

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE
[COMMERCIAL DIVISION]

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE SHAMPA DUTT (PAUL)

APO No. 60 of 2022
AP No. 442 of 2021
(GA No. 1 of 2022)

Board of Trustees for the Syama Prasad Mookerjee Port, Kolkata

Vs.

Marinecraft Engineers Private Limited

Appearance:

For the Appellant : **Mr. Kishore Dutt, Adv.**
Mr. Ashok Kumar Jena, Adv.

For the Respondent : **Mr. Sabyasachi Chaudhury, Adv.**
Mr. S.E. Huda, Adv.
Mr. Arjun Mookerjee, Adv.
Mr. Abhijit Guha Ray, Adv.

Judgment On : **25.11.2022**

Harish Tandon, J.

The only point involved in the instant appeal is whether the order passed by the arbitral tribunal constituted under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 ruling upon its jurisdiction is an interim award amenable to be challenged under Section 34 of the Arbitration and Conciliation Act, 1996.

By the impugned order dated 17.5.2022 passed in AP 442, 2021 the Single Bench dismissed the said application holding that the said impugned order is not an interim or final award and, therefore, an application under Section 34 of the Arbitration and Conciliation Act, 1996 is not maintainable.

The salient facts involved in the instant case are required to be adumbrated before we proceed to decide the points canvassed before us by the respective counsels.

The appellant is a statutory body constituted under Major Port Trust Act, 1963 and its primary function is to supervise and control the major port at Kolkata and Haldia. A tender was floated for 4 Yearly Survey & Dry Dock Repair of Tug Bijay Singha (hereinafter referred to as “the said ship”) at Marin Operation Division, Haldia Dock Complex on 29th March, 2011. The respondent No.3 emerged as successful bidder and a work order was issued on 22.11.2011. The dispute arose between the contracting parties in relation to the release of the security deposits and the purported deductions at the behest of the appellant. Subsequently, a notice was received by the appellant on 24th September, 2015 intimating that the proceeding has been initiated before the West Bengal State Micro and Small Enterprises

Facilitation Council for recovery of the purported claim with further intimation that the conciliation proceedings would commence in terms of the provision of the Micro, Small and Medium Enterprises Development Act, 2006. The said respondent was called upon to file the statement of facts and after receiving the same the appellant filed two applications i.e., an application raising the question as to the maintainability and the jurisdiction of the said council to adjudicate upon the dispute and further filed the written statement without prejudice to such contention.

However, recourse to an amicable resolution of dispute was undertaken by the said council which could not yield any fruitful result, the appellant insisted before the council to decide the question of jurisdiction and the maintainability of the said proceedings and by an alleged interim award dated 12.5.2021 the said council upheld the jurisdiction and directed the parties to proceed on the merit of the claims.

The alleged interim award dated 12.5.2021 is challenged by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 before this Court in AP 442 of 2021 by the impugned order, the application is dismissed with the finding that the impugned order dated 12.5.2021 is not an interim award and, therefore, the proceeding under Section 34 of the Arbitration and Conciliation Act, 1996 is not maintainable.

The learned Advocate appearing for the appellant harps upon the clauses of the general conditions of the contract being the integral part of the tender document containing the arbitration clause and contend that in view of the same, the invocation of the provision under Section 18 of the

Micro, Small and Medium Enterprises Development Act, 2006 is misconceived and, therefore, the proceeding is incompetent and should have been dismissed for want of jurisdiction. It is further contended that by virtue of Section 5 of the Arbitration and Conciliation Act, the matter governed under Part-I of the Arbitration and Conciliation Act, 1996 are not capable of being adjudicated by any judicial authority except what is provided in the said part. It is, thus, contended that by virtue of a non-obstante clause contained under Section 5 of the Arbitration and Conciliation Act, 1996 the applicability of the Micro, Small and Medium Enterprises Development Act of 2006 are expressly excluded and, therefore, no recourse can be taken under the said Act of 2006. It is further contended that the moment the parties have chosen a forum for adjudication of the dispute by inserting an arbitration clause in the agreement itself it cannot take a rebound and invoke the provision of the Act of 2006. It is arduously submitted that the arbitral award includes an interim award by virtue of a definition assigned under Section 2 (1) (c) of the Act of 1996 and, therefore, any decision upholding the jurisdiction and the maintainability of the proceeding is regarded as an interim award amenable to be challenged under Section 34 of the said Act of 1996. It is, thus, submitted that the plea of jurisdiction strikes at the root of it, if decided, partake a character of the interim award and, therefore, the observation of the Single Bench to the contrary is liable to be set aside.

On the other hand, the learned Advocate appearing for the said respondent No.3 submits that the said respondent is governed by the

provisions of the Micro, Small and Medium Enterprises Development Act, 2006 and, therefore, any dispute concerning such establishment is amenable to be adjudicated under the provision of the said Act of 2006. It is further submitted that by virtue of sub-Section 4 of Section 18 of the Act of 2006 the provision contained under Act of 1996 has been expressly excluded and the jurisdiction is conferred upon the Micro and Small Enterprises Facilitation Council to act as an arbitrator in resolving the disputes. The reliance is placed upon the unreported judgment of the Apex Court in case of ***Deep Industries Ltd. vs. Oil and Natural Gas Corporation Ltd. and Anr. (Civil Appeal No. 9106 of 2019 decided on November 28, 2019)*** to the effect that even if the arbitral tribunal has ruled its own jurisdiction, such order is passed under Section 16 (2) of the Act of 1996 and, therefore, cannot be regarded as an interim award. It is further submitted that sub-Section 3 of Section 18 clearly stipulates that the said council shall follow the provisions of the Arbitration and Conciliation Act, 1996 while adjudicating the dispute and, therefore, the submission of the appellant is misconceived in this regard that the said council cannot act as an arbitrator.

On the conspectus of the aforesaid facts and the contention raised before us the moot question which arise is whether the order passed by the arbitral tribunal upholding the jurisdiction can be regarded as an interim award capable of being challenged under Section 34 of the Act of 1996.

The interim award is not defined in the Act of 1996. Rather the arbitral award defined under Section 2 (1) (c) of the Act of 1996 imbibed

within itself an interim award. Section 31 of the Act of 1996 contained exhaustive provisions pertaining to the forms and content of the arbitral award and by virtue of sub-Section 6 thereof the arbitral tribunal is vested with the power to make an interim award on any matter with respect to which it may make a final arbitral award.

There is no ambiguity in our mind by virtue of the inclusive definition of an arbitral award that the interim award is regarded as an arbitral award and capable of being challenged under Section 34 of the Act of 1996. However, Section 16 of the Act of 1996 bestowed power upon the arbitral tribunal to adjudicate upon its jurisdiction. Sub-Section 2 of Section 16 of the Act of 1996 provides a right to raise a jurisdictional issue before the arbitral tribunal itself and such jurisdictional issue can be decided by the arbitral tribunal under sub-Section 1 of the said Section. Section 37 of the Act of 1996 provides a remedy by way of an appeal against an order of the arbitral tribunal accepting the plea referred to under sub-Sections 2 and 3 of Section 16 of the Act of 1996.

The question, thus, begging an answer whether upholding the jurisdiction upon repealing the contention of the appellant in this regard can be regarded as an interim order or merely an order under Section 16(2) or Section 16 (3) of the Act of 1996. What logically follows from the combined reading of Section 16 and Section 37 of the Act of 1996 is that in the event, the jurisdictional issue raised by the parties to the arbitral proceeding is accepted, such order is capable of being challenged by way of an appeal under Section 37 of the Act of 1996; on the other hand, the converse does

not appear to be the same. While incorporating Section 16 of the Act of 1996 legislature was conscious that an order rejecting the contention on the jurisdictional issue is not an appealable order under Section 37 of the Said Act which can be very well perceived from the provision contained under sub-Section 5 of Section 16 of the Act of 1996. The said sub-Section postulates that in the event, the arbitral tribunal takes a decision rejecting the jurisdictional plea shall continue with the arbitral proceeding and make an arbitral award. It is, thus, manifest from the aforesaid provision that the rejection of a jurisdictional issue unless it strikes at the root of the jurisdiction is not an arbitral award far to speak of interim award otherwise it would frustrate the legislative intent by incorporating the expression “continue with the arbitral proceedings and make an arbitral award”. The Scuttle to Section 16 of the Act of 1996 on the misconceived proposition that the rejection of the jurisdictional issue would still be regarded as an interim award is unacceptable. The moment the legislatures have provided the remedy by way of an appeal on an eventuality under the provisions of law the converse cannot be construed as an interim or final adjudication under the premise of an arbitral award be it interim or final.

In Deep Industries Ltd. (supra) the Apex Court held that in the event, the jurisdictional issue raised before the arbitral tribunal is rejected, the agreed person has to wait till the final award is made and the challenge as to the jurisdiction can be raised under Section 34 of the said Act in the following:

“16. One other feature of this case is of some importance. As stated herein above, on 09.05.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34.”

The aforesaid observations have been reiterated in a subsequent decision rendered in ***Bhaven Construction vs. Executive Engineering reported in 2021 SCC online Page 8*** in the following:

“27. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the Court examines the same under Section 34. Respondent No.1 is therefore not left remediless and has statutorily been provided a chance of appeal. In Deep Industries case (supra), this Court observed as follows :

One other feature of this case is of some importance. As stated hereinabove, on 9.5.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a

Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34.”

We are not unmindful of the situation where an objection as to jurisdictional issue so raised may not come within the strict parameters of the Section 16(2) or 16(3) of the said Act and, therefore, the rigour of sub-Sections 5 and 6 of Section 16 of the said Act may not apply. It is the nature of the order on objection is regarded as a guiding factor. The composite reading of the provision contained in various sub-Sections of Section 16 leads no ambiguity that the moment objection is accepted the reference comes to an end, the said order would partake the character of an award capable of being challenged under Section 34 but if the said objection is overruled yet the aggrieved person is not rendered remediless as the aforesaid order can still be challenged under Section 34 of the said Act while challenging the final award. The object of the purpose can be seemingly visualized by bringing amendments in the Act of 1996 incorporating the timeline within which the proceeding is required to be concluded. Any other interpretation which would undermine the legislative intent should be guarded against and, therefore, interim order passed by the arbitral tribunal unless for which the remedy is provided in the said act cannot be challenged in a piecemeal manner. Ruling upon the jurisdiction on such premise does not partake the character of the interim award and, therefore, we do not find

any infirmity in the impugned order wherein the application under Section 34 of the Act of 1996 is dismissed.

The appeal sans merit and is, thus, dismissed.

No order as to costs.

Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Shampa Dutt (Paul), J.)