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**Court** : Karnataka

**Decided On :** Feb-24-1967

**Judge** : Govinda Bhat, J.

**Acts** : Arbitration Act, 1940 - Sections 8, 8(2) and 11

**Appeal No.** : C.R.P. No. 890 of 1966

**Appellant** : State of Mysore

**Respondent** : R.J. Shah and Co. Ltd. and anr.

**Judgement** :
ORDER

1. This Revision petition, arising out of proceedings under the Arbitration Act, 1940 , hereinafter called the Act, raises the question of the scope of the Umpire's authority when he enters on the reference in lieu of the Arbitrators.

2. The material facts may be shortly stated:

By a contract in writhing dated October 12, 1959, and made between the petitioner (hereinafter referred to as 'the State') of the one part, and respondent-1 (herein after referred to as 'the contractor') of the other part, the contractor agreed to construct what is called 'Malali Tunnel' and approaches thereto (part of Sharavati Valley-Hydro Electric Project) in accordance with the specifications, plans and terms and conditions specified in the annexures to the said agreement. The

contract contained the following material provisions:--

'51, Arbitration: Notwithstanding anything contained in the clauses hereinabove, the decision of the Special Chief Engineer shall be final in all technical matters detailed in clause 20 of the general conditions and be binding on both the parties.

In case of non-technical matters, either party may resort to arbitration by giving notice in writing of the existence of a dispute. On such a notice being given, the matter shall be referred to arbitration of two persons, one to be nominated by the Government and the other by the contractor. Such submission shall be deemed to be submission to arbitration within the meaning of the Indian Arbitration Act, 1940, or any statutory modification thereof. The award of the arbitrators shall be final and binding on both the parties on all such non-technical matters.'

The contractor made a cam for payment of a sum of Rs. 3,83,985.52 being the alleged charges and expenses for dewatering the approach channels to the tunnel, which was rejected by the State on the ground that it was contrary to the terms and conditions of the contract. The contractor, by virtue of clause 51 of the contract set out above, asked for arbitration of the dispute and nominated Sri K. M. Joshi, Retired Chief Engineer, as their Arbitrator and the State appointed Sri K. Basanna, the Chief Engineer, Government of Mysore. The said two arbitrators appointed the second respondent as Umpire.

3. Before the arbitrators, the contractor and the State filed their respective statements. The State contended, inter alia, that the matter in dispute was technical in nature as detailed in Clause 20 of the General Conditions of the contract, and therefore, not arbitrable. On August 23, 1965, the parties filed a joint submission stating the following points which the arbitrators were required to decided.

1(a) Whether the claimants are entitled to the payment from the respondents for the expenses incurred for pumping out the water that entered into the open cuts of the Malali Tunnel during the construction period?

1(b) If the answer to 1(a) is yes, what is the amount to be paid by the respondents?

2. Is this dispute arbitrable?

4. The arbitrators heard the parties on Point No. 2 as a preliminary issue; the arbitrator appointed by the State held that the dispute was not arbitrable and the arbitrator appointed by the contractor held that it was arbitrable. The arbitrators, having thus disagreed, referred the question of arbitrability of the dispute to the Umpire requesting him to give a decision, and if the decision is in favour of further proceedings, to refer the matter back to the arbitrators.

5. The second respondent, on receipt of the letter of the arbitrators, entered upon the reference; he decided that the subject matter of the claim is non-technical and therefore, the dispute referred is arbitrable. Respondent-2 next considered whether after deciding the point as to arbitrability, he should refer back the case to the arbitrators for further proceedings. After hearing the parties, he ruled that when once the case was referred to the Umpire by the arbitrators, stating in writing that they have disagreed on certain matter, the jurisdiction of the arbitrators ceases and the Umpire has to proceed with case and make an award.

6. Thereafter, when respondent 2 proposed to proceed to decide points 1(a) and 1(b) referred to arbitration, the State filed an application under Section 11 of the Act, in the Court of the Principal Civil Judge at Bangalore in Misc. 53/66 for removal of respondent 2 on the ground that he has no jurisdiction to proceed with the hearing of the dispute on merits, since what was referred to him by the arbitrators was only the question of arbitrability and his action in proposing to proceed to consider the merits of the case amounts to legal misconduct on his part and misconduct of the proceedings.

7. The learned Civil Judge overruled the contentions of the State, holding that the arbitrators differed on the vital question of arbitrability and could not proceed any further, and the disagreement amongst the arbitrators constituted a disagreement of such an essential nature as to render any agreement between them not possible, and consequently, respondent-2 was the only person competent to

arbitrate in the matter under reference. Against the said order, the State has referred the above revision petition.

8. The learned Advocate-General appearing for the State, urged that the arbitrators having disagreed on the jurisdictional preliminary issue only and they having expressly reserved their right to proceed with the arbitration if the decision of the Umpire was in favour of further proceedings, respondent 2 has no jurisdiction to enter on the reference in lieu of the arbitrators under para 4 of Schedule I of the Act. His argument was, that the claim for payment by the contractor related to technical matters on which decision of the Special Chief Engineer alone shall be final, that the arbitrator's jurisdiction is only in respect of non-technical matters, and they having disagreed on a jurisdictional issue, viz., whether the claim related to technical or non-technical matters, the scope of the authority of the Umpire was limited to the question of arbitrability only.

9. Section 3 of the Act provides that unless a different intention is expressed in an arbitration agreement, it shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference. In the First Schedule, there are altogether eight paras, the first of which provides that, unless otherwise expressly provided, the reference shall be to a sole arbitrator. The second para relates to the appointment of an umpire, where the reference is to an even number of arbitrators. The next provision in para 3 regulates the time for the arbitrators making the award; Para 4 fixes the time when the Umpire shall forthwith enter on the reference in lieu of the arbitrators.

10. Section 8 in the Arbitration Act, 1950 (14 Geo. 6, e. 27) is in pari materia with Section 3 read with para 4 of the First Schedule of the Act. Dealing with the scope of the Umpire's jurisdiction under Section 8(2) this is what Russel on Arbitration, (17th Edition at page 155) states:

'Where the umpire enters upon the reference in lieu of the arbitrators under Section 8(2), all the matters referred fall to be decided by him, and not merely matters in respect of which the arbitrators have disagreed.

Where Section 8(2) is excluded and the Court has made no order, it depends upon the terms of the arbitration agreement whether all the arbitrators or only the matters upon which the arbitrators are not agreed, are referred to the Umpire. Prima facie, if the arbitrators cannot agree to an award on any one of the maters referred, the umpire should decide on all of them and not only upon those as to which the arbitrators disagree.'

(Italics is mine).

In Tollit v. Saunders, (1821) 3 RR 732 = 9 Price 612-62 the arbitrators by their award decided several matter, and having disagreed on the question whether the plaintiff was entitled to be paid for his leaving the trade in the hands of the defendant, they submitted that question to the Umpire, who made an award in respect of the said question only. The award by the arbitrators in part and by the Umpire in part, was held bad and that unless the submission so provided, the arbitrators could not have determined upon one point, and the Umpire upon another. In Clayton v. Westminster Braymb Coal and Coke Co., Ltd., (1864) 11 LT 366, the parties referred their disputed to two arbitrators; the arbitrators having differed in there opinion, referred the matters in dispute to the decision of an umpire who made his award. A motion was made to set aside the award on the ground that it was not final. The Court decided that the best course would be to remit certain of the questions in dispute to the arbitrators. On the question whether the maters referred for reconsideration should be decided by the arbitrators or the Umpire, the Vice-Chancellor expressed the opinion that the Umpire was the person to whom the matter must be remitted, He referred to Finlason's edition of the Act, as showing that Umpire and arbitrators were, to some extent, convertible terms, and that when the difference between the arbitrators arose, and they called in the Umpire, they became at once functus officio and the umpire took their place.

11. Sarkar, in his Tagore Law Lectures, 1942, at page 152 had stated the scope of the Umpire's authority thus:--

'In this connection it is necessary to consider what are the questions which the Umpire should decide. The Umpire's scope of authority may be narrowed down by the arbitration agreement, an instance of which may be found from the clause in

the agreement considered by the Court in Lang v. Brown, (1855) 25 LT (O.S.) 297. There it was agreed that in case of the arbitrators differing in opinion, the differences were to be settled by an umpire to be appointed by them and 'whatever the arbitrators or Umpire shall determine in the premises by an award or awards, interim or final, to be pronounced by them.

And the Court held that the arbitrators might make an award on some of the differences between the parties and might refer to the Umpire only the differences on which the arbitrators had not agreed. But in the absence of an agreement of the kind which existed in (1855) 25 LT (OS) 297, the Umpire should decide all the matters referred to arbitration including those on which was no difference of opinion among the arbitrators: Winteringham v. Robertson, (1858) 27 LJ Ex. 301, Wicks v. Cox, (1847) 11 Jur 542; (1821) 9 Price 612.

Remembering that the First Schedule can be excluded by agreement of the parties, it will be wise to provide for the umpire to decide only the matters on which the arbitrators have disagreed, otherwise it will necessitate his hearing the matter over again.

The Umpire has to hear the evidence de novo if application is made to him to do so by either party; notwithstanding that the same evidence has already been adduced before the arbitrators and an Umpire can make his award on the notes of the evidence taken by the arbitrators only if no party objects: In re, Jenkins, (1841) 11 LJ QB 71. As was observed by Littledale, J., agreeing with Lord Denman, C. J. in Re Salkeld and Slater, (1840) 12 Ad & E1. 767: The Umpire is to hear all the evidence over again upon application.

12. The American Jurisprudence, 3 Am Jur Para 81; contains the following statement of the Law:

'An Umpire is a person whom the arbitrators select, pursuant to the authority of the submission, to decide the matter in controversy when they are unable to agree; he stands in the same situation as a sole arbitrator of the issue originally submitted to the arbitrators, is bound to hear and determine the case in like manner as if it originally had been referred to him for decision, and makes his sole award, in

which neither of the original arbitrators is required to join in order to make it valid binding upon the parties.'

13. In the absence of express words empowering the arbitrators to decide in part and the umpire on the remainder on which the arbitrators differed, where the Umpire enters on the reference in lieu of the arbitrators, all the matters fall to be decided by him and not merely maters in respect of which the arbitrators have disagreed. The fact that the disagreement is in respect of jurisdictional issue makes no difference on the scope enters on the reference in lieu of the arbitrators.

14. In the instant case, the arbitration agreement has not excluded the First Schedule of the Act, and does not provide for the Umpire to decide only matters on which the arbitrators have disagreed.

15. The question whether the dispute related to non-technical matters as alleged by the contractor, or technical matters as contended by the State, necessarily arose for adjudication in applying ascertained facts to the terms of the contract even if the joint submission to the arbitrators did not specifically refer the question of arbitrability. The parties in the instant case, however, specifically referred to the arbitrators for their decision, the question of arbitrability. It was not disputed by the learned Advocate-General that if the question of arbitrability had not been specifically referred, and if the arbitrators had disagreed on the question whether the claim related to non-technical matters, the Umpire would enter on the reference in lieu of the arbitrators and that the Umpire has to arbitrate as if he were the sole arbitrator. By specifically referring the question of arbitrability, the parties agreed to accept the decision of the arbitrators on the jurisdictional issue. The dispute as to arbitrability is not an isolated question and it necessarily arose for decision in view of the contentions of the State on the claim made by the contractor.

16. The arbitrators had no jurisdiction to ask the Umpire to make an award in part reserving the power to make an award in respect of the remainder. Respondent 2 was right in his view that having entered on the reference in lieu of the arbitrators, he has to make an award in respect of all the points referred to arbitration. The Court below was, therefore, right in rejecting the application of the petitioner.

17. For the above reasons, the revision petition fails and is dismissed with costs. Advocate's fee Rs. 100/-.

18. Revision dismissed.

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