

Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 541 OF 2019
WITH
INTERIM APPLICATION (L) NO. 18680 OF 2021

Larsen & Toubro Ltd.

...Petitioner

Versus

Roofs & Ceilings (I) Pvt.Ltd.

...Respondent

Mr. Chetan Kapadia, Senior Counsel, Mr. Faisal Sayyed, Ms. Vidisha Roharia, Mr. Mohammed Oomar Shaikh i/by Manilal Kher Ambalal and Co. for the Petitioner.

Mr. Suresh Dhole a/w Mr. Pravin Mengane for the Respondent.

CORAM : R.I. CHAGLA J

DATE : 28 March 2024

ORAL JUDGMENT :

1. By this Commercial Arbitration Petition, the Petitioner has sought setting aside of the impugned Award dated 14th February 2019 passed by the Facilitation Council.

2. By the impugned Award dated 14th February 2019 which was served upon the Petitioner on 6th March 2019, the

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Facilitation Council had directed the Petitioner to make payment of Rs. 3,31,37,970 along with compound interest with monthly rests from the date immediately following the date agreed upon at three times of bank rate notified by the Reserve Bank of India, till the amount is paid to the Respondent finally. The impugned Award was passed in the Reference Petition No. 77 of 2015 filed by the Respondent herein before the Facilitation Council.

3. The said Reference Petition is a reference submitted by the Respondent herein under Section 18 of the Micro, Small and Medium Enterprises (Development) Act, 2006 (“**the MSMED Act**”). The reference pertains to the Letter of Intent (“**LoI**”) dated 20th August 2012 issued by the Petitioner in favour of the Respondent for the ceiling works contract as well as LoI dated 15th December 2012 issued by the Petitioner in favour of the Respondent for design, fabrication, installation, alignment of skylight well cladding and associated work. The Petitioner had also issued separate work orders in favour of the Respondent in furtherance of the aforementioned LoIs and some were amended from time to time. The LoI and the work orders issued by the Petitioner are with respect to the works which were carried out for expansion of existing Terminal – I at

Bengaluru International Airport and activities related thereto.

4. Arguments have been canvassed by the learned Counsel for both the sides as to the validity of the impugned Award.

5. Mr. Chetan Kapadia, learned Senior Counsel for the Petitioner has made submissions on the issue of the subject contract being a works contract and falling outside the purview of the the MSMED Act. This has been countered by Mr. Dhole for the Respondent who contends that the contract is a supply contract.

6. Mr. Chetan Kapadia has also made submissions on the invalidity of the impugned Award on the ground that the members of the Facilitation Council, who have passed the impugned Award, had also acted as Councilators between the parties. Thus, they could not have assumed the jurisdiction and acted as Arbitrators as this is impermissible under the MSMED Act and amounts to procedural error going to the root of the matter and vitiating the proceedings due to bias and violation of fair play, justice and good conscience.

7. Mr. Kapadia has also made submissions on the Arbitral

Tribunal not having jurisdiction to adjudicate the present dispute since the Respondent was not an MSME as on the date of the contract.

8. However, apart from these grounds of challenge to the impugned Award, which have been countered by Mr. Dhole, what is relevant to consider, is that the learned Arbitral Tribunal/Facilitation Council has denied the opportunity of cross-examination and oral hearing to the Petitioner by wrongful invocation of the law.

9. In order to determine this ground of challenge, it is necessary to refer to the order of this Court dated 7th August 2018 which had been passed in the Writ Petition No. 1084 of 2018 heard along with the Commercial Arbitration Petition No. 500 of 2018. By the said order, this Court had considered the prior impugned order dated 15th January 2018, which had finally disposed of the Application of the Petitioner for cross-examination and oral hearing without granting the Petitioner opportunity of being heard.

10. This Court by the said order dated 7th August 2018 had set aside the impugned order dated 15th January 2018

passed by the Facilitation Council and directed the Facilitation Council to grant an opportunity to the Petitioner to make oral submissions and decide the matter in accordance with law. This Court had directed the parties to appear before the Facilitation Council on the next available date after two weeks from the date of the said order. In view of these directions, Mr. Kapadia, learned Senior Counsel for the Petitioner had withdrawn Writ Petition No. 1084 of 2018.

11. Thereafter, the Facilitation Council had taken up the Application of the Petitioner for oral hearing and cross-examination.

12. In the impugned Award dated 14th February 2019, the Facilitation Council has rejected the Application under Issue No. 3 by holding that this would amount to reopening of trial from the beginning which is not contemplated in summary proceedings. The Facilitation Council has placed reliance upon Section 18(5) of the MSMED Act which provides for disposal of the Reference within 90 days from the date of making such a reference by the MSME under Section 18(1) of the MSMED Act. The Facilitation Council has further

placed reliance upon Section 24(1) read with Section 29B(1) and (3) of the Arbitration Act, which provide for hearing and written proceedings and Fast Track Procedure respectively. The Facilitation Council has thereafter, in paragraph 18 given a finding that considering the above provisions of the MSMED Act and Arbitration Act, Reference Petition No. 77 of 2015 before the Facilitation Council is to be decided on the basis of record and evidences on Affidavits submitted by both the parties. It has been held that “*Therefore, there is no question of holding cross-examination as the respondent submitted vide their Application 4th December 2017.*”

13. The Facilitation Council was directed by this Court vide order dated 7th August 2018 to decide the Application of the Petitioner for oral hearing and cross-examination in accordance with law. This Court was mindful while issuing such direction that the Facilitation Council would consider such an application for oral hearing and cross-examination by keeping in mind, the provisions of the Arbitration Act apart from the MSMED Act. Further, the principles of natural justice were required to be adhered to. It is well settled that where Affidavits of evidence are filed by the parties, an opportunity of cross-examination is required to be granted as it is in

conformity with principles of natural justice and *audi alterem partem*.

14. Mr. Dhole has made submissions on the principle of *audi alterem partem* and natural justice. His submission is that the Facilitation Council had considered Section 29B of the Arbitration Act, which would apply as the provisions of Arbitration Act have under Section 18(3) of the MSMED Act been made to apply to adjudication of disputes before the Facilitation Council. He has submitted that Section 29B contemplates Fast Track Procedure. In such Fast Track Procedure as has been held by the Facilitation Council, the Reference Petition before it is to be decided on the basis of record and evidence on Affidavits submitted by both the parties. Speedy disposal of the Reference is also contemplated under Section 18(5) of the MSMED Act, which provides that the Reference shall be decided within a period of 90 days from making such a reference.

15. Mr. Dhole has submitted that there has been no violation of principles of natural justice and that the supervising Court has no jurisdiction to substitute its own view to the reasoning of the Facilitation Council. He has placed reliance upon the decision

of the Supreme Court in **New Prakash Transport Co. Ltd vs New Suwarna Transport Co. Ltd.**¹, which has held that straight jacket formula cannot be made applicable, but compliance of the doctrine is solely dependent upon the facts and circumstances of each case. The totality of the situation ought to be taken note of and if on examination of such totality, if it comes to light that the executive action suffers from the vice of non-compliance of the doctrine of natural justice, the law Courts in that event ought to set right the wrong inflicted upon the concerned person and to do so would be a plain exercise of judicial power. As a matter of fact, the doctrine is now termed as a synonym of fairness in the concept of justice and stands as the most accepted methodology of governmental action.

16. Mr. Dhole has also placed reliance upon the following decisions of the Supreme Court.:-

(i) **Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant**²;

(ii) **Maneka Gandhi Vs. Union of India**³;

¹ (1957) SCR 98

² AIR 2001 SC 24

³ AIR 1978 SC 597

- (iii) **Sunil Batra Vs. Delhi Administration**⁴;
- (iv) **Hussainara Vs. Home Secretary, State of Bihar**⁵;
- (v) **State of Maharashtra Vs. Champalal**⁶;
- (vi) **Olga Tellis Vs. Bombay Municipal Corporation**⁷

17. Mr. Dhole has submitted that the rule requiring reasons to be given in support of an order is like the principle of *audi alterem partem*, a basic principle of “*natural justice*”, which must inform every quasi-judicial process and the rule must be observed in its proper spirit and mere pretense of compliance with it would not satisfy the requirement of the law.

18. Mr. Dhole has relied upon the decision of the Supreme Court in **The Siemens Engineering and Manufactured Co. of India Ltd. Vs. The Union of India & Anr.**⁸. He has accordingly, submitted that it is clear that the Facilitation Council has not committed breach of principle of natural justice as contended by the

⁴ AIR 1978 SC 1675

⁵ AIR 1979 SC 1369

⁶ AIR 1981 SC 1675

⁷ AIR 1986 SC 180

⁸ (1976)2 SCC 981 : AIR 1976 SC 1785

Petitioner.

19. Mr. Dhole has referred to the Writ Petition No. 1084 of 2018 and his submission is that this Court by order dated 7th August 2018 had turned down, the submissions on violation of natural justice and only granted permission for oral hearing. He has further submitted that the Petition was withdrawn by the Petitioner and also the claim. He has accordingly, submitted that there is no merit in the Application for cross-examination of the Respondent's witness.

20. I have considered the submissions of Mr. Dhole on the issue of whether the Facilitation Council has complied with the principles of natural justice in rejecting the Application of the Petitioner for cross-examination of the Respondent's witness. In my view, what is fundamental to note is that the provisions which have been relied upon by the Facilitation Council, namely Section 29B of the Arbitration Act read with Section 24 of the Arbitration Act and Section 18(5) of the Arbitration Act have not been correctly invoked by the Facilitation Council.

21. Under Section 29B(1) of the Arbitration Act which provides for Fast Track Procedure the Arbitration Act can only be invoked provided the parties to the Arbitration Agreement agree in writing to have their disputes resolved by the Fast Track Procedure. In the present case, there is no such agreement in writing between the parties to the arbitration and thus, in my view, this provision has been wrongly invoked by the Facilitation Council. Further, the Facilitation Council has only relied upon Section 24(1) of the Arbitration Act without considering the proviso thereto. It is provided therein that the Arbitral Tribunal is to hold oral hearings for presentation of evidence or for oral arguments on a day-to-day basis. Thus, the presentation of evidence has been contemplated under proviso to Section 24(1) of the Arbitration Act. The cross-examination of the witness of Respondent herein sought for was very much contemplated under Section 24 of the Arbitration Act and its proviso thereto.

22. I find that the Facilitation Council has by wrongly invoking the Fast Track Procedure under the Arbitration Act, overlooked the correct provision of law which would be applicable namely Section 24 and its proviso thereto, which clearly

contemplates presentation of evidence, which would include cross-examination. The Facilitation Council by holding in paragraph 18 of the impugned Award that the Reference Petition No. 77 of 2015 is to be decided on the basis of record and evidences on Affidavit submitted by both the parties, has not granted an opportunity to the parties to cross examine the witnesses who have given their evidences on Affidavit and thus, the Facilitation Council has clearly wrongful invoked the law which holds otherwise. Further, Section 18(5) of the MSMED Act which provides for the reference made under Section 18 shall be decided within a period of ninety days from the date of making such a reference does not exclude presentation of evidence and cross-examination. Thus, apart from there being a clear violation of the principle of natural justice laid down in the decisions which Mr. Dhole himself has relied upon, the impugned Award requires to be set aside on the ground of wrongful invocation of law by the Facilitation Council.

23. It is well settled by the Supreme Court in **Ssangyong Engg. & Construction Co. Ltd. Vs. National Highways Authority of India (NHAI)**⁹ that the Court though cannot set aside the

⁹ (2019) 15 SCC 131

impugned Award on the ground of mere error of law committed by the Arbitrator in the impugned Award. However, where there is wrongful invocation of law by the Arbitral Tribunal, the impugned Award shall be set aside.

24. Thus, in my view, the impugned Award is to be set aside on the ground of wrongful invocation of law by rejecting the application of the Petitioner to hold cross-examination by placing reliance upon the Fast Track Procedure.

25. The impugned Award dated 14th February 2019 is accordingly, set aside.

26. The above Commercial Arbitration Petition is disposed of accordingly.

27. There shall be no order as to costs.

28. At this stage, Mr. Chetan Kapadia has applied for return of monies deposited by the Petitioner including interest accrued. He has in this context referred to the orders passed by this

Court including order dated 6th June 2019, wherein it was recorded that the Petitioner seeks time to make a statement before this Court as to when it would deposit 75% of the amount in view of Section 19 of the MSMED Act. Therefore, on 12th June 2019, the learned Senior Counsel for the Petitioner on instructions stated that the Petitioner would deposit 75% of the amount inclusive of interest upto the date of deposit. This was to be deposited within two weeks of the Prothonotary & Senior Master determining the amount to be deposited.

29. Further, by the order dated 15th July 2019, this Court had recorded that the Petitioner had deposited 75% of the awarded amount inclusive of interest upto the date of deposit. Accordingly, the impugned Award was stayed. By subsequent order dated 28th August 2019, this Court had allowed the Respondent to withdraw 90% of the amount deposited by the original Petitioner on furnishing a bank guarantee of a nationalised bank, which shall also cover the amount of interest at 8% per annum on the amount which shall be withdrawn. The balance 10% amount was to be invested by the Prothonotary & Senior Master of this Court in a fixed deposit in a nationalised bank initially for a period of two years and thereafter,

for like period depending upon the pendency of the Arbitration Petition.

30. Mr. Kapadia has submitted that in view of the Petition having been allowed, the bank guarantee for 90% of the amount allowed to be withdrawn by the Respondent and which also covers the amount of interest at 8% is required to be encashed by the Petitioner. Further, Mr. Kapadia has submitted that the balance 10% amount which has been invested by the Prothonotary & Senior Master along with the accrued interest is also required to be returned to the Petitioner.

31. Having considered the above submission, I allow the application of the Petitioner for return of the aforementioned amounts which have been deposited by the Petitioner along with the accrued interest. However, considering that Mr. Dhole, learned Counsel for the Respondent has sought time in order to challenge this judgment, Mr. Kapadia states on instructions that for a period of four weeks from the date of uploading of the judgment, the application for the return of the aforementioned amounts will not be proceeded with. Statement is accepted.

32. Interim Application filed in the above Arbitration
Petition does not survive and is accordingly, disposed of.

[R.I. CHAGLA J.]