Serial No.5
February 10, 2020.
SG

MAT 1497 of 2019
with
CAN 10905 of 2019

Mackintosh Burn Limited
-versus-
Micro and Small Enterprises Facilitation Council and others

Mr Abhratosh Majumder
Mr Soumak Basu
...for the appellant.

Mr Vikram Nandrajog
Mr Biswarup Bhattacharya
Mr Rajib Mullick
Mr Rounak Bose
...for the respondents.

The short question involved in this appeal is as to the extent of the authority available to the Facilitation Council under the Micro, Small and Medium Enterprises Development Act, 2006 to make a reference to arbitration in terms of Section 18 thereof.

The facts are not much in dispute. The third respondent herein is a small enterprise within the meaning of Section 2 (m) of the Act of 2006. Upon disputes arising as to the payment to the third respondent herein in connection with an agreement to set up a demineralised water plant at Raghunathpur, the third respondent herein invoked the jurisdiction of the Micro and Small Enterprises Facilitation

Council, the first respondent herein, to recover the dues from the appellant.

Upon receipt of a reference from a supplier as defined in Section 2(n) of the Act of 2006, the machinery envisaged in Section 18 of such Act is set in motion. Section 18 of the Act may be seen in such context:

> "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 any 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."

Thus, on receipt of a reference for recovery of any amount due to a supplier as defined in Section 2(n) of the Act of 2006, the Council is obliged to either 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 institution or centre for conducting conciliation proceedings. In the event the conciliation fails, the Council is then obliged to either take up the disputes for arbitration by itself or refer such disputes for arbitration to any institution or centre providing alternate dispute resolution services. There is a time-bound schedule for the reference to be concluded.

Section 19 of the Act of 2006 recognises the challenge mechanism as provided in the Arbitration and Conciliation Act, 1996; but requires a statutory pre-deposit to be made for the arbitration court to entertain a challenge.

Section 24 of the Act of 2006 gives overriding effect to the provisions of Sections 15 to 23 of the said Act:

"24. Overriding effect

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

In the present case, the original agreement between the appellant and the third respondent contained an arbitration clause. It is asserted on behalf of the appellant that once there is

an arbitration agreement between two parties, irrespective of whether the other party is a small or micro enterprise, there is no room for the legal fiction envisaged in Section 18(3) of the Act of 2006 to operate. It is the further submission of the appellant that a legal fiction operates when such a position as is sought to brought about by the legal fiction does not actually exist; when the parties themselves have an arbitration agreement, the legal fiction can have no manner of operation. In support of such contention of the appellant, an unreported judgment of the Nagpur Bench of the Bombay High Court delivered on August 27, 2010 in WP No.2145 of 2010 *(Steel Authority of India Limited v The Micro, Small Enterprise Facilitation Council)* has been brought for the law as enunciated at paragraph 11 of the judgment. So that the entirety of the reasoning in support of the view expressed in the Bombay High Court judgment may be seen, paragraph 11 of the judgment is set out:

> "11. Having considered the matter, we find that Section 18 (1) of the Act, in terms allows any party to a dispute relating to the amount due under Section 17 i.e. an amount due and payable by buyer to seller; to approach the facilitation Council. It is rightly contended by Mrs. Dangre, the learned Addl. Government Pleader, that there can be variety of disputes between the parties such as about the date of acceptance of the goods or the deemed day of acceptance, about schedule of supplies etc. because of which a buyer may have a strong objection to the bills raised by the supplier in which case a buyer must be considered eligible to approach the Council. We find that Section 18(1) clearly allows any party to a dispute namely a buyer and a supplier to make reference to the Council. However, the question is; what would be the next step after such a reference is made, when an arbitration agreement exists between the parties or not. We find that there is no provision in the Act, which negates or renders an arbitration agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the provisions of Section

15 to 23-including section 18, which provides for forum for resolution of the dispute under the Act-would not have the effect of negating an arbitration agreement since that section overrides only such things that are inconsistent with Section 15 to 23 including Section 18 notwithstanding anything contained in any other law for the time being in force. Section 18(3) of the Act in terms provides that where conciliation before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution and that the provisions of the *Arbitration and Conciliation Act, 1996* shall thus apply to the disputes as an arbitration in pursuance of arbitration agreement referred to in Section 7 (1) of the *Arbitration and Conciliation Act, 1996*. This procedure for arbitration and conciliation is precisely the procedure under which all arbitration agreements are dealt with. We, thus, find that it cannot be said that because Section 18 provides for a forum of arbitration an independent arbitration agreement entered into between the parties will cease to have effect. There is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996."

Since it is a State Government company which is the appellant, in keeping with the degree of fairness which is incumbent on every litigant, the appellant has referred to a judgment reported at 2014 SCC Online All 2895. At paragraphs 5 and 6 of such Allahabad judgment, a different view has been taken from the Bombay judgment, without, however, elaborating much on the issue.

Neither judgment cited on behalf of the appellant in this appeal was placed before the Single Bench. In addition, the appellant refers to a judgment reported at 2019 (8) SCC 416 and places paragraphs 88 and 89 from the report to emphasise on the construction of a deeming provision or the legal fiction that is

created by a deeming provision. Upon noticing previous authorities on the subject, the Supreme Court accepted that when a legal fiction is introduced by a statute, the attended corollaries would also operate.

The essence of the Act of 2006 is captured in Chapter V thereof which is intituled as “Direct payments to Micro and Small Enterprises”. Section 15 is the first provision under Chapter V of the Act. Section 15 obliges a buyer who has agreed to obtain goods or services from a supplier as defined in Section 2(n) of the Act to make the payment therefor before the date agreed in writing by the parties to the transaction or, when there is no such agreement, before the appointed day. “Appointed day” is defined in Section 2(b) of the Act to be the day following immediately after the expiry of a period of 15 days from the date of acceptance or the date of deemed acceptance of any goods or services obtained by a buyer from a supplier as defined. The proviso to Section 15 of the Act records that the period agreed upon for payment shall not exceed 45 days from the date of acceptance or the date of deemed acceptance of the goods or services.

Section 16 of the Act stipulates that, notwithstanding anything contained in any agreement between the buyer and the supplier or any law for the time being in force, when the buyer fails to make payment of the amount to the supplier as required under Section 15 of the Act, the buyer would be liable to pay compound interest with monthly rests to the supplier on the defaulted amount from the appointed day or the day immediately following the date agreed upon at three times the bank rate notified by the Reserve Bank. Section 17 mandates that the buyer shall be liable

to pay the amount with interest as provided under Section 16 of the Act to a supplier as defined in Section 2(n) of such Act.

Section 18 of the Act begins with a *non-obstante* clause. The implication of such clause is that notwithstanding the pendency of any suit or arbitral reference between the parties to the transaction, a supplier as defined in Section 2(n) of the Act may make a reference to the Micro and Small Enterprises Facilitation Council with regard to any amount due to such supplier under Section 17 of the Act. It is possible, therefore, that the buyer has instituted a suit complaining of the quality of the goods supplied by a supplier as defined in the Act or the buyer has initiated an arbitral reference in accordance with an arbitration clause governing the agreement; but it would still be open to the supplier as defined in the Act to carry a reference to the Council in respect of any amount that such supplier perceives to be due to such supplier under Section 17 of the Act.

It is true, and as has been noticed in the Bombay judgment, that, in theory, a reference may be made under Section 18(1) of the said Act by either party to a dispute when the supplier as defined in the said Act is one of the parties to the transaction. However, in practice, it is difficult to imagine that a buyer in such a transaction would make a reference to the Council under Section 18(1) of the Act. It is scarcely expected of a buyer to invite upon itself the payment of interest at the prohibitive rate as stipulated in Section 16 of the said Act; because that is the consequence of a reference being made and the buyer being found in default. Thus, ordinarily, it may only be the supplier as defined in the Act which would make a reference to the Council under Section 18(1) of the said Act. In any event, the words “with regard to any amount due

under section 17" in Section 18(1) of the said Act points to the supplier as defined in the Act being the party making a reference to the Council under such provision; though it is possible, in theory, for even a buyer who has obtained goods and services from a registered micro or small enterprise to make such a reference if such buyer perceives that the amount claimed from it, whether on account of compound interest under Section 16 of the said Act or otherwise, is exorbitant.

Once a reference is received by the Council under Section 18(1) of the said Act, the Council has first to resort to the mechanism envisaged in sub-section (2) and, upon the failure of such mechanism, the Council has to take steps in terms of sub-section (3) of Section 18 of the Act. Section 18(2) of the said Act permits the Council itself to conduct conciliation in the matter or to send the matter for conciliation to any institution or centre providing alternate dispute resolution services. Such conciliation has to be conducted in accordance with Sections 65 to 81 of the Act of 1996 and the legal fiction in Section 18(2) of the said Act is that the resultant conciliation will be deemed to have been initiated under Part-III of the Act of 1996.

In the event the conciliation initiated under Section 18(2) of the said Act is not successful and stands terminated without any settlement between the parties, Section 18(3) of the said Act comes into play. Under such provision, the Council may itself take up the disputes for arbitration or refer the disputes to the arbitration of any institution or centre providing alternate dispute resolution services. Such arbitration has then to be conducted in accordance with the Act of 1996. The legal fiction in Section 18(3) of the said Act is in its last limb as evident from the words "as if the

arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7" of the Act of 1996.

Under Section 18(3) of the said Act, the Council has only two choices: to take upon the burden of adjudicating the disputes or to refer such disputes to any institution or centre providing alternate dispute resolution services. There is no third choice open to the Council.

Indeed, the scheme under Chapter V of the Act gives an overwhelming advantage to a supplier as defined in the Act if such supplier remains unpaid for any goods supplied or services rendered. Section 18(4) of the Act is at variance with Section 2(1)(e) of the Act of 1996 and, as such, contrary to the general principles embodied in Sections 16 to 20 of the Civil Procedure Code that find reflection in Section 2(1)(e) of the Act of 1996. A supplier as defined in the said Act may approach the Council with a reference and if the disputes are taken up for adjudication by the Council or the disputes are referred to the arbitration of an institution or centre providing alternate dispute resolution services, the arbitral tribunal so constituted will have jurisdiction notwithstanding the buyer being located anywhere in India. Section 18(4) of the said Act is another indication that the reference that is envisaged under Section 18(1) thereof would, ordinarily, be made by a supplier as defined in the said Act and not by the buyer.

Section 18(5) of the Act requires every reference under Section 18 is to be decided within a period of 90 days from the date of making of the reference.

As in this case, it is possible that the parties to an agreement to supply goods or services by a supplier as defined in the Act of 2006 have a previous arbitration agreement. Such arbitration agreement can operate in several fields; but if the claim of the supplier is for recovery of the amount due, the private arbitration agreement may be of no relevance as such supplier is entitled to make a reference to the Council under Section 18 of the said Act and the Council is entitled to retain or send the matter for conciliation and, if necessary, for arbitration in accordance with sub-sections (2) and (3) thereof, completely disregarding the previous private agreement as to arbitration that may have been in place between the parties to the disputes. The legal fiction that is created by the last limb of Section 18(3) of the Act of 2006 is that when a reference is taken up by the Council itself or a reference for arbitration is sent to any other in accordance with such provision, the parties to the dispute are deemed to have entered into an arbitration agreement for the purpose of such reference being taken up by the relevant arbitral tribunal. Such legal fiction is necessary since the arbitration that is conducted even pursuant to a reference made under Section 18(3) of the Act of 2006 is in accordance with the general statute of 1996. The Act of 1996 recognises such agreements as indicated in Section 7 thereof to be arbitration agreements. Simply put, an arbitration agreement has to be in writing and either signed by the parties thereto or acknowledged in some manner or form by such parties. If the deeming provision in the last limb under Section 18(3) of the said Act had not been there, it may have been possible to take the view as reflected in the Bombay High Court judgment.

However, when an arbitral reference is taken up by the Council or a reference made for arbitration to some other body

under Section 18(3) of the Act of 2006, the legal fiction springs to life: that is to say, the parties to the dispute are immediately deemed to have executed an agreement in terms of Section 7(1) of the Act of 1996 to refer such disputes to arbitration in accordance with the reference made by the Council.

It may also be observed in this context that when parties enter into a contract it is completely in order for the parties to alter the terms thereof or rewrite the contract; the only limitation being that the parties must be *ad idem* in such regard. An arbitration agreement between two or more parties, in such sense, is not different from any other contract or from any other term of a contract. As such, just as it is possible to rewrite a contract or to alter the terms of a contract by mutual consent, it is equally possible to rewrite an arbitration agreement or alter the original arbitration agreement by mutual consent. In a scenario where there already exists an arbitration agreement between the parties to the dispute, the legal fiction recognised in the last limb of Section 18(3) of the said Act operates as if a subsequent arbitration agreement is entered into between the parties which has the effect of overriding the initial arbitration agreement that they had entered into. In a sense, the arbitration agreement that comes into existence as a consequence of the legal fiction is foisted on the party against whom the reference is made - ordinarily, the buyer - despite such party not submitting to the same. Any other interpretation would rob the provision of its efficacy and render it toothless.

For the reasons aforesaid, the view expressed in the Bombay judgment is found to be exceptionable and unacceptable. The Allahabad view proceeds on the wording of the statute, the non-

obstante clauses contained in Section 18 of the said Act and the overriding primacy given to the essential provisions of Chapter V of the statute in Section 24 thereof.

It is the elementary that when the law requires something to be done in a particular manner, it must be done in such manner and in no other manner. Section 18(3) of the Act of 2006 commands that the arbitral reference may be taken up by the Council or the disputes may be referred to arbitration by any institution or centre involved in alternate dispute resolution. In the light of such statutory requirement, the Council has no option but to take upon the reference itself or send it to another institution or centre as provided for in the provision. There is no charter for the Council to do anything else. Thus, the previous arbitration agreement between the supplier and the purchaser is of no avail, since the disputes cannot be referred to arbitration in accordance with such agreement which stands obliterated by the legal fiction in Section 18(3) of the said Act.

The Supreme Court judgment cited by the appellant is of no assistance to it in the present context. Indeed, by relying on such principle as enunciated by the Supreme Court, the corollary to the legal fiction in Section 18(3) of the said Act is that there is an altered arbitration agreement between the parties that overrides the earlier arbitration agreement.

For the reasons indicated above, the appeal is found to be completely devoid of merit. The reference made by the Council under Section 18(3) of the Act of 2006 in this case has to be the mode of adjudication of the disputes between the appellant and the third respondent pertaining to the third respondent's claim for

recovery of the amount due in respect of the Raghunathpur contract.

At the request of the appellant, the time to file the counter-statement before the arbitral tribunal is extended till March 5, 2020. The time to file the rejoinder to the counter-statement will remain unchanged and the arbitral tribunal should take up and dispose of the matter in accordance with law as expeditiously as the statute provides therefor.

MAT 1497 of 2019 and CAN 10905 of 2019 are dismissed, but without any order as to costs.

(Sanjib Banerjee, J.)

(Kausik Chanda, J.)