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\* IN THE HIGH COURT OF DELHI AT NEW DELHI

*Date of Decision: 20<sup>th</sup> March, 2024*

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**O.M.P. (COMM) 132/2023**

WAPCOS LIMITED

..... Petitioner

Through: Mr. Pawan Upadhyay, Ms. Supriya R. Pandey, Mr. Himanshu Rao &amp; Mr. Rakesh Kr. Jha, Advs.

versus

VIRGO AQUA

..... Respondent

Through: Mr. Babu Joseph Kuruvathazha Ms. Malini &amp; Ms. Bahita Sant, Advs.

**CORAM:****JUSTICE PRATHIBA M. SINGH****Prathiba M. Singh, J.(Oral)**

1. This hearing has been done through hybrid mode.

**Background and Submissions**

2. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter*, '1996 Act') has been filed by the Petitioner-WAPCOS Ltd., assailing the arbitral award dated 2<sup>nd</sup> December, 2022, passed by the Micro and Small Enterprises Facilitation Council, Kerala (*hereinafter*, 'MSEFC') under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006.

3. Vide the impugned award, the MSEFC held that WAPCOS was liable to pay an amount of Rs. 5.33 crores, w.r.t., three work orders under O.A. 32/2021 and an amount of Rs. 43.31 crores w.r.t two work orders under O.A. 33/2021, along with compound interest on monthly rests calculated at



three times of bank rate notified by the Reserve Bank of India ('RBI').

4. The brief background of the present petition is as follows:

- WAPCOS Limited is a Public Sector Enterprise under the Union Ministry of Jal Shakti and is wholly owned by the Government of India. The Respondent-M/s Virgo Aqua is a micro-enterprise with its office in Kochi, Ernakulam.
- WAPCOS Limited entered into multiple Memorandums of Understanding (*hereinafter*, 'MoUs') and agreements with the Department of Fisheries, Government of Andhra Pradesh, on various dates such as 29<sup>th</sup> February, 2016, 7<sup>th</sup> September, 2018, 10<sup>th</sup> January, 2019, and 12<sup>th</sup> November, 2021 to provide consultancy services for projects as defined in each MoU. These MoUs facilitated the issuance of five tender documents for related works, leading to the selection of M/s. Virgo Aqua as the successful bidder for these tenders. Subsequently, WAPCOS issued work orders for projects across Andhra Pradesh and Odisha, detailing the development of multiple fishery harbours and an aquatic quarantine facility, including associated consultancy services. The said work orders specified different timeframes for the completion of the Detailed Project Reports (*hereinafter*, 'DPRs'), tendering stages, construction supervision, technical assistance, and overall project obligations.
- As per the petition, disputes concerning certain payment issues related to the work orders issued by WAPCOS Limited arose between the parties. M/s. Virgo Aqua approached the MSEFC, filing two Statement of Claims bearing application numbers KL02D0005169/M/0001 (O.A. No. 33/2021, dated 1<sup>st</sup> September,



2022) and KL02D0005169/M/0002 (O.A. No. 32/2021, dated 2<sup>nd</sup> September, 2020) in 2020, although the actual claims were submitted in 2021. WAPCOS claims that the Statement of Claims was not provided it during the conciliation process.

- The disputes were then forwarded to the District Legal Services Authority in Thiruvananthapuram, Kerala for conciliation on 11th December, 2021 as per Section 18(2) of the Micro, Small and Medium Enterprises Development Act, 2006 (*hereinafter, 'MSMED Act'*), but WAPCOS was allegedly not informed of the failure of these proceedings. Eventually, the MSEFC decided to hear both applications concurrently on 30th June, 2022, with both parties present, while WAPCOS claimed to be under the impression that conciliation proceedings were still ongoing.
- In the meantime, the petition states that to expedite the resolution of the disputes, M/s Virgo Aqua approached the High Court of Kerala in a writ petition bearing no. **W.P. (C) No. 25686/2022** titled '**Virgo Aqua v. MSEFC, Kerala**', seeking disposal of the applications/references filed before the MSEFC. Vide judgment dated 16th September, 2022, the High Court of Kerala directed the MSEFC to resolve the references within 10 days. WAPCOS Limited in the present petition claims that despite being a party to the petition, receiving no notification about the M/s Virgo Aqua's petition to the High Court.
- Following the judgment of the Kerala High Court, the MSEFC again issued notice to WAPCOS on 26th October, 2022. However, since there was no appearance, the Petitioner could not be heard. Thereafter



the MSEFC issued the impugned award on 2<sup>nd</sup> December, 2022. However, as per WAPCOS, the award was passed without providing WAPCOS an opportunity to present its case, and at a time when WAPCOS believed that the conciliation proceedings were still ongoing.

5. WAPCOS has assailed the award dated 2<sup>nd</sup> December, 2022 on the following grounds:

- Firstly, it is submitted that the work orders issued do not fall within the scope of the MSMED Act. Despite this, MSEFC proceeded to pass an award, and hence the award has been passed without jurisdiction.
- Secondly, WAPCOS submits that the termination of conciliation proceedings did not take place in terms of Section 76 of the 1996 Act, which provides for instances under which conciliation proceedings may be terminated, including mutual agreement between parties, declaration by the conciliator, or declaration by one party to the conciliator or the other party. The termination of the conciliation proceedings did not comply with the conditions under Section 76 of the 1996 Act, and thus there was an absence of a declaration of termination.

6. As per the petition, the first meeting convened by the MSEFC on 30th June, 2022 directed WAPCOS to file a reply, without specifying the context of the reply, leaving WAPCOS under the impression that conciliation proceedings were still underway. Thereafter, another notice was statedly issued for a hearing scheduled to be held on 26<sup>th</sup> October, 2022. However, WAPCOS claims that it could not attend the hearing due to the ongoing



Diwali vacations, at which point MSEFC reserved its award, and pronounced the same on 2<sup>nd</sup> December, 2022.

7. In the present petition, notice was issued on 21st April, 2023. On the said date, to establish the territorial jurisdiction of this Court to entertain the present petition, WAPCOS relied on the judgment in ***IRCON International Limited v. Pioneer Fabricators Pvt. Ltd., (2023: DHC:2153-DB)***. It was argued that since the arbitration agreement designated New Delhi as the seat of arbitration, this Court had territorial jurisdiction over the matter, regardless of the impugned award being issued by the MSEFC Thiruvananthapuram, Kerala. WAPCOS also highlighted that under Section 18(2) of the MSMED Act, conciliation must precede arbitration and can only lead to arbitration upon failure of the conciliation proceedings. Thus, WAPCOS challenged the MSEFC's assertion that conciliation failed on 11<sup>th</sup> December, 2021, as mentioned in the impugned award.

8. Upon hearing the parties, on the said date, the Court disposed of the present writ petition in the following terms:

*"5. He submits that pursuant to the order dated 16.09.2022 passed in W.P.(C) 25686/2022 titled M/s Virgo Aqua, rep. by its Managing Partner, P.T. Joy v. Micro and Small Enterprises Facilitation Council (MSEFC) & Another, NC: 2022/KER/50229, filed by the respondent herein before the High Court of Kerala, the Facilitation Council issued a notice calling upon the respondent to appear before it on 26.10.2022. As the said notice was not received by the concerned Officer on account of him being on leave, the petitioner by an e-mail dated 30.10.2022 prayed for further opportunity to be heard. However, the Facilitation Council proceeded to pass the Impugned Award.*

*6. He submits that the Impugned Award is liable to be*



*set aside as it is contrary to the procedure prescribed in the MSMED Act' inasmuch as there was no failure of the conciliation proceeding before proceeding with the arbitration. In any case, if the arbitration was to be proceeded with, sufficient time should have been given to the petitioner to respond to the claim of the respondent. He submits that even the request dated 30.10.2022 remained unanswered by the Facilitation Council.*

*7. Issue notice.*

*8. Notice is accepted by Ms. Malini Poduval, learned counsel, on behalf of the respondent.*

**9. She submits that, without prejudice to the rights and contentions of the respondent, she has no objection if the Impugned Award is set aside and the matter is remanded back to the Facilitation Council for adjudication of the disputes in accordance with the MSMED Act.**

**10. The learned counsel for the petitioner does not oppose being referred back to the Facilitation Council for a fresh determination.**

**11. Accordingly, the Impugned Award is set aside. The parties are directed to appear before the Facilitation Council on 19<sup>th</sup> May, 2023 at 11:00 AM.**

**12. The Facilitation Council shall thereafter proceed with the reference filed by the respondent in accordance with the MSMED Act.**

**13. The petition and the pending application are disposed of in the above terms."**

9. Thereafter, a review petition bearing **no. 126/2023** was filed by Virgo Aqua, seeking a review of the order dated 21<sup>st</sup> April, 2023. The ground for the review was that the Id. Counsel for Virgo Aqua did not have instructions to consent to the setting aside of the impugned award or for the remand of the matter to the MSEFC. Vide order dated 8<sup>th</sup> May, 2023, this Court recalled the order dated 21<sup>st</sup> April, 2023 in the following terms:



*“3. The application has been filed on the premise that the learned counsel appearing for the respondent did not have the instructions to accede to the setting aside of the Impugned Award or for the remand of the matter to the Facilitation Council.*

**4. Though, the respondent was represented by a counsel who would have full authority to act in the matter, as the learned counsel for the petitioner does not oppose the present Review Petition, the same is allowed. The order dated 21.04.2023 is recalled.”**

10. Thereafter, upon fresh notice being issued in the present petition under Section 34 of the 1996 Act, Virgo Aqua filed its reply affidavit on 30<sup>th</sup> June, 2023. The grounds taken by Virgo Aqua *inter alia* are as follows:

- Since the impugned award was passed under Section 18 of MSMED Act, in order to sustain the present challenge, it is obligatory to pre-deposit 75% of the amount, as provided under Section 19 of MSMED Act, within 120 days.
- WAPCOS received a conciliation notice but failed to attend, contradicting claims of non-existent conciliation proceedings.

11. Thereafter, vide order dated 17th November, 2023, this Court recorded WAPCOS' submission that the Petitioner does not contest the requirement for the deposit to be made. However, WAPCOS requested that the Court may direct the provision of a bank guarantee or other suitable security instead of making the deposit. This was objected by Virgo Aqua. Thus, on the said date, the Court granted time to WAPCOS to cite cases supporting the plea that a bank guarantee or other form of security can be provided in lieu of a deposit.



### Analysis

12. The legal issue arising in this case concerns whether the 90-day period prescribed under Section 18(5) of the MSMED Act applies solely to conciliation proceedings under Section 18(2) or also to arbitration proceedings under Section 18(3).

13. The Court has examined the matter. The dispute between the parties related to payments to be made by WAPCOS to Virgo Aqua. Virgo Aqua approached the MSEFC. Initially, conciliation proceedings took place in which notice was issued to WAPCOS and it appeared before the MSEFC, as recorded vide order dated 30<sup>th</sup> June, 2022. It however chose not to file objections and also stopped appearing in the matter. The matter did not reach any settlement or fruition.

14. Virgo Aqua was then constrained to approach the Kerala High Court by way of a writ petition. In the said proceeding before the Kerala High Court, vide judgment dated 16<sup>th</sup> September, 2022, the High Court directed as under:

*“3. Learned Government Pleader submitted that there is no deliberate delay on the part of the first respondent. It is pointed out that after the second respondent entered appearance, the matter was referred to the District Legal Service Authority, Thiruvananthapuram for mediation as provided under Section 18(2) of the Act. **The mediation failed and the Council is now proceeding to decide the original applications.***

***Having heard the learned Counsel on either side and having been taken to the relevant provisions, the Writ Petition is disposed of, directing the first respondent to take up O.A.Nos.32/2021 and 33/2021 to decide the dispute within ten days of receipt of a copy***



*of this judgment.”*

15. Subsequent to this order, the MSEFC issued another notice to WAPCOS on 16th October, 2022, in which WAPCOS did not participate in the proceedings. No adjournment was also sought by WAPCOS from the MSEFC. The MSEFC gave effect to the Kerala High Court's order and resolved the matter within the 10-day period as directed by the High Court. The language of the order of the High Court brooks no ambiguity. MSEFC had to '**decide**' the dispute, meaning thereby it had to enter reference and pass an award. Such a course of action is contemplated and fully permissible under Section 18 of the Act which provides in sub-section (3) that the MSEFC can either itself decide the matter or send it to any other arbitration centre. The relevant provision is set out below:

***“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 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.**

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution 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.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference..”

16. A perusal the above section shows that there are two stages in a Section 18 reference

- Conciliation
- Arbitration
  - By MSEFC
  - By a third party arbitral institution

The word `decide` does not connote conciliation but in fact adjudication, which is what the MSEFC did. It also gave notice to WAPCOS and it chose to remain absent. The conduct of WAPCOS of -

- Initially not filing objections during the conciliation proceedings – thereby resulting in its stand not being placed before the MSEFC;
- Thereafter stopping appearance in the conciliation proceedings;



- Not appearing after receiving notice from the MSEFC post the decision dated 16<sup>th</sup> September, 2022 of the High Court of Kerala
- Not even showing any inclination to appear, by filing an adjournment request etc.,

The above conduct shows that WAPCOS has, after having obtained notice of the proceedings, stayed away from the same at its own peril.

17. The legal issue raised by WAPCOS in this petition is that the Kerala High Court only allowed the MSEFC to conclude the conciliation proceedings, not the arbitration proceedings. So the award is not sustainable.

18. The Court has perused through Section 18 of the MSMED Act, as well as the orders of the Kerala High Court and the award. It is clear from the impugned award that WAPCOS was repeatedly notified but did not appear. Despite attempts at conciliation before the MSEFC, the process failed. Once the matter was brought before the Kerala High Court, the decision, as mentioned, required the MSEFC to adjudicate the disputes between the parties within the stipulated time period. Therefore, the matter progressed to the stage outlined in Section 18(3) of the MSMED Act, and the MSEFC proceeded accordingly.

19. WAPCOS, having failed to appear before the MSEFC despite notices issued following the Kerala High Court's order, led to the issuing of the impugned award. According to the proviso of Section 19(1) of the MSMED Act, when such an award is passed, 75% of the awarded amount ought to be deposited in the Court for a challenge to be considered.

20. The requirement of deposit under Section 19 of the MSMED Act is mandatory. A buyer ought to first deposit 75% of the awarded amount, as a one-time deposit or in instalments, before the Court may entertain an



application for setting aside of the award made by the MSEFC. On the requirement of deposit, the Supreme Court in *M/s. Tirupati Steels v. M/s. Shubh Industrial Components [(2022) 7 SCC 429]* held as under:

*“4. 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 3 observed and held that pre-deposit of 75% of the awarded amount under section 19 of the MSMED Act, 2006 is a mandatory requirement...*

**5. 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.**

21. Consequently, the Petitioner is directed to deposit the said amount within 8 weeks, failing which the present petition would be liable to be dismissed.

22. List on 15th July, 2024.

**PRATHIBA M. SINGH  
JUDGE**

**MARCH 20, 2024**

*dj/dn*

*corrected & released on 26<sup>th</sup> March, 2024*