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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Pronounced on 06th February, 2017

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LPA 138/2016

UNITED ELECTRICAL INDUSTRIES LTD.

...Appellant

Through: Mr. G. Prakash, Advocate.

Versus

MICRO AND SMALL ENTERPRISES & ORS.

...Respondents

Through: Mr. Manish Sharma and Mr. Pranay Raj Singh,
Advocates for R-2.

Mr. Sanjay Dewan, Advocate for R-3.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. The unsuccessful petitioner in W.P. (C) No. 7072/2015 is the appellant before us.
2. The learned Single Judge dismissed the W.P.(C).No. 7072/2015 vide order dated 14.12.2015 and observed as under:

“20. I find merit in the contention of the petitioner that upon the petitioner controverting that the respondent No.2 EEPL is a small enterprise as claimed by it, the respondent No.1 MSEFC was required to adjudicate the same and since there does not appear to be any remedy available against the decision of the respondent No.1 MSEFC in this regard, a writ petition would be maintainable there against. It has been so held by the High Court of Hyderabad in The Indur District Cooperative Marketing Society Ltd. Vs. Microplex

(India), Hyderabad MANU/AP/0785/2015 and by the High Court of Madhya Pradesh in judgment dated 24th July, 2015 in W.P.(C) No.19319/2014 titled M/s Frick India Ltd. Vs. Madhya Pradesh Micro and Small Enterprises Facilitation Council. It was held to be a jurisdictional issue.

21. However, I find that the orders dated 17th June, 2013 and 1st October, 2013 of the respondent No.1 MSEFC which the petitioner is challenging in this petition were also the subject matter of challenge in W.P.(C) No.350/2015 earlier filed by the petitioner and which ended in the order dated 13th March, 2015 which the petitioner allowed to attain finality. As per the said order, the said question was left open to be decided by the Arbitrator. Even though I am of the opinion that the decision in this regard was required to / ought to have been taken by the respondent No.1 MSEFC and the dispute would fall into the lap of the Arbitrator, only upon the respondent No.1 MSEFC being satisfied regarding applicability of Section 18 of the MSMED Act, but the fact of the matter is that the order dated 13th March, 2015 in W.P.(C) No.350/2015 earlier filed by the petitioner cannot be re-visited by me and has attained finality. Moreover, the order dated 13th March, 2015 is in the nature of a consent order.

22. As far as the challenge to the conclusion so reached now by the Arbitrator in this regard is concerned, the said conclusion having been reached in exercise of power under Section 16 of the Arbitration Act, the challenge thereto can only be in accordance with Section 34 of the Arbitration Act and not by way of a writ petition. I have recently in *Evolve Marketing Services Pvt. Ltd. Vs. Aircel Ltd.* MANU/DE/3851/2015, referring to the case

law in this regard, held that the petitions under Articles 226 & 227 of the Constitution of India are not maintainable with respect to arbitration proceedings. Reference in this context can also be made to the judgments of the Division Bench of this Court in *ATV Projects India Ltd Vs. Indian Oil Corporation Ltd.* 200 (2013) DLT 553 and to *Awasthi Construction Co. Vs. Govt. of NCT of Delhi* MANU/DE/5926/2012.

23. Thus, the petition insofar as challenging the orders dated 17th June, 2013 and 1st October, 2013 of the respondent No.1 MSEFC is held to be not maintainable, being by way of re-litigation and the petition insofar as impugning the order dated 15th May, 2015 of the Learned Arbitrator is held to be not maintainable, the remedy of the petitioner being under Section 34 of the Arbitration Act.

24. Dismissed.

No costs.”

3. Feeling aggrieved by the aforesaid order, the appellant has preferred the present appeal.
4. We have heard the learned counsel for the parties and perused the material available on record.
5. Mr. G. Prakash, learned counsel for the appellant company contended that the order passed by the Arbitrator can be challenged by way of filing a writ petition invoking the jurisdiction of the High Court under Article 226 of the Constitution of India. It was further contended that the order passed by the Arbitrator pertaining to jurisdiction of the Micro and Small Enterprises Facilitation Council (hereinafter referred to as ‘MSEFC’) in entertaining the application of the respondents is illegal

without taking into consideration the relevant provisions of the Micro, Small & Medium Enterprises Development Act, 2006 (hereinafter referred to as 'MSMED Act'). The learned counsel for the appellant company vehemently urged that the Arbitrator was not appointed under the Arbitration Act, infact the Arbitrator acted on behalf of the MSEFC to decide the jurisdiction.

6. It was further contended by the learned counsel for the appellant that there has been no document produced on record to establish whether the respondent No.2 was a Micro or Small Enterprise and the MSEFC was required to adjudicate the same first.

7. Counsel for the appellant company urged that the orders passed by MSEFC were *exparte* orders and thus were liable to be set aside as there was denial of natural justice to the appellant company.

8. Contrarily, Mr. Manish Sharma, learned counsel for the respondent No.2 contended that the Arbitration and Conciliation is a complete code in itself and the writ petition challenging the order passed by the Arbitrator was not maintainable.

9. Before considering the rival contentions advanced by the learned counsel for the parties, it is necessary to mention the brief facts of the instant case. The appellant company/United Electrical Industries Ltd. and the respondent No.2/ Eppletone Engineers Pvt. Ltd. entered into several transactions/purchase orders wherein the appellant placed orders for supply of various kinds of electricity meters. Against the supplies made and the payment due, the respondent No.2 submitted a reference to the respondent No.1/Micro and Small Enterprises Facilitation Council under Section 18 of the Micro, Small & Medium Enterprises Development Act,

2006 for adjudication of the dispute between the parties stating that the appellant company has failed to settle the principal amount of Rs.1,58,63,929/- and Rs.7,64,07,919/- as interest. Since MSEFC did not act on the reference respondent No.2 filed W.P.(C) No. 1535/2013 before this Court which was disposed of vide order dated 08.03.2013 with a direction to the MSEFC to examine the request of the respondent No.2 EEPL, if necessary after issuing notice to the appellant. Pursuant to the aforesaid directions, MSEFC issued a notice to the appellant. The respondent No.1/ MSEFC vide order dated 17.06.2013 decided that the reference under Section 18 (2) of the MSMED Act of the respondent No.2 EEPL be referred to the Delhi Dispute Resolution Society for conciliation and in the event of the conciliation proceedings remaining unsuccessful, the matter be referred for arbitration to DIAC. As the possibility of amicable settlement through conciliation was not reached, the respondent No.1/ MSEFC vide order dated 01.10.2013 referred the dispute to DIAC in pursuance of an Arbitration Agreement referred to Sub-Section (1) of Section 7 of the Act.

10. The appellant filed an application before the Arbitrator under Section 16 of the Arbitration and Conciliation Act, 1996. In the meantime, the appellant also challenged the order dated 17.06.2013 and 01.10.2013 passed by the MSEFC by filing Writ Petition No. 350/2015 which was disposed of vide order dated 13.03.2015 with a request to the learned Arbitrator to rule upon the ground whether the Micro and Small Enterprises Facilitation Council/ respondent No.1 had jurisdiction to make a reference to the Delhi International Arbitrator Centre. The sole Arbitrator of the DIAC vide order dated 15.05.2015 dismissed the

application of the appellant under Section 16 of the Arbitration and Conciliation Act, 1996.

11. At this stage, it is significant to rummage through section 18 of the MSMED Act which reads as under:

“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 (26 of 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 to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.....”

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12. Perusal of the aforesaid Section shows that the Council could itself conduct conciliation and on failure to reach any settlement the council

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could refer the dispute for arbitration. Undoubtedly, there should be an arbitration agreement in writing, however the legislative prudence in the enactment of the MSMED Act cannot be interfered with and therefore since the Council could itself take up the dispute for arbitration or refer it to any institution it did so by referring the same to Delhi International Arbitrator Centre.

13. We do not find any error in the procedure adopted by the MSEFC by referring the matter to the DIAC. However, at this stage, it is relevant to ascertain whether the respondent No.2/EEPL was a Small Scale Industrial Unit for invoking the provisions of MSMED Act.

14. For this purpose, we deem it appropriate to reproduce the relevant paras of the order of the Arbitrator, which reads as under:

“It is a matter of record that the claimant which was initially known as **M/s. Eppeltone Engineers** had **registered itself with the Directorate of Industries as a Small Scale Industrial Unit as per the certificate issued by the Director on 20.05.1987.** The contention of the respondent that the claimant has not been able to show itself as a Small Scale Unit is therefore negated by the document on record and the respondent has not been able to lay grounds for doubting the veracity of the said document. **Moreover, the said document being a document issued by a branch of the Government in its normal course of business is a public document and a presumption about its genuineness therefore exists.** The mere oral averment of the respondent that the claimant has failed to prove its status as a Small Scale Unit is therefore of no relevance.

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The nature of activity has been shown as manufacturing and the category of enterprise has been shown as small **thereby acknowledging the claimant as a small enterprise which would bring it within the ambit of the MSME Act in terms of Section 2(m), (n), 7 and 8 of the Act.** Once again, I have no reason to doubt the memorandum or its contents. Moreover, the said document cannot be challenged before me, once the respondent chose not to challenge the same either before the MSME Council or any other forum. In the two statements of reply filed by the respondent there is no challenge to the memorandum dated 03.05.2012 and 07.05.2012. There has been no challenge also to the notice dated 12.04.2013 issued by the council which makes a mention of the memorandum dated 03.05.2012 or to the order dated 17.06.2013 which again makes a mention of the memorandum dated 07.05.2012 in paragraph 6. To my mind this amounts to a waiver to such an objection if at all and would act by conduct as an estoppel on the respondent from raising such a contention at a belated stage. From the documents on record it has clearly been established that the claimant was initially registered as a Small Scale Unit and after the commencement of the MSME Act got a memorandum issued acknowledging it as a small enterprise.”

15. From a bare reading of the above, it is abundantly clear that the respondent No.2/EEPL was registered as a small scale unit as per the certificate issued by the Director on 20.05.1987 and there is nothing on record doubting the veracity of the said document.

16. Moreover, we find from the record that the appellant herein has challenged the order dated 17.03.2016 and 01.10.2013 passed by the

MSEFC by filing Writ Petition No. 350/2015 which was disposed of on 13.03.2015 and the said order attained the finality and thus, the appellant could not be permitted to challenge the same orders again by filing another Writ Petition No. 7072/2015.

17. The Apex Court in Civil Appeal No. 11584 of 2016 (Arising out of SLP (C) No. 2865 of 2015) titled as *Mahanagar Telephone Nigam Ltd. Vs. Applied Electronics Ltd.*, has observed that :

“22. In *SBP & Co. V. Patel Engineering Ltd. and Anr. : (2005) 8 SCC 618*, the majority, while dealing with the power under Articles 226 and 227 of the Constitution, has ruled that:

45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged Under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting Under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal Under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises,

the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court Under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

46. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached Under Article 227 of the Constitution of India or Under Article 226 of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them Under Section 37 of the Act even at an earlier stage.

23. We are absolutely conscious that the principle stated in the aforesaid verdict pertaining to interference of exercise of jurisdiction was in relation to any order passed by the arbitral tribunal. However, we have referred to the same to exposit and underline the stress on the minimal intervention of the court. In essence it has to be remembered that the concept of dispute resolution under

the law of arbitration, rests on the fulcrum of promptitude.”

18. Having dealt with the jurisdiction of the arbitrator in the case at hand, now it is pertinent to determine whether this court is the proper forum to redress the grievances against the award of the Tribunal. It is well settled proposition of law that the extent of judicial intervention in matters pertaining to arbitration proceedings should be minimum and open to limited challenge before the Court. Arbitration is a manifestation of consensual process and the proper recourse against the arbitral award is to invoke Section 34 of the Arbitration and Conciliation Act, 1996.

19. Having said so, the contention of the counsel for the appellant company that the order passed by the arbitrator can be challenged by way of Article 226 of Constitution of India is not tenable.

20. In view of the above facts and circumstances, we see no reason to interfere with the judgment of the learned Single Judge.

21. The appeal is accordingly dismissed.

SANGITA DHINGRA SEHGAL, J.

CHIEF JUSTICE

FEBRUARY 06, 2017

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