SUPREME COURT OF INDIA

Premier Fabricators, Allahabad

Vs.

Heavy Engineering Corpn. Ltd., Ranchi

C.A.No.1852 of 1981

(A.M.Ahmadi C.J.I., M.M.Punchhi and K.Ramaswamy JJ.)

21.03.1997

JUDGEMENT

PUNCHHI, J.:-

1. (Minority view) The sole and subtle question arising in this appeal is whether in the facts and circumstances, it was required of the Umpire making the award to formally express in terms that items Nos. 2 to 5 of the dispute were arbitrable on the terms of the contract ?

2. The appellant herein M/s. Premier Fabricators Allahabad is the contractor. The Respondent-Corporation engaged the contractor to execute some works. On May 25, 1971, a deed of agreement was executed in writing between the parties. Clause 78 thereof made provision for settlement of disputes by arbitration. That clause reads as follows:

"SETTLEMENT OF DISPUTES BY ARBITRATION

78(1) All questions, disputes or difference of any kind, whatsoever, arising out of, or in connection with, the contract, at any time, whether during the progress of work or after its completion, or whether before or after the determination of the contract, other than determination of the contract, other than question, disputes or differences for the decision of which specific provisions have been made in the foregoing clauses of these conditions (hereinafter referred to as "excepted matters") and decisions on such "excepted matters" according to the said specific provisions shall be final and binding on the contractor and shall not be re-opened or attempt to be re-opened on the ground of any informality, omission, delay or error in the proceeding in or about the same or on any other ground whatsoever, shall be submitted in writing by the contractor to the employer, and the employer shall within a reasonable time, after the submissions of the same, make and notify its decisions thereon in writing.

(2) If the contractor be dissatisfied with the decision of the employer on any matter in question, dispute or difference, on any ground, or as to the withholding by the employer of any certificate to which the contractor may claim to be entitled to, or if the employer fails to make a decision within a reasonable time, then and in any such case but not including any of the excepted matters, the contractor may, within ten days of the receipt of such decision or after the expiry of a reasonable period of time, as the case may be, demand in writing that such matter in question, dispute or difference be referred to arbitration. Such demand for arbitration shall be delivered to the employer by the contractor and shall specify the matters which are in question, dispute or difference and only such question, dispute or difference of which the demand has been made and no other shall be referred to arbitration.

(3) The further progress of any work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the employer shall be withheld on account of such proceedings, provided however that it shall also be open to the arbitrators, to consider and decide whether or not such work shall continue during the arbitration proceedings.

(4) (a) Matters in question, dispute or difference to be submitted to arbitration as aforesaid shall be referred for decision to two arbitrators, one to be nominated by the Chairman and the other to be nominated by the contractor. In the event of the two arbitrators being divided in their opinion, the matter under dispute shall be referred for decision to an umpire to be appointed by the two arbitrators not later than one month from the latest date of their respective appointments and, in any case, before they enter upon and proceed with the reference.

(b) The Arbitrators or the umpire shall have power to call for such evidence by way of affidavits or otherwise as the arbitrators or the umpire, as the case may be, shall think proper, and it shall be the duty of the parties to do or cause to be done all such things as may be necessary to enable the arbitrators or umpire to make the award without any delay.

(c) Unless otherwise agreed upon by the parties, the venue of the arbitration proceedings under these conditions shall be at Ranchi in the State of Bihar.

(d) Subject to aforesaid, the provisions of the Arbitration Act, 1940 or any statutory modification or enactment thereof and of the rules made thereunder for the time being in force, shall apply to all arbitration proceeding under this clause.

Provided, however, that the arbitrators or, as the case may be, the umpire may, from time to time, with the consent of the parties, enlarge the time for making the award."

3. The appellant-contractor laid down for payments in terms of items Nos. 1 to 5, as mentioned in its claim, from the Corporation which was rejected by the latter. Thereupon, the contractor asked for arbitration in terms of Clause 78. The Corporation denied arbitration in respect of items 2, 3, 4 and 5 as being not referable to arbitration in terms of the contract. On the basis of the disputes and differences thus existing between the parties in respect of the claims of the contractor, the Managing Director of the Corporation nominated Shri K. N. Mehra, its Works Manager (Production) as an arbitrator to give a joint award on all the above claims after deciding whether claims referred to in items 2, 3, 4 and 5 were or were not referable for arbitration in terms of the contract. The contractor on its part nominated Shri S. B. Gadodia as the arbitrator to make a joint award in respect of the terms of the arbitration made by the Corporation.

4. On entering upon arbitration, the arbitrators on 6-2-1973 recorded on their respective files their decisions that items Nos. 2, 3, 4 and 5 of the claim of the contractor were referable and could be decided by the arbitrators. This meant that all the items 1 to 5 were arbitrable. Proceeding further went on but the joint arbitrators ultimately could not arrive at a joint award. Therefore by a joint letter dated November 2, 1973, they requested Professor G. B. Pant of Birla Institute of Technology, Ranchi to enter upon the reference as Umpire and give his award. As given out in their joint letter they forwarded separately their respective files for perusal of the Umpire, as also rest of the record.

5. The Umpire then went into the matter. As is evident from the record, he took into account the fact that the matter had come to him in pursuance of a contract dated May 25, 1971 executed between the parties and that the parties in terms thereof had referred to S/Shri Mehra and Gadodia by letter of reference the matters of difference between them concerning items 1 to 5 (as detailed out) and that since there was reported failure by the joint arbitrators to arrive at a joint award in respect of the referred matters, the case was referred to him as the Umpire. Therefore he observed in his award that having heard both the parties and having seen all the documents submitted and having given the matter a careful consideration he would direct the Corporation to pay a sum of Rs. 80,000/- to the contractor bearing interest at the rate of 6 per cent per annum from the date of order till the date of decree.

6. The contractor applied for the award of the Umpire being made Rule of court, which was registered as a suit in the Court of Third Additional Sub-Judge, Ranchi. The Corporation objected on a number of grounds of the award being made Rule of Court. Despite objection the award, all the same, was made Rule of Court. The Corporation then went up in appeal before the High Court of Patna which was placed before a Bench of two Hon'ble Judges of the High Court. It was contended on behalf of the Corporation before the Bench that there was error of law apparent on the face of the award because the Umpire, who was the substitute of the arbitrators, had not recorded the preliminary finding whether items Nos. 2 to 5 of the claim could be subject matter of arbitration under the terms of the contract and, therefore, the award was vitiated. It was urged that the Umpire could give his award on merits only after deciding the preliminary question as to whether claims under item Nos. 2 to 5 were arbitrable. Both the Hon'ble Judges of the High Court constituting the Division Bench were in agreement that the order passed by the arbitrators on 6-2-1973 to that effect could not, on its own, be said to have disposed of the preliminary question once for all and that on reference to the Umpire the entire dispute including the question of referability was required to be decided by him. Up to this point the Hon'ble Judges were in concurrence but not thereafter, One Hon'ble Judge took the view that the Umpire must in the facts and circumstances be deemed to have decided the question of referability of items 2 to 5 in the affirmative and the award must therefore be accepted as valid. The other Hon'ble Judge differed by stating that in the facts and circumstances of the case, it was not possible to inferentially hold that the Umpire must have decided the preliminary question about referability while making the award to the tune of Rs. 80,000/- only, a sum much below than what was claimed. The matter then had to be, and was, referred to a Third Hon'ble Judge of that High Court.

7. The controversy before the Third Hon'ble Judge was thus narrowed to the facts and circumstances of the case, i.e. whether a deemed decision on referability should or should not be inferred ? The Third Hon'ble Judge noticing that since the members of the Division Bench had agreed that it was for the Umpire to have considered and decided the preliminary question, went on to opine that the Umpire may not have appreciated the position as to his obligation and there was a possibility that he might not have considered it necessary to form his opinion on the point due to the decision of the Arbitrators. The Third Hon'ble Judge also was of the view that inference in favour of the contractor could not be drawn from the conclusion merely because an award in terms of money had been made, unless he had stated in express terms in the award. On this basis, the Third Hon'ble Judge agreed with the view of one of the Hon'ble Judges of the Division Bench holding that the contractor had failed to show that the Umpire had decided the preliminary question in its favour before proceeding to consider the claim on merits. It is on that account that the Award was set aside leaving it for the parties to move the Court below to proceed further in the matter in accordance with the provisions of the Indian Arbitration Act.

8. As is evident, no abstract question of law or of legal import has arisen herein. It is from the facts and circumstances of the case that one would have to draw and record inferences. There are four reasons detailed hereafter which call to infer that (i) the Umpire was alive to his duties as such, knowing fully well that he was not a superior between the two arbitrators, but their sole substitute assigned their duties; (ii) The Umpire did not consider the decision of the joint arbitrators dated 6-2-

1973 holding that claims under items 2 to 5 were referable to arbitration, as binding on him as if in the nature of an interim award, nor was it treated as much by the arbitrators by delivery and despatch to the parties concerned; (iii) that since the said order was part of the proceedings recorded by the joint arbitrators, the Umpire on receiving the matter is presumed to have gone through the terms of the contract and the arbitration proceedings; and (iv) it is also implied that the Umpire as a substitute of the arbitrators must be presumed to have known that before he entered upon reference to decide item Nos. 2 to 5 on their merits, he would have to decide whether those items were arbitrate but the same need not have been in express terms. To hold it otherwise would be to negate his independence. It may be true that the joint decision dated 6-2-1973 of the arbitrators regarding referability of those items might have been of some support of his view. Yet it cannot be presumed that he considered himself bound by those orders, absolving him of the duty from going into the question. It would thus in the circumstances be seen that obligating the Umpire to make a speaking award in so far as the question of referability is concerned, lest it vitiates his non speaking award on merit, goes to the very root of the independence of the arbitrator. This is impermissible in law and against the spirit of the Arbitration Act, 1940. The award of the Umpire, as is plain, is a non-speaking award in entirety. He has preluded it with the recorded awareness that differences between the parties had arisen and the matter stood referred to arbitration in pursuance of the contract in writing dated May 25, 1971. He is then presumed to have read the terms of the contract, the terms of reference and scope of items 2 to 5 of the claim. He is presumed to have examined whether those claims were referable to arbitration in terms of the contract. He is further presumed to have read the respective files of the two arbitrators and to have heard both parties at length, screening all the documents submitted, to come to the base finding that items 2 to 5 were referable. All the five items were thus arbitrable, resulting in the award for a sum of Rs. 80,000/- in favour of the contractor. The award must therefore be upheld for the afore reasons, holding that there is no error apparent on the face of the record which would justify its vitiation.

9. For the afore-going reasons, it must be held that the Third Hon'ble Judge was in error in not agreeing with the view of one of the Hon'ble Judges in the Division Bench who had held that there was a deemed/ presumed decision on referability inferable from the award of the Umpire. Therefore, the impugned order of the High Court is set aside by allowing this appeal, as a result of which appeal from original Order No. 240 of 1975 in the Civil Appellate Jurisdiction of Patna High Court shall stand dismissed with costs, maintaining that of the Court of first instance.

10. **K. RAMASWAMY, J. :-** (Majority view) We have the advantage to read the proposed judgment by our esteemed brother Punchhi, J. Despite our deep and abiding personal respects, we express our regards for our inability to agree with the proposed judgment. Hence we are constrained to write this separate judgment.

11. This appeal by special leave arises from the judgment and order dated December 19, 1979 made in A. O. O. No. 240 of 1975 by L. M. Sharma, J. (as he then was) agreeing with the dissenting opinion of one of the members of Division Bench of Patna High Court, viz., B. S. Sinha, J. The result was that the award of the umpire stood set aside.

12. The appellant had entered into an agreement with the respondent on May 2, 1971 for execution of certain works. During the course of their execution, certain disputes had arisen between them. Clause 78 of the contract provided resolution of the disputes by arbitration. In furtherance thereof, the parties had referred the disputes in 1972 to two arbitrators. One of the disputes referred to them was "whether claims referred to at items 2, 3, 4 and 5 of Annexure-A are or are not referable to arbitration in terms of the contract." The total claim including items 2 to 5 was for Rs. 2,55,600/-. The arbitrators held that the claim Nos. 2 to 5 were referable under arbitration agreement but they could not come to an agreement on the merits of the claims. Therefore, they had appointed an umpire by their letter dated November 2, 1973. The umpire made a non-speaking award directing the respondent to pay a lump sum of Rs. 80,000/- besides interest. On an application made by the appellant, the Civil Court made the award rule of the Court and the application under Section 33 of Arbitration Act, 1940 (for short, the "Act") to set aside the award was dismissed. The respondent preferred an appeal in the High Court.

13. When the matter came before the Division Bench consisting of B. P. Jha and B. S. Sinha, JJ., both the learned Judges agreed that one of the terms of the reference was that the arbitrators were required to decide as to whether the claims referred to under items 2 to 5 of Annexure-A are or are not referable to arbitration in terms of the contract. They further held that the finding by the arbitrators that the claims were arbitrable, was not an interim award. The entire controversy including arbitrability of items 2 to 5 was at large and the umpire was to decide whether item 2 to 5 of Annexure-A were arbitrable under contract. B. P. Jha, J. held that when the matter was referred to an umpire, the whole dispute which was referred to the arbitrators by the parties stood referred to the umpire. If a part of the dispute was decided by the arbitrators, the arbitrators could not refer the other half of the dispute to the umpire. The learned Judge observed that "In my opinion, the whole dispute is referred to the umpire for the simple reason that the umpire acts in lieu of the arbitrators. The umpire is entitled to give a consolidated award instead of giving the award on each point. While setting aside an award the Court can look at the award and not on any other extraneous evidence on the record". Accordingly, the learned Judge dismissed the appeal of the respondent. B. S. Sinha, J. held that if a dispute is capable of being split into different parts and the arbitrators agreed on one part and disagreed on the other part, "I can see no reason why the whole dispute must be referred to the umpire. An interim award can be made in terms of Section 27 of the Act. Of course, if the dispute is not capable of being split up and the arbitrators do not agree, the whole dispute will go to the umpire. In other words, as far as I can see, whether the whole dispute was referred to the umpire or not depends upon the facts and circumstances of each case for which no hard and fast rule can be laid down." He held that the whole dispute had been referred to the umpire. The arbitrators did not give an interim award to say that items 2 to 5 were arbitrable and then to further decide as to what amount was payable to the respondent. It was not necessary to express the decision in that behalf. "Therefore, the umpire had to consider firstly whether items 2 to 5 were arbitrable or not. There is no such statement in the award of the umpire. Therefore, to hold that items 2 to 5 were arbitrable would be speculative." Accordingly the learned Judge held that the judgment and decree of the Civil Court making the award as rule of Court is invalid and illegal. The award was held to be illegal and one which could not be acted upon. When the matter was referred to L. M. Sharma, J. [as he then was], in the first instance, the learned Judge indicated that since the umpire could not clothe himself with jurisdiction to decide conclusively whether items 2 to 5 were arbitrable or not, the question was whether the learned Judge could go into that question ? Both the counsel had taken time and after

consultation had stated before the learned Judge that as the scope of reference was limited to the question whether the umpire had to decide the arbitrability of items 2 to 5, the learned Judge could not go into the question whether the claims could have validly been referred to the arbitrators or umpire and could conclusively decide the arbitrability thereof or whether they were within the scope of the agreement itself or within the scope of S. 36 of the Act. On that submission, the learned Judge had proceeded on the basis that both the learned Judges constituting the Division Bench were agreed that it was for the umpire to consider and decide as the preliminary question of arbitrability of claims 2 to 5 under the contract. The inference that the umpire "Chose to give an award allowing the claim partially" cannot be drawn. It was also held that unless it was possible to draw only one inference from the impugned award, it was not permissible in law to arrive at a conclusion that on the basis of mere possibility of having arrived at the decision of preliminary question which was not stated in the expressed terms in the award, to infer that he considered the arbitrability of items 2 to 5. Therefore, the learned Judge concluded thus : "I, therefore, hold that the respondent, the applicant in the court below, has failed to show that the umpire had decided the preliminary question in its favour before proceeding to consider the claims on merits. The award must, therefore, be set aside. I accordingly agree with the conclusion arrived at by Mr. Justice B. S. Sinha and regret to have taken a view different from Mr. Justice B. P. Jha for whom I have great respect". The learned Judge thus allowed the appeal and set aside the award.

14. The question, therefore, is : whether the umpire must be deemed to have decided arbitrability of items 2 to 5 of Annexure-A while giving a non-speaking consolidated award including the claim of item I? It is seen that one of the specific references to the arbitrators was whether items 2 to 5 of the claim of the appellant are arbitrable under the agreement. In view of the finding recorded by all the learned Judges that there is no express finding recorded by the umpire on the arbitrability of the claims in items 2 to 5, the question emerges : whether the umpire must be deemed to have decided arbitrability of items 2 to 5 ? It is seen that both the learned Judges of the Division Bench came to a positive finding that the reference itself is of the arbitrability of the claims in items 2 to 5 under the agreement. The arbitrators were required to decide the same as a further step to decide them on merits. Though, the arbitrators concluded that the claims 2 to 5 were arbitrable, both the learned Judges held that it was not an interim award. The third learned Judge also agreed with that conclusion. The entire dispute including arbitrability of claims in items 2 to 5 had thereby been referred to the umpire. The reference clearly manifests the intention of the parties, when they preferred their dispute for adjudication by the arbitrators, that it was a condition precedent for the umpire to proceed to decide the claims on merits to decide the arbitrability of claims 2 to 5. He did not write a separate order nor indicated in the award that he had applied his mind to that aspect that the claims are arbitrable. The award should have contained a statement that the claims were arbitrable and that he had given a consolidated award. His finding on arbitrability is not conclusive. It is for the Court to ultimately decide the controversy. The umpire is enjoined to consider a preliminary question of his jurisdiction as to arbitrability of claims in items 2 to 5 of Annexure-A. It being a jurisdictional issue, though the umpire cannot conclusively clothe himself with his conclusion of arbitrability of items 2 to 5 which decision is to be taken ultimately by the Civil Court as a condition to exercise his power to decide the claims on merits, he is required to decide arbitrability of the claims in items 2 to 5 as preliminary issue and then to proceed to decide the claims on merits. The award cannot be split into two parts but should be one of integral whole, as was opined by the learned Judges constituting the Division Bench. In a way, L. M. Sharma, J. [as he then was] also agreed in that behalf.

15. The sole question for consideration, therefore, is: whether the umpire having indicated the consolidated sum in his non-speaking award, could be deemed to have decided the preliminary issue of arbitrability of claims 2 to 5 ? We may, at the outset, state that the Constitution Bench in Raipur Development Authority v. Chokhamal Contractors, (1989) 2 SCC 721 : (AIR 1990 SC 1426), had held that unless the parties expressly agree, the arbitrator is not required to give reasons in support of his award. The Court pointed out the distinction between the private award and the award touching the coffers of the public exchequer and observed that in case the contracts were entered into by and between the Government or instrumentality of the State on the one hand and private party on the other, they should incorporate in the contract that the arbitrator should give reasons in support of the award. In other cases it may not be incumbent upon the arbitrator to give reasons in the award. In the Arbitration and Concilation Act, 1996 repealing the 1940 Act, it is indicated in Section 31 (3) that the arbitral award shall state reasons upon which it is based unless the parties agree that no reasons have to be given or the award is an arbitral award on agreed terms under Section 30 thereof. In other words, under the 1996 Act, it is incumbent upon the arbitrator to give reasons in support of the award unless the parties otherwise agree or give consent to the terms under Section 30.

16. In Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd., LR (1922) 50 IA 324 : AIR 1923 PC 66, the Privy Council held that "(A)n error in law on the face of the award means that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party, that opens the door to seeing first what that contention is, and then going to the contract on which the parties' right depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying : 'inasmuch as the arbitrators awarded so and so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at the result by totally misinterpreting Rule 52'. But they were entitled to give their own interpretation to Rule 52 or any other article, and the award will stand unless, on the face of it, they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound." Thus on the face of the award if an erroneous proposition of law or an indication in that behalf is found which under the law is not sustainable, it cannot be said that there is an error on the face of the award. This view was followed by this Court in Hindustan Construction Co. Ltd. v. State of J. and K., (1992) 4 SCC 217 : (1992 AIR SCW 2647).

17. In Tarapore and Co. v. Cochin Shipyard Ltd., Cochin, (1984) 2 SCC 680 : (AIR 1984 SC 1072), this Court was called upon to consider error of jurisdiction on the arbitrability of the claims as a question of law. A two-Judge Bench had gone into the question of jurisdiction of the arbitrator to decide the arbitrability of the dispute and held in para 10 that undoubtedly the respondent proceeded to formulate the point in dispute between the parties on which the arbitrator was to be invited to give his award without prejudice to his right to contend that the dispute was not covered by the arbitration clause and that the appellant was not entitled to any compensation in respect of the

increase in the cost of imported pile driving equipment and technical know-how fees. At page 692 (of SCC) : (at P. 1078 of AIR), this Court considered whether the arbitrator committed error within his jurisdiction or exceeded his jurisdiction and pointed out thus :

"What is the effect of referring the specific question of law to arbitration without prejudice to one's right to contend to the contrary will be presently examined."

"If this issue specifically raises a question as to jurisdiction of the arbitrator to arbitrate upon the dispute set out in Point No. 2, it appears to have been specifically referred to the arbitrator for his decision. Parties, therefore, agreed to submit the specific question even with regard to the scope, ambit width and the construction of the arbitration clause so as to define its parameters and contours with a view to ascertaining whether the claim advanced by the appellant and disputed by the respondent would be covered by the arbitration clause. Whether upon its true construction the arbitration clause would include within its compass the dispute thus raised between the parties was specifically put in issue because parties were at variance about it."

"The arbitrator was thus required and called upon first to decide whether the dispute is arbitrable as falling within the width and answer is in the affirmative, then alone the second point need be examined. If the answer to the first point of reference is in the negative in that if the arbitrator were of the opinion that the dispute is not arbitrable as it would not fall within the scope, width and ambit of the arbitration agreement, it would not be necessary for him to determine whether the appellant was entitled to recover anything by way of compensation. This aspect is being analysed in depth to point out that the parties specifically referred the question of construction of arbitration agreement, its width, ambit and parameters vis-a-vis the dispute raised so as to decide whether the dispute would fall within the purview of the arbitration agreement, in other words the jurisdiction of the arbitrator."

18. In para 12 of the judgment it was further elaborated that:

"The first point extracted hereinbefore would clearly show that the specific question about the jurisdiction of the arbitrator to arbitrate upon the dispute set out in Points Nos. 2, 3, and 4 was specifically referred to the arbitrator. On the first point, the arbitrator had to decide whether the claim made by the appellant and disputed by the respondent would be covered by clause 40, i.e. the arbitration clause. In other words, the specific question referred to the arbitrator was about his jurisdiction to arbitrate upon the disputes covered by Points Nos. 2, 3 and 4, if and only if, upon a true construction of the arbitration clause that is first paragraph of Clause 40, would cover the disputed claim for compensation he can enter into the merits of the dispute and decide it."

In M/s. Sudarshan Trading Co. v. State of Kerala, (1989) 2 SCC 38 : (AIR 1989 SC 890), a Bench of two Judges had held that in order to establish whether the jurisdiction has been exceeded or not "it has to be reiterated that an arbitrator acting beyond his jurisdiction" - is a different ground from the error apparent on the face of the award. In Halsbury's Laws of England II, 4th edn., Vol. 2 para 622 one of the misconducts enumerated, is the decision by the arbitrator on a matter which is not included in the agreement or reference. But in such a case one has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Whether a particular amount was liable to be paid or damage liable to be sustained, was a decision within the competency of the arbitrator in this case. By purporting to construe the contract the Court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. It has to be realised that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to the exercise of that jurisdition. There may be a conflict as to the power of the arbitrator to grant a particular remedy. Therein, it was held that the arbitrator had jurisdiction to award the amount and that, therefore, it was not a case of jurisdictional error but an error within his jurisdiction.

19. In U. P. Rajkiya Nirman Nigam Ltd. v. Indore Pvt. Ltd., (1996) 2 SCC 667 : (1996 AIR SCW 980), a Bench of three Judges [to which one of us, K. Ramaswamy, J., was a member] had gone into the question whether the arbitrator can go into the question whether there emerged any concluded contract and the claims are arbitrable and whether he can get exclusive jurisdiction to decide those questions by himself. It was held in para 13 that "the arbitrability of a claim depends on the construction of the clause in the contract. The finding of the arbitrator/ arbitrators on arbitrability of the claim is not conclusive as under Section 33, ultimately it is the Court that decides the controversy. It being a jurisdictional issue, the arbitrator/ arbitrators cannot clothe themselves with jurisdiction to conclusively decide the issue." In para 15 it was held thus:

"The clear settled law thus is that the existence or validity of an arbitration agreement shall be decided by the Court alone. Arbitrators, therefore, have no power or jurisdiction to decide or adjudicate conclusively by themselves the question since it is the very foundation on which the arbitrators proceed to adjudicate the disputes. Therefore, it is rightly pointed out by Shri Adarsh Kumar Goel, learned counsel for the appellant that they had by mistake agreed for reference and that arbitrators could not decide the existence of the arbitration agreement or arbitrability of the disputes without prejudice to their stand that no valid agreement existed. Shri Nariman contended that having agreed to refer the dispute, the appellant had acquisced to the jurisdiction of the arbitrators and, therefore, they cannot exercise the right under Section 33 of the Act. We find no force in the contention. As seen, the appellant is claiming adjudication under Section 33 which the Court alone has jurisdiction and power to decide whether any valid agreement is existing between the parties. Mere acceptance or acquiescing to the jurisdiction of the arbitrators for adjudication of the disputes as to the existence of the arbitration agreement or arbitrability of the dispute does not disentitle the appellant to have the remedy under Section 33 through the Court. In our considered view the remedy under Section 33 is the only right royal way for deciding the controversy."

20. Accordingly, it was held that the arbitrator cannot decide the arbitrability of the claim by

himself and it was to be decided by the Court. In Union of India v. G.S. Atwal and Co. (Asansole), (1996) 3 SCC 568 : (1996 AIR SCW 1180), a Bench of two Judges, to which one of us, K. Ramaswamy, J. was a member, the question was whether the arbitrator, when he enlarged his scope of the award in a non-speaking award, could conclusively decide the dispute and award a consolidated sum. After elaborate consideration it was held in paragraph 6 thus :

"To constitute an arbitration agreement, there must be an agreement that is to say the parties must be ad idem. Arbitrability of a claim depends upon the dispute between the parties and the reference to the arbitrator. On appointment, he enters upon that dispute for adjudication. The finding of the arbitrator on the arbitrability of the claim is not conclusive, as under Section 33 ultimately it is the Court that decides the controversy. It can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. The arbitrator had no power to decide his own jurisdiction. The arbitrator is always entitled to inquire whether or not he has jurisdiction to decide the dispute. He can refuse to deal with the matter at all and leave the parties to go to the Court if he comes to the conclusion that he has no power to deal with the matter, or he can consider the matter and if he forms the view that the contract upon which the claimant is relying on and from which, if established, he alone has jurisdiction, he can proceed to decide the dispute accordingly. Whether or not the arbitrator has jurisdiction and whether the matter is referred to or is within the ambit of clause for reference of any difference or dispute which may arise between the parties, it is for the Court to decide it. The arbitrator by a wrong decision cannot enlarge the scope of the submission. It is for the Court to decide finally the arbitrability of the claim in dispute or any clause or a matter or a thing contained therein or the construction thereof."

21. Accordingly, the award was found to be in excess of jurisdiction and was set aside.

22. In Tarapore Company case (AIR 1984 SC 1072) (supra), the arbitrator had indicated his mind in his non-speaking award thus :

"It has to be seen whether the term of the agreement permitted entertainment of the claim by necessary implication. It may be stated that we do not accept the broad contention of Shri Nariman that whatever is not excluded specifically by the contract can be subject-matter of claim by a contractor. Such a proposition will mock at the terms agreed upon. Parties cannot be allowed to depart from what they had agreed. Of course, if something flows as a necessary concomitant to what was agreed upon, courts can assume that too as a part of the contract between the parties."

23. On that basis, this Court had held that he had decided the arbitrability of the claims by his express indication in that behalf and that, therefore, the award was held to be valid.

24. In Tarapore and Co. v. State of M. P., (1994) 3 SCC 521, it was held that an award rendered by going beyond the terms of the arbitration agreement is without jurisdiction. On the facts in that case,

it was held that the dispute was within the terms of the agreement and hence the award was not without jurisdiction. This Court pointed out latent and patent errors and that patent error was always amenable to correction. In Gujarat Water Supply and Sewerage Board v. Unique Erectors, (1989) 1 SCC 532 : (AIR 1989 SC 973), one of the questions referred was arbitrability of one of the items. The arbitrator in his award had indicated thus : (At P. 977 of AIR)

"In the instant case, the arbitrator by virtue of the terms mentioned in the order of this Court had to decide which of the disputes were arbitrable and which were not. It is true that the arbitrator has not specifically stated in the award that he had to decide the question of arbitrability. The arbitrator has rested by stating that he had heard the parties on the point of arbitrability of the claim and the counter-claim. He has further stated that after 'considering all the above aspects' and 'the question of arbitrability or non-arbitrability' he had made the award on certain aspects."

25. It was held that since the arbitrator had indicated his mind in the award by awarding consolidated sum the validity of the non-reasoned award was upheld.

26. In "Russel on Arbitration" [Nineteenth Edition] by Anthony Walton, page 99, it is stated as under :

"It can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. It has indeed several times been said bluntly that an arbitrator has no power to decide his own jurisdiction and in one case where rules of an institution prepared to conduct arbitrations gave the arbitrator such power, the Court will ignore this when asked to enforce the award, and decide the question itself. However, an arbitrator is always entitled to enquire whether or not he has jurisdiction. An umpire faced with a dispute whether or not there was a contract from which alone his jurisdiction, if any, can arise can matter at all and lease the parties to go to Court, or he can consider the matter and if he forms the view that the contract upon which the claimant is relying and from which, if established, alone his jurisdiction can arise is in truth the contract, he can proceed accordingly."

27. In "Law of Arbitration" by R. S. Bachawat [2nd (1987) Edition] at pages 154-55, it is stated thus :

"An arbitrator cannot by mistake assume jurisdiction over a matter on which he has no jurisdiction. If it is shown by the terms of the submission or by extrinsic evidence that the arbitrator has adjudicated upon matters outside the scope of his authority the award cannot stand, however well meaning and honest the mistake might have been. An arbitrator cannot give himself jurisdiction by a wrong decision collateral to the merits as to facts on which the limits of his jurisdiction depends.

Where it was a condition precedent to his jurisdiction that the dispute should have arisen during a tenancy between the plaintiff and the defendant or in the event of a collusion if certain works had been completed, the arbitrator could not clothe himself with jurisdiction by a wrong decision on the preliminary point. The question is not concluded against any party by a finding of the arbitrator that he has jurisdiction. It is for the Court and not for the arbitrator to decide finally whether or not the arbitrator has jurisdiction and that is the law both in India and in England."

". . . . The question whether the matters referred were within the ambit of the clause for reference of "any difference on dispute which may arise between the partners is for the Court to decide."

". . . . Disputes about the existence or validity of the contract and as to the existence of facts which render it illegal must be determined by the Court and not by the arbitrator. The arbitrator cannot by his own finding clothe himself with jurisdiction. Supposing he finds that the arbitration agreement is valid such a finding cannot bind the parties."

28. In Tamil Nadu Electricity Board v. M/s. Bridge Tunnel Constructions, (1997) 2 SCALE 653 a two-Judge Bench, to which one of us, K. Ramaswamy, J., was a member, a similar question, as in the present case, had directly arisen for consideration. Therein, in a dispute raised under Section 33 of the Act, one of the contentions raised was as to the arbitrability of the claims put up by the respondent. The Court left open that question and held that in the event of dispute raised by the appellant therein, the arbitration was required to go into the question and if it decided that question against it, it would be open to the appellant to have the award challenged in the civil Court. The arbitrators differed on the question of arbitrability and an umpire came to be appointed for decision on the point of arbitrability. The umpire without deciding the arbitrability of the claim gave consolidated sum in his non-speaking award. Considering the entire case law, this Court held : "(T)hus, it could be seen that prior to the proceedings under Section 33, the Court had left open the point of the non-arbitrability of the dispute and the umpire had to decide the dispute. In the event of the decision going against the Board, the same is also entitled to question the correctness of the award in a Court of law". After considering the question, this Court held : "(I)t would thus be clear that the arbitrator cannot clothe himself conclusively with the jurisdiction to decide or omit to decide the arbitrability of a particular item or the claim made by the parties. When a specific reference has been made to the arbitrator and the parties raise the dispute of arbitrability, with the leave of the Court/ by a direction of the Court in a proceedings under Section 33, he is to decide the arbitrability of the dispute and make a decision while giving reasons in support thereof. The decision of the arbitrator in granting a particular sum by a non-speaking award, therefore, hinges upon the arbitrability of a dispute arising under the contract or upon a particular item claimed thereunder. He is required to give the decision thereon. The question of decision by implication does not arise since his jurisdiction to decide the dispute on merits hinges upon his jurisdiction to decide the arbitrability of the dispute. In this case, in view of the finding recorded by the Court, which has become final, as referred to earlier, the arbitrator/ umpire was enjoined to decide the arbitrability of the claims set up by the respondent and disputed by the appellant. Admittedly, the award of the umpire does not contain any decision on arbitrability of the claims". Since the award contains the claims, in a non-speaking award where the claims consist of arbitrable and non-arbitrable claims, it

was held that it would be difficult to discern as to what extent the umpire had considered the admissible and inadmissible claims which he adjudged. In such a situation, it would not be possible to discern to what extent he had exercised his jurisdiction vis-a-vis of the admissible claims and disallowed the non-arbitrable claims. Thus it was not clear whether he exercised his authority in abdication of or in excess of his jurisdiction. Therefore, it was held to be an error of jurisdiction, the very foundation for his decision. The award was held to be in excess of his jurisdiction and was accordingly set aside. The umpire having been invested with jurisdiction to decide the arbitrability of the claim, he has committed error of jurisdiction in not considering the arbitrability of the claims and passed a non-speaking award. Accordingly, the award was set aside.

29. In view of the admitted position that the umpire in the present case has not considered the arbitrability of items 2 to 5 of the claims in the non-speaking award, it cannot be construed that by implication he had considered the arbitrability of the claims. The preliminary question raised by the parties was as to the arbitrability of items 2 to 5 of the claims and whether they are within the scope of the contract. Before proceeding to adjudicate the claims 2 to 5 on merits, the umpire was required to give his finding on the issue of arbitrability of claims 2 to 5 and reasons in support thereof. The third learned Judge (L. M. Sharma, J. as he then was) and Sinha, J. have rightly held that the umpire cannot conclusively decide for himself in a non-speaking award of the arbitrability of the claims and that, therefore, the umpire was required to decide as a preliminary issue of the arbitrability of the claims 2 to 5. We agree with the learned Judges on the finding that the award is illegal.

30. The question, therefore, that remains to be considered is : what procedure in such a situation is required to be adopted ? In M/s. Sudarshan Trading Company case, (AIR 1989 SC 890), Tarapore Co. Case (1994 (3) SCC 521), G. S. Atwal case (1996 AIR SCW 1180) and Tamil Nadu Electricity Board case (supra) this Court pointed out that in such a situation two courses are open to the Court, viz., either to set aside the award in toto and relieve the parties from the arbitration or to remit the award to the umpire/ arbitrator for de novo consideration. In G. S. Atwal case (1996 AIR SCW 1180) and Tamil Nadu Electricity Board cases this Court had set aside the award and thereby put the lis in quietus. But in view of the facts in this case we think that since the preliminary issue raised by the parties was not decided by the umpire which is condition precedent to proceed with adjudication of the claims on merits, he committed misconduct in giving the award. We, therefore, direct that the matter will go back to the Umpire for reconsideration of the same afresh in the light of what we have stated hereinbefore. If for any reason, the Umpire is not available the parties may choose a new Umpire and if the parties fail to do so, the Court may appoint a new Umpire who will decide the matter afresh, clearly expressing his views on the arbitrability of claims 2 to 5 while deciding the matter.

31. The appeal accordingly is allowed with the above directions. No costs.

Appeal allowed.