Supreme Court of India
Tamilnadu Electricity Board vs M/S. Bridge Tunnel Constructions ... on 18 February, 1997
Bench: K. Ramaswamy, S. Shaggier Hammed

PETITIONER:
TAMILNADU ELECTRICITY BOARD

Vs.

RESPONDENT:
M/S. BRIDGE TUNNEL CONSTRUCTIONS & ORS.

DATE OF JUDGMENT: 18/02/1997

BENCH:
K. RAMASWAMY, S. SHAGGIER HAMMED

ACT:

HEADNOTE:

JUDGMENT:

O R D E R Leave granted. Substitution allowed.

These appeals, by special leave, arise from the judgment of the Madras High Court, dated December 20, 1990, made i n O.S.A. Nos. 109 and 110 of 1988. q The admitted facts are that the respondents had entered into an agreement with the appellant to construct inter- connecting tunnels for Suruliyar Hydroelectric Project as per specification No. 1138- Schedule-B to the agreement. The initial value of the tender to be awarded was Rs. 47 lakhs and it was revised to Rs. 69 lakhs on January 16, 1975. In the course of execution of the contract, a sum of Rs. 92 lakhs was paid to the respondent. The contract was to be completed within a period of 24 months from the date of taking over of the site, i.e., January 18, 1975; thus, it was completed after the expiry of the term, on August 25, 1978. Resultantly, there had arisen a dispute as to the entitlement to further amount towards the work done by the respondent.

On a notice issued by the respondent for appointment of an arbitrator in terms of clause 50 of the contract (arbitrator clause), there was a delay on the part of the appellant i n nomination of the arbitrator. When the respondent exercised the power, after expiry of the time prescribed in the notice, appointing a sole arbitrator, proceedings under Section 33 of the Arbitrator Act, 1940 were initiated by the appellant. One of the objections raised by the appellant in the proceedings under Section 33 was that under the terms of the contract the claim sought to be put up in the notice given

by the respondent was not arbitrable. The question was gone into and the court recorded a finding as under:

> "If the petitioner had come forward to raise dispute and if it is outside the scope of clause 50, the first respondent itself would come forward with such a reservation. It is not as if all disputes would come within the cope of clause 50 and only those that would come within the ambit of clause 50 alone can be decided by the Arbitrators when such is the clear position on this aspect; enabling the petitioner Board to raise a objection regarding disputes which may not come within the scope of clause 50 is not a concession, but a recognition of a right, which is available not only to the petitioner Board but also the first respondent in the event of the Board raising any dispute as against it. Therefore, the first stipulation is dependent upon the Arbitrators deciding as to whether particular dispute would come within the scope of Section 50 or not, and only if they consider that it falls within the scope of Arbitration clause, they would have the jurisdiction to decide the same. In the event of the Arbitrators holding that any particular dispute is outside the Arbitration clause, it is not as if the first respondent is deprived of remedies by agitating the same in Course."
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> It is also further held that :
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> "After the award is made, as the petitioner Board has already reserved its right, it would enable the Board to raise this point, in the event of any need arising for setting aside the award in Court."

Pursuant thereto, condoning the delay liberty was given to the appellant to nominate an Arbitrator on its behalf which accordingly was done and dispute was referred to arbitration. Arbitrability of some of the claims was disputed as part of no liability. Since the two Arbitrators differed, an umpire was selected by the Arbitrators and he had gone into the question. At this stage, it is relevant to mention that some of the claims made by the respondents relate to excavation of hard rock in the tunnel and the rate of claims.

The relevant clauses of the Contract postulate thus : "22. Material to be excavated :

The character of the material through which the tunnel is to be excavated is indicated i n the report of the Geologist of the Geological Survey of India, attached of this specification as an appendix. The probable nature of materials to be excavated is given in the above report. It is expressly to be under stood, however, that the purchaser does not guarantee the accuracy of the information and should the conditions be found to differ from those indicated, the contractor shall have no claim against the purchaser on the grounds of misrepresentation. Moreover, the price to be given in the schedule of prices for excavation work is to be inclusive and to be held to cover excavation in the actual materials encountered.

23. Tunnel Excavation:

a) The tunnel is to be excavated to such dimensions as to give the minimum thickness of concrete lining specified and to suit the shape and size of cross section of the tunnel shown on drawing.

b) Excavation is to be carried out as far as feasible, simultaneously on all fages. It is expected, that more of the ground alone the tunnel will be hard rock requiring the supports. Except where the materials penetrated is hard rock and will safely stand by itself, the tunnel is to be lined temporarily with timber supports and shoring. The timbering is to be kept as alose to the face of the heading as possible. Any shoring of protective arrangements considered inadequate by the Engineer is to be strengthened immediately.

g) The type of tunnel section to be constructed shall be as directed or approved by the Engineer.

Measurement for payment of tunnel excavation, will be limited to the special sectional dimensions and will be made along the established centre line of the tunnel and payment therefore will be made at the unit bid in the schedule for excavation of all classes of tunnel. No additional allowance above the unit price bid in the schedule for excavation of all eclasses of tunnel will be made on account of the class, nature or condition of any of the material encountered."

The rates were mentioned in the Schedule and the respondent had set up the claims raised at rates higher than the contracted rates and twice the rate for the work done after the expiry of the contract period.

Against the claims, objections were raised by the appellant. They have disputed the claim set up by the respondents and requested the Arbitrators to decide on the arbitrability of the items mentioned in the claims of the respondents. The umpire, without going into the details, in a non-speaking award as against the claim of Rs. 2 crores 10 lakhs, has awarded a consolidated sum of Rs. 70.83 lakhs as under :

> "I hereby award and direct as follows:
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> (1) The Respondent shall pay the claimant a sum of Rupees Seventy Lakhs eighty three thousand seven hundred and ninety three only (Rs.
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> 70,83,793/-) and release the earnest money deposit and Bank Guarantees furnished by the claimant in lieu of Security Deposit, in full settlement of all claims and counter-claims."

Calling the award in question, an application to set it aside has been filed. The respondent filed an application to make the award the rule of the court. The civil Court dismissed the petition of the appellant and made the award the rule of the court. On appeal, the Division Bench of the High Court has confirmed the same. Thus these appeals, by special leave.

Shri V.R. Reddy, the learned Additional Solicitor General, contends that the award is illegal on account of omission on the part of the Umpire to give the findings and reasons in support thereof of

the arbitrability of the claims. He contends that arbitrability of claim is a jurisdictional issue. The arbitrator cannot clothe himself with the power, in a non-speaking award to award a consolidated sum, without deciding the arbitrability of the claims set up by the respondents including those which are not part of the contract.

Shri Poti, learned senior counsel for the respondents has contended that the award being a non-speaking one in the absence of specific reference directing the Arbitrators to decide the arbitrability of some of the items in the claims set up by the respondent, Umpire was not called upon or obliged to decide the dispute by a speaking order on arbitrability. He reached the conclusion whether or not the dispute or the claim is arbitrable and obviously he was of the opinion that all the claims are arbitrable and he is empowered to decide it either rightly or wrongly. He may be wrong in not expressly giving his decision on arbitrability of some of the claims. However, his decision is within his jurisdiction. He is not required to give any reasons in the award for reaching that decision. When the arbitrator had given a consolidated sum towards all the claims, it would mean that he had considered the arbitrability of some of the claims in terms of the contract and that, therefore, he has not committed any error in reaching that conclusion which is apparent on the face of the record. In the absence of any specific reference for deciding that dispute, even if incidentally he reaches that decision, he gets the jurisdiction and power to decide the question, he gets the otherwise also, the award cannot be assailed o n the ground that he reached a wrong decision without any reasons in support thereof. In that event, it must be deemed that he had considered the non-arbitrability of the items in a non- speaking ward given by him. He also further contends that i n the absence of any agreement between the parties that the arbitrator would give reasons in support of his decision on the arbitrability of the dispute, he is not called upon to decide the dispute by a speaking award. What is required, therefore, is to be considered is whether the arbitrator reached the decision as to the entitlement to for a specified sum or disentitlement thereof, in his award. Once he specifies the amount to which the respondent is entitled, it must be deemed that he had taken into consideration the arbitrability of all the claims including the claim relating to non-arbitrability of some of the items and had given the award. Thereby, consolidated sum in the award is not subject to attack that the award made by the Arbitrator is vitiated by any error of jurisdiction or error of law apparent on the face of the record. Shri Poti further contends that the contract of arbitration is not part of the record and the umpire had not referred to the agreement as part of the award and that, therefore, it is not open to the court to look into the contract to find out whether the contractor claimed at the rates higher than what were contracted and the umpire has omitted to consider the non- arbitrability of the claims in respect of some of the items. In support thereof, the places strong reliance on the decision of this Court in Tarapore and Co. v. Cochin Shipyard Ltd., Cochin [(1984) 2 SCC 680], in particular, paragraphs 10, 12,33 thereof, and State of A.P. v. R.V. Rayanim [(1990) 1 SCC 433 at 435, para 5].

In view of the respective contentions, the question that arises for consideration is: whether the Umpire was required to give a decision supported by reasons on the non- arbitrability of some of the items in terms of the contract. It is already seen that the Court prior to the proceedings under Section 33 had gone into the question as to the right of the appellant to question the arbitrability of some of the items and had expressly recorded, as seen hereinbefore, that if any objection regarding the dispute is raised, either parties is at liberty to raise the same and avail of decision by the

arbitrator and the arbitrator is required to decide the arbitrability of the claim and if he considers that it falls within the scope of the arbitration clause/arbitrability, then he would have the jurisdiction to decide the same. If the decision has been reached by the arbitrator against the appellant, it would be open to the Board to raise that point, in case any need arises for setting aside the said award in the court. Thus, it could be seen that prior to the proceedings under Section 33, the court had left open 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. That order has become final.

In the light of the above facts, the question arises; whether the arbitrator was not obliged to decide the non- arbitrability of some of the items claimed by the respondents before/while giving a non-speaking award and whether a deemed decision could be given credence. In Tarapore Co.'s case relied on by Shri Poti, a Bench of two judges of this court had gone into the question of jurisdiction of the arbitrator to decide the arbitrability of the dispute. In para 10 thereof, it is stated 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."
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> 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."
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> "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 he opinion that the dispute is not arbitrable as it would not fall within the scope, width an 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 constriction 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."

Thus, it could be seen that therein that when the question is specifically referred to the arbitrator, the arbitrator is required to decide the question referred to him and decide the point on the question. Then only he gets the jurisdiction to go into the merits. In para 12 of the judgment that

point was elaborated holding 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 claims 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."

This ratio clearly establishes that the arbitrator gets jurisdiction to decide the dispute on merits only when he is specifically called upon to decide the dispute in terms of the contract.

In Managing Director, J & K Handicraft v. Good Luck Carpets [(1990) 4 SCC 740], the question arose: whether the court could look into the arbitration agreement, find out whether the arbitrator has jurisdiction to decide the dispute though it was not formed part of the award? In para 5, this Court had held that:

> "... Here we may point out that the learned counsel for the respondent has urged that the agreement containing the arbitration clause cannot be looked into even to find out as to what was the nature of the dispute contemplated by it with regard to which a reference to an arbitrator was contemplated, more so when the ward was a non-speaking one. We find it difficult to agree with this submission for two reasons: Firstly, the award is not a totally non-speaking one inasmuch as it gives as resume of the incentive scheme and the agreement between the parties as also the items of the claim made by the respondent. Of course, while fixing the amount found payable by the appellant, no reasons are recorded. Secondly, if there is any challenge to the award on the ground that the arbitrator had no jurisdiction to make the award with regard to a particular item inasmuch as it was beyond the scope of reference, the only way to test the correctness of such a challenge is to look into the agreement itself. In our opinion, looking into the agreement for this limited purpose is neither tantamount to going into the evidence produced by the parties nor into the reason which weighted with the arbitrator in making the award."

In fact this Court had gone into merits while deciding the question as to whether the arbitrator was justified in making the award in excess of the jurisdiction with reference to the arbitration agreement and deciding the dispute on that basis.

In U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd. [(1996) 2 SCC 667] a Bench of three judges [to which both of us were members] had gone into the question whether the arbitrator can go into the question whether there emerged any concluded contract and whether he can get exclusive

jurisdiction to decide that question by himself? In an application under Section 33, the learned Single Judge of the High Court had held that the arbitrator has exclusive jurisdiction to decide that question. Reversing that judgment this Court in para 13 had held 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 is 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 of 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 cold 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 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 controversy of arbitrability requires to be decided by the court and not by the arbitrator himself.

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, was to consider the question whether the arbitrator. when he enlarged his scope of award in a non-speaking award, can conclusively decide the dispute and give an award in that behalf? It was held in paragraph 6 that :

> "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 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 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 the 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 of 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.:

In Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co. Ltd. (LR (1922) 50 IA 324 : AIR 1923 PC 66] Lord Dunedin had laid down the dictum as to an error in law on the face of the award, which was accepted and followed by this court in Hindustan Construction Co. Ltd. v. State of J & K. [(1992) 4 SCC 217]. Therein it was held that:

> "An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reason 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 the 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:
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> '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 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 it, they have tied themselves down to some special legal proposition which then when examined, appears to be unsound."

The decision has been followed by this Court in all subsequent judgments and the precise scope of the law as to error apparent on the face of the award has been crystalised. But there is a distinction between an error apparent on the face of the award and jurisdictional error in passing the award. In that behalf, in M/s. Sudarsan Trading Co. v. State of Kerala [(1989) 2 SCC 38] Justice Sabyasachi Mukharji, as he then was, had pointed out the distinction on the jurisdictional error and the error on the face of the award. It was stated thus:

> "An award may be remitted or set aside on the ground that the arbitrator in making it, had exceeded this jurisdiction and evidence of matters not appearing on the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is something which has to be determined outside the award- whatever might be said about it in the award or by the arbitrator. 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 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 determined that there is a distinction between dispute as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy."

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 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 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 the 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 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 n the preliminary point. The question is not 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."
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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". "....Dispute 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 jurisdiction agreement is valid such a finding cannot bind the parties".

It would thus be seen that the arbitrator, while deciding the admitted dispute, subject matter of adjudication, may decide the dispute in reference to the agreement. That would be within his jurisdiction. In such jurisdictional issue, even if an error is committed that may not be an error apparent on the face of the record because the arbitrator, the chosen forum, may commit an error in exercising his jurisdiction. However, if he, by a speaking award, decides it on a wrong proposition of law, it will be an error apparent on the face of record and liable to correction. If the arbitrator decides a dispute which is beyond the scope of his reference or beyond the subject matter of the reference or he makes the award disregarding the terms of reference or the arbitration agreement or terms of the contract, it would jurisdictional error beyond the scope of reference, he cannot clothe himself to decide conclusively that dispute as it is an error of jurisdiction which requires to be ultimately decided by the court. This Court has pointed out the distinction between latent and patent error of jurisdiction in Tarapore Co.'s case thus:

> "It has to be seen whether the terms 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."

It 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 of the arbitrability f 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 to

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 arbitrabilty 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.

In Gujarat Water Supply and Sewerage Board v. Unique Erectors [(1989) 1 SCC 532] one of the questions referred was arbitrability of a particular item. It was by the Court stated 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 could be seen that if the arbitrator has indicated his mind in the award that he in fact adverted to the arbitrability or non-arbitrability of the claim and then made the award, it would be indicative of the fact that he had, in fact, applied his mind, considered that question and reached the decision in awarding certain amounts by a non-speaking award including the claim in respect of which arbitrability was in issue.

In Raipur Development Authority v. Chokhamal Contractors [(1989) 2 SCC 721], a Constitution Bench of this Court had gone into the question whether the arbitrator is required to give reasons in a non-speaking award. The Constitution Bench had pointed out in para 35 thus:

"We do not appreciate the contention, urged on behalf of the parties who contend that it should be made obligatory on the part of the arbitrator to give reason for the award, that there is no justification to leave the small area covered by the law of arbitration out of the general rule that the decision of every judicial and quasi-judicial body should be supported by reasons. But at the same time it has to be borne in mind that what applies generally to settlement of disputes by authorities governed by public law need not be extended to all cases arising under private law such as those arising under the law of arbitration which is intended for settlement of private disputes."

In para 37 thereof, this Court emphasised the need to make a speaking award and the terms in the contract should postulate such a need when the contract is entered into by the State or its instrumentalities. It was held thus:

> "The trappings of a body which discharges judicial functions and s required to act in accordance with law with their concomitant obligations for reasoned decisions, are not attracted to a private adjudication of the nature of arbitration as the latter, as we have noticed earlier, is not supposed to exert the State's sovereign judicial power. But

> arbitral awards in disputes to which the State and its instrumentalities are parties affect public interest and the matter of the manner in which government and its instrumentalities allow their interest to be affected by such arbitral adjudications involve larger questions of policy and public interest. Government and its instrumentalities cannot simply allow large financial interests of the State to be prejudicially affected by non-reviewable - except in the limited way allowed by the statute - non-speaking arbitral awards. Indeed, this branch of the system of dispute resolution has, of late, acquired a certain degree of notoriety by the manner in which in many cases the financial interests of government have come to suffer by awards which have raised eyebrows by doubts as to their rectitude and property. It will not be justifiable for governments or their instrumentalities to enter into arbitration agreements which do not expressly stipulate the rendering of reasoned and speaking awards.
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> Government and their, instrumentalities should, as a matter of policy and public interest- if not as a compulsion of law ensure that wherever they enter into agreements for resolution of disputes by resort to private arbitrations, the requirement of speaking awards is expressly stipulated and ensured."

In State of A.P. & Ors. v. R.V. Rayanim & Ors. [(1990) 1 SCC 433], relied on by Shri Poti, the question arose whether the award of escalation charges in a non-speaking award is vitiated by any error apparent on the face of the record? Therein the question of jurisdictional issue had not arisen. On the other hand, on merits, it was contended that there was an error in that behalf. In para 5 it was held that " it was then contended, that the award has purported to grant damages on the basis of escalation of cost and prices and such escalation was not a matter within the domain of the bargain between the parties and having taken that factor into consideration the award was bad." Therefore, the ratio there is an authority supporting the contention on the need of an arbitrator to give a reasoned decision on arbitrability of the contract or claim in dispute.

In this regard, Section 31(3) of the Arbitration and Conciliation Act, 1996, provides thus:

> "(3) The arbitral award shall state the reasons upon which it is based, unless-
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> (a) the parties have agreed that no reasons are to be given, or
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> (b) the award is an arbitral award on agreed terms under Section
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> 30."

The Parliament has expressed the legislative judgement that the award shall state reasons upon which it is based unless parties have agreed otherwise or the award is covered on agreed terms under Section 30 of the new Act.

Thus, the law on the award, as governed by the new Act, is other way about of the pre-existing law; it mandates that the award should state the reasons upon which it is based. In other words, unless (a) the parties have agreed that no reasons are to be given or (b) the award is an arbitral award on agreed terms under Section 30 of the new Act, the award should state the reasons in support of determination of the liability/non-liability. Thereby, legislature has not accepted the ratio of the Constitution Bench in the Chokhamal Contractor's case that the award, being in the private law field, need not be a speaking award even where the award relates to the contact of private parties or between person and the Government or public sector undertakings. The principle is the same, namely the award is governed by Section 31(3).

We have set out the relevant portions of the award. From a reading thereof, it is clear that the arbitrator had considered the claims made on the basis of escalation and damages, in a non-speaking award of the disputes consisting of arbitrable and non-arbitrable claims. He awarded a lumpsum amount of Rs. 70,83,793/-. It is difficult to discern as to what extent the umpire had considered the admissible and inadmissible claims which he adjudged. In such a situation, it is not possible to discern to what extent he had exercised his jurisdiction vis-a-vis of the admissible claims and disallowed the non-arbitrable claims. So, it is not clear whether he exercised his authority either beyond his jurisdiction or in abdication thereof. In either case, it is an error of jurisdiction, the very foundation for his decision.

It is well settled that in the matter of challenge to the award there are two distinct and different grounds, viz., that there is an error apparent on the face of the record and that the arbitrator has exceeded his jurisdiction. In the latter case, the court can look into the arbitration agreement but under the former it cannot do so unless agreement but under the former it cannot do so unless the agreement was incorporated or cited in the award or evidence was made part of the agreement. In the case of jurisdictional error, there is no embargo on the power of the court to admit the contract into evidence and to consider whether or not the umpire had exceeded the jurisdiction because the nature of the dispute is something which has to be determined, outside the award, whatever might be said about it in the award or by the arbitrator. In the case of non-speaking award, it is not open to the court to go into the merits. Only in a speaking award the court can look into the reasoning in the award and correct wrong proposition of law or error of law. It is not open to the court to probe the mental process of the arbitrator and speculate, when no reasons have been given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. But in the later case the court, with reference to the terms of the contract/arbitrator/umpire has exceeded his jurisdiction in awarding or refusing to award the sum of money awarded or omitted a consolidated lumpsum.

In fact, in G.S. Atwal & Co.'s case, having noticed that the arbitrator had exceeded his jurisdiction to grant amount de hors the terms of the contract and being a non- speaking award, the court was unable to speculate as to what extent the award was within the terms of the contract or claims made and to what extent the amount awarded was in respect of non-arbitrable dispute. Accordingly, the order of the civil court was set aside reversing the judgment of the Division Bench of the Calcutta High Court.

Thus considered, we hold that the arbitrator, having been invested with the jurisdiction to decide the arbitrability of certain claims, has committed error of jurisdiction in not considering the arbitrability of the claims and passed a non-speaking award, awarding a sum of Rs. 70.83 lakhs and odd. It is difficult to ascertain as to what extent he has awarded the claims within the contract or the claims outside the contract, of a total claim of Rs. 2.10 crores. Under those circumstances, we are constrained to hold that it is difficult to give acceptance to the award made by the umpire as upheld by the courts below. Equally, we find it difficult to accept the contention that out of a claim of Rs. 2.10 crores, only a sum of Rs. 70.83 and odd was awarded. So, it is not a fit case for interference on the basis of the mere fact that a lesser sum than was claimed has been awarded. An illegal award cannot be upheld to be valid or within jurisdiction.

The question then is : what procedure should be adopted in this behalf? The contention of Shri Poti is that it may be remitted to the umpire for fresh consideration. On the other hand, the contention of Shri V.R. Reddy is that in the event of the conclusion that the arbitrator has exceeded his jurisdiction, the entire award would become invalid and it has to be set at naught. Having given due consideration to the respective contentions, we find force in the contention of Mr. V.R. Reddy. Mr. Poti has stated that though it is found that the award is not valid in law, the party cannot be made to suffer on account of the illegality committed by the umpire. We find no force in the contention. Once a finding recorded that the umpire/arbitrator has committed error of jurisdiction, as stated earlier, two course are open, viz., either to remit the award to the umpire for reconsideration or to set aside the award in toto. We think that the latter course would be appropriate in the facts and circumstances in this case.

Accordingly, we allow the appeals set aside the award of the arbitrator and leave the parties to bear their own costs. If there are no outstanding dues recoverable from the respondents, the security deposit and bank guarantee is required to be refunded to the respondent.