IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

FAO-CARB-17-2022(O&M)

Date of Decision:-10.05.2022

Punjab State Power Corporation Ltd.

......Appellant.

Versus

M/s Sangrur Industrial Corporation Ltd. & Anr.

......Respondents.

CORAM:- HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present:- Ms. Ekjot Sandhu, Advocate for the Appellant.

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JASJIT SINGH BEDI, J.

The present first appeal has been preferred against the order dated 09.02.2021 passed by the Additional District Judge, Patiala acting as Commercial Court-I, Patiala vide which the objection petition under Section 34 of the Arbitration & Conciliation Act, 1996 filed by the appellant-PSPCL against the award dated 27.08.2015 announced by the MSE Facilitation Council, Chandigarh has been dismissed.

2. The brief facts of the case are that the appellant-PSPCL and the respondent-company entered into several agreements in pursuance of which purchase orders were issued in favour of the respondent company and transactions were carried on between the parties. The condition as mentioned in Clause 3 of the Contract agreement, regarding payment of material supplied against the supply orders, was binding upon the parties.

The said clause is reproduced below:-

> "*3. TERMS OF PAYMENT- 100% of the contract value pro-rata for each consignment of operationally complete equipment dispatched after approval of inspecting authority/test Certificates etc. along with 100% sales tax, Excise Duty and other statutory Levies as per contract shall be paid within 30 days against receipt challans subject to furnishing a bank guarantee of 5% of the amount valid for a period of three moths after receipt of material'/equipment against that consignment.*"

Though the payment clause in all the purchase orders was the same, in purchase order H11918 and H11985 the payment was to be made within 45 days and in purchase orders no.H11890 and H11927 the payment was to be made by the appellant-PSPCL within 30 days. Since a bank guarantee was furnished in terms of the payment clause, PSPCL was bound to make 100% payment of the receipt challans within 45 days and 30 days, respectively, in the two sets of purchase orders, as mentioned above. However, the payment was not made within 30/45 days from the day the material was delivered to the PSPCL store thereby causing delay in payment, which led to disputes between the two sides.

3. The appellant-PSPCL declined the claim of the respondent-Claimant company for interest. The respondent/claimant company, accordingly, filed a claim petition before Micro and Small Enterprises Facilitation Council at Chandigarh (hereinafter called the Council) raising the following claim upon PSPCL:-

Sr.No.	Purchase Order No.	Amount
a.	H-11980/Q-3870/POT	Rs.58,99,286/-
b.	H-11918/Q-3881/POT	Rs. 2,23,048/-

c.	H-11927/Q-3878/POT	Rs.42,78,605/-
d.	H-11985/Q-3897/POT	Rs. 97,478/-

4. The appellant contested the claim of the Respondent/Complainant company for interest, on account of delayed payment, with the averment that the Claimant company had accepted the payments as full and final payment without any protest and was, therefore, estopped from making any further claim.

5. The entitlement of the respondent/Claimant Company as being a supplier under Section 2(1)(n) of the Act was also disputed and it was prayed that the claimant does not answer the definition of Small scale industry, as stipulated in Section 7 of the Act, and the claimant company, therefore, could not seek protection of the Act.

6. The claim was further resisted by challenging the rationality and constitutionality of the Act.

7. The parties led evidence before the Council and the Presiding Arbitrator-cum-Chairman, MCE Facilitation Council after framing points for determination, vide impugned Award dated 29.08.2015 adverted to the law laid down by the High Court in the case of **Saramma Ninan vs. Ninah John, 2002(1) RCR Civil, 148** to hold that the Forum, which is created under the statute, could not adjudicate upon the constitutional validity of a provision or the vires of the statute. The claimant company was found to be duly registered as an SSI unit with the Director of Industries, Punjab qua which the Council was having jurisdiction under Section 18(4) of MSMED Act. The claim was held to be within limitation with the observation that contracts............ are still alive and have not been closed and that the limitation for the present petition would arise when bank guarantees are released and contracts are closed. The copy of certificate, bearing registration no. 16/12/07724 dated 11.2.1985, was taken into consideration to arrive at the conclusion that the Claimant company is an SSI unit and entitled to invoke the provisions of the Act. Finally, the company was held entitled to claim interest after having accepted the amount without any protest and, accordingly, an award for Rs. 1,67,12,553/- upto 30.4.2015 alongwith future interest at three times of the bank rate (3x7.25%=21.75%) with monthly rests w.e.f 1.5.2015 till date of its realization, was passed.

8. Aggrieved by the said award, the appellant-PSPCL filed a petition under Section 34 of the Act impugning the said award, which came to be dismissed by the impugned judgment dated 09.02.2021.

9. The learned Counsel for the appellant-PSPCL has prayed that the award and the impugned order are erroneous and are neither based on law nor on the procedure as set out in the Micro, Small and Medium Enterprises Development Act, 2006. It is further argued that respondents/claimants are not covered under the definition of Small/Medium Enterprises, as stipulated under Section 2(n), 7 & 8 of the Act of 2006

10. The learned Counsel for the PSPCL has assailed the locus standi of the Claimant company to invoke the provisions of the MSMED Act and has put forth the plea that Claimant company failed to attach any documentary proof to show that their company was covered under the statutory definition, as provided under Section 7 & 8 of the Act, and this fact has not been property appreciated by the Courts below.

11. The orders have further been assailed on the ground that the same has been passed on the basis of incorrect data filed by the claimant company. The calculations submitted by the appellant-PSPCL had not been considered and interest had been awarded on a much higher side and not as per the prevalent rate of interest of the RBI.

12. As per the counsel for the appellant even time barred entries had been considered for calculating the interest, thereby, making the entire award illegal and against public policy. It is stated that the claim of respondent-claimant company was not within limitation and no interest therefore could have been awarded to respondents no.1 and 2, lastly asserting that a wrong rate of interest has been taken against PO no.H-11918, bill no.537 to 539 dated 30.3.2012 as the same was 27% but has wrongly been taken as 28.50%.

13. We have heard the learned Counsel for the appellant at some length.

14. Before proceeding further it would be pertinent to examine Section 34 of the Arbitration and Conciliation Act which 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 subsection (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 law.

***Explanation 1.**- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--*

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions or morality or justice.

***Explanation 2-** For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.*

2-A An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

15. An examination of the aforementioned provision would show that under sub Section (2) of Section 34 of the Act, an arbitral award is to be set-aside only on the grounds mentioned in sub clause (a) and (b) of sub Section (2) or on the ground provided in sub Section 2-A of Section 34 of the Act. In the instant case, it is not the case of either the Appellant-PSPCL or the respondent that either of the parties was under some incapacity or that proper notice was not given to either of the parties of the appointment of the arbitrator or of the arbitral proceedings. It is also not the case of the appellant that passing of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81 of the Act of 1996 nor is it the case of the appellant that the award is in conflict with the basic notions of morality or justice.

16. The main thrust of the learned counsel for the PSPCL has been on the fact that the claimant is not a small scale industry and therefore, could not invoke the provisions of MSMED Act, 2006 as it was not covered as such under the Act.

17. The argument that the complainant/respondent-company is not a small scale company is without merit. In fact after the promulgation of the MSMED Act, 2006 the respondent/complainant company got itself registered under the said Act under the Registration No.16/12/07724 and thus became an SSI Unit. This fact was conceded that under Section 18(4) of the Act the Council had the jurisdiction to try and decide the petition.

18. The Counsel for the appellant argued that the complainant/respondent-company had accepted full and final payment without protest and, therefore, was estopped from seeking interest on delayed payment. It was also argued that the interest had not been properly calculated either by the Council or by the PSIDS.

19. With respect to the plea of estoppel raised by the learned Counsel for the appellant on the ground that the claimant company had accepted full and final payment without protest and was therefore estopped from seeking interest on delayed payment. Reference to the proposition of law laid down by the Hon'ble Apex Court in the case of **M/s Purbanchal Cables and Conductors Pvt Ltd. vs. Assam State Electricity Board and another <u>2012(7) SCC 462</u>** may be made wherein it has been held that *even if any amount is received by supplier under protest, even then he is entitled to file claim only for interest under the provisions of MSMED Act and that the act does not create any embargo against the supplier, not to accept principal amount at any stage and thereafter file a suit for the recovery of interest only on delayed payments.* With respect to the compensation clause being relied upon by PSPCL, clearly the said clause cannot override the statutory provisions of MSMED Act nor can the same bar the right of a buyer to claim interest under Section 16 of the MSMED Act.

20. It would be apposite at this stage to reiterate the law settled by the Hon'ble the Apex Court in **State of Rajasthan vs. Puri Communication Company Ltd and another <u>1994(6) SCC 485</u> viz a viz the scope of interference by Courts under section 34 of the Arbitration Act** to the effect that "*in the anxiety to render justice to parties to arbitration, court should not reappraise the evidence intrinsically with close scrutiny for finding out that conclusion drawn from some fact by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power, which can be exercised by the Appellate Court to reverse the finding of fact, is alien to the scope and ambit of challenging the award under Arbitration Act. If the question of law is referred to the Arbitrator* *and the arbitrator comes to the conclusion, then it is not open to challenge the award on the ground that alternative view of law is possible. Even if it is assumed that, on the materials on the record, a different view could have been taken and Arbitrator has failed to consider the documents and materials on record, in their proper prospective, the award is not liable to be struck down in view of judicial decision referred to herein before. Error apparent on the face of record does not mean that on the closer scrutiny of the import of documents and materials on record, the finding made by the Arbitrator may be held to be erroneous and that an error of law or fact committed by the arbitrator by itself does not constitute misconduct warranting interference with the Award*". A similar view has been taken in **P.R.Shah, Shares & Stock Brokers (P) Ltd 13 Versus B.H.H. Securities (P) Limited <u>2012(4) RCR (Civil), 379, Supreme Court of India</u>**, and **National Highways Authority of India vs. Cementation India Ltd, <u>2015(5) Scale 554</u>** as per which it has been held that the court does not sit in appeal over the Award of the Arbitral Tribunal by reassessing and reappreciating the evidence and an Award could be challenged only on the ground mentioned under Section 34(2) of the Arbitration & Conciliation Act, 1996.

21. In the instant case also the Council is found to have acted within the terms of submissions made to it under the MSMED Act. None of the conditions, as mentioned in Section 34(2) and 2A of the Arbitration Act, can be said to be made out in the instant case so as to vitiate the award or to call for setting aside of the award. Though the learned counsel for the appellant has given an instance of the wrong awarding of interest by putting forth the plea that wrong rate of interest has been awarded against PO no.H-

11918 qua bill no.537 to 539 as during that period rate of interest was 27%, no such document has been produced by the learned counsel about the prevalent rate of interest during the said period being 27%. It needs to be reiterated here that the very contention of the learned counsel for the appellant that different rates of interest are to be allowed qua different bills is fallacious as the rate of interest prevalent at that time of the award was awarded by the Council without there being any bifurcation with respect to different rates of interest prevalent at the time of delay in making the payments.

22. In fact the original calculations submitted by the respondent-Claimant company were never accepted by the Arbitrator. Rather the objections raised by the appellant-PSPCL with respect to the calculation of interest were put to the Claimant company which then filed fresh calculations after removing the objections raised by PSPCL. The said calculations were sent to PSIDS for verification and only, thereafter, the award was passed.

23. In view of the aforementioned discussion as also the law enunciated by the Hon'ble' Apex Court, we find that there is no merit in the instant appeal and it is therefore dismissed.

(JASJIT SINGH BEDI)
JUDGE

(AUGUSTINE GEORGE MASIH)
JUDGE

May 10, 2022
Vinay

Whether speaking/reasoned	***Yes/No***
Whether reportable	***Yes/No***