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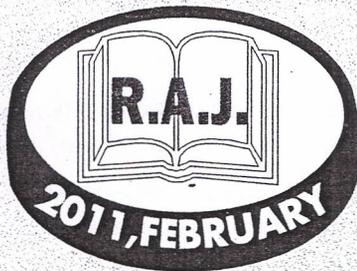
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ARTICLES

POWERS OF ARBITRAL TRIBUNAL TO AWARD 'INTEREST' - A STUDY IN THE LIGHT OF SUPREME COURT'S DECISION IN M/S. SREE KAMATCHI AMMAN CONSTRUCTION CASE¹

By Prof (Dr) Mukund Samoa

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1. The Supreme Court highlighted the system of arbitration in *M/s. Guru Nanak Foundation's case*² in these words:

"Interminable, time-consuming, complex and expensive Court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy resolution of disputes avoiding procedural claptrap and this lead them to Arbitration Act, 1940".

Again the apex Court in *Food Corporation of India's Case*,³ made the following observations:

"We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situations but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms, which will create confidence not only by doing justice between the parties but by creating sense that justice appears to have been done".

2. Under the Indian Arbitration Act, 1940, the Supreme Court held, "that the arbitrator had

the jurisdiction and authority to award interest for three distinct periods:

- (i) For pre-reference period (referred to the period between date of cause of action to date of reference);
- (ii) Pendente Lite (period between the date of reference to the date of award); and
- (iii) Future period (period between the date of award to the date of payment)

If there was no express bar in the contract regarding award of interest."⁴

3. In *irrigation Dept., Govt. of Orissa (Supra)*, the Supreme Court laid down the following guidelines:

- (i) A person, deprived of the use of money to which he is legitimately entitled, has a right to be compensated to the deprivation, call it, by any name.

It may be called interest, compensation or damages;

- (ii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and

1 Sree Kamatchi Amman Construction Vs. Divisional Railway Manager (Works) Palghat & Others, AIR 2010 SC 3337: 2010(5) R.A.J. 529

2 M/s. Guru Nanak Foundation Vs. M/s. Rattan Singh & Others, AIR 1981 SC 2076

3 Food Corporation of India Vs. Joginderpal Mohinderpal AIR 1989 SC 1267

4 Irrigation Dept., Govt. of Orissa Vs. G.C. Roy, AIR 1992 SC 732; Executive Engineer, Dhenkanal Minor Irrigation Division Vs. N.C. Budharaj AIR 2001 SC 626: 2001(1) R.A.J. 1; Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd. (2005)6 SCC 462: 2005(1) R.A.J. 585; State of Rajasthan Vs. Ferro Concrete Construction (P) Ltd., 2009(12) SCC 1: 2009(3) R.A.J. 270.

prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

- (iii) An arbitrator is an alternative forum for resolution of disputes or differences arising between the parties so as to avoid multiplicity of proceedings:
- (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 (during pendency or dispute); and
- (v) interest pendent lite is not a matter of substantive law, like interest for the pre-reference period. For doing complete justice between the parties, such powers has always been inferred.

In UK, an established principle exists in the matter of award of interest on debt or damages. The principle⁵ may be stated thus:

"in any proceedings tried in any Court of record for the recovery of debt or damages, the Court may, if it thinks fit, order that those shall be included in the sum for which Judgment is given interest at such rate as it thinks fit on the whole or part of the debt or damages for whole or part of the period of action arose and the date of judgment"

The arbitrators also possess the power to grant interest and such a power exists⁶.

4. The discretionary power which arbitrator had under the old Act⁷ 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 new Act⁸. Supreme Court in *Engineers-De-Space-Age*⁹ held that even if the parties are not entitled to interest for pre-reference period (that is the date of commencement of action to the date of reference), they are entitled to interest pendente lite (from the date of reference to the date of award). It is a matter of interest to know that the difference between pre-reference period and pendente lite period has now disappeared in view of the New Act which provides¹⁰ thus: "In regard to the award of interest 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". In other words, if there is a bar against the payment of interest in the contract, the arbitrator cannot award any interest for pre-reference period or pendente lite¹¹.

5. A specific provision is made in the new Act, for award of interest by arbitrators.¹² In *S. Kamatchi Amman Construction Case* (Supra), the agreement between the parties in clause 16(2) of the conditions of contract provided thus:

"No interest will be payable upon the earned money or the security deposit or amount payable to the contractor under the contract
....."

5 See for details Sec 3(1) of the Law Reform (Miscellaneous Provisions) Act, 1934

6 *Chandris Vs. Isbrandisen Moller Co.* (1951) 1 K.B. 255

7 Old Act refers to The Indian Arbitration Act, 1940 throughout this study.

8 New Act refers to The Indian Arbitration & Conciliation Act, 1996 through out this study.

9 *Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age* AIR 1996 SC 2853.

10 See Sec 31(7)(a) of the Indian Arbitration & Conciliation Act, 1996.

11 *Union of India Vs. Saraswati Trading Agency*, 2009(16) SCC 504: 2009(3) R.A.J. 552

12 Section 31(7)

- * A clear persual of the clause clearly indicates that there is a specific bar relating to payment of interest in the language used in the contract - "any amount payable to the contractor".

The Supreme Court in *Madnani's Case*, AIR 2010 SC 383, reiterated the position in the old as well as in the new Act, while it made the following observations:

"No bar on arbitrators to award interest arose under old Act, which did not contain a provision similar to Sec 31 (7) of the New Act" ... and the decisions rendered under the old Act, "may not be of assistance to decide the validity of grant of interest under the new Act"¹³

6. Any prohibition in the contract preventing the department from paying interest on delayed payments etc., cannot take away the

power of the arbitrator to award interest. Prohibition, if any, has to strictly construed.

7. Parties to the contract suffering loss or damage on account of an act of a party to the contract intentionally done need to be compensated on the grounds of equity, justice and fairness. Quasi-contractual principle to compensate the loss must be of prime concern. The healthy in built mechanism in UK, which was notably found a place in Indian Law under the old Act, to provide justice in the matter of grant of interest needs to be incorporated in the New Act. Parties to the contract cannot try to deprive other party of its legitimate right to interest justice where irreparable damage or injury is caused. The decision in the *Sree Kamatchi Amman Construction* case (Supra) points out the imperative need to amend the New Act to restore the position under the old Act, in the interest of justice to "intefest justice".

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