

OCD-2

ORDER SHEET

AP/418/2023

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

THE NEW INDIA ASSURANCE CO. LTD.
Versus
WINSOME INTERNATIONAL LTD.

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 5th July, 2023.

Appearance:

Mr. Ratnanko Banerji, Sr. Adv.
Mr. Srinjoy Bhattacharya, Adv.
Ms. Nikita Rathi, Adv.
...for the petitioner

Mr. Samit Talukdar, Sr. Adv.
Ms. Nandini Mitra, Adv.
Mr. Pradip Sarawagi, Adv.
Ms. Debolina Dey, Adv.
...for the respondent

The Court: This is an application for stay of an arbitral Award passed by a learned sole Arbitrator on 3rd April, 2023. By the impugned Award, the petitioner, who was the respondent in the arbitration, was directed to pay an amount of Rs.24,11,07,449.15 to the respondent (the claimant in the arbitration).

The petitioner is aggrieved by the addition of two components of interest calculated at 24.6% per annum for two periods amounting approximately to Rs.4.77 crores and Rs.13.16 crores. According to learned counsel appearing for the petitioner, the interest calculated at 24.6% was based on the respondent

before this Court (claimant in the arbitration) being a “medium” enterprise. Counsel submits that the calculation of interest at 24.6% is on the basis of Section 16 mandate under The MSMED Act, 2006. Counsel seeks to make a distinction between a medium, micro and small enterprise as defined under the said Act.

Learned counsel appearing for the respondent/award-holder submits that these points can only be taken in the application for setting aside of the Award filed under Section 34 of the 1996 Act which is also part of the cause list for the day. Counsel submits that the amount awarded was on the admitted fact of the respondent being an MSME under the Act of 2006.

Micro, small and medium enterprises are defined in Section 2 of The Micro, Small and Medium Enterprises Development Act, 2006. “Medium enterprise” is defined under Section 2(g) as an enterprise classified under Section 7 and the sub-clauses thereunder. A “micro enterprise” is defined under Section 2(h) while a “small enterprise” is defined under Section 2(m) of the Act. Each of the definitions refer to specific clauses / sub-clauses of section 7(1) of the Act. The very fact that the three kinds of enterprises are defined in three distinct and specific sub-sections of Section 2 means that they cannot be viewed as a common set of similar enterprises coming within the fold of the MSMED Act.

The distinction becomes further important with reference to the definition of “supplier” under Section 2(n) which has been defined to mean a “micro” or “small” enterprise which has filed a memorandum with the authority referred to under Section 8(1) and further explained under the Clauses in

Section 2(n). The definition of “supplier” specifically excludes a “medium enterprise” as defined under Section 2(g) of the Act.

The conscious exclusion of a “medium enterprise” from the definition of “supplier” becomes significant in the interpretation of Section 16 of the Act which deals with the rate of interest payable by a defaulting buyer to a “supplier”, as required under Section 15 which in turn deals with the liability of a buyer to make payment to a supplier. Section 16 uses the term “supplier” which traces back to Section 2(n).

Section 16 of The MSMED Act is an intervention by way of the liability to be fixed on an errant buyer for non-payment to a supplier at three times of the bank rate notified by the Reserve Bank of India with monthly rests on that amount from the appointed date; “appointed day” has been defined in Section 2(b) of the Act. The result of the exclusion of a “medium enterprise” from the definition of a supplier and the liability fixed on a buyer to make payment to a supplier under Section 16 of the Act at three times the bank rate, therefore, establishes that interest components could not have been awarded to the respondent/supplier/claimant in the arbitration in accordance with the mandate of Section 16 of the Act. The statutory position is therefore as follows: A defaulting buyer will not be liable to pay interest at three times the bank rate under Section 16 of the Act if the supplier is a medium enterprise. The position entirely changes if the supplier is a micro or small enterprise.

The interference is not on account of any law as contemplated under Section 34 of the 1996 Act but on a plain interpretation of Section 2(g), (h), (m) and (n) of The MSMED Act. The respondent/supplier before the Court is admittedly a “medium enterprise” and the impugned Award records the same.

This Court is accordingly of the view that the petitioner/award-debtor should be directed to pay the principal amount of Rs.5,17,09,732.78 plus costs at Rs.1 crore as computed by the learned Arbitrator for stay of the Award.

The submissions made on account of the irrationality of the quantum of the costs imposed will be considered at the time of determining whether the Award should be set aside under Section 34 of the 1996 Act.

The award-debtor/petitioner will make payment of the interest component at 8% on the principal amount of Rs.5,17,09,732.78 for the two time periods indicated in the tabulated statement. The time periods computed will remain the same but the interest will be at 8% per annum instead of 24.6% for the reason stated above.

The petitioner will secure 50% of the total amount of Rs.11,68,82,129.93 which comes to Rs.5,84,41,064.97 (50%) by way of cash deposit and the balance by way of a bank guarantee with the Registrar, Original Side of this Court within two weeks from today.

The operation of the impugned Award will be stayed on and from the date of the petitioner securing the amount as directed. In the event the petitioner defaults on the directions given, the respondent shall be at liberty of taking steps for execution of the Award.

AP/418/2023 is disposed of in terms of the above.

(MOUSHUMI BHATTACHARYA, J.)