

OD 7

WPO/1372/2023

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

MISSION OF MERCY HOSPITAL AND ANR.
VS
WEST BENGAL MICRO SMALL
ENTERPRISES FACILITATION COUNCIL AND ORS.

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date: 14th July, 2023.

Appearance:

Mr. Rupak Ghosh, Adv.

Mr. Tanay Agarwal, Adv.

Mr. C. Sarawgi, Adv.

...for the petitioner

Ms. Noelle Banerjee, Adv.

Mr. Yash Vardhan Deora, Adv.

...for the State

Mr. Aneek Pandit, Adv.

Mr. Atish Mazumdar, Adv.

Mr. Labanyasree Sinha, Adv.

Ms. Sonakshi Mitra, Adv.

Mr. Avijit Kundu, Adv.

...for the respondent no.4

The Court: Learned counsel for the petitioner raises an extremely interesting point as to whether the reference of the dispute between the parties to arbitration, on the finding that conciliation had failed within the contemplation of Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, was justified.

Learned counsel for the petitioner contends that at no point of time were due communications made to the petitioner, for which the petitioner could not get adequate opportunity to explore the avenue of conciliation before the Council under the 2006 Act. It is submitted that only upon getting a copy of the award, which followed the termination of conciliation, did the petitioner learn about the previous orders passed prior to termination of the conciliation. As such, the writ petition could not be moved earlier than when it has been filed.

An objection as to maintainability of the writ petition is taken by both respondent no.4 and respondent nos.1 to 3. Learned counsel for the respondent nos.1 to 3 submits that the remedy of the petitioner lies under Section 34 of the Arbitration and Conciliation Act, 1996, since an award has already been passed in the arbitration proceeding. It is argued that the arbitral proceeding was a continuation of the conciliation proceeding under the 2006 Act.

It is submitted by learned counsel for the respondent no.4, who adopts the submissions of respondent nos.1 to 3 regarding the maintainability of an appeal under Section 34, is that the writ petition is also debarred, in view of the provisions of Section 77 of the 1996 Act having been invoked in the present case. Learned counsel places reliance on Section 18(2) of the 2006 Act, which provides that in conducting conciliation, the provisions of Section 65 to 81 of the 1996 Act shall apply. Since Section 77 falls within the said range of provisions, the same is also applicable in the present case.

It is argued that in terms of Section 77, the parties have a window to initiate an arbitral proceeding even during the conciliation proceeding, where, in the opinion of a party, such proceedings are necessary for preserving its rights.

If it is deemed that such provision was invoked by the MSME Council in the present case, there could not have been any impediment in the arbitration being initiated, irrespective of the termination of the conciliation proceedings on the ground that the same has failed.

Although such argument of respondent no.4 is interesting, the same cannot be accepted in the present case. The Council, within the contemplation of 2006 Act, is the authority which deals with the conciliation proceedings and also has the power to undertake the arbitration proceedings itself and/or refer it to some other authority.

Such coordinate forum, which is taking up the conciliation proceedings as well as the arbitration proceedings, acting as an authority in both roles, cannot be deemed to be a “party” as envisaged in Section 77 of the 1996 Act. It is evident from a plain reading of Section 77 that the same takes into account parties, who, in their opinion, are of the view that the proceedings are necessary for preserving *their* “rights”. Taking into consideration such aspect of the Section, it cannot be said that the MSME Council is one of the “parties” which can be of opinion that the arbitration is necessary for preserving *its* rights.

Hence, the argument with regard to Section 77 of the 1996 Act coming in the way cannot be accepted.

In so far as the challenge to the arbitral award under Section 34 is concerned, although the respondent nos.1 to 3 have made out an extremely arguable case in submitting that the proceedings for conciliation continues and culminates in an arbitration proceedings, if so referred, the same cannot help the respondent on their maintainability issue in the present case.

Taking into consideration the scope of a challenge in a Section 34 application under the 1996 Act, the same is not wider than the scope of exercise of jurisdiction by the arbitral tribunal itself. After all, a challenge under Section 34 is before a superior authority which sits in judgment, under certain yardsticks, on the adjudication of an Arbitral Tribunal and cannot go wider than the Tribunal's jurisdiction.

The Arbitral Tribunal itself, under Section 16 of the 1996 Act, could not have decided the issue as raised by the writ petitioner in the present writ petition, since the grievance ventilated herein, regarding termination of conciliation, relates back before the commencement of the arbitral proceedings itself, as contemplated in Section 21 of the 1996 Act.

As such, pre-arbitral grievances, which do not fall within the ambit of the disputes raised in arbitration, cannot be a subject matter on which the Arbitrator would decide for the purpose of adjudicating its own jurisdiction. Hence, the said arguments regarding availability of Section 34 cannot be accepted, since such remedy is independent of the present challenge to the termination of the conciliation proceedings prior to reference to arbitration.

However, in the present case, although the petitioner would otherwise have succeeded on the ground of maintainability of the writ petition, the writ petition cannot be entertained simply because of the conduct of the petitioner, who has not come with the clean hands, in the opinion of this Court.

The petitioner learnt of the termination of the conciliation proceedings by the MSME Council under the 2006 Act, at least when the petitioner participated in the arbitral proceeding, which can only commence after such termination of conciliation.

Hence, as in October, 2022, the petitioner participated in the arbitration proceedings, being well aware about the termination of conciliation, which is the cause of action of the present writ petition. However, the petitioner chose to abstain from filing the writ petition, till an award was passed in the arbitral proceedings. Although the petitioner might have received the arbitral award late, such delay cannot mitigate the conduct of the petitioner in so far as it participated in the arbitral proceedings and awaited the conclusion of the same before preferring the present challenge. In such view of the matter, the petitioner has not come up with the clean hands and is not entitled to any equitable relief under the writ jurisdiction.

Accordingly, WPO/1372/2023 is rejected on such score alone. However, it is made clear that it will be open to all parties to challenge the arbitral award before the competent forum. If such a challenge is preferred, nothing in this order shall preclude the parties from arguing all questions on merits, which are open for being decided by the said appellate forum independently, without being influenced in any manner by any observation made herein.

No order as to costs.

Urgent certified website copy of this order, if applied for, be made available to the parties subject to compliance with the requisite formalities.

(SABYASACHI BHATTACHARYYA, J.)