IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ARB No. 86 of 2020 (O&M)
Date of Decision:10.06.2022

M/s SGM Packaging Industries

.....Applicant

Versus

M/s Goyal Plywood LLP

..... Respondents

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. D.S.Sobti, Advocate
for the applicant.

Mr. Vikram Amarnath, Advocate
for the respondent.

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LISA GILL, J(Oral).

This petition has been filed under Section 14 of the Arbitration and Conciliation Act (for short 'Arbitration Act') read with Section 151 CPC seeking termination of the mandate of the Sole Arbitrator.

It is submitted that the petitioner is a proprietorship firm engaged in manufacturing of corrugated boxes, packaging material and other material which is used in logistic industry for safe transportation of goods. Respondent is stated to be a supplier of plywood and other wooden material used in the manufacturing of corrugated boxes and other packaging material by the petitioner. Respondent claimed an outstanding amount qua the petitioner in respect of goods supplied by it to the petitioner in the year 2016. Claim was filed by the respondent before the Haryana Micro and

Small Enterprises Facilitation Council (for short 'HMSEFC') claiming an amount of Rs. 14,01,505/-.

It is contended that the matter was referred for arbitration without any valid order being passed on conciliation proceedings under the Micro, Small and Medium Enterprises Development Act, 2006 (for short 'MSMED Act') Petitioner is stated to have received notice dated 08.06.2020 from the office of Sh. Satish Ahlawat, the Sole Arbitrator, asking the parties to appear before the Arbitrator on 20.06.2020 as he had been appointed Arbitrator by the HMSEFC. It is stated that the petitioner filed an application under Section 12 of the Arbitration Act seeking valid disclosure from the learned Arbitrator, copy of which is attached as Annexure P-2 and a specific objection was raised in the said application that there exists no clause for arbitration, therefore HMSEFC could not have referred the matter to the Arbitrator. Moreover, declaration in terms of Section 12 of the Arbitration Act, should be made by the Arbitrator. Said application was dismissed by the learned Arbitrator on 20.06.2020, Annexure P-3.

Present petition has thus been filed on the grounds that conduct of the Arbitrator is arbitrary and disclosure regarding independence and impartiality of the Arbitrator is imperative as per Section 12 of the Arbitration Act. It is further submitted that claim filed by the respondent-claimant is time barred as invoices are of the year 2016. Learned counsel for the petitioner also argued that Section18 (3) MSMED Act, provides for referral of the dispute to any institution or centre or arbitration, therefore referral to the Sole Arbitrator is illegal. Furthermore, it is contended that learned Arbitrator was moving with the arbitration proceedings at a very fast pace, thus mandate of the Arbitrator should stand terminated.

This petition has been vehemently opposed by the respondent

while submitting that petitioner is guilty of concealment of material facts. It is contended that respondent-claimant being duly registered under the MSMED Act had approached the HMSEFC for redressal of its grievances. Intimation of the same was duly conveyed vide order dated 25.09.2019 wherein petitioner was advised to pay the amount in question and to settle the dispute. It is thereafter that the HMSEFC on 26.02.2020 decided to refer the matter to the empanelled Arbitrator i.e., Sh. Satish Ahlawat, retired District and Sessions Judge. The said order, at no point of time has been challenged by the petitioner.

Learned counsel for the respondent further submits that after dismissal of petitioner's application under Section 12 and 13 of the Arbitration Act on 20.06.2020, present petition was filed on 13.07.2020. Petitioner's defence was struck off by the learned Arbitrator on 18.07.2020. Petitioner filed ARB No. 113 of 2020 under Section 37 of the Arbitration Act before the learned Additional District Judge, Gurugram, challenging order dated 18.07.2020 striking off petitioner's defence. Notice was issued in ARB No. 113 of 2020 for 31.07.2020, but no interim order was passed in petitioner's favour.

Petitioner, it is stated filed ARB No. 114 of 2020 i.e., another petition under Section 37 of the Arbitration Act before the learned District Judge, Gurugram, challenging striking off his defence along with an application for stay of arbitral proceedings, which was taken up on 24.07.2020. It is submitted that due to concealment of facts and false averments of petitioner, order dated 24.07.2020 was passed by the learned Additional District Judge, Gurugram in ARB No. 114 of 2020 to the effect that pronouncement of the award by the Sole Arbitrator, shall remain stayed. In an utterly devious manner, petitioner it is stated withdrew the previous

arbitration case i.e., ARB No. 113 of 2020 on 31.07.2020.

It is submitted by learned counsel for the respondent that the present petition i.e., ARB No. 86 of 2020, which had been filed earlier, was taken up for hearing on 27.07.2020 but the petitioner actively concealed the pendency of ARB No. 114 of 2020 filed by it before the learned Additional District Judge, Gurugram as well as the interim order dated 24.07.2020 passed therein, due to which *ex parte* interim order dated 27.07.2020 was passed in the present petition to the effect that Arbitrator shall not pass the final award. Answering respondent, it is stated filed an application for vacation of ex parte stay dated 24.07.2020 as is reflected in order dated 31.07.2020 of learned Additional District Judge, Gurugram. ARB No. 114 of 2020 was ultimately dismissed on 10.08.2020.

Learned counsel for the respondent submits that apart from the fact that petitioner has never challenged the order referring the matter to the learned Arbitrator, proceedings are very well maintainable under the MSMED Act. Existence of an arbitral clause between the parties is not a sine qua non for the respondent-claimant to approach the HMSEFC under the MSMED Act in terms of Section 18 thereof. Petitioner's application under Section 12 of the Arbitration Act, has been rightly dismissed by the learned Arbitrator. Moreover, present petition, it is urged is not maintainable and if at all, the petitioner would have his remedy available after passing of the award. Petitioner, it is submitted is merely trying its level best to delay the proceedings in one way or the other and defeat the very purpose of the MSMED Act. It is thus prayed that this petition be dismissed.

Heard learned counsel for the parties and have gone through the file with their assistance.

Notice of motion was issued in this petition by a Coordinate Bench while noting contentions on behalf of the petitioner to the effect that there is no agreement between the parties, therefore, an Arbitrator could not have been appointed by invoking Section 18 of the MSMED Act and furthermore even if Section 18 of the MSMED Act had to be invoked, appropriate procedure of conciliation etc., was not adopted.

At the outset, it is relevant to note that the petitioner did not challenge appointment of the Arbitrator by the HMSEFC, vide order dated 26.02.2020 which has incidently not even been placed on record. Having noted this fact, it is useful to refer to the provisions of Section 15, 16, 17 and 18 of the MSMED Act, which read as under:-

> "15. **Liability of buyer to make payment.**—Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefore on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day: Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.
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> 16. **Date from which and rate at which interest is payable.—**Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.
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> 17. **Recovery of amount due.—**For any goods supplied or services rendered by the supplier, the buyer shall be liable

to pay the amount with interest thereon as provided under section 16.

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 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."

A bare perusal of these provisions clearly indicate that the respondent who was registered under the MSMED Act, at the relevant time was entitled to approach the HMSEFC under the MSMED Act for redressal of its grievance. Hon'ble Supreme Court in **M/s Silpi industries etc., Vs. Kerela State Road Transport Corporation and another etc., Civil Appeal Nos. 1570-1578 of 2021, d/d 29.06.2021,** held as under:-

> "23. The obligations of the buyer to make payment, and award of interest at three times of the bank rate notified by Reserve Bank in the event of delay by the buyer and the mechanism for recovery and reference to Micro and Small Enterprises Facilitation Council and further remedies under the 2006 Act for the party aggrieved by the awards, are covered by Chapter V of the 2006 Act. The provisions of Section 15 to 23 of the Act are given overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. From the Statement of Objects and Reasons also it is clear that it is a beneficial legislation to the small, medium and micro sector. The Arbitration and Conciliation Act, 1996 is a general law whereas the Micro, Small and Medium Enterprises Development Act, 2006 is a special beneficial legislation which is intended to benefit micro, small and medium enterprises covered by the said Act."

It is specifically held that provisions of the MSMED Act being a Special Act shall prevail and have overriding effect *vis-a-vis* the Arbitration Act. Even in a case where exists an agreement between the parties for resolution of disputes by Arbitration, if a seller is covered under the MSMED Act, the seller is at liberty to approach the competent authority to make its claim and agreement, if any, between the parties is to be ignored in view of the statutory obligations and mechanism provided under the MSMED Act. The counter claim was also held to be permissible by the

buyer. Section 18 of the MSMED Act starts with a non obstante clause, therefore, argument that proceedings are not maintainable in the absence of an arbitral clause is devoid of any merit, hence rejected.

In respect to the argument that no conciliation etc., was carried out, it is to be reiterated that order dated 26.02.2020 whereby the Sole Arbitrator was appointed has never been subjected to challenge by the petitioner.

It is relevant to note at this stage that conduct of the petitioner does reflect active concealment of facts. It is a matter of record that the present petition was filed on 13.07.2020. ARB No. 113 of 2020 was filed by the petitioner on 18.07.2020 challenging order dated 18.07.2020 passed by the Arbitrator whereby petitioner's defence was struck off. Admittedly, notice was issued therein by the learned Additional District Judge, Gurugram on 23.07.2020 without any interim order being passed. ARB No. 114 of 2020 under Section 37 of the Arbitration Act was again filed by the petitioner which was taken up on 24.07.2020 by another Additional District Judge, Gurugram on the same cause of action. Order dated 24.07.2020 passed by the said Additional District Judge, Gurugram, reads as under:-

> "Petition u/s 37 of the Arbitration and Conciliation Act, 1996 received by way of assignment. It be checked and registered.
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> Ld. Counsel for the petitioner has maintained that the arbitrator has fixed the date of 25.07.2020 for pronouncement of the award after striking out the defence of the appellant on account of non payment of fee of arbitrator. Ld. Counsel for the petitioner has maintained that in case pronouncement of award is not stayed then very purpose of filing the present petition shall be frustrated as the arbitrator has shown undue anxiety to dispose of the matter. **In view of the request made by ld counsel pronouncement of the award is stayed**.
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> (**emphasis added**)

Notice be given to the respondents on filing of PF & copy etc. for 31.07.2020. Dasti copy be given."

ARB No. 113 of 2020 was simply withdrawn from before the other learned Additional District Judge, Gurugram by the petitioner on 31.07.2020. Further, without disclosing passing of order dated 24.07.2020, the matter was argued before the Coordinate Bench on 27.07.2020, wherein notice of motion was issued and it was directed that learned Arbitrator shall not pass the final award in the meanwhile.

Learned counsel for the petitioner has sought to explain the abovesaid by stating that due to outbreak of the pandemic COVID-19, there was miscommunication and there is no question of any concealment on the part of the petitioner. However, such a simplistic explanation does not pass muster in the given factual matrix.

Learned Additional District Judge, Gurugram, while dismissing ARB No. 114 of 2020 on 10.08.2020 has specifically observed that there has been concealment of material facts on the part of the petitioner which disentitles it from any discretionary relief. Though, this petition can be dismissed solely on account of the conduct of the petitioner, however even on the merits of the matter, there is no justifiable ground for interference by this Court. It is useful to refer to Section 12 and 14 of the Arbitration Act, which read as under:-

"12. Grounds for challenge.—

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay,

disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—
(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

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14. Failure or impossibility to act.—

(1) The mandate of an arbitrator shall terminate if—

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12."

The Hon'ble Supreme Court in **HRD Corporation Vs. GAIL (India) Ltd., (2018) 12 SCC 471**, has observed as under:-

"After the 2016 Amendment Act, a dichotomy is made by the Act between persons who become "ineligible" to be appointed as arbitrators, and persons about whom justifiable doubts exist as to their independence or impartiality. Since ineligibility goes

to the root of the appointment, Section 12(5) read with the Seventh Schedule makes it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as arbitrator. Once he becomes ineligible, it is clear that, under Section 14(1)(a), he then becomes de jure unable to perform his functions inasmuch as, in law, he is regarded as "ineligible". In order to determine whether an arbitrator is de jure unable to perform his functions, it is not necessary to go to the Arbitral Tribunal under Section 13. Since such a person would lack inherent jurisdiction to proceed any further, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground. As opposed to this, in a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts as to independence or impartiality have to be determined as a matter of fact in the facts of the particular challenge by the Arbitral Tribunal under Section 13. If a challenge is not successful, and the Arbitral Tribunal decides that there are no justifiable doubts as to the independence or impartiality of the arbitrator/arbitrators, the Tribunal must then continue the arbitral proceedings under Section 13(4) and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds contained in the Fifth Schedule may make an application for setting aside the arbitral award in accordance with Section 34 on the aforesaid grounds. It is clear, therefore, that any challenge contained in the Fifth Schedule against the appointment of Justice Doabia and Justice Lahoti cannot be gone into at this stage, but will be gone into only after the Arbitral Tribunal has given an award. Therefore, we express no opinion on items contained in the Fifth Schedule under which the appellant may challenge the appointment of either arbitrator. They will be free to do so only after an award is rendered by the Tribunal."

The Hon'ble Supreme Court in **Bharat Broadband Network Limited Vs. United Telecoms Limited, 2019 AIR (SC) 2434**, has observed as under:-

> "17. The scheme of Sections 12, 13, and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express

agreement in writing between the parties only if made subsequent to disputes having arisen between them."

Therefore, in the instant case, remedy of the petitioner is to clearly wait for the award and avail its remedies thereafter, which it is at liberty to do so. Reference in this respect can gainfully be made to decision of the **Delhi High Court in G.S. Developers and Contractors Private Limited vs. Alpha Corp. Development Private Limited and others, 2019 (261) DLT 533**. Learned counsel for the petitioner is unable to point out any ground which calls for interference in this petition.

No other argument has been raised.

This petition being devoid of any merit, is dismissed with no order as to costs.

[LISA GILL]
Judge

10.06.2022
s.khan

Whether speaking/reasoned : Yes/No.

Whether reportable : Yes/No.