IN THE HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

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WRIT PETITION NO.29174 OF 2012

Between:

A.P. State Agro Industries Development Corporation Limited .. Petitioner

and

M/s. Microplex (India) and another .. Respondents

DATE OF JUDGMENT PRONOUNCEMENT : 27th OCTOBER, 2015

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE SANJAY KUMAR

1.	Whether Reporters of Local newspapers may be allowed to see the Judgment?	Yes/No
2.	Whether copies of the Judgment may be marked to Law Reporters/Journals	Yes/No
3.	Whether His Lordship wishes to see the fair copy of the Judgment?	Yes/No

THE HON'BLE SRI JUSTICE SANJAY KUMAR

WRIT PETITION NO.29174 OF 2012

O R D E R

The Andhra Pradesh Agro Industries Development Corporation Limited, Hyderabad, filed this writ petition aggrieved by the order dated 25.08.2012 passed by the Andhra Pradesh Micro & Small Enterprises Facilitation Council, Hyderabad, (for brevity, 'the Council') in Case No.13/IFC/2010/331. By the said order, the petitioner Corporation was held liable to pay to M/s. Microplex (India), Hyderabad, the first respondent company, Rs.1,84,17,822/- towards principal and Rs.1,73,41,800/- towards interest, totaling to Rs.3,57,59,622/- up to 30.11.2010, under Section 16 of the Micro, Small and Medium Enterprises Development Act, 2006 (for brevity, 'the Act of 2006') along with future interest. A writ of Certiorari was sought by the petitioner Corporation to quash the said order.

On 15.10.2012, this Court directed that pending further orders no coercive steps should be taken for implementation of the impugned order. W.V.M.P.No.4071 of 2012 was filed by the first respondent company to vacate the interim order.

Though the matter was listed before this Court for hearing of the vacate stay petition filed by the first respondent company, comprehensive arguments covering the merits of the main case were advanced by Sri G. Vidyasagar, learned senior counsel appearing for the petitioner Corporation, and Sri Ashok Anand Kumar, learned counsel for the first respondent company. This Court therefore deems it appropriate to pass a final order in the writ petition.

The petitioner Corporation is a State public sector undertaking. It was appointed as a nodal agency to cater to the needs of farmers in the erstwhile State of Andhra Pradesh by providing fertilizers, micro nutrients and other agricultural inputs. The petitioner Corporation accordingly invited tenders in 2006 for supply of bio-fertilizers, bio-pesticides, micro nutrients, water soluble fertilizers, neem cake, etc., to farmers under departmental subsidy schemes. Pursuant to this tender, the first respondent company emerged successful and Agreement dated 08.11.2006 was entered into by and between the parties. Thereunder, the petitioner Corporation was to procure products on consignment basis from the supplier, the first respondent company, for a period of one year from the date of the agreement and arrange for distribution of the same under departmental subsidy schemes through Agro Ryotu Seva Kendras, its retail outlets in the erstwhile State of Andhra Pradesh.

Clause 23 of this agreement provided that unsold stocks and stocks nearing expiry should be replaced by the supplier with fresh material based on the indents of the concerned departments. Payment for stocks sold or distributed under subsidy schemes was to be effected within 45 days to the extent of the non-subsidy amount realized on sale, while payment for the subsidy portion was to be released only upon receipt of such amount from the concerned department (Clauses 24 and 25). Under Clause 26, the petitioner Corporation stipulated that it was not liable for payment for unsold stocks, while Clause 27 provided that left over stocks at the retail outlets of the petitioner Corporation were to be taken back by the supplier at its own cost immediately upon receipt of communication from the petitioner Corporation. Clause 30 of the agreement provided that any difference or dispute had to be decided by way of arbitration as per the provisions of the Arbitration and Conciliation Act, 1996, and that the Vice-Chairman and Managing Director of the petitioner Corporation would be the sole arbitrator.

It is an admitted fact that the petitioner Corporation and the first respondent company entered into similar agreements for the years 2007-08, 2008-09 and 2009-10.

While so, the first respondent company filed a claim before the Council asserting that certain amounts were due to it from the petitioner Corporation. The Council issued notice dated 12.07.2011 calling upon the petitioner Corporation to respond to the claim. The petitioner Corporation submitted letter dated 07.01.2012 informing the Council that the agreements entered into by and between the parties provided for dispute resolution through arbitration. The first respondent company however rebutted this, stating that the Council could adjudicate the dispute under the provisions of the Act of 2006. The petitioner Corporation then filed its counter-affidavit on 29.02.2012 asserting that the claim was not maintainable before the Council as it was not a buyer. Rejecting the petitioner Corporation's objections, the Council passed the order dated 25.08.2012 directing it to pay the named sums along with future interest.

The petitioner Corporation stated that the first respondent company had its manufacturing unit in the State of Maharashtra and only had an administrative office at Hyderabad. According to the petitioner Corporation, supply of material by the first respondent company was on consignment basis and there was, therefore, no buyer-seller relationship between them. In the affidavit filed in support of the writ petition, the petitioner Corporation reiterated that it was not a 'buyer' and that the Council had no jurisdiction to deal with the claim under the Act of 2006. Various other grounds were also urged by it in support of its challenge to the impugned order.

In its counter affidavit, the first respondent company contended that it was a 'supplier' as defined in the Act of 2006 and the Council therefore had jurisdiction to deal with its claim as the petitioner Corporation fell within the definition of a 'buyer'. Adverting to the merits of the matter, it pointed out that the tender conditions prescribed by the petitioner Corporation indicated that the shelf life of the products supplied should be six months but, if the same were not utilized during the shelf life, they would no longer be useful. Various other contentions were also urged justifying the order passed by the Council.

Sri Ashok Anand Kumar, learned counsel, took a preliminary objection that this writ petition is not maintainable as Section 19 of the Act of 2006 provided an efficacious alternative remedy against the impugned order passed by the Council. Countering this argument, Sri G. Vidyasagar, learned senior counsel, stated that mere existence of an alternative remedy would not bar invocation of the extraordinary jurisdiction of this Court under Article 226 of the Constitution. Learned senior counsel would assert that the jurisdictional aspect raised by the petitioner Corporation was completely overlooked by the Council and it was therefore open to it to approach this Court and seek a writ of Certiorari. He placed reliance on ***WHIRLPOOL CORPORATION V/s. REGISTRAR OF TRADE MARKS, MUMBAI***[1] in this regard. The Supreme Court observed therein that though the High Court would normally not exercise jurisdiction if an effective and efficacious remedy was available, it has consistently been held that such remedy would not operate as a bar where the order under challenge is wholly without jurisdiction. As rightly pointed out by Sri G. Vidyasagar, learned senior counsel, the observations made by the Supreme Court in ***UNION OF INDIA V/s. MAJOR GENERAL SHRI KANT SHARMA***[2], in the context of ***WHIRLPOOL CORPORATION***[1], did not deviate from the principle enunciated therein but only affirmed the general principle that when a statutory forum is created by law for redressal of grievances, a writ petition should ordinarily not be entertained, ignoring the statutory dispensation. This proposition would obviously have no application when a jurisdictional issue is raised going to the very root of the order under challenge. For reasons to be stated hereinafter, this Court finds that the Council did, in fact, fail to consider the jurisdictional issue raised by the petitioner Corporation in the proper perspective. This writ petition is therefore maintainable notwithstanding the availability of a statutory remedy.

The other preliminary issue that requires to be addressed at the outset is that raised by Sri G. Vidyasagar, learned senior counsel, to the effect that the petitioner Corporation was not a 'buyer' and consequently, the Council had no jurisdiction to deal with the matter under the Act of 2006.

The Act of 2006 was promulgated for facilitating the promotion, development and enhancement of the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto. This Act repealed the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (for brevity, 'the Act of 1993'). Section 2(d) of the Act of 2006 defines 'buyer' to mean whoever buys any goods or receives any services from a supplier for consideration. Therefore, either goods have to be bought or services have to be received from a supplier for consideration for the person, so buying or receiving, to become a 'buyer'. 'Delayed payments to micro and small enterprises' is dealt with in Chapter V of the Act of 2006. Section 15 in this Chapter states that where a supplier supplies goods or renders services to a buyer, the buyer shall make payment therefor within the stipulated time frame. Section 16 stipulates that where any buyer fails to make payment of the amount to the supplier as required under Section 15, the buyer would be liable to pay compound interest with monthly rests to the supplier on that amount. Section 17 of the Act of 2006 deals with recovery of amounts due and states as under:

> '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.'

Section 18 (1) is relevant and reads as under:

> '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.'

The aforestated statutory provisions, read together, demonstrate unequivocally that a dispute with regard to any amount due under Section 17 alone can be brought before the Council under Section 18. Section 17, in turn, speaks of liability of the 'buyer' to pay for the goods supplied or services rendered by the supplier. Therefore, unless the petitioner Corporation qualifies as a 'buyer', a reference of the dispute could not have been made by the first respondent company to the Council under Section 18.

Sri G. Vidyasagar, learned senior counsel, would contend that the transactions between the petitioner Corporation and the first respondent company must be examined in their entirety to determine whether the relationship of 'buyer' and 'supplier' was created between them. Learned senior counsel reiterated that unless the petitioner Corporation qualified as a 'buyer', the Council had no jurisdiction to entertain the claim put forth before it by the first respondent company. This aspect is not in dispute as Sri Ashok Anand Kumar, learned counsel, fairly conceded that the Act of 2006 and more particularly, Section 18 thereof, would have application to the case only if the petitioner Corporation is a 'buyer'.

Sri G. Vidyasagar, learned senior counsel placed reliance on case law in support of his contentions.

In ***ASSAM SMALL SCALE INDUSTRIES DEVELOPMENT CORPN. LTD. V/s. J.D. PHARMACEUTICALS***[3], the Supreme Court pointed out that while interpreting the terms of an agreement, it would be necessary to look to the substance of the matter rather than its form and that use of terminology may not be sufficient to lead to a conclusion that parties to the contract in fact intended that a particular status should be conferred.

In ***THE BHOPAL SUGAR INDUSTRIES LTD. V/s. SALES TAX OFFICER, BHOPAL***[4], the Supreme Court affirmed that it is well settled that while interpreting the terms of an agreement, the Court has to look to the substance rather than the form of it and the mere fact that the word 'agent' or 'agency' is used or the words 'buyer' and 'seller' are used to describe the status of the parties concerned, it is not sufficient to lead to the irresistible inference that the parties did, in fact, intend that the said status should be conferred. The Supreme Court cautioned that the mere formal description of a person as an agent or buyer is not conclusive, unless the context showed that the parties clearly intended to treat a buyer as a buyer and not as an agent.

It is not the contention of Sri G. Vidyasagar, learned senior counsel, that an agency was created by and between the parties under the agreements in question. The above judgments were cited by the learned senior counsel only in the context of how an agreement is to be interpreted by the Court and that the substance, rather than the form, must be considered in such an exercise. Nomenclature would not be decisive, by itself, in this regard and the actual nature of the transactions would have to be culled out from the intention of the parties independently. As pointed out by the learned senior counsel, the relationship between the petitioner Corporation and the first respondent company has to be gleaned from their transactions with each other, be it under the tender specifications or the agreements entered into by them subsequently.

The tender documents are placed on record. The subject reflects that tenders were called for 'supply' of bio-fertilizers, etc. Clause 15 of the tender specified that the required products should be supplied in a phased manner and against definite indents. Clause 28 provided that the products supplied should have a shelf life of minimum six months as on the date of supply. Clause 34 stipulated that the stocks positioned, if unsold, should be replaced with fresh material based on the indents of concerned departments. Payment should be effected within 45 days to the extent of the non-subsidy amount realized on sale, while payment for the subsidy portion was to be released only on receipt of the amount from the concerned department (Clauses 35 and 36). Clause 37 demonstrated that the Corporation was not liable for payment for the unsold stocks. Clause 31 stated that supplies should be made within 15 days of placement of the purchase order.

The tender document for the year 2008-09 contained a clause to the effect that all materials had to be supplied on ‘consignment basis’ only and that the balance unsold stocks at the destinations at the end of season should be taken back by the supplier (Clause 23). Again, Clause 28 stated that supplies should be made within 15 days from the date of the purchase order. Clause 32 reiterated that the Corporation was not liable to pay for the unsold stocks. Similar clauses as in the earlier tender document were set out as regards the mode of payment for the subsidy and the non-subsidy components.

The tender document for the year 2009-10 was also on similar lines. Clause 26 stated that in the event of any materials failing to conform to the specifications on quality, the petitioner Corporation had the right to reject them out right and the supplier should replace the rejected materials with fresh stock at its own cost. Clause 27 stated that the successful tenderer should replace the material due for expiry on receipt of intimation from the petitioner Corporation three months in advance. Clause 29 stated that the products supplied should have a minimum shelf life of two years as on the date of supply. Clause 33 provided that all the material had to be supplied on consignment basis only and the balance unsold/left over stocks at destinations at the end of season/distribution should be taken back by the supplier.

The agreements entered into by the petitioner Corporation and the first respondent company also ran on the same lines. The Agreement dated 08.11.2006 described the first respondent company as the ‘supplier’ and the petitioner Corporation as the ‘Corporation’. This agreement stipulated that the material was to be marketed through the retail outlets of the Corporation on consignment basis. Clause 19 stipulated that the responsibility for quality and quantity of the material supplied was with the supplier. Clause 20 provided that the supplies should be made within 15 days of placement of the purchase order. Clause 23 provided that the stocks positioned, if unsold/nearing expiry, had to be replaced with fresh material based on the indents of the concerned departments. Clause 24 stated that payment for the stocks sold/ distributed under subsidy schemes should be effected within 45 days to the extent of the non-subsidy amount realized on sale, while Clause 25 provided that the payment of the subsidy portion would be released only on receipt of the amount from the concerned department. Clause 26 stipulated that the Corporation was not liable for payment for unsold stocks and Clause 27 provided that the left over stocks at the retail outlets of the Corporation should be taken back by the supplier immediately on receipt of communication from the Corporation. The agreements dated 18.11.2008 and 09.10.2009 were also on these lines.

Perusal of the impugned order dated 25.08.2012 reflects that the petitioner Corporation specifically raised the jurisdictional issue that it was not a 'buyer' before the Council. Surprisingly, the Council opined that the petitioner Corporation could exercise its discretion to return the stock only during its shelf life and not after expiry thereof as it became useless to the farming community, manufacturers and suppliers. Any decision taken by the petitioner Corporation to return the product after expiry of the shelf life, *per* the Council, could not be accepted. The Council opined that time was the essence in any contract and that non-mention of time by the buyer would definitely tilt the balance of convenience in favour of the supplier. The Council further introduced a new condition that the stocks supplied could only be returned in the same form and as the stocks were returned after the expiry date, it should be treated as supplied stock.

In effect, the Council held certain agreement conditions to be invalid and introduced a new condition that unsold stocks should be returned before the date of shelf life expiry. Such power of rewriting the contract was not vested with the Council under the Act of 2006.

Significantly, it was not the case of first respondent company before the Council that it had entered into the agreements in question with the petitioner Corporation unwillingly or unwittingly. That being so, the first respondent company was bound by the agreement conditions which stipulated that the petitioner Corporation would not be liable to pay for unsold stocks. This tender condition, which was thereafter reproduced in the agreements between the parties, clearly postulated that irrespective of the date of expiry of the stock supplied, the first respondent company could not lay a claim for the price of such unsold stocks from the petitioner Corporation. Further, the first respondent company was well aware of the fact that it had to replace unsold stocks or stocks nearing expiry at its own cost as and when required by the petitioner Corporation. Therefore, the factum of such stocks being rendered useless after the date of expiry was well within the knowledge of the first respondent company when it agreed with the above contract conditions and the sympathetic consideration extended to it by the Council on this count was wholly unwarranted.

Further, the Council never addressed the primary issue as to whether the petitioner Corporation qualified as a 'buyer', whereby the provisions of Sections 17 and 18 of the Act of 2006 could be invoked against it by the first respondent company. The core issue was whether title in the products supplied by the first respondent company passed to the petitioner Corporation under the above transactions, whereby it could be said to be a 'buyer'. What was essential for the passage of title in the products was not whether the time of payment of the price or the time of delivery of the goods was postponed, but the 'unconditional contract' signifying the intention of the parties as to when 'transfer' in the goods must take place.

The terms and conditions agreed upon by and between the parties demonstrated that the first respondent company was required to supply the material to the retail outlets of the petitioner Corporation for sale to farmers. This sale was to be under certain subsidy schemes and only upon the actual sale being made to the farmers, the petitioner Corporation undertook to pay the non-subsidy amount of the sale consideration within 45 days and the subsidy part thereof after receipt from the department concerned. One other condition was that the stocks positioned, if unsold/nearing expiry, need to be replaced with fresh material based on the indents of the concerned departments. The use of the oblique (/) between 'unsold' and 'nearing expiry' clearly indicated that irrespective of either event, the responsibility was with the first respondent company to replace such material. This was made further clear by the specific condition that the petitioner Corporation was not liable to pay for the unsold stocks. Significantly, there was no mention of the date of expiry of the stock in the context of this agreement condition, which applied to all unsold stocks. Another condition was that left over stocks at the retail outlets of the petitioner Corporation had to be taken back by the supplier at its own cost immediately upon receipt of communication from the petitioner Corporation. The petitioner Corporation also stipulated that though its retail outlets would take utmost care to store the material supplied by the first respondent company in proper condition, it would not take any responsibility for storage losses and demurrages or viability during the period of storage with retail outlets. This condition is sufficient to infer that the title in the material supplied still remained with the first respondent company, as the petitioner Corporation made it clear that it would not take any responsibility for storage losses which it would not have done had it become the owner of the material supplied.

The use of the term 'consignment' in only some of the documents was given a lot of weightage by the Council, but irrespective of this, the nature of the transactions as demonstrated by the other concomitant agreement clauses and conditions makes it amply clear that the title in the material supplied by the first respondent company to the petitioner Corporation did not stand transferred upon mere supply thereof. These clauses would not have found mention in the agreements, had the title in the material passed to the petitioner Corporation upon supply and delivery thereof by the first respondent company. The petitioner Corporation was only an intermediary, but not an agent, between the first respondent company and the buyer of its material, the farmer, and merely facilitated the sale through use of its retail outlets, in keeping with its role as a nodal agency of the State constituted for the benefit of farmers. The title in the material supplied therefore continued to remain with the first respondent company till the actual sale to the farmer.

In that view of the matter, the petitioner Corporation did not become a 'buyer' of the material in terms of the Act of 2006 upon mere supply thereof by the first respondent company. Once the petitioner Corporation failed to fulfil this crucial requirement, the question of the first respondent company invoking the jurisdiction of the Council under Sections 17 and 18 of the Act of 2006 against it did not arise. The impugned order dated 25.08.2012 passed by the Council was therefore wholly without jurisdiction.

The writ petition is accordingly allowed setting aside the order dated 25.08.2012 passed by the Andhra Pradesh Micro & Small Enterprises Facilitation Council, Hyderabad, in Case No.13/IFC/2010/331. Pending miscellaneous petitions shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR, J

27th OCTOBER, 2015

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[1] (1998) 8 Supreme Court Cases 1

[2] (2015) 6 Supreme Court Cases 773

[3] (2005) 13 Supreme Court Cases 19

[4] (1977) 3 Supreme Court Cases 147