AD-16
Ct No.09
12.10.2023
TN

WPA No. 11265 of 2023

Spectrum Infra Ventures Private Limited
Vs.
West Bengal State Micro Enterprises Facilitation Council and others

Mr. Utpal Bose,
Mr. Ankan Rai,
Mr. Sayantan Das
.... for the petitioner

Mr. T.M. Siddique,
Mr. Suddhadev Adak
.... for the respondent nos.1 & 2

1. The present challenge has been preferred against an award passed in an arbitral proceeding held within the contemplation of Section 18 of the MSME Act, 2006.

2. Learned senior counsel appearing for the petitioner submits that the present writ petition is maintainable in view of the palpable injustice which has been done in the present case. It is contended that service of a peremptory notice, to the effect that in the event of absence of a party the hearing would be taken up *ex parte*, was not given to the petitioner, which vitiates the award itself. It is further contended that in the facts of the case, only a meagre sum was due and

payable by the petitioner even as per the claims of the respondents. That apart, the petitioner had to suffer the ignominy and harassment of previous litigation unnecessarily for such paltry sum.

3. Learned senior counsel places reliance on a judgment of a learned Single Judge of the Orissa High Court rendered in *Bajaj Electricals Limited vs. Micro Small and Enterprises Facilitation and another,* reported at *2022 SCC OnLine Ori 77.* In the said case, the learned Single Judge observed, *inter alia,* that the question therein was whether the petitioner was aggrieved by the reasoning or he had not been heard at all.

4. The learned Single Judge went on to observe that the question for consideration, adjudication and answer was whether the petitioner was heard. The court was convinced that in the facts and circumstances of the case, the petitioner was not heard or given the right of hearing to which it was entitled under the Act of 2006.

5. Learned senior counsel next places reliance on a Division Bench judgment of this court rendered in *Ganesh Chandra Ghosh and others vs. State of West Bengal and others,* reported at *2022 SCC OnLine Cal 2582.* The Division Bench observed in

the said case that the petitioner's specific case was that no notice of arbitration was served upon them and the arbitral award was passed behind their back.

6. The Division Bench further observed that the arbitrator was a statutory arbitrator under the 1956 Act and he was mandated by Section 3G(6) of the said Act to conduct the arbitration in terms of the Arbitration and Conciliation Act, 1996. The arbitral award itself, it was observed, revealed that in disposing of as many as 299 arbitration petitions in a single day and in a single hearing, the principle of natural justice was given a complete go-bye, much less the compliance of the 1996 Act. In such factual matrix, it was observed, the Division Bench was not ready to accept the argument of alternative remedy in view of the flagrant violation of the principle of natural justice in passing the award-in-question.

7. Learned senior counsel next contends that the issuance of a peremptory notice of *ex parte* hearing is mandatory. In support of such contention, learned senior counsel cites an unreported Single Judge decision of the Madras High Court in *M/s Feedback Infra Private Limited vs. The Micro and Small Enterprises Facilitation*

Council and others, where the learned Single Judge went on to observe that the impugned order passed by the first respondent therein cannot be termed as an award passed under the provisions of the 1996 Act. Though Section 34(2)(a)(iii) of the 1996 Act enables that the aggrieved party to challenge the award on the ground that no proper notice of appointment of an arbitrator or of the arbitral proceedings was given or it was otherwise unable to present his case, in the case before the Madras High Court, the second respondent not even filed a claim statement after initiation of arbitration proceedings and in the absence of filing of pleadings and recording of evidence as per the 1996 Act, the court had already come to a conclusion that the impugned order could not be termed as an award. Under such circumstances, the court invoked the power under Article 226 of the Constitution of India.

8. The petitioner next cites *Mittal Pigments Pvt. Ltd. vs. Gail Gas Limited*, reported at *2023 SCC OnLine Del 977* where again, a learned Single Judge of the Delhi High Court went on to observe that sufficient notice was not served upon the

petitioner before the arbitration proceedings were proceeded against him *ex parte.*

9. In the said case, admittedly no communication was made on or behalf of the respondent intimating the initiation of arbitration proceedings. Only in the month of December, 2018, the petitioner had received a communication from the arbitrator calling upon the petiotner to appear for the arbitration proceedings at the time and place decided. It was observed that the said case lies within the ambit of Section 25(c) of the Arbitration Act. The petitioner, it was observed, chose not to appear before the learned Arbitrator. However, the pertinent question was that whether before proceeding *ex parte* there was any procedural requirement including furnishing of notice etc. to be fulfilled by the learned Arbitrator.

10. On a reading of Section 25(c) of the Arbitration Act, the court held that the Arbitrator is to examine whether the absence of the parties is without showing sufficient cause. The learned Single Judge referred to several judgments, some of which are of this court, before coming to its conclusion.

11. Heard learned counsel for the parties.

12. Before deciding the issue of maintainability of the present writ petition in the teeth of the an alternative remedy under Section 34 of the Arbitration and Conciliation Act, 1996 read with Section 19 of the MSME Act, 2006, the scope of Section 18 is required to be looked into.

13. Section 18(3) of the 2006 Act clearly provides that the provisions of the 1996 Act shall apply to the dispute, once it is referred to arbitration under the said Act, "as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7 of that Act".

14. Section 19 of the Act provides that no application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternative dispute resolution services to which reference is made shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the award.

15. Thus, a conjunctive reading of the said two provisions indicates that the provisions of Section 34 of the 1996 Act, read with the pre-condition of seventy-five per cent deposit as stipulated in Section 19 of the 2006 Act, is the appropriate

remedy before a person aggrieved by the award under normal circumstances.

16. It has to be explored in the context of Section 34 whether the petitioner stands the scrutiny of an exceptional case to override the alternative remedy in the present case.

17. Section 34 of the Arbitration and Conciliation Act, 1996, it has to be kept in mind, is not an ordinary appeal but stipulates specific grounds on which a challenge to an arbitral award can be taken out.

18. It is also required to be remembered that after coming into force of the 1996 Act in line with the UNCITRAL Model Law of Arbitration, the intended scheme of the legislature is clearly to encourage arbitration and the arbitral process, with the least interference of the court, which is also clearly provided within the contemplation of Section 5 the 1996 Act itself. Under the said Act, the judicial interference shall be minimal.

19. Seen in such perspective, the scope of interference with an arbitral award *de hors* Section 34 is extremely limited.

20. Insofar as the judgments cited by learned senior counsel are concerned, the same do not help the petitioner much.

21. As far as *Bajaj Electricals Limited* (supra) is concerned, the learned Single Judge had observed that the petitioner was not heard or given the right of hearing it was entitled to under the Act of 2006.

22. The present case is different on facts. Here, the petitioner was given a hearing on August 05, 2021. Thereafter, the petitioner chose not to put in its defence.

23. Subsequently, vide notice by way of an e-mail dated February 10, 2022, the petitioner was informed that a final hearing of the matter was fixed.

24. The petitioner although did not appear in such hearing, issued an e-mail on February 16, 2022 indicating to the authorities that it would not be possible for the petitioner to be available during the relevant period of hearing since the petitioner would remain outstation. The petitioner also sought an adjournment and the opportunity to file a statement of defence and counter-claim to effectively defend its case.

25. Thus, it cannot be said that the petitioner did not get any opportunity of hearing at all, which were the circumstances in *Bajaj Electricals Limited* (supra).

26. In *Ganesh Chandra Ghosh and others* (supra), the Division Bench took into consideration the exceptional circumstance that the arbitrator, whose award was challenged had disposed of as many as 299 arbitration petitions in a single day and in a single hearing which, of course, was an *ex facie* travesty of justice. The court, in such circumstances, held that there was a flagrant violation of the principles of natural justice which prompted the court to observe that a challenge under Article 226 was maintainable.

27. The petitioner, in the present case, has not made out such a high ground.

28. The judgment rendered by the Madras High Court in *M/s Feedback Infra Private Limited* (supra) recorded, *inter alia*, that the second respondent had not even filed a claim statement after initiation of arbitration proceeding. The court observed that in the absence of filing of pleadings and recording of evidence as per the provisions of the 1996 Act, the court had to come to a conclusion that the impugned order was not fit to be called an award at all. In such circumstances only, the learned Single Judge of the Madras High Court interfered under Article 226 of the Constitution of India. Here, as opposed

to the said case, a claim statement had definitely been filed and a first opportunity of hearing was given to the petitioner on August 05, 2021.

29. However, the petitioner had not filed its defence. Thus, the facts of the present case are not akin to those before the Madras High Court in the reported judgment, since there no pleadings were filed by either of the parties, nor was there any scope of recording evidence. In the present case, however, it cannot be said that the arbitral award is so tainted that the same cannot be called an arbitral award at all.

30. In the judgment of *Mittal Pigments Pvt. Ltd.* (supra), the learned Single Judge of the Delhi High Court, noticeably, was hearing a petition under Section 34 of the 1996 Act and not an application under Article 226 of the Constitution of India. While taking into consideration the challenge of the petitioner therein, the court had observed that under the Arbitration Act, 1940, the court had formulated a concept of serving peremptory notice of hearing so that a litigant may be warned if he defaults in future.

31. In fact, all the judgments cited in the *Mittal Pigments Pvt. Ltd.* (supra), apart from *Magma Leasing Limited vs. Gujarat Composite Limited*

2006 SCC OnLine Cal 235, were from proceedings under the Arbitration Act, 1940.

32. The scheme of things under the 1940 Act contemplated much more interference by the courts than the present Act of 1996.

33. We also have to keep in mind that Section 25 of the 1996 Act has brought in a new era into the field of arbitration.

34. Remaining on the topic of *Mittal Pigments Pvt. Ltd.* (supra), the same had also considered the proposition laid down in *Magma Leasing Limited* (supra). However, the concept of preliminary notice of *ex parte* hearing is not inbuilt into the scheme of the 1996 Act. To such extent, this court cannot but differ with utmost respect from the view of the Delhi High Court.

35. A cursory reading of Section 25 of the 1996 Act indicates that under the said provision, unless otherwise agreed by the parties where, without showing sufficient cause, the respondent failed to communicate his statement of defence in accordance with sub-section (1) of Section 23, the Arbitral Tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant and shall have the discretion to treat the right of the

respondent to file such statement of defence as having been forfeited.

36. Under sub-section (c) of Section 25, when a party fails to appear at an oral hearing or to produce documentary evidence, without showing sufficient cause, the Arbitral Tribunal may continue the proceedings and make the arbitral award on the evidence before it. *Per se*, the contrary need not be read into Section 25(c) insofar as if some reason is shown for the non-appearance of a party, the Arbitral Tribunal cannot continue with the proceedings. There is no such fetter in Section 25 of the 1996 Act to vitiate an award so much so as to call for interference under the high ground of judicial review under Article 226 of the Constitution of India.

37. As is well-settled, for exploring the window under Article 226 of the Constitution of India, a patently arbitrary act, *mala fides*, palpable violation of the law and/or a patent arbitrariness is to be established. In the present case, no such yardstick has been satisfied by the petitioner.

38. Insofar as the provisions of Section 34 of the 1996 Act are concerned, the same, in sub-section 2(a)(iii), provide that one of the grounds of

challenge under Section 34 is that the party making the application under Section 34 was not given proper notice of the appointment of an arbitrator or *of the arbitral proceedings or otherwise unable to present his case.* Thus, the petitioner has to establish, if the petitioner is so entitled in law, to show before the court taking up the Section 34 application if preferred, that the petitioner falls within the purview of Section 34(2)(a)(iii). Merely because the petitioner's request for adjournment was not granted, the petitioner cannot invoke the jurisdiction of this court under Article 226 of the Constitution of India, bypassing the provisions of Section 34 of the 1996 Act and Section 19 (1) of the 2006 Act.

39. In such scenario, this court does not find any reason to interfere with the impugned award under Article 226 of the Constitution of India.

40. Accordingly, WPA No. 11265 of 2023 is dismissed as not entertained, with liberty to the petitioner to approach the appropriate authority with a challenge under Section 34 of the Arbitration and Conciliation Act, 1996 upon compliance of the statutory stipulation of Section 19(1) of the MSME Act, 2006.

41. It is made clear that this court has not gone into the merits of the contentions of either of the parties and it will be open to the parties to agitate all points in a challenge, if taken out under Section 34 of the 1996 Act.

42. There will be no order as to costs.

43. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)