

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP No.27234 of 2016
Date of Decision: 20.04.2017

NTPC-BHEL Power Projects Pvt. Ltd.

....Petitioner

Vs.

Haryana Micro & Small Enterprise Facilitation Council and others

....Respondents

CORAM: HON'BLE MR.JUSTICE R.K. JAIN

Present: Ms.Neha Sonawane, Advocate, and
Mr.Rajat Kumar, Advocate,
for the petitioner.

Mr.,Shalender Jain, Sr. Advocate, with
Mr.Sahil Nayyar Advocate,
for respondent No.2/contesting respondent.

RAKESH KUMAR JAIN, J. (ORAL)

The petitioner is a joint venture of the Public Sector Undertaking, namely, National Thermal Power Corporation (NTPC) and Bharat Heavy Electrical Limited (BHEL). The petitioner has prayed for a writ in the nature of certiorari to set aside the summons dated 6.7.2016 and 4.8.2016 by which the petitioner was directed to attend the conciliation proceedings and notice dated 9.9.2016 to attend the matter for arbitration under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 [for short 'the Act'].

At the time of notice of motion issued on 23.12.2016, the following order was recorded by this Court: -

*“Counsel for the petitioner, inter alia,
contends that respondent No. 2 made a*

reference invoking provisions of Section 18(1) of the Micro, Small and Medium Enterprise Development Act, 2006 (for short, 'the Act'). The Council issued notice to the petitioner to appear on 7.07.2016. It is submitted that because of the paucity of time, the petitioner could not appear and requested the Council for postponing the date of hearing and ultimately, on an information supplied by respondent No. 2 about the date of hearing in August, 2016, the petitioner appeared before the Council and submitted its reply, raising preliminary objection, about the jurisdiction of the Council to hear and decide the reference made by respondent No. 2 as according to the petitioner respondent No. 2 is not the supplier and was not entitled to invoke the provision of Section 18(1) of the Act. According to the petitioner, no proceedings of conciliation took place in terms of Section 18(2) of the Act and straightway on 7.09.2016, respondent No. 1 passed the order appointing respondent No. 3 as the sole arbitrator. It is further submitted that the scheme of Section 18 suggests that at the first instance the Council has to try and apply alternative dispute redressal mechanism for finding an amicable solution between the parties and in case the conciliation fails only then the proceedings under Section 18(3) of the Act can be invoked. Counsel for the petitioner has also referred to Rule 4(13) of the Haryana Micro

and Small Facilitation Council Rule, 2007 (for short, 'Rules') notified on 20.04.2007 to contend that the Council is required, at the first hearing, to decide on any challenge to jurisdiction or any challenge to any of its member but in the present case, no such decision has been taken despite the fact that the petitioner has taken objection regarding jurisdiction.

Notice of motion for 15.01.2017

Till then the proceedings before the Arbitrator shall remain stayed.”

Thereafter, the case was adjourned for filing the reply.

The respondents have filed their reply dated 22.1.2017.

Learned counsel for the respondents has argued that the petitioner is guilty of suppression of material fact and making false assertions on 23.12.2016 when the notice of motion was issued and interim order was passed. In this regard he has referred to an order dated 27.7.2016 passed by the council, which reads as under: -

“Present :

1. Sh. Sanjeev Gupta, Advocate, on behalf of the claimant.

2. None on behalf of respondent.

None appeared on behalf of respondent.

The council observed that the case was listed for the first time. The council decided to give one more opportunity to the respondent for appearing before the council

and for making efforts for settlement of the payment dispute.

Adjourned.

*Sd/-
Member Secretary-cum-
CEO, HMSEF
27.07.2016”*

Thereafter the case was listed for hearing on 24.08.2016 before the Haryana, Micro and Small Enterprises Facilitation Council-cum-Additional Director Industries and the final order was passed on that date, which reads as under: -

“Present: -

- 1. Sh. Sanjeev Gupta, Advocate on behalf of the claimant.*
- 2. Sh. Vivek Sharma, Senior Engineer on behalf of the respondent.*

The respondent submitted that the Council does not have jurisdiction to entertain the claim application as there was arbitration clause at Sr. No.36.0 in the agreement between both the parties which is stated as under: -

“Arbitration: All disputes between the parties to the contract arising out of or in relation to the contract, other than those for which the decision of the Engineer or any other person is by the contract

expressed to be final and conclusive, shall after 30 days advance written notice by either party to the contract to the other party, be referred to sole arbitration of the General Manager or his nominee. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The parties to the contract understand and object that the General Manager or the person nominated as Arbitrator has earlier in his official capacity to deal directly or indirectly with the matters to which the contract relates or that in the course of his official duties had expressed views on all or any of the matters in dispute or difference. The award of the Arbitrator shall be final and binding on the parties to this contract. In the event of the Arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason General Manager or his nominee shall appoint another person to act as an arbitrator in accordance with the terms of agreement and the person so

appointed shall be entitled to proceed from the state at which it was left out by his predecessor. Work under the contract shall be continued during the arbitration proceedings. The venue of the arbitration proceedings shall be the office of the General Manager or his nominee, New Delhi, or such other places as the arbitrator may decide”

The council deliberated on the issue of jurisdiction to entertain the claim application, as per the provisions of Section 18(4) of the MSMED Act, 2006, whereby the Council have jurisdiction to act as a Conciliator or Arbitrator in case of a dispute between the supplier i.e. Micro or Small Enterprises located within its jurisdiction and a buyer located anywhere in India. The relevant provisions of Section 18(4) of the MSMED Act, are reproduced below:

“(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.”

Besides, the Section 24 of the MSMED Act, had overriding effect to anything inconsistent therewith contained in any other law for the time being in force, which is reproduced as under: -

“24. Overriding effect – The provisions of Sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

Council observed that the respondent and claimant failed to reconcile the matter in spite of sufficient opportunities provided during the meetings held on 27.07.2016 and 24.08.2016. They appear to be reluctant to come to any kind of conciliation through mutual understanding. The counsel was of the view that there are no chances of mutual settlement and the reconciliation process stands terminated.

After hearing both the parties, the council unanimously decided to refer the matter to the empanelled Arbitrator notified by the Government vide order dated 24.10.2013, 08.08.214 and 23.06.2015 under Rule 16 of the HMSEFC Rules, 2007 read with Section 18(3) of Chapter V of Micro Small and Medium Enterprises Development Act, 2008. The Arbitrator shall decide the matter within 12 weeks from the date of receipt of the case.

Disposed off.”

According to the respondents, the Council had decided the objection with regard to its jurisdiction and also held that despite affording sufficient opportunities during the meetings held on 27.7.2016 and 24.8.2016, no conciliation took place through mutual understanding and thus, the Council unanimously decided to refer the matter to the empanelled Arbitrator notified by the Government vide orders dated 24.10.2013, 08.08.2014 and 23.06.2015 under Rule 16 of the Haryana Micro and Small Facilitation Council Rule, 2007 (for short, 'the Rules') read with Section 18(3) of Chapter V of the Act.

Learned counsel for the respondents has submitted that the order dated 24.8.2016 was passed in the presence of Vivek Sharma, Senior Engineer, who had appeared on behalf of the petitioner but the said order has been concealed from this Court

though the voluminous petition has been filed at the instance of the petitioner and it has been projected during the course of hearing as if the Council did not pass any order about the failure of conciliation proceedings before initiating proceedings under Section 18(3) of the Act for the purpose of appointing an Arbitrator.

Learned counsel for the petitioner has, however, submitted that the copy of the order dated 24.8.2016 was not served upon the petitioner, therefore, the petitioner was not aware of the said order but it is admitted that Vivek Sharma, Senior Engineer is their employee and was deputed to attend the hearing on that date only for the purpose of filing reply.

I have heard learned counsel for the parties in this regard and have found that the petitioner has tried to over-reach this Court by making false averments during the course of hearing and specifically and knowingly concealed the order dated 24.8.2016, which was passed in the presence of their representative, who was none else than the Senior Engineer of the petitioner.

Learned counsel for the petitioner has also failed to show any provision of the Act as per which the order passed by the Council was required to be served upon the petitioner/parties especially when the petitioner was represented by their Senior Engineer in the said proceedings. Since, the whole case set up by the petitioner, during the course of hearing, was that the proceedings under Section 18(3) of the Act have been initiated without first exhausting the proceedings of conciliation, which is found to be false in view of the order recorded by the Council on 27.8.2016, therefore, the petitioner is found guilty

of *suppressio veri suggestio falsi* and in that situation in view of the decision of the Supreme Court in the case of “**S.P. Chengalvaraya Naidu (dead) by LRs. v. Jagannath (dead) by L.Rs. and Ors.”** AIR 1994 SC 853, the petitioner cannot be allowed to be heard even on the merits of the case.

Consequently, in view of the aforesaid facts and circumstances, I am of the considered opinion that the petitioner has lost the discretion of this Court and hence, the present petition is hereby dismissed.

20.04.2017

Vivek

(RAKESH KUMAR JAIN)
JUDGE

Whether speaking/reasoned *Yes/No*

Whether reportable *Yes/No*