sidings and at the weighbridges with consequent detention of lorries, labour unrest and chronic want of space in the Corporation's godowns and by others. The arbitrator noted that there was insistent complaint about this want of space in the Corporation's godown, which led to the goods being left in railways sheds for days together incurring unusually heavy wharfage charges. The Corporation sometimes prepared over ambitious programmes of work for the contractors, as if unaware. Of the existing situation. The arbitrator noted that the appellant had examined several witnesses from the sidings. But they did not according to the Arbitrator, prove anything beyond the procedure of work generally adopted at the sidings. The arbitrator further noted about the foregoing explanations that the very often the objection of the railway shed staff to the claimant regarding not clearing of the wagons timely from the railway shed because of non-space there owing to heavy stock kept therein remaining uncleared, and further that the claimant under the direction and order of the respondent being given limited programme because of non- space in the receiving depots/ godowns were causes of delay. The arbitrator noted that it would be fair to make the claimant firm liable for only 25% of the demurrage and wharfage charges sought to be recovered by the Corporation, leaving the remaining 75% to be borne by the Corporation itself. Therefore, out of Rs.13,94,982.46 the Corporation, according to the arbitrator, could recover only Rs.3,48,745.61. The appellant felt aggrieved thereby and challenges this grant of 25%. So far as respondent's claim for refund of Rs.46.996.20 already recovered, the arbitrator felt that there was no ground for interference. The arbitrator noted that after hearing the claimant firm's objections the deductions had been made. The claimant firm had been granted relief in respect of Rs.1,21,884.55. The arbitrator had not been able to ascertain precisely the total claim of the appellant till the end of November, 1975 but he noted that the sum of Rs.46,996.20 represented not much more than 25% of the total claim. Therefore, the arbitrator noted that the claimant, namely, the respondent was not entitled to any refund and that the appellant could recover only Rs.3,48,745.61 on account of demurrage and wharfage charges. As mentioned hereinbefore that is the main contention in this challenge before this Court. The appellant claimed that it should have been entitled to the benefit of Rs.13,94,982.46 and not to 25% of the same.

Sree Sen, counsel for the appellant drew out attention to clauses 9(a) and (b) as set out hereinbefore and submitted that the respondent was only entitled to the amount as determined by the Manager which was described as final. Sree Sen submitted that according to clause 9(a) aforesaid the adjudication made by the manager was final and there was no dispute thereafter and therefore, there could be no determination beyond 25%. He drew our attention to that part of the 13 clause 9(a) to the following effect "the decision of the manager in this respect shall be final and binding on the Agent." So according to Sree Sen apart from what had been granted by the Manager for determination on account of demurrage and wharfage charges, no further deduction was possible nor was it arbitrable because it was final. He drew our attention to certain observation in Wadsworth v. Smith, L.R. Vol. . Vl Q.B. 332. There by a written agreement the plaintiff therein had agreed to build four houses on land of defendant and the defendant to grant plaintiff a lease when the houses were completed; the architects of the defendant for the time being were to certify as to the progress of the work, and if there should be any unnecessary delay or unsatisfactory conduct on the part of the plaintiff with regard to the erection of the buildings, on any matter or thing connected therewith "the fact of such delay or unsatisfactory conduct to be ascertained and decided in writing by the architects, against whose decision there shall be no appeal", then it should be lawful for defendant to employ other persons to execute the works, and to sell the buildings and lease the land to other persons. On an application to make the agreement a rule of court under section 17 of the Common Law Procedure Act, 1854 of England, it was held by Cockburn, C.J., Blackburn and Mellor, JJ. that assuming the agreement to be "an agreement or submission to arbitration" within the section, the clause that there was to be no appeal against the decision of the architects amounted to "words purporting that the parties intended that it should not be made a rule of court." The question was raised whether the agreement was not a submission to arbitration. Cockburn, C.J. Observed that this clause was certainly more like a submission to arbitration' it was on the confines of the two classes' but on the whole it seems to His Lordship to savour more of a mere architect's certificate than of a judicial proceeding. Moreover, even if this were a submission within section 17, the Chief Justice thought that it could not be made a rule of court, because it was clear that the parties intended that the matter should be left to the decision of the architects without appeal; but to make it a rule of court would be to submit the decision to the jurisdiction of the Court. Blackburn, J. agreed. His Lordship observed that where by an agreement the right of one of the parties to have or to do a particular thing was made to depend on the determination of a third person, that was not a submission to arbitration, nor was the determination an award; but where there was an agreement that any dispute about a particular thin shall be enquired into and determined by a person named, that might amount to a submission to arbitration, and the determination though in the form of a certificate, be an award. Hannen, J. was of the view that this is not an agreement or submission to arbitration; the clause in question appeared to be no more than an extension of the ordinary clause in building contracts, that the certificate of the architect should be conclusive as to work done and the mode of doing it.

If we proceed on this basis then the logical conclusion of this would be that where there is a decision by the manager as in the instant case that would be final. Where a dispute has been adjudicated by the manager in this aspect there was nothing for the arbitrator to decide. It appears to us on the facts as recorded by the arbitrator in his award that there was adjudication really by the Manager of the claims upto November, 1975. Thereafter there could be no adjudication as a result of injunction

obtained from the court. Therefore, it appears to us that there was really, in fact, no adjudication of all the disputes. The remaining points were arbitrable because of the amplitude of the arbitration clause. The relevant arbitration clause in this case contained, inter alia, as follows: .

> "In the event of any question or dispute arising under this Agreement regarding the construction thereof or any clause herein or in respect of any act, matter or thing relating to this agreement the same shall be referred to the Sole Arbitration of any person appointed by the Managing Director of the Food Corporation of India ..... The Award of such Arbitrator shall be final and binding on the parties to this Agreement ....."

The point there having been decision before the Manager, that disallowance of the claim beyond 25% was beyond the jurisdiction of arbitration was not agitated before the High Court. Prabir Kumar Majumdar, J. speaking for the Division Bench of the High Court of Calcutta observed at page 24 of the paper book as follows:

> "It has not been brought to our notice whether there has been any such decision by the Manager. Further, taking all the relevant materials into consideration, the learned arbitrator has made a finding in respect of the appellant's claim and respondent's counter-claim in respect of demur rage and wharfage charges."

It has not been brought to our notice that there has been any such decision by the Manager beyond the claim for the period of November, 1975 as mentioned hereinbefore. Therefore, in our opinion, the arbitrator was not in error in proceeding in the manner as he did. There was no other aspect of law on this aspect of the matter to which our attention was drawn. The submission on this aspect is, therefore, negatived. The challenge to the award on this aspect must, therefore, fail.

So far as the grant of interest pendente lite in the award is concerned, reliance was placed on various decisions of this Court. Reliance was placed on State of Orissa and others v. Construction India, (J.T. 1987 4 S.C. 588) where the award of interest from the commencement of the proceedings before the Arbitrator to the date of the award was disallowed in consonance with the views expressed by this Court in the case of Executive Engineer Irrigation Galimala & Ors. v. Abaaduta Jena,) J.T. 1987 4 S.C. 8).

Our attention was drawn by Dr. Ghosh counsel for the respondent firstly, to the decision in the case of Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore, [1967] 1 S.C.R. 105. There the respondent had filed a suit against the appellant claiming two sums as losses in respect of two items and interest on the same. The disputes were referred to an arbitrator, before whom the respondent did not press for interest prior to the institution of the suit, but pressed its claim for the two sums and interests from the date of the institution of the suit till recovery. Bachawat, J. speaking for the three learned Judges of this Court held that though in terms, section 34 of the Code of Civil Procedure did not apply to arbitrations, it was an implied term of the reference in the suit that the arbitrator would decide the dispute according to law and would give such relief with regard to pendente lite interest as the Court could give if it decided the dispute. This power of the

arbitrator, it was held, was not fettered either by the arbitration agreement or by the Arbitration Act, 1940.

Our attention was also drawn to the decision in the case of State of Madhya Pradesh v. M/s. Saith & Skelton (P) Ltd., [1972] 3 S.C.R. 233. There disputes had arisen between the appellant and the respondent with reference to the performance of a contract which provided for arbitration. Steps were taken to appoint arbitrators and an umpire.

The appellant filed a petition in the District Judge's Court, having jurisdiction over the matter for Setting aside the nominations. When the matter came up to this Court in appeal, this Court appointed a sole arbitrator with consent of the parties. Thereafter in the presence of counsel for both the parties, this Court gave directions in the appeal that the arbitration records be sent to the sole arbitrator and later extended the time for making the award and gave directions regarding the venue. The arbitrator gave his award, directing the payment of a certain sum by the appellant to the respondent with simple interest at 9% from the date anterior to the reference and filed the award in the Court the next day. One of the question that arose before this Court was whether the arbitrator had any jurisdiction to award the interest from a date anterior to the date of award or reference. This Court held that the claim for the payment of interest had been referred to the arbitrator. The contract did not provide that no interest was payable on the amount that might be found due. Therefore, the respondent was entitled under section 61(2) of the Sale of Goods Act, 1930, to claim interest from the date on which the price became due and payable. The arbitrator had found that the price had become payable from a date anterior to the date of the award. Therefore, the award of interest from the anterior date was justified. The Court further held that the award of interest at 9% was also not exorbitant because the parties themselves claimed interest at 12%.

Our attention was also drawn to M/s. Ashok Construction Company v. Union of lndia, [1971] 3 S.C.C. 66 where a bench of three learned Judges at page 68 of the report held that the terms of the arbitration agreement did not exclude the jurisdiction of the arbitrator to entertain a claim for interest, on the amount due under the contract and on this ground this Court upheld the grant of interest.

Our attention was drawn by Dr. Ghosh to the observations in the case of M/s. Alopi Parshad & Sons, Ltd. v. The Union of India, [1960] 2 S.C.R. 793. This Court reiterated the well-settled principle that an award was liable to be set aside because of an error apparent on the face of the award. An arbitration award may be set aside on the ground of an error on the face of it when the reasons given for the C, decision, either in the award or in any document incorporated with it, are based upon any legal proposition which is erroneous.

In a recent decision, Chinnappa Reddy, J. speaking for a bench of three learned Judges in Executive Engineer Irrigation Galimala's case (supra) at paragraph 15 of the judgment considered the ques- ll tion of award of interest by an arbitrator. The learned Judge noted the decisions in Firm Madanlal Roshanlal Mahajan v. Hukamchand Hills Ltd. (supra) Ashok Construction Company v. Union of India, (supra. and the State of Madhya Pradesh v. M/s. Saith & Skelton Private Limited, (supra) and expressed the view that these were cases in which the references to arbitration were made by the

court or in court proceedings of the disputes in the suit. It was held that the arbitrator must be assumed in these cases to have the same power to award interest as the court. Therefore, the grant of pendente lite interest on the analogy of section 34 of the Civil Procedure Code was permissible. In regard to interest prior to the suit, it was held in most of these cases that since the Interest Act, 1839 was not applicable, interest could be awarded if there was an agreement to pay interest or a usage of trade having the force of law. This Court held in the last mentioned case that they are not entitled to claim interest for the period prior to the commencement of the arbitration proceedings for the reason that the Interest Act did not apply to their case and there was no agreement to pay interest or any usage of trade. It was further held that the claimants were not entitled to claim pendente lite interest as the arbitrator was not a court nor were the references to arbitration made in suits.

In deference to the latest pronouncement of this Court which is a pronouncement of three learned Judges, we must hold that the grant of pendente lite interest in this case was not justified. Though the award in this case is a speaking award, it was not made clear on what basis the interest was awarded. We are of the opinion that the arbitrator was in error in granting the interest in the manner he did. It is true that in specific term there was no denial of this right to grant interest but there was denial as to get it in accordance with law.

In the aforesaid view of the matter so far as the interest of the award is concerned we are of the opinion that in awarding the interest the arbitrator committed an error of law. With this modification the judgment and order of the High Court are confirmed. The appeal is disposed of in these terms without any order as to costs.

S.L. Appeal disposed of.