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

COMMERCIAL ARBITRATION PETITION (L) NO.7555 OF 2023

Maharashtra Public Service Commission .. Petitioner
Versus
Vast India Pvt. Ltd. ..Respondent

WITH
INTERIM APPLICATION (L) NO.12352 OF 2023
IN
COMMERCIAL ARBITRATION PETITION (L) NO.7555 OF 2023

Vast India Pvt. Ltd. .. Applicant

IN THE MATTER BETWEEN

Maharashtra Public Service Commission .. Petitioner
Versus
Vast India Pvt. Ltd. .. Respondent

Mr. Ashutosh M Kulkarni *a/w. Mr. Gaurav Sharma & Mr. Rushikesh Tondwalkar, Advocates for Petitioner.*

Mr. Suresh Dhole, *Advocate for Respondent No.1.*

CORAM : SOMASEKHAR SUNDARESAN, J.
Reserved on : January 31, 2025
Pronounced on : February 11, 2025

JUDGEMENT :

Context and Background:

1. In this Petition under Section 34 of the *Arbitration and Conciliation Act, 1996* ("**Arbitration Act**"), the Petitioner, the

Maharashtra Public Service Commission (“**MPSC**”) has challenged an arbitral award dated December 16, 2022 (“**Impugned Award**”) passed in favour of the Respondent Vast India Private Ltd. (“**Vast India**”).

2. The Impugned Award has been passed under the statutory arbitration process conducted by the Facilitation Council (“**Arbitral Tribunal**”) formed under the *Micro, Small and Medium Enterprises Development Act, 2006* (“**MSME Act**”) – Vast India is a “small enterprise” for purposes of the MSME Act.

3. MPSC’s attack on the Impugned Award is based on two specific grounds that were pressed into service by Mr. Ashutosh Kulkarni, Learned Counsel on behalf of MPSC, and reduced to writing in a cogent and articulate Note on Submissions. *First*, that the Impugned Award is passed belatedly, beyond the permissible deadline, and after expiry of mandate of the Arbitral Tribunal, as stipulated in the law. *Second*, the Arbitral Tribunal erred by deciding not to entertain the counter-claim of MPSC, which is fatal to the Impugned Award.

Factual Matrix:

4. In order to deal with the challenge posed in this Petition, a basic overview of the factual context, mindful of the scope of Section 34 of

the Arbitration Act, would be in order. It may be summarised as under:-

- a. MPSC floated a Tender Document for Digital Asset Management on July 20, 2010;
- b. Vast India was awarded the contract on January 3, 2011;
- c. The work involved scanning of 30-year old documents of MPSC under the stipulated methodology at the rate Rs. 2.63 per page, and the contract was for a three-year period;
- d. According to Vast India, such work was completed by October 22, 2012, and its work was accepted without any contemporaneous complaint;
- e. MPSC had a right to terminate the contract by one month's notice, and this right was not exercised throughout the life of the contract;
- f. An invoice dated January 11, 2013 was not paid, and on follow up, queries were raised by MPSC in May 2013, which were clarified in June 2013. In 2014, a server and software for conducting search on the documents was installed in MPSC's premises, after space was provided. Training was also

provided to MPSC staff to use the digitised documents;

- g. According to MPSC, the methodology for document retention under the Tender Conditions was not adhered to by Vast India, and it was only after May 2014 that all the files became available from Vast India. According to Vast India, the files physically returned by MPSC had not been classified on a department-wise basis, and it could not be faulted for not creating a department-wise list of files when the physical files were handed back;
- h. MPSC asserted that nothing was payable to Vast India as invoiced. Vast India filed a reference before the Facilitation Council under the MSME Act in August 2018.
- i. Relations turned sour, and on December 30, 2019, MPSC issued a show cause notice for black-listing of Vast India;
- j. On February 13, 2020, Vast India was black-listed by MPSC;
- k. Vast India filed an application on February 14, 2019 to hear its petition. Vast India claimed a sum of Rs. ~2.03 crores coupled with interest under Section 16 of the MSME Act (computed at Rs. ~8.03 crores as of the date of filing of the reference to the Facilitation Council). According to Vast

India, at the agreed rate of Rs. 2.63 per page, payment for 83,31,636 pages has been made by MPSC, while the payment for 77,46,123 pages amounting to Rs. 2,03,72,303 was not paid;

- l.* Conciliation efforts over three meetings (with both parties present) held between May 14, 2019 and November 4, 2020, failed;
- m.* The matter was then taken up for arbitration by issuance of a notice of arbitration on June 10, 2021. The first arbitration hearing took place on June 17, 2021;
- n.* One day before before the first hearing, the Statement of Defence was filed by MPSC i.e. on June 16, 2021;
- o.* Arbitration proceedings were spread over six hearings between June 17, 2021 and November 11, 2022. Both parties were present in all but one hearing (MPSC did not appear on May 18, 2022);
- p.* On July 27, 2022 (nearly 13 months after the Statement of Defence had been filed), MPSC filed a counter-claim for a staggering Rs. ~152 crores against Vast India's claim for unpaid dues of Rs. ~2.03 crores; and

q. On December 16, 2022, the Impugned Award was passed.

Impugned Award:

5. The Arbitral Tribunal, which is the master of the arbitration proceedings, heard the parties, reviewed the material on record, and has returned findings in the Impugned Award. The Arbitral Tribunal found that the relationship between the parties emerging from the purchase order of January 3, 2011 is that of a purely commercial contract. The work had been completed on October 22, 2012. Vast India had requested MPSC to clear the payments due, and to provide space for installing a server with all the data of the scanned files. Vast India also requested MPSC to take back the physical files that were stinking and occupying a large space of Vast India's premises. A total of 44,739 scanned old files, containing 1,60,77,759 pages were handed over, and the search software too was installed and accepted by MPSC. A Hardware Engineer and Trainer was also deputed to train MPSC's staff on May 8, 2014.

6. The material on record would show that out of the pages scanned, payment for 83,31,636 pages has been made by MPSC while the payment for 77,46,123 pages amounting to Rs. 2,03,72,303.00. Indeed, the Arbitral Award has a typographical error, treating the

number of pages scanned, paid for, and not paid for, as the amount involved rather than the pages involved, but a plain reading of the Impugned Award with the pleadings reconciles this human error.

7. The Arbitral Tribunal also found that there had been no complaints from MPSC during the performance of the contract either about the quality of work done or about any requirement not being met. However, the payment due to Vast India had not been released. The Arbitral Tribunal, on facts, upon a review of the evidence before it, has returned a conclusive finding that there had been no default on the part of Vast India and the payments due to it ought to be made.

8. As regards the counter-claim of Rs. ~152 crores made on July 27, 2022 when the final hearing in the arbitration was on, the Arbitral Tribunal has noticed that it was filed belatedly, when final hearings were underway. The Arbitral Tribunal has essentially held that the jurisdiction of arbitration under the MSME Act, a legislation according special protection to small commercial entities, covers claims made by such small enterprises against counterparties, and that forum would not be available for claims against such enterprises. The Arbitral Tribunal has ruled that the benefit of access to the forum would not be available to an entity that is not a protectee of the special provisions of the MSME Act.

9. Consequently, the Arbitral Tribunal has ruled that it had no jurisdiction to entertain the counter-claim, and went on to award Rs. 2,03,72,303 to Vast India, along with interest to be computed under Section 16 of the MSME Act from January 11, 2013 (the date of the invoices) until December 16, 2022 (the date of the award). Such payment was to be made within a period of one month from the receipt of the Impugned Award. Thereafter, further interest has been awarded under Section 16 of the MSME Act, until final payment by MPSC to Vast India.

10. By an order dated March 28, 2023, a Learned Single Judge of this Court, directed MPSC to deposit an amount equal to 75% of the amount awarded in terms of Section 17 of the MSME Act. Thereafter, an application of withdrawal came to be filed by way of the captioned Interim Application, and on May 2, 2023, the Learned Single Judge decided that the matter would be next considered on June 14, 2023 finally at the admission stage, and if for any reason, it could not be disposed of, the Interim Application for withdrawal would be taken up for consideration and disposed of.

11. The captioned proceedings have been listed and stood over from time to time. Eventually, on January 13, 2025, when the matter came

up before me, Learned Counsel for the parties agreed to time commitments of 30 minutes each and undertook to file a Short Note on Propositions, bearing in mind the contours of the jurisdiction of Section 34 of the Arbitration Act, focusing on the pivotal issues. Each party has tendered its respective Note on Propositions, which were taken on record on January 23, 2025.

12. This Court is grateful to the Learned Counsel for having adhered to their agreed timelines for verbal submissions, enabling judgement to be reserved on that date.

Core Submissions of MPSC:

13. The core and pivotal submissions of Mr. Kulkarni, Learned Counsel on behalf of MPSC may be summarised thus:-

- a.* The Impugned Award is not passed within the outer deadline of 90 days stipulated under Section 18(5) of the MSME Act for passing final arbitral awards;
- b.* The even longer deadline of 12 months (extendable to 18 months by consent of parties) under Section 29-A of the Arbitration Act had also been missed;
- c.* Therefore, the Impugned Award has been passed after the

mandate of the Arbitral Tribunal expired, rendering the forum “*functus-officio*”; and

- d. The counter-claim being disallowed by the Arbitral Tribunal is fatal to the legal standing of the Impugned Award – it demonstrates perversity in the approach of the Arbitral Tribunal in not considering the counter-claim at all.

Ground of Functus-Officio:

14. On the issue of the Impugned Award having been rendered after expiry of the statutory mandate, the statutory timeline applicable to an Arbitral Tribunal constituted under the MSME Act is to be considered. The relevant provisions cited are Section 18 of the MSME Act (as applicable at the time relevant to this case) and Section 29-A of the Arbitration Act. Each of these is extracted below.

15. Section 18 of the MSME Act is extracted below:-

“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 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.”

[Emphasis Supplied]

16. It will be seen from a plain reading of the foregoing that Section 18 of the MSME Act is a special *non-obstante* provision enabling the Facilitation Council to act as a conciliator as well as an arbitrator. Section 18(3) empowers the Facilitation Council to be the arbitral tribunal and provides that the Arbitration Act “shall then apply” to the

arbitration. It would then follow that once the Facilitation Council commences its role as the arbitral tribunal, the provisions of the Arbitration Act would take over. Section 18(4), which is also a *non-obstante* provision, confers jurisdiction on the Facilitation Council to act as an arbitrator, mooring the territorial jurisdiction of the Facilitation Council to the location of the supplier, regardless of where in India, the counterparty is located. Finally, Section 18(5) provides for a timeline of 90 days to the Arbitral Tribunal for completion of the arbitration.

17. Mr. Kulkarni's primary reliance is on Section 18(5) of the MSME Act. Upon the expiry of the 90-day period, he would submit, the Arbitral Tribunal lost its jurisdiction. Therefore, he would argue, the Impugned Award is not backed by validly subsisting jurisdiction.

18. Section 29-A of the Arbitration Act is extracted below:-

“29-A Time limit for arbitral award.—

*(1) **The award** in matters other than international commercial arbitration **shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings** under sub-section (4) of section 23:*

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavor may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings

under sub-section (4) of section 23.

(2) *If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.*

(3) *The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.*

(4) *If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:*

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application:

Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.

(5) *The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.*

(6) *While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.*

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

[Emphasis Supplied]

19. It will be seen from the foregoing that Section 29-A of the Arbitration Act regulates the timeline for completion of arbitration proceedings. The statutory expectation is that arbitration must be completed within a period of twelve months from the date of completion of pleadings. This deadline may be extended by consent of the parties by another six months. Approval from the jurisdictional Court would be necessary to extend the mandate. The extension may be granted on an application by a party, for sufficient cause, and on such terms and conditions as the Court deems necessary.

20. Against this backdrop, according to Mr. Kulkarni, the Arbitral Tribunal was denuded of its jurisdiction to render any award on the expiry of 90 days from the date of the reference under the MSME Act. Further, he would submit, beyond the 90-day period, even under

Section 29-A of the Arbitration Act, the mandate expired, since the Arbitral Tribunal was to render the award within twelve months of the date of the Statement of Defence (which was filed on June 16, 2021) i.e. by June 15, 2022. The Impugned Award was passed on December 16, 2022, a good six months later.

21. I have no hesitation in rejecting the contentions made on behalf of MPSC on the first issue i.e. on the ground that the Impugned Award is a product of an Arbitral Tribunal with an expired mandate on its hands, i.e. that had become “*functus-officio*”.

22. Implications of the purported expiry of mandate under the MSME Act are analysed first. The first notice of arbitration was issued by the Facilitation Council on June 10, 2021. This is the date that MPSC states is to be regarded as the date of commencement of arbitration for computation of the 90-day period under the MSME Act. Therefore, according to MPSC, on September 9, 2021, the Arbitral Tribunal lost its statutory basis and became *functus-officio*.

23. To begin with, Section 18(5) is a provision in which the protectee is the enterprises registered under the MSME Act. That provision is a statutory assurance to such enterprises that the arbitral award would be passed within 90 days. The owner of the entitlement under this

provision is the enterprise registered under the MSME Act. The corresponding obligor for such assurance is the Facilitation Council. It would be absurd to say that the statutory beneficiary would lose its entitlement under Section 18 of the Act for no reason other than the obligor's failure to discharge the obligation corresponding to such entitlement to do so in a timely manner.

24. That apart, the deadline under Section 18(5) is evidently directory in nature. It is not a mandatory deadline. There is no penal consequence for the obligor (the Facilitation Council) for this deadline being missed. The economic effect of this deadline being missed cannot be to penalise the very party for whose benefit the deadline has been set in Section 18(5). Therefore, I have no hesitation to reject the contention in relation to expiry of mandate of the Arbitral Tribunal under the MSME Act on September 9, 2021 (90 days from the issuance of the first arbitration notice dated June 10, 2021).

25. The next issue is the mandate under the Arbitration Act. Arguably, Section 18(5) of the MSME Act and Section 29-A of the Arbitration Act being read harmoniously could mean that the 90-day deadline under the former is indicative of what the effort should be, but the deadline under the latter would be an inviolable deadline. Once the Facilitation Council takes up arbitration because of failure of

conciliation, arguably, the provisions of the Arbitration Act would take over, and therefore, Section 29-A would run its course.

26. However, one need not embark upon a detailed exercise of reconciling the two legislation, simply because the facts of this case render that unnecessary. The twelve-month period referred to in Section 29-A of the Arbitration Act commenced on “the date of completion of pleadings” in the arbitration. MPSC filed its Statement of Defence on June 16, 2021. In the proceedings before this Court, MPSC contends that the twelve-month deadline commenced on June 16, 2021 and that the arbitration ought to have been completed by June 15, 2021.

27. What is missed in this line of argument is that the MPSC filed a counter-claim on July 27, 2022. A counter-claim is a pleading. By filing the counter-claim, MPSC reset the twelve-month deadline for purposes of Section 29-A of the Arbitration Act. The new deadline under Section 29-A of the Arbitration Act was July 26, 2023 (twelve months later). The Impugned Award was passed on December 16, 2022, well within the statutory mandate period under Section 29-A of the Arbitration Act.

28. The object of Section 29-A of the Arbitration Act is to ensure that the arbitration proceedings are completed within a reasonable period after all that needs consideration by the Arbitral Tribunal, has been placed before it. This is why Parliament has taken care to provide that the period of twelve months would commence from the date on which pleadings are completed.

29. In the arbitration proceedings conducted by the Arbitral Tribunal, MPSC kept contending that the Arbitral Tribunal was *functus officio* with effect from September 9, 2021 i.e. the expiry of 90 days from June 10, 2021. It kept asking the Arbitral Tribunal to adjourn the hearing on the premise that MPSC has even filed a Writ Petition in this regard before this Court. MPSC's written submissions point to Writ Petition No. 3 of 2023 being pending in this Court. Evidently, that writ petition did not get any traction. I have already expressed my views above, on the fallacy in the contention that on the ninety-first day from the commencement of arbitration, the protectee of an assurance of expeditious arbitration would in fact stand to lose the benefit of the very arbitration. By the reading advanced by MPSC, all that a counterparty to a small enterprise has to do, is drag its feet beyond 90 days, and the very protectee would become a victim of the provision affording the protection.

30. What is even more remarkable is MPSC's justification for filing the counter-claim of an overwhelming amount of Rs. ~152 crores against Vast India, which reset the expiry date under Section 29-A of the Arbitration Act. The written submissions state that "*despite becoming functus-officio since the [Facilitation] Council continued with the arbitration proceeding, [MPSC was] left with no option as and by way of utmost caution, [MPSC] filed 'the counter-claim' for Rs. 152 cr.*"

31. Evidently, MPSC adopted the strategy of throwing the kitchen sink at the matter and was convinced to seek Rs. ~152 crores against a small scale enterprise that had sought recovery of Rs. ~2.03 crores. However, what it cannot escape is the fact that such a counter-claim is a new pleading and this reset the clock under Section 29-A of the Arbitration Act. I refrain from discussing the merits, if any, in such an overwhelming and potentially intimidating counter-claim, bearing in mind the contours of the jurisdiction under Section 34 of the Act. But the limited point being made is that the outcome of such a counter-claim for purposes of this challenge under Section 34 of the Act is that the twelve-month deadline was reset. The Impugned Award has been passed well within the revised deadline for expiry of the mandate.

32. That the counter-claim was rejected is of no relevance to the computation of timeline under Section 29-A of the Act, since the counter-claim has to be considered in the light of the other pleadings and the statute grants twelve months from the completion of pleadings to undertake that exercise. The contentions on the rejection of the counter-claim are dealt with, in the discussion on the second issue below.

33. Since the Impugned Award has been made well within the deadline of twelve months from the completion of pleadings, it is not necessary to discuss further, any contentions about whether Section 29-A of the Arbitration Act would at all apply to arbitration proceedings conducted by the Facilitation Council under the Arbitration Act.

34. In the result, I have no hesitation in rejecting the first contention of MPSC – that the Arbitral Tribunal lacked the statutory mandate to render the Impugned Award. The contention that the mandate of the Arbitral Tribunal expired on September 9, 2021 on account of Section 18(5) of the MSME Act, as well the contention that the mandate expired on June 15, 2022 on account of Section 29-A of the Arbitration Act, deserve emphatic rejection.

Rejection of Counter-Claim:

35. MPSC, advisedly, filed a counter-claim for Rs. ~152 crores against a small scale enterprise that claimed Rs. ~2.03 crores. MPSC attacks the finding returned by the Arbitral Tribunal that it did not have jurisdiction to entertain any counter-claim against a small scale enterprise, as an evident error of law.

36. Indeed, the Arbitral Tribunal was erroneous in its sweeping proposition, made in December 2022, that a counter-claim cannot be entered by the Facilitation Council. The Supreme Court ruled in *Silpi Industries*¹ way back on June 29, 2021 that a counter-claim would be maintainable in the course of arbitration conducted under the MSME Act. However, this error of law by the Arbitral Tribunal does not aid the MPSC in setting aside the Impugned Award, for the reasons set out below.

37. *First*, the counter-claim was filed by MPSC on July 27, 2022. The MPSC had filed its Statement of Defence, admittedly, on June 16, 2021. The normal rule for the permissible timing for filing of a counter-claim is that it ought to be filed no later than the Statement of Defence. The first principles in this regard can be traced to Order VIII, Rule 6A of the

¹ *Silpi Industries etc. vs. Kerala State Road Transport Corporation and Another* – 2021 SCC OnLine SC 439

Code of Civil Procedure, 1908 (“**CPC**”), which stipulate that a counter-claim may be set up by a defendant before the delivery of the defence or before the expiry of the deadline for delivery of the defence.

38. I must hasten to add that under Section 19(1) of the Arbitration Act, an arbitral tribunal would not be bound by the CPC. Therefore, for purposes of the analysis in this judgement, one may assume that the strict enforcement of the principle contained in Order VIII, Rule 6A is not to be expected.

39. Now, looking to the facts of the case at hand, MPSC filed its counter-claim of Rs.~152 crores, more than one year and one month after it filed its Statement of Defence. Even if one were to not strictly apply the deadline obtaining in the CPC for filing of a counter-claim, it would only be fair to expect that a counter-claim in an arbitration is filed in reasonable time. More so, for a party seeking to enforce its perception of statutory deadlines being sacrosanct.

40. The counter-claim appears to be a counter-blast to the Arbitral Tribunal not agreeing to the submission of MPSC that its mandate had expired on the ninety-first day of the issuance of the arbitration notice. The MPSC has in fact submitted before me that since the Arbitral Tribunal did not agree with the MPSC’s submission on the Arbitral

Tribunal having become *functus-officio* under the MSME Act, MPSC was “left with no option” but to file a counter-claim “as and by way of utmost caution”.

41. The aforesaid contention is not comprehensible. A counter-claim ought to be filed, if a case is made out on merits in support of the counter-claim. It is an explicit finding of fact returned by the Arbitral Tribunal that throughout the period of service rendered by Vast India to MPSC, between 2011 and 2013, there was no contemporaneous complaint by MPSC about the quality of the work conducted by Vast India. MPSC had a right to terminate the contract at will with one month’s notice. Had there had been such egregious conduct on such part of Vast India as to warrant a counter-claim as humongous as Rs. ~152 crores, it would be highly likely that it would have exercised such right to terminate the contract. These observations are only being made to put the matter in perspective on a commercially reasonable person’s reasonable conduct. A Section 34 Court cannot re-appreciate evidence or change the findings of fact. The limited point being made is that if facts warranting a counter-claim of this magnitude were at hand, it ought not to have taken MPSC over thirteen months after filing its Statement of Defence, to file the counter-claim.

42. The Arbitral Tribunal has indeed also recorded that the counter-claim has been filed by MPSC at the fag end of the arbitration proceedings, when final hearings were underway. This is an accurate finding over and above its erroneous finding that it lacked jurisdiction. Even if the Arbitral Tribunal had not made the mistake of stating that it lacked jurisdiction, it was accurate in its finding that the counter-claim was late.

43. Section 34(2) permits me to set aside an arbitral award *only if* one of the ingredients set out in that provision is attracted. The error of the Arbitral Tribunal in stating that it lacked jurisdiction to consider the highly belated counter-claim, can only be examined through the prism of Section 34(2)(b)(ii) or Section 34(2-A) of the Arbitration Act, since none of the other provisions of Section 34 are even pleaded as the ground of this challenge by the MPSC.

44. The error of the Arbitral Tribunal in holding that it does not have jurisdiction, in my opinion, is not an error of a nature that conflicts with the fundamental policy of Indian law, or conflicts with the most basic notions of morality or justice. As stated earlier, I refrain from delving into the merits of the dispute, and have restricted myself to examining the timing of the counter-claim (over thirteen months after

the Statement of Defence). As a matter of fact, even if the Arbitral Tribunal had not committed the error it committed, it would have been contrary to the most basic notions of morality and justice to entertain such a belated counter-claim.

45. Therefore, I have no hesitation in holding that the ingredients of Section 34(2)(b)(ii) of the Arbitration Act are not attracted on account of such error of the Arbitral Tribunal.

46. As regards Section 34(2-A) of the Arbitration Act, there is no evidence of patent illegality vitiating the Impugned Award, appearing on the face of the Impugned Award. The two grounds pressed into service by MPSC in this challenge are about the Arbitral Tribunal not having the statutory mandate to make the Impugned Award when it did, and that the rejection of the counter-claim was illegal. I have already ruled on the former ground in the earlier part of my reasoning above. On the latter ground, considering the highly belated and untenable timing of the counter-claim, it can never be said that the rejection of the counter-claim on the premise of lack of jurisdiction would translate into a patent illegality. The very same Impugned Award rightly notices the extreme delay in the counter-claim – that it was filed when final hearings were underway, and thirteen months after the Statement of Defence. Such an inordinate delay in filing of a counter-

claim is untenable. Entertaining it, despite such delay, would have been patently illegal.

47. In the result, the second ground too, namely, that the rejection of the counter-claim (citing lack of jurisdiction) being fatal to the Impugned Award, is without any merit, and warrants rejection.

Direction:

48. Consequently, the Section 34 Petition is hereby dismissed, rejecting the prayer for setting aside the Impugned Award.

49. The contract was executed in 2011, and the work was completed in 2012. Even according to MPSC, it was completed in May 2014. More than a decade later, the small enterprise remains unpaid.

50. Therefore, the monies deposited in this Court shall stand released by the Registry along with all accruals and earnings thereon, to Vast India no later than two weeks from today.

51. The balance amounts due to Vast India under the Impugned Award, along with interest under Section 16 of the MSME Act computed until the date of actual payment by MPSC, as awarded, shall be paid by MPSC to Vast India no later than two weeks from today.

52. Since the Section 34 Petition is dismissed, nothing survives in the Interim Application and the same is accordingly disposed of.

Costs:

53. This is a commercial arbitration. No doubt, MPSC is a constitutional functionary, but the contract in question relates to a commercial service availed of by MPSC in the marketplace by inviting bids from society in response to a tender. Being a commercial dispute, I am duty bound to apply my mind to the facet of costs.

54. Normally, the party prevailing should be awarded costs, payable by the party that loses. Neither party has presented its statement of costs. Taking a pragmatic view of the matter and with a view to incentivize bringing to an end this long-standing dispute that has run for more than a decade, as an exception, I have persuaded myself to exercise my discretion not to award costs in this round of litigation. This will not come in the way of costs being considered in any future round of litigation, for costs incurred in this round as well.

55. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]