IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.12.2018

CORAM

THE HONOURABLE Mrs. JUSTICE PUSHPA SATHYANARAYANA

W.P.No.30083 of 2018
and W.M.P.No.35096 2018

M/s.Madhucon Sugars & Power
Industries Limited
represented by its Authorised Person,
Rajeswarapuram Village,
Ammagudem Post,
Nelakondapally (Mandal),
Khammam District,
Telengana-507 160. .. Petitioner

Vs.

1. The Chairman,
MSE Facilitation Council,
Chennai.

2. M/s.Samay Projects Services Pvt. Ltd.,
No.1218, 17th Street,
West End Colony,
Mogappair,
Chennai-600 050. .. Respondents

* * *

Prayer : Writ petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorari calling for the records of the case relating to the impugned order in MSEFC/CR/73/2017, dated 11.07.2018, passed by the first respondent and to quash the same.

* * *

For Petitioner : Mr.T.Ramesh

For Respondents : No Appearance for R1

Ms.V.Sudhana Vinodhini for R2

O R D E R

The petitioner is before this Court with a prayer to quash the order of the first respondent dated 11.07.2018.

2. The petitioner is a manufacturer of sugar and it has a Distillery Project in the sugar factory. The petitioner issued a Letter of Indent (LOI) on 20.04.2015 in favour of the second respondent for certain works with respect to the piping and appurtenance package. An Agreement was also entered into between the parties in May 2015 in this regard. The second respondent was asked to complete the supply within a period of five months from the date of LOI as per Clause 10 of the LOI. Clause 11 provides for 'liquidated damages' on a weekly basis delay at the rate of 0.5% for each week, however, the maximum claim of damages was restricted to 5% of the total contract price.

3. Though, the time stipulated in the LOI came to an end on 20.09.2015, the supply was made only on 19.07.2016 resulting in 17 weeks delay. Due to the enormous delay, the petitioner had to incur extract cost and also suffered loss. Hence, the petitioner invoking Clause 11 read with 2.11 of the agreement, sent a communication to the second respondent stating that a sum of Rs.15,00,000/- will be deducted as liquidated damages. Since there was no response from the second respondent, the petitioner deducted the said amount and settled the remaining bill.

4. The petitioner also averred that the Annexures to the LOI, namely, provides for resolution of disputes under Clause 1.16, without following the same and without even issuing any notice to the petitioner, the second respondent filed a claim before the first respondent on 27.07.2017. A counter affidavit was filed by the petitioner on 19.12.2017 followed by additional reply affidavit on 19.05.2018. Thereafter, the first respondent passed the impugned order dated 11.07.2018 directing the petitioner to pay a sum of Rs.20,53,264/- along with interest. Hence, the present petition.

5. Heard Mr.T.Ramesh, learned counsel appearing for the petitioner and Ms.V.Sudhana Vinodhini, learned counsel appearing on behalf of the second respondent.

6. Indisputably, there was a LOI and Agreement between the parties. Clause 10 of the LOI stipulates time-line, which the second respondent breached. Hence, the petitioner invoked Clause 11 of LOI read with 2.11 of the agreement and deducted a sum of Rs.15,00,000/- as liquidated damages while settling the final bill. Clause 1.16 of the Agreement provides for resolution of disputes, according to which, if there is no settlement between the parties, the disputes may be referred for arbitration and the arbitration procedures is contained in Clause 2.16 of the Agreement. It is to be stated that though the second

respondent claimed to be an industry within the meaning of the the Micro, Small and Medium Enterprises Development Act, 2006, the parties agreed for arbitration proceedings and the award of the arbitral tribunal shall be final and binding on the parties. Clause 1.17 deals with jurisdiction for legal proceedings, as per which, any suit or proceedings shall be instituted in the courts at Khammam in the State of Telangana.

7. Though the second respondent has agreed upon the terms and conditions of the LOI and the Agreement, without resorting to arbitration, had chosen to file the claim before the first respondent. It is to be stated that the petitioner has also, without any resistance, participated in the proceedings before the first respondent. The first respondent merely observing in the impugned order that the conciliation process did not succeed, directed the petitioner to pay the principal amount along with interest, till the date of settlement. Having come to the conclusion that the conciliation is not successful and it has to be terminated without any settlement, the first respondent ought to have taken up the dispute for arbitration itself or referred it to any arbitration institution or centre in terms of Section 18(3) of the said Act.

8. At this juncture, it is apt to quote Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006, as hereunder :

> "18. Reference to Micro and Small Enterprises Facilitation Council -
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> ....
>
> (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 disputes as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7 of that Act."

9. However, the first respondent, as stated above, without taking up the dispute for arbitration itself or referring it to any arbitration institution or centre straight away passed the impugned order in contravention of Section 18 of the said Act and hence, the same is liable to be quashed on this sole ground.

10. It is also relevant to note that the first respondent, after arriving at the conclusion that the conciliation failed, ought to have heard the petitioner on the merits of the dispute, by affording them opportunity of hearing. A perusal of the impugned order would go to show that the first respondent has not assigned any valid reasons for issuing a direction to the petitioner to pay the disputed amount. Hence, the impugned order is liable to be quashed on the ground of violation of principle of natural justice also.

11. In the result, this writ petition is allowed and the order of the first respondent is set aside. The first respondent is directed either to take up the dispute for arbitration itself or refer it to any arbitration institution or centre in terms of Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

The Chairman,
MSE Facilitation Council,
Chennai.

+1cc to Mr. R.Natarajan, Advocate SR.No. 89311

+1cc to Mr.T.Ramesh , Advocate SR.No. 554(25.01.2019)

W.P.No.30083 of 2018

A.SK(24/01/2019)