

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Reserved on: 21.01.2020

Pronounced on: 19.05.2020

+

OMP (MISC.)(COMM.) 363/2019 & I.A. 12478/2019

SIRIUS GLOBAL LIMITED

..... Petitioner

Through: Mr. Hindol Banerjee, Advocate

versus

SOUTH EASTERN RAILWAY

..... Respondent

**Through: Mr. Malaya Kumar Chand & Mr.
Rohit Sharma, Advocates**

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition has been filed under Section 29A (4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'). Petitioner is a small enterprise registered under the Micro Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the 'MSMED' Act) and provides IT services to various organizations.
2. An Annual Maintenance Contract was executed between the Petitioner and Respondent - South Eastern Railway. As per the Petitioner, it executed the work under the Contract for the years 2009-

2012, to the satisfaction of the Respondent, but no payment was made by the Respondent.

3. It is averred in the petition that Petitioner had requested for appointment of an Arbitrator and while the Arbitrator was appointed by the Respondent, but no date was fixed in the proceedings and for many months nothing was heard either from the Respondent or from the Arbitrator. In these circumstances, Petitioner being MSME registered Company approached the Delhi MSME Facilitation Council as per the MSMED Act and the Council called for Conciliation. Conciliation having failed, the Council referred the dispute for Arbitration to the DIAC (Delhi International Arbitration Centre) and a Sole Arbitrator was appointed.

4. Petitioner filed its Statement of Claim for Rs. 1,40,39,899/-. First hearing was held on 02.01.2018. On 27.02.2018 issues were framed and on 08.03.2018 Petitioner filed its evidence by way of Affidavit. On next five occasions dates were fixed, but cancelled as the Arbitrator was not available.

5. In the hearing on 13.07.2018, Respondent filed an application seeking adjournment of the proceedings, *sine die*. This application was in view of a stay order passed by Delhi High Court in W.P. (C) 2273/2018 staying the Arbitration Proceedings between the Petitioner and Eastern Railway, which was pending before another Arbitrator at the DIAC and had been similarly referred under MSMED Act. Considering the application, the Arbitrator fixed the same for arguments on 01.10.2018.

6. In the meantime, the Writ Petition was dismissed by the Single Judge on 25.09.2018. On 01.10.2018, the Tribunal called for a copy of the judgment. The judgment was placed on record and dates for

admission and denial of documents and further proceedings were fixed for 22.12.2018, 11.01.2019 and 22.01.2019. On 22.12.2018, Respondent filed evidence by way of affidavit and sought time for filing affidavit of admission and denial of documents and the Tribunal adjourned the matter to 11.01.2019.

7. Petitioner avers that, in the meantime, the stipulated 12 months period expired, but inadvertently, the Petitioner realized this only in the month of January, 2019. Hence, in the hearing on 11.01.2019, Petitioner raised the issue of extension of time before the Arbitrator, who in turn sought clarification from the office of the DIAC. DIAC informed the Arbitrator that he had entered upon reference on 18.11.2017 and thus it was within the powers of the Tribunal to grant extension, with the consent of the parties. Respondent sought time to seek instructions and the proceedings were adjourned to 22.01.2019, on which date on the request of the Respondent, case was fixed for 18.02.2019.

8. On 18.02.2019, Respondent's counsel made an oral submission that it had filed LPA No. 42/2019 against the dismissal of the Writ Petition and could not consent to extension of time, till the Appeal was pending. In the absence of consent, the Arbitrator vide order dated 18.02.2019 gave liberty to the parties to take appropriate steps and consigned the file to records, subject to revival.

9. Petitioner states that Respondent moved an urgent application in LPA No. 42/2019 for stay of Arbitration Proceedings in that matter and on 06.03.2019, the Division Bench directed that without prejudice to the rights of the parties, proceedings before the Arbitrator may go on, but final Award shall not be passed without leave of the Court.

10. It is in these circumstances that the Petitioner filed the present petition.

11. Learned counsel for the Petitioner submits that Respondent has taken every step to ensure that the Arbitration Proceedings are obstructed and the Petitioner is not able to realize its legitimate dues. He further submits that the Petitioner is a small enterprise and is being unnecessarily victimized by the Respondent. Since, the Respondent did not give consent, the mandate of the Tribunal was not extended. However, this Court has wide powers to extend the mandate even at this stage and thus prays that the time for completion of proceedings and passing of the Award be extended.

12. Learned counsel for the Respondent on the other hand, based on the reply filed by the Respondent, contends that the reference and extension are contrary to the Arbitration Clause in the Agreement dated 09.02.2011. He submits that the reference is barred by limitation as the Agreement expired on 05.08.2012. He further submits that even the present petition is barred by limitation and there is no application for condonation of delay. Application was filed on 03.09.2019 after a long gap of seven months from the Tribunal's order dated 18.02.2019.

13. Learned counsel further contends that Petitioner has suppressed the fact that it had invoked the Arbitration Agreement earlier and an Arbitrator was appointed by the Respondent and the proceedings had commenced. Thus, the present Arbitration Proceedings cannot proceed under law. Counsel also submits that this Court has no territorial jurisdiction as the Agreement was signed in the Office of South Eastern

Railways, Kolkata. It is denied that the Respondent owes any money to the Petitioner.

14. In rejoinder, learned counsel for the Petitioner submits that Respondent had appointed a Sole Arbitrator vide letter dated 17.06.2014 and vide letter dated 09.03.2015 the first hearing was fixed for 18.03.2015. It was postponed to 19.03.2015 vide letter dated 16.03.2015. However, vide letter dated 18.03.2015, the date of hearing of 19.03.2015 was cancelled with the next date to be informed later. But no intimation was ever received for any further date in the matter and no hearing took place in the said proceedings.

15. Counsel further submits that when the Respondent or the Arbitrator failed to respond for nearly two years, Petitioner resorted to the process of Conciliation and then reference, through the MSME Council. The first hearing before the DIAC was on 02.01.2018 after nearly two years of the Petitioner waiting helplessly for any intimation qua the earlier proceedings. It is further submitted that it is not open to the Respondent to even question the DIAC Proceedings as it had participated therein, filed its reply and even evidence by way of Affidavit and has thus subjected itself to the jurisdiction of the Arbitral Tribunal. If the Respondent was aggrieved with the initiation of the proceedings, it should have challenged the same at the start of the proceedings.

16. Learned counsel further submits that validity of Section 18 of the MSMED Act, 2006 has been upheld by the Supreme Court in the case of ***Principle Chief Engineer v. M/s Manibhai & Bros., decided on 05.07.2017***. This aspect was also considered by a Division Bench of this Court in LPA No. 42/2019, mentioned above, and the appeal was

dismissed on 23.08.2019. Learned counsel submits that all letters pertaining to the previous Arbitration have been placed on record of this Court.

17. I have heard the learned counsels for the parties.

18. In view of the strong opposition to the present petition by the Respondent, on certain legal grounds, it becomes necessary for this Court to examine the same. The first issue that arises for consideration is whether in view of the earlier Arbitration Proceedings, invoked by the Petitioner, the present Arbitration Proceedings before the DIAC (hereinafter referred to as DIAC Proceedings) can proceed and in which event, is the Petitioner entitled to relief in the present petition. The second issue is with respect to validity of the DIAC proceedings, having been initiated by reference of the MSME Council under the MSMED Act, 2006.

19. In order to answer the first issue, it is necessary to go into the factual aspects of the earlier proceedings. From the narration of facts given by the Petitioner in the rejoinder, which is unrebutted, it is clear that no hearing took place in the said proceedings, though rescheduled from time to time. Before proceeding further it needs a mention that the said proceedings commenced in 2014. The proceedings would thus be governed by the Arbitration and Conciliation Act, 1996 as it stood prior to the 2015 Amendment. The unamended Section 14 of the Act reads as under:-

“14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate if—

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12.”

20. Reading of the unamended Section 14 shows that mandate of an Arbitrator terminates on account of the Arbitrator's inability to act, without undue delay. Affirmatively stated, if an Arbitrator fails to act without undue delay, the inaction results in termination of the mandate. In the present case, the status of the earlier proceedings can at best be defined as proceedings in Limbo for the longest time due to inaction on the part of the Arbitrator. This conclusion is drawn on the basis of the averments by the Petitioner, which are clearly unrebutted by the Respondent.

21. In the case of ***State of West Bengal vs. National Builders, (1994) 1 SCC 235***, the Supreme Court while examining the scope of Section 8(1)(b) of the Arbitration Act, 1940, which is *pari materia* to unamended Section 14 of the Act, held as under:-

“4. To decide if the court was justified in assuming jurisdiction to appoint another arbitrator as the arbitrator appointed by the Chief Engineer under Clause 25 refused to act, it is necessary to examine the scope of Section 8(1)(b) of the Arbitration Act which reads as under:

“8. (1) In any of the following cases—

(a)

(b) If any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement, does not show that it was intended that the vacancy should not be supplied and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c)

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.”

This provision vests the court with supervisory jurisdiction to interfere with relationship between the parties and the arbitrator if any of the situations as provided in this subsection comes into being. What was claimed by the respondent, which has been accepted by the courts below, is that the sole arbitrator appointed by the Chief Engineer refused to act. The question, therefore, is what does this expression mean? Refusal to act in legal sense means denial to do something which one is obliged to do under law. Black's Law Dictionary explains it thus: ‘The act of one who has, by law, a right and power of having or doing something of advantage, and declines it’. In private law, of which arbitration is a part with court's power to supervise and intervene in arbitral proceedings within statutory framework, an arbitrator who is appointed, with common consent of parties, may not proceed with arbitration for various reasons. The refusal to act may be express or implied. If an arbitrator resigns or informs the parties his inability to act it would be express refusal. And even the

courts cannot force him to arbitrate. In Shibcharan v. Ratiram [ILR (1885) 7 All 20 : 1884 AWN 212] when despite his refusal the Subordinate Judge directed the records to be sent back to the arbitrators to submit the award within ten days who, thereafter, made the same it was set aside by the High Court and it was held:

“Expression has recently been given by this Court to the view, that one of the most essential principles of the law of arbitration is, that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrator to undertake the duties of arbitrating between the contending parties who have agreed to repose confidence in his judgment. Indeed, the finality of such award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, and that such judges are willing to settle the disputes referred to them. This essential characteristic of the effect of such adjudications is necessarily vitiated if compulsion is employed by the Court.”

5. Refusal to act may be inferred as well. On what facts such an inference can be raised cannot be laid down with certainty. There can be no fixed principle for it. When an arbitrator has failed to discharge his obligation so as to give rise to an inference that he has refused to act it shall have to be decided by the court on facts and circumstances of each case. For instance in Priyabrata Bose v. Phani Bhusan Ghose [AIR 1937 Cal 523] the High Court held that even when the arbitrator was not willing to proceed unless his fees were paid in advance, it was refusal to act. Inaction by the arbitrator or inordinate delay in rendering the award are yet some of other reasons due to which courts have raised an inference that the arbitrator refused to act. (See Manohar Singh Sahay & Co. v. Jogendra Singh Kalra [AIR 1984 Pat 3 : 1983 BBCJ (HC) 606] , State of U.P. v. Sardul Singh Kulwant Singh [AIR 1985

All 67 : 1985 All CJ 117] and Gajanand Sita Ram v. Phul Chand Fateh Chand [AIR 1930 All 675 : 1930 ALJ 1373]). The parties appoint an arbitrator by consent and he undertakes to decide the dispute out of his free will. He may withdraw his consent expressly or may act in a manner giving rise to inference that he was not willing to act any more. In either case the basic principle is that the arbitrator cannot be forced to act.”

22. These observations have been recently affirmed by the Supreme Court in ***Jayesh Pandya & Anr. v. Subhtex India Limited & Ors., 2019 SCC OnLine SC 1101***, with respect to Sections 14 & 15 of the Arbitration and Conciliation Act, 1996 as amended by the Amendment Act, 2015. Therefore, in my view, the mandate of the Arbitrator appointed in the earlier proceedings stood terminated.

23. In so far as, the provisions of the MSME Act are concerned, the Petitioner being a small enterprise and registered at Delhi rightly invoked the MSME Act. As per Section 18 (4) of the MSME Act, the MSME Facilitation Council or the Centre provides Alternate Dispute Resolution services and has jurisdiction in a dispute where the supplier is located within its jurisdiction even though the buyer may be located anywhere in India. Section 18 (4) is extracted hereinafter:-

“18. Reference to Micro and Small Enterprises Facilitation Council.—

(1)

(2)

(3)

(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.

(5) ”

24. The issue as to whether the Council has the jurisdiction to refer a dispute to Arbitration is no longer *res integra*. Coordinate Bench of this Court in W.P.(C) 6564/2016 titled ***Mangalore Refinery & Petrochemicals Ltd. vs. Micro & Small Enterprises Facilitation Council & Anr., decided on 24.01.2019***, held as under:-

“7. Insofar as the first contention is concerned – that is, regarding the jurisdiction of the Council to refer the disputes to arbitration that are not covered under the arbitration agreement – the same is no longer res integra. This Court has, in a number of decisions now, held that the reference under Section 18 of the MSMED Act is a statutory reference and is dehors any arbitration agreement between the parties (See: M/s Ramky Infrastructure Private Ltd. v. Micro and Small Enterprises Facilitation Council & Anr.: W.P.(C) 5004/2017, decided on 04.07.2018). It has also been held that the Council is not W.P. (C) 6564 of 2016 Page 5 of 8 bound by the terms of the arbitration agreement while making such reference (See: Bharat Heavy Electricals Limited v. The Micro and Small Enterprises Facilitations Centre and Anr.: W.P.(C) 10886/2016, decided on 18.09.2017).

8. A Coordinate Bench of this Court has further held that the dispute resolution mechanism under Section 18 of the MSMED Act overrides the arbitration clause under the

*contract (see: **GE T & D India Ltd. v. Reliable Engineering Projects and Marketing: OMP (Comm) No. 76/2016, decided on 16.02.2017).***

*9. The Division Bench of the Allahabad High Court in **BHEL v. State of UP and Others: W.P.(C) 11535/2014, decided on 24.02.2014** had held that even though there may be an arbitration agreement between the parties, the provisions of Section 18(4) of the MSMED Act contains a non-obstante clause in empowering the Council to act as an Arbitrator. It is also noticed that in terms of Section 24 of the MSMED Act, the provisions of the MSMED Act would have an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.*

10. In this view, the scope of reference before the DIAC is also not circumscribed in any manner by the terms of the arbitration agreement between the parties.”

25. In the case of **Indian Oil Corporation Limited vs. FEPL Engineering (P) Limited & Anr., being OMP (COMM) 144/2019, decided on 05.04.2019**, Court held that MSMED Act being a special Legislation dealing with Micro, Small and Medium Enterprises, would certainly have precedence over the General Law, i.e. the Arbitration and Conciliation Act, 1996.

26. It is significant to mention that the Respondent during the proceeding before the DIAC had relied upon a parallel litigation between the present Petitioner and the Eastern Railways, where according to the Respondent the same issue was under consideration of the Court. The

Writ Petition filed by the Railways being W.P. (C) 2273/2018, was dismissed on 25.09.2018 and the learned Single Judge held that provisions of Section 18 of the MSMED Act would be applicable, notwithstanding the Arbitration Agreement in terms of Section 7 of the Arbitration and Conciliation Act, 1996. Railways had contended that the order passed by the MSME Council referring the disputes to the DIAC was without jurisdiction as the Agreement between the parties included an Arbitration Clause. Relevant para of the judgment is as under:-

“3. Both the aforesaid issues are covered by the decisions of this Court. In Bharat Heavy Electricals Limited v. Micro and Small Enterprises Facilitations Centre and Ors.: W.P.(C)10886/2016, decided on 18.09.2017, this Court after considering the scheme of the Act had held that by virtue of the provisions of Section 24 of the Act, the provisions of the Act would have the effect notwithstanding anything inconsistent in any other law or instrument. Thus, the provisions of Section 18(3) of the Act would be applicable notwithstanding the arbitration agreement in terms of Section 7 of the Arbitration and Conciliation Act, 1996.”

27. As noted in the earlier part of the judgment, during the DIAC Proceedings, Respondent had submitted that the said judgment was under consideration in an Appeal before a Division Bench of this Court. It needs a mention that vide Order dated 23.08.2019, the said LPA bearing No. 42/2019 has been dismissed by the Division Bench, upholding the order of the learned Single Judge. Relevant part of the order of the Division Bench is as under:-

“8. In view of the aforesaid provisions of law, no error has been committed by the learned Single Judge while deciding W.P.(C) 2273/2018, vide order dated 25th September, 2018. Thus, despite an arbitration clause in the agreement between the parties to the litigation, if the Micro, Small and Medium Enterprises Development Act, 2006 is applicable to them, the MESF Council, has the power, jurisdiction and authority under Section 18(3) to either take up the matter for arbitration itself or refer the matter for arbitration to any institution or centre providing alternate dispute resolution services once the conciliation proceedings before MESF Council fails. This provision has overriding effect, looking to Section 18(4) and Section 24 of the Act, 2006. This aspect of the matter has been properly appreciated by the learned Single Judge while deciding W.P.(C) 2273/2018, vide order dated 25th September, 2018, especially looking to para 10 of the judgment delivered by the Hon’ble Gujarat High Court in First Appeal No. 637/2016, wherein it has been observed as under :

“10. In view of the above and for the reasons stated above, no error has been committed by the learned Council in not entertaining the application under Section 8 of the Arbitration Act, 1996. We see no reason to interfere with the order passed by the learned Council. As observed herein above and LPA 42/2019 Page 5 of 6 considering the sub-section (1) of Section 18 of the Act, 2006 the Facilitation Council has jurisdiction to act as Arbitrator and/or conciliator any dispute between the parties and that Council had only one of two courses of action open to it, either to conduct an arbitration itself or to refer the parties to a centre or institution providing alternate dispute resolution services stipulated in Section 18(3) of the Act, 2006. Therefore, while dismissing the present appeal, it is observed that Council shall

now act in accordance with provision of sub-section (3) of Section 18 and either to conduct an arbitration itself or to refer the parties to a centre or institution providing alternate dispute resolution services. With the above observations, present appeal is dismissed. No costs. In view of dismissal of the First Appeal, Civil Application stands dismissed accordingly.””

28. In view of the judgments referred above, it can hardly be argued by the Respondent that the MSME Council had no jurisdiction to refer the matter to DIAC in the present proceedings. Thus, the contention that the DIAC Proceedings are bad in law and the present petition cannot be entertained only merits rejection. Additionally, Petitioner is right that the Respondent participated in the proceedings upto the stage of admission and denial of documents and took no steps to challenge the proceedings at the start.

29. The Petitioner has averred in the petition that the DIAC Proceedings were at the stage of admission/denial of the documents by the Respondent when they were adjourned *sine die*. In my view, the Petitioner has made out a case of extension of time for completion of the proceedings and passing of the Award.

30. Accordingly, time for completion of the proceedings and passing of the Award is extended by a period of 6 months from 19.05.2020. The period between 18.11.2018 till 19.05.2020 is hereby regularized. Petitioner is at liberty to file an appropriate application before the learned Arbitrator for revival of the proceedings in terms of the order passed by this Court today.

31. Petition is allowed in the aforesaid terms.
32. Pending application also stands disposed of.

JYOTI SINGH, J.

MAY 19th, 2020
yo/rd

