

(2014) 02 P&H CK 0166
In the Punjab And Haryana At Chandigarh
Case No : L.P.A. No. 1186-2012 (O and M)

Punjab State Electricity Board

APPELLANT

Vs

Malerkotla Power Supply Co.

RESPONDENT

Date of Decision : 05-02-2014

Acts Referred:

Arbitration Act, 1940 — Section 14

Citation : (2014) 2 RCR(Civil) 435

Hon'ble Judges : Sanjay Kishan Kaul, C.J.; Arun Palli, J

Bench : Division Bench

Advocate : Girish Agnihorti, Senior Advocate and Mr. Vijay Pal, Advocate for the Appellant; Naveen Goel, Advocate for the Respondent

Judgement

Sanjay Kishan Kaul, C.J.—The exercise of option by the appellant under the Indian Electricity Act, 1910 (hereinafter referred to as the said Act) to purchase the respondent undertaking for supply of electricity to Malerkotla town has given rise to a dispute which has dragged on for 37 years. In the pre-independent era, on 22.02.1947 the rulers of the erstwhile Malerkotla State had granted a license to M/s. Bhagwan Dass and Sons/respondent for supply of electricity to Malerkotla town which was subsequently carried out under the name and style of Malerkotla Power Supply Company. The said company was generating its own power by installing diesel generating sets, but on increase of demand stopped generating the power and started purchasing the same in bulk supply from Punjab State Electricity Board. On the expiry of twenty years from the date of grant of license, an option was available to the appellant before us i.e. Punjab State Electricity Board under the said Act to purchase the undertaking which was duly exercised by issuance of a notice on 29.01.1976 requiring the lands, buildings, work materials, equipment machinery and plant to be delivered to the Board on 21.02.1977 for which the Board had to pay the purchase price to the respondent. This was so done.

2. The ordeal for the respondent began thereafter on the issue of evaluation of

the assets and liabilities when a communication dated 21.02.1977 (Annexure P2) was sent by the appellant to the respondent seeking to work out the tentative purchase price of the undertaking at Rs. 30 lacs inclusive of 20 percent solatium on account of compulsory purchase. However, simultaneously in the same letter, the amounts due from the respondent were also set out as a result of which the amounts due exceeded the purchase price tentatively worked out. The amounts due specified were as under:--

3. The appellant, thus, forwarded a token paltry amount of Rs. 100/- by cheque. Thereafter began the issue of evaluation, but suffice to say that no finality was achieved for more than a decade. The respondent left with no option, thus, filed C.W.P.-4500-1988. It is set out in the petition that in view of the differences inter se the parties, as would be apparent from Annexure P2, the matter was referred to arbitration to determine the amount payable by the respondent before us to the appellant. In terms of the agreement of arbitration dated 14.09.1976, the appellant-Board had the right to retain the calculated amount on account of the demands referred to in the agreement from the purchase price payable to the respondent at the time of taking over of the undertaking or on the expiry of its license and the same was to ultimately abide by the decision of the arbitrator. The award of the arbitrators came only on 16.06.1986 determining the amount payable by the respondent to the appellant at Rs. 5,63,044/- as against the amount specified at Rs. 27,74,744/- as per Annexure P2. The award was filed in the Court of Sub Judge 1st Class-cum-Chief Judicial Magistrate, Patiala in pursuance to an application filed u/s 14 of the Indian Arbitration Act, 1940 (hereinafter referred to as the 1940 Act), whereafter objections were filed by the appellant which were dismissed on 12.11.1987 and the award was made rule of the Court. This judgment was not assailed further.

4. The aforesaid also did not settle the controversy for the reason that thereafter began a saga of determination of the value payable as purchase price to the respondent which had been proclaimed at approximately Rs. 30 lacs by the appellant in Annexure P2. In fact, the say of the respondent is that since the endeavour of the appellant to wipe out the amount payable as purchase price showing huge amount outstanding from the respondent did not succeed and the amount payable by the respondent was assessed at a much lesser value, the appellant endeavoured to reduce the value to be paid as purchase price so that they are not liable to pay any amount or pay a paltry amount.

5. In the writ petition filed by the respondent, the sole relief prayed for is as under:--

To issue a writ in the nature of mandamus directing respondent Punjab State Electricity Board to pay to the petitioner the purchase price of the undertaking compulsorily acquired by it in the year 1977 and as determined by it vide Annexure P/2.

6. The process of adjudication of this case went on for almost four years without

any result when a document styled as a compromise deed was filed by the two parties before the learned Single Judge the contents of which are as under:--

Compromise deed

1. That the above noted case is pending for hearing in this Hon"ble Court and is fixed for 25.03.92.

2. That the parties to the present writ petition are agreed that the matter is disputed regarding determination of the purchase price of the petitioner company as raised in the present writ petition be referred for the consideration of Shri Fauja Singh Gill, Retd. Judge of the Delhi High Court.

3. That both the parties to the present writ petition are agreed that the report of the above named Hon"ble shall be binding on both the parties. However, if either party wants to file objections to the said report, the same shall be filed in this Hon"ble Court for adjudication thereupon.

7. We may note that the perusal of the aforesaid shows that neither the parties were relegated to civil proceedings nor to an arbitration under the 1940 Act. This is apparent, as if the latter was so, then objections would have to be filed in accordance with the provisions of the 1940 Act. Not only that, the ultimate product of the reference was to be a "report" and it was for "consideration" by the Judge so appointed and not for final adjudication. Thus, the report was capable of two alternatives:--

(i) The parties accepted what was the net result and put an end to the litigation, or

(ii) If there was non-acceptance, then objections had to be filed in the writ proceedings.

In the latter situation, thus, the report would only be a piece of material for assistance of adjudication of the Court.

8. The proceedings before Justice F.S. Gill (Retired) were, however, labelled by him as arbitration proceedings as he purported to make findings vide the final report dated 06.03.1993. This report was sent to the High Court for "further proceedings". The records of the proceedings show that while the stand of the respondent was that the tentative evaluation should be taken as the final value, the appellant pleaded to the contrary. The respondent submitted that the very phraseology used of "tentative" would imply an element of approximation, but it cannot be the way of target and the appellant was seeking to reduce the amount payable as purchase price on account of the findings of the arbitrator in the award dated 16.06.1986 which had been made rule of the Court. This tentative evaluation was at Rs. 30,10,000/-. The respondent did not lead any evidence. Surprisingly, the appellant also failed to produce the records of the company which contained the measurements and counting of material necessary to aid in the determination of the purchase price. The report seeks to suggest as if the

burden was on the respondent in view of an adverse inference in the style of a claim preferred before an arbitrator where the claimant had to establish the claim. The appellant sought to rely on a final report of the Board which appears to have been adopted by Justice F.S. Gill (Retired). This is despite the fact that on various aspects pointed out by learned counsel for the respondent there is a finding arrived at that the copy of the final report had been tampered with, but it was stated that the original report was intact.

9. In our view, there was a basic fallacy in this report arising from the approach adopted by the learned Judge so appointed by consent to submit the report inasmuch as the principle of a claimant establishing his case could not have been the basis for the report. The relevant material had been taken possession of by the appellant. The appellant had done the tentative evaluation. The appellant had come to the final evaluation and, thus, the burden lay on the appellant to produce the relevant material to substantiate the position about the evaluation to determine the purchase price. Thus, there could not be any occasion to draw adverse inference against the respondent.

10. As the situation developed, both the parties filed objections to the report and the learned Single Judge was, thus, faced with the position of two sets of objections read with the report containing the aforesaid apparent fallacy (though not so mentioned by the learned Single Judge).

11. The learned Single Judge proceeded to adopt a different course of action. It has been opined by him that the responsibility lies with the Court to adjudicate a dispute. The reference was not one under the said Act or the 1940 Act and it would not be appropriate to once again now deal with the objections to a report where both the parties were dissatisfied. It is his view that any compromise that permits parties to come back to Court by reserving their rights to file objections on what the adjudicator decided was unknown to law and could not be a feasible way of settling a dispute. He, thus, proceeded to decide the case on merits.

12. Learned Single Judge vide the impugned judgment dated 06.12.2011 has determined the balance amount payable as Rs. 26,51,092/- with simple interest at the rate of 10.5% per annum from 21.02.1977 till date of the judgment. After having taken note of the historical progress of the dispute, it has been noticed that the amount payable by the respondent to the appellant was Rs. 5,63,044/- on the basis of the award dated 16.06.1986 which was made rule of the Court with no further challenge. At that stage itself, the appellant was expected to make the balance payment of the respondent. But every time a demand was made by the respondent, the appellant-Board went into fresh calculations escalating its own assessment of what was recoverable from the respondent. In a communication dated 04.07.1988, the additional amount alleged to be payable by the respondent was specified at Rs. 12,44,134/- which could be deducted after proper assessment of value of assets and, thus, the amount payable would be Rs. 17,14,513/- including interest upto that date. However, on 06.07.1990, the Executive Engineer determined the amount at Rs. 54,457.34/- towards final

payment which was reduced to Rs. 23,308/-. In this context, the learned Single Judge has noticed that on the evaluation undertaken of assets on 07.03.1990, the replacement cost of material was assessed at Rs. 26,78,446/- and learned counsel for the respondent before us laid emphasis on this figure to state that at best from this figure the amount under the award was liable to be deducted and that the depreciation of Rs. 15,68,683/- was impermissible. Further there was no basis for a sum of Rs. 18,18,805/- to be determined as payable by the respondent when the amount already stood determined by the arbitrator. The learned Single Judge, thus, accepted this plea of taking the value of assets as per replacement cost at Rs. 26,78,446/- with addition of solatium at 20 percent on the said amount with a deduction being made of Rs. 5,63,044/- being the amount determined as payable by the respondent to the appellant.

13. In our view, the purpose of any party approaching the Court is to get the lis or claim decided. There cannot be an indefinite litigation and that too on a simple issue of the purchase price payable to the respondent on the appellant having exercised the option to purchase the unit. The value of money has declined so much that no amount of interest can compensate the respondent. We are thus of the view that the approach adopted by the learned Single Judge by adjudicating the proceedings himself cannot be faulted in view of the circumstances set out aforesaid. We have already stated the fallacy in the report which was also not to be of a binding character. Thus, the report became almost an irrelevant piece of material for purposes of adjudication by the learned Single Judge.

14. The own assessment of the machinery by the inter se communications of the appellant shows that the replacement cost is Rs. 26,78,446/-. If that be the replacement cost, then there was no reason to add further depreciation on that amount as that is the value on the date when it can be stated to have been purchased. There can be no dispute similarly on the 20 percent solatium payable on the amount. The amount payable by the respondent having been determined in arbitration proceedings which became final and the award being made rule of the Court was again not in issue. A calculation, thus, made in this behalf determining the net amount payable as Rs. 26,51,092/- as per para 8 of the impugned order cannot be faulted. We are of the view that the appellant has unnecessarily dragged on the matter making the payment of the respondent almost illusory keeping in mind the real value of money. The grant of simple interest at the rate of 10.5% per annum is the least which is to be expected and that interest has to be payable till the date of actual payment. The imposition of costs also does not require to be interfered with. We may note that the very basis for the issuance of notice in this appeal as recorded in the order dated 21.08.2012 was on the plea that the product of Justice F.S. Gill (Retired) was an award and the scope of interference by the learned Single Judge could only have been to decide the objections in the award. This plea is misconceived for the reason that neither did the parties envisage, nor admit it as an award. This is an undisputed fact and it is not the stand of the parties that the settlement made by Justice F.S. Gill (Retired) was not an award.

The appeal is, thus, dismissed.

The additional relief of interest will continue to enure to the respondent till the date of payment.

The appellant shall further pay costs quantified at Rs. 20,000/- to the respondent.