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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 26th July, 2022

+ OMP(ENF.)(COMM.) 140/2021 & EX.APPL.(OS) 988/2021

M/S. UNICON ENGINEERS Petitioner
Through: Mr. Senthil Jagadeesam, Ms.
Mrinal Kanwar & Mr. Sajal Jain,
Advocates.

versus

M/S. JINDAL STEEL
AND POWER LTD Judgment Debtor
Through: Mr. Saket Sikri, Mr. Naman Joshi,
Mr. Yuvraj Francis, Mr. Ajay
Pal Khullar & Ms. Ekta Gupta,
Advocates.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. The petitioner seeks execution of an “order” dated 22.09.2020 passed by the Micro & Small Enterprises Facilitation Council, Coimbatore Region [“the Council”]. The proceedings have been filed on the premise that the said order is an arbitral award capable of execution under Section 36 of the Arbitration and Conciliation Act, 1996 [“the Act”].

2. The petitioner is a “small enterprise” within the meaning of the Micro, Small & Medium Enterprises Development Act, 2006 [“the

MSMED Act”]. The respondent issued a work order dated 29.05.2015 in favour of the petitioner for erection of pollution control equipment. The value of the work awarded was to the tune of ₹6.47 crores. The claim of the petitioner was that the respondent failed in making timely payment on account of which, a sum of ₹1,76,45,947/- became due from the respondent. It proceeded under Section 18 of the MSMED Act by making a complaint before the Council constituted under Section 20 thereof.

3. The proceedings resulted in the impugned order dated 22.09.2020. The order narrates the proceedings over six sittings, culminating in the hearing held on 22.09.2020. The proceeding of the 6th hearing held on 22.09.2020 are summarised in the following terms:-

*“During the hearing held on 22.9.2020 through Video Conference, the Petitioner was present and represented by Thiru P. Ponram, Managing Partner and the Respondent was represented by Thiru Sidharth Tiwary and Thiru Akshat Bajbai. This was the 6th hearing. **After lapse of 6 hearings there is no conciliation among the Petitioner and Respondent. The Petitioner Enterprise has submitted a revised due amount of Rs.1,67,37,737/- vide their letter No.FIN/107/2020-21 dated 16.7.2020, and the revised claim for cost is Rs.5,41,35,658/- Subsequently, the Respondent has also acknowledge the outstanding due of Rs.167,37,737/- vide their e mail dated 22.9.2020.**”*

[Emphasis supplied]

4. The Council has thereafter held as follows: -

*"Based on a detailed and critical examination of the claims made by the Petitioner along with available materials on record, **the Council decided to issue final orders directly that the Respondent was liable to pay Rs.167.37,737/-** [Rupees one Crores sixty seven lakhs seven hundred and thirty seven only] to the Petitioner **with compounded interest with monthly rests, at three times the Bank rate** notified by the Reserve Bank of India as stipulated in the Section 15 and 16 of MSMED Act, 2006 [and claim for Rs.5,41,35,658/- referred to HAC, Chennai for arbitration.]*

In this regard, Section 15 of the MSMED Act 2006 is extracted hereunder:

"Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefore 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: Provided that in no case, the period agreed upon between the supplier and the buyer in writing shall exceed forty- five days from the day of acceptance or the day of deemed acceptance."

Section 16 of the MSMED Act 2006 is extracted hereunder:

"Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount 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."

*The Council directed that the Petitioner was entitled to recover the principal amount **of Rs.1,67,37,737/-**(Rupees*

*one Crores sixty seven lakhs seven hundred and thirty seven only) with compounded interest for the pending bills. The Council ordered the Respondent to pay the principal sum of **Rs.1,67,37,737** /-(Rupees one Crores sixty seven lakhs seven hundred and thirty seven only) together with compounded interest with monthly rests, at three times of the bank rate notified by the Reserve Bank of India as stipulated in the Section 15 and 16 MSMED Act, 2006 from the appointed due dates as above to the Petitioner till the date of settlement. ”*

[Emphasis supplied]

5. Ms. Mrinal Kanwar, learned counsel for the petitioner, has drawn my attention to a communication of the respondent dated 21.04.2021, which indicates that the principal sum has been released pursuant to the directions of the Council dated 22.09.2020, but that there is an apparent mismatch in the calculation of the interest component payable to the petitioner. Ms. Kanwar states that the execution arises in respect of the interest component, as directed by the Council.

6. In this regard, a preliminary objection is taken by Mr. Saket Sikri, learned counsel for the respondent, that the execution proceedings are not maintainable as the aforesaid order is not an executable arbitral award at all. He submits that the proceedings were taken up by the Council for conciliation which, as recorded in the impugned award, failed. In these circumstances, Mr. Sikri submits that the Council was required to refer the matter to arbitration and could not have passed a direction for payment by the respondent to the petitioner. He relies upon the judgment of the Supreme Court in

Jharkhand Urja Vikas Nigam Limited vs. The State of Rajasthan & Ors.
[Civil Appeal No. 2899/2021, decided on 15.12.2021] in this connection.

7. Ms. Kanwar, on the other hand, submits that the respondent having failed to challenge the order of the Council cannot now resist execution on this ground. She states that both the parties had submitted their documents in the course of the conciliation proceedings, and the Council has directed payment of only the admitted sums, alongwith interest as stipulated in the MSMED Act itself. To this extent, she submits that the order ought to be regarded as an arbitral award.

8. Section 18 of the MSMED Act provides 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 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.”

9. This provision has been interpreted by the judgment of the Supreme Court in *Jharkhand Urja Vikas Nigam Limited* (supra), cited by Mr. Sikri. In that case, the appellant before the Supreme Court had challenged an order of the Facilitation Council directing payment, by way of a writ petition. The Facilitation Council had issued summons on a complaint by the enterprise. The appellant having failed to appear, the Council passed the order directing payment of certain amounts by the appellant to it. The challenge failed before the High Court (before the learned Single Judge and the Division Bench).

10. The Supreme Court allowed the appeal, with the following observations:-

*“9. From a reading of Section 18(2) and 18(3) of the MSMED Act it is clear that the Council is obliged to conduct conciliation for which the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 would apply, as if the conciliation was initiated under Part III of the said Act. **Under Section 18(3), when conciliation fails and stands terminated, the dispute between the parties can be resolved by arbitration.** The Council is empowered either to take up arbitration on its own or to refer the arbitration proceedings to any institution as specified in the said Section. **It is open to the Council to arbitrate and pass an award, after following the procedure under the relevant provisions of the Arbitration and Conciliation Act, 1996, particularly Sections 20, 23, 24, 25.***

10. There is a fundamental difference between conciliation and arbitration. In conciliation the conciliator assists the parties to arrive at an amicable settlement, in an impartial and independent manner. In arbitration, the Arbitral Tribunal/ arbitrator adjudicates the disputes between the parties. The claim has to be proved before the arbitrator, if necessary, by adducing evidence, even though the rules of the Civil Procedure Code or the Indian Evidence Act may not apply. Unless otherwise agreed, oral hearings are to be held.

11. If the appellant had not submitted its reply at the conciliation stage, and failed to appear, the Facilitation Council could, at best, have recorded the failure of conciliation and proceeded to initiate arbitration proceedings in accordance with the relevant provisions of the Arbitration and Conciliation Act, 1996, to adjudicate the dispute and make an award. **Proceedings for conciliation and arbitration cannot be clubbed.**

12. In this case only on the ground that the appellant had not appeared in the proceedings for conciliation, on the very first date of appearance, that is, 06.08.2012, an order was passed directing the appellant and/or its predecessor/Jharkhand State Electricity Board to pay Rs.78,74,041/- towards the principal claim and Rs.91,59,705/- odd towards interest. **As it is clear from the records of the impugned proceedings that the Facilitation Council did not initiate arbitration proceedings in accordance with the relevant provisions of the Arbitration and Conciliation Act, 1996.**

13. **The order dated 06.08.2012 is a nullity and runs contrary not only to the provisions of MSMED Act but contrary to various mandatory provisions of Arbitration and Conciliation Act, 1996.** The order dated 06.08.2012 is patently illegal. **There is no arbitral award in the eye of law.** It is true that under the scheme of the Arbitration and Conciliation Act, 1996 an arbitral award can only be questioned by way of application under Section 34 of the Arbitration and Conciliation Act, 1996. **At the same time when an order is passed without recourse to arbitration and in utter disregard to the provisions of Arbitration and Conciliation Act, 1996, Section 34 of the said Act will not apply.** We cannot reject this appeal only on the ground that appellant has not availed the remedy under Section 34 of the Arbitration and Conciliation Act, 1996. The submission of the learned senior counsel appearing for the 3rd respondent that there was delay and laches in filing writ petition also cannot be accepted. After 06.08.2012 order, the appellant after verification of the records has paid an amount of Rs.64,43,488/- on 22.01.2013 and the said amount was received by the 3rd respondent without any protest. Three years thereafter it made an attempt to execute the order in Execution Case No.69 of 2016 before the Civil Judge, Ranchi, which ultimately ended in dismissal for want of territorial jurisdiction, vide order dated 31.01.2017. Thereafter S.B.Civil Writ Petition No.11657 of 2017 was filed

questioning the order dated 06.08.2012 before the Rajasthan High Court. In that view of the matter it cannot be said that there was abnormal delay and laches on the part of the appellant in approaching the High Court. As much as the 3rd respondent has already received an amount of Rs.63,43,488/- paid by the appellant, without any protest and demur, it cannot be said that the appellant lost its right to question the order dated 06.08.2012. Though the learned counsel appearing for the respondents have placed reliance on certain judgments to support their case, but as the order of 06.08.2012 was passed contrary to Section 18(3) of the MSMED Act and the mandatory provisions of the Arbitration and Conciliation Act, 1996, we are of the view that such judgments would not render any assistance to support their case.”

[Emphasis supplied]

11. I am of the view that the present order sought to be executed by the petitioner suffers from the same vice, as held by the Supreme Court in the aforementioned case. The Council held that the conciliation proceedings admittedly failed, as recorded in the order extracted above. However, instead of following the procedure of Section 18(3) of the MSMED Act, the Council proceeded to direct that the petitioner was entitled to recover part of its claim from the respondent. The remainder of the claim was, in fact, referred to the High Court Arbitration Centre, Chennai, for arbitration. I am informed that the arbitration proceedings pursuant to the aforesaid reference are in progress, and both the parties have made their claims and counter claims.

12. Be that as it may, as far as the present direction is concerned, the Council does not appear to have taken up the matter for arbitration, or to refer this component of the petitioner's claims to arbitration at all. It is clear from the observations of the Supreme Court in *Jharkhand Urja Vikas Nigam Limited* (supra) that, even if the Council were to arbitrate and pass an award, the relevant procedure of the Arbitration and Conciliation Act, 1996, particularly Sections 20, 23, 24 and 25, must be followed. Ms. Kanwar did not seek to contend that this procedure was, in fact, followed in the present case. The observations of the Supreme Court in paragraph 11 make it clear that the proceedings for conciliation and arbitration cannot be clubbed. Taking the present case at its highest, the procedure adopted by the Council is contrary to this mandate. I am, therefore, of the view that the order does not constitute an arbitral award, and the preliminary objection to the present execution proceedings raised by Mr. Sikrimust succeed.

13. As held by the Supreme Court in paragraph 13 above, such a direction is a nullity and not an award at all. The Court has specifically negated the applicability of Section 34 of the Act in such a situation, and Ms. Kanwar's contention to the contrary must also fail.

14. The enforcement proceedings, along with the pending application, are therefore, disposed of as not maintainable, without prejudice to the petitioner's right to seek recovery of the unpaid interest amount in such proceedings as it may be advised.

15. Ms. Kanwar states that the petitioner will approach the arbitrator in the pending arbitration proceedings for an amendment of its claims to include the aforesaid amount. In the event the petitioner does so, the learned Arbitral Tribunal may consider the petitioner's request in accordance with law.

PRATEEK JALAN, J

JULY 26, 2022

„Bhupi“/