IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.13051 of 2020(O&M)
Date of Decision-07.12.2021

Indian Drugs and Pharmaceuticals Ltd.

... Petitioner

Versus

State of Haryana and others

... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Subhash Ahuja, Advocate
for the petitioner.

Mr. Vivek Chauhan, Addl., A.G., Haryana.

Mr. S.C. Singhal, Advocate
for respondent No.3.

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<u>RAJ MOHAN SINGH, J.</u>

[1]. Petitioner has preferred this writ petition under Articles 226/227 of the Constitution of India for issuance of an appropriate writ, order or direction especially in the nature of certiorari for quashing the order dated 31.08.2017 passed by respondent No.1, referring the parties to face arbitration before Arbitrator along with all connected proceedings and orders being void, *ab initio* including award dated 30.12.2017 passed by respondent No.2 and order

dated 14.02.2019 passed by Additional District Judge-cum-Presiding Judge, Special Commercial Court, Gurugram along with all consequential execution proceedings being null and void. Further a direction be issued to respondent No.1 to decide the claims of the parties afresh by following mandatory procedure under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as MSMED Act) and Rules framed thereunder.

[2]. Respondent No.3 made a reference with claim statement dated 14.04.2017 under Section 18(1) of the MSMED Act before respondent No.1-Council. Petitioner-Company was summoned vide notice dated 27.04.2017. Petitioner filed its reply on 12.07.2017. Thereafter, respondent No.4 vide order dated 20.07.2017, directed the parties to settle payment dispute mutually and appear on 09.08.2017.

[3]. Respondent No.1 vide letter dated 31.08.2017 observed that Facilitation Council in its 109^{th} meeting held on 09.09.2017 has decided to refer the case to Arbitrator empanelled by the Government order No.2/5/13-IIB-II-2006 dated 24.10.2013, 08.08.2014 and 23.06.2015 as the buyer/supplier failed to come to any kind of conciliation. As per provisions contained under Section 18(5) of the MSMED Act, 2006, the dispute regarding the delayed payment is required to be decided within a period of 90 days by way of conciliation/arbitration. The matter was sent to Arbitrator (Sh. C.B.

Jaglan, District & Sessions Judge (Retd.) for arbitration preferably within a period of 12 weeks under Chapter V of MSMED Act and Rules framed thereunder. It has also been observed that Section 16 of the MSMED Act regarding imposition of percentage of penal rate of interest on the delayed payment be kept in view.

[4]. Sole Arbitrator vide award dated 30.12.2017, directed the petitioner to pay Rs.1,80,42,168/- to respondent No.3 towards principal and interest due upto 31.03.2017. Petitioner has been held liable to interest on this amount at the rate provided under Section 16 of the MSMED Act from 01.04.2017 till the date of payment by adjusting an amount of Rs.1,20,000/-, which has been paid by the petitioner to respondent No.3 during pendency of the claim petition on 11.12.2017. Petitioner has also been held liable to pay Rs.25,000/- to respondent No.3 towards fee of the Arbitrator. Petitioner duly participated in the arbitral proceedings before the Arbitrator and was represented by an Advocate/legal consultant.

[5]. Thereafter, petitioner filed objections under Section 19 of the MSMED Act read with Section 34 of the Arbitration and Conciliation Act. An application under Section 5 of the Limitation Act for condonation of delay was also filed before the Additional District Judge-cum-Presiding Judge, Special Commercial Court at Gurugram. No objections with regard to jurisdiction of the Arbitrator and holding conciliation proceedings in terms of Section 18(2) of the

MSMED Act were taken in the objections filed before Special Commercial Court.

[6]. Special Commercial Court vide order dated 14.02.2019 dismissed the application for condonation of delay in filing the objections for setting aside the arbitral award, which was filed much after expiry of limitation of four months. As a result of dismissal of the application under Section 5 of the Limitation Act, objections under Section 19 of the MSMED Act read with Section 34 of the Arbitration and Conciliation Act, 1996 were held to be time barred and not maintainable. Objections were dismissed with costs vide order dated 14.02.2019 passed by the Additional District Judge-cum-Presiding Judge, Special Commercial Court at Gurugram.

[7]. The aforesaid order dated 14.02.2019 was appealable in terms of Section 37 of the Arbitration and Conciliation Act, 1996. No such appeal was filed by the petitioner. Petitioner was well within its right to raise objections regarding jurisdiction of the Arbitrator as well as conciliatory mechanism attached in terms of Section 18(2) of the MSMED Act. Respondent No.1 has specifically observed vide reference dated 31.08.2017 that buyer/supplier has failed to execute any kind of conciliation. Order dated 14.02.2019 passed by the Additional District Judge-cum-Presiding Judge, Special Commercial Court at Gurugram could have been assailed in appeal under Section 37 of the Arbitration and Conciliation Act, 1996. Petitioner

instead of availing remedy in hierarchy, prefered to file the present writ petition.

[8]. Notice of motion was issued to respondent No.3 vide order dated 28.08.2020 by passing the following order:-

> *"(Proceedings conducted through video conferencing).*
>
> *Today at the very outset, learned counsel for the petitioner submits that there still are chances of some amicable settlement amongst the parties and that the petitioner has offered to pay an amount of Rs.20,00,000/- which was the initial claim of respondent No.3.*
>
> *Notice of motion to respondent No.3 only at this stage to probe the possibility of some amicable settlement.*
>
> *The petitioner would be at liberty to serve the respondent No.3 by way of 'Dasti' process as well.*
>
> *28.08.2020 (GURVINDER SINGH GILL)*
> *Gaurav Sarot JUDGE"*

[9]. Perusal of the aforesaid order would show that learned counsel for the petitioner projected a case, where chances of amicable settlement were perceived and the petitioner offered to pay an amount of Rs.20,00,000/-, which was the initial claim of respondent No.3. Notice of motion was issued only at that stage to probe the possibility of some amicable settlement.

[10]. Thereafter, learned counsel for respondent No.3 put in appearance on 08.09.2020 and submitted that respondent No.3 is not willing to compromise the matter for Rs.20,00,000/-. Learned counsel for the petitioner sought time to have instructions whether

the petitioner is willing to make an offer better than the amount of Rs.20,00,000/ or not.

[11]. Thereafter, the matter was taken up in due course on 10.02.2021 and learned counsel for the petitioner by making reference to the order dated 28.08.2020 submitted that a committee has been constituted to settle the matter and it is likely that some settlement may reach between the parties. Thereafter, on 17.03.2021, learned counsel for the petitioner submitted that the settlement proceedings as mentioned in the order dated 10.02.2021 have failed and he sought time to address arguments on merits.

[12]. The matter was again taken up on 27.10.2021 and the following order was passed:-

> *"Notice of motion was issued on the basis of readiness and willingness of the petitioner for amicably resolving the dispute. At that time, learned counsel for the petitioner offered to pay an amount of Rs.20 lakhs which was stated to be the initial claim of respondent No.3. The matter was deliberated thereafter even before the Committee constituted for that purpose. The parties could not strike any amicable resolution of dispute due to difference in claim as agreed and projected by the parties. Vide order dated 17.03.2021, the matter was listed for arguments.*
>
> *Perusal of award dated 30.12.2012 would show that the petitioner was directed to pay an amount of Rs.1,80,42,168/- to respondent No.3 towards principal and interest upto 31.03.2017.*
>
> *There cannot be any doubt that the total amount as on*

date has attained figure of more than Rs.4 crores. Respondent No.3 is a small industry and is covered under the Micro, Small and Medium Enterprise Development Act, 2006 and Rules of 2007 framed by the Haryana Government namely Haryana Micro and Small Enterprise Facilitation Council Rules, 2007. The award was a duly contested award. The petitioner remained unsuccessful in its objections under Section 34 of the Arbitration and Conciliation Act, 1996. No further appeal has been preferred under Section 37 of the Act. Instead of challenging the order, declining the objections under Section 34 of the Act, the petitioner has preferred the present writ petition.

Though the settlement has not been arrived at between the parties so far, but one more effort has been made in the consultation with learned counsel for parties.

Learned counsel for respondent No.3 has very fairly stated at the Bar that his client would be satisfied in case the total amount of Rs.1 crore is paid within 15 days towards full and final settlement of the entire claim. His client would withdraw all the pending litigation on receipt of the said amount.

Learned counsel for the petitioner seeks a week's time to have further instructions.

Adjourned to 03.11.2021."

[13]. On that day, learned counsel for respondent No.3 fairly stated at the bar that his client would be satisfied in case total amount of Rs.1 crore is paid to respondent No.3 within 15 days towards full and final settlement of entire claim. In such eventuality, respondent No.3 would withdraw all the pending litigations on receipt of such amount. Learned counsel for the petitioner sought

time to have further instructions and the case was adjourned to 03.11.2021.

[14]. On 03.11.2021, learned counsel for the petitioner submitted that the case is being processed at different levels and approval from the Board of Directors would take some time. He sought further adjournment and the case was adjourned to 11.11.2021. On 11.11.2021, learned counsel for the petitioner could not point out any such maturity of compromise and the case was adjourned to 12.11.2021.

[15]. Perusal of different interlocutory orders on record would show that initially notice of motion was issued on 28.08.2020 when learned counsel for the petitioner made a statement of fact that there are chances of amicable settlement between the parties and he even offered an amount of Rs.20,00,000/- to respondent No.3. Thereafter, on 10.02.2021, learned counsel for the petitioner further made a statement that a committee has been constituted to settle the matter. Ultimately, learned counsel for the petitioner stated before the Court on 17.03.2021 that settlement proceedings have failed. Even thereafter, learned counsel for the petitioner sought time on 27.10.2021 when learned counsel for respondent No.3 offered that amount of Rs.1 crore be paid to respondent No.3 towards full and final settlement of the claim. Even thereafter, learned counsel for the petitioner sought time to have further instructions, but ultimately could not come up with concrete

settlement. Notice of motion was never issued on merits, rather the same was issued only on the statement of learned counsel for the petitioner in the context of striking amicable resolution of dispute.

[16]. Learned counsel for the petitioner made an effort to address this Court by citing ***M/s Process Equipments India and another Vs. H.P. Micro and Small Enterprises Faciliation Council, 2014(42) RCR (Civil) 195 DB (HP)*** and contended that when statutory authority has not acted in accordance with the statutory provisions of MSMED Act, 2016, writ is maintainable. Learned counsel relied upon ***Eden Exports Company Vs. Union of India and others, 2013(7) RCR (Civil) 1441*** to contend that the decision of Facilitation Council is not final and the same is always subject to review under Article 226/227 of the Constitution of India. Learned counsel further referred to ***Haresh Dayaram Thkaur Vs. State of Maharashtra and others, 2000 AIR (SC) 2281, Oil and Natural Gas Corporation Ltd. and another Vs. Government of Assam and others, 2009 AIR (Gauhati) 77, Refex Energy Limited, by its Managing Director/Authorised Signatory Anil Jain, Mumbai 400012 Vs. Union of India, by its Secretary (Legislative), Ministry of Law and Justice, Government of India, 4th Floor, A-Wing, Shastri Bhavan, New Delhi 110001 and another, 2016 AIR (Madras) 139, Hukam Chand Shyam Lal Vs. Union of India and others, 1976 AIR (SC) 789*** and ***J.N. Ganatra Vs. Morvi Municipality, Morvi, 1996 AIR (SC) 2520*** and contended

that conciliatory mechanism attached in terms of Section 18 of MSMED Act should have been resorted to before referring the dispute to the Arbitrator, when power is required to be exercised in a certain way, then it should have been exercised in that manner only. Learned counsel also referred to ***Snehdeep Structures Pvt. Ltd Vs. Maharashtra Small Scale Ind.Dev. Corpn, 2010(3) SCC 34*** and ***Goodyear India Ltd. Vs. Nortorn Intech Rubbers, 2012(6) SCC 345.***

[17]. There is no dispute with the proposition of law held by the Hon'ble Supreme Court and other High Courts and there is no estoppel against law, but the fact remains that writ jurisdiction of the High Court can only be invoked when there is no alternative remedy available to the petitioner. Under Section 19 of the MSMED Act, 2006, no application for setting aside any decree or 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 75 % of the amount in terms of the decree, award in the manner directed by such Court.

[18]. In the instant case, objections under Section 19 of the MSMED Act were dismissed by the Additional District Judge-cum-Presiding Judge, Special Commercial Court at Gurugram vide order dated 14.02.2019 and the said order was appealable under Section

37(1)(c) of the Arbitration and Conciliation Act, 1996. In the objections filed before Additional District Judge-cum-Presiding Judge, Special Commercial Court at Gurugram, no objection with regard to the jurisdiction of the Arbitrator was taken, nor there was any objection taken in respect of non-compliance of provisions under Section 18 of the MSMED Act.

[19]. In the event of taking objection with regard to jurisdiction of the Arbitrator, the Arbitrator was competent to decide his jurisdiction. The procedure for Arbitration and Conciliation Act is precisely the procedure under which all arbitration agreements are dealt with. 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 of the Act and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration and Conciliation Act, 1996.

[20]. During arbitration proceedings before the Arbitrator, the question whether the arbitration clause applied to the fact of the case or not, has to be raised or decided before the Arbitrator. Arbitrator is competent and has jurisdiction to adjudicate upon and decide upon his jurisdiction, validity and existence of arbitration agreement with reference to arbitrability of the subject matter. In view of existence of arbitration award as alternative mode of

redressal, it has to be honoured. Reference can be made to ***Hindustan Petroleum Corporation Limited Vs. M/s Pinkcity Midway Petroleums, 2003 RCR (Civil) 6867*** and ***Swiss Timing Ltd. Vs. Commonwealth Games, 2010 Organizing Committee, 2014 6 SCC 677***. Arbitral Tribunal is empanelled under Section 16 of the Arbitration and Conciliation Act, 1996 to rule about its own jurisdiction. It is always open to the party to raise all these issues and place before the Arbitral Tribunal/Arbitrator. Arbitration Act in itself is a complete code and provides for all channels of adjudication. Reference can be made to ***Rewa Electricals Vs. Movil, 2012(II) SCC 93***.

[21]. Petitioner has duly participated in the arbitration proceedings. After the award has come into existence, the petitioner was entitled to raise objections under Sections 19 of the MSMED Act read with Section 34 of the Arbitration and Conciliation Act, 1996. In the objections raised before the Additional District Judge-cum-Presiding Judge, Special Commercial Court at Gurugram, no objection with regard to jurisdiction of the Arbitrator was raised, nor was any objection with regard to non-compliance of Section 18 of the MSMED Act.

[22]. Having failed under the regular remedy of the Act, the petitioner has ventured to file the present writ petition. Even in the present writ petition, notice of motion was issued only for exploring amicable resolution of dispute. On two occasions, learned counsel

for the petitioner sought time to have further instructions. Under the award, the entitlement of respondent No.3 is in crores as the petitioner was directed to pay Rs.1,80,42,168/- towards principal and interest upto 31.03.2017. If necessary calculations are made, due amount may go further in crores. During the proceedings in the Court on 27.10.2021, learned counsel for respondent No.3 slashed down the entitlement of respondent No.3 to the tune of Rs.1 crore only, provided the same is paid within 15 days towards full and final settlement of the entire claim of respondent No.3. Even learned counsel for the petitioner responded to the call and sought two adjournments thereafter. He responded to the call by saying that the matter is being processed at different levels and approval of Board of Directors will take some time. Thereafter, he preferred to argue the case without disclosing the nature of approval if at all granted by the Board of Directors or not. Petitioner cannot be allowed to take recourse of jurisdiction under Article 226/227 of the Constitution of India, particularly when remedy of appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 is available to the petitioner. Even in the present writ petition, notice of motion was issued only on the premise of exploring amicable resolution of dispute.

[23]. Since learned counsel for the petitioner has stated before this Court on 17.03.2021 that the settlement proceedings have failed and thereafter, also sought time on two occasions to seek

approval from Board of Directors in this context, therefore, I deem it appropriate to dismiss this petition with a liberty that if the petitioner pays the offered amount of Rs.1 crore within further period of 15 days to respondent No.3 in view of order dated 27.10.2021, then the matter shall be treated to be finally adjudicated in terms of settlement of entire claim of respondent No.3.

(RAJ MOHAN SINGH)
JUDGE

07.12.2021
Prince

Whether reasoned/speaking **Yes/No**

Whether reportable **Yes/No**