

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.01.2019

CORAM:

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

Original Petition No.424 of 2018

Ved Prakash (Authorized Representative)
M/s Karmic Energy Private Limited,
851, Ground Floor, Udyog Vihar Phase-V,
Gurgaon, Haryana - 122 016. ...Petitioner

Vs.

P.Ponram,
Managing Partner,
M/s.Unicon Engineers,
513-A/6, Bharathi Road,
Chinnavedampatty,
Coimbatore - 641 049 ...Respondent

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Exparte Award dated 05.08.2016 passed in Case No.M&SEFC/CBER/26/2016.

For Petitioner : Mr.Rajkishore Bhagwatsaran

For Respondent : Mr.B.Manoharan, for Caveator

ORDER

The petitioner has come forward with this Original Petition challenging the Arbitral Award dated 05.08.2016, on the ground that it is an Ex-Parte Award.

2. The case of the petitioner is that there were two Agreements dated 31.05.2013 and 12.06.2013, entered into between the parties, with regard to supply of equipments that are required for setting up a small plant and the total cost of both orders was fixed at Rs.115 Lakhs plus applicable taxes and duties extra for Design, Engineering etc.

3. According to the learned counsel for the petitioner, there was short supply of equipments required for setting up of the plant, by the respondent and the equipments were inspected by both the parties. When there is short supply of the contracted list and there is delay in erection and completion of the plant due to the short supply of equipments, the responsibility lies on the respondent. Hence, according to the learned counsel, the Exparte Award dated 05.08.2016, directing the Petitioner to pay the principal sum of Rs.34,56,479/- (Rupees Thirty Four Lakhs Fifty Six Thousand And Four Hundred and Seventy Nine Only) together with compound interest with monthly rest, is bad.

4. Learned counsel for the petitioner further submitted that when both the Agreements entered into between the parties contain an Arbitration Clause, the respondent ought not to have invoked Micro, Small & Medium

Enterprises Development Act, 2006 (hereinafter referred to as 'MSMED Act'). According to him, in terms of Section 18 of the MSMED Act, the Micro & Small Enterprises Facilitation Council, Coimbatore Region (for short 'Council'), which dealt with the matter, ought to have referred the matter to Arbitration Centre, if the respondent is not agreeing for an Arbitrator to be appointed by the petitioner in terms of the MSMED Act. As per the Arbitration Agreement, when the parties have agreed to have the seat of Arbitration at Delhi invoking the jurisdiction of the Council under the MSMED Act, the exparte Arbitral Award is liable to be interfered with.

5. Learned counsel for the petitioner also drew the attention of this Court to the petitioner's communication dated 02.06.2016, wherein it has been stated that the parties have agreed for Arbitration at New Delhi and that on going through the provisions of the MSMED Act, proper advice will be given by the Lawyer. He further submitted that the petitioner did not appear before the Council at Coimbatore, as the Council has no jurisdiction to entertain any dispute arising between the parties with regard to the two Agreements entered into between them.

6. Learned counsel for the Petitioner also drew the attention of this Court to the decision of the Bombay High Court in the case of **M/s.Steel**

Authority of India Ltd. vs. The Micro, Small Enterprise Facilitation Council, reported in **CDJ 2010 BHC 2883**, wherein, the Court, considering Section 18 of the MSMED Act, has held that Arbitration has to be proceeded with, in spite of the MSMED Act being invoked.

7. Learned counsel went on to contend that in the exparte Award dated 05.06.2016 passed by the Arbitrator, none of the Exhibits filed by the respondents have been numbered and that the Award has to be considered as non-speaking Award and needs to be interfered with. He also contended that the parties have to be relegated to the Arbitrator, who shall be appointed either by this Court or by the Council, in terms of Section 18(3) of the MSMED Act.

8. In reply, learned counsel appearing for the respondent submitted that the respondent had agreed to supply the materials and there is no fault on his part. He further submitted that though both parties have agreed for an Arbitration, the petitioner did not appear before the Council under MSMED Act, except sending a representation and no plea was taken by him with regard to want of jurisdiction in terms of Section 18(3) of the MSMED Act.

9. He further contended that in terms of Section 19 of the MSMED Act, the entire Award amount has to be taken into account for deposit of 75% of the amount and that only 75% of the amount claimed alone has been deposited and hence, the petitioner is not entitled to get any relief, as he has not complied with the mandatory provisions under Section 19 of the MSMED Act and also the directions of this Court.

10. Heard the learned counsel for the parties and perused the material documents available on record.

11. In Application No.1511 of 2017 in O.P.(D) No.6821 of 2017, this Court, by an order dated 22.03.2017, held as follows:

"8.1. Thus, it is clear, out of two enactments, the provisions of the MSMED Act would prevail especially when it has a overriding provision under Section 24, where it has been clearly said that Sections 15 to 23 shall have the overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, the contention that the Award passed by the Council is patently illegal, has to be rejected and it is rejected accordingly.

9.2. Therefore, it is clear that the deposit of 75% is mandatory except for the supplier. The Appellant is not the supplier, but the person benefited from the supplies made by the supplier. Therefore,

the contention that the appellant is not liable to deposit 75% of the Award cannot be accepted and this contention is rejected."

12. The above cited order passed in Application No.1511 of 2017 in O.P.(D) No.6821 of 2017 was challenged by the Petitioner herein in O.S.A.No.96 of 2017 and a Division Bench of this Court, by an order dated 25.10.2017, held as under:

"20. Therefore, we are inclined to say that pre-deposit of 75% of the Award amount as contained in Section 19 of MSMED Act be made by the appellant, for which three instalments were permitted by the learned Single Judge vide order dated 22.03.2017 in Application No.1511 of 2017 in O.P. Diary No.6821 of 2017, now stands extended/modified. The extended/modified time frame is that the aforesaid 75% of the pre-deposit Award amount shall now be made in three equal fortnightly instalments and the first instalment shall be within a fortnight from the date of receipt of a copy of this judgment. In all other aspects of the matter, the order of the learned Single Judge stands confirmed.

21. With the above observations and directions, the appeal is disposed of. Interim order already granted by this Court vide order dated 10.08.2017 shall continue to operate for a period of eight weeks from the date of receipt of a copy of this order. ..."

13. Challenging the order passed in O.S.A.No.96 of 2017, the Petitioner herein approached the Apex Court by filing S.L.P.(C) No.3931 of 2018, whereby, the Apex Court extended time for pre-deposit of 75% of the

Award amount, as required by law, by further two months.

14. Learned counsel appearing for the respondent submitted that as the issue which is to be considered has already been decided by the Division Bench of this Court and the same having been upheld by the Apex Court, the petitioner cannot object the same. He further submitted that the procedure contemplated under the MSMED Act is only summary in nature and there is no need for numbering the Exhibits and this Court will have to only consider whether the documents referred to by the respondents have been gone into by the Council, before rendering a finding.

15. It is not in dispute that there are two Agreements entered into between the parties on 31.05.2013 and 12.06.2016, wherein, both the parties have agreed for an Arbitration under the Arbitration and Conciliation Act, 1996 and that the Petitioner can appoint an Arbitrator. When a dispute arose between the parties with regard to short supply of equipments, the respondent has invoked the MSMED Act and except for sending a reply that the parties will have to appear before the Arbitrator, the petitioner did not take any other plea. The only point taken by the learned counsel for the petitioner is that no other learned counsel was engaged by the petitioner to represent him in this case and that he is unaware as to who represented him on the earlier occasion.

He also submitted that he had not lodged any complaint with the Bar Council about the misrepresentation of the counsel on his behalf.

16. It is seen that the order dated 22.03.2017 passed by this Court in Application No.1511 of 2017 in O.P.(D) No.6821 of 2017, holding that deposit of 75% of the Award amount is mandatory and that it cannot be waived, has been confirmed by the Division Bench of this Court in O.S.A.No.96 of 2017 and the same was also upheld by the Apex Court in S.L.P.(C) No.3931 of 2018.

17. In this connection, it is worth referring to a decision of the Apex Court in the case of **Goodyear India Limited vs. Norton Intech Rubbers (P) Ltd.** reported in **2012 (2) CTC 829**, wherein, it is held that the Court cannot waive the statutory deposit and at the most, the Court can extend the time or direct the Petitioner to pay the amount in instalments.

18. It is further seen that in the orders referred to above, the learned Single Judge of this Court as well as the Division Bench of this Court, have considered the issue only with regard to Section 18 of the MSMED Act and nowhere, there is reference to Section 19 of the MSMED Act.

19. I am in entire agreement with the decision rendered by the Bombay High Court in the case of *M/s.Steel Authority of India (cited supra)*, wherein, it is held that Micro & Small Enterprises Facilitation Council is not entitled to proceed under the provisions of Section 18(3) of the Act in view of independent Arbitration Agreement between the parties. The Council will have to ascertain as to whether the Agreement refers to the Arbitration clause and if that be so, the matter has to be referred to the Arbitration Centre. Even though it is a special enactment, Section 18 of the MSMED Act does not exclude Arbitration Proceedings. In the said decision, the Bombay High Court has further held that there is no question of an independent Arbitration Agreement ceasing to have any effect, because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an Arbitration conducted by the Council under Section 18 and Arbitration conducted under an individual clause, since both are governed by the provisions of the Arbitration Act, 1996.

20. In view of the above, as the issue on hand is concerned only with regard to exclusion of Arbitration clause and the same has been confirmed by the Division Bench of this Court and that has become final, I find that there are no merits in this Original Petition. The non-marking of Exhibits cannot be cited as a ground, as observed supra and it is only a summary procedure and this

Court cannot expect the Arbitrator in the case on hand, i.e. the Council, to number the Exhibits.

21. In the result, the Original Petition is dismissed. No costs. It is open to the respondent to withdraw the amount deposited by the Petitioner, after the limitation period of Appeal is over.

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Index : Yes/No
Speaking Order : Yes/No
(tsg)



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S.VAIDYANATHAN,J.

(tsg)



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