IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9836 of 2018

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The Bihar State Food and Civil Supplies Corporation Ltd.

... ... Petitioner/s

Versus

1. Omega Electronics Scales Co. Ltd. and Anr
2. The Secretary Member Deputy Director of Industries Konkan Region, Thane and Ex- Office Chairman MI

... ... Respondent/s

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Appearance :
For the Petitioner/s : Mr.Shailendra Kumar Singh
For the Respondent/s : Mr.Sanchay Srivastava

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CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY

ORAL ORDER

9 23-04-2024 Heard the Learned counsel for the petitioner and the Learned counsel for the Respondent No. 1.

2. The petitioner has challenged for quashing the order dated 21.03.2023 passed in Arbitration Petition No. 38 of 2013, whereby and whereunder the Member Secretary, the Deputy Director of Industries, Konkan Region, Thane Mumbai has passed order with directing the petitioner to pay Rs. 43,99,943/- along with interest on each and every due amount of the invoice, when became payable after deduction of 30 days, as per Section of Micro Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the MSMED Act, 2006), till the release of the amount of the petitioner. And further prayed to issue as appropriate Writ for which the

petitioner may be found entitled to.

3. The brief facts of the case is that the 1^{st} respondent filed Reference Petition No. 38 of 2013, before Micro Small and Medium Enterprises Facilitation Council for deciding the dispute of non-payment of material of electronic weighing machines supplied to buyer/ 1^{st} respondent. Further the 1^{st} respondent filed amendment petition with a prayer (the petitioner issued letter No. 1545 dated 17.02.2024) to take revenge against the 1^{st} respondent by black listing them with the malafide view to stop the payment of Rs. 49,11,921/- to the Respondent No. 01.

4. Further to direct the petitioner to pay the amount of Rs. 49,11,921/- along with monthly compound interest, against each of the invoice after deduction of 45 days from the date of respective invoices as per the provisions of Section 15 and 16 of MSMED Act, 2006 and further to set aside the impugned letter No. 1545 dated 17.02.2014 as invalid.

5. The petitioner has already preferred a petition before the 2^{nd} Respondent in Petition No. 38 of 2013 regarding its maintainability in the light of clause-17 of terms and conditions of the contract i.e. exclusively under the jurisdiction of the Court of Civil Court, Patna to decide any disputes arising

between them.

6. The petitioner floated the open tender notice for supplies of weighing machines and thereafter, the 1st Respondent rate was found to be lowest. Thereafter, the Board of Director gave approval for installing weighing machines in 307 godowns in 38 Districts of Bihar. Accordingly, order was placed with the 1st respondent vide order No. 7680 dated 26.09.2011.

7. Certain issues were raised by the 1st Respondent and after discussions with Managing Director, Bihar State Foods and Civil Supplies Corporation, the said issues were settled and the same was communicated to the 1st respondent vide letter No. 8368 dated 31.10.2011. Later, the machines were transported and installed in godowns and proof of successful installation of machines were also dispatched.

8. It is the specific contention of the writ petitioner that the progress of supply of weighing Scale Machine was not up to the mark, therefore, the 1st Respondent issued warning and directed to expedite supply and installation of weighing machines vide letter No. 8702 dated 17.11.2011, however, the situation did not improve. The 1st respondent was once again directed to complete the supply and installations by 15th

December, 2011 vide letter No. 9284 dated 09.12.2011.

9. The 1st respondent failed to supply and install the order quantity within the stipulated period, therefore, the work order was cancelled and the same was informed to the 1st respondent vide letter No. 941 dated 02.02.2012, and further it was clarified in the letter that why the 1st respondent should not be blacklisted?

10. In response to the aforesaid letter, the 1st respondent submitted a detailed plan vide letter No. 119 dated 05.03.2012 to complete the contract order within six weeks from the date of acceptance of this letter. The petitioner was pleased to accept the offer and the same was communicated to the 1st respondent.

11. Again, the progress was not up to the mark and only 72 weighing machines were delivered out of 307 machines. On the basis of status report, the 1st respondent was again directed to complete the supply and installation of the weighing machines by order dated 30.04.2012.

12. The contents of the petition further disclose that the 1st respondent sent an E-mail dated 11.04.2012, wherein it was mentioned that respondent No. 1 had dispatched 115 machines and supplied 163 machines totaling to 278 machines.

The petitioner replied to E-mail dated 03.05.2012, that they dispatched all machines in total 307 units. But, as per the information received from different districts as on 29.06.2012, it was found that only 142 machines were delivered to the District and out of which many machines were not installed and balance 165 machines were still pending for delivery. As per the terms and conditions, payment of bills against the supply of weighing machine will be made, once successful installation and stamping was done and a Certificate of successful operation was issued by the Assistant Manager. Further, the bill should be counter signed by the concerned District Manager after proper entry in the Stock Register.

13. As successful installation has not been made, the question of payment does not arise as the 1st respondent has violated Clauses 3.3, 3.4, 3.6, and 3.8 of terms and conditions of the agreement.

14. Several notices were issued to complete the contract work but the 1st respondent failed to comply with the terms and conditions of the contract.

15. A detailed counter was filed by the respondent denying all the allegations made in the Writ petition. The counter affidavit disclose, that the petition is wholly

misconceived. The 1st respondent raises the preliminary objection with regard to the jurisdiction of this Hon'ble Court to hear the writ application wherein the petitioner has to challenge the Award passed under the M.S.M.E.D. Act, 2006 by a Facilitation Council in Thane, Mumabi, (Maharashtra).

16. It is contended by the Learned counsel for the petitioner that the Award passed by the Facilitation Council Thane, Mumbai was without jurisdiction and the exclusive jurisdiction for Arbitrarial Tribunal was at Patna, as per Section 20 of the said Act, therefore, prayed to quash the Award passed by the Facilitation Council at Thane, and stay the impugned order dated 21.03.2018 in Petition No. 30 of 2013.

17. On the other hand the Learned counsel for the 1st respondent contended that the MSMED Act, 2006 is a Central Act, wherein as per Section 18(4) of the Act, Thane, Mumbai has the jurisdiction where the buyer was located. It is also contended that Section 18 with reference to the Micro and Small Prices Facilitation Council reads as follows:-

> *"18. Reference to Micro and Small Enterprises Facilitation Council.- (1). Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section*

17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2). On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3). Where the conciliation initiated under Sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 shall then apply to the disputes as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act. Of 1996).

(4). Notwithstanding anything contained ses Facilitation for the time

> *being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution servi services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.*
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> *(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference. This clause seeks to provide for the jurisdiction of the Micro and Small Enterprises Facilitation Council for acting as an arbitrator or conciliator in respect of the matters referred to in clause 17. (Notes on Clauses).”*

18. Further the Learned counsel for the respondent No. 1 relied on Section 20 of the Act which reads as follows:-

> *“20. Establishment of Micro and Small Enterprises Facilitation Council.- The State Government shall, by notification, establish one or more Micro and Small Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification.”*

19. As per the said Sections, whoever disagrees with the Award or order, they have to deposit 75% therein then only an application to setting aside the award will be interfaced.

20. In order to support this contention, Learned counsel for the petitioner relied on the citation of the Hon’ble

Apex Court reported in 2023 SCC online 1852 (India Glycols Limited and Another Vs Micro and Small Enterprises, Facilitation Council, Medchal – Malkajgiri and Others), wherein their Lordships have held in paras 15 and 17 as follows:-

> *"15. For the above reasons, we affirm the decision of the Division Bench by holding that it was justified in coming to the conclusion that the petition under Articles 226/227 of the Constitution instituted by the appellant was not maintainable. Hence, it was unnecessary for the High Court, having come to the conclusion that the petition was not maintainable, to enter upon the merits of the controversy which arose before the Facilitation Council.*
> *17. For the above reasons, we affirm the impugned judgment of the High Court of Telangana dated 21 March 2023 by affirming the finding that the petition which was instituted by the appellant to challenge the award of the Facilitation Council was not maintainable, in view of the prov*isions of Section 34 of the Act of 1996."

21. As per the above citation, it is evident that the Writ petition is not at all maintainable for setting aside the Award passed by the Facilitation Council in view of the provisions of Section 34 of Arbitration and Conciliation Act 1996.

22. Further, the Learned counsel also relied on the citation of Delhi High Court in L.P.A. No. 91 of 2024, C.M.

Application No. 6199 of 2024, C.M. Application No. 6200 of 2024 and C.M. Application No. 6201 of 2024, wherein, the Hon'ble Single Judge has relied on the judgment of the Hon'ble Supreme Court reported in (2023) 6 SCC 401 (Gujarat State Civil Supplies Corporation Limited vs. Mahakali Foods Private Limited) wherein their Lordships have, categorically, held that such an issue of lack of inherent jurisdiction can be decided by the Arbitral Tribunal appointed under the said Act, which by virtue of Section 18(3) of MSMED Act is competent to rule on its own jurisdiction as also other issues in view of Section 16 of the Act of 1996. The sequitur is that, the decision of the Arbitral Tribunal on the issue of jurisdiction would be amendable to challenge under Section 34 of the Act, 1996.

23. Further, the Learned counsel relied on judgment of the Hon'ble Supreme Court in Civil Appeal No. 2941 of 2022 in (M/s Tirupati Steel vs. M/s Shubh Industrial Component and Another), wherein their Lordships have held as under:-

> "*The question which is posed for consideration of this Court is, whether, the pre-deposit of 75% of the awarded amount as per section 19 of the MSMED Act, 2006, while challenge to the award under section 34 of the Arbitration Act, 1996, is made mandatory or not, is now no longer res integra in view of the decision of this Court in the case of*

Gujarat State Disaster Management Authority Vs. Aska Equipments Limited; (2022) 1 SCC 61. *While interpreting section 19 of the MSMED Act, 2006 and after taking into consideration the earlier decision of this Court in the case of* ***Goodyear (India) Ltd. Vs. Norton Intech Rubbers (P) Ltd.; (2012) 6 SCC 345****, it is observed and held that the requirement of deposit of 75% of the amount in terms of the award as a pre-deposit as per section 19 of the MSMED Act, is mandatory. It is also observed that however, at the same time, considering the hardship which may be projected before the appellate court and if the appellate court is satisfied that there shall be undue hardship caused to the appellant/applicant to deposit 75% of the awarded amount as a pre-deposit at a time, the court may allow the pre-deposit to be made in instalments. Therefore, it is specifically observed and held that pre-deposit of 75% of the awarded amount under section 19 of the MSMED Act, 2006 is a mandatory requirement. In para 13 of the aforesaid judgment, it is observed and held as under:-*

"13. *On a plain/fair reading of Section 19 of the MSME Act, 2006, reproduced hereinabove, at the time/before entertaining the application for setting aside the award made under Section 34 of the Arbitration and Conciliation Act, the appellant- applicant has to deposit 75% of the amount in terms of the award as a pre-deposit. The requirement of deposit of 75% of the amount in terms of the award as a pre-deposit is mandatory. However, at the* *same time. considering the hardship which may be projected before the appellate court and if the appellate court is satisfied that there shall be undue hardship caused to the appellant-applicant to deposit 75% of the awarded amount as a pre-deposit at a time, the court may allow the pre-deposit to be made in instalments."*

In view of the aforesaid decision of this Court, the impugned order passed by the High Court permitting the proceedings under section 34 of the Arbitration Act, 1996 without insistence for making pre-deposit of 75% of the awarded amount is unsustainable and the same deserves to be quashed and set aside. As observed hereinabove, while passing the impugned order, the Division Bench of the High Court has relied upon an earlier decision of the Division Bench in the case of ***M/s Mahesh Kumar Singla*** *(supra) which has taken a contrary view. Therefore, the decision of the Division Bench in the case of* ***M/s Mahesh Kumar Singla*** *(supra), which has been relied upon by the Division Bench of the High Court while passing the impugned order, is held to be not good law and is specifically overruled to the extent that it holds that pre- deposit of 75% of the awarded amount under section 19 of the MSMED Act, 2006, is directory and not a mandatory requirement.*

24. Wherein the Hon'ble Apex Court have made it mandatory to deposit 75% of awarded amount before its application under Section 34 of Arbitration Act, while challenging the award.

25. On perusal of the entire record and considering the rival submissions for both the counsel, it is evident that Award has been passed with the Facilitation Council Thane, Mumbai with respect to the disputes between the petitioner as well as the Respondent No. 1. A detailed award has been passed on 21 March, 2018, in Petition No. 38 of 2013. If at all the petitioner has any grievance against the said Award, the remedy is available to challenge it under Section 34 of the the Arbitration Conciliation and Act, 1996.

26. Though, it is contended that the Facilitation Council do not have any jurisdiction to try the matter at Thane, Mumbai, as already Award has been passed, the only remedy available for the petitioner is to challenge it under Section 34 of the Act even on the point of jurisdiction. Moreover, Section 18(4) of MSMED Act jurisdiction lies at the place where the supplier resides. As per the proposition of the Hon’ble Apex Court the Writ petition itself is not maintainable to set aside the Award. Therefore, this Court is of the considerable view that the writ petition is not at all maintainable to set aside or to quash the orders of the Facilitation Council in Petition No. 38 of 2013 dated 21.03.2018. Further, this Court has received the execution petition and the case filed for the execution petition vide order

dated 12.12.2022. In view of the disposal of this writ petition, there is no necessity for pursuing the said record and the Registry is directed to transmit the record to the Executing Council.

27. Interlocutory Application(s), if any, shall stand disposed of.

28. As per the abovesaid observations, this writ petition is dismissed as devoid of merits.

(G. Anupama Chakravarthy, J)

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