

APPELLATE CIVIL

Before K. L. Gosain, and A. N. Grover, JJ.

M/S PANIPAT ELECTRIC SUPPLY CO., LTD.,
NEW DELHI,—Appellant

versus

THE STATE OF PUNJAB AND OTHERS,—Respondents.

First Appeal from Order No. 186 of 1958

1957

Apr., 15th

Indian Electricity Act (IX of 1910)—Section 7—Scope of—Reference to arbitration—When can be made—Jurisdiction of the arbitrator—Extent of—Arbitration Act (X of 1940)—Section 34—Stay of suit—Whether can be ordered where matter in suit not covered by section 7 of the Indian Electricity Act.

Held, that section 7 of the Indian Electricity Act envisages a case where the State Government elects to purchase the undertaking and the licensees sell the undertaking to the Government, but a dispute arises with regard to the valuation of the same. Where, however, the right of the Government to elect to purchase the undertaking and its sale by the licensees to the Government is disputed and a suit for damages for tortious acts of the Government and its servants is filed, section 7 of the said Act is not applicable and the subject-matter of the suit cannot be referred to arbitration. The mere fact, that in the assessment of the claim for damages the plaintiff's have included an item for the price of the concern and its property, would not attract the provisions of section 7 of the Indian Electricity Act.

Held further, that the arbitrator, as contemplated by the provisions of the Indian Electricity Act, can legally assume jurisdiction only if the Government validly and properly elects to purchase the undertaking and there arises a dispute regarding its valuation.

Held also, that if the present case were referred to the arbitrator, he would have to decide whether or not the Government had properly and validly elected to purchase the concern and whether or not the various acts of

the defendants in taking over forcible possession of the concern were or were not tortious. The arbitrator clearly has not jurisdiction to decide these matters. The claim for damages made in the present case is consequent only upon the decision of the aforesaid points, and if the main points cannot be decided by the arbitrator, the claim for damage cannot obviously be adjudicated upon by him. In these circumstances the stay of suit cannot be ordered under section 34 of the Arbitration Act, 1940.

First appeal from the order of Shri Onkar Parkash Sharma Senior Sub-Judge, Karnal, dated the 28th August, 1958, staying the plaintiff-appellant suit under section 34 of Indian Arbitration Act.

G. S. VOHRA AND SURRENDER SINGH, for Appellant.

L. D. KAUSHAL, for respondents.

JUDGMENT

GOSAIN, J.—This is a first appeal against an order of Shri Onkar Parkash Sharma, Senior Sub-ordinate Judge, Karnal dated the 28th August, 1958, staying the plaintiff-appellants' suit under section 34 of the Indian Arbitration Act.

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The facts giving rise to this appeal are as under :—The plaintiffs Messrs Panipat Electric Supply Company, Limited, were granted "The Panipat Electric Licence 1934",—*vide* Notification No. 826-Elec., published in the *Government Gazette*, Punjab, dated Friday, July, 20, 1934. The period of licence was originally fixed as 15 years but was later extended by another five years, According to the plaintiffs, the licence must be deemed to have been granted on 20th July, 1934, when the notification regarding the same was published in the *Government Gazette*,—*vide* rules 19

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and 20 framed under the Indian Electricity Act. According to the defendants, the date of the grant of the licence must be taken to be the 17th July, 1934, when it was actually granted and not the 20th July, 1934, when the notification regarding its grant was published in the Gazette. On the 4th July, 1952, the State Punjab served as notice on the plaintiffs,—*vide* Memo No. 209-EI-52/31298, dated the 4th July, 1952, from the Secretary to the Government Punjab, P.W.D., Electricity Branch, Simla, which reads as under:—

“In accordance with the requirements of Sub-section (4) of section 7 of the Indian Electricity Act, 1910, the Governor of Punjab is pleased to give you notice hereby that the Punjab State Government has elected to purchase the Electric Supply undertaking connected with the Panipat Electric Licence, 1934, in exercise of the optiin given to them by clause 9(1) of the said licence read with sub-section (2) of section 7 of the Indian Electricity Act, 1910.”

It is not clear whether the plaintiffs sent any reply to the same earlier than the 9h December, 1953, but on the last mentioned date they sent through their lawyer notices to the State of Punjab, Shri J. R. Handa, Chief Engineer, P.W.D., and Shri S.S. Kumar Formerly Secretary to Government, Punjab (P.W.D. Electricity Branch). In these notices the plaintiffs challenged the validity of the aforesaid notice of the State of Punjab, dated the 4th July, 1952, on various grounds which *inter alia* were:—

- (1) it had not been given by an appropriate authority;

- (2) it was not in the proper form;
- (3) it was *mala fide* and *ultra vires* the Governor of the Punjab and the Punjab State Government,
- (4) the Punjab State Government was not the licence granting authority; and
- (5) that, in any case, the State Government could not acquire the undertaking without payment of compensation in full before the taking over of the concern.

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The Punjab Government then wrote letters to the plaintiffs on the 12th June, 1954, 29th June, 1954, and 16th July, 1954, informing the plaintiffs that the Punjab Government would take over the undertaking on the night between the 16th and 17th July, 1954. On the aforesaid night the undertaking was actually taken over by the Government through Mr. J. R. Handa, acting under the orders of Mr. S. S. Kumar, and since then the undertaking is in possession of the Government. We have not been informed as to what correspondence, if any, ensued between the parties between the 17th July, 1954, and 5th April, 1957, but it appears that on the latter date, i.e., the 5th April, 1957, the plaintiffs again served notices under section 80, Civil Procedure Code, on the State Government, Shri J. R. Handa and Shri S. S. Kumar, stating that all of them were jointly and severally liable to pay the plaintiffs a sum of Rs. 11,76,586-4-0 together with interest at 6 per cent per annum from the date of taking over the electricity undertaking connected with the Panipat Electric Licence, 1934, till actual payment and requiring them to pay the aforesaid

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amount within the statutory period of two months from the date of receipt of notice by each of them.

On the 15th July, 1957, the plaintiffs filed the present suit against (1) The State of Punjab, defendant No. 1, (2) Shri J. R. Handa, defendant No. 2, and (3) Shri S. S. Kumar, defendant No. 3, for the recovery of a sum of Rs. 13,88,371-4-0. The main allegations made in the plaint were that the various notices served on them and referred to above were illegal and *ultra vires* that the State Government was not authorised to take over the undertaking of the plaintiffs, that the action of the defendants in taking over the concern on the night between the 16th and 17th July, 1954, was illegal, highhanded, malicious and tortious, that the Government had, at any rate, no power to assume possession before the expiry of the period of licence on the 20th July, 1954, that all the three defendants were jointly and severally liable to pay damages to the plaintiffs to the extent of the amount in suit on account of their various tortious acts as described in the plaint. The claim in suit consisted of the following items:—

- (1) Rs. 2,00,000 ... profits for ten years and four days on the basis that the licence having not been validly terminated stood automatically renewed for ten years and the plaintiffs would have made this amount as profits in the period of ten years and four days for which the licence was till available:
- (2) Rs. 8,00,000 ... value of the Electric Supply undertaking connected with

the Panipat Electric Licence, 1934, including power-house building, power station, distribution main lines, service connection etc., etc.,

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(3) Rs. 1,60,000 ... 20 per cent on the value of the undertaking on account of requisition/having service to purchase ;

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(4) Rs. 91,839-13-0... claimed as per notice No. P/94/233, dated 24th August, 1954, served on the Sub-Divisional Officer Punjab, P.W.D., Electricity Branch, Panipat; and the Secretary to the Government, Punjab, P.W.D., Electricity Branch;

(5) Rs. 50,000 ... claimed as per notice No. P/2A/Loan/969, dated 5th November, 1953, addressed by the plaintiffs to the Electric Inspector to Government, Punjab, Karnal, and the Secretary to Government Punjab, P.W.D. Electricity Branch, Chandigarh;

(6) Rs. 20,000 ... on account of damages, for short supply of power, irregular supply of power and voltage, failure of supply, loss of reputation, defamation, taking over the staff, breaking of locks, threats, coercion, seizure of records, etc., and

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(7) Rs. 2,11,785 ... on account of interest by way
of damages in the aforesaid
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Rs. 15,33,624-13-0 Total

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By adjusting two items of Rs. 1,35,033 and
Rs. 10,220-9-0, i.e., Rs. 1,45,253-9-0 in all, which
the plaintiffs admittedly owed to the Government,
the plaintiffs' claim came up to Rs. 13,88,371-4-0.

The defendants made an application to the
Court on 9th October, 1957, under section 34 of the
Indian Arbitration Act, praying for stay of the
proceedings in the suit in so far as they related
to the main claim of the valuation of the under-
taking. In this application the defendants
alleged that the valuation of the Company had
to be made through arbitration as envisaged by
section 7 of the Indian Electricity Act read with
the conditions of the Plaintiffs' licence. They
further alleged that the plaintiffs had joined
in their suit separate and independent causes of
action in order to defeat the provisions of the
Arbitration Act and to cause embarrassment to
the defendants in their defence. It was stated by
the defendants that the causes of action were
separable, that the plaint read as a whole clearly
showed that the plaintiffs' main claim related to
the valuation of the concern and that the other
claims were only a fractional part of the aforesaid
principal claim. The plaintiffs opposed the afore-
said application and urged that the suit filed by
them was not covered by section 7 of the Indian
Electricity Act and that the matter in suit did
not fall within the ambit of the arbitration clause
contained in the aforesaid section. The trial
Court framed the following issues on the 16th
November, 1957:—,

1. Whether the proceedings in the present
suit can be stayed under section 34 of

the Indian Arbitration Act when admittedly the whole of the subject-matter of the suit does not fall within the purview of the reference relied upon ?

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2. Whether the provisions of section 7 of the Indian Electricity Act are applicable in the present case when the plaintiffs in the suit have challenged the validity of the acquisition itself ?
3. If issue No. 2 is proved, whether in that case section 34 of the Indian Arbitration Act is not applicable to the case for the reasons given in clauses (a), (b), (d), (e) and (f) of paras 1 to 3 and 5 of the reply of the applicants dated 16th November, 1957 ?
4. Whether the respondents have always been ready and willing to do all things necessary to the proper conduct of the arbitration ?
5. Whether, if issue No. 3 is not proved, in that case the proceedings in the present suit should not be stayed ?

After going through the whole case the trial Court found that there was a valid and subsisting arbitration agreement for settling the principal dispute between the parties and that the main relief claimed by the plaintiffs, i.e., the value of the undertaking, clearly fell within the purview of the submission asked for and that reference to arbitration to that extent had to be made. In paragraph 8 of its order the trial Court observed as under : —

“The main relief claimed by the plaintiff-Company, i.e., the value of the undertaking, thus, clearly comes within the

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purview of the submission asked for, and the reference has got to be made. The other reliefs claimed, though not strictly within the scope of the reference, are subordinate to the main relief and arise out of the same transaction, i.e., grant of the licence to the plaintiff-Company and the ultimate purchase or acquisition of the undertaking by the State. These matters can conveniently be separated from the main relief for the purpose of reference and will have to be decided by this Court after the receipt of the award in the case."

The trial Court ultimately referred to arbitration the matter of valuation of the undertakings in question under the provisions of section 7 read with section 52 of the Indian Electricity Act and stayed further proceedings in the case till the receipt of the award of the arbitrator. The plaintiffs feeling aggrieved against the said order have come up to this Court in first appeal.

Mr. Gian Singh Vohra, learned counsel for the plaintiff-appellants, urges that the trial Court has wholly misconceived the suit and has erred in staying the proceedings in the same. He contends that the plaintiffs' claim was in respect of damages for the various tortious acts of the defendants as detailed in the plaint and that it was not a case where the Government had validly elected to take over the undertaking and the same had been voluntarily given over to the Government by the defendants. I think there is a good deal of force in his contentions. Section 7 of the Indian Electricity Act envisages a case where the State Government elects to purchase the undertaking and the licensees sell the undertaking to the

Government, but a dispute arises with regard to the valuation of the same. In the present case, however, the plaintiffs allege that the State Government though allegedly electing to purchase was not authorised to make the said election and further allege that the State Government could not, in any case, purchase the undertaking before the expiry of the entire period of licence, i.e., before the 20th July, 1954. The action of the State Government is impugned on a number of other grounds also. The plaint read as a whole clearly shows that the plaintiffs do not admit that the Government at any time validly or properly elected to purchase the concern. The plaintiffs further deny that they were bound to sell the undertaking to the State Government in the circumstances of the present case, and urge that no occasion has, on the facts of the present case, arisen for valuation of the undertaking to be made for the purposes of section 7 of the Indian Electricity Act. The plaintiffs clearly allege that the concern and its property have been taken over by the defendants forcibly and without any right and they claim damages for tortious acts of the defendants in the aforesaid matter. The mere fact, that in the assessment of claim for damages the plaintiffs have included an item for the price of the concern and its property, would not, in my opinion, attract the provisions of section 7 of the Indian Electricity Act. The suit is, for all intents and purposes, a suit based on tort, and on the allegations made in the plaint, it cannot be said that the suit is for the recovery of the price of the undertaking on the basis envisaged by section 7 of the Act.

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The arbitrator, as contemplated by the provisions of the Act, can legally assume jurisdiction only if the Government validly and properly

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elects to purchase the undertaking and there arises a dispute regarding its valuation. If the present case were referred to him, he would have to decide whether or not the Government had properly and validly elected to purchase the concern and whether or not the various acts of the defendants in taking over forcible possession of the concern were or were not tortious. The arbitrator clearly has no jurisdiction to decide these matters. The claim for damages made in the present case is consequent only upon the decision of the aforesaid points, and if the main points cannot be decided by the arbitrator, the claim for damages cannot obviously be adjudicated upon by him.

In *Gaya Electric Supply Company, Limited v. State of Bihar* (1), their Lordships of the Supreme Court observed at page 184 of the report as under—

“The scope of this arbitration clause is a very narrow one. It only confers jurisdiction on the arbitrator on the question of valuation of the undertaking pure and simple and does not say that all disputes arising out of the agreement or in respect of it will be decided by arbitration. Questions relating to the breach of contract or its rescission are outside the reach of this clause. The arbitrator has not been conferred the power by this clause to pronounce on the issue whether the plaintiff was justified in claiming that time was of the essence of the contract and whether the State Government committed a breach of the contract by not making a

(1) A.I.R. 1953 S.C. 182

valuation within the time specified. This clause is, therefore, no answer to the company's query 'Show me that I have agreed to refer the subject-matter of the suit to an arbitrator'. Besides this clause in the agreement, there is nothing else which can deprive the Court of its jurisdiction to decide the plaintiff's suit as brought."

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In *Monro v. Bognor Urban District Council*, (1), a contractor entered into a written contract with the defendants for the construction of certain sewerage works. After he had done certain work under the contract, he refused to complete the work alleging that he had been induced to enter into the contract by fraudulent misrepresentations made in the specification as to the nature of the subsoil of the ground where the work was to be done, and he brought an action to recover damages for the alleged misrepresentation and to have the contract declared void. The defendants prayed for stay of the said suit on the ground that there was an arbitration clause in the agreement which provided as under :—

"if at any time any question, dispute or difference shall arise between the council or their engineer and the contractor, upon or in relation to or in connection with the contract, the matter shall be referred to and determined by the Engineer."

Banckes L.J. found that the claim made by the contractor was not within the scope of submission, and at page 172 of the report observed as under :—

"It is a claim for damages for fraudulent

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misrepresentation whereby the plaintiff was induced to enter into the contract, and there are claims for consequent relief. These are put in the form of a claim for work and labour done, but the essence of the claim is that the plaintiff is asserting that he was induced by fraud to enter into the contract, and that as a consequence the contract never was binding. If that is the nature of the claim, it seems to me plain that it does not come within the scope of the submission, and it is no answer to say that the plaintiff has mistaken his remedy and that he ought not to have brought this form of claim, and that he cannot substantiate it, or that if you look into it you will find that he ought to have brought a different action altogether, and if he had it would have been plain that it came within the submission."

In *Johrumull Parasram and others v. Louis Dreyfus & Co. Ltd.* (1), a contract between A and B for the supply of goods contained an arbitration clause. A supplied a certain quantity of goods to B and then brought a suit against B alleging that the contract had been wiped out by frustration and, secondly, that he was induced to enter into it by fraud and on discovery of the fraud had avoided it. A claimed damages for fraudulent misrepresentation and laid a further claim for value of goods supplied at the request of B. B applied for stay of the suit on the basis of an arbitration clause which read as under:—

"In the event of a dispute arising under this contract, the same shall be referred

(1) A.I.R. 1949 Cal, 179

for settlement in Calcutta to the Tribunal of Arbitration of the Bengal Chamber of Commerce whose decisions it is expressly agreed shall be final and binding on both parties to this contract."

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In paragraph 25 of the Judgment a Division Bench of the Court consisting of Harries C.J. and Mukherjee J. observed as under:—

"In my view as the suit as framed is one for a money claimed wholly independent of the contract this Court has no power to stay it under section 34, Arbitration Act. The claim as framed is a claim not under the contract containing the arbitration clause, but is really a claim based on tort and an implied contract. That being so the learned Judge was wrong in making an order staying the suit."

In *Ghewarchand Rampuria v. Shiv Jute Bailing Ltd.* (1), another Division Bench of the Calcutta High Court held that where the cause of action in a suit for damages for wrongful conversion of goods is based wholly upon tort and tort alone, which has got no connection direct or indirect with the contract which provides for reference to arbitration of any dispute arising out or in any way relating to the contract is only a link in the story to show how the goods came to be in the possession of the defendants and the claim is not based in any way or related to the contract itself, the suit cannot be stayed under section 34.

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A similar view was taken in *Gauri Shankar & Sons v. Union of India*, (1).

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The *ratio decidendi* of the aforesaid rulings fully applies to the facts of the present case and the rulings therefore do support the contentions raised on behalf of the appellants.

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The learned Deputy Advocate-General appearing for the State urges that the plaintiffs' main claim in the present suit is for the recovery of a sum of Rs. 8,00,000 which is on account of the value of the undertaking. He also contends that the claim on account of interest and by way of 20 per cent of the valuation on account of compulsory acquisition are also parts of the claim relating to the valuation of the concern. On these bases he contends that the suit must be stayed and the matter must be referred to arbitration as envisaged by section 7 of the Act. There is an obvious fallacy in the above argument. The claim for valuation or for compulsory acquisition allowance or interest has not been made on the basis that the Government has elected to purchase the concern and the company has sold the same to the Government in pursuance of the said election. The plaintiffs have denied that there was any proper election to purchase by the Government. They have further denied that there was any sale by them to the Government. The whole case of the plaintiffs is based on the tortious acts of defendants Nos. 2 and 3, and on the allegations made in the plaint, it cannot be found that the case falls within the ambit of the arbitration clause. Reliance is placed by the learned counsel on *Woolf v. Collis Removal Service* (2), but the facts of that case are entirely distinguishable from

(1) A.I.R. 1933 All. 446

(2) 1947 (2) A.E.L.R. 260

those of the present case. The plaintiff in that case had employed the defendants as bailees for certain furniture of his. The defendants instead of keeping the furniture at the place specified in the contract removed the same to another place and left it there without any arrangements for watch and ward with the result that some of it was stolen. The plaintiff filed a suit for the recovery of the price of the furniture alleging that the defendants had been guilty of negligence in the performance of the contract. Although the claim in negligence was a claim in tort, the claim as a whole arose from the contract of bailment and was, therefore, held covered by the arbitration clause. In the present case, however, no claim is founded on the basis as envisaged by section 7 of the Act, and the plaintiffs' whole case is based on tort and tort alone.

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For the aforesaid reasons, I find that the learned trial Judge was not justified in staying the suit under the provisions of section 34 of the Indian Arbitration Act. I, accordingly, accept the appeal; set aside the order of stay and remand the case to the trial Court for its decision on merits. The costs in this Court will abide the ultimate event. Parties to appear in the trial Court on the 18th May, 1959.

GROVER, J.—I agree.

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B.R.T.

SUPREME COURT

Before Syed Jafer Imam and J. L. Kapur, JJ.

RANJIT SINGH,—Appellant.

versus

THE STATE OF PEPSU (NOW PUNJAB),—Respondent

Criminal Appeal No. 19 of 1957

Indian Penal Code (XLV of 1860)—Section 191—Person not bound to make an affidavit making one which is

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