

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Writ Petition No.40760 of 2016

ORDER:

This writ petition, under Article 226 of the Constitution of India, is filed requesting to call for records in reference/ case No.21C/ IFC/ 2016/ 18077 on the file of the Telangana State Micro & Small Enterprises Facilitation Council at Hyderabad and issue a Writ in the nature of Certiorari setting aside the order/ Award, dated 07.05.2016, in the above said reference case.

2. I have heard the submissions of Sri Keerthi Kiran Kota, learned counsel appearing for the petitioner, of the learned Government Pleader for Industries & Commerce appearing for the 1st respondent; and of Sri N. Ashwani Kumar, learned counsel appearing for the 2nd respondent. I have perused the material record.

3. The case of the petitioner Municipal Corporation and the submissions made on its behalf, in brief, are as follows:

The petitioner Municipal Corporation has issued a tender notification inviting through e-procurement intended bidders for procuring, installing, commissioning, operating and maintaining, for a period of ten years, water treatment plants on Build, Operate and Transfer (BOT) basis. The 2nd respondent quoted the lowest price and became L1 tenderer. In furtherance of the same, 2nd respondent bagged the contract of erection and maintenance of water treatment plants. The 2nd respondent entered into an agreement, on 09.04.2015, with the petitioner for the desired purpose. Clause 34 of the said agreement, which deals with disputes and arbitration, reads as under:

34. DISPUTES AND ARBITRATION

- i. If any dispute or difference of any kind what-so-ever shall arise between the Government/its authorized representative and the Concessionaire in connection with or arising out of this contract or the execution of work there under.

- ii. Whether before its commencement or during the progress of work or after the termination, abandonment or breach of the contract, it shall, in the first instance, be referred for settlement to the Engineer-in-Charge of the work and he shall, within a period of 7 days after being requested in writing by the Concessionaire to do so, convey his decision to the Concessionaire. Such decision in respect of every matter so referred shall, subject to arbitration as hereinafter provided, be final and binding upon the Concessionaire. In case the work is already in progress, the Concessionaire shall proceed with the execution of the work on receipt of the decision of the Engineer-in-Charge as aforesaid with all due diligence, whether any of the parties requires arbitration as hereinafter provided or not.
- iii. If the Engineer-in-Charge has conveyed his decision to the Concessionaire and no claim for arbitration has been filed by the Concessionaire within a period of 7 days from the receipt of the letter communicating the decision, the said decision shall be final and binding upon the Concessionaire and will not be a subject matter of arbitration at all.
- iv. If the Engineer-in-Charge fails to convey his decision within a period of 7 days after being requested as aforesaid the Concessionaire may within further 7 days of the expiry of the final 7 days from the date on which the said request was made by the Concessionaire refer the dispute for arbitration as herein-after provided.
- v. All disputes or differences in respect of which the decision is not final and conclusive shall, at the request of either party made in a communication sent through registered A.D post, be referred to the sole arbitration of the Superintending Engineer of the circle concerned in the PWD (Pb W/S & Sanitation Deptt/Buildings and Roads) Branch acting as such at the time of reference unless debarred from acting as an Arbitrator by an order of the Government, in which event the Chief Engineer shall appoint any other technical officer not below the rank of Superintending Engineer to act as an arbitrator on receipt of a request from either party.
- vi. Chief Engineer-in-charge of works shall have the authority to change of arbitrator on an application by either the Concessionaire or the Engineer-in-Charge requesting change of arbitrator giving reasons thereof, either before the start of the arbitration proceedings or during the course of such proceedings. The arbitration proceedings would stand suspended as soon as an application for change of Arbitrator is filed before the Chief Engineer and a notice thereof is given by the applicant to the Arbitrator. The Chief Engineer after hearing both the parties may pass a speaking order rejecting the application or accepting to change the Arbitrator simultaneously, appointing a technical officer not below the rank of a Superintending Engineer as Arbitrator under the contract. The new Arbitrator so appointed may enter upon the reference a fresh or he may continue the hearings from the point these were suspended before the previous Arbitrator.
- vii. The reference to the Arbitrator shall be made by the claimant party within one hundred twenty days from the date of dispute of claim arise during the execution of work. If the claim pertains to rates or recoveries introduced in the final bill, the reference to the Arbitrator shall be made within six calendar months from the date of payment of the final bill to the Concessionaire or from the date a registered notice is sent to the Concessionaire to the effect that his final bill is ready by the Engineer-in-Charge (Whose decision in this respect shall be final and binding) whichever is earlier.
- viii. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitrator shall specify the disputes based on facts and

calculations stating the amount claimed under each claim and shall furnish a "deposit-at-call" for ten percent of the amount claimed, on a scheduled bank in the name of the Arbitrator, by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded with respect to the amount claimed and the balance if any, shall be forfeited and paid to the other party.

- ix. The provisions of the Indian Arbitration Act, 1996 or any other statutory enactment thereunder or modification thereof end for the time being in force shall apply to the arbitration proceedings under this clause (x) The Arbitration shall award separately giving his award against each claim & dispute & counter claim raised by either party giving reasons for his award. Any lump sum award shall not be legally enforceable.
- x. The independent claims of the party other than the one seeking arbitration as also the counter claims of any party shall be entertained by the Arbitrator.
- xi. The venue of arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion. The work under the contract shall continue during the arbitration proceedings.
- xii. The stamp fee due on the award shall be payable by the party as desired by the Arbitrator and in the event of such party's default, the stamp fee shall be recoverable from any other sum due to such party under this or any other contract.
- xiii. Neither party shall be entitled to bring a claim for arbitration, if it is not filed as per the time period already specified or within six months of the following:
 - a) Of the date of completion of the completion of the work as certified by the Engineer-in-Charge, Or
 - b) Of the date of abandonment of the work or breach of contract under any of its clauses, Or
 - c) Of its non-commencement or no resumption of work within 10 days of written notice for commencement or resumption as applicable, Or
 - d) Of the cancellation, termination or withdrawal of the work from the Concessionaire in whole or in part and/or revision or foreclosure of the contract, Or
 - e) Of receiving an intimation from the Engineer-in-Charge that the final payment due or recovery from the Concessionaire had been determined for the purpose of payment/adjustment whichever is the latest.
- xiv) If the matter is not referred to arbitration within the period prescribed above, all the rights and claims of either party under the contract shall be deemed to have been forfeited and absolutely barred by time for arbitration and even for civil litigation.
- xv) No question relating to this contract shall be brought before any civil court without first invoking and completing the arbitration proceedings, if the issue is covered by the scopes of arbitration under this contract. The pending of arbitration proceedings shall not disentitle the Engineer-in-Charge to terminate the contract and to make alternate arrangement for completion of the works.
- xvi) The arbitrator shall be deemed to have entered on the reference on the day, he issues notices to the parties fixing the first date of hearing. The arbitrator may, from time to time, with the consent of the parties enlarge the initial time for marking and publishing the award.
- xvii) The ex-party of the contractual time limit, whether originally fixed or extended, shall not invalidate the provisions of this clause.

The 2nd respondent filed the afore-said case claiming that the writ petitioner has to pay an amount of Rs.2,06,23,240/- as principal amount and Rs.55,25,428.27 ps as interest, that is, a total sum of Rs.2,61,48,668.27 ps. In the said claim, the 2nd respondent herein stated that all 21 plants were received by the writ petitioner (through Executive Engineer) in good condition and that the same were installed and are operational and that the services of the water treatment plants are being utilized by the people and that out of the total outstanding amount of Rs.3,71,20,996/-, only Rs.1,64,97,756/- was paid and the balance amount with interest is due and payable. The 2nd respondent/ claimant's case was placed before the Council, on 02.12.2015. In the meeting held, on 20.02.2016, the claimant, that is, 2nd respondent herein and the writ petitioner were present. The writ petitioner submitted a statement of defence. Finally, by the order/ Award impugned in this writ petition, the writ petitioner was directed to make payments as follows:

"A) Rs.2,25,65,332/- (Rupees Two Crore Twenty Five Lakh Sixty Five Thousand Three Hundred and Thirty Two only) towards Principal & Rs.70,11,621/- (Rupees Seventy Lakh Eleven Thousand Six Hundred and Twenty One only) towards interest totaling to Rs.2,95,76,953/- (Rupees Two Crore Ninety Five Lakh Seventy Six Thousand Nine Hundred and Fifty Three only).

B) Further interest with monthly rests at three times bank rate prevailing as on date of this award as notified by RBI on the amount adjudicated in terms of Section-16 of MSMD Act 2006 till such date the Respondent makes full & final payment."

As per clause 34 of the agreement, dispute shall, in the first instance, be referred for settlement to the Engineer-in-charge of the work and that he shall, within a period of 7 days, after being requested in writing by the Concessionaire to do so, convey his decision to the Concessionaire and that such decision in respect of every matter so referred shall, subject to arbitration as provided, be final and binding upon the Concessionaire. The 2nd respondent never raised a claim for arbitration as contemplated in the terms of the said clause in the agreement. Under clause 39 of the agreement, the

jurisdiction of the civil Court would be the location of the Office of the Engineer-in-Charge and that would be Bengaluru in Karnataka State. Therefore, the Facilitation Council at Hyderabad has no jurisdiction. If only the conciliation is not successful and stands terminated without any settlement, the dispute can be taken up for arbitration under Section 18(2) of The Micro, Small and Medium Enterprises Development Act, 2006 [‘the MSMED Act’, for short]. Already a writ petition in WP.No.32587 of 2015 was filed before the High Court of Karnataka. Therefore, the present claim ought to have been dismissed. The payments have been released to the claimant in respect of all projects where completion certificates were issued as per the bills raised by the 2nd respondent. However, payments were not released for the projects which are yet to be completed. 19 projects sanctioned are yet to be completed by the 2nd respondent. Therefore, the order impugned was passed without jurisdiction and without considering the facts correctly and in proper perspective. The order/ award impugned simply narrated the claim and defence and thereafter an order directing payment was passed without discussing the objections and the case of the writ petitioner. The Award was signed by only four members out of five members. Though a reason is to be stated for omitted signature as per law, in the instant award, no reason for the omission of the signature of one of the five members of the Tribunal is stated. Section 31 of the Arbitration and Conciliation Act, 1996 [‘Act 26 of 1996’, for short] ordains that the Award shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given. In the case on hand, the parties specifically agreed that the arbitration award shall separately state each claim, dispute and counter claim raised by either of the parties and give reasons for the Award. Hence, the impugned award is liable to be set aside.

4. This Court while ordering notice before admission, on 25.11.2016, passed the following interim order: ‘..In view of the same, there shall be interim suspension of the Award dated 07.05.2016 in Case No.21C/ IFC/ 2016/ 18077 for a period of four (04) weeks.’ While admitting the writ petition, on 31.01.2017, the afore-said interim order was extended until further orders.

5. The 2nd respondent filed vacate stay petition. The case of the 2nd respondent and the submissions made on its behalf, in brief, are as follows:

The writ petition is not maintainable. Section 19 of the MSMED Act postulates that no application for setting aside any decree, award or other order made either by the Council itself or any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court. The writ petitioner is having an effective alternative remedy to challenge the award in a competent civil Court under Section 34 of the Act 26 of 1996. Had the petitioner chosen to avail the said remedy, the petitioner would have been required to comply with the mandate of deposit of seventy-five per cent of the amount in terms of the award as any appeal under Section 34 of the Act 26 of 1996 is not entertainable, unless such deposit is made. The writ petitioner chose not to avail the said remedy and filed the writ petition to avoid depositing of seventy-five percent of the amount in terms of the award, which is a mandatory requirement. In view of the fact that the writ petition is filed without availing the effective alternative remedy and to avoid depositing of the amount as mandated by the provisions of the statute, the writ petition is liable for dismissal. All the contentions which the petitioner raised in this writ petition could have been taken in the appeal, which the law

provided for, for challenging the award impugned in this writ petition. The allegations that the payments have been released to the 2nd respondent-claimant in respect of all projects where completion certificates were issued and as per the bills raised by the 2nd respondent and that payments were not released for the projects which are yet to be completed and that 19 projects sanctioned are yet to be completed by the 2nd respondent are all denied as false. Out of the total amount of Rs.3,71,20,996/-, only an amount of Rs.1,64,97,756/- was paid leaving a balance amount of Rs.2,06,23,240/- . Requests were made on numerous occasions for payment of the same. Aggrieved of the inexorable attitude of the writ petitioner, the 2nd respondent company initiated arbitration proceedings before the Facilitation Council, Hyderabad, that is, 1st respondent for recovery of the balance principal amount with interest. The dispute was resolved by following due procedure established by law and the petitioner, even after suffering an Award, is adopting evading tactics and filed the present writ petition. Since the conciliation proceedings failed, the Council referred the dispute for arbitration and the arbitration was conducted in pursuance of the arbitration agreement and as per the provisions of the Act 26 of 1996. Section 21 of MSMED Act postulates that the Facilitation Council shall consist of not less than three but not more than 5 members; and, in the case on hand the Award was signed by 4 members and, therefore, the contention that the Award signed by four members out of five members is not valid is untenable. Under Section 31 of the Act 26 of 1996, which deals with form and contents of arbitral award, an arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal and that in arbitral proceedings with more than one arbitrator, the signatures of majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated. Hence, the writ petition may be dismissed.

6. Dealing first with the contentions that the writ petition is not maintainable, it is to be first noted that admittedly an efficacious alternative remedy under Section 34 of the Act 26 of 1996 is available to the petitioner.

Section 34 of the Act 26 of 1996 reads as under:

34 Application for setting aside arbitral award. —

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

- (i) a party was under some incapacity, or
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
- (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
- (ii) the arbitral award is in conflict with the public policy of India.

Explanation. —Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

It is pertinent to refer to sub-Section (4) of Section 2 of the Act 26 of 1996, which reads as under:

‘This part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.

However, the petitioner raising various grounds, which are excerpted supra, filed the present writ petition without availing the remedy under Section 34 of Act 26 of 1996.

7. It is also pertinent to refer to Section 19 of the MSMD Act, which reads as under.

19. Application for setting aside decree, award or order.

No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:

PROVIDED that pending disposal of the application for setting aside decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose.

A plain reading of the above provision makes it manifest that the petitioner herein is required, under law, to make with the petition, that is, at the time of institution of the appeal under Section 34 of the Act 26 of 1996 a deposit of seventy-five per cent of the amount in terms of the award, but the petitioner herein did not prefer an appeal as provided under Section 34 of the Act 26 of 1996 and filed this writ petition obviously for the reason that if an appeal as provided under Section 34 of Act 26 of 1996 were to be filed, the petitioner would be required to make the deposit of seventy-five percent of the amount awarded. Even while instituting this writ petition also, the petitioner did not comply with the said mandate of law. Further, from the ratio of the decision

of the Supreme Court in Goodyear India Limited v. Norton Intech Rubbers Private Limited and another [(2012) 6 SCC 345], it is clear that the Court has no discretion to either waive or reduce the amount of 75% of award as a pre deposit for filing of the appeal but the Court has only discretion to allow pre deposit to be made in instalments, if required. Further, it is to be noted that MSMED Act is a beneficial legislation enacted for the survival of Small Scale Industries from the clutches of the wilfully defaulting debtors. Therefore, allowing the petitioner to file the writ petition in the presence of an efficacious alternative remedy tantamounts to allowing the petitioner to circumvent the mandatory provisions of MSMED Act. Though in certain cases this Court entertains writ petitions even in cases where alternative remedies are available, having regard to the facts peculiar to such cases, this Court, however, finds that this is not a case where such discretion is exercisable in view of the facts of this case as well as the provisions of the MSMED Act and the object of the said legislation.

8. On the above analysis and for the foregoing reasons, this Court finds that the writ petition is not maintainable and is liable to be dismissed as in the present case the petitioner ought to have availed the remedy of appeal under the Act 26 of 1996 instead of filing the present writ petition. Even assuming that the grounds raised in the writ petition are fundamental and are assumed to be sufficient to set aside the Award, the petitioner could as well raise all these contentions in the appeal that is provided under the Act 26 of 1996 as the provisions of the said Act read with the provisions of MSMED Act are self contained and deal with all contingencies.

9. Accordingly, this Writ Petition challenging the award, dated 07.05.2016, of the 1st respondent passed in case No.21C/ IFC/ 2016/ 18077 is dismissed reserving liberty to the petitioner to avail the remedy of appeal, if it is so advised, however, subject to the law of limitation.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

M.SEETHARAMA MURTI, J

16.07.2018

Note: Issue CC by 01.08.2018.

[B/o]

Vjl

