IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 18.09.2017

\+ **W.P.(C) 10886/2016 and CM No. 42638/2016**

BHARAT HEAVY ELECTRICALS LIMITED ..... Petitioner

versus

THE MICRO AND SMALL ENTERPRISES FACILITATIONS CENTRE & ANR ..... Respondent

AND

\+ **W.P.(C) 10901/2016 and CM No. 42707/2016**

BHARAT HEAVY ELECTRICALS LIMITED ..... Petitioner

versus

THE MICRO AND SMALL ENTERPRISES FACILITATIONS CENTRE & ANR ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Ashim Vachher, Mr P. Piyush and Mr Vaibhav Dabas.

For the Respondent : Mr Siddharth Dutta for R-1.
Mr Vikram Nandrajog and Mr S. Khanna for R-2.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Bharat Heavy Electricals Limited (hereafter 'the BHEL') has filed these petitions, challenging two separate orders (hereafter 'the impugned orders'), both dated 16.06.2016, passed by the respondent no.1, The Micro

and Small Enterprises Facilitations Centre (hereafter 'the MSEFC'). By the impugned orders, MSEFC had recorded its conclusion that resolution of disputes between BHEL and respondent no.2 (hereafter 'DRIPLEX'), by conciliation, was not possible; it had, accordingly, decided to terminate the conciliation proceedings and refer the disputes to Delhi International Arbitration Centre (hereafter 'DIAC') for initiating arbitration proceedings.

2. The parties involved and the controversy raised in these petitions is common and, therefore, both the petitions were taken up and heard together.

3. The principal question involved in the present petitions is whether MSEFC could - in terms of Section 18 (3) of The Micro, Small and Medium Enterprises Development Act, 2006 (hereafter 'the Act') - refer the disputes for arbitration under the aegis of DIAC, considering that the disputing parties had also entered into an arbitration agreement. The General Conditions of Contracts (hereafter 'GCC'), included as a part of the agreements (purchase orders) entered into between the parties, contains an arbitration clause in terms of which the disputes are to be referred to an arbitrator appointed by BHEL. It is BHEL's contention that MSEFC does not have the jurisdiction to override the arbitration agreement and refer the disputes to DIAC. According to BHEL, once MSEFC had concluded that the disputes could not be resolved through conciliation, it could refer the parties to resolve their disputes by arbitration in terms of their agreement but it could not supplant the arbitration agreement. The respondents, both MSEFC and DRIPLEX, dispute the same. According to the respondents, in terms of Section 18(3) of the Act, if the conciliation proceedings initiated is not successful, MSEFC is enjoined to adjudicate the disputes or refer the

disputes for arbitration to any institution or centre providing alternate disputes resolution services. The respondents claim that the provisions of Section 18(3) would override the arbitration agreement between the disputing parties.

4. Briefly stated, the relevant facts necessary to address the controversy are as under:-

4.1. BHEL had entered into a contract for setting up a Thermal Power Plant in Syria on a turnkey basis. BHEL in turn has placed purchase order dated 26.03.2013 for supply of DM Plant (subject matter of ***W.P. (C) 10901/2016***) and purchase order dated 20.12.2016 for supply of Condensate Polishing System and other items (subject matter of ***W.P. (C) 10886/2016***), on DRIPLEX.

4.2. BHEL's claims that on 11.06.2012, it was forced to suspend all operations relating to the thermal plant in question, including exports to Syria from India, due to Civil unrest and the advisory issued by the Indian Embassy at Damascus. Accordingly, BHEL informed all the concerned suppliers, including DRIPLEX, that the project had been put on hold. According to BHEL, it is, thus, not required to make payments under the agreements (purchase orders). DRIPLEX claims to the contrary; according to DRIPLEX, it is entitled to the consideration payable for supply of DM Plant and Condensate Polishing Unit delivered to BHEL.

4.3. Since BHEL declined to pay the consideration for the supplies, on June 2015, DRIPLEX filed separate applications under Section 18 of the Act, with MSEFC, enclosing therewith a statement of their claims in respect of the respective purchase orders. In respect of the purchase order

dated 26.03.2013, DRIPLEX claimed a sum of ₹2,22,00,000/- along with interest and, in respect of the purchase order dated 20.12.2011, DRIPLEX claimed a sum for ₹6,08,59,300/- along with interest.

4.4. Pursuant to the above applications, MSEFC issued a notice to BHEL on 02.11.2015 and called upon BHEL to appear before MSEFC on 23.11.2015. BHEL was also called upon to file a reply to the claims filed by DRIPLEX. In response to the aforesaid notices, BHEL filed its replies to the respective claims preferred by DRIPLEX, *inter alia*, disputing the liability to pay the amount claimed on account of *force majure* conditions. BHEL claimed that the *force majeure* clause as contained in the Special Conditions of Contract was applicable and, thus, BHEL was not obliged to make any payments to DRIPLEX. DRIPLEX filed rejoinders countering the contentions advanced by BHEL.

4.5. It appears that certain proceedings were undertaken by MSEFC for reconciliation of the disputes but since MSEFC found that the same was not possible, MSEFC passed the impugned orders referring the disputes to arbitration under the aegis of DIAC.

Submissions

5. Mr Ashim Vachher, learned counsel appearing for BHEL contended that there was no dispute that MSEFC would have the jurisdiction to undertake the conciliation proceedings in terms of Section 18(3) of the Act. However, the parties could not be referred to arbitration contrary to the arbitration agreement entered into between them. He submitted that Section 18(3) of the Act only provided for the disputes to be resolved by arbitration failing the conciliation proceedings, however, the said

arbitration was to be conducted in terms of the agreement between the parties. He canvassed that there was no conflict between the arbitration agreement and the provisions of Section 18(3) of the Act and, the same must be read in an harmonious manner. He relied on the decision of the Bombay High Court in the case of ***M/s Steel Authority of India v. The Micro, Small Enterprise Facilitation Council and Anr.*** : ***AIR 2012 Bom 178*** and drew the attention of the Court to paragraph 11 of the said judgment, wherein the Court had observed that "*we find that there is no provision in the Act, which negates or renders the arbitration agreement entered between the parties ineffective*".

6. Mr Siddharth Dutta, learned counsel appearing for MSEFC countered the aforesaid submissions and relied on the decision of the Punjab & Haryana High Court in ***Welspun Corp. Ltd v. The Micro and Small, Medium Enterprises Facilitation Council, Punjab and others*** : ***CWP No. 23016/2011 decided on 13.12.2011***, whereby the single Judge of the Punjab and Haryana High Court had taken a view contrary to that of the Bombay High Court in ***M/s Steel Authority of India v. The Micro, Small Enterprise Facilitation Council*** (*supra*). He also relied on the decision of the Madras High Court in ***M/s Refex Energy Limited v. Union of India and Another*** : ***AIR 2016 Mad139***

7. Mr Vikram Nandrajog, learned counsel appearing for DRIPLEX supported the contentions advanced on behalf of MSEFC. He further contended that there was a clear conflict between the provisions of Section 18(3) of the Act and the arbitration agreement between BHEL and DRIPLEX (Clause 30 of the GCC) and, therefore, the provisions of the Act would necessarily prevail. He relied on the decision of the Division Bench

of Allahabad High Court in ***BHEL v. State of U.P. and Others*** : ***W.P. (C) 11535/2014 decided on 24.02.2014****;* the decision of the Punjab and Haryana High Court in ***The Chief Administrator Officer, COFMOW v. MSEFC of Haryana & Ors.***: ***CWP 277/2015 decided on 09.01.2015***; the decision of the Calcutta High Court in ***NPCC Limited and another v. West Bengal State MSEFC & Ors.***: ***GA No. 304/2017 W.P. 294/2016 decided on 16.02.2017***; and the decision of a coordinate bench of this Court in ***GE T & D India Ltd. v. Reliable Engineering Projects and Marketing*** : ***OMP (Comm.) No. 76/2016 decided on 15.02.2017,*** in support of his aforesaid contention. He also referred to the decisions of the Supreme Court in ***Fair Air Engineers Pvt. Ltd & Anr. v. N.K. Modi*** : ***(1996) 6 SCC 385*** and ***National Seeds Corporation Ltd v. M. Madhusudhan Reddy & Anr.*** : ***(2012) 2 SCC 506*** and on the strength of the said decisions contended that the Act being a Special Act would override the provisions of Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act').

8. Mr Nandrajog also contended that BHEL, in its reply filed before MSEFC, had not raised any objection as to jurisdiction of MSEFC and, therefore, was estopped from raising such objections at this stage. He referred to paragraph 3 of the replies filed on behalf of BHEL wherein BHEL had reserved its rights to urge further grounds in case the matter was referred to arbitration under the Act.

Reasons and Conclusion

9. At the outset, it is relevant to observe that the Act was enacted with the object of facilitating the promotion, development and enhancing the competitiveness of small and medium enterprises. Chapter V of the said Act (funiculus of sections 15 to 24) contains provisions to address the issue

of delayed payment to Micro and Small Enterprises. Section 15 of the Act mandates that where any supplier supplies any goods or renders any services to any buyer, the buyer would make the payment for the same on or before the date agreed, which in any case could not exceed 45 days from the date of acceptance/deemed acceptance. Section 16 of the Act provides for payment of interest. Section 17 of the Act mandates that the buyer would be liable to pay the amount for the goods supplied or services rendered along with interest as provided under Section 16 of the Act.

10. Section 18(1) of the Act contains a non obstante clause and enables any party to a dispute to make a reference to the Micro and Small Enterprises Facilitation Council (MSEFC). Section 18 of the Act is relevant and 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.
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> (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.
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> (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."

11. Section 19 of the Act, *inter alia*, provides that 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 would be entertained, unless the appellant (not being a supplier) has deposited 75% of the amount in terms of the decree or award in the manner as directed by the Court. Section 19 of the Act is set out below:-

"**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 with it seventy-five percent 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."

12. Section 20 and 21 of the Act provides for establishment and composition of Micro and Small Enterprises Facilitation Council. Section 22 mandates that a buyer would furnish certain additional information in his annual accounts. Section 23 of the Act expressly provides that the amount of interest payable or paid by any buyer would not be allowed any deduction for the purposes of computing the income charitable to tax under the Income Tax Act, 1961.

13. Section 24 of the Act is a non-obstante provision and reads as under:-

"**24 Overriding effect**- The provision of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

14. A plain reading of Section 18(2) of the Act indicates that on receipt of a reference under Section 18(1) of the Act, the Council [MSEFC] would either conduct conciliation in the matter or seek assistance of any institution or centre providing alternate dispute resolution services. It also expressly provides that Section 65 to 81 of the A&C Act would apply to such a dispute as it applies to conciliation initiated under the Part III of the A&C Act.

15. It is clear from the provisions of Section 18 (2) of the Act that the legislative intention is to incorporate by reference the provisions of Section 65 to 81 of the A&C Act to the conciliation proceedings conducted by MSEFC.

16. Section 18 (3) of the Act expressly provides that in the event the conciliation initiated under Section 18 (2) of the Act does not fructify into any settlement, MSEFC would take up the disputes or refer the same to any institution or centre providing alternate dispute resolution services for such arbitration.

17. It is at once clear that the provision of Section 18(3) of the Act do not leave any scope for a non-institutional arbitration. In terms of Section 18 (3) of the Act, it is necessary that the arbitration be conducted under aegis of an institution -either by MSEFC or under the aegis of any "*Institution or Centre providing alternate dispute resolution services for such arbitration*".

18. At this stage, it would be relevant to refer to clause 29 and 30 of the GCC. The relevant extracts of which are quoted below:-

> "29.0 **SETTLEMENT OF DISPUTES**
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> 29.1 Except as otherwise specifically provided in the Order/Contract, all disputes concerning questions of the facts arising under the Order/Contract, shall be decided by purchaser, subject to written appeal by the Seller/Contractor to the purchaser, whose decision shall be final.
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> 29.2 Any disputes or differences shall be to the extent possible settled amicably between the parties hereto, failing which the disputed issues shall be settled through arbitration.

29.3 The Seller/contractor shall continue to perform the Order/Contract, pending settlement of dispute(s).

30.0 **ARBITRATION**

30.1 In the event of any dispute or difference arising out of the execution of the Order/Contract or the respective rights and liabilities of the parties or in relation to interpretation of any provision by the Seller/Contractor in any manner touching upon the Order/Contract, such dispute or difference shall (except as to any matters, the decision of which is specifically provided for therein) be referred to the arbitration of the person appointed by the competent authority of the Purchaser.

Subject as aforesaid, the provisions of Arbitration and Conciliation Act, 1996 (India) or statutory modifications or re-enactments thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause. The venue of arbitration shall be at New Delhi.

30.2 In case of order/contract on Public Sector Enterprises (PSE) or a Govt. Deptt., the following clause shall be applicable:-

In the event of any dispute or difference relating to the interpretation and application of the provisions of the Order/Contract, such dispute or difference shall be referred to by either party to the arbitration of one of the arbitrators in the department of public enterprises. The award of the arbitrator shall be binding upon the parties to the dispute, Provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law secretary, Deptt. of Legal Affairs, Ministry of Law & Justice, Government of India. Upon such reference the dispute

shall be decided by the Law Secretary or the Special Secretary or Additional Secretary when so authorized by the Law Secretary, whose decision shall bind the parties hereto finally and conclusively.

30.3 The cost of the arbitration shall be borne equally by the parties."

19. It is apparent from the plain reading of clause 30 (1) above, that the DRIPLEX and BHEL had agreed to refer disputes to an arbitrator appointed by BHEL and this in material variance with the provisions of Section 18(3) of the Act. In this view, the contention that there is no conflict between the arbitration agreement and Section 18(3) of the Act, is not persuasive. The arbitration clause under the GCC provides for an arbitration by an arbitrator to be appointed by BHEL, which is repugnant to an institutional arbitration.

20. As noticed above, Section 24 of the Act contains an non-obstante provision and, expressly provides that the provisions of Section 15 to 23 of the Act will have an overriding effect. Thus, the provisions of Section 18(3) of the Act cannot be diluted and must be given effect to notwithstanding anything inconsistent, including the arbitration agreement in terms of section 7 of the A&C Act.

21. If one examines the scheme of the provision of Section 15 to 23 of the Act, it is apparent that the scheme is to provide a statutory framework for Micro and Small Enterprises to expeditiously recover the amounts due for supplies made by them. This is in conformity with the object of the Act to minimise the incidence of sickness in Small and Medium Enterprises and to enhance their competitiveness. It is understood that the Small and Medium Enterprises do not command a significant bargaining power and -

as indicated in the statement of object and reasons of the Act - the object of the Act is, *inter alia*, to extend the policy support and provide appropriate legal framework for the sector to facilitate its growth and development. It is, apparently, for this reason that Section 18 (3) does not contemplate an arbitration to be conducted by an arbitrator which is to be appointed by either party, but expressly provides that the same would be conducted by MSEFC or by any institution or a centre providing alternate dispute resolution services.

22. Section 19 of the Act also ensures a more expedient recovery by making pre-deposit of 75% of the awarded amount a pre condition for assailing the award. The benefit of this provision is not available in case of arbitrations in terms of agreements between the parties (and not by a statutory reference under Section 18 (3) of the Act).

23. In ***BHEL v. State of U.P. & others*** (*Supra*), a Division Bench of the Allahabad High Court had considered the case where the agreement between the disputing parties contained an arbitration clause, however, the MSEFC had decided to arbitrate the disputes under Section 18(3) of the Act. BHEL was also the petitioner in that case and, had approached the Court seeking that the proceedings before Uttar Pradesh State Micro and Small Enterprises Facilitation Council be set aside and the said Council be directed to decide BHEL's objection under Section 8 of the A & C Act (that is, that the disputes be referred to Arbitration in terms of the agreement between the parties therein). The Division Bench of Allahabad High Court had repelled BHEL's contention and held as under:-

> "In this view of the matter, the relief of certiorari for quashing all the proceedings before the Council is

> manifestly misconceived. The proceedings had been entertained by the Council in pursuance of the provisions of the Act. Though there may be an arbitration agreement between the parties, the provisions of Section 18 (4) specifically contain a non obstante clause empowering the Facilitation Council to as an Arbitrator. Moreover, section 24 of the Act states that sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

24. The Punjab and Haryana High Court in ***The Chief Administrative, COFMOW*** (*supra*) had rejected the contention that provisions of Section 18 (3) of the Act for referring the disputes to arbitration would apply only where there was no arbitration agreement between the parties.

25. A coordinate bench of this court has in ***GE T & D India Ltd.*** (*supra*) had unequivocally held as under:-

> "In the present case, therefore, the Court is satisfied that the MSMED Act to the extent it provides for a special forum for adjudication of the disputes involving a 'supplier' registered thereunder, overrides the Act i.e., the Arbitration and Conciliation Act 1996."

26. The Calcutta High Court in the case of ***National projects Construction Corporation Limited*** (*supra*) had also concluded that in cases where an arbitration agreement existed between two parties and one such party was an entity within the meaning of the Act, the Council established under the Act would have jurisdiction to arbitrate the disputes between such parties. The Court further observed as under:-

> "When there exists an arbitration agreement between two parties and one of such parties to the arbitration agreement is

> an entity within the meaning of the Act of 2006, the Council established under the provisions of the Act of 2006 or any institution or centre identified by it has the jurisdiction to arbitrate such disputes on a request being received by such Council for such purpose."

27. This court, respectfully, is unable to concur with the view of the Bombay High Court in ***M/s Steel Authority of India v. The Micro, Small Enterprise Facilitation Council*** *(supra)*. In that case, the Court had reasoned that Section 24 of the Act, which was enacted to give an overriding effect to provisions of Section 15 to 23 of the Act would override only such provisions which were inconsistent with Section 15 to 23 of the Act. And, since the Court was of the view that there was no inconsistency between the provisions of Section 18 (3) of the Act and the agreement between the parties to refer the disputes to arbitration under the 'A&C Act', it held that the arbitration agreement between the parties could not be rendered ineffective.

28. This Court - for the reasons as stated hereinbefore - is unable to subscribe to the view that there is no inconsistency between the arbitration agreement and section 18(3) of the Act; Section 18(3) contemplates only an institutional arbitration and not an *ad hoc* arbitration. In the present case, the provision that only BHEL would appoint the arbitrator, plainly, runs contrary to the mechanism under section 18(3) of the Act. Further, in terms of Section 19 of the Act, the award rendered pursuant to an arbitration under Section 18(3) of the Act cannot be assailed by the party (other than the supplier), without depositing seventy-five percent of the amount awarded. Concededly, Section 19 would be inapplicable to an award, which is rendered pursuant to an arbitration that is not conducted in

terms of Section 18(3) of the Act.

29. Mr Vachher, earnestly contended that there was no issue with regard to MSEFC conducting the conciliation proceedings, however, MSEFC could not, on failure of such conciliation proceedings, refer the disputes to arbitration in view of an express agreement between BHEL and DRIPLEX. This contention is unsustainable. The agreement between the parties also includes provisions for an amicable resolution of their inter se disputes (clause 29 of GCC). Thus, it is difficult to find any rationale why Section 18 of the Act would override part of the dispute resolution clause and not the other.

30. There is also much merit in Mr Nandrajog's contention that BHEL had not raised any objections for referring of the disputes to arbitration under Section 18(3) of the Act and, thus, would be estopped from raising this contentions at this stage. Paragraph 3 of the replies filed on behalf of BHEL, which are similarly worded in both the cases, read as under:-

> "In view of the above directions, the following reply is being submitted to the claim lodged by Driplex. However, the present reply to the claim is only a preliminary reply and BHEL reserves its right to take any other or further grounds or make further averments in case the matter is referred to Arbitration under the MSMED Act. BHEL also reserves its rights to file a Counter claim, if so advised, against Driplex in case the dispute is referred to Arbitration."

31. It is apparent from the above that BHEL had proceeded on the basis that if the conciliation proceedings failed, the disputes would be referred to arbitration under the Act and, thus, they cannot be permitted to assail the

orders passed by MSEFC under Section 18(3) of the Act. It was not BHEL's case, as is apparent from its replies filed before MSRFC, that reference to arbitration would necessarily have to be as per the agreement between the parties and not under the Act. Thus, they cannot be permitted to agitate this issue in these proceedings.

32. In view of the above, the petitions are dismissed with costs quantified at ₹25,000/- in each case.

VIBHU BAKHRU, J

SEPTEMBER 18, 2017
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