

PETITIONER:
M/S. PREMIER FABRICATORS, ALLAHABAD

Vs.

RESPONDENT:
HEAVY ENGINEERING CORPN. LIMITED, RANCHI

DATE OF JUDGMENT: 21/03/1997

BENCH:
MADAN MOHAN PUNCHI

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

Punchhi, J.

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

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

"SETTLEMENT OF DISPUTES BY
ARBITRATION

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

submissions of the same, make and notify its decisions thereon in writing.

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

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

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

(b) The Arbitrators or the umpire shall have power to call for such evidence by way of affidavits or

otherwise as the arbitrators or the umpire, as the case may be, shall think proper, and it shall be the duty of the parties to do or cause to be done all such things as may be necessary to enable the arbitrators or umpire to make the award without any delay.

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

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

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

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

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

The Umpire then went into the matter. As is evident from the record, he took into account the fact that the matter had come to him in pursuance of a contract dated May 25, 1971 executed between the parties and that the parties in terms thereof had referred to S/Shri Mehra and Gadodia by letter of reference the matters of difference between them concerning items 1 to 5 (as detailed out) and that since there was reported failure by the joint arbitrators to arrive at a joint award in respect of the referred matters,

the case was referred to him as the Umpire. Therefore he observed in his award that having heard both the parties and having seen all the documents submitted and having given the matter a careful consideration he would direct the Corporation to Pay a sum of Rs. 80, 000/- to the contractor bearing interest at the rate of 6 per cent per annum from the date of order till the date of decree.

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

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

provision of the Indian Arbitration Act.

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

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