

**IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE**

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

A.P. No. 175 of 2020

Bharat Heavy Electricals Limited, Electronics Division

Vs.

Optimal Power Synergy India Private Limited

For the petitioner : Mr. Jishnu Saha, Sr. Adv.
Mr. Ishan Saha, Adv.
Mr. Touseef Khan, Adv.
Mr. Arindam Pal, Adv.

For the respondent : Mr. Tilak Bose, Sr. Adv.
Mr. Rohit Mukherjee, Adv.
Mr. G.P. Shaw, Adv.
Mr. Gourav Kumar, Adv.

Last Heard on : 13.03.2023.

Delivered on : 29.03.2023.

Moushumi Bhattacharya, J.

1. The petitioner has made an application under section 34 of The Arbitration and Conciliation Act, 1996 for setting aside of an Arbitral Award dated 24.9.2019 which was communicated to the petitioner under cover of a

letter dated 7.11.2019. The impugned Award was passed by the West Bengal State Micro Small Enterprises Facilitation Council before which the petitioner was the respondent / buyer. The impugned Award was passed on an application made by the supplier unit which is the respondent before this Court.

2. By the impugned Award, the respondent's claim of supply of materials to the petitioner (buyer) and performing the work as per the order of the petitioner was established. The petitioner was accordingly held liable to pay the total outstanding principal amount of Rs. 61,08,654/- together with the interest on the said amount at 3 times of the Bank rate of the RBI compounded with monthly rests to the respondent under section 16 of The Micro, Small and Medium Enterprises Development Act, 2006. The respondent was directed to submit its claim of interest on the principal amount to the petitioner duly certified by a Chartered Accountant along with the claim of the outstanding principal amount. The petitioner was directed to pay the amount within 30 days from the date of submission of the respondent's claim failing which the respondent would be entitled to realise the amount in accordance with law.

3. The petitioner / buyer unit i.e., the respondent before the Council, has challenged the Award on primarily the ground that the petitioner was deprived of a sufficient opportunity of presenting its case and that the Award suffers from unequal treatment of the parties. Learned counsel appearing for the petitioner submits that the impugned Award suffers from non-application of

mind and a failure to take admitted facts into account. Counsel further submits that the Award is devoid of reasons and does not establish any nexus between the facts presented by the respondent and the denial thereof by the petitioner. Counsel urges that the Award is such that it would shock the conscience of this Court and is hence liable to be set aside.

4. Learned counsel appearing for the respondent / supplier seeks to defend the impugned Award on the ground that it is a reasoned Award. Counsel places several provisions of the MSMED Act, 2006 to urge that the rate of interest awarded is strictly provided under the Statute. Counsel relies on a list of dates to show that the petitioner had sufficient notice of the proceedings at all relevant times and that there was no breach of the principles of natural justice. Counsel places emphasis on the fact that the petitioner did not attend any of the conciliation proceedings but was represented in the arbitration and also filed its counter-claim to the claim of the respondent without any documents in support thereof.

5. The petitioner's case, as expressed from the submissions of counsel and the notes of argument, shows that the impugned Award has been challenged on several grounds. The decision of this Court is given on each of these grounds with reference to the specific heads of challenge.

Jurisdiction of the Tribunal

6. Section 18(1) of the MSMED Act, 2006 enables a party to make a reference to the Micro and Small Enterprises Facilitation Council provided the

reference is made by a party to a dispute with regard to an amount due under section 17 of the Act. The Supreme Court in *Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods Pvt. Ltd.*; 2022 SCC OnLine SC 1492, construed section 18(1) to be an enabling provision which gives an option to a party to a dispute covered under section 17 of the Act to approach the Facilitation Council despite an arbitration agreement existing between the parties.

7. Moreover, section 18(4) of the Act begins with a non-obstante clause and provides that the Facilitation Council shall have jurisdiction to act as an Arbitrator and Conciliator in a dispute between a supplier located within the jurisdiction of the Council and the buyer located anywhere in India. In the present case, Optimal/supplier (respondent before this Court) is based in Kolkata. Hence, the Facilitation Council in West Bengal had jurisdiction to deal with the dispute. The purchase orders of the petitioner were also sent by the petitioner/buyer to the supplier respondent at his office in Saltlake, Kolkata.

8. Moreover, the statutory mechanism under section 18(1) is therefore triggered by any party who is a party to the dispute and would override any other agreement entered into between the parties in view of the non-obstante clauses in section 18(1) and (4) of the MSMED Act.

9. The objection taken on behalf of the petitioner with regard to the jurisdiction of the Facilitation Council is hence rejected.

10. The connected objection taken by the petitioner that the conciliator cannot be the arbitrator has also been answered by the Supreme Court in *Gujarat State Civil Supplies Corporation Ltd.* where it was held that although section 80 of The Arbitration and Conciliation Act, 1996 stipulates that unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in any arbitral proceedings in respect of the dispute that is the subject matter of the conciliation proceedings, the statutory bar is superseded by section 18 of the MSMED Act read with section 24 of the said Act. Section 24 of the MSMED Act provides that sections 15-23 of the said Act shall have effect notwithstanding anything inconsistent to the said provisions contained in any other law for the time being in force.

11. Moreover, section 18(3) of the MSMED Act provides that where the conciliation under section 18(2) fails, the Council shall take up the dispute thereafter for arbitration either by itself or refer the dispute to any institution for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 shall apply to the dispute. The Supreme Court in *Gujarat State Civil Supplies Corporation Ltd.* also held that the Facilitation Council acting as an arbitral tribunal in pursuance of section 18(3) of the MSMED Act would be competent to rule on its own jurisdiction like any other arbitral tribunal under section 16 of the 1996 Act.

Notice of the proceedings/the petitioner was not able to present its case

12. A tabulated statement of the particulars of the notice of proceedings was placed before the Court. The statement starts from 29th August, 2017 when the respondent commenced a reference under the MSMED Act before the Facilitation Council and the Council issued a notice for holding the second conciliation meeting between the parties. The statement ends with 24th September, 2019 when the 5th sitting of the arbitration was held and attended by both the parties and the petitioner filed an application for termination of the arbitration proceedings. The particulars of proceedings show that the Council held at least two conciliation meetings on 24th January and 27th March, 2018 when the petitioner was absent. The Council issued a letter on 26th June, 2018 to inform the parties about the termination of the conciliation proceedings and commencement of the arbitration proceedings and directed the respondent to file its statement of facts within 7 days from receipt of the letter and the petitioner to file its statement of defence within 10 days after receiving the statement of facts.

13. The 1st sitting of the arbitration was held on 28th August, 2018 where the petitioner was given 15 days to file its defence and directed to ensure presence of its representative who has technical knowledge in the matter. The 2nd sitting of arbitration was held on 4th October, 2018 when again both the parties were represented followed by the 3rd sitting on 24th April, 2019. The Minutes of the proceeding was shared with the respondent on 12th June, 2019 as well as the

copy of the Minutes of the proceeding held on 24th April, 2019. The parties were again informed by way of a notice that the 5th arbitration sitting would be held on 24th September, 2019. The petitioner filed an application for termination of the arbitration proceedings on 24th September, 2019 at the 5th sitting. The particulars in the statement would suggest that the petitioner was given notice of the arbitration proceedings at all relevant points of time and that the petitioner was not represented during the conciliation proceedings.

14. Further, the Minutes of the proceedings record that (a) the petitioner did not attend any of the conciliation meetings / proceeding but appeared throughout the arbitration; (b) the petitioner submitted its counter claim at the 3rd hearing but without any supporting document; (c) the petitioner had informed of filing the proceedings before this Court as also that there was no stay granted in respect of the arbitration. The impugned Award also records in the course of the proceedings held on 24th September, 2019 that the Council decided to proceed to deliver the arbitral award under section 31 of the 1996 Act.

15. It may be relevant to point out at this stage that the petitioner filed an application under Article 227 of the Constitution before this Court on 24th April, 2019 which was disposed of on 27th September, 2019 without interfering with the arbitration or the award passed by the Council. The order of the High Court was communicated to the Council only on 16th October, 2019.

The petitioner contends violation of the principles of natural justice

16. The said contention is rejected for the following reasons:

(a) The Council informed the parties on 26th June, 2018 about the commencing of arbitration and directed the respondent to file its statement of facts within seven days and the petitioner to file its statement of defence within 10 days thereafter.

(b) The respondent filed its statement of facts on 10th July, 2018 which was sent to the petitioner on the same date.

(c) The Council directed the petitioner on 28th August, 2018 to file its statement of defence within 15 days.

(d) The preliminary objections raised by the petitioner were considered and rejected on 24th April, 2019. The petitioner was given time to submit its counter-claim and other necessary documents. The Minutes record that the petitioner's failure to submit documents would result in a final decision on the basis of oral deposition.

(e) The petitioner again attempted to obfuscate the contents of a mail sent by the respondent on 10th May, 2019 where the respondent had requested for correction of a typographical error in recording of the arbitration proceedings held on 24th April, 2019. This correction was duly noted and corrected in the Minutes supplied to both the parties in June,

2019. The petitioner did not make any further complaints with regard to the Minutes circulated by the Council.

(f) The petitioner sought to file a counter-claim beyond the prescribed time. However, the Council permitted the filing of the counter-claim. The petitioner's Advocate also sought inspection of the records which was allowed by the Council. The petitioner sought time to file its submission on 29th August, 2019 and the Council recorded that the petitioner would be required to bring a technical person to represent its case failing which the Council would pronounce a decision on the basis of the existing records.

17. The facts and documents placed before the Court including the Minutes of proceedings in the conciliation followed by the arbitration conducted by the Council fails to substantiate the arguments made on behalf of the petitioner of violation of the principles of natural justice. The Minutes of the 1st sitting held on 28th August, 2018 and the 2nd sitting held on 4th October, 2018 do not substantiate any of the allegations made on behalf of the petitioner that the Minutes were not circulated to the petitioner. The alleged irregularities in any event were cured by 6th March, 2019 when the certified copies of the proceedings of the Minutes were given to the petitioner.

18. It should also be noted that the respondent found certain discrepancies in the Minutes held on 24th April, 2019 and sought for correction of the same by a mail dated 10th May, 2019 which was thereafter corrected and the

corrected copies of the Minutes held on 24th April, 2019 was sent to both the parties by a letter dated 10th June, 2019. Even assuming that the petitioner had a case, the petitioner failed to raise any objection before the Council at next meeting held on 29th August, 2019 or even at any other subsequent meeting with regard to any alleged procedural irregularity. Significantly, the petitioner's Advocate, after receiving the corrected Minutes of 24th April, 2019, sent a mail on 18th June, 2019 to the petitioner seeking instructions in the matter to make appropriate submission on the next date of hearing.

Constitution of the Tribunal :

19. The petitioner has also raised an objection to the composition of the Tribunal as its constituent members were allegedly changed in violation of the settled principle that the person who has heard the dispute must decide it. Contrary to the allegation, the impugned Award has been signed by 5 members of the West Bengal State Micro Small Enterprises Facilitation Council. Rule 16 of the West Bengal Micro and Small Enterprises Facilitation Council Rules, 2016 states that the Council is to make an award in accordance with section 31 of The Arbitration and Conciliation Act, 1996. Section 31 of the 1996 Act states that an award is to be signed by the members of the arbitral tribunal and the signatures of the majority of the members of the tribunal will be sufficient when the arbitral proceedings has more than one arbitrator. Section 21(1) of the MSMED Act provides that the Council shall consist of not less than 3 but not more than 5 Members. The Award indicates that the 2 hearings for

conciliation before the Council on 24th January, 2018 and 27th March, 2018 failed by reason of the non-appearance of the petitioner. The Council thereafter held 5 sittings on 28th August, 2018, 4th October, 2018, 24th April, 2019, 29th August, 2019 and 24th September, 2019. The Award also reflects that only on one occasion, that is at the second sitting held on 4th October, 2018, the Chairman of the Council had to leave the meeting midway as a result of which the Council could not take any decision on that date. It may further be noted that the Council is always represented by a Chairperson who is appointed under section 21(2) of the MSMED Act. The Facilitation Rules are also relevant in this context.

20. On the factual score, the first 3 Arbitration sittings had one Vijay Bharti as the Chairperson who ceased to be the Chairperson on and from the fourth Sitting held on 29th August, 2019. The 4th and 5th sittings had Anurag Srivastava as the Chairperson. Although, names of different members of the Council have been printed in the Award, the name of the Chairperson has not been printed in the Award. In any event the Chairperson of the Council, who signed the final Award attended at least 2 dates of the hearing in the arbitral proceedings.

21. The objection taken on behalf of the petitioner with regard to the constitution of the Council affecting the principles of natural justice is hence without any basis and is accordingly rejected.

Limitation :

22. The present petition for setting aside of the impugned award dated 24th September, 2019 does not contain any grounds with regard to limitation. In any event, the allegation made in the petition would show that the claim of the respondent/supplier is essentially for recovery of the retention amount which was payable 3 years after installation of the equipment. The invocation of the facilitation was done as early as in 2017.

The impugned Award is a reasoned Award:

23. The impugned Award is not only replete with reasons but also segregates the claim of the respondent supplier against the petitioner under the 8 projects for which the respondent made supplies to the petitioner in accordance with the purchase orders individually issued for the 8 projects. The Award goes into details of the claims of the respondent/ supplier for retention and completion of the projects at Bangalore, Bhilai, Kanchipuram and also the claim for Bareilly, Rawra, Raichur and Lakshadweep Island.

24. The specific amounts claimed are mentioned against each of the heads together with the response of the petitioner / buyer (or the lack of it) to the claim. The Award also notes that the supplier completed the work as per the specification of the purchase orders and the counter-claim of the petitioner particularly with regard to Rawra or the allegations for loss of energy generation for equipment for Bareilly or non-performance of the supplier for Lakshadweep were without basis. The Award has gone into the particulars of

each claim, the claim of the respondent, counter-claim or response/denial by the petitioner and recorded the finding under each of the 8 claims. The Award also notes that the petitioner was given sufficient opportunity to substantiate its claim but failed to establish the same.

25. This Court is of the view that the impugned Award does not leave any space for interference. It is well settled that the Court exercising jurisdiction under section 34 of The Arbitration and Conciliation Act, 1996, does not sit in appeal over the decision of the Arbitrator / Tribunal. It is not the business of the Court to reappraise the evidence or review the merits of the dispute: refer section 34(2)(b) *Explanation 2* and the proviso to section 34(2A).

The Award of interest :

26. The Arbitral Tribunal directed for payment of interest on the principal amount awarded in terms of section 16 of the MSMED Act. The earlier petition filed by the petitioner for stay of the impugned Award can be referred to in this context. This Court had considered the argument of the petitioner that the Award of interest is vague, uncertain and non-executable. The petitioner's argument had earlier been rejected by the judgment dated 1.9.2021. The computation made by the Chartered Accountant of Rs. 2,78,88,228/- as directed in the Award was furnished by the respondent to the petitioner and the petitioner did not dispute the computation. It was further found that the amount of Rs. 2,78,88,228/- payable by the petitioner to the respondent was made from the date of the invoices as opposed to the date of delivery of the

goods by the respondent to the petitioner. Hence, the total outstanding amount inclusive of interest would have been substantially higher had the interest been calculated from the date of delivery of goods which were made pursuant to the purchase orders from 2011-2014. The dispute raised by the petitioner on the alleged confusion of the “appointed day” under section 2(b) of the Act was also found to be self-defeating as the total of the outstanding amount together with interest would increase many times over if the appointed day is taken from the date of actual delivery of the goods.

27. The objection of the petitioner to the rate of interest imposed by the Award should also be rejected since section 16 of the MSMED Act specifically provides for the same. Section 16 of the Act takes into account a buyer’s failure to make payment of the amount due to the supplier under section 15 of the Act and the buyer notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force would be liable to pay the compound interest and monthly rests to the supplier on the amount from the appointed day or from the date immediately following the date agreed upon at 3 times of the bank rate notified by the RBI.

28. The petitioner and the respondent, as the buyer and supplier respectively, fulfill the criteria to come within the operation of sections 15 and 16 of the MSMED Act, the object of which is to facilitate the promotion and development of Micro, Small and Medium Enterprises and to enhance their competitiveness.

29. The judgment delivered by the Court in the application filed by the petitioner came to certain specific findings with regard to the petitioner failing to make payment to the respondent and the consequent imposition of interest on the petitioner. The Court accordingly did not find any error in imposition of the interest at three times of the bank rate notified by the RBI. The present proceeding relates to stay of the Award which was also the subject matter before the Court in the earlier application. The petitioner has not been able to place any material for the Court to take a different view from the judgment pronounced or to differ from the reasons contained therein. In any event, sections 15 and 16 are in keeping with the object of the MSMED Act where a defaulting buyer who fails to make payment to a supplier, is put to task and to compensate the loss caused to the supplier for the intervening period.

30. The above discussion would show that the impugned Award dated 24.9.2019 cannot be assailed under section 34 of the 1996 Act. The petitioner has not made out or established any ground to seek recourse for setting aside of the impugned Award under any of the grounds available to the petitioner under section 34 of the 1996 Act. All the points raised by the petitioner are contrary to the special statute enacted by the Parliament namely the MSMED Act, 2006 as well as The Arbitration and Conciliation Act, 1996 and this Court accordingly finds no reason to interfere with the reasoned Award.

31. On the relevant factual score, the respondent supplier remains unpaid till date for supplies made to the petitioner between 2011-2014 and despite an

Award of 24.9.2019. This is indeed a sorry state of affairs and in stark contradiction to the object which the MSMED Act, 2006 sought to promote and protect. The respondent is a medium-scale business running from one proceeding to another for recovery of its dues.

32. An award under The Arbitration and Conciliation Act, 1996, is akin to a decree in a suit and indicates *finitum*- an end to proceedings. The Act reinforces curtailing of interference in a challenge to an award on the necessary logic of the award being a final view on the merits of the dispute before the arbitral tribunal. The legislature could certainly not have contemplated proceedings *ad infinitum* where the award-holder is put through the hierarchical grind of proceedings without finality in sight. In the present case, the petitioner is waiting – 4 years on- for that finality despite having an Award and an order of execution in its favour.

33. It is also evident from the series of proceedings filed by the petitioner that the petitioner is desperate to deny payment to the respondent or to delay the same as long as the petitioner is able to under the garb of proceedings pending before a Court of law. All the grounds raised in the petition are frivolous and aimed solely at keeping proceedings alive before this Court.

34. AP 175 of 2020 is accordingly dismissed with costs of Rs. 5 lakhs on the petitioner which is to be paid to the respondent within 10 days from the date of this judgment.

35. The prayer for stay made on behalf of learned counsel appearing for the petitioner is considered and refused for the reasons stated in the judgment.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)