

Allahabad High Court

M/S Paper & Board Convertors Thru' ... vs U.P. State Micro & Small ... on 29 April, 2014

Bench: Dhananjaya Yeshwant Chandrachud, Chief Justice, Dilip Gupta

HIGH COURT OF JUDICATURE AT ALLAHABAD

Chief Justice's Court

A.F.R.

Case :- WRIT - C No. - 24343 of 2014

Petitioner :- M/S Paper & Board Convertors Thru' Partner Rajeev Agrawal

respondents :- U.P. State Micro & Small Enterprises & 2 Others

Counsel for Petitioner :- Swapnil Kumar

Counsel for respondents :- A.S.G.I.

Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, Chief Justice

Hon'ble Dilip Gupta, J.

The petitioner is a partnership firm which is registered under the provisions of the Indian Partnership Act, 1932 and is also registered as a small scale industry. The petitioner is engaged in the business of processing, manufacture and conversion of various kinds of papers and paper products. The petitioner is registered with the National Small Industries Corporation as a supplier of paper products to government departments in accordance with the rate contracts which are issued from time to time by the second respondents.

During 2005, 2008 and 2009, rate contracts were awarded to the petitioner for the supply of paper products which the petitioner claims to have supplied to designated consignees. According to the petitioner, goods were supplied but payments were not made.

On 3 June 2011, the petitioner served an Advocate's notice on the second respondent for the payment of its outstanding dues failing which, it was stated that it would be constrained to initiate proceedings under the Micro, Small and Medium Enterprises Development Act, 2006 (2006 Act). On 3 October 2011, the petitioner filed a claim before the Micro and Small Enterprises Facilitation Council of the State of Uttar Pradesh at Kanpur claiming an award of an amount of Rs.1.03 crore

together with interest and expenses.

An objection was filed on behalf of the respondents on 4 May 2012 inter alia contending that the dispute was first required to be decided by an arbitrator and it was only when the liability to make payment was established that the Facilitation Council at Kanpur could exercise the jurisdiction. The respondents stated that in pursuance of the request which was made by the petitioner, an arbitrator had been appointed on 5 October 2011. On 28 December 2012, the respondents filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 on the ground that the sole arbitrator had been appointed by the respondents in pursuance of the request made by the petitioner.

Upon receipt of the reference, the Facilitation Council conducted conciliation proceedings. The Facilitation Council recorded a failure of conciliation on 30 December 2013. Thereafter, by an order dated 13 February 2014, the Facilitation Council upheld the contention of the respondents and directed that the petitioner should place its version before the sole arbitrator in terms of the rate contract agreement.

The submission which has been urged on behalf of the petitioner is that once the petitioner had invoked the provisions of the 2006 Act, the Facilitation Council was conferred with the exclusive jurisdiction under Section 18 to enter upon the dispute and to initially conduct the conciliation proceedings. Moreover, once the conciliation ended in a failure, the Council was, under Section 18 (3) either required to take up the dispute for arbitration itself or to refer it to any institution or centre providing alternate dispute resolution services. The submission is that though the petitioner had invoked arbitration initially, the provisions of the 2006 Act were invoked on 3 October 2011. Thereafter, the proceedings had to be governed by that Act which contains a non-obstante clause in sub-section (4) of Section 18 and hence, it was not open to the respondents to seek a reference to the sole arbitrator whom the respondents had designated on 5 October 2011 after the petitioner had moved the Facilitation Council.

On the other hand, it has been urged on behalf of the respondents by the learned Assistant Solicitor General of India that it was at the behest and the request of the petitioner that the respondents had appointed an arbitrator on 5 October 2011. The respondents having acceded to the request for arbitration in terms of the arbitration agreement between the parties, the Facilitation Council was not in error in referring the parties to arbitration by the sole arbitrator appointed by the respondents on 5 October 2011.

The 2006 Act makes special provisions for facilitating the promotion and development and enhancing the competitiveness of Micro, Small and Medium Enterprises. The Statement of Objects and Reasons appended to the Bill which was introduced in Parliament contains the following rationale for the enactment of law.

"Statement of Objects and Reasons.--Small scale industry is at present defined by notification under section 11-B of the Industries (Development and Regulation) Act, 1951. Section 29-B of the Act provides for notifying reservation of items for exclusive manufacture in the small scale industry sector. Except for these two provisions, there exists no legal framework for this dynamic and vibrant

sector of the country's economy. Many Expert Groups or Companies appointed by the Government from time to time as well as the small scale industry sector itself have emphasised the need for a comprehensive Central enactment to provide an appropriate legal framework for the sector to facilitate its growth and development. Emergence of a large services sector assisting the small scale industry in the last two decades also warrants a composite view of the sector, encompassing both industrial units and related service entities. The world over, the emphasis has now been shifted from "industries" to "enterprises". Added to this, a growing need is being felt to extend policy support for the small enterprises so that they are enable to grow into medium ones, adopt better and higher levels of technology and achieve higher productivity to remain competitive in a fast globalisation area. Thus, as in most developed and many developing countries, it is necessary, that in India too, the concerns of the entire small and medium enterprises sector are addressed and the sector is provided with a single legal framework. As of now, the medium industry or enterprise is not even defined in any law.

2. In view of the above-mentioned circumstances, the Bill aims at facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises and seeks to--

- (a) provide for statutory definitions of "small enterprise" and "medium enterprise";
- (b) provide for the establishment of a National Board for Micro, Small and Medium Enterprises, a high-level forum consisting of stakeholders for participative review of and making recommendations on the policies and programmes for the development of small and medium enterprises;
- (c) provide for classification of micro, small and medium enterprises on the basis of investment in plant and machinery, or equipment and establishment of an Advisory Committee to recommend on the related matter;
- (d) empower the Central Government to notify programmes, guidelines or instructions for facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises;
- (e) make provisions for ensuring timely and smooth flow of credit to small and medium enterprises to minimise the incidence of sickness among and enhancing the competitiveness of such enterprises, in accordance with the guidelines or instructions of the Reserve Bank of India;
- (f) empower the Central and State Governments to notify preference policies in respect of procurement of goods and services, produced and provided by small enterprises, by the Ministries, departments and public sector enterprises;
- (g) empowering the Central Government to create a Fund or Funds for facilitating promotion and development and enhancing the competitiveness of small enterprises and medium enterprises;

(h) make further improvements in the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act, 1993 and making that enactment a part of the proposed legislation and to repeal that enactment.

3. The Bill seeks to achieve the above objects."

Chapter V of the Act contains special provisions in regard to delayed payments to Micro and Small Enterprises. Section 15 provides that where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment on or before the date agreed upon between him and the supplier in writing or, where there is no agreement, before the appointed day. The proviso stipulates that, in any case, the period agreed upon between the supplier and the buyer shall not exceed forty-five days from the day of acceptance or the day of deemed acceptance. Section 16 provides for the payment of interest by the buyer at three times of the Bank rate notified by the Reserve Bank upon a failure of the buyer to make payment, as required under section 15, notwithstanding anything contained in any agreement or in any law for the time being in force.

Section 18 of the Act is to the following effect:

"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 it to 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 disputes as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of the 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."

Certain salient aspects of Section 18 would merit emphasis. Sub-section (1) of Section 18 provides for a reference to the Micro and Small Enterprises Facilitation Council notwithstanding anything contained in any other law for the time being in force, by any party to a dispute, with regard to any amount due under Section 17. Consequently, what Section 18 (1) does, is to stipulate a statutory reference to the Facilitation Council for the resolution of disputes. Under sub-section (2), on receipt of a reference, the Council shall either conduct a conciliation in the matter itself or seek assistance of any institution or centre providing alternate dispute resolution services. Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 are to apply to such a dispute. Sub-section (3) provides for the consequences if the conciliation is not successful. Once the conciliation proceeding is terminated without any settlement, the Council has one of two courses of action open. The Council may either itself take up the dispute for arbitration or refer the dispute to an institution or centre providing alternate dispute resolution services for such arbitration. Thereupon the provisions of the Arbitration and Conciliation Act, 1996 apply as if the arbitration was in accordance with the provisions of Section 7 (1) of the Act of 1996. Sub-section (3) of Section 18, therefore, contains a statutory reference to arbitration. This is not dependent on the existence of an arbitration agreement in the contract between the parties.

Under sub-section (4) of Section 18, this position is made abundantly clear because it stipulates that notwithstanding anything contained in any other law for the time being in force, the 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 a supplier located within its jurisdiction and a buyer located anywhere in India.

The petitioner invoked the provisions of the 2006 Act by filing a reference to the Facilitation Council on 3 October 2011. There was undoubtedly a dispute between the petitioner and the respondents in regard to the claim of the petitioner arising out of non payment of its bills. The respondents appointed a sole arbitrator on 5 October 2011 after the petitioner had invoked the intervention of the Facilitation Council on 3 October 2011 under Section 18 of the 2006 Act. Once the jurisdiction of the Facilitation Council has been validly invoked, the Council has exclusive jurisdiction to enter upon conciliation in the first instance and after conciliation has ended in failure, to refer the parties to arbitration. The Facilitation Council could either have conducted the arbitration itself or could have referred the parties to a centre or institution providing alternate dispute resolution services. The Facilitation Council was clearly in error in entertaining the objection filed by the respondents and referring the petitioner to the sole arbitrator so designated by the respondents.

The non-obstane provision contained in sub-section (1) of Section 18 and again in sub-section (4) of Section 18 operates to ensure that it is a Facilitation Council which has jurisdiction to act as an arbitrator or Conciliator in a dispute between a supplier located within its jurisdiction and a buyer located anywhere in India. The Facilitation Council had only one of the two courses of action open to it : either to conduct an arbitration itself or to refer the parties to a centre or institution providing alternate dispute resolution services stipulated in sub-section (3) of Section 18.

In this view of the matter, the impugned order of the Facilitation Council directing the parties to a reference before the sole arbitrator appointed by the respondents was manifestly illegal. We would,

accordingly, have to allow the petition and set aside the impugned order dated 13 February 2014. We order accordingly.

As a consequence, we restore the proceedings back to the first respondent. The first respondent shall now act in accordance with the provisions of sub-section (3) of Section 18 and either conduct the arbitration itself or refer the arbitral proceedings to any institution or centre providing alternate dispute resolution services. The first respondent shall pass necessary orders in consequence of this direction within a period of one month from the receipt of a certified copy of this order.

By way of abundant caution, we make it clear that we have expressed no opinion on the merits or the tenability of the claim of the petitioner in respect whereof we keep all the rights and contention of the respondents open, to be urged before the arbitral forum.

The petition is, accordingly, allowed. There shall be no order as to costs.

Order Date :- 29.4.2014

(Dr.D.Y.Chandrachud,C.J.)

RK

(Dilip Gupta,