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O.S.A.No.101 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.12.2023
DELIVERED ON : 15.03.2024

CORAM:

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR
AND
THE HON'BLE MR.JUSTICE P.DHANABAL

O.S.A.No.101 of 2021

M/s.BHARAT SANCHAR NIGAM LIMITED,
Represented by its Chief General Manager,
Southern Telecom Projects,
No.25, BSNL Towers, Greenways Lane,
Raja Annamalai Puram,
Chennai-600 028. ... Appellant

Vs.

1.Micro and Small Enterprises Facilitation Council,
Jaipur (Third),
Office of Commissioner of Industries,
Government of Rajasthan, Udyog Bhavan,
Tilak Marg, Jaipur,
Rajasthan-302 005.

2.M/s.Purma Plast Private Limited,
Represented by Sri Raghuveer Sharma,
B-494, RIICO Industrial Area, Phase I,
Bhiwadi, Alwar, Rajasthan. ... Respondents



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Prayer : Original Side Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996, to set aside the fair and final order, dated 10.12.2020 made in O.P.No.443 of 2020.

For Appellant : Mr.T.R.Rajagopalan
Senior Counsel
for Mr.S.Gopinathan

For R-1 : No appearance

For R-2 : Mr.Abishek Jenasenan

JUDGMENT

[Judgment of the Court was delivered by **P.DHANABAL, J.**]

This Original Side Appeal has been preferred as against the order passed in Arbitration Original Petition No.443 of 2020, wherein, the appellant herein has filed petition under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the arbitral award passed by the Micro and Small Enterprises Facilitation Council, Jaipur. The second respondent herein has filed claim petition before the Micro and Small Enterprises



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Facilitation Council, Jaipur and the same was allowed. As against the order passed by the Micro and Small Enterprises Facilitation Council, Jaipur, he filed the arbitration OP and the same was dismissed. As against the order passed by the learned Single Judge in Original Petition No.443 of 2020, the present Original Side Appeal has been preferred.

2. The first respondent herein has filed claim petition before the Micro and Small Enterprises Facilitation Council, Jaipur stating that the claimant is supplier and the respondent is buyer and the supplier production is the Micro Enterprises of category which is registered in District Industry Centre, Bhiwadi, UAM, dated 25.05.2016. Therefore, as per Rule 2(n) of the Supplier Enterprises Act, 2006, applicant keeps eligibility of the seller. According to the supplier, out of total amount of Rs.6,30,37,837/-, Rs.52,26,273/- has not been paid by the buyer. Therefore, he presented the application under Rule 18 of MSMDE Act, dated 23.02.2018. Thereafter, the Facilitation Council issued notice, dated 13.11.2018 and invited for personal hearing. There was no one present and thereafter, the case was adjourned. Then the Council called for personal hearing and the supplier



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was present on 23.09.2019 and represented his case and the buyer was not present. Therefore, by the Council reconciliation process was ended and arbitration process was began, on the basis of proofs available on paper assuming delayed payment as valid under Rule 16 of MSMDE Act and the decision was made to issue three times monthly compound of popular rate of interest of Reserve Bank of India and passed the award for a sum of Rs.52,26,273/-. Under Rule 16 of MSMDE Act from popular way of Reserve Bank of India, three times compound interest amount of Rs.1,85,12,956/-, total amount of Rs.2,37,39,229/- to be paid to supplier in one month. If amount is not paid by the buyer to supplier within one month, then supplier has to pay Reserve Bank of India's three times monthly compound interest through buyer under Rule 16 of MSMDE Act. The said order was passed on 30.09.2019. Against this order, the arbitration OP has been filed before this Court and the learned Single Judge has dismissed the petition on the ground of limitation.

3. The learned Senior Counsel appearing for the appellant would contend that the learned Single Judge erred in not considering that the



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award itself passed without any notice to this appellant and it is the *ex parte* award. No conciliation or arbitration conducted by the MSEFC Council at any time before passing the award. Since the award passed under the MSMDE Act, the appellant filed OP under the Arbitration and Conciliation Act. Notice has been not served to the BSNL in respect of termination of conciliation or initiation of arbitration by the MSEFC Council. Without serving notice and without giving opportunity, the award was passed. The second respondent has filed a claim petition before the first respondent Council claiming the liquidated damages, after accepting the payments made by the appellant deducting the LD amount as per the tender condition. The extension of time requested by the second respondent was considered by applying the clauses of tender condition that the liquidator damages would be levied for granting extension of time. Therefore, the claim of liquidated damages would not come under the purview of arbitration, since it is non arbitral issue.

4. Further, the learned Single Judge erred in holding that the OP was presented on 09.07.2020. But the OP was filed through e-mail on



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04.06.2020 along with Court fee paid through online. The Registry also returned the petition on 05.06.2020 for want of certified copy of the award in original and deficit Court fee. Again, on 12.06.2020 represented the case through e-filing after paying the balance Court fee of Rs.95,000/- through online and after receipt of the original certified award from the first respondent, the same was filed on 08.07.2020 physically before the Registry of this Court. The photocopy of the award only received on 04.11.2019 and it does not mean that the provision of Section 31 (5) of the Arbitration and Conciliation Act is complied with. As per the provisions of Section 31 (5), the original certified copy of the award containing the signatures of the arbitrator should be served on the party to the arbitral proceedings. When the appellant filed the OP with an application seeking dispense with the production of the certified copy, the Registry, returned with an endorsement that original certified copy should be produced and not xerox copy of the award. Therefore, the petition is not barred by limitation. But the learned Single Judge has failed to consider the same. Moreover, the vendor was silent for two and a half years after receiving the last payment shows that there were no dues payable to him by BSNL. The vendor has misused the



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provisions of MSMDE Act, 2006 and filed false claim before the MSEFC Council. Therefore, the order passed by the learned Single Judge without going into the merits of the case only on the limitation point is not sustainable and the same is liable to be set aside.

5. The learned Counsel appearing for the respondents would contend that the MSEFC Council has passed order in the year 30.10.2019 but the present petition has been filed belatedly (i.e.,) on 09.07.2020. Therefore, the petition was not filed within the time as per Section 34 (3) of the Arbitration and Conciliation Act. The Conciliation proceedings were not started since the respondent fail to appear before the Council. The conciliation proceedings were concluded and the arbitration proceedings were commenced. Therefore, the contention of the appellant / first respondent has no merits and the award passed by the MSEFC Counsel is binding on the appellant. The learned Single Judge after elaborate discussion dismissed the petition on the ground of barred by limitation.



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Therefore, the order passed by the learned Single Judge is in order and the present appeal is liable to be dismissed.

6. This Court after hearing both sides and upon perusing the documents including the order of the Tribunal and learned Single Judge, the point for determination in this appeal are as follows:

- (1) Whether the petition filed under Section 34 of Arbitration Act is barred by limitation?
- (2) Whether the order passed by the MSEFC Council is under the Arbitration Act or not?
- (3) Whether the appeal has to be allowed or not?
- (4) What other relieves the parties are entitled to?

7. Point No.1:

In this case, it is admitted fact that the MSEFC Council has passed order, dated 23.10.2019. In the order itself they stated that none appeared on behalf of the buyer. Therefore, by council reconciliation process was ended



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and arbitration process was begun on the basis of proofs available on proper

and assuming delayed payment as valid under Act 16 of the MSMDE Act.

As per Section 18 of MSMDE Act, it is clear that when conciliation proceedings initiated under Section 18(2) of the MSMDE Act is unsuccessful and stands terminated without any settlement arrived at between the parties, then the Council should either take up the dispute for arbitration or refer the same to any institution or centre providing such services for conducting arbitration proceedings as applicable under Arbitration and Conciliation Act. For the arbitration proceedings they have to serve notice to the respondent to that effect. According to the appellant, they have not received any notice for appointment of arbitrator and arbitral proceedings and they not even received the signed copy of the arbitral award. They only received the xerox copy. Thereby, the Registry also returned the papers for want of certified copy. Thereafter, the petitioner have obtained copy from the respondent and then filed the OP. Therefore, the limitation starts from the date of receipt of signed copy of the arbitrator.

The learned Single Judge after referring the judgment of ***Himachal Techno Engineers*** case ***[Himachal Pradesh and Another Vs. Himachal Techno***



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Engineers and Another] reported in **2010 (12) SCC 210** calculated the date and then came to a conclusion that the petition is barred by limitation. But failed to consider that the date of receipt of award is 13.06.2020. Further the learned Single Judge in the order stated that the BSNL received the impugned award on 04.11.2019 and thereafter, what happened as narrated in paragraph Nos.5 and 6 and other paragraphs of the said affidavit is a internal matter of BSNL and that cannot be pressed into service for expanding statutorily prescribed period of limitation or for lifting the *cap qua* condonable period. But the learned Single Judge failed to consider that the said award is not the signed copy of the arbitrators. The learned Single Judge has interpreted the **Tecco Trichy Engineers** case that the same was in respect of delay within the condonable period or within the tolerance period of 30 days (i.e.,) delay of 27 days was sought to be condoned. The number of days delay is immaterial. The main question is when the limitation will starts. According to Section 31(5) of the Arbitration and Conciliation Act, the parties (i.e.,) applicant of the arbitration Tribunal to serve the signed copy of the order and then only the period of limitation starts.



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8. However, this appeal was tagged along with W.A.Nos.1839 of 2021 and 1792 of 2021 and this Court in the said writ appeals discussed and decided that this Court has no territorial jurisdiction to entertain the writ petitions. W.A.No.1839 of 2021 is pertaining to the order passed by the MSEF Council, which is subject matter of this appeal. Therefore, in view of the findings rendered in W.A.No.1839 of 2021 that this Court has no territorial jurisdiction to entertain the case since the parties have already availed the jurisdiction of MSEF Council at Rajasthan and thereby, this Court has no jurisdiction. Therefore, this Court without going into the merits of the case, is inclined to set aside the order passed by the learned Single Judge on the ground of lack of territorial jurisdiction. This Court has not gone into the merits of the case and the issues raised by the parties are left open and the same can be agitated before the appropriate forum in accordance with law.

9. Once the appellant disputed the jurisdiction of the MSEF Council that they have not followed the procedures under the Arbitration and



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Conciliation Act, and thereby, the award passed by the MSEF Council is not at all arbitral award, if so, the filing of arbitration original petition itself is maintainable or not is also left open to the parties to agitate before the appropriate forum.

10. Point No.2 & 3 :

This Court in the previous point decided that this Court has no territorial jurisdiction to decide the arbitration petition and thereby the other points need not be decided.

11. In view of the above discussions, this Original Side Appeal is allowed and the order passed by the learned Single Judge in arbitration O.P.No.443 of 2020 is set aside. The issues raised by the parties are left open and the same can be agitated before the appropriate forum in accordance with law. There shall be no order as to costs.

(D.K.K.J.,) (P.D.B.J.,)



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NCC : Yes / No
Index : Yes / No
Internet : Yes
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To

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Tilak Marg, Jaipur,
Rajasthan-302 005.

2. Sri Raghuvver Sharma,
M/s. Purma Plast Private Limited,
B-494, RIICO Industrial Area, Phase I,
Bhiwadi, Alwar, Rajasthan.

D.KRISHNAKUMAR, J.
and
P.DHANABAL, J.

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Pre-delivery judgment made in
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