Delhi High Court

Mangalore Refinery & ... vs Micro And Small Enterprises ... on 24 January, 2019

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ W.P.(C) 6564/2016 & CM No. 26926/2016

MANGALORE REFINERY & PETROCHEMICALS LTD. ..... Petitioner

Through: Mr J. P. Sengh, Sr. Advocate with Mr Jai Bansal, Mr Shahi Pratap Singh, Ms Mrigna Shekhar, Ms Manisha Mehta and Mr Akash Mishra, Advocates.

versus

MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL & ANR ..... Respondents

Through: Mr Sanjay Dewan and Ms Nishima Arora, Advocates for R-1.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% 24.01.2019

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, inter alia, impugning an order dated 16.06.2016 passed by respondent no. 1 (the Micro and Small Enterprises Facilitation Council - hereafter 'the Council'), whereby the petitioner and respondent no.2 (Driplex Water Engineering Ltd.) were referred to arbitration under the aegis of the Delhi International Arbitration Centre (DIAC).

2. The principal controversy raised in the present petition is that the impugned order falls foul of the arbitration clause, as contained in the Agreement entered into between the concerned parties. It is the petitioner's case that the Council has no jurisdiction to refer the disputes contrary to the express terms of the arbitration agreement (arbitration clause).

3. Briefly stated, the relevant controversy arises in the following context:

3.1 On 08.07.2009, the petitioner invited tenders for supply and services comprising of Design, Engineering, Supply, civil work, erection testing etc. of DM water and CPU plant package for Phase III refinery project of the petitioner. Pursuant to the aforementioned invitation, respondent no.2 submitted its bid, which was found to be the lowest. Accordingly, on 01.12.2009, the petitioner issued a Letter of Acceptance (LOA) awarding the contract to respondent no.2, for a total contract price of 51,00,00,000/-. The LOA was duly accepted by respondent no.2.

3.2 The entire work was required to be completed within a period of eighteen months from the date of issue of the LOA, that is, by 31.03.2011. However, the works could not be completed within the stipulated time. Subsequently, the work was completed on 11.03.2013 and a completion certificate was issued by the petitioner. It is the petitioner's case that the delay in completion of the project is entirely due to reasons attributable to respondent no.2. This is stoutly disputed by respondent no.2.

3.3 After the works were completed, respondent no.2 submitted its final bill. Admittedly, certain amounts were withheld by the petitioner. Although respondent no.2 had raised certain claims, it is contended that respondent no.2 had voluntarily given up these claims by submitting a No Claim Certificate dated 25.09.2013.

3.4 According to the petitioner, no cause of action survived after the issuance of the No Claim Certificate dated 25.09.2013. This is also disputed by respondent no.2. According to respondent no.2, the said No Claim Certificate was conditional and was without prejudice to the claims, which had already been raised. It is also contended that the said Certificate was not issued with free consent.

3.5 On 09.07.2014, respondent no.2 filed an application under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereafter the 'MSMED Act'), before the Council raising certain claims in respect of the aforementioned LOA. Notices were issued by the Council to explore the possibilities of conciliation between the parties. The impugned order indicates that at a meeting held on 12.02.2016, the Council had directed the claimant to file a reply. Apparently, the same was not filed within the stipulated time. However, it is the petitioner's case that it had filed a reply on 03.03.2016 (that is, the date on which the hearing was fixed). The impugned order further indicates that both parties were encouraged to explore the possibility of conciliation, in mutual interest. However, the Council found that the parties were not interested in conciliation and, accordingly, by an order dated 16.06.2016, referred the parties to arbitration under the aegis of the DIAC.

4. Mr Sengh, learned senior counsel appearing for the petitioner, has assailed the impugned order on three fronts. First, he contended that there was an arbitration agreement between the parties in terms of which only a "notified claim" could be referred to arbitration. He submits that the disputes raised by respondent no.2 do not relate to notified claims and, therefore, reference to arbitration under the aegis of the DIAC is wholly without jurisdiction.

5. Second, he contends that the petitioner had already issued a No Claims Certificate and, therefore, the contract was discharged by accord and satisfaction. He submits that in the circumstances, there were no disputes that had to be referred to arbitration.

6. Third, he submitted that respondent no.2 was not a small enterprise within the definition of Section 7 or Section 8 of the MSMED Act.

7. Insofar as the first contention is concerned - that is, regarding the jurisdiction of the Council to refer the disputes to arbitration that are not covered under the arbitration agreement - the same is

no longer res integra. This Court has, in a number of decisions now, held that the reference under Section 18 of the MSMED Act is a statutory reference and is dehors any arbitration agreement between the parties (See: M/s Ramky Infrastructure Private Ltd. v. Micro and Small Enterprises Faciliatation Council & Anr.: W.P.(C) 5004/2017, decided on 04.07.2018). It has also been held that the Council is not bound by the terms of the arbitration agreement while making such reference (See: Bharat Heavy Electricals Limited v. The Micro and Small Enterprises Facilitations Centre and Anr.: W.P.(C) 10886/2016, decided on 18.09.2017).

8. A Coordinate Bench of this Court has further held that the dispute resolution mechanism under Section 18 of the MSMED Act overrides the arbitration clause under the contract (see: GE T & D India Ltd. v. Reliable Engineering Projects and Marketing: OMP (Comm) No. 76/2016, decided on 16.02.2017).

9. The Division Bench of the Allahabad High Court in BHEL v. State of UP and Others: W.P.(C) 11535/2014, decided on 24.02.2014 had held that even though there may be an arbitration agreement between the parties, the provisions of Section 18(4) of the MSMED Act contains a non-obstante clause in empowering the Council to act as an Arbitrator. It is also noticed that in terms of Section 24 of the MSMED Act, the provisions of the MSMED Act would have an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

10. In this view, the scope of reference before the DIAC is also not circumscribed in any manner by the terms of the arbitration agreement between the parties.

11. Insofar as the petitioner's contention regarding the No Claim Certificate is concerned, the question whether the contract had been discharged by accord and satisfaction is a matter of dispute, and the petitioner is not precluded from raising the same before the Arbitral Tribunal. Plainly, the impugned order referring the parties to the DIAC cannot be faulted on this ground.

12. Mr Sengh had contended that respondent no.2 is not a small enterprise within the meaning of Section 7 of the MSMED Act, inasmuch as, its fixed assets exceed an aggregate value of 5 crores. He had also submitted that in the given circumstances, respondent no.2 could not have been issued a Memorandum under Section 8 of the MSMED Act. He also emphasised that the Council had failed to consider the aforesaid contention while passing the impugned order.

13. It is seen that no such ground was taken before the Council at the material time. After the proceedings were concluded before the council, the petitioner had filed an application dated
6. 05.2016, inter alia, contending that Suez Environment and Degremont (a French Company) had purchased shares of respondent no.2 and, therefore, respondent no.2 was no longer a small or medium enterprise since it was a part of a multinational corporation. It was submitted that Suez Environment and Degremont is a 15 billion business group.

14. This Court is of the view that the impugned order cannot be faulted on this ground. First of all, the said contention was not raised before the Council at the material time. Secondly, the contention

now advanced - that the fixed assets of respondent no.2 exceeded the threshold as stipulated in Section 7 of the MSMED Act - was not one of the contentions advanced, even in the application filed by the petitioner. It is also important to note that no such ground had been taken by the petitioner in this petition as well.

15. Mr Sengh had referred to Ground C as raised in the petition to contend that the petitioner had specifically urged that the petitioner's assets had exceeded the threshold amount as stipulated under Section 7 of the MSMED Act. This contention is plainly erroneous as is evident from the plain language of Ground C, which is set out below:-

> **"C. Because as per Section 8 of the Act, any industry having invested in plant and machinery of more than one crore rupees but not more than ten crore rupees, cannot register themselves under the Act, based on the same parameters, it is humbly submitted that a dispute raised more than 10 crores at the same time cannot be entertained under Section 18 of the Act. It is a different issue as to how the Respondent No.2 got themselves registered under the Act."**

16. It is apparent from the above that the ground raised by the petitioner is that the Council cannot entertain a dispute more than 10 crores. Although the petitioner had raised a doubt as to registration of respondent no.2 under section 8 of the MSMED Act, it had not asserted that the value of plant and machinery of respondent no. 2 had exceeded the specified value. In view of the above, the contention that the petitioner's assets exceeded the maximum stipulated value appears to be an afterthought and does not warrant any interference.

17. This Court is not persuaded to accept that any interference in the impugned order is warranted. The petition is, accordingly, dismissed. The pending application stands disposed of.

VIBHU BAKHRU, J JANUARY 24, 2019 MK