

## POWER OF ARBITRAL TRIBUNAL TO AWARD INTEREST UNDER SECTION 31(7) OF ACT 1996

By

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### *Introduction:*

There is no provision in Article 31 of the UNCITRAL Model Law with regard to award of interest. But there exists a provision in the English Arbitration Act, 1996, which reads as:

### *Provision under English Arbitration Act, 1996*

“49 Interest:—(1) The parties are free to agree on the powers of the Tribunal as regards the award of interest.

(2) Unless otherwise agreed by the parties the following provisions apply.

(3) The Tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case—

(a) on the whole or part of any amount awarded by the Tribunal, in respect of any period upto the date of the award;

(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period upto the date of payment.

(4) The Tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under sub-section (3) and any award as to costs).

(5) References in this section to an amount awarded by the Tribunal include an amount payable in consequence of a declaratory award by the Tribunal.

(6) The above provisions do not affect any other power of the Tribunal to award interest”.

### *Provision under ‘The Arbitration Act 1940’:*

In India, Prior to the Arbitration and Conciliation Act 1996, there exists an enactment called ‘The Arbitration Act 1940. In that enactment, Section 29 dealt with the subject-matter of ‘Interest on award’ which reads as:

“29. Interest on awards:—Where and insofar as an award is for the payment of money the Court may in the decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree”.

### *Provision under ‘The Arbitration and Conciliation Act’ 1996:*

When the Arbitration Act 1940 was repealed by the present Arbitration and Conciliation Act 1996 and it contained a provision relating to the award of interest under Section 31(7) of the said Act 1996 which reads as:

“31(7) Form and contents of arbitral award.—

(7) (a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or

any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment”.

*Distinctive features of the English and Indian Act.*

From out these enactments as referred to above, The English Arbitration Act 1996 is moiré broad based than the provision contained in Section 31(7) of the Arbitration and Conciliation Act 1996 of India. The distinctive features of these two enactments are given below for ready reference.

The English Arbitration Act 1996

“49 Interest:

(1) The parties are free to agree on the powers of the Tribunal as regards the award of interest.

(2) Unless otherwise agreed by the parties the following provisions apply.

(3) The Tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case—

(a) on the whole or part of any amount awarded by the Tribunal, in respect of any period upto the date of the award;

(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period upto the date of payment.

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(5) References in this section to an amount awarded by the Tribunal include an amount payable in consequence of a declaratory award by the Tribunal.

(6) The above provisions do not affect any other power of the Tribunal to award interest”.

The Arbitration and Conciliation Act 1996 of India

“31(7) Form and contents of arbitral award.—

(7) (a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment”.

The broad features are:

The English Act gives discretion to the Arbitral Tribunal to award simple or compound interest to meet the ends of justice in a case. This discretionary power indicates that the rules of various arbitration institutions empower the Arbitral Tribunal to award compound interest.

*Section 49 of the English Arbitration Act 1996*

Section 49(6) of the English Arbitration Act 1996 specifically preserves any power of the Tribunal to award interest other than the statute. [(6) The above provisions do not affect any other power of the Tribunal to award interest]

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agree on the powers of the Tribunal as regards the award of interest.

(2) Unless otherwise agreed by the parties the following provisions apply.

(3) The Tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case—

- (a) on the whole or part of any amount awarded by the Tribunal, in respect of any period upto the date of the award;
- (b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period upto the date of payment.

(4) The Tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under sub-section (3) and any award as to costs).

(5) References in this section to an amount awarded by the Tribunal include an amount payable in consequence of a declaratory award by the Tribunal.

(6) The above provisions do not affect any other power of the Tribunal to award interest”.

In practice such ‘other’ power will most commonly arise where there is an express or implied contractual right to interest.

*Mustill and Boyd* (Mustill and Boyd: Commercial Arbitration, Second edition, 1989 at Page 393] identify some other situations which could give rise to some ‘other power’ to award interest. They are:

- (i) Interest as special damages;
- (ii) Interest recoverable as of right;

(iii) Equitable right of compound interest;

(iv) Right to simple interest on any claim for a sum in respect of which the arbitrator makes the award, if the claim is one which falls within the admiralty jurisdiction of the High Court but is referred to arbitration.

*Provisions mentioned in the Civil Procedure Code 1908*

Interest under Section 31(7) of Act 1996 can be awarded on the basis of Section 34 of the Civil Procedure Code 1908, which reads as:

“34. *Interest*—(1) Where and insofar as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent, per annum as the Court deems reasonable on such principal sum from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit:

Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent, per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

*Explanation I.*—In this sub-section, “nationalised bank” means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 (5 of 1970).

*Explanation II.*—For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

(2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie”.

Basing on the law developed by the Courts, on the interpretation and application of Section 29 of Arbitration Act 1940, Section 31(7) has been enacted, with regard to the power of the Arbitral Tribunal to award interest.

There are two significant aspects in Section 29 of Act 1940, that is to say (i) Power to award interest was not conferred on Arbitral Tribunal and (ii) the interest could be award only from the date of decree, and the words “——— the Court may in the decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree” supports the same. But this aspect is no more applicable in respect of arbitration matters that are dealt with under Act 1996.

Even though in many cases, the subject-matters has been considered {1955 (2) SCR 48, AIR 1960 SC 307, 1961 (3) SCR 676, 1964 (3) SCR 164, 1966 (1) SCR 580, AIR 1967 SC 1020, 1967 (1) SCR 324, (1971) 3 SCC 66, (1972) 1 SCC 702, (1979) 3 SCC 102, (1988) 1 SCC 418, (1989) 1 SCC 532, (1992) 4 SCC 217, (1993) 1 SCC 140, (1993) 1 SCC 114, (1997) 2 SCC 469, (1999) 9 SCC 514 and 2004 (2) ALR 33 (Del)}, finally in *Secretary, Irrigation Department, Government of Orissa v. G.C. Roy*, (1992) 1 SCC 508, the Constitution Bench of the Hon’ble Supreme Court of India set the matter at rest by pronouncing as:

“(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the

period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative form (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the Court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until *Jena* case almost all the Courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.”

In *M/s Jagdish Rai & Brothers v. Union of India*, AIR 1999 SC 1258 = 1999 (3) SCC 257 = 1999 (2) SCALE 141, the Hon’ble Supreme Court of India held as:

“There are four stages of grant of interest. Firstly, from the stage of accrual of cause of action till filing of the arbitration proceedings; secondly, during pendency of the proceedings before arbitrator; thirdly, future interest arising between date of award and date of the decree; and fourthly, interest arising from date of decree till realisation of award”.

In *Hindustan Construction Co. Ltd. v. State of Jammu and Kashmir*, 1992 (4) SCC 217, the Hon’ble Supreme Court of India held as:

“The arbitrator is competent to award interest from the date of the award.”

In *Secretary, Irrigation Department, Government of Orissa v. G.C. Roy*, 1992 (1) SCC 508, the Constitution Bench of the Hon’ble Supreme Court of India recognised the power of the arbitrator to grant interest pendente lite.

In *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. N.C. Budharaj*, 2001 (2) SCC 721, a Constitution Bench of the Hon’ble Supreme Court of India further stated as :

“An arbitrator can award interest for the pre-reference period as well.”

In *P.T. George v. State of Kerala*, 2001 (2) SCC 758 and *B.L. Gupta Construction (P) Ltd. v. Bharat Coop. Group Housing Society Ltd.*, 2004 (1) SCC 110, the Hon’ble Supreme Court of India observed as:

“The Arbitral Tribunal has the power to award interest in all the four stages.”

Having regard to sub-section (7) of Section 31 of the Act, the difference between pre-reference period and pendente lite period has disappeared insofar as award of interest by the arbitrator. The said section recognises only two periods and makes the following provisions: (a) In regard to the period between the date on which the cause of action arose and the date on which the award is made (pre-reference period plus pendente lite), the Arbitral Tribunal may award interest at such rate as it deems reasonable, for the whole or any part of the period, unless otherwise agreed by the parties. (b) For the period from the date of award to the date of payment the interest shall be 18% per annum if no specific order is made in regard to interest. The arbitrator may however award interest at a different rate for the period between the date of award and date of payment.

Thus, the four stages referred to above have now been codified in to two situations as mentioned in Section 31(7). They are:

(i) “—— the period between the date on which the cause of action arose and the date on which the award is made” and (pendente lite period)

(ii) “—— from the date of the award to the date of payment”.(post award period)

*Award of interest for the pre-reference period:*

In the absence of an agreement by the parties to the contrary, *i.e.*, unless otherwise agreed by the parties, Section 31(7) provides that, where and insofar as an arbitral award is for the payment of money, the Arbitral Tribunal may include, in the sum for which the award is made, interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made *i.e.*, pre-award *i.e.*, pendente lite period. The words ‘as it deems reasonable’ indicates discretion of the Arbitral Tribunal. Here the words ‘In

the absence of an agreement by the parties' acquires significance.

Right to agree what powers, if any, the Arbitral Tribunal shall have as regards the award of interest. In other words, the powers of the Tribunal are flexible and can be made greater or narrower, more by agreement of the parties. Section 31(7)(a) says that unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. So this clearly indicates that the Arbitral Tribunal can use its discretion in arriving at the rate of interest to be awarded under this sub-section. In this back ground, if we see the words 'unless otherwise agreed by the parties' it goes to show that the agreement by the parties otherwise, is only for not awarding interest only but not about the rate of interest that may be inserted in the agreement. That is to say the parties may agree in four ways, *viz.*, (i) the aggrieved party is not entitled to raise any claim towards interest, (ii) the employer shall not consider or allow any request of the aggrieved party for interest, (iii) the Arbitral Tribunal is debarred from awarding any interest to the aggrieved party' and (iv) clause indicating that no interest is payable to the aggrieved on any sum whatsoever. In the said circumstances, the question of considering any clause in the agreement specifying the rate of interest may not arise at all.

In the case of *Mc Dermott International Inc. v. Burn Standard Co. Ltd. and others*, 2006 (2) RAJ 661 (SC), the Hon'ble Supreme Court of India held as:

"Power of arbitrator to award interest for pre-award period, interest, pendente lite

and interest post-award is undisputed. Arbitrator has to exercise its discretion as regard; (i) at what rate interest should be awarded; (ii) whether interest should be awarded on whole or part of the award money; (iii) whether interest should be awarded for whole or any part of the pre-award period. Grant of interest by arbitrator at 10% on the principal amount. An interest thereon was upto the date of award as also the future interest at rate of 18% p.a. In view of some decisions of the Court under Article 142 to do complete Justice between the parties and long lapse of time in the present case, it will be furtherance of Justice to reduce the rate of interest to 7-1/2%. Award to be modified accordingly".

When it is held, as in this case, that the Arbitral Tribunal has to exercise its discretion as to what rate of interest should be awarded, the question of consideration of agreemental stipulation as to the rate of interest is deemed to have been *non est*.

As stated supra, as per Section 31(7), the four stages for awarding interest has now been reduced to only two stages, that is (i) from the date of cause of action upto the date of reference – one stage, and (ii) from the date of award till date of payment – second stage.

The Hon'ble Supreme Court judgments on the award of interest on these two stages are as follows:

(1) *Power to award interest from the date of cause of action to the date of reference:*

One of the clause in contract providing that no interest would be payable on disputed claim and that in which set of circumstances, interest amount would be paid in case of delay in payment of undisputed claim. In such case, the interest rate was also specified at 1% per month on such undisputed claim amount. Direction to pay interest on wrongful deductions at the rate

of 12% p.a. from 1.4.1997 till the date of filing of the statement of claim and thereafter having regard to the commercial nature of the transaction at the rate of 18% p.a. pendente lite till payment, improper. Clause 34.4 in terms provides that no interest would be payable on disputed claim. It also provides that in which set of circumstances, interest amount would be paid in case of delay in payment of undisputed claim. In such case, the interest rate is also specified at 1% per month on such undisputed claim amount. [*Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, AIR 2003 SC 2629 = 2003 (5) SCC 705 = 2003 (4) JT 171 = 2003 (4) Scale 92 = 2003 (3) Supreme 449 = 2003 (2) ALR 5 = 2003 (2) RAJ 1 (SC)]

Reduction of Rate of to do complete justice between the parties and long lapse of time. Grant of interest by arbitrator at 10% on the principal amount an interest thereon was upto the date of award as also the future interest at rate of 18% p.a. In view of some decisions of the Court under Article 142 to do complete justice between parties and long lapse of time in present case, it will be a furtherance of justice to reduce the rate of interest to 7-1/2%. Award to be modified accordingly. (ii) iscretionary power of arbitrator to award interest for pre-award period, interest pendente lite and interest post-award is undisputed. Arbitrator has to exercise its discretion as regard. (i) at what rate interest should be awarded. (ii) Whether interest should be awarded on whole or part of the award money. (iii) Whether interest should be awarded for whole or any part of the pre-award period. [*Mcdermott International Inc. v. Burn Standard Co. Ltd.*, 2006 (2) RAJ 661 = 2006 (6) SCALE 220 = 2006 (5) Supreme 662 = 2006 (4) SCJ 660 = 2006 (6) SCJD 600 = 2006 (2) ALR 498 (SC)]

Contract for building of Cogeneration Captive Power Plant between Numaligarh Refinery Ltd. (NRL) and Daelim Industrial Company Ltd. (DIC). DIC claimed Rs.6.5

crores as interest on borrowing of funds. Since there was delay on part of NRL, DIC had to pay interest on funds borrowed. Majority arbitrators rightly awarded Rs.0.2 crores. Same being a pure question of fact, no interference warranted. Since in view of the Court's finding on the issue of delay in liquidity damages the Court is of the opinion that the view taken by the majority of arbitrators is correct as there was delay on the part of the owner NRL and therefore, DIC had to pay interest on the delayed sum. Therefore, the view take by the majority of the arbitrators cannot be said to be wrong as it is a pure question of fact and therefore, the Court is of the opinion that the grant of Rs.0.2 crores towards interest on delayed amount has been rightly held by the majority of the arbitrators and affirmed by the High Court. Majority of arbitrators granted pendente lite interest 12% and post pendente lite 18% p.a. Grant of interest being the discretion of arbitrators, no interference warranted with the same. [*Numaligarh Refinery Ltd. v. Daelim Industrial Company Ltd.*, 2007 (4) RAJ 257 (SC)]

Award of interest 18% for pre-arbitration, pendente lite and post-award period, held not proper, as after economic reforms in country interest regime has changed and rates have substantially reduced. Interest awarded reduced to 9%. [*Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and another*, 2007 (3) ALD 1 = AIR 2007 SC 817 = (2007) 2 SCC 720 (SC) = 2007 (1) RAJ 537 (SC)]

In view of Section 31(7) of the Act, the difference the pre-reference period and pendente lite period has disappeared insofar as awarding of interest by arbitrator is concerned. In the facts of the instant case the arbitrator awarded interest @ 18% p.a. on Rs.24,18,586/-; 14% p.a. on amount due on finalisation of the bill and 12% p.a. on the security deposit amount that had to be refunded. Section 31(7)(b) of the Act 1996 provides that if the award otherwise direct, the amount awarded shall carry interest as

directed in the award. In the absence of any provision of 18% p.a. any provision in the contract barring interest will, therefore operate only till the date of the award and not thereafter. Award of interest by the arbitrator is not contrary to Section 31(7)(b) of the Act 1996. High Court has not assigned any reasons for reducing the rate of interest to 6% p.a. which reduction cannot be sustained. Accordingly judgment of the High Court is modified as follows: (a) the judgment of the High Court setting aside the award of interest upto the date of award is affirmed and (b) the decision of the High Court reducing the rate of interest to 6% p.a. from the date of award is set aside. Appeal partly allowed. [*M/s Sayeed Ahmed & Co. v. State of U.P. and others*, 2009 (80) AIC 109 (SC)]

The arbitrator allowed interest on the amount determined under Item Nos.3 and 4 both for the pre-reference period and pendente lite at the rate of 16% per annum. He further allowed interest on the consolidated amount for the post-award period at the rate of 18% per annum till the date of payment. In the case on hand, the respondent's claim was in regard to two periods one from August 3, 1991 to December 31, 1992 when the agreement was subsisting and the parties were bound by its terms, and the other from January 1, 1993 to August 31, 1994 when the agreement was admittedly terminated and the respondent was carrying on the work on the request of the appellant. In the Court's view the fact that the first period was covered by the agreement while the second fell beyond it is significant and on that score the two periods must receive different treatments. In the case on hand, clause 31 of the agreement is materially different. It bars payment of any interest or damage to the contractor for any reason whatsoever. The Court is, therefore, clearly of the view that no pre-reference or pendente lite interest was payable to the respondent on the amount under item No.3 and the arbitrator's award allowing pre-reference and pendente

lite interest on that amount was plainly in breach of the express term of the agreement. The order of the High Court insofar as pre-reference and pendente lite interest on the amount under item No.3 is concerned is, therefore, unsustainable. The position with regard to the claim under item No.4 is quite different. That relates to the period after the termination of the agreement and hence, the after clause 31 would not apply to it in the same way as it would apply to Item No.3 the Court, therefore, found no infirmity in grant of pre-reference and pendente lite interest on the amount under item No.4. In light of the discussions made above, the respondent shall be entitled to interest only on the sum of Rs.10,79,456.80, the amount determined under item No.4 at the rate of 16% per annum for the period November 1, 1994 to September 9, 2000. The final amount under the award shall be accordingly worked out. The consolidated amount of the award after being re-calculated shall carry, as provided in the award, interest at the rate of 18% from the date of the award till the date of payment. In working out the amount of interest for the post-award period, the period(s) for which the operation of the award was stayed by the Court would be excluded. Arbitrator has jurisdiction to award interest on the sums found due and payable for pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. [*Union of India v. Saraswat Trading Agency and others*, 2009 (3) RAJ 552 (SC)]

At the time of the final settlement of the respondent's claims the Railway authorities offered to it a sum of Rs.6,848=00 as additional payment for the period January 1993 to August 1994. The respondent declined to accept the paltry amount. Finally, a high level committee appointed by the Railways fixed the respondents claim at Rs.3,61,058=00 but it was not acceptable to the respondent. A departmental arbitrator was then appointed who gave his award on June 4, 1998. Not being satisfied with the



award the respondent challenged it before the High Court which upheld the award on items 1 and 2 but set it aside in respect of items 3, 4 and 5 and appointed a certain advocate, a member of the bar to decide afresh in regard to the respondents claim under those three items. The arbitrator made and published his award holding the respondent entitled to receive from the appellant the sum of Rs.32,71,774=00 along with interest on that amount @ 18% per annum from the date of the award till the date of payment. Arbitrator has jurisdiction to award interest for the pre-reference period. A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation way of interest, compensation or damages. When the arbitration clause expressly bars any interest or damage for any reason whatsoever arbitrator cannot allow pre-reference or pendente lite interest. Respondent shall be entitled to interest for post award period. [*Union of India v. Saraswat Trading Agency*, [2009] 16 SCC 504 = [2009] 6 Supreme 156 = [2009] 3 ALR 119 (SC)]

Jurisdiction and authority of arbitrator to award interest. However, if there is a bar against payment of interest in the contract, the arbitrator cannot award any interest for the pre-reference period or pendente lite. In view of the specific bar under clause 16(2), the arbitral Tribunal rightly refused interest from the date of cause of action to date of awards. Arbitrator is bound by the terms of the contract as regards award of interest from the date of cause of action to date of award. Therefore, where the parties had agreed that no interest shall be payable, arbitral Tribunal cannot award interest between the dates when the cause of action arose to date of award. The arbitral Tribunal finally passed an award awarding certain amounts with a direction for simple interest at 10% per annum on the amounts awarded from 5.1.2002 till date of payment. That is, the arbitral Tribunal awarded only future interest and refused to award the interest

for pre-reference period and interest pendente lite. Arbitrator is bound by the terms of the contract as regards award of interest. Appeal dismissed. [*Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat*, [2010] 6 Supreme 702 (SC)]

Contract prohibiting the employer from entertaining any claim for interest. The Arbitrator could not award interest for pre-reference period and pendente lite, in view of clause (a) of sub-section (7) of Section 31 of the Act, the arbitrator could not have awarded interest upto the date of the award, as the agreement between the parties barred payment of interest. Any provision in the contract barring interest, will operate only till the date of award and not thereafter. Interest from the date of award till date of payment shall be in terms of the award of the Arbitrator. The Legislature while enacting the Arbitration and Conciliation Act, 1996 incorporated a specific provision in regard to award of interest by Arbitrators. Sub-section (7) of Section 31 of the Act deals with the Arbitrator's power to award interest. Clause (a) relates to the period between the date on which the cause of action arose and the date on which the award is made. Clause (b) relates to the period from the date of award to date of payment. Having regard to sub-section (7) of Section 31 of the Act, the difference between pre-reference period and pendente lite period has disappeared insofar as award of interest by arbitrator. The said section recognizes only two periods and makes the following provisions: (i) In regard to the period between the date on which the cause of action arose and the date on which the award is made (pre-reference period plus pendente lite), the Arbitral Tribunal may award interest at such rate as it deems reasonable, for the whole or any part of the period, unless otherwise agreed by the parties; (ii) For the period from the date of award to the date of payment the interest shall be 18% per annum if no specific order is made in regard to interest. The arbitrator

may however award interest at a different rate for the period between the date of award and date of payment; (iii) The decisions of the Court with reference to the awards under the old Arbitration Act making a distinction between the pre-reference period and pendente lite period and the observation therein that arbitrator has the discretion to award interest during pendente lite period in spite of any bar against interest contained in the contract between the parties are not applicable to arbitrations governed by the Arbitration and Conciliation Act, 1996; (iv) Clause G-1 09 makes it clear that no interest or damages will be paid by Government, in regard to: (i) any money or balance which may be lying with the Government; (ii) any money which may become due owing to any dispute, difference or misunderstanding between the Engineer-in-charge in making periodical or final payment; or (iv) any other respect whatsoever. The clause is comprehensive and bars interest under any head in clear and categorical terms. In view of clause (a) of sub-section (7) of Section 31 of the Act, it is clear that the Arbitrator could not have awarded interest upto the date of the award, as the agreement between the parties barred payment of interest. The bar against award of interest would operate not only during the pre-reference period that is upto 13.3.1997 but also during the pendente lite period that is from 14.3.1997 to 31.7.2001.

(ii) Unless the award of interest is found to be recorded, the Court should not alter rate of interest awarded by the Arbitrator. Any provision in the contract barring interest, will operate only till the date of award and not thereafter. Arbitrator having awarded interest at three different rates on three different amounts which were all less than 18% p.a. High Court had not assigned any reasons for reducing rate of interest to 6% p.a. Decision of the High Court reducing rate of interest held liable to be set aside. Rate of interest on amounts due and payable under the award, from the

date of award till date of payment shall be in terms of the award of the Arbitrator. The arbitrator awarded interest at the rate of 18% per annum on Rs.24,18,856/- 14% per annum on amount found due on finalization the final bill and 12% per annum on the security deposit amount if any that has to be refunded. As noticed above, clause (b) of sub-section (7) of Section 31 of the Act provides that if the award does not otherwise direct, the amount awarded shall carry interest as directed by the award and in the absence of any provision of 18% per annum. Any provision in the contract barring interest, will therefore operate only till the date of award and not thereafter. The arbitrator has awarded interest at three different rates on three different amounts which are all less than 18% per annum. The said award of interest by the arbitrator is not contrary to Section 31(7)(b) of the Act. Unless the award of interest is found to be unwarranted for reasons to be recorded, the Court should not alter the rate of interest awarded by the Arbitrator. The High Court has not assigned any reasons for reducing the rate of interest to 6% per annum. Therefore, such reduction cannot be sustained. In view of the above, the Court allowed the appeal in part and modify the judgment of the High Court as follows: (a) the judgment of the High Court setting aside the award of interest upto the date of award is affirmed. The decision of the High Court reducing the rate of interest to 6% per annum from the date of award is set aside. The rate of interest on the amounts due and payable under the award, from the date of award till date of payment shall be in terms of the award of the Arbitrator. [M/s. Sayeed Ahmed & Co. v. State of U.P. and others, 2010 (5) RAJ 401 (SC)]

(i) Expression 'unless otherwise agreed by parties' clarifies that arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to date of award.

(ii) Where parties agreed that no interest shall be payable, Arbitral Tribunal cannot award interest between the date when cause of action to date of award.

(iii) Non-awarding of interest for pendente lite and pre-reference period, challenged. Terms of contract specifically bars payment of interest on security deposit and on amount payable to contract under the contract. No interest could be paid having regard to bar under clause 16(2). Since Arbitral Tribunal exercised its discretion and refused to award interest, no interference warranted with the award. [*Sree Kamatchi Amman Constructions v. The Divisional Railway Manager (Works) Palghat and others*, 2010 (5) RAJ 529 (SC)]

Interest at 18% p.m. for pre-arbitration period, pendente lite period and future interest, however, reduced to 9%. Idling charges awarded by Arbitrator at Rs.42,000/- per day at total amount of Rs.1.47 crores reduced to Rs.one crore as agreed by Counsel for claimant. The Arbitrator has meticulously examined the claims of the contractor under each separate Heads. The Court did not see any reason to interfere except on the rates of interest and on the quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the Award. Here also the Court added that it did not wish to interfere with the Award except to say that after economic reforms in the country the interest regime has changed and the rates have substantially reduced and, therefore, it is of the view that the interest awarded by the Arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%. [*Krishna Bhagya Jala Nigam Ltd. v. G. Harichandra Reddy*, AIR 2007 SC 817 = [2007] 1 Supreme 133 = [2007] 1 AIR 148 = 2007 (3) ALD (SC) 1 = AIR 2007 Kar (R) 169 = [2007] 2 SCC 720 (SC)]

(2) *Power to award interest - post award period*

Arbitrator allowing interest at the rate of 12% p.a. on the total amount of award of

Rs.14,94,000/- *w.e.f.* 19.12.1990 upto the date of award and further directing that in case the total amount of award together with this interest is not paid within 30 days from the date of making award, future interest shall be paid at the rate of 18% p.a. on the entire award from the date of award upto actual date of payment. ————Section 31(7)(a) and (b) contemplates award of only simple interest and not compound interest or interest upon interest. Section 31(7) makes no reference to payment of compound interest or payment of interest upon interest. Nor does it require the interest which accrues till the date of the award, to be treated as part of the principal from the date of award for calculating the post-award interest. The use of the words ‘where and insofar as an arbitral award is for the payment of money’ and use of the words ‘the Arbitral Tribunal many include in the sum for which the award is made, interest on the whole or any part of the money in clause (a) and use of the words a sum directed to be paid by an arbitral award shall carry interest’ in clause (b) of sub-section (7) of Section 31 clearly indicate that the section contemplates award of only simple interest and not compound interest or interest upon interest. A sum directed to be paid by an arbitral award refers to the award of sums on the substantive claims and does not refer to interest awarded on the sum directed to be paid by the award. Interest, in particular interest from the date of award, ———— are ancillary issues and are not substantive disputes even in case of involvement of substantial amount. There is a tendency among contractors to elevate the claims for interest and costs to the level of substantive disputes by describing them as separate and independent heads of claim. ———— The provision for interest in the Act is contained in Section 31 dealing with the form and contents of arbitral award. It employs two significant expressions where the arbitral award is for payment of money and the arbitral Tribunal may include in the sum for

which the award is made, interest on the whole or any part of the money. The Legislature has thus made it clear that award of interest under sub-section (7) of Section 31 is an ancillary matter to be provided for by the award, when the arbitral Tribunal decides the substantive disputes between the parties. Payment of interest arises in different circumstances. It can be the consideration paid by a borrower to a lender for the money lent or made available by the lender. It can be the return given by a bank, financial institution or a company on amounts deposited or invested with them by a customer or constituent. It can be the compensation paid by a person who withhold or defaults in paying an amount or in discharging a liability, when it is due and payable. Interest may be payable in pursuance of a contract, or a provision in a statute, or the fact of a Court of Tribunal. It is usually quantified in terms of a percentage of the principal or the investment or the amount of liability. Interest unless otherwise specified, refers to simple interest, that is interest paid on only the principal and not on any accrued interest. Compound interest refers to a method of charging interest where interest is computed not only on the principal, but also the accrued interest. For this purpose, periodical rests are provided for computation of interest, say yearly, or quarterly or monthly. At the end of the first rest, the interest accrued till then is added to the principal, so that for the second interest bearing period, the aggregate of the original principal and interest thereon becomes the enhanced principal. At the end of the second rest, the accrued interest on the enhanced principal is added to the enhanced principal so that such further enhanced principal becomes the principal for charging the interest for the third period and so on. — There is no general discretion in Courts or Tribunals to award compound interest or interest upon interest. In the absence of any provision for interest upon interest in the contract, the arbitral Tribunals

do not have the power to award interest upon interest, or compound interest, either for the pre-award period or for the post-award period. If the contract provides for compounding of interest, or provides for payment of interest upon interest, or provides for interest payable on the principal upto any specified stages being treated as part of principal for the purpose of charging of interest during any subsequent period, the Arbitral Tribunal will have to give effect to it. — The Arbitration and Conciliation Act, 1996, on the other hand, contains a specific provision dealing with the power of the Arbitral Tribunal to award interest. The said provision is incorporated in sub-section (7) of Section 31 which deals with the forms and contents of arbitral awards. Principles relating to award of interest, in general, are not different for Courts and Arbitral Tribunals, except to the extent indicated in Section 31(7) and CPC. Some Arbitral Tribunals have misconstrued clause (b) of Section 31(7) of the Act and assumed that the said provision requires the rate of post-award interest in all arbitral awards should be 18% per annum, and that they do not have any discretion in regard to post-award interest. Some have misconstrued it further to infer the rate of interest mentioned therein is an indication that invariably the rate of interest in arbitrations, either pre-award or post-award, should be 18% per annum. Both these assumptions are baseless and erroneous. If that was the legislative intention, there would have been no need for vesting discretion in arbitral Tribunals, in the matter of interest, under Section 31(7)(a). The principles relating to award of interest, in general, are not different for Courts and Arbitral Tribunals, except to the extent indicated in Section 31(7)(b) of the Act, not because 18% is the normal rate of interest to be awarded in arbitrations, but purely as a deterrent to award-debtors from avoiding payment or using delaying tactics. In fact a provision similar to Section 31(7)(b) of the Act, if

provided in Section 34 of Code of Civil Procedure, will considerably reduce the travails of plaintiffs in executing their decrees in civil cases. The difference between clauses (a) and (b) of Section 31(7) of the Act may conveniently be noted at this stage. They are: (i) Clause (a) relates to pre-award period and Clause (b) relates to post-award period. The contract binds and prevails in regard to interest during the pre-award period. The contract has no, application in regard to interest during the post-award period; (ii) clause (a) gives discretion to the Arbitral Tribunal in regard to the rate, the period, the quantum (principal which is to be subjected to interest) when awarding interest. But such discretion is always subject to the contract between the parties. Clause (b) also gives discretion to the Arbitral Tribunal to award interest for the post-award period but that discretion is not subject to any contract; and if that discretion is not exercised by the arbitral Tribunal, then the statute steps in and mandates payment of interest, at the specified rate of 18% per annum for the post-award period; (iii) While clause (a) gives the parties an option to contract out of interest, no such option is available in regard to the Post-award period. In a nutshell, in regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract as per discretion of the Arbitral Tribunal. On the other hand, in regard to the post-award period, interest is payable as per the discretion of the arbitral Tribunal and in the absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum. Sum for which the award is made and a sum directed to be paid sum for which the award is made and a sum directed to be paid by an arbitral award contextually refer to award on the substantive claims and not ancillary or consequential directions relating to interest and costs. The authority of the Arbitral Tribunals to award interest under Section 31(7)(a) is subject to the contract between the parties and the contract will prevail over the

provisions of Section 31(7)(a) of the Act. Where the contract between the parties contains a provision relating to, or regulating or prohibiting interest, the entitlement of a party to the contract to interest for the period between the date on which the cause of action arose and the date on which the award is made, will be governed by the provisions of the contract, and the Arbitral Tribunal will have to grant or refuse interest, strictly in accordance with the contract. The arbitral Tribunal cannot ignore the contract between the parties, while dealing with or awarding pre-award interest. Where the contract does not prohibit award of interest, and where the arbitral award is for payment of money, the Arbitral Tribunal can award interest in accordance with Section 31(7)(a) of the Act, subject to any term regarding interest in the contract. If Court in an application for setting aside of award under Section 34 finds that interest awarded is in conflict with, or violating public policy of India, it may set aside that part of the award. Where an Arbitral Tribunal awards interest under Section 31(7)(a) of the Act, it is given discretion in three areas to do justice between the parties. First is in regard to rate of interest. The Tribunal can award interest at such rate as it deems reasonable. The second is with reference to the amount on which the interest is to be awarded. Interest may be awarded on the whole or any part of the amount awarded. The third is with reference to the period for which the interest is to be awarded. Interest may be awarded for the whole or any part of the period between the date on which cause of action arose and the date on which the award is made. The Act does away with the distinction and differentiation among the four interest bearing periods, that is, pre-reference period, *pendente lite* period, post-award period and post-decree period. Though a dividing line has been maintained between pre-award and post-award periods, the interest bearing period can now be a single continuous period the outer limits

being the date on which the cause of action arose and the date of payment, subject however to the discretion of the arbitral Tribunal to restrict the interest to such period as it deems fit. Provision intended to ensure prompt payment by award-debtor once award is made. If the award grants interest at a specified rate upto the date of payment, or specifies the rate of interest payable from the date of award till date of payment, or if the award specifically refused interest, clause (b) of Section 31 will not come into play. But if the award is silent in regard to the interest from the date of award, or does not specify the rate of interest from the date of award, then the party in whose favour an award for money has been made, will be entitled to interest at 18% per annum from the date of award. They may claim the said amount in execution even though there is no reference to any post-award interest is at much lower rate, if the award is silent in regard to post-award interest, the claimant will be entitled to post-award interest at the higher rate of 18% per annum. The higher rate of interest is provided in clause (b) with the deliberate intent of discouraging award-debtors from adopting dilatory tactics and to persuade them to comply with the award. Decisions under Arbitration Act, 1940 are of no assistance in interpreting Section 31(7). Arbitral Tribunal to award interest in accordance with the contract and in the absence of any prohibition in the contract and in the absence of specific provision relating to interest in the contract, to award simple interest at such rates as it deems fit from the date on which the cause of action arose till the date of payment. It also provides that if the award is silent about interest from the date of award till date of payment, the person in whose favour the award is made will be entitled to interest at 18% per annum on the principal amount awarded, from the date of award till date of payment. Portion of *McDermott* extracted in three circles assuming it to be law laid down in *McDermott* is not

a finding or conclusion of the Court nor the *ratio decidendi* of the case but is only a reference to the contention of the respondent in *McDermott*. Observation in Three Circles that *McDermott* held that interest award becomes the principal amount and therefore award of future interest therein does not amount to award of interest on interest is *per incuriam* due to an inadvertent erroneous assumption. [*State of Haryana and others v. S.L. Arora & Company*, 2010 (2) RAJ 1 = 2010 (3) SCC 690 (SC)]

High Court set aside the judgment passed by District Court holding that arbitrator has no authority to award interest on the interest relying on judgment passed by Supreme Court in the matter of *State of Haryana and others v. S.L. Arora and Company*, (2010) 3 SCC 690 = 2010 (2) RAJ 1. Plea of appellant that judgment of *S.L. Arora and Company* passed inadvertently declaring two judgments namely *McDermott International Inc. v. Burn Standard Co. Ltd.*, 661, and *Uttar Pradesh Cooperative Federation Limited v. Three Circles*, (2009) 10 SCC 374 = 2009 (4) RAJ 205 *per incuriam* is not a binding precedent. Held, in the circumstances matter be heard by a bench comprising of three Judges, accordingly, request was made to CJI. [M/s. Hyder Consulting (UK) Ltd. v. Governor, State of Orissa Tr. Chief Engg., 2012 (3) RAJ 36 (SC)]

In the case of *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, AIR 2011 SC 2979 = [2011] 10 SCC 573, the Hon'ble Supreme Court held as: "So far as the rate of interest is concerned, it may be necessary to refer to the provisions of Section 3 of the Interest Act 1978, relevant part of which reads as under: In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid 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... Thus, it is evident that the aforesaid provisions empower the Court to award interest at the rate prevailing in the banking transactions. Thus, impliedly, the Court has a power to vary the rate of interest agreed by the parties. This Court in *Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and another*, AIR 2007 SC 817, while dealing with the similar issue held as under: '...after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%. In *H.U.D.A v. Raj Singh Rana*, AIR 2008 SC 3035, this Court considered various earlier judgments of this Court including *Ghaziabad Development Authority v. Balbir Singh*, AIR 2004 SC 2141; *Bihar State Housing Board v. Arun Dakshy*, (2005) 7 SCC 103; *Haryana Urban Development Authority v. Manoj Kumar and another*, (2005) 9 SCC 541; *H.U.D.A v. Prem Kumar Agarwal and another*, JT 2008 (1) SC 590 and came to the conclusion: .....the rate of interest is to be fixed in the circumstances of each case and it should not be imposed at a uniform rate without looking into the circumstances leading to a situation where compensation was required to be paid. ————— Be that as it may, the High Court while dealing with the rate of interest has relied upon the judgment of this Court in *Krishna Bhagya Jala Nigam Ltd.*, and thus, there is no scope for us to interfere with the rate of interest fixed by the Courts below. In view of the fact that a long time has elapsed, we request the learned Tribunal to decide the case as early as possible after giving due opportunity to the parties concerned. The private appellant shall be entitled only for a sum of Rs.26.34 lakhs awarded by the Tribunal for delay in issuing the notification with 10% interest, if not paid already or it could be adjusted in the final accounts bills. With these observation, the appeals stand disposed of. No costs.

In the case of *H.P. Housing & Urban Development Authority v. Ranjit Singh Rana*, [2012] 2 Supreme 558, the Hon'ble Supreme Court held as: "(a) In case the award is silent about post-award interest, the party in whose favour the money award has been made shall be entitled to 18% interest. (b) Payment means extinguishment of liability arising under the award it is satisfied when the decretal amount is deposited in the Court No post-award interest can accrue thereafter. (Para 11)

*What is per incuriam:*

In *Mamleshwar Prasad v. Kanhaiya Lal*, (1975) 2 SCC 232, reflecting on the principle of judgment *per incuriam*, the Court has stated thus: "7. Certainty of the law, consistency of rulings and comity of Courts - all flowering from the same principle - converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of judgment *per incuriam*. 8. Finally it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law, indistinguishably identical, and that ruling must bind. The Supreme Court in *A.R. Antulay v. R.S. Nayak*, (1988) 2 SCC 602 = 1988 SCC (Cri) 372, has quoted the observations of Lord Goddard in *Moore v. Hewitt*, (1947) 2 All ER 270 (KBD) and *Penny v. Nicholas*, (1950) 2 All ER 89 (KBD), to the following effect: *Per incuriam* are those decisions given in ignorance or forgetfulness of some inconsistent (sic) statutory provision or of

some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. The Supreme Court in *State of U.P. v. Synthetics & Chemicals Ltd.*, (1991) 4 SCC 139, in has observed thus: 40. Incuria literally means carelessness. In practice *per incuriam* appears to mean per ignoratum. English Courts have developed this principle in relaxation of the rule of stare decisis. The quotable in law is avoided and ignored if it is rendered, in ignoratum of a statute or other binding authority. (*Young v. Bristol Aeroplane Co. Ltd.*), (1944) 2 All ER 293 = 1944 KB 718. A prior decision of the Court on identical facts and law binds the Court on the same points of law in a latter case. This is not an exceptional case by inadvertence or oversight of any judgment or statutory provisions running counter to the reason and result reached. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment *per incuriam*. It is also not shown that some part of the decision was based on a reasoning which was demonstrably wrong, hence the principle of *per incuriam* cannot be applied. [*Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, (2001) 6 SCC 356 (367, 368)]

In *Mukesh K. Tripathi v. Sr. Divisional Manager, L.I.C. and others*, [2004] 7 Supreme 62 = [2004] 8 SCC 387 = AIR 2004 SC 4179 (SC-3)), the Hon'ble Supreme Court held as: "The High Court, however, relying on or on the basis of a Constitution Bench decision of this Court in *H.R. Adyanthaya and others v. Sandoz (India) Ltd. and others*,

(1994) 5 SCC 737, held that as therein *S.K. Verma* was held to have been rendered *per incuriam*, it was no longer a good law".

### Conclusion:

In view of the aforesaid discussion on the subject-matter, it is to be observed that under Section 31(7)(a) of Act 1996, the Arbitral Tribunal has to exercise its discretion as regard: (i) At what rate interest should be awarded. (ii) Whether interest should be awarded on whole or part of the award money. (iii) Whether interest should be awarded for whole or any part of the pre-award period.

As regards Section 31(7)(b) of the Act 1996, the Arbitral Tribunal has to exercise its discretion in awarding interest at 18% p.a. [Section 31(7)(b): A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment]. In view of the aforesaid judgments, the Arbitral Tribunal has to consider that the rate of interest is to be fixed in the circumstances of each case and it should not be imposed at a uniform rate without looking into the circumstances leading to a situation where compensation was required to be paid, and the Arbitral Tribunal can reduce the rate of interest from 18% to any reasonable percentage depending upon the facts of the case. For awarding interest, the Arbitral Tribunal is required to give cogent reasons so that the party aggrieved can question the grant of interest in the award on appropriate grounds.