M/S. Premier Fabricators, Allahabad vs Heavy Engineering Corpn. Limited, ... on 21 March, 1997

Author: K. Ramaswamy

Bench: Chief Justice, K. Ramaswamy

PETITIONER:
M/S. PREMIER FABRICATORS, ALLAHABAD

Vs.

RESPONDENT:
HEAVY ENGINEERING CORPN. LIMITED, RANCHI

DATE OF JUDGMENT: 21/03/1997

BENCH:
CJI, K. RAMASWAMY

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T K. Ramaswamy, J.

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 right this separate judgment.

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.

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 has arisen between them. Clause 78 of the contract provided resolution of the disputes by arbitration. In furtherance thereof,

the parties has referred the disputes in 1972 to two arbitrators, one of the disputes referred to them was "whether claims referred to at item 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 and appeal in the High Court.

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 claim 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 arbitrator that the claims were arbitrable, was not an interim award. The entire controversy including arbitrability of items of to 5 was at large and the umpire was to decide whether items 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 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 arbitrator. 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 whey 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 the 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 Section 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 claim 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 item 2 to 5. Therefore, the learned Judge concluded thus : " I, therefore, hold that the respondent, the application 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. In 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.

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 claim 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 claim on merits to decide the arbitrability of claim 2 to 5. he did not write a separated order nor indicated in the wared 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 is 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.

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], had held that unless the parties expressly agree, the arbitrator is not required to give reasons in support of his 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 case it may not be incumbent upon the arbitrator to give reasons in the award. In the Arbitration and Conciliation 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 on 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 reason in support of the award unless the parties otherwise agree or give consent to the terms under Section 30.
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> In Champsey Bhara & Co. v. Jivraj Balloo Spinning & 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 arbitrator awarded so and so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that 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 its, 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 & K. [(1992) 4 SCC 217].
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> In Tarapore and Co. v. Cochin Shipyard Ltd., Cochin [(1984) 2 SCC 680], 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, this Court considered whether the arbitrator committed error within this 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 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."

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 Point 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 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] 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 damages liable to be sustained, was a decision within the competency of the arbitrator in this case. By purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. It has to be realised that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to the exercise of that jurisdiction. 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.

In U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd. [(1996) 2 SCC 667] a Bench of three Judges [to which one of us, K. Ramaswamy, J., was member] had gone into the question whether there emerged any concluded contract and the claim 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.
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> 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 arbitrator cold not decide the existence of the arbitration agreement or arbitrability of the disputes without prejudice to the stand that no valid agreement existed. Shri Nariman contended that having agreed to refer the dispute, the appellant had acquiesced 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."

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 & Co. (Asansole) [(1996) 3 SCC 568] 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.
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> 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 claim is not conclusive, as under
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> Section 3 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."

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

In Tarapore Company case (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.
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> 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."

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

In Tarapore & Co. V/s. 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] one of the questions referred was arbitrability of one of the items. The arbitrator in his award had indicated thus:

"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."

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.

In "Russel on Arbitration" [Nineteenth Edition] by Another 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 decided 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 inquire 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."

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 if certain works had been completed, the arbitrator could not clothe himself with arbitrator could not clothe himself with arbitrator could not clothe himself with jurisdiction by a wrong decision on the preliminary . 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/"
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> "...The question whether the matters referred were within the ambit of the clause for reference of "any difference or dispute which may arise between the partners is for the court to decide".
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> "...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."

In Tamil Nadu electricity Board V/s. M/s. Bridge Tunnel Constructions & Ors. [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 the dispute raised by the appellant therein, the arbitrator 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 held 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. 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.

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 ar 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 that finding that the award is illegal.

The question that found that remains to be considered is what procedure in such a situation is required to be adopted? In M/s. Sudarshan Trading Company Case, Tarapore Co. Case, G.S. Atwal case and Tamil Nadu Electricity Board case (supra) this Court pointed out that in such a situation two corses 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 a ward to the umpire/arbitrator for de novo consideration. In G.S. Atwal case 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 fact 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 Clair 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 parities 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.

The appeal accordingly is allowed with the above directions. No casts.