
(1996) 10 KAR CK 0006
In the Karnataka High Court
Case No : M.F.A. No. 2797 of 1996

Mysore Manufacturers and Traders (MMT)	APPELLANT
Vs	
Karnataka Elect. Board (KEB)	RESPONDENT

Date of Decision : 04-10-1996

Acts Referred:

Arbitration Act, 1940 — Section 14, 32, 33
Electricity Act, 1910 — Section 19 (2), 21, 21 (4)

Citation : AIR 1997 Kar 210 : (1997) ILR (Kar) 176

Hon'ble Judges : S. Venkataraman, J

Bench : Single Bench

Advocate : Indra K. Sanghi, Party in Person, for the Appellant; Krishnanda Gupta, for the Respondent

Judgement

1. The appellant who is the defendant in the lower Court is aggrieved by an order of temporary injunction granted by the lower court restraining him and the arbitrator who is the 2nd defendant in the lower Court from taking any further action pursuant to the notice dated 30-10-1995 issued in case No. 3/95 on the file of the arbitrator either by filing the alleged award in the Civil Court or taking any further action u/s 14 of the Arbitration Act, pending disposal of the suit.

2. The appellant which is a small scale industry had entered into an agreement with the respondent/plaintiff for supply of power to its unit. According to the appellant though the respondent had to instal 200 amps fuses in the pole while supplying the power, only 100 amps fuses were put as a result of which the imported Dixon plant could not be run properly. It is stated that the respondent had illegally disconnected the power supply. There were several litigations between the parties reference to which is not necessary for the purpose of this case. The appellant's case is that because of the failure of the respondent to instal 200 amps fuses it suffered losses and that the respondent by installing only 100 amps fuses had restricted the power supply to its unit. The appellant sought for statutory arbitration u/s 52 of the Indian Electricity Act (hereinafter

referred to as "Act") in respect of his claim for damages of Rs. 55 lakhs purporting to be under Sections 19(2) and 21(4) of the Act. The appellant issued a notice to the respondent to nominate their arbitrator while the appellant nominated the 2nd defendant as its arbitrator. The respondent without nominating any arbitrator wrote to the 2nd defendant that the dispute raised by the appellant was not arbitrable as Sections 19(2) and 21(4) of the Act were not applicable to the appellant's claim and requesting him to decline to enter upon the proposed arbitration. The 2nd defendant however entered upon the arbitration and passed an award dated 30-10-1994 upholding the appellant's claim for damages of Rs. 55,00,000/-. The arbitrator issued notice to the respondent of the passing of the award on the same day.

3. On receipt of the notice from the arbitrator the respondent has filed the suit for a declaration that the provisions of Sections 19(2) and 21(4) and Section 52 of the Act do not confer any right on the appellant to initiate arbitration proceedings claiming compensation that the proceedings initiated by the 2nd defendant and the award passed by him are illegal, void and unenforceable. According to the respondent, the claim made by the appellant is not at all arbitrable under the provisions of the Act and as such the arbitration proceedings and the award are without jurisdiction and void.

4. Along with the suit the respondent also sought for temporary injunction to restrain the arbitrator from filing the award and restraining the appellant from taking any steps in pursuance of that award. The appellant opposed the respondent's prayer contending that the suit itself is barred u/s 32 of the Arbitration Act and that as already the award had been filed in Court by the arbitrator nothing remained to be done and that if at all the respondent had to approach the Court under the Arbitration Act to challenge the award.

5. The trial Court has held that the plaintiff's suit is maintainable and that the plaintiff has made out a prima facie case and that the balance of convenience was in favour of granting the temporary injunction. Accordingly the trial court has granted the temporary injunction sought for.

6. The partner of the appellant who argued in person contended that this claim is made under Sections 29(2) and 21(4) of the Act on the ground that the respondent had controlled and interfered with the supply of power causing damages to the appellant; that this claim is arbitrable; that at any rate the question whether the appellant's claim is arbitrable or not and whether the award is void or not had to be agitated by the respondent in the proceedings before the Court under the Arbitration Act and that the suit challenging the award is expressly barred u/s 32 of the Arbitration Act. He also contended that the respondent has filed objections to the appellant's claim before the Arbitrator and it thus participated in the proceedings and that as such they cannot be allowed to challenge the proceedings or the award in a separate suit. He also urged that as the award is already filed in Court nothing more remained to be done by the Arbitrator and the lower Court could not have granted any

temporary injunction.

7. The learned counsel for the respondent contended that prima facie the claim made by the appellant is not arbitrable either u/s 19(2) and section 21(4) of the Act, that the bar u/s 32 of the Arbitration Act does not apply to a case where a question arises as to whether a dispute is statutorily arbitrable under the provision of the Act and whether an award passed in respect of a claim made under the provisions of the Act is without jurisdiction. He strongly relied on the latest decision of the Supreme Court in Punjab State Electricity Board, Mahilpur Vs. M/s. Guru Nanak Cold Storage and Ice Factory Mahilpur and another, in support of his contention. The first point that requires to be considered is whether prima facie the suit itself is not maintainable. If it is maintainable then it has to be considered whether the appellant's claim is prima facie not arbitrable under the Act and whether the impugned order calls for interference.

8. Section 32 of the Arbitration Act reads as hereunder:--

"Notwithstanding any law for the time being in force, no suit shall lie on any ground, whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or an award nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Court."

The above provision will have to be read along with Section 33 which is as hereunder:--

"33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits;

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

If we read the above two provisions, it will be clear that because the Arbitration Act itself provides a Forum u/s 33 before which the existence or validity of an arbitration agreement or an award can be challenged, there is a bar for a suit being filed for such a relief. It is obvious that if Section 33 is not applicable to a case, the bar u/s 32 would not also come into play.

9. The application u/s 33 can be made by any party to an arbitration agreement or any person claiming under him. It therefore follows that Sections 32 and 33 would apply to cases where there is an arbitration agreement and an award is passed on the strength of an arbitration agreement. Section 2(a) of the Arbitration Act defines arbitration agreement as a written agreement to submit present or future differences to arbitration, whether an arbitrator is; named therein or not.

10. This is not a case where there is any arbitration agreement between the appellant and the respondent as defined u/s 2(a). According to the appellant he is entitled to statutory arbitration under the provisions of the Act. The question is whether Sections 32 and 33 of the Arbitration Act apply to a case of statutory arbitration under the provisions of the Act.

11. Reliance is placed on Section 52 of the Act to contend that the provisions of the Arbitration Act are applicable for the statutory arbitration. Section 52 of the Act reads as hereunder:--

"52. Arbitration:-- Where any matter is, by or under this Act, directed to be determined by arbitration the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the (State Government) may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration Act, 1940.

Provided that where the Government or a State Electricity Board is a party, to a dispute, the dispute shall be referred to two arbitrators, one to be appointed by each party to the dispute."

The above provision shows that when any matter is required by the Act to be determined by arbitration then the arbitration shall be subject to the provisions of the Arbitration Act. But if there is a dispute as to whether the claim is arbitrable under the provisions of the Act, the above provision does not authorise the arbitrator or the Court under the provisions of the Arbitration Act to decide that question.

12. There is a provision in the Arbitration Act which creates a fiction of the statutory provisions regarding Arbitration, in another enactment, being treated as an arbitration agreement. Section 46 of the Arbitration Act reads as hereunder:--

"46. Application of Act to statutory arbitrations:-- The provisions of this Act except sub-section (1) of Section 6 and Sections 7, 12, 36 and 37, shall apply to every arbitration Under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder."

Where an arbitration is sought not on the basis of an arbitration agreement between the parties but on the basis of a statutory provision in another enactment then by virtue of Section 46 of the Arbitration Act that statutory provision itself will have to be deemed as an arbitration agreement. In such a case Sections 32 and 33 would get attracted. But Section 46 is not per se applicable to all statutory arbitrations. That provision would not come into play if the provisions of the Arbitration Act are inconsistent with the provisions of the enactment under which arbitration is sought.

13. The ambit of Section 46 of the Arbitration Act has been explained by the Supreme Court in Punjab State Electricity Board, Mahilpur Vs. M/s. Guru Nanak Cold Storage and Ice Factory Mahilpur and another, as hereunder:

"12. Sections 6 and Sections 7, 12, 36 and 37 have been expressly excluded from the operation of statutory arbitration. The rest of the provisions per force would get attracted. But the provisions of the appropriate statute or rules should necessarily be consistent with the provisions of the Arbitration Act. In that event, despite absence of an arbitration agreement, rest of the provisions of Arbitration Act would apply (as if there was an arbitration agreement between parties) and the dispute becomes arbitrable under the Arbitration Act, as if there was an arbitration agreement, between the parties. If there is any inconsistency, then the provisions of the Arbitration Act do not get attracted."

In the above case also when a consumer sought for arbitration in respect of a claim for damages for disconnection and issued a notice under Sec. 52 of the Act requiring the electricity Board to refer the matter for arbitration, the Board filed a suit for declaration and a permanent injunction restraining the arbitrator from adjudicating the dispute. The suit was dismissed by the trial Court and the High Court dismissed the appeal holding that the suit was not maintainable in view of Sections 32 and 33 of the Arbitration Act. Before the Supreme Court it was urged that by virtue of Section 46 of the Arbitration Act Section 33 of that Act gets attracted and that the suit would not be maintainable. The Supreme Court which considered the scheme of the Act in para 13 has held that Section 46 of the Arbitration Act does not apply as the scheme in both the Acts in this behalf is inconsistent.

13. The appellant's representative sought to distinguish the above decision by pointing out that in that case claim was for damages for disconnection whereas in this case the claim is for damages for interference with supply of power u/s 51(4). Irrespective of the claim made in that particular case, the position law laid down by the Supreme Court is that Section 46 would not be applicable to statutory arbitration under the provisions of the Act. In view of this ruling, Section 46 of the Arbitration Act cannot be made use of to treat the provisions regarding arbitration under the Act as an arbitration agreement. Thus, it follows that there is neither an arbitration agreement between the parties as defined u/s 2(1)(a) of the Arbitration Act nor the fictional arbitration agreement as contemplated u/s 46 of the Arbitration Act. This necessarily means that Section 33 would not be applicable and the Court under the Arbitration Act will not have jurisdiction to decide whether the appellant's claim is arbitrable or not. Consequently, the bar u/s 32 of the Arbitration Act would not also get attracted. Hence, the contention of the appellant that the suit itself is not maintainable cannot be accepted.

14. The next point to be considered is whether the respondent had made out a prima facie case for grant of temporary injunction. The appellant has made a claim for damages of Rs. 55,00,000/- on the ground that the respondent by

providing fuses of only 100 amps instead of providing 200 amps had controlled or interfered with the supply. This claim is made u/s 19(2) and Section 21(4) of the Act.

15. Section 2 applies to a case where compensation is claimed for the damage, detriment or inconvenience caused by the licensee or his employees to the owner of the property while executing the work undertaken by it. When Section 19(2) gets attracted is clarified by the Supreme Court in Punjab Punjab State Electricity Board, Mahilpur Vs. M/s. Guru Nanak Cold Storage and Ice Factory Mahilpur and another, as here under (at p. 2686 of AIR) :--

"It is seen that the right to claim damages obviously is not to the consumer to whom, though under the Electricity Act the licensee, on an application made in this behalf, is under an obligation to supply the electrical energy. The damages which ensued for disconnection is not a dispute arising u/s 19(1) of the Electricity Act. The scheme of Part II of the Electricity Act would be viewed in its operational perspective. It would indicate that if any damage is caused obviously to the owner of the property or the person affected in execution of the works undertaken as envisaged in Part II, the damages so ensued, unless agreed between licensee and the person affected, the dispute arisen u/s 19(1) would be arbitrable, by operation of sub-section (2) of Section 19 of the Electricity Act.

It is patent that in this case also Section 19(2) cannot apply as the appellant is seeking compensation for the alleged interference or control in the supply of power and not for any damage caused to his property by the respondent while undertaking its work.

16. Section 21 of the Act on which reliance is placed by the appellant reads as hereunder :--

"Section 21 :-- Restrictions on licensee's controlling or interfering with use of energy :-- (1) A licensee shall not be entitled to prescribe any special form of appliance for utilising energy supplied by him, or save as provided (in any conditions made under sub- section (2) or) by Section 23 sub-section (2) or by Section 26, sub-section (7), in any way to control or interfere with the use of such energy :

Provided that no person may adopt any form of appliance, or use the energy supplied to him, so as unduly or improperly to (interfere with -

(a) the safety or efficient working of a licensee's electric supply lines or other works; or

(b) the supply of energy by the licensee to any other person).

(2) (3) (4) Where any difference or dispute arises as to whether a licensee has prescribed any appliance or controlled or interfered with the use of energy in contravention of sub-section (1), the matter shall be either referred to an (Electrical Inspector) and decided by him, or, if the

licensee or consumer so desires, determined by arbitration."

Section 21(1) prohibits a licensee from prescribing any special form of appliance for utilising energy supplied by him or in any way to control or interfere with the use of such energy. Under sub-section (4) of Section 21, if there is a difference or dispute as to whether the licensee has prescribed any appliance or controlled or interfered with the use of energy, that question can be referred for arbitration. The scope of arbitration under the provision is only to decide whether there is such an interference or not. That provision does not authorise referring a claim for compensation for violation of clause (1) to arbitration. It may be noted that there are other provisions in the Act where even the claim for compensation is made arbitrable. Section 13(2) provides that where the licensee makes default in complying with any of the provisions of that Section he shall make full compensation for any loss or damage incurred by reason thereof and that where any difference or dispute arises as to the amount of such compensation, the matter shall be determined by arbitration. Section 14(3) stipulates that the licensee should make full compensation for any loss or damage that may be incurred on account of his default in complying with the provisions of that Section and if any difference or dispute arises as to the amount of such compensation, the matter has to be determined by arbitration. Similar provisions are found in Sections 19(2) and 32(3) where the dispute regarding the compensation payable is required to be referred for arbitration. Section 21 does not contain any provision which requires a claim by the consumer for compensation for violation of Section 21(1) being referred for arbitration. As such, prima facie the claim referred by the appellant for arbitration is not arbitrable under the Act. Prima facie the arbitrator had no jurisdiction either to decide whether the dispute is arbitrable or not or to arbitration upon the appellant's claim. In the circumstances, it has to be held that the respondent has made out a prima facie (case) for grant of temporary injunction.

17. It is stated that the arbitrator has already filed the award in Court. If so, the temporary injunction against the arbitrator may not have any effect. But there is no reason as to why an injunction cannot be granted against the appellant restraining him from taking further steps in pursuance of the award passed by the arbitrator. The trial Court has pointed out that if the injunction is not granted, the appellant may get the award made a rule of Court and may execute the same which would result in the respondent being forced to pay the big sum of Rs.55,00,000/- which would affect the interest of the rate payers. The Court has pointed out that if ultimately the appellant were to succeed he would not in any way be affected as he can easily recover the amount together with interest.

18. After careful consideration of the points urged, I do not think that this is a fit case where this Court should interfere with the order passed by the Lower Court which cannot be characterised as either unreasonable, arbitrary or capricious.

19. For the above reasons, this appeal is dismissed. Parties to bear their own costs.

20. Appeal dismissed.