IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
[COMMERCIAL DIVISION]
(Via Video Conference)

BEFORE:
The Hon'ble Mr. Justice Ravi Krishan Kapur

AP/442/2021

Board of Trustees for the Syama Prasad Mookerjee Port, Kolkata
Vs.
Marinecraft Engineers Private Limited

For the Petitioner	: Mr. Kishore Datta, Sr. Adv. Ms. Ashok Kumar Jena, Mr. Abhra Jena,
For the Respondent	: Mr. Sabyasachi Chaudhury, Mr. S. E. Huda, Mr. Arjun Mookerjee, Mr. Abhijit Guha Ray,
Heard on	: 16.12.2021, 04.01.2022, 13.01.2022
Judgment on	: 17.05.2022

Ravi KrishanKapur, J.:

1. This is an application under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Act').

2. The petitioner assails an order dated 12 May, 2021 which is described as an interim award passed by The Micro Small and Medium Enterprise Facilitation Council ('The Council'). By the impugned order, the objection raised by the petitioner in respect of jurisdiction of the Council to entertain the disputes referred to the Council has been rejected.

3. The brief facts of this case are that, the petitioner had published a tender dated 29 March, 2011 for Four Yearly Survey and Dry Dock Repair of Tug Bijoy Singha situated at Marine Operation Division at the Haldia Dock Complex. The respondent participated in the tender and was awarded the bid. Thereafter, a work order dated 22 November, 2011 was issued to the respondent.

4. The disputes between the parties pertain to the deductions made by the petitioner under diverse heads from the moneys which were due and payable to the respondent. The respondent being a unit entitled to the benefits of the Micro Small and Medium Enterprises Development Act, 2006 (MSMED Act) referred the disputes to the Council under Section 18 of the Act. The conciliation proceedings failed and the arbitration commenced before the Council. Subsequently, the petitioner raised an issue of jurisdiction inter alia contending that the Council could not adjudicate the disputes on the ground that the contract contained an arbitration clause, which had already been invoked by the respondent.

5. On behalf of the petitioner it is urged that, the order dated 12 May, 2021 is an interim award and is subject to challenge under Section 34 of the Act. It is also urged that the contract between the parties contains a multitier arbitration clause (Clause 18 of the agreement) and the respondent by a letter dated 16 January, 2015 had already invoked the arbitration clause. Hence, the Council had no jurisdiction to adjudicate upon the disputes.

6. On behalf of the respondent, it was urged that the provisions of the MSMED Act have an overriding effect and the Council has exclusive jurisdiction to conduct the proceedings. Moreover, it is contended that the impugned order is not an interim award within the meaning of the Arbitration and Conciliation Act, 1996. In any event, the impugned order pertains to the jurisdiction of the Tribunal. Thus, the drill of Section 16 (5) and Section 16 (6) of the Act has to be followed and the petitioner must await the passing of the final award. Hence, on the ground of maintainability, this application is liable to be rejected.

7. In *Deep Industries Limited Vs Oil and Natural Gas Corporation Limited and Another (2020) 15 SCC 706*, the Supreme Court held as follows:

> *"The drill of Section 16 of the Act is that where a section 16 application is dismissed. No appeal is provided and the challenge to section 16 application being dismissed must wait the passing of a final award at which stage it may be raised under section 34".*

8. Subsequently, in *Bhaven Construction Vs Executive Engineer 2021 SCCOnLine 8,* it has been held that where an issue is raised on the aspect of the jurisdiction of an Arbitral Tribunal and the said contention is rejected or dismissed by the Tribunal, all issues of the arbitration must be decided first before challenging the issue of jurisdiction. In this context, it has been held as follows:

> *"27. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the Court examines the same under Section 34. Respondent No. 1 is therefore not left remediless,*

and has statutorily been provided a chance of appeal. In Deep Industries case (Supra), this Court observed as follows:

> *One other feature of this case is of some importance, As stated hereinabove, on 9.5.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34."*

9. In my view, the impugned order relates to the Tribunal's own jurisdiction. By the impugned order, the Council has held that "it does have jurisdiction to adjudicate the instant matter". In passing the impugned order, the Council has interpreted the provisions of the MSMED Act and adjudicated upon whether the contractual arbitration clause gets overridden by the provisions of the MSMED Act. I also find that the decision relied on by the petitioner in *IFFCO Limited Vs. Bhadra Products 2018(2) SCC 534* is inapplicable and distinguishable. In the said decision, the Arbitral Tribunal had finally decided on the issue of limitation. Paragraph 30 of the said decision reads as follows:

> *"In our view, therefore, it is clear that the award dated 23-7-2015 is an interim award, which being an arbitral award can be challenged separately and independently under Section 34 of the Act. We are of the view that such an award, which does not relate to the Arbitral tribunal's own jurisdiction under section 16, does not have to follow the drill of Sections 16(5) and 16(6) of the Act. Having said this, we are of the view that Parliament may consider amending Section 34 of the Act so as to consolidate all*

> *interim awards together with the final arbitral award, so that one challenge under Section 34 can be made after delivery of the final arbitral award. Piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense.” (*emphasis supplied)

10. Moreover, in an unreported decision of *Ranjiv Kumar & Another vs. Sanjiv Kumar & Another* (APO No.60 of 2018 and GA No.506 of 2018 in AP No.679 of 2017) the Division Bench has held as follows:

> “It is not the character of an objection that determines the nature of the remedy available to the objector upon the objection being overruled by an arbitral tribunal. It is only the nature of the order on the objection that is the guiding factor. Indeed, such distinction was noticed in *Pandurang Dhoni Chougule* and is evident from the passage from such judgment relied upon in *Indian Farmers Fertilizer Co-Operative Limited* and quoted above. An objection may result in it being accepted or overruled: if it is accepted and the reference comes to an end, surely such order will deemed to be an award and will be amenable to a challenge under Section 34 of the Act; *if, however, the objection is overruled, nothing is decided finally thereby as it only implies that the reference may continue*”.

11. Thus, since the impugned order relates to the Arbitral Tribunal’s own jurisdiction, it does not pass the test of an interim award permitting an application under Section 34 of the Act at this stage of the proceedings. The whole object and scheme of the Act is to secure an expeditious resolution of disputes, therefore the drill of section 16 prevents the parties from filing multiple litigations.

12. Accordingly, since the impugned order is not an interim or final award, there is no scope for challenging the same at this stage of the proceeding. Hence, A.P No 442 of 2021 stands dismissed on the ground of maintainability. However there shall be no orders as to costs.

(Ravi Krishan Kapur, J.)