

(2006) 143 PLR 691

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Miscellaneous No. 4716-CII of 2004

Punjab State Electricity
Board

APPELLANT

Vs

Railway Board and
Others

RESPONDENT

Date of Decision: March 22, 2006

Acts Referred:

Arbitration Act, 1940 " Section 2, 2, 31(4), 8#Arbitration and Conciliation Act, 1996 " Section 11, 11(6), 14, 14(4), 2#Constitution of India, 1950 " Article 226, 227

Citation: (2006) 143 PLR 691

Hon'ble Judges: Hemant Gupta, J

Bench: Single Bench

Advocate: P.P. Malhotra, Additional Solicitor General, Puneet Gupta and Shailender Sharma, for the Appellant;

Judgement

Hemant Gupta, J.

This order shall dispose of Civil Misc. No. 4716-CII of 2004 filed on behalf of the respondents in writ petition i.e.

Railway Board and its functionaries (hereinafter to be referred as "the objectors") against the award dated 21.11.2003 passed by Hon"ble Mr.

Justice P.K. Bahri (Retired).

2. The facts leading to the filing of said objections are that the Punjab State Electricity Board (hereinafter to be referred as "the Board") filed a writ

petition before this Court for quashing of letter dated 16.8.2001, Annexure P-12, and order dated 15.5.2002, Annexure P-21, and to implement

its decision of withdrawal of 15% surcharge levied and forthwith refund the amount due as per the reconciled statements or in the alternative to

adjust the same against the future freight payment.

3. The said relief was claimed on the basis that the Board has thermal power stations at Ropar, Lehra-Mohabhat and Bhatinda. The Board

requires coal in huge quantities for running of these thermal plants and that such coal is transported by the objectors. Since the objectors have

monopolistic right to run railways in the entire country, the Board has no option but to deal with the objectors for transportation of coal to its

thermal plants since no other form of transportation is possible considering the quantum and frequency of the requirement. The usual terms of

carriage by the objectors requires payment towards freight either at booking station/loading point or at destination/unloading site. Non payment of

freight leads to coercive methods of recovery such as detention of goods, their sale and recovery from proceeds etc. An arrangement was arrived

at between the Board and the objectors to meet the obligation of the Board to freight for smoother traffic of goods movement for public utility

services. Under the said arrangement, the Board was required to deposit and keep with the Railways and advance towards freight for one month

and settle the current freight of consignments periodically. The objectors levied surcharge of 15% on the freight charges on the ground that freight

has not been paid regularly or settled periodically.

4. It was the case of the Board that 15% surcharge is not payable since advance towards freight was in deposit. It was their case that till such time

any amount of freight is available, the surcharge could not be levied. However, it is the case of the railways that non payment of freight periodically

in terms of the arrangement entitles to claim surcharge from the Board.

5. On 17.12.2002, the learned Single Judge of this Court records that the only dispute which remains to be settled in the writ petition is as to

whether prior to 27.7.2002, any surcharge was leviable and, if so, what amount was to be levied. It was on 27.7.2002, it was found that the

Board is in debit i.e., no amount is in deposit towards freight with the objectors. On the said date, the Court found that since the dispute is between

a public sector undertaking and Union of India, the same may be resolved amicably by mutual consent by a High Powered committee in terms of

decision of Hon'ble Supreme Court in case reported as Oil and Natural Gas Commission and Another Vs. Collector of Central Excise, On

28.3.2003, both the parties agreed that the matter be referred to an arbitrator to decide the dispute ""whether Punjab State Electricity Board is

liable to pay any surcharge or freight for the period prior to 27.7.2002 and, if so, what was the amount so payable"". While appointing the

arbitrator, the High Court directed that one set of complete record of writ petition including the orders passed from time to time be forwarded to

the arbitrator. The writ petition was disposed of in the above-said agreed terms.

6. The learned Arbitrator announced his award on 21.11.2003 whereby the parties were found bound to act in terms of the order of the General

Manager, Northern Railways. Aggrieved against the said award, the Railway Board filed objections u/s 34 of the Arbitration and Conciliation Act,

1996 (hereinafter to be referred as ""the Act"") before this Court vide Civil Misc. No. 4716-CII of 2004. The Railway Board filed reply to the

objections. During the course of arguments on 25.01.2006, a question arose whether the objections against such award would be maintainable

before this Court or they are required to be filed before the Principal Civil Court of original jurisdiction in a District.

7. At this stage, it would be advantageous to reproduce the relevant provisions of the Arbitration Act, 1940 (hereinafter to be referred as ""1940

Act"") and that of the Act.

Arbitration Act, 1940.

2. Definitions: In this Act, unless there is anything repugnant in the subject or context,-

(a) and (b) xx xx xx xx xx

(c) Court means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the

subject-matter of a suit, but does not, except for the purpose of arbitration proceedings u/s 21, include a Small Cause Court.

31. Jurisdiction: (1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference

relates

(2) xx xx xx xx xx

(3) xx xx xx xx xx

(4) Notwithstanding anything contained elsewhere in this Act or in any other law "for the time being in force where in any reference any application

under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all

subsequent applications arising out of the reference and the arbitration proceedings shall be made in that Court and in no other Court.

Arbitration and Conciliation Act, 1996

2. Definitions: (1) In this Part, unless the context otherwise requires.-

(a) to (d) xx xx xx xx xx

(e) ""Court means the principal Civil Court of original jurisdiction in a district, and include the High Court in exercise of its ordinary original civil

jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a

suit, but does not include any civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

42. Jurisdiction: Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an

arbitration agreement any application under this Part has been made in a Court, subsequent applications arising out of that agreement and the

arbitral proceedings shall be made in that Court and in no other Court.

8. Learned counsel for the objectors has vehemently argued that since the Board has claimed ad interim measures in the writ petition which would

be analogous to an exercise of the jurisdiction conferred u/s 9 of the Act. An arbitrator was appointed by this Court, therefore, in terms of Section

42 of the Act, the objections are maintainable before this Court alone. It is contended that Section 42 of the Act gives overriding effect to all other

provisions of Part I of the Act including Sections 2(e), 8, 9 and 11 of the Act and, therefore, objections have been rightly filed before this Court.

Reference was made to the decisions of the Hon^{ble} Supreme Court in *Kumbha Mawji v. Union of India* 1953 2 SC 878, *Guru Nanak*

Foundation Vs. Rattan Singh and Sons, and *Neycer India Ltd. Vs. GMB Ceramics Ltd.*, .

9. In *Kumbha Mawji's* case (supra), a dispute arose whether Calcutta High Court or Gauhati High Court will have the jurisdiction to entertain the

objections. The question of territorial jurisdiction of the Court arose as an application for filing of the award has been first made u/s 14 of the Act.

It was found that Sub-section (4) was not meant to be confined to applications made during the pendency of an arbitration. It was interpreted that

the phrase ""in any reference"" in Sub-section (4) is to be taken as meaning ""in the course of a reference"". It was held to the following effect:

In the context of Section 31, Sub-section (4), it is reasonable to think that the phrase ""in any reference"" means ""in the matter of a reference"". The

word ""reference having been defined in the Act as ""reference to arbitration"", the phrase ""in a reference"" would mean ""in the matter of a reference to

arbitration"". The phrase ""in a reference"" is, therefore, comprehensive enough to cover also an application first made after the arbitration is

completed and a final award is made, and in our opinion that is the correct construction thereof in the context. We are, therefore, of the opinion

that Section 31(4) would vest exclusive jurisdiction in the court in which an application for the filing of an award has been first made u/s 14 of the

Act.

10. In *Guru Nanak Foundation Vs. Rattan Singh and Sons*, , Hon"ble Supreme Court while hearing a civil appeal, removed Shri M.L. Nanda as

an arbitrator and appointed Shri C.P.Malik, retired Chief Engineer, C.P.W.D, the sole arbitrator to settle the dispute between the parties. The

objections against the award were filed before the Delhi High Court which were resisted on the ground that the objections would be maintainable

only before the Supreme Court. Hon"ble Supreme Court considering the definition of Sections 2(c) and 31(4) of 1940. Act held that the non-

obstante clause excludes anything anywhere contained in the whole Act or in any other law for the time being in force if it is contrary to or

inconsistent with the substantive provision contained in Sub-section (4). It was, thus, held that Sub-section (4) invests exclusive jurisdiction in the

Court, and all subsequent applications arising out of reference and the arbitration proceedings shall have to be made in that Court and in no other

Court. The court held to the following effect:

On a pure grammatical construction as well as taking harmonious and overall view of the various provisions contained in the Act it is crystal clear

that ordinarily the Court will have jurisdiction to deal with the question arising under the Act, except the one in Chapter IV, in which a suit with

regard to the dispute involved in the arbitration would be required to be filed under the provisions of the Code of Civil Procedure. However,

where an application is made in any reference to a court competent to entertain it, that Court alone will have jurisdiction over the arbitration

proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall have to be made in that Court alone

and in no other Court.

11. Since the arbitrator was appointed by the Hon"ble Supreme Court and directions were given to the arbitrator to decide the dispute

expeditiously and taking into consideration other factors, it was concluded that the Supreme Court has complete control over the proceedings of

the arbitrator. Learned counsel for the objectors has strongly placed reliance on the said judgment to contend that this Court has not only

appointed the arbitrator but directed the arbitrator to decide the dispute expeditiously and also forwarded the record of the Court including the

interim orders, therefore, this Court would be deemed to be seized of the dispute and, thus, competent to entertain the objections.

12. Learned counsel for the objector has also relied upon Neyeer India Limited"s case (supra) to contend that the Board is estopped to raise the

objection regarding the jurisdiction of this Court as such objection was not raised at any point of time. The objections raised in reply to the

objection petition are in generic terms and not specifically in respect of the maintainability of the objections before this Court in terms of Section

2(e) of the Act. Reference is also made to the decision of the Supreme Court reported as Union of India (UOI) and Others Vs. Aradhana Trading

Co. and Others, , to contend that since the Board has submitted to the jurisdiction of this Court, it is not open to the Board to turn around and

contend that this Court cannot entertain the objections against the award.

13. On the other hand, learned Counsel for the Board has submitted that the Board has invoked extra-ordinary writ jurisdiction of this Court under

Article 226 of the Constitution of India and not the jurisdiction of the Court in terms of the Act. There is not agreement between the parties

containing arbitration clause and, therefore, the appointment of an arbitrator by this Court is not in terms of any of the provisions of the Act, The

order passed by this Court directing the arbitrator to decide the dispute is on account of an agreement between the parties. The objections to an

award announced by such an arbitrator are to be filed before the Court as defined u/s 2(c) of the Act which, undoubtedly, does not include the

High Court.

14. Learned counsel for the Board has relied upon the decision of the Supreme Court reported as Tamil Nadu Electricity Board Vs. Sumathi and

Others, , to contend that there was no arbitration agreement within the meaning of Section 7 of the Act prior to the filing of writ petition. Since the

parties had agreed to refer their dispute to an arbitrator during the course of pendency of writ petition, the High Court is not competent to pass a

decree in terms of the award. Reference is also made to P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, to contend that

if there is arbitration agreement satisfying the requirements of Section 7 of the Act, it is obligatory for the Court to refer the parties to arbitration.

Nothing remains to be decided in the original action or the appeal arising therefrom. All the rights, obligations and remedies of the parties would

now be governed by the new Act including the right to challenge the award. It was held to the following effect:

...The Court to which the party shall have recourse to challenge the award would be the Court as defined in Clause (e) of Section 2 of the new Act

and not the Court to which an application u/s 8 of the new Act is made. An application before a Court u/s 8 merely brings to the Court's notice

that, the subject-matter of the action before it is the subject-matter of an arbitration agreement. This would not be such an application as

contemplated u/s 42 of the Act as the Court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent

court within the meaning of Section 2(e) of the new Act.

15. Learned counsel for the Board has also relied upon Godara Construction Company v. The State of Rajasthan and Ors. A.J.R. 2004 Raj 66 to

contend that in similar circumstances the High Court of Rajasthan has examined the provision of Section 2(e) of the Act and held that the

objections are not maintainable before this Court. It was held to be following effect:

10. Moreover, Section 42 refers to any application made to a Court under Part of the Act. In the context, this clause can be invoked only on

fulfillment of condition referred to therein. Firstly, an application must have been made under Part I of the Act of 19%, Secondly, such application

must have been made to a Court Obviously, in the context, "the Court" to which reference is made u/s 42 ought to be a Court as defined in

Section 2(e) of the Act. High Court exercising extraordinary jurisdiction under Articles 226 and 227 of the Constitution does not come within its

purview....

16. A comparison of the provisions of Section 31(4) of 1940 Act and that of Section 42 of the Act shows that such provisions are substantially the

same, However, it is the definition of the Court contained in Section 2(c) of 1940 Act which is materially different from Clause 2(e) of the Act.

Under 1940 Act, the "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same

had been the subject-matter of a suit. While interpreting the said provisions, it has been found that even the appointment of an arbitrator by the

Supreme Court will confer exclusive jurisdiction upon that Court alone to entertain the objections against the said award.

17. The Chief Justice or his delegatee is to appoint an arbitrator if a party fails to act as required under the procedure to seek appointment of an

arbitrator etc., under the Act. The Act contemplates different and distinct procedure for the appointment of arbitrator and another distinct

procedure for challenge to the award. A Constitution Bench of Hon"ble Supreme Court in State Bank of Patiala v. Patel Engineering 2005 (8)

SCC 618 has held that the power to appoint an arbitrator has to be exercised by the Chief Justice or his delegatee who can be only a Judge of the

High Court alone. If the interpretation suggested by the objector is to be accepted, it would necessarily mean that the objections against the award

rendered by the arbitrator in terms of the appointment order u/s 11(6) of the Act has to be filed before the High Court alone. The said

interpretation would, in fact, amount to rewriting of Section 2(e) of the Act which defines the "Court" as contained in Section 34 contemplating

procedure for challenge to an award. Still further, when this Court appointed an arbitrator there was no prior agreement containing the arbitration

clause. The Board has sought prerogative writ in exercise of extra-ordinary writ jurisdiction of this Court against the decision of the Railway Board.

The interim relief claimed was in exercise of the plenary jurisdiction exercised by this Court under Article 226 of the Constitution of India and not in

terms of Section 9 of the Act as there was no agreement containing the arbitration clause in terms of which the Board could approach this Court

for interim relief. The Court contemplated u/s 9 of the Act is again a Court as defined u/s 2 of Act and the writ Court obviously does not come

within the ambit of such definition.

18. It was concluded that the phrase ""in any reference"" would mean in the matter of reference as well. The principle laid down in the said judgment

cannot have any application in the facts of the present case where reference to an arbitrator was not contained in any arbitration agreement

between the parties. It was during the course of hearing before this Court, the parties decided to submit to the jurisdiction of an arbitrator. In terms

of Section 42 of the Act, that Court alone shall have the jurisdiction where any application has been made with respect to the arbitration

agreement.

19. In P. Anand Gajapathi Raju's case (supra), Hon"ble Supreme Court has held that application u/s 8 of the Act is not an application

contemplated u/s 42 of the Act as the Court trying action may or may not have the jurisdiction to try the suit or competent Court within the

meaning of Section 2(e) of the Act. Therefore, the direction to the Arbitrator to decide the dispute on an agreement between the parties was not an

order passed by this Court in terms of any provisions of the Act which may entitle the objectors to file objections before this Court.

20. A Division Bench of Andhra Pradesh High Court in a judgment reported as Rashtriya Ispat Nigam Limited, Visakhapatnam Steel Plant,

Visakhapatnam v. Kaveri Engineering Industries Limited, Madras and Anr. 2002(2) ALR 484, has considered the question of filing of objections

against the award of arbitrator appointed in exercise of the writ jurisdiction under 1948 Act. While considering the judgment of Hon"ble Supreme

Court rendered in M/s Guru Nanak Foundations"s case (supra), the Division Bench has concluded that the writ court is not a Civil Court within the

meaning of the provisions of 1948 Act and, therefore, objections cannot be filed before the High Court. The said judgment also refers to another

judgment titled General Manager, SC Railway, Sec"bad and Another Vs. Sri Rama Engineering Constructions and Others, , wherein it has been

held that the provisions of 1948 Act contemplating the objections before the same Court will not be applicable in view of the fact that the arbitrator

is now appointed by the Chief Justice or by the person or a body nominated by him. The relevant extract from the said judgment reads as under;-

16. In our view, aforesaid decisions have no application to the facts of the present case. In the instant case, the Arbitrator was appointed in a writ

proceeding. A writ Court is not a Civil Court within the meaning of the provisions of the Arbitration Act. There is also nothing to show that this

Court has retained with it the overall control over the arbitration proceedings. The award has already been transmitted to the Court of I Additional

Senior Civil Judge, Visakhapatnam.

17. In General Manager, SC Railway, Sec"bad and Another Vs. Sri Rama Engineering Constructions and Others, , it was held:

The decision of the apex Court in M/s Guru Nanak Foundation (supra) was under the old Act. Section 31(4) of 1940 Act in the said decision was

construed holding that where Arbitrator has been appointed by the Supreme Court, it would have jurisdiction to entertain the award and it could

not be filed before the High Court. Having regard to the fact that the Arbitrator is not appointed by the Chief Justice or by the person or body

nominated by him in an administrative capacity and not in a judicial capacity, the said decision cannot be said to have any application whatsoever.

21. The judgments in Kambha Mawji"s case (supra), Neyeer India Limited"s case (supra) and Aradhana Trading Company"s case (supra) do not

deal with the question arising in the present proceedings. There cannot be any question of estoppel against the Board for two reasons. Firstly, there

cannot be any estoppel against the statute and secondly an objection has been raised by the Board in the reply that the objections are not

maintainable before this Court. The judgment in M/s Guru Nanak Foundation's case (supra) is clearly distinguishable for the reason that the said

judgment arises out of the proceedings initiated before the Civil Court but taken to the Supreme Court in Special Leave Petition. Therefore,

Hon"ble Supreme Court can be said to be a civil Court within the meaning of Section 2(e) of 1948 Act. However, the objections under the Act in

terms of Section 34 are required to be filed before the Court which is defined in Section 2(e) of the Act. In the present case, the parties have

decided to resolve their dispute through an arbitrator consented in proceedings under the writ proceedings pending before this Court under Article

226 of the Constitution of India. Such consent is not in terms of the provisions of the Act. There were no proceedings initiated between the parties

under the Act before the filing of objections by the objectors u/s 34 of the Act before this Court. Therefore, the objections had to be filed by the

objections before the principal civil court of original jurisdiction in terms of Section 2(e) of the Act and not before the writ court. Under the new

Act, the procedure for appointment of an arbitrator is contemplated to be separate and distinct from the procedure of challenge to the award of the

Arbitral Tribunal. The interpretation sought to be raised will, in fact, negate the challenge procedure to the award of (he Arbitral Tribunal in Part I

of the Act. Such interpretation cannot be accepted.

22. Even in National Aluminium Co. Ltd. Vs. Pressteel and Fabrications Pvt. Ltd. and Another, , an arbitrator was appointed by the Supreme

Court. The arbitrator was also requested to conclude the proceedings within four months from the day he enters upon the arbitration. In the said

case, the parties by consent agreed before the arbitrator that the proceedings should go on under the provisions of 1996 Act. In respect of the

question of forum before which an application for modification or setting aside of the award could be entertained, the Court held to the following

effect:

...In regard to the forum before which the application for modification or setting aside the award is concerned, we find no difficulty in coming to the

conclusion that in view of the provisions of Section 34 read with Section 2(e) of the 1996 Act it is not this Court which has the jurisdiction to

entertain an application for notification of the award and it could only be the principal civil court of original jurisdiction as contemplated u/s 2(e) of

the Act, therefore, in our opinion, this application is not maintainable before this Court.

23. Thus, I conclude that the objections filed before this Court are not maintainable. Therefore, such objections are ordered to be returned to the

objectors to file the same before the competent Court within 30 days from today.

The civil miscellaneous stands disposed of accordingly.