

Bombay High Court

Maharashtra State Electricity ... vs M/S. Deltorn Electronics on 15 November, 2016

Bench: S.C. Gupte

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION (L) NO.2464 OF 2015
WITH
NOTICE OF MOTION (L) NO.3696 OF 2015

AND
NOTICE OF MOTION (L) NO.15 OF 2016
AND
NOTICE OF MOTION (L) NO.14 OF 2016

Maharashtra State Electricity Distribution
Company Limited And Others
Versus

... Petitioners

M/s Deltron Electronics

... Respondent

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Mr. Gaurav Joshi, Senior Advocate a/w Ms. Neeta Jain, Nirav Shah And
Anuj Jaiswal i/b Little & Co., for the Petitioners.

Mr. Suresh Dhole a/w Pushpa Shinde for the Respondent.

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CORAM : S.C.GUPTA, J.

RESERVED ON : 03 MARCH 2016

(JUDGEMENT)

. This Arbitration Petition challenges an award passed by the Micro and Small Enterprises Facilitation Council, Konkan Division, Thane under Section 18(3) of Micro, Small and Medium Enterprises Development Act, 2006 ("Small Enterprises Act"). By consent, the petition is admitted and taken up for final hearing forthwith.

2 The short facts of the case may be stated as follows :

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2.1 The Petitioners are successors of erstwhile Maharashtra State

Electricity Board (MSEB) and are distributors of electricity in their area of operation in Maharashtra. The Respondent is a small scale enterprise duly registered with the District Industries Centre, Thane and is governed by the Small Enterprises Act.

2.2 The Petitioners had floated a tender for distribution of transformers.

Pursuant to it, the Respondent submitted its offer. The offer was accepted by the Petitioners and a letter of award was issued to the Respondent. Pursuant to the letter of award, the Petitioners placed ten purchase orders on the Respondent. The contract between the parties stipulated payment of 100% value of the contract by account payee cheque within 60 days from the date of receipt of the entire quantity as per the monthly delivery schedule. The purchase orders pertain to the period between 1 August 1994 to 10 October 2000. Through this period the Respondent supplied the materials against the purchase orders under various invoices. The Petitioners accepted the materials and paid the bills submitted by the Respondent from time to time in respect of the same.

2.3 By its letter dated 9 June 2004, the Respondent for the first time raised its claim for interest on delayed payments on the various contracts of purchase represented by the purchase orders. An aggregate sum of Rs.83,54,695/- was claimed in respect of such interest. The Petitioners refused to pay these delayed payment charges.

2.4 In the premises, on 21 September 2005, the Respondent filed a reference before the Industries Facilitation Council Bench, Thane under Chittewan 3/16 ARBPL 2464-16.doc the provisions of

Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 ("Interest on Delayed Payments Act").

The council, by its letter dated 24 January 2006, served a copy of the reference on the Petitioners directing them to file their reply to the reference.

2.5 During the pendency of the reference, on 16 June 2016, the Interest on Delayed Payments Act was repealed by the Small Enterprises Act which made appropriate provisions for Small Scale and Ancillary Industrial Undertakings. The Council was re-designated as Micro and Small Scale Enterprises Facilitation Council ("Council"). Section 32 of the Small Enterprises Act which provided for repeal of the former Act inter alia contained a clause to the effect that anything done or any action taken under the repealed Act shall be deemed to have been done or taken under the corresponding provisions of the Small Enterprises Act.

2.6 By its notice dated 30 November 2012, under Section 18 read with Section 17 of the Act, the Council called upon the Petitioners to file their submissions/say on the reference petition filed by the Respondent.

2.7 By its letter dated 24 December 2013, the Respondent called upon the Petitioners to hold a conciliation meeting in terms of Section 18 of the Act. The Petitioners did not comply with this requisition.

2.8 On 18 January 2014, in the premises, the Respondent through its Advocate informed the Council that the parties had failed to arrive at any amicable settlement and required the Council to place the matter for Chittewan 4/16 ARBPL 2464-16.doc arbitration under the provisions of Section 18(3) of the Small Enterprises Act.

2.9 The Council, by its order dated 30 January 2014, terminated the conciliation proceedings and took up the matter for arbitration under Section 18(3) of the Small Enterprises Act.

2.10 By its award dated 31 January 2015, the Council awarded the Respondent's claim for interest on delayed payment together with further interest. The impugned award is not signed by chairperson of the Council/Arbitral Tribunal. The remark to be found on the award states that he was "transferred". It appears that some other members of the Council/Arbitral Tribunal have also signed the award on different dates other than 31 January 2015.

2.11 The impugned award was received by the Petitioners on 18 May 2015.

2.12 Whilst the Petitioners were contemplating steps to challenge the award, the Petitioners received a letter dated 24 August 2015 from the Council proposing a rehearing of the reference petition. The letter mentioned that due to technical and administrative reasons, the award was not signed by the Chairman of the Council and the matter was required to be reviewed as per the discussions of the Council held on 11 August 2015. The rehearing was fixed on 4 September 2015.

2.13 On 31 August 2015, the Respondent filed an application challenging Chittewan 5/16 ARBPL 2464-16.doc the decision taken by the Arbitral Tribunal/Council for rehearing of the matter. No meeting was called by the Arbitral Tribunal/Council for hearing of that application. The rehearing of the reference petition was, however, adjourned to 5 September 2015. It appears that no effective rehearing took place on either the scheduled date or the adjourned date.

2.14 It appears that on 29 September 2015, the Council transferred the award as a decree in Execution Petition No.1 of 2005 to this Court. On 26 October 2015, the Petitioners received Minutes of Meeting purportedly held on 5 September 2015 stating that the matter did not require any rehearing, as the award purportedly passed under Sections 31(1) and (2) of the Arbitration and Conciliation Act, 1996 was signed by the majority of the members of the Arbitral Tribunal/Council and that it was accordingly valid.

A copy of the transfer decree was received by the Petitioner on 28 October 2015.

2.15 The Petitioners challenged the award by way of the present Arbitration Petition lodged in December 2015. The petition has been amended on 18 January 2016 by incorporating further averments, grounds and reliefs.

3 As submitted by learned Counsel for the Petitioners, the challenge to the award is mainly on three grounds. Firstly, it is submitted that the award is not signed by the chairperson of the Council, who sat as one of the Arbitrators; there is no material to show that he actually participated in the deliberations of the Arbitral Tribunal/Council for making of the award or agreed with or even considered its findings; and that in the premises, Chittewan 6/16 ARBPL 2464-16.doc the award cannot be termed as a valid Arbitral award. Secondly, it is submitted that the Council having acted as a conciliator in the reference made to it, cannot act as an arbitral tribunal by virtue of Section 80 of the Arbitration and Conciliation Act, 1996. Thirdly, it is submitted that the claim is clearly barred by the Law of Limitation and ought to have been rejected by the Arbitral Tribunal/Council.

4 Learned Counsel for the Respondent, in the first place, raised an objection to the maintainability of the petition on the ground that the petition itself is filed beyond the period of limitation. At the outset, it is pertinent to note that the limitation of three months and the further period of 30 days for filing of an application for setting aside an award within the meaning of Section 34(3) of the Arbitration and Conciliation Act, 1996, begins on the date a party making the application receives a signed copy of the arbitral award from the arbitral tribunal. Admittedly the signed copy of the award in the present case was received by the Petitioners on 18 May 2015. The period of limitation thus originally began with effect from that date. Admittedly before the expiry of this period, the Petitioners received a communication from the Arbitral Tribunal/Council (letter dated 21 August 2015), communicating the Arbitral Tribunal/Council's decision to review the reference petition, and communicating the date of rehearing of the reference petition as 4 September 2015. The Petitioners could not have, in the premises, applied for setting aside of the award within the period of limitation. The Arbitral Tribunal/Council was entitled to correct any mistake in the award or interpret the award under Section 33 of the Arbitration and Conciliation Act 1996. Even the Court under sub-section (4) of Section 34, on an application for setting aside the award under sub-

Chittewan 7/16 ARBPL 2464-16.doc section (1) of Section 34 was empowered to adjourn the proceedings in order to give the Arbitral Tribunal/Council an opportunity to resume the arbitral proceedings. On these facts and the law as it stands, there is a clear communication by the Arbitral Tribunal/Council that the award served on the Petitioners was not a final award and that the Arbitral Tribunal/Council had proposed to rehear the matter. There is no question, in the premises, of the Petitioners approaching this Court for setting aside the award between the date of receipt of the communication and expiry of the period of limitation originally available in respect of the award. The Arbitral Tribunal/Council in fact fixed a date of hearing of the reference, i.e. on 4 September 2015, which was later rescheduled to 5 September 2015. In its meeting (between the members of the Arbitral Tribunal/Council) held on 5 September 2015, the Arbitral Tribunal/Council decided that the award passed in the matter and communicated to the Petitioners earlier, was valid and there was no question of rehearing the matter. Accordingly, by its Minutes of Meeting dated 5 September 2015 (received by the Petitioners on 26 October 2015), the Arbitral Tribunal/Council decided to withdraw the notice of rehearing of the petition. The communication of the minutes along with the notice of withdrawal of hearing, as mentioned above, was received by the Petitioners on 26 October 2016. Effectively, therefore, the final award on the reference petition can be said to have been communicated by the Arbitral Tribunal/Council to the Petitioners on 26 October 2015. The present petition, which is filed in December 2015, is, accordingly, clearly within time.

5 Coming now to the first ground of challenge to the impugned award

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raised by the Petitioners, sub-section (1) of Section 31 of the Arbitration and Conciliation Act, 1996 requires the Arbitral Award to be made in writing and signed by the members of the Arbitral Tribunal. Sub-section (2) of Section 31 provides that for the purpose of sub-section (1), signatures of majority of members of the Arbitral Tribunal shall be sufficient so long as the reason for any omitted signature is stated. As held by a number of our High Courts, an award signed by a majority of the Arbitrators is valid, provided all Arbitrators were present through the proceedings and took part in all deliberations, including the deliberations for preparation of the award. (See the cases of Ram Narain Ram Vs. Pati Ram¹, Abu Hamid Zahir Ala Vs. Golam Sarwar², Appayya Vs. Venkataswami³, Tara Prasad Singh Vs. Raja Singh⁴, Raghubir Pandey Vs. Kaulesar Pandey⁵, Y.L. Paul Vs. G.C. Joseph⁶, Johara Bibi Vs. Mohammad Sadak Thambi Marakayar⁷, Deo Narain Singh Vs. Siabar Singh⁸.)⁶ If one has regard to the impugned award in the present case, what transpires, in the first place, is that there is nothing in the award or the subsequent orders of the Arbitral Tribunal/Council to indicate that the Chairman of the Arbitral Tribunal/Council was available and actually participated in the deliberations of the Council for making of the award. The award itself is dated 31 January 2015. It, however, appears from the award that atleast two members of the Arbitral Tribunal/Council, who have 1 AIR 1916 Pat. 156 2 AIR 1918 Cal. 865 3 AIR 1919 Mad. 877 4 AIR

1935 ALL 90 5 AIR 1945 Pat. 140 6 AIR 1948 Mad. 512 7 AIR 1951 Mad. 997 8 AIR 1952 Pat. 461 Chittewan 9/16 ARBPL 2464-16.doc appended their signatures to the Award, have signed the same after 31 January 2016. On the other hand, the Minutes of Meeting dated 5 September 2015 take a position that the award was passed on 8 May 2015 (it was served on the Petitioners on 18 May 2015). The award itself indicates that the matter was closed for order/award on 31 January 2015. It is hardly likely, in the premises, that the award was actually made on 31 January 2015. In any event, as the subsequent communication indicates, it is the stand of the Arbitral Tribunal/Council itself that the award was passed on 8 May 2015. It is not borne out by the record as to when the Chairman of the Arbitral Tribunal/Council was transferred.

There is absolutely nothing either in the award or in the communication, as mentioned above, to indicate that after the matter was closed for order/award, the Chairman of the Arbitration Tribunal/Council participated in the deliberations or assented or even applied his mind to the impugned award. No doubt, under the scheme of the Arbitration and Conciliation Act, 1996, the award within the meaning of the Act is really an award of the majority of the Arbitral Tribunal and the award of any dissenting minority is no award. That still does not dispense with the requirement of participation of all Arbitrators in the reference and in the deliberations for making of the award. Sub-section (2) of Section 31 of the Arbitration and Conciliation Act, 1996 requires that if the award is not signed by all members of the arbitral tribunal, the reason for omitted signature/s must be stated. As we have noted the law on the point, what this means is that not just that the reason must be stated mechanically and as a matter of form, but that such reason must be adequate and germane for fulfillment of the requirement of the law that though the arbitrator/s whose signature/s is/are omitted actually participated in the hearings and Chittewan 10/16 ARBPL 2464-16.doc deliberations for making of the award, his/their signature/s is/are justifiably not appended to the award. The justifiable reason may be absence or unavailability of the arbitrator/s at the time of signing (which is merely a ministerial act) or his/their refusal on the ground of any dissention or disagreement with the majority or the like. As I have noted above, such adequate and germane reason is clearly absent in the present case. In the premises, the impugned award cannot be termed as a valid award in the eyes of law. The want of signature of the Chairman of the Arbitral Tribunal/Council cannot be attributed simply to any administrative exigency or ministerial lapse or difficulty or even his having taken a dissenting view. It rather goes to the root of the award and undermines its validity.

7 Insofar as the objection concerning the Council itself having entered upon the reference, committing thereby a breach of Section 80 of the Arbitration and Conciliation Act, 1996, is concerned, it is pertinent to note that what Section 80 prohibits is the Conciliator himself acting as an Arbitrator in the absence of an agreement between the parties permitting him to do so. It is submitted across the bar by learned Counsel for the Petitioners that the Council in the present case first acted as a Conciliator and having so acted, in the admitted absence of a contrary agreement between the parties, it could not have itself entered upon the reference. On the other hand, it is submitted by learned Counsel for the Respondent that the scheme of the Small Enterprises Act, under Section 18 thereof, permits the Council whenever a reference is made to it under sub-section (1) of Section 18 to either itself conduct conciliation in the matter or refer the same to any institution or centre for conducting such conciliation. If Chittewan 11/16 ARBPL 2464-16.doc such conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement

between the parties, sub-section (3) empowers the Council to either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration. It is submitted that to the extent Section 18 makes a contrary stipulation, it overrides the provisions of the Arbitration and Conciliation Act, 1996. It is submitted that provisions of Section 18 open with a non-obstante clause and accordingly its provisions operate in precedence over any other law for the time being in force.

8 There are two questions involved in this objection. The first is whether the Council itself did act as a Conciliator and would, therefore, be subject to the restrictions of Section 80 of the Arbitration and Conciliation Act, 1996. The second, if the answer to the first question is in the affirmative, is whether Section 18 of the Small Enterprises Act overrides Section 80 of the Arbitration and Conciliation Act, 1996 or, in other words, whether the Council having undertaken conciliation under sub-section (2) of Section 18, is empowered to itself take up the dispute for arbitration under sub-section (3) of Section 18 notwithstanding the provisions of Section 80 of the Arbitration and Conciliation Act, 1996.

9 On the factual aspect, namely, whether or not the Council itself acted as a Conciliator in the matter, there is nothing on record to indicate that the Council did so. The only communication, which is on record, is a letter addressed by the Respondent to the Petitioners on 24 December 2013 requesting the latter for date and time of a conciliation meeting. Admittedly, no such conciliation meeting was actually fixed between the Chittewan 12/16 ARBPL 2464-16.doc parties. Since the Petitioners failed to respond, the Respondent intimated failure of conciliation. In the premises, there is nothing to show that the Council itself undertook any conciliation within the meaning of sub-section (2) of Section 18. Accordingly, there is no question of applying the embargo contained in Section 80 to the Council entering upon the reference for arbitration. In the premises, the second question, namely, the overriding effect of Section 18 of the Small Enterprises Act over Section 80 of the Arbitration and Conciliation Act, 1996, does not arise in the present case. The cases of Welspun Corp. Ltd. Vs. The Micro and Small, Medium Enterprises Facilitation Council, Punjab and Others,⁹ and M/s Eden Exports Company Vs. Union of India¹⁰, which deal with this legal question, need not, therefore, be considered.

10 As for the issue of limitation, it is contended by learned Counsel for the Respondent that the provisions of the Limitation Act do not apply to any arbitration before the Council or the authority designated by it. It is submitted that the Small Enterprises Act is a special statute making provisions for arbitration; and to a statutory arbitration thereunder through the Council or its designate, the provisions of Limitation Act do not apply.

11 Before we go into this aspect, it is pertinent to note that the objections on the ground of limitation were raised before the Arbitral Tribunal/Council in the reference. These objections were disposed of in a cavalier fashion by the Arbitral Tribunal/Council in terms of the following observations :

9 CPW No.23016 of 2011 (O&M) and connected cases, decided on 13.12.2011 10 W.A.Nos.2461 of 2010 and other connected cases, decided on 20 November 2012.

Chittewan 13/16 ARBPL 2464-16.doc "The issue of limitation is dealt in the enactment itself that the buyer has to mention the due amount payable to the supplier till it is paid finally to the supplier. The responsibility is fastened upon the buyer to pay interest upon the delayed payment as per the provision of the Act of 1993 and improved Act of 2006. Thus, all the issues raised by the respondents are addressed by this Council."

12 It is pertinent to note that sub-section (3) of Section 18 of the Small Enterprises Act itself provides that the Arbitration and Conciliation Act 1996 shall apply to any dispute submitted to the arbitration of the Council or its designate as if such arbitration was in pursuance of an arbitration agreement referred in sub-section (1) of Section 7 of that Act. This provision would obviously include Section 43 of the Arbitration and Conciliation Act 1996, which makes the provisions of Limitation Act applicable to any arbitration conducted in pursuance of an arbitration agreement under Section 7(1) of that Act. Accordingly, the provisions of the Limitation Act fully apply to all arbitrations under the Small Enterprises Act.

13 Learned Counsel for the Respondent relied on several judgments to support his contention that the Limitation Act does not apply to arbitrations conducted under sub-section (3) of Section 18 of the Small Enterprises Act. None of these judgments supports the Respondent. The case of Assam State Electricity Board Vs. Shanti Conductors Pvt. Ltd 11., relied on by learned Counsel for the Respondent, deals with the overriding effect of the Interest on Delayed Payments Act. The Full Bench of Gauhati High Court in that case held that the provisions of that Act create a statutory liability against the buyer to pay interest under that Act on 11 Gauhati High Court, decided on 5 March 2002.

Chittewan 14/16 ARBPL 2464-16.doc delayed payments and simultaneously vests a right in the supplier to recover such interest according to the provisions of Section 4 and 5 of that Act. Even if one concedes that a similar statutory liability against the buyer and corresponding right in the supplier are provided under the Small Enterprises Act, there is nothing to show that the provisions of Limitation Act would not apply to any claim for enforcement of such right or liability. The case of Assam State Electricity Board does not deal with the question with which we are concerned in the present case, namely, whether or not the Limitation Act applies to any adjudication of liability owed by buyer to the supplier through the statutory arbitration under Section 18(3) of the Small Enterprises Act. The judgment in the case of Savitra Khandu Beradi Vs. Nagar Agricultural Sale and Purchase Co-operative Society 12, concerns itself with the applicability to statutory arbitrations of Section 37 of the Arbitration Act, 1940, which made the Limitation Act applicable to arbitrations generally. It is pertinent to note that Section 46 of the Arbitration Act, 1940 particularly provided for exclusion of applicability of Section 37 to statutory arbitrations. The statutory arbitration, with which the Court was concerned in the case of Savitra Khandu was under the Bombay Co-operative Societies Act. That Act had no particular provision for applicability of the Arbitration Act, 1940 and particularly, Section 37 thereof to statutory arbitrations carried out under that Act. Such applicability was provided for under Section 46 of the Arbitration Act, 1940, which in terms excluded the applicability of Section 37 of the Arbitration Act, 1940. On the other hand, by virtue of the provisions of Section 18 of the Small Enterprises Act, all provisions of the Arbitration and Conciliation Act, 1996 are made applicable to any arbitration carried 12 AIR 1957 Bom. 1957

Chittewan 15/16 ARBPL 2464-16.doc out by the Council or its designate under Section 18(3) of the Small Enterprises Act as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration and Conciliation Act, 1996. There is no exception made in respect of Section 43 of the Arbitration and Conciliation Act, 1996. Accordingly, the provisions of the Limitation Act apply to arbitrations under Section 18(3) of the Small Enterprises Act, just as they would apply to arbitrations arising out of an arbitration agreement entered into between the parties under sub-section (1) of Section 7 of the Arbitration and Conciliation Act, 1996. The case of Savitra Khandu (supra), thus, has no application to the facts of the present case. The case of Central Coal Fields Ltd. Vs. S.K. Dutta¹³ decided by Jharkhand High Court also relies on the decision of our Court in Savitra Khandu (supra), which has been explained above.

14 It is not the Respondent's case that even if the Limitation Act were to apply, the claims are within time. In any event, it was for the Arbitral Tribunal/Council to go into each claim and see if it was within time. The Arbitral Tribunal/Council did not do so, for the reason that, according to it, under the Small Enterprises Act, the buyer has a claim so long as the amount is not finally paid by the supplier. The liability to pay interest arises under Section 16 of the Small Enterprises Act "notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force". The enforcement of such liability, is, however, through the mechanism of Section 18 of the Small Enterprises Act, first by conciliation under sub-section (2) and then, arbitration under sub-section (3) thereof. As we have noted above, the provisions of 13 Miscellaneous Appeal (S.J.) No.258 of 1997 (R) Decided on 19 May 2010.

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Limitation Act apply to such arbitrations.

15 In the premises, the impugned award of the Arbitral Tribunal/Council cannot be sustained.

16 The Arbitration Petition is, accordingly, allowed and the impugned award dated 31 January 2015 passed by the Micro and Small Enterprises Facilitation Council, Konkan Division, Thane, is set aside.

17 In view of the disposal of the Arbitration Petition, the Notices of Motion do not survive and the same are disposed of.

18 In the circumstances of the case, there shall be no order as to costs.

19 The amount deposited in Court by the Petitioners in pursuance of an order passed by this Court earlier shall be refunded by the Office of the Prothonotary to the Petitioners. The Office to number the petition forthwith.

(S.C.GUPTE, J.)