

Bombay High Court

M/S. Steel Authority Of India Ltd vs The Micro on 27 August, 2010

Bench: S.A. Bobde, Mridula Bhatkar

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 2145/2010

1. M/s. Steel Authority of India Ltd.,

A Government Company having its Registered
Office at Ispat Bhavan, Lodhi Road, New Delhi.

2. Bhilai Steel Plant Through its
Authorised Person, Factory at

Bhilai, Dist. Durg (Chhattisgarh)

.....PETITIONERS

... V E R S U S ...

1. The Micro, Small Enterprise Facilitation

Council, through Joint Director of

Industries Nagpur Region, Office at Udyog
Bhawan, Nagpur.

2. M/s. Vidarbha Ceramics Pvt. Ltd. ,

a Industry incorporated under the relevant
provisions of the Companies Act, 1956.

Having its Registered Office at
5, Temple Road, Civil Lines, Nagpur Factory
At:- F-13, MIDC,

Industrial Area Hingna.

.... RESPONDENTS

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Mr. K. H. Deshpande, Senior Advocate with Mr. S. S. Khati, Advocate

for petitioners.

Mrs. Bharti Dangre, Addl. Government Pleader for respondent no.1.

Mr. Suresh Dhole, Advocate for respondent no.2.

CORAM:- S. A. BOBDE &

MRS. MRIDULA BHATKAR, JJ.

th DATE :-

AUGUST , 2010 ORAL JUDGMENT (Per:- S. A. Bobde, J.)

1. Rule. Rule returnable forthwith. Heard finally by consent of the parties.

2. This is a petition by M/s. Steel Authority of India, questioning the jurisdiction of respondent NO.1-THE Micro, Small Enterprises Facilitation Council (hereinafter referred to as "the Council") in entertaining a reference under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "the Act"), in disputes, which have arisen between the petitioners as a buyer of goods from respondent NO.2-M/S. Vidarbha Ceramics Pvt. Ltd, as seller.

3. Respondent NO.2-M/S. Vidarbha Ceramics Pvt. Ltd.

(hereinafter referred to as "the Supplier") has supplied certain goods to the petitioners (hereinafter referred to as "the Buyers") under a contract for supply of Fire Clay Refractory Coke-Oven. According to the petitioners, the materials supplied by the supplier were defective and the supplier was, therefore, asked to replace the material. The supplier, apparently, admitted the defects in the material vide communications dated 01.01.2007, 25.01.2007 and 10.02.2007.

The supplier, thereafter, issued a notice to the petitioners and invoked clause 22 of the agreement between them and proposed to appoint Justice C. P. Sen (Retired) as Arbitrator to settle the dispute through arbitration. However, in pursuance to clause 23 of the general conditions of contract, the petitioners exercised, its powers and appointed one Mr. S. K. Gulati as an Arbitrator for resolving the disputes between the parties. The Arbitrator issued notices to the parties on 09.03.2009 asking them to submit their claim within 21 days. However, on 26.03.2009, the supplier instead of filing the claim submission before the Arbitrator, objected to the arbitration by stating that the matter be either referred to Justice C. P. Sen (Retired) or it should go before the Micro, Small Enterprise Facilitation Council (hereinafter referred to as "the Council") established under the Act.

The petitioners declined to enter into another mode of settlement of dispute before the Council since it had already appointed an Arbitrator. On 17.04.2009, the supplier went ahead and filed a reference before the respondent NO.1-COUNCIL under Section 18 of the Act. The petitioners filed an objection before the Council contending that the matter cannot be entertained by it in view of the Arbitration and Conciliation Act, 1996.

4. In this background, respondent NO.1-COUNCIL having decided to proceed with the matter, the petitioners have invoked jurisdiction of this Court for a Writ of Prohibition restraining the Council from entertaining the reference.

5. Mr. K. H. Deshpande, the learned counsel for the petitioners, submitted that the reference under Section 18 of the Act is not tenable in the present case before the Council since there is an arbitration agreement between the parties, which has already been invoked by the petitioners and in fact even by respondent-supplier, who has mainly disputed the choice of the Arbitrator. According

to the learned Senior Advocate, a reference may be entertained by the Council only where an arbitration agreement does not exist between the parties. He further submitted that there is no inconsistency between the existence of an independent arbitration agreement and the arbitration which the Council is bound to undertake under the Act. In the submission of the learned counsel for the petitioners, the arbitration agreement between the parties could have been ignored only if the Arbitration in pursuant thereof was inconsistent with the provisions of the Act, which has an overriding effect over any law and not in a case such as the present one where there is no inconsistency between the arbitration agreement between the parties and the arbitration is liable to be held in pursuance thereof on one hand and the Arbitration, which may be conducted by the Council under the provisions of Section 18 of the Act, since the arbitration to be conducted by the Council is also required to be conducted under the provisions of the Arbitration and Conciliation Act, 1996. In short, the contention on behalf of the petitioners is that no inconsistency can arise if the arbitration is conducted under the arbitration agreement and the arbitration is conducted by the Council under Section 18 of the Act since both must be conducted under the Arbitration and Conciliation Act, 1996.

It is further submitted that the scheme under the Act namely Sections 16, 17 and 18 provide only for recovery of a sum allegedly due to the seller, therefore, a party such as a buyer i.e the petitioners are not entitled to invoke that remedy. Hence, according to the learned counsel for the petitioners, the arbitration agreement between the parties, which allows for an adjudication of the claims and counter claims of both the parties, if any, under the provision of the Arbitration and Conciliation Act, 1996 is the only proper remedy.

6. It is, therefore, necessary to look into the provisions of the Act. The Act is enacted to provide for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or identical thereto. The Act has enacted special provisions for preventing delayed payments to such enterprises and a special procedure for recovery of the amount due to a supplier is also laid down. Chapter V of the Act contains the special provisions. Section 15 of the Act provides that a buyer is liable to make payment of goods purchased from a micro or small enterprise on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day, which is the 16TH day from the day of acceptance or deemed day of acceptance of the goods. Section 16 of the Act provides that notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, the buyer shall be liable to pay compound interest with monthly rests to the supplier on the amount due from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank. Section 17 provides that the buyer shall be liable to pay entire amount i.e. price of goods with interest as contemplated by Section 16. Section 18 provides for mechanism for reference i.e. reference of the dispute by any of the parties to the Micro and Small Enterprises Facilitation Council. And section 19 provides for an application for setting aside a decree, award or other order made by Council or by institution or Centre, which acts as an Arbitrator. However, it is not necessary to deal with other provisions of Chapter V since they do not have direct bearing on this matter, except Section 24. Section 24 of the Act provides for an overriding effect of Sections 15 to 23 notwithstanding anything inconsistent therewith contained in any other law for the time being

in force.

7. Sections 17, 18, 19 and 24 of the Act read as follows:-

17. Recovery of amount due.- For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under Section 16.

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 condition 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 to it 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.

19. Application for setting aside decree, award or order.- No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited within it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:

Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems

necessary to impose.

(20)

(21)

(22)

(23)

(24) OVERRIDING effect.- The provisions of Section 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

8. Mr. Deshpande, the learned counsel for the petitioners, submitted that where there is an independent arbitration agreement in existence between the parties, the Council has no jurisdiction under Section 18 of the Act either to conduct conciliation or to enter upon the reference for the purposes of arbitration. According to Mr. Deshpande, Section 24 of the Act, which provides for an overriding effect of the provisions of the Act including Section 18, which provides for reference to a Council is of no effect in a case where there is an arbitration agreement capable of being given full effect to under the provisions of the Arbitration and Conciliation Act, 1996. Since such an agreement serves the same purpose as that of arbitration, which might be entered upon under Section 18 of the Act by the Council. According to the learned counsel for the petitioners, a buyer like the petitioners, have no remedy under the Act and are not entitled to invoke the provisions of Section 18 of the Act at all either for conciliation or for arbitration since an amount can be claimed under Section 18 of the Act only in respect of an amount due under Section 17, which in term can only be an amount payable by the buyer for service provided or goods provided by the supplier.

9. As against this, Mrs. Dangre, the learned Additional Government Pleader for respondent NO.1, submitted that though Section 17 of the Act makes a provision for recovery of the amount due from the buyer alone at the instance of the supplier, Section 18 clearly contemplates that any party to the dispute may; with regard to any amount due under Section 17; make reference to the Council in view of the expressed provisions of Section 18 (1) supra. According to the learned Addl. Government Pleader, the purport of the Act is to provide for a special procedure for micro, small and medium enterprises to recover the amount and the Act has, therefore, set up a Facilitation Council, which is required to deal with the dispute, which has arisen between a buyer and a micro and small enterprise, initially by conciliation and later if conciliation fails, by arbitration.

10. Mr. Dhole, the learned counsel for respondent NO.2, submitted that the arbitration agreement between the parties cannot be given effect to in view of the Forum provided by Section 18, which has been given an overriding effect by Section 24 of the Act.

11. Having considered the matter, we find that Section 18 (1) of the Act, in terms allows any party to a dispute relating to the amount due under Section 17 i.e. an amount due and payable by buyer to seller; to approach the facilitation Council. It is rightly contended by Mrs. Dangre, the learned Addl.

Government Pleader, that there can be variety of disputes between the parties such as about the date of acceptance of the goods or the deemed day of acceptance, about schedule of supplies etc. because of which a buyer may have a strong objection to the bills raised by the supplier in which case a buyer must be considered eligible to approach the Council. We find that Section 18(1) clearly allows any party to a dispute namely a buyer and a supplier to make reference to the Council. However, the question is; what would be the next step after such a reference is made, when an arbitration agreement exists between the parties or not. We find that there is no provision in the Act, which negates or renders an arbitration agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the provisions of Section 15 to 23-INCLUDING section 18, which provides for forum for resolution of the dispute under the Act-would not have the effect of negating an arbitration agreement since that section overrides only such things that are inconsistent with Section 15 to 23 including Section 18 notwithstanding anything contained in any other law for the time being in force. Section 18(3) of the Act in terms provides that where conciliation before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution and that the provisions of the Arbitration and Conciliation Act, 1996 shall thus apply to the disputes as an arbitration in pursuance of arbitration agreement referred to in Section 7 (1) of the Arbitration and Conciliation Act, 1996. This procedure for arbitration and conciliation is precisely the procedure under which all arbitration agreements are dealt with. We, thus find that it cannot be said that because Section 18 provides for a forum of arbitration an independent arbitration agreement entered into between the parties will cease to have effect. There is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996.

12. At this stage, it is necessary to deal with another contention raised on behalf of the Council by Mrs. Dangre, the learned Addl. Government Pleader. According to the learned Addl.

Government Pleader, the procedure of conciliation contemplated by Section 18 (2) of the Act is a procedure, which has been specially enacted for the purposes providing a Forum for conciliation which itself is capable of settling a dispute between the micro, small and medium enterprises and any other party. We find that the arbitration agreement in question, like most arbitration agreements, does not contain a specific provision for conciliation and, therefore, it would be necessary for the parties to submit to the conciliation process under Section 18 (2) of the Act notwithstanding the existence of an arbitration agreement. Undoubtedly, the Council may either itself conduct the conciliation in accordance with the provisions of Section 65 to 81 of the Arbitration and Conciliation Act, 1996 or as provided by Section 18 (2) of the Act refer it to any institute or centre provided for alternate dispute resolution.

13. At one stage, it was also submitted at the bar that the procedure contemplated by Section 18 of the Act for resolution of dispute is not compulsory either for the seller or the buyer and the parties are free to adopt any course including the civil suit. We, however, find that it is not possible for the parties-whether a buyer or seller-to invoke jurisdiction of a Civil Court by filing Civil Suit in respect

of its claim particularly since the requirement of conciliation is mandatory and the buyer or seller must approach the Council where there is a dispute with regard to any amount due under Section 17 of the Act.

14. In the circumstances, we hold that respondent NO.1-

Council is not entitled to proceed under the provisions of Section 18 (3) of the Act in view of independent arbitration agreement dated 23.09.2005 between the parties. The petitioners and respondent NO.2 shall, however, participate in the conciliation, which shall be conducted by respondent NO.1-COUNCIL under the provisions of Section 18 (1) and (2) of the Act. Respondent NO.1-COUNCIL shall complete the process of conciliation within a period of two weeks from the date the parties appear before it. The parties are directed to appear before respondent NO.1-COUNCIL on 25.10 .2010.

Rule made absolute in the above terms. No order as to costs.

JUDGE

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