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HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved for orders on :01/12/2021

Order passed on : 14/01/2022

HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 4235 of 2021

1. M/s SEW Infrastructure Limited Registered Office at6-3-871, 'Snehlata, Green Lands Road, Begumpeth, Hyderabad District Hyderabadd-500016, (Telangana) Through It's Power of Attorney holder Shri K Srinivasa Rao, S/o Shri Kotaiah.

---- Petitioner

Versus

1. Micro & Small Enterprises Facilitation Council, C.G., Director of Industries, Chhattisgarh, Udyog Bhawan, Ring Road No. 1 Telebandha, Raipur (C.G.)

2. M/s. Core Fab Projects Pvt. Ltd. 141/21, 2nd Floor, Matoshree Complex, Infront of Steel City Hospital Maharaja Chowk Durg, District-Durg, (C.G.)

---- Respondents

For Petitioner	:	Mr. Ashish Shrivastava, Sr. Advocate with Mr. Aman Saxena, Advocate.
For Respondent No.2	:	Ms. Ginny Jetley Rautray with Mr. Akshay K. Shail & Mr. P.R. Patankar, Advocates.
For Caveater	:	Mr. Vaibhav Dhar Diwan, Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV Order

14/01/2022

1. This petition has been brought praying for issuance of appropriate writs against the proceeding of arbitration initiated before respondent No.1 on the dispute present between petitioner and respondent No.2.

2. It is submitted by the learned Senior counsel for the petitioner that the petitioner company had entered into an agreement with National

Mineral Development Corporation Limited on 23.5.2012 relating to execution to same works and supply of different articles. The petitioner by a Letter of Award of Contract (LAC) placed orders with respondent No.2 for supply of fabricated article and transportation of the same of quantity 2500 Matric Tonne(MT) of E-250 and E-350 grade of worth Rs.17,78,52,500/-. An agreement was executed between the petitioner and respondent No.2 on 6.5.2013. Subsequently, the petitioner made amendment in the LAC on 10.7.2013 by increasing the amount of payment for fabrication of E-350 grade to the tune of Rs.2000/- per metric tonne. Respondent No.2 made supply of the articles. The petitioner on 5.5.2014 placed additional order of 850 MT again the basic price of E-250 grade and E-350 grade were increased.

3. It is submitted by counsel for petitioner that the respondent No.2 failed to supply the additional quantity of fabricated materials of 8500 MT according to the amended order. Another amendment was made in the contract agreement on 6.6.2013, reducing the quantity from 8500 MT to 6250 MT and time was extended for supply till 15.1.2016. The respondent had submitted performance bank guarantee of value Rs.75,00,000/- initially, but he failed to furnish any performance bank guarantee for the additional quantities ordered by the subsequent amendment in contract. The respondent No.2 has failed to perform part as per the terms of the contract. The respondent No.2 submitted bills of value Rs.46,27,70,759/-. After the payment and adjustments, the outstanding amount was only Rs.43,60,946/- out of which Rs.10,00,000/- has been paid to the respondent No.2 by LAC on 7.7.2018, therefore, the total outstanding amount is Rs.33,60,936/- only.

4. It is submitted that after negotiations, the respondent No.2 agreed to have Rs.1.10 crores as final settlement, out of which the petitioner has released the amount of Rs.75 lakhs at the first instance and the balance amount was agreed to be released in two installments. The respondent No.2 has sent e-mail on 15.1.2019 requesting the petitioner for payment of amount Rs.47 lakhs regarding which there is no dispute.

5. Respondent No.2 has erroneously invoked Section 20 of The Micro, Small Medium Enterprises Development Act, 2006. The claim amount in the petition before respondent No.1 is Rs.7,89,33,137/-. The petitioner is contesting the petition, who raised objection that the disputed claim cannot be adjudicated under Section 18 of the Act, 2006, and the same has to be decided by arbitration under the provisions of Arbitration and Conciliation Act, 1996. The respondent No.1 has initiated arbitration proceeding on 13.7.2021. Although Section 18(2) of the Act, 2006 provides, that the respondent No.1 either itself arbitrate on the dispute or direct any authority or forum to arbitrate on the same. In the instant case, there is no such order passed for initiating arbitration proceeding. The petitioner has objection that the members of the council, who were party in the conciliation proceeding are arbitrating on the dispute. The objection was raised that the dispute cannot be arbitrated by a team of arbitrators in even number. Further, as per Section 80 of the Arbitration and Conciliation Act, 1996 the conciliator should not act as an arbitrator. There is no declaration of the members of arbitral body under Section 12 of the Act, 1996 about their not having any interest in the dispute. The copy of objection filed is Annexure-P10. The respondent No.1 has not decided the objection and posted the matter for passing of award on

26.10.2021. It is submitted that under Section 15 of the Act, 2006, the respondent No.1 has jurisdiction only to deal with the dispute present between the parties. The disputes regarding the claims like price variation etc. cannot be decided under the Act, 2006, for which arbitration is required and the arbitration proceeding drawn by the respondent No.1 is erroneous and against the provisions contained in the Act, 1996. It is submitted that on the failure of the conciliation under Section 18(2) of the Act, 2006, respondent No.1 has initiated the proceeding under Section 18(3) of the Act, 2006. The petitioner has not agreed that the members of the respondent No.1 should arbitrate on the dispute, therefore, the arbitration proceeding taken up by respondent No.1 is not sustainable.

Reliance has been placed on the judgment of High Court of Karnataka in the case of M/s Pal Mohan Electronics Pvt. Ltd. Vs. The Secretary Department of Small and others in W.P. No.9485 of 2017 decided on 27.3.2019, in which, it was held that a facilitation counsel which has acted as conciliator cannot act as an arbitrator. The applicability of Section 80 of the Act, 1996 is discussed in this judgment.

Reliance has also been placed on the judgment of High Court of Madras in the case of Ved Prakas Vs. P. Ponram and others in Original Side Appeal No.231/2019 decided on 23.1.2020, in which, the Madras High Court has taken the same view, hence, the petitioner be granted relief as prayed.

6. There is no representation on behalf of respondent No.1.

7. Learned counsel for respondent No.2 opposes the submissions made by the learned Senior counsel for the petitioner. Admitting the contract

between the petitioner and respondent No.2, it is submitted that the respondent No.2 has performed its part in the contract. The petitioner company deliberately failed to make timely payment of the legitimate dues of the respondent No.2. The total outstanding balance amount is Rs.3,97,60,152/-. The respondent No.2 has made a claim of Rs.7,89,33,137/- including the interest on the balance amount before respondent No.1. Earlier the WPC No.20 of 2021 was preferred by the petitioner, in which, this Court has passed order on 6.1.2021, directing the respondent No.1 to take up conciliation proceeding under Section 18(2) of the Act, 2006, and on failure of the same to take up proceeding as provided under Section 18(3) of the Act, 2006. This order has been complied by the respondent No.1 and on failure of the conciliation proceeding, the arbitration proceeding has been initiated. The pleadings in the arbitration case is complete from both the parties. The case has been finally heard and only the award is to be passed. Subsequent to which, this petition was filed and by the order of this Court, the proceeding in the arbitration case has been stayed.

8. It is submitted that the petitioner has effective remedy available under Section 34 of the Act, 1996. Section 5 of the Act, 1996 provides that no judicial authority shall intervene except where so provided in this Part and, therefore, it is only the provision under Section 34 of the Act, 1996, which can be invoked. The respondent No.1 has the authority to arbitrate the under Section 18(3) of the Act, 2006, therefore, the proceeding is not fit to be interfered by exercise of jurisdiction under Article 226 Constitution of India.

Reliance has been placed on the judgment of Supreme Court in the case of Bhaven Construction through Authorised Signatory

Premjibhai k. shah Vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. & another, reported in 2021 SCC OnLine SC 8. It is submitted that in the case of M/s Cummins Technologies India Vs. Micro & Small Enterprises Writ(C) No.-7785 of 2020 decided on 3.3.2020, it is held that Section 80 of the Act, 1996 cannot override the provisions of MSMED Act, 2006 and it cannot prevent the facilitation counsel to act as an arbitrator.

Reliance has been placed on the judgment of Delhi High Court in the case of Bata India Limited Vs. AVS International Private Limited, reported in 2019 SCC OnLine Delhi 9801, in which, the Delhi High Court has taken a similar view and held that Section 80 of the Act, 1996 cannot put a bar for facilitation counsel to conciliate and subsequent to that arbitrate on the matter.

Reliance has also been placed on the judgment of Patna High Court in the Best Towers Private Limited Vs. Reliance Communication Limited (Letters Patent Appeal No.1036 of 2018) decided on 15.2.2019, where the question raised before the Court was same that as to whether the conciliator can act as arbitrator under the provisions of the Act, 2006, in which, it was held that combined reading of Section 18 and 24 of the Act, 2006, show that there is an overriding effect over provision under Section 80 of the Act 1996. It is submitted that similar view has been taken by the Madras High Court in the case of Eden Exports Company Vs. Union of India, reported in 2012 SCC OnLine Mad 4570 and it was held that the MSMED Act, 2006 is a self-contained code and have effect notwithstanding anything inconsitent therewith contained in any other law including the law under Arbitration and Conciliation Act, 1996. Similar view is expressed in the case of Delhi High Court in Badri Singh Vinimay Private Vs. MMTC

Limited, reported in Laws (DLH) (2020) 1 179. It is submitted that the submissions made on behalf of the petitioner are misleading and the correct proposition of law is this, that the petitioner has the remedy available to challenge the award passed by the respondent No.1 under Section 34 of the Act, 1996, hence, the petition be dismissed.

9. In reply, it is submitted by the counsel for the petitioner that the citations on which the respondent No.2 has placed reliance has not applicable in the present case because here is case in which the respondent No.1 has failed to exercise the jurisdiction and has not taken the decision on the objection filed by the petitioner, therefore, the petitioner is entitled for grant of relief.

10. Considered on the submissions.

11. According to the facts present, the petitioner had earlier preferred WP227 No.22/2021, which was decided by this Court vide order 12.4.2021 and directions were issued to the respondent No.2 to take up proceedings of conciliation as required under Section 18(2) of the Act, 2006 before proceeding under Section 18(3) of the Act, 2006. The sitting of the respondent No.1 was held on 3.8.2021. The minutes of this proceeding mentions about the order dated 12.4.2021 of WP227 No.22/2021. The minutes further mentions that both the parties made a declaration that there can be no conciliation between them, therefore, the proceeding under Section 18(2) of the Act, 2006 was closed and proceeding under Section 18(3) of the Act, 2006 was initiated.

12. The minutes of the proceeding held on 3.8.2021 are not very specific regarding the role of the members of respondent No.1 in the conciliation proceeding, but it is very specific that there is a declaration

of the parties that there is no possibility of any conciliation between them, hence, it cannot be said with affirmation that the members of the respondent No.1 had infact acted to conciliate on the dispute present between the parties.

13. The question raised by the petitioner is legal on the basis of the facts present, that the respondent No.1 had itself taken up the conciliation proceeding under Section 18(2) of the Act, 2006 and, therefore, the arbitration proceeding by the respondent No.1 itself is against the provision under Section 80 of the Act, 1996. Although the Single Bench of the High Court of Karnataka has in the case of M/s Pal Mohan Electronics (supra) expressed a view that the Section 80 of the Act, 1996 expresses against the empowerment of the facilitation Committee to act as a arbitrator, subsequent to being a conciliator, but this view has not been supported or rectified of any other High Court. The view of Allahabad High Court in the case of M/s Cummins Technologies India(supra), in the case of Supreme Court in Bhaven Construction through Authorised Signatory Premjibhai k. shah(supra), in the case of Delhi High Court in Bata India Limited Vs. AVS International Private Limited (supra), in the case of Patna High Court in the Best Towers Private Limited(supra), in the case of Madras High Court in Eden Exports Company(supra) and similar view is expressed in the case of Delhi High Court in Badri Singh Vinimay Private(supra) are to this effect that the bar under Section 80 of the Act, 1996 shall not be applicable to the proceeding before the facilitation Committee under the provisions of the Act, 2006 and, further, that the Section 24 of the Act, 2006 is very clear on this point showing that the provisions under the Act, 2006, have overriding effect over the provision under

any other act including the Act, 1996. Hence, I am of this view that the petition filed is without any substance, which is liable to be dismissed.

14. Accordingly, the petition is dismissed and disposed off.

Sd/-

(Rajendra Chandra Singh Samant)
Judge

Nisha