

(2011) 12 P&H CK 0043

High Court Of Punjab And Haryana At Chandigarh
Case No: Civil Writ Petition No. 4500 of 1988 (O and M)

M/s Malerkotla Power
Supply Co.

APPELLANT

Vs

Punjab State
Electricity Board

RESPONDENT

Date of Decision: Dec. 6, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3
- Electricity Act, 1910 - Section 10A(3A), 7(A), 7A(1), 7A(4)

Hon'ble Judges: K. Kannan, J

Bench: Single Bench

Final Decision: Allowed

Judgement

K. Kannan, J.

The writ petition seeks for a direction by issue of a mandamus to pay the petitioner the purchase price of the undertaking of

the petitioner-Power Supply Company that was compulsorily acquired in the year 1977. The acquisition was made on the expiry of period of the

licence to the Power Supply Company on 21.02.1977 and as per Section 7A of the Indian Electricity Act of 1910 then in force, the purchase

price was required to be determined in accordance with the provisions of Section 7A(4) and paid at the time of taking over of the undertaking. In

case the payment of the purchase price was deferred, the payment was required to be made along with interest at the Reserve Bank of India's rate

ruling at the time of delivery of the undertaking plus 1%. This obligation on the part of the State was even an admitted fact at the time when the

initial notice was issued to the Secretary, Punjab State Electricity Board on 29.01.1976. Subsequently by a communication dated 21.02.1977, the Electricity Board informed the petitioner that the purchase price had been tentatively worked out to Rs. 30 lacs inclusive of 20% solatium on account of compulsory purchase (comprising of assessed value of materials at Rs. 25,10,000/-and adding 20% solatium, the total amount was Rs. 30,10,000/-), but there had been debits to the tune of Rs. 30,90,707.98 against the petitioner and pending finalization of the amount, the Electricity Board was making a payment of Rs. 100/-as token amount for acquisition of assets. The debit which was imposed on the petitioner was objected to by the petitioner and it should have been possible to refer the difference, in the manner contemplated u/s 7A(1) to arbitration. There was already however an agreement of arbitration between the parties that spelt a dispute with reference to additional tariff which was claimed by the State Board against the licensee for the period from 01.04.1966 to 15.10.1973. The subject of arbitration was expanded subsequently by an order of Court when it was directed that the Arbitrator shall consider all the pending claims by both the parties one against the other. An award came to be passed on 16.06.1986. As per the Award, an amount of Rs. 5,63,044/-alone was payable by the petitioner to respondent and consequently, that alone would have been the subject of adjustment against the assessed value of assets and solatium payable to the petitioner. The award which had been made by the Arbitrator on 16.06.1986 was made the Rule of Court after hearing the objections from the Electricity Board. The award that became final through the decree passed by the Court on 12.11.1987 had become final and no action for setting aside the award had been made by the respondent. The petitioner made a demand on the Secretary, Electricity Board soon after the arbitral award and before it was made a decree of Court through a notice dated 15.09.1986 but the demand was not satisfied, it was only thereafter the writ petition came to be filed.

2. Certain proceedings after the filing of the writ petition would require to be recalled about how there had been some attempts to compromise the matter between parties de hors the arbitration award brought before the Court. The fresh attempts were in the context of the Electricity Board's

attempt to escalate the alleged outstanding due and payable by the petitioner. As far as the petitioner was concerned, the dispute, if at all, was only in respect of the amounts which were said to be recoverable from the petitioner and it did not have any objection to the tentative valuation of the assets and the solatium that had been already calculated and informed at the time of take over. The moment the Arbitrator passed an award determining the amounts recoverable from the petitioner, the respondent was bound to act on the same and make a balance of payment to the petitioner. However, the issue took a different turn only because at every time when the demand was made, the Electricity Board was making fresh calculations and escalating its own assessment of what was recoverable from the petitioner. I find this to be rather a strange course of events, for, once all mutual claims had been referred to arbitration, there was no way by which the Electricity Board could make fresh assessments and escalate its demands. In a communication dated 04.07.1988 by the Executive Engineer to the Superintending Engineer, it is specifically mentioned that the Electricity Board had decided not to challenge the award on 12.11.1987. The Executive Engineer has worked out calculations again and has observed that even apart from the amount which was determined by the Arbitrator, additional amounts were also liable to be paid by the petitioner totalling a sum of Rs. 12,44,134/-. The Executive Engineer has suggested that the said amount could be deducted and after a proper assessment of the value of the assets, the amount that would still become payable would be Rs. 17,14,513/- that would include 10% interest for 1 1/2 years from February, 1977 to August 1988 and if compound interest were to be calculated, it would be worked out to be Rs. 23,88,973/-.

Even apart from the letter of the Executive Engineer, I find the Superintending Engineer of the Sangrur circle had also informed the Chief Engineer, Patiala that after recasting evaluation of the assets, the amount as suggested in the Executive Engineer's letter must be fair so that further litigation is avoided. With intra communication from the respective higher officials of the Electricity Board that clearly admitted of liability, the respondents were only dragging their feet that has resulted in this writ petition.

3. Quite contrary to all these admissions of liabilities, a letter has been issued by the Executive Engineer on 06.07.1990 during the pendency of the writ petition that they had determined an amount of Rs. 54,457.34 as payable and that it would constitute a full & final payment in respect of taking over of Malerkotla Power Supply Company. It was later reduced to a further sum of Rs. 23,308/- On an evaluation of assets undertaken, it bears out clearly through the document referred to along with the communication of the Executive Engineer to the Deputy Chief Accounts Officer, PSEB, Patiala, on 07.03.1990, the replacement cost of the machineries had been taken at Rs. 26,78,446/-. The contention of the learned counsel for the petitioner was that this amount was liable to be paid and if at all, only the amount which is determined by the Arbitrator could have been deducted and the balance of amount was the petitioner's entitlement. The learned counsel would argue that the depreciation worked out to the tune of Rs. 15,68,683/- was simply impermissible since they were liable to pay the amount as determined on the date when the assets were acquired. There was no basis for reckoning Rs. 18,18,805/- as payable by the petitioner when the amount stood determined by the Arbitrator. The ultimate payment which was made at Rs. 23,308/- was, therefore, clearly unjustified.

4. I had referred to the issue that during the pendency of the proceedings itself, a compromise had been attempted. As a part of the effort, it is found from the records that the matter had been entrusted to a retired Judge of this Court and even his remuneration was fixed by orders of this Court on 20.02.1992. The order reads thus:

Arguments partly heard. Learned counsel for the parties are agreed that the writ petition be adjourned and let the dispute between the parties be gone into by a retired Judge of this Court. The matter is adjourned to February 28, 1992 to enable the learned counsel for the parties to give an agreed name. It is also agreed that a minimum fee of Rs. 25,000/- will be payable to the learned Judge.

Case to come up on February 28, 1992.

A compromise deed signed by the respective counsel on instruction from the parties was made a part of the record and it reads as follows:

1. That the above noted case is pending for hearing in this Hon"ble Court and is fixed for 25.3.92.

2. That the parties to the present writ petition are agreed that the matter in dispute 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 Judge 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.

On 30.03.1992, after the compromise deed was signed between parties, the Court had referred the matter to Justice Fauja Singh Gill for decision.

The order of this Court on 30.03.1992 would required to be reproduced, for, it will give an idea about how the Court perceived the appointment:

Learned counsel for the parties have filed a written compromise dated March 24, 1992. In accordance with this compromise the matter in dispute

is referred to Mr. Justice Fauja Singh Gill (retired) for decision. Learned counsel for the parties are further agreed that Mr. Justice Gill shall be paid

at the rate of Rs. 3000/-per hearing. Learned counsel for the parties are agreed that their respective pleadings, as put up before this Court, shall be

filed before Mr. Justice Gill within one week from today. It will be appreciated if the matter is expeditiously decided, preferably within three

months.

The hearing of this case is adjourned to August 3, 1992.

A Court order shall be final even as regards what is decided between parties. During the proceeding, the parties had decided that the matter

should be compromised. The compromise shall itself be the terminus quo of the proceedings. It is rather a strange term in a compromise proposal

that when the matter was entrusted to a retired judge and a decision was to be taken by the person to whom the parties were willing to place the

dispute for resolution, there was hardly a scope for making it possible to keep the proceedings pending and come back to Court by reserving their

rights to file the objections to the report. It was not as if the Court was appointing a Commissioner to do a ministerial job. On the other hand, it

was literally allowing the parties to enter into a compromise and place the matter before a retired Judge for adjudication. In the manner in which the order was passed on 30.03.1992, which has been reproduced above, I cannot take this to be merely an act of appointment of a Commissioner to call for a report and for a Court to again adjudicate on the correctness of such a report.

5. If a decision had been taken by a Judge where the parties placed the dispute, I will offer no further opportunity for them to treat it as though it was a commissioner's report for parties to file their objections and seek for a fresh adjudication again. If the report were to be taken as a final adjudication of the rights, it could have been only set aside in the manner known to law. The reference to arbitration could only be done in the manner contemplated u/s 7A of the Electricity Act, 1910. The Court has itself no power to refer the parties to an arbitral process alien to Arbitration Act, 1940 (then in force) or the Electricity Act. In a slightly different situation under the Industrial Disputes Act, a Division Bench of Madras High Court held in *Madras Machine Tools Mfres. Vs. Spl. Dy. Commissioner of Labour and Another*, that a reference to arbitration, when there was no notification u/s 10A(3A) by the appropriate Government, was invalid and an arbitral award secured was invalid. If it were to be treated as arbitral award, as one passed even before the coming into the force of the 1996 Act, it could not be enforced without the same being made a decree of Court. Ever that was not done. By no count, could the decision brought through the so-called compromise be given effect.

6. If the proceedings themselves had not been allowed to terminate, but the Court had kept the case pending, probably the parties were led to believe that their own compromise deed which provided for parties to allow for their objections to be stated as being accepted by the Court and, therefore, they were entitled to make their objections and be heard on their objections. If the compromise had been given effect to, the manner of keeping the case pending itself was not appropriate. The only manner by which the case could have again come back to a Court was when one party was affirming the existence of a compromise and the other party was denying the same and on the principle of application of Order 23 Rule

3, proviso CPC, there could have been an adjudication of whether there had been a compromise or not. Compromise itself could relate to a part of a dispute. As regards such a part, there could be finality through such compromise. Any compromise that allows parties to come back to court to state the objections on what the adjudicator decided is unknown to law. The compromise deed signed by the parties on the basis of which adjudication was sought to be consigned to an outside agency, but allowing the parties to come back to court is an untenable hotchpotch that could not be made effective. In this case, there is no dispute that the parties had entered into a compromise. There is no issue for an adjudication whether compromise existed or not.

7. If the compromise itself did not terminate the proceedings and the case was still being called back in Court, then the report given by the Judge cannot be treated as a Commissioner's report to allow the parties to file their objections. I have extracted the orders passed by the Court which clearly spelt out that the parties were prepared to take an adjudication of the retired Judge as conclusive. The Court itself was not making any provision for allowing the parties to come back with their objections although the terms of the deed spelt out such a course. I deny no strength from the Judge's efforts, but I see no means of making this Court's imprimatur on the report if both parties had not accepted the same. I would, therefore, consider the entire exercise of putting the matter before a retired Judge for adjudication as *brutum fulmen*. As the maxim goes, *actus curiea neminem gravabit*. No act of the Court can prejudice any party and, therefore, I would do what is exigent.

8. The case would only require an adjudication on the facts already brought through the writ petition and the objections. I would take the assessment of value of assets which had been made and referred to in the communication of the Executive Engineer to the Deputy Accounts Officer, namely, Rs. 26,78,446/- as the amount of the value of the assets and on the said amount, there shall be addition of a further 20% solatium, which come to Rs. 32,14,136/- and all that could be deducted from the same would be what was determined already by the Arbitrator as the

amount payable by the petitioner to the respondent, namely, Rs. 5,63,044/-. The balance of amount shall be Rs. 26,51,092/- (Rs. 32,14,136- Rs.

5,63,044 = Rs. 26,51,092/-). This amount shall be payable from 21.02.1977 till date with simple interest at 10.5% p.a. The petitioner shall also

be entitled to costs assessed at Rs. 1 lakh against the respondent, having regard to the long pendency of proceedings and the wasteful attempts of

the respondent in keeping the case at bay after acquisition of its assets.

9. The writ petition is allowed with costs on the above terms.