

Karnataka 54, approved.

A

Arbitration Act, 1940 : Sections 2(a), 33 and 46.

Arbitration agreement—Question as to existence and validity of agreement—Held the existence and validity of the arbitration agreement has to be decided by the Civil Court—Arbitrator cannot clothe himself with jurisdiction to conclusively decide it.

B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9501 of 1996.

From the Judgment and Order dated 14.12.92 of the Punjab & Haryana High Court in R.S.A. No. 1993 of 1990.

C

P.P. Rao, R.S. Sodhi and Darshan Singh for the Appellant.

M.S. Gujral and Mrs. Kirti Mishra, for the Respondents.

D

The following Order of the Court was delivered :

Leave granted.

This case has a chequered history, the entire narration of which is not material to the controversy at hand. Suffice it to state that pursuant to the default committed by the respondent in payment of the dues, the appellant-Board had disconnected the supply of electrical energy on 20.8.1982. For the recovery of the arrears, the appellant had laid the suit. Ultimately, the suit ended in the order passed by this Court in C.A. No. 2767 of 1987 on February 15, 1989 upholding the decree for recovery of the arrears for the disconnection of the supply of electrical energy; the respondent had a notice issued on August 1, 1985 claiming damages in a sum of Rs. 68,25,734 which, we are informed, subsequently increased to over Rs. 93,00,694.00. Therein, the respondent called upon the appellant to refer the dispute to an arbitrator under Section 52 of the Indian Electricity Act, 1910 (for short, the 'Electricity Act') or under Section 76(2) of the Electricity (Supply) Act, 1948 (for short, 'Supply Act'). Calling that notice in question, the appellant filed suit No. 291 of 1985 on the file of the Sub-Judge, I class for declaration and also for permanent injunction restraining the appointment of an arbitrator to adjudicate the dispute raised in the notice. The civil suit was dismissed on March 31, 1989 which

E

F

G

H

A was confirmed in appeal. The High Court in the impugned judgment and order dated December 14, 1992 in Second Appeal No. 1993 of 1990 dismissed the appeal finding thus :

B "A perusal of Section 32 shows that no suit is competent on any ground whatsoever "for a decision upon the existence, effect or validity of an arbitration agreement.....". Furthermore, a perusal of provisions of section 33 shows that any Party wanting to challenge the existence of an arbitration agreement can do so only through an application under the said provisions of the Arbitration Act. It appears that no civil suit is competent in respect of matters which C can be decided through arbitration and any party challenging the existence of an arbitration agreement can only do so through the summary procedure contemplated under section 33 of the Act. The remedy of a regular civil suit, thus, appears to have been excluded."

D Thus this appeal by special leave.

E Shri P.P. Rao, learned senior counsel for the appellant, contended that the view taken by the High Court and courts below is clearly unsustainable in law. His primary contention is that the disconnection of supply of electrical energy and the alleged consequential damages claimed by the respondent are not matters arbitrable under the provisions either of Electricity Act or Supply Act. Therefore, the invocation of the provisions in either of the Acts for reference is clearly without authority of law. He has taken us through the relevant provisions under the Acts which we F would refer during the course of the judgment. Shri M.S. Gujral, learned senior counsel for the respondent contended that illegal disconnection of supply of electricity energy to the appellant and resultant damages is a dispute arising under Section 19 of the Electricity Act since due to illegal disconnection, the respondent had suffered damages. As a consequence the respondent is entitled to compensation for such illegal act done by the G appellant. Therefore, it is a dispute arbitrable under the provisions of the Electricity Act and also the Supply Act. He also contended that though there is no agreement entered into between the appellant and the respondent for arbitration as defined under Section 2(a) of the Arbitration Act, 1940, by operation of Section 46 of the Arbitration Act read with Section H 33 thereof, it would clearly give power to the civil court to decide whether

the matter would be arbitrable under the provisions of the Acts. The High Court accordingly recorded a finding that the civil suit is not maintainable but the arbitrator is competent to decide the arbitrability of the dispute as regards the damages caused to the respondent due to illegal disconnection under Section 52 of the Electricity Act or Section 76(2) of the Supply Act. A

In view of the rival contentions, the question that arises is : whether the view of the High Court is correct in law ? It is seen that the learned sub-ordinate Judge had recorded a finding that the dispute is not arbitrable under the provisions of either the Electricity Act or the Supply Act. Consequently, the notice issued by the respondent for arbitration of the dispute is illegal. However, on wrong premise of the arbitrability of the dispute by the arbitrator under Section 33 suit was dismissed. As noted, the High Court recorded that that dispute would be decided only in the arbitration by operation of Section 33 or 32 and that the civil court has no jurisdiction to go into the matter. B C

The Electricity Act deals with grant of licences to the licensee for supply of electrical energy to the consumer and erection of the electrical lines etc. Part II deals with supply of energy. Section 7-A(1) deals with determination of purchase price. Section 8 provides consequences for non-purchase of undertaking and revocation of licence with consent of licensee. Section 9 prohibits licensee from purchasing, or associating himself with, other licensed undertakings or transfer his undertaking. Section 10 deals with general power of Government to vary terms of purchase. D E

Sections 12 to 18 deal with various types of works and Section 12 empowers licensee to open and break up streets, railways and tramways. Section 13 speaks of notice to the owners undertaking new works. Sub-section (3) thereof provides that "[N]otwithstanding anything in this section, the licensee may, in case of emergency due to the breakdown of an underground electric supply-line, after giving notice in writing to the repairing authority or the owner, as the case may be, of his intention to do so, place an overhead line without complying with the provisions of sub-section (1)". Section 14 provides for alteration of pipes or wires. Section 15 gives power of laying of electric supply-lines or other work near sewers, pipes or other electric supply-lines or works. Section 16 gives power to the licensee to exercise any of the powers under the Act to open or break-up soil or pavement of any street, railway or tramway, or any sewer, drain or H

A tunnel. Section 18 empowers to lay overhead lines. While exercising those or any of those powers and performing undertaken works, Section 19 envisages that the licensee may in exercise of any of the above powers, cause as little damage, detriment or inconvenience as may be, and shall make full compensation for any damage, detriment or inconvenience caused by the licensee or by any one employed by the licensee. Sub-section B (2) in that behalf provides that save in the case provided for in Section 12, sub-section (3), where any difference or dispute arises as to the amount or the application of such compensation, the matter shall be determined by arbitration. Similarly, Sections 21(4), 22, 14(3), 15(5), 16-(3), 22-A(2) and 32 provide determination of the disputes by arbitration. If any of the C disputes arise under the aforesaid provisions, obviously Section 52 of the Electricity Act provides for forum for arbitration which reads as under :

D "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 (10 of 1940) :

E 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."

F A reading thereof would thereby clearly indicate that where any matter is by or under the 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 this behalf on application by either party; and in all other respects, in furtherance of the arbitration, it shall be subject to the provisions of the Arbitration Act. It would, therefore, be clear that with a G view to attract the provisions of the Electricity Act, the dispute shall be one of the disputes directed by or under the Act arbitrable by the arbitration under the provisions of the Act. As seen, the Act expressly refers to the relevant provisions extracted hereinbefore where a dispute shall be arbitrable in an arbitration which attracts the provisions of Section 52 of H the Electricity Act. Similarly, the Supply Act envisages that if arbitration

of any question or matter is required under Sections 19(4), 44(3) 55(3) and 78-A(2) to be referred to arbitration under Section 76(2) of the Supply Act, such question or matter becomes arbitrable. A

It is, therefore, to be seen whether the dispute raised in this case is arbitrable under any of the provisions of either the two Acts. As stated earlier, the specific contention of Shri Gujral is that it is a dispute arising under Section 19(1) of the Electricity Act for damages caused to the consumer-respondent and that, therefore, it is arbitrable under Section 52 of the Electricity Act or Section 76(2) of the Supply Act. We are unable to agree with the learned counsel. B

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 under Section 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 under section 19(1) would be arbitrable, by operation of sub-section (2) of Section 19 of the Electricity Act. C D E

The question then is : whether the matter will be only referable to arbitration as provided under Section 33 of the Electricity Act ? The contention of Shri Gujral is that by operation of Section 46 read with Section 33 of the Arbitration Act, the dispute would be arbitrable by an arbitrator and the civil court is devoid of jurisdiction to decide the matter. We find no force in the contention. It is true that Section 46 expressly envisages that despite the absence of an express arbitration agreement as defined under Section 2(a) of the Arbitration Act, if it is a dispute statutorily arbitrable, Section 46 stands attracted except to the extent of the provisions excluded therein, i.e., Sections 6(1), 7, 12, 36 and 37. Section 46 reads as under : F G

"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 enact- H

A ment 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 the other enactment or with any rules made thereunder."

B Sections 6(1), 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 and 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. Section 33 expressly gives power to the civil court to decide the existence or validity of the arbitration agreement or the award as such. If this question was to arise, necessarily the civil court would be devoid of jurisdiction to decide the dispute on merits but only in the forum of arbitration. The existence and validity of the arbitration agreement should be decided by the civil court. Arbitrator cannot clothe himself with jurisdiction to conclusively decide it by himself as a jurisdictional issue. It is for the court to decide it. The dispute on merits should be resolved by the arbitrator and the legality of the award would be subject to decision by the court under Section 33.

The question is : whether the dispute as to damages is arbitrable ? As stated earlier, Section 52 of the Electricity Act or 76(2) of Supply Act read with Section 19(1) of Electricity Act has no application to the dispute, So, Section 52 of the Electricity Act does not get attracted; and equally Section 76(2) of the Supply Act. Therefore, it is not arbitrable under the statute. In view of the express admission made by the respondent that there is no agreement of arbitration as defined in Section 2(a) of the Arbitration Act, Section 33, therefore, does not get attracted. Section 46 does not apply as the scheme under both the Acts in this behalf if inconsistent. The arbitrator cannot decide that question.

Shri Gujral laid emphasis on the ratio of this Court in *Punjab S.E.B. v. Bassi Cold Storage*, [1994] Supp. 2 SCC 124, contending that the dispute whether it is arbitrable itself would be decided by he arbitrator and that,

therefore, the appellant having raised that question, it is not open to the Board to contend that it is not arbitrable. We find no force in the contention. In that case, the question was whether the dispute was arbitrable or not. Though the question was given up in the trial court, the learned counsel appearing for the party had conceded that the question did arise. On that basis, notice was issued by the High Court and it was held that it was not arbitrable. But in this case, the question is : whether the notice issued by the respondent invoking the provisions of Section 52 and Section 76(2) of the Electricity Act and the Supply Act respectively would get attracted ? In *The Mysore State Electricity Board v. Bangalore Woolen, Cotton and Silk Mills Ltd. & Ors.*, [1963] Supp. 2 SCR 127, this Court had considered whether the dispute as regards revision of rates of tariff was arbitrable under the provisions of the Acts. On an elaborate consideration, it was held that the dispute as regards revision of rates of tariff was not arbitrable. Similarly, a suit for damages for disconnection was filed and the question arose whether it was arbitrable. In *Mysore Manufacturers & Traders v. State of Karnataka*, AIR (1982) Karnataka 54, the learned Single Judge of the High court had held that the dispute was not arbitrable and, therefore, the reference of the dispute under the provisions of the Arbitration Act was not available. This Court in *Bassi's case* (supra) had held that the dispute for the arbitration for the damages caused due to disconnection was not arbitrable under either of the two Acts. In that view, the High Court and courts below were clearly in error in holding that the matter was to be referred to arbitration and arbitrator had to decide the dispute as to arbitrability or on merits.

The appeal is accordingly allowed, but in the circumstances without costs. The decrees of all courts stand set aside and suit stands decreed as prayed for. No costs.

T.N.A.

Appeal allowed.