

(1997) 08 KAR CK 0070
In the Karnataka High Court
Case No : MFA No. 2595 of 1997

Karnataka Electricity Board

APPELLANT

Vs

Bharath Conductors

RESPONDENT

Date of Decision : 13-08-1997

Acts Referred:

Electricity (Supply) Act, 1948 — Section 76 (2)
Electricity Act, 1910 — Section 19 (1), 52

Citation : (1997) ILR (Kar) 2687

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : N. Krishnananda Gupta, for the Appellant; A.Y.N. Gupta, for R-1, for the Respondent

Judgement

M.F. Saldanha, J.—An unfortunate and unusual situation has arisen in this case which I shall briefly record. The appellants are the Karnataka Electricity Board (hereinafter referred to as the K.E.B) and the respondent No. 1 M/s. Bharath Conductors Private Limited are one of the contractors of the K.E.B. The respondents had entered into a contract with the K.E.B. for the supply of certain aluminium conductors and it is the case of the Respondent No. 1 that there was an abnormal and unprecedented jump in the prices of the basic raw materials which according to them made it impossible for them to execute the contract on the original terms. They therefore referred the matter to the Chief Engineer who under normal circumstances was the authority to decide matters relating to price escalation and it is their grievance that the officer concerned did not take any decision in the matter. Therefore the respondent No. 1 decided to invoke the remedy provided under the arbitration clause at which stage the Chief Engineer is supposed to have directed that the Respt.No. 1 should complete its obligation under the contract and then take up the issue regarding escalation which would have to be within the parameters of plus or minus 20%. The respt.No. 1 thereupon invoked the arbitration clause and 3 arbitrators who are the Respts. Nos. 2, 3 and 4 to this appeal came to be appointed the first of whom is a

Retired Judge of the Supreme Court and the other two are eminent technical persons. At this stage, the Board filed a suit before the City Court at Bangalore being O.S.No. 3265/1995 wherein they contended that the dispute was not arbitrable principally because according to the K.E.B. the respt.No. 1 could not ask for any escalation beyond the parameters prescribed in the contract namely plus and minus 20% which amount would be decided by the Chief Engineer after the respt. No. 1 had completed its obligation under contract. To summarise, what was contended by the Board was that there is nothing for the arbitrators to decide as the question of awarding the additional amount which the respt.No. 1 was claiming by virtue of the price increases was not competent since the contract had pegged the upper limits. The Board contended that if there was nothing for the arbitrators to decide that the whole exercise would be a futile one and that therefore, the arbitrator should be restrained from entering upon the reference. As indicated by me earlier, the basic plank of the contention taken up in the plaint proceeded on the footing that assuming there was a dispute that is not arbitrable. The lower Court initially granted an ad-interim injunction and after hearing the parties, through a speaking order dated 5th July 1997 vacated the interim injunction. The present appeal seeks to assail the correctness of that order.

2. I shall briefly summarise the contentions raised on behalf of respt.No. 1 because they are of some consequences. On facts, it was contended that the respt.No. 1 had never visualised or even anticipated that there would be such an unprecedented raise in the cost of the raw materials and respt. No. 1 sought to rely on certain documents to establish that the price had gone up 15 times within that short span which made it absolutely impossible for the respt.No. 1 to supply the conductors on the old terms. It is the case of respt.No. 1 that the limits of plus or minus 20% governed normal conditions and that if something completely foreign to the ordinary circumstances had taken place and if the situation had occurred due to circumstances that were totally beyond the control of the party that it would be governed by the force majeure clause in the contract which happens to be Clause 25. According to respt.No. 1, this clause entitled the contracting parties in situational that could be justified under that clause, to adopt a course of action that would transcend what would be permissible under normal circumstances. It was however the case of respt.No. 1 that the contract itself constrained an omnibus clausal namely Clause 32 which entitled the parties to refer any dispute that arose under the contract to arbitration. A subsidiary argument canvassed on behalf of the respt.No. 1 was that whatever defence the Board had, including the contention that the prices are limited to certain parameters or even the contention that the parties are bound by the decision of the Chief Engineer, all capable of being pleaded as a defence before the arbitrators and that therefore the Civil Court ought not to come in the way of the arbitration proceeding making a headway. As indicated by me earlier, the Trial Court vacated the interim injunction and the Board had carried the matter in appeal.

3. Mr. Gupta, learned counsel who represents the Board briefly reiterated the Board's submissions. Dealing first with the contention raised on behalf of respt.No. 1 that Clause 25 entitled the respt.No. 1 to transcend the limitations prescribed in the contract namely plus or minus 20%, he submitted that it is well settled law as is illustrated even from the explanation to Clause 25 that this Clause can only have application in the case of situations such as wars, floods and the like and that market variations howsoever steep they may be, was something that can never come within the ambit of this clause. He assailed the reasoning in the impugned order and contended that the trial Court has misinterpreted the terms of the contract and that it has wrongly vacated the interim order. Mr. Gupta also submitted that the contracting party namely respt.No. 1 was totally and completely bound by what it had agreed to and that this is an attempt to rescind from the contract, that the respt.No. 1 has not completed the execution and its attempt to make excuses and fall back on all sorts of clauses was a defence for non-completion of the contract and that it is also an attempt to pressurise the Board into agreeing to demands which are unjustified. His last submission was that the Board is a public authority and that howsoever strange it may seem, that the sole purpose of filing the suit was in order to save the Board from being hauled through a lengthy and costly arbitration which is something that the Board can ill afford which is an exercise on which public money should not be spent if it is as clear as day light that the entire dispute is not arbitrable.

4. Learned Counsel who represents respt.No. 1 vehemently contended that under Clause 32 of the Contract there is a blanket provision for referring all disputes between the parties to arbitration and he contends that the whole purpose of providing for an arbitration remedy is in order to ensure speedy and effective resolution of disputes and that in these circumstances, his client is fully justified in having invoked the arbitration clause. He also demonstrates to me that the respt.No. 1 has gone through the exercise of referring the matter to the Chief Engineer with no worthwhile resolution. He states that the respt.No. 1 had virtually no option except to invoke the arbitration clause and he was extremely critical of the passing of the ad-interim order which remained in force for something like two years as a result of which the arbitration could not make any headway. With regard to the main question as to whether the parameters of plus or minus 20% as provided for in the contract circumscribe the limitations of the parties, learned counsel contended that it was in relation to the normal execution of the contract but cannot govern a situation wherein a totally abnormal state of affairs exists. His basic argument was that everything that is being contended by the parties before this Court is in fact concerning heads of the dispute which are required to be decided upon by an independent authority and that the Board is not justified in contending that a bar exists to the arbitration because that issue itself will have to be adjudicated upon.

5. As regards this last contention, the K.E.B.'s learned counsel submitted that it is not competent for the arbitrators to decide the question as to whether they

have jurisdiction to entertain the dispute or not or in other words whether the dispute between the parties is arbitrable. Learned Counsel contended that this precisely is the scope of the suit and that was why the Board had approached the Civil Court. This submission is not wholly correct because any forum be it court or an arbitrator is empowered to go into all aspects of a dispute one of which could always be the basic issue of jurisdiction. If the Board succeeds in convincing the forum that the dispute is not arbitrable, the arbitrators themselves could refuse to make an award under those circumstances but it is not correct to contend that this issue would have to be decided only by another forum namely the Civil Court.

6. It is true that the points raised by the parties are arguable and under normal circumstances this Court should have admitted the appeal and considered the question of interim relief. The fact of the matter is that the present appeal has been directed against an interim order and as a result of the earlier interim order the arbitration has been held up for 2 years. It is therefore very much in the interests of the parties themselves that the preliminary issue as to whether or not the arbitrators can be restrained from proceeding must be gone into and decided without further delay which was why, I have heard the learned counsel at considerable length at the admission stage itself.

7. Mr. Gupta, learned counsel who represents the K.E.B relied on certain decisions in support of his contentions. Firstly, he drew my attention to a decision of the Supreme Court reported in Punjab State Electricity Board, Mahilpur Vs. M/s. Guru Nanak Cold Storage and Ice Factory Mahilpur and another, wherein, the Supreme Court had occasion to deal with a case concerning the Punjab Electricity Board. That was a case in which the dispute was in relation to disconnection of supply of electric energy and a claim for damages by the consumer. The Court was concerned with a question as to whether it was a dispute arising u/s 19(1) of the Electricity Act as also Section 52 of the Act or Section 76(2) of the Supply Act. The conclusion arrived at by the Court was that the arbitrator had no jurisdiction to decide the dispute as to the arbitrability or on merits. Mr. Gupta submitted that this case clearly amplifies the point that the Board would be precluded from raising the issue of arbitrability before the arbitrators and that therefore the issue would have to be decided by the Civil Court. The present case has not parallel with the decision referred to supra because that was a proceeding where damages were claimed on the ground that the Board had acted wrongfully and the Court looking to the statutory provisions found that there was virtually no ground whatsoever for a reference to arbitration and if this was the position, where the arbitrators just could not decide the dispute, it logically followed that they could not go into the question of arbitrability. Mr. Gupta has pointed out to me that this decision has been followed by a learned Single Judge of this Court in the decision reported in Mysore Manufacturers and Traders (MMT) Vs. Karnataka Elect. Board (KEB), . The dispute in that case once again was for compensation on the ground that the Board had used faulty equipment and it was analogous to the decision of the Supreme Court decision

referred to by me supra which was why the learned Single Judge of this Court took the view that the Civil Court could restrain the claimants from taking the matter to arbitration. One needs to observe here that there is a difference between a situation wherein damages or compensation is claimed for a wrongful act and the present case wherein a contract exists between the parties which contract itself provides for resolution of all disputes through arbitration. To my mind, the bar that is pleaded on the basis of the two decisions will not come in the way of the respt. No. 1. Mr. Gupta also drew my attention to another decision of the Supreme Court reported in 1997 (2) SUP 265 wherein the Supreme Court pointed out that arbitrators being a creature of agreement must operate within the four corners of the contract and that they cannot undermine what is ruled out or prescribed by the terms of the agreement. Learned counsel submitted that if the contract self provides for an escalation limited at 20% that no arbitrator can go beyond that limit and that therefore, the entire claim put forward by the respt.No. 1 is completely beyond the scope of any arbitration proceeding and that this is an additional ground on which the Board can contend that no useful purpose would be served by going through any such exercise. This argument does appear very convincing but I need to point out that there is a flaw in this argument in so far as the basic dispute as I understood it, is the question as to whether at all the parties are bound by the plus or minus 20% provision or whether in the facts and circumstances of the case these parameters do not apply to them. That precisely is the real curacy of the matter. Since that issue will have to be resolved by which ever forum that hears the dispute, I refrain from making any comments with regard to this issue on merits but I need to point out that at the stage of approaching the grievance redressal forum that it is premature for the Board to contend that any of the provisions are sacrosanct and that they do or do not apply. That issue according to me is open and that is precisely what will have to be decided by the appropriate forum.

8. Mr. Gupta raised one additional point namely that the respt. No. 1 as a contracting party is totally and completely bound by the terms of the contract which obliged it to supply the conductors at the rates prescribed and that if at all the circumstances justified that respt.No. 1 could be entitled to escalation which is limited to 20% either way but that this is where the limits stopped. Mr. Gupta drew my attention to two cases the first of them reported in AIR 1980 SC 588 wherein the Supreme Court held that the parties are bound by the terms of the contract and the second decision report in Alopi Parshad and Sons Ltd. Vs. Union of India (UOI), wherein the Supreme Court has in more elaborate terms indicated that the contract provisions circumscribed the parties. Mr. Gupta's argument was that no amount of debate can ever permit the respt.No. 1 to get out of the limits prescribed in the written contract and that therefore, the Board is right in refusing to agree to take the matter to arbitration. Again, what needs to be noted here is as to whether the Board is right in raising this plea. Under normal circumstances, the law is well settled that this position holds good. I refer to this case being an unusual one because the respt.No. 1 has pleaded an

unfortunate situation. Again, whether the situation was in fact abnormal and whether even if it was so, it would come within the scope of the force majeure clause is an issue on which I prefer not to comment because that is the basic point that will have to be determined by the forum which adjudicates the dispute. To give a finding on that issue would be premature. Suffice it to say however that the plea having been raised by the respt.No. 1 that the party cannot be precluded from asking for a decision on that issue.

9. Mr. Gupta then submitted that the respt.No. 1 has committed breach of the contract in so far as they have not completed their obligations and he points out that such a party cannot seek to take advantage of its own ground and that therefore they are precluded from asking for an adjudication by the arbitrators at this point of time. He supports the decision of the Chief Engineer that the respt. No. 1 was obliged to complete the terms of the contract and then only get the matter adjudicated before any of the competent forums. I am unable to accept this argument because the issue as to whether respt.No. 1 has breached the contract or not is itself one of the points for adjudication. Learned counsel for respt.No. 1 contended that it is the Company's case that the contract was virtually frustrated in so far as his clients were unable to proceed with the contract since the Appellant refused to consider the position in which they were placed and to agree to pay them the proportionately higher prices in view of what had happened. This again is a mixed question of fact and law which remains to be adjudicated.

10. On the short question as to whether the Board is justified in insisting at this point of time that the arbitrators are precluded from proceeding, it is my considered view that the plea taken is unjustified. The reason for this is because it is now well settled that the alternate disputes redressal mechanism namely the resolution of disputes through forums other than the Courts is not only highly desirable but is absolutely essential. Apart from the item factor involved, it takes the load of the Courts. It provides effective solutions and in those of the situations where the parties are able to appoint a panel of arbitrators which consist of Senior Retired Judicial officers such as Retired High Court or Supreme Court Judges assisted by persons of technical competence, experience has shown that the results have been excellent. In this background, I am firmly of the view that on the facts and circumstances of the present case there is no prohibition or bar that could preclude the arbitrators from entering into the reference and decides the dispute that is referred to them at this point of time. Everyone of the defences that has been pleaded by the Board can certainly be pleaded before the arbitrators and the arbitrators are more than competent to decide on them. There is no compulsion on the arbitrators to concede any of the claims of the respt.No. 1 if they are unjust on facts or in law. Even the question as to whether the force majeure clause applies, the issue as to whether the respt no 1 is at all entitled to go beyond the plus or minus 20% provision and the question as to whether on the facts of the present case the respt.No. 1 is entitled to the whole or any part of its claim are all issues within the competence of the arbitrators. As

the contract stands, I am unable to accept the contention of the Board that the respt.No. 1 is precluded from referring the matter to arbitration or for that matter the respt.No. 1 is prohibited from referring the matter to arbitration at this point of time. Having regard to this position, the appeal fails and stands disposed of. The impugned order stands confirmed and it shall be open to the respondents 2, 3 and 4 to proceed with the arbitration. The appeal to stand disposed of. No order as to costs.

11. The copies of this judgment to be furnished to the learned advocates immediately. The appellant's learned advocate has stated that he will have to refer the matter to the Board alongwith his opinion for a decision as to whether the Board would like to carry the matter further. Respondents' learned advocate has strongly objected to the stay of operation of this judgment because he states that already two years have elapsed and that there is no ground on which the operation should be stopped. The fact of the matter is that the issues are hotly contested if the Board is aggrieved by the view taken by this Court and desires to test the matter in appeal, that remedy ought not to be frustrated. Under these circumstances, the operation of the judgment is stayed for a period of 30 days only and it is made clear that the appellants if they desire to carry the matter further shall give written notice to the respt.1 or their learned counsel along with a copy of the proceedings and the date when the matter is being taken up for further orders. It is also made clear that under no circumstances will the stay be extended.