nsc.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4450 OF 2014

M/s.Omega Electronic Scale Company Limited ...Petitioner
v/s.
Micro and Small Enterprises Facilitation Council and Ors. ...Respondents.

Mr.Suresh Dhole a/w Ms.Anuja Dhole, for the Petitioner.
Mr.Ashok Singh, for the Respondent Nos.2 and 3.

CORAM: A. S. OKA &
REVATI MOHITE DERE, JJ.

DATED : 25th JUNE, 2015.

P.C.

1. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the second and third respondents.

2. The first challenge in this petition is to the order/communication dated 19th March, 2014, issued by the Member Secretary of the Micro and Small Enterprises Facilitation Council (for short 'the said Council'). In the said communication, it is recorded that the application made by the petitioner to restrain the second respondent from

implementing the notice dated 17th February, 2014 cannot be entertained and the petitioner was advised to approach the appropriate forum. By amending the petition on 20th November, 2014, the petitioner has substantively challenged the aforesaid communication dated 17th February, 2014, issued by the second respondent by which the petitioner was ordered to be black listed.

3. The learned counsel appearing for the second and third respondents submits that this Court has no territorial jurisdiction to entertain this writ petition as far as the challenge to the order of blacklisting is concerned. The learned counsel appearing for the petitioner relied upon a decision of the Apex Court in the case of ***Nawal Kishore Sharma v/s Union of India and Ors.,***[1] and submitted that as communication of the order of blacklisting was served to the petitioner in Mumbai at the registered office of the petitioner at Mumbai, a part of the cause of action has arisen in Mumbai.

4. The second submission of the learned counsel appearing for the petitioner is that the issue of validity of the order of blacklisting ought to have been considered by the said Council. He submitted that the said

1 2014 ALL SCR 2946

Council could not have relegated the petitioner to another remedy. On merits of the order of the blacklisting, his submission is that the letter dated 5th March, 2012 addressed by the second respondent to the petitioner shows that there is a novation of contract and therefore, the order of blacklisting could not be acted upon in view of novation of contract.

5. When a query was made by this Court as to whether the petitioner has disclosed in the Petition the fact that show-cause-notice dated 2nd December, 2012 was issued by the second respondent, he pointed out that there is no reference to the said show-cause-notice issued to the petitioner. He submitted that the show-cause-notice was issued by a subordinate officer of the second respondent. He submitted that after the receipt of the show-cause-notice, the petitioner met the Managing Director of the second respondent and offered explanation about the contents of the show-cause-notice. He submitted that in view of novation of contract, the order of blacklisting is rendered illegal. The learned counsel appearing for the second and third respondents submits that there was no reply to the show-cause-notice served to the petitioner and therefore, the order of blacklisting was passed. He reiterated his contention that the petition is not maintainable in this Court.

6. Relying upon Section 17 and 18 of the Micro, Small and Medium Enterprises Development Act, 2006, he urged that the said Council has no jurisdiction to deal with the issue of legality or validity of the order of blacklisting.

7. We have given our careful consideration to the submissions. The first issue is regarding the territorial jurisdiction of this Court to entertain this petition. There is no dispute that the petitioner – Company is having the registered office at Mumbai and the order of blacklisting was served to the petitioner in Mumbai.

8. The Apex Court in the case of ***Nawal Kishore Sharma (supra)*** held that the cause of action for the purpose of Clause (2) of Article 226 of the Constitution of India, for all intent and purpose must be assigned the same meaning as envisaged under clause (c) of Section 20 of the Code of Civil Procedure, 1908. In view of what is held by the Apex Court in paragraph 20 of the said decision, the objection raised by the learned counsel appearing for the second and third respondents will have to be overruled, as the case of the petitioner is covered by clause (c) of Section 20 of the said Code.

9. As far as the impugned order of the said Council is concerned it will be necessary to make a reference to the material averments made in the petition. The grievance made in paragraph 10 of the petition is that the notwithstanding the repeated communications made by the petitioner, the second and the third respondents did not release the amount due and payable to the petitioner. It is stated that therefore the petitioner approached the said Council by filing a Reference Petition No.38 of 2013. The averments made in paragraphs 10 and 11 of the petition show that the Reference Application has been filed by the petitioner for recovery of the amount which is allegedly due and payable by the second and third respondents.

10. The impugned communication dated 19th March, 2014, issued by the said Council specifically refers to an application made by the petitioner to restrain the second and third respondents from implementing the notice dated 17th February, 2014 by which the petitioner was blacklisted. Although the Member Secretary of the Council has stated that the grievance regarding the said notice cannot be entertained and the petitioner should approach appropriate forum to seek the relief, the

Reference Petition filed by the petitioner remains unaffected by the communication dated 19th March, 2014. The Council has not decided the Reference Petition filed by the petitioner. All that the Council has stated is that no relief can be granted to the petitioner as regards the communication dated 17th February, 2014, by which the petitioner was blacklisted.

11. It will be necessary to make a reference to the relevant provisions of the said Act of 2006. Section 15 to 18 of the said Act of 2006 reads thus :-

> 15. **Liability of buyer to make payment :-**
>
> Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day.
>
> Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.
>
> 16. **Date from which and rate at which interest is payable**
>
> Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the

buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

17. **Recovery of amount due :-**

For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16.

18. **Reference to Micro and Small Enterprises Facilitation Council :-**

(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-

section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred in sub-section(1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.

12. Sub-section (1) of Section 18 deals with a reference. It is clear that there can be a reference made to the Council only with regard to any amount due under section 17. Section 17 provides that for any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16. Therefore, a reference can be made under sub-section (1) of Section 18 of

the said Act of 2006 to the said Council in case of a dispute as regards any amount due and payable as per Section 17. Therefore, the Member Secretary of the Council was justified in taking a view which he has taken that as far as the order of blacklisting is concerned, the petitioner will have to adopt an appropriate remedy. We find no error in the view taken by the Member Secretary of the Council.

13. Now turning to the order of blacklisting on merits, we must note here that though the petitioner was permitted to amend the petition by order dated 10th November, 2014 for the purpose of challenging the order of blacklisting and though amendment was carried out on 20th November, 2014, in the amended petition there is not even a reference to the show-cause-notice of 2nd December, 2012 served upon the Petitioner. Though the learned counsel appearing for the petitioner tried to submit that the show-cause-notice has been issued by a subordinate officer of the second respondent, a copy of the show-cause-notice (Exhibit – 'C' to the reply filed by the second and third respondents) shows that the same was issued by Mr.Pradip Kumar, who was the Managing Director of the Bihar State Food and Civil Supplies Corporation Limited. By the said show-cause-notice, the petitioner was called upon to submit his explanation as to why

the said Company should not be blacklisted. Though the learned counsel appearing for the petitioner tried to submit that after receiving the said notice of blacklisting, the petitioner met the Managing Director and offered explanation, admittedly, no such averment has been made in the petition. While amending the petition for challenging the order of blacklisting, it was the duty of the petitioner to point out that a show-cause-notice was issued on 2nd December, 2012 and the reasons as to why there was no reply to the show-cause-notice.

14. The order of blacklisting dated 17th February, 2014, specifically mentions that no reply was issued by the petitioner to the show-cause-notice.

15. The learned counsel appearing for the petitioner invited our attention to the letter dated 5th March, 2012, issued by the Managing Director of the second respondent to the petitioner which according to him shows that there was a novation of Contract. We must note here that the said letter dated 5th March, 2012 is in response to the letter of the same date addressed by the petitioner to the Managing Director. The letter dated 5th March, 2012 issued by the Managing Director specifically records that

a last opportunity is being granted to the petitioner to complete the order. It specifically records that the petitioner has the last opportunity to supply the balance quantity as promised by the petitioner on telephone.

16. To the reply filed by the second respondent at Exhibit – 'D', a letter dated 11th April, 2012, is annexed, which is addressed to the petitioner by the Managing Director of the second respondent, which records that the progress was slow and last opportunity is being granted to the petitioner.

17. On plain reading of the letter dated 5th March, 2012, by no stretch of imagination it can be said that there was a novation of contract. The said letter merely gives a last opportunity to the petitioner to complete the order placed by the second respondent. Therefore, the plea that there was a novation of contract cannot be accepted. Thus, the scenario which emerges is that there was a specific show-cause-notice issued to the petitioner calling upon the petitioner to submit his explanation as to why the petitioner should not be blacklisted. There was no reply filed by the petitioner to the said show-cause-notice. Various defaults committed by the petitioner were listed in the show-cause-notice. The said defaults are

of violation of Condition nos.3.3 and 3.4 of the contract as well as the violation of Condition No.3.6 committed by failing to give an indemnity bond.

18. In the circumstances, no fault can be found with the order of blacklisting passed by the Managing Director of the second respondent. Accordingly, we see no merit in this petition filed under Article 226 of the Constitution of India. Hence, we pass the following order :-

ORDER

i) The Writ Petition is rejected ;

ii) We, however, make it clear that the said Council shall proceed with the hearing of the Reference Petition No.38 of 2013, in accordance with law ;

iii) All contentions raised by the parties in relation to the merits of the said Reference Petition, are expressly kept open.

(REVATI MOHITE DERE,J.) **(A.S. OKA,J.)**