

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

Present :

Hon'ble Justice Moushumi Bhattacharya

AP 90 of 2023

IA No: GA 2 of 2023

Government of Maharashtra

VS

Shrivin Pharma Pvt. Ltd.

For the petitioner	:	Mr. Anubhav Sinha, Adv. Mr. Ashish Shah, Adv. Mr. Rohit Mukherji, Adv.
For the respondent	:	Mr. Debrup Bhattacharya, Adv. Mr. Amit Chowdhury, Adv.
Last heard on	:	05.10.2023
Delivered on	:	12.10.2023

Moushumi Bhattacharya, J.

1. The respondent award-holder in AP No. 90 of 2023 has filed the present application for modification of an order passed by this Court on 12.7.2023. The order was passed in the main application whereby the petitioner award-debtor was directed to deposit Rs. 26,25,000/- with the Registrar, Original Side of this Court within 3 weeks from the date of the order.

2. The applicant award-holder submits that the petitioner award-debtor should be directed to deposit a sum of Rs. 4,25,35,173/- and not the amount which was directed to be deposited by the order dated 12.7.2023.
3. The applicant grounds its prayer on a calculation of 75% of the amount of Rs. 5,67,13,564/- awarded by the State Micro Small Enterprises Facilitation Council (MSME Council) by its award dated 24.9.2019.
4. The backstory to the application should briefly be stated.
5. The applicant award-holder is registered as a “small enterprise” under The Micro Small and Medium Enterprises Development Act, 2006 (MSMED Act).
6. The MSME Council passed the impugned award, which is the subject matter of AP 90 of 2023, on 24.9.2019 on a claim made by the respondent award-holder in 2017 before the Council. The claim was made on account of outstanding dues against supply of medicines by the respondent award-holder to the petitioner award-debtor. The applicant’s reference to the Council was made under section 18(1) of the MSMED Act. The reference travelled through the hierarchy of section 18 of the Act and the Council made the impugned award under section 18(3) of the said Act. By the impugned award, the petitioner award-debtor was directed to pay the outstanding principal amount of Rs. 35,83,588/- plus interest thereon @ 3 times the bank rate compounded with monthly rests.

7. The petitioner filed AP 90 of 2023 for setting aside of the award dated 24.9.2019. By an order dated 7.7.2023, the petitioner was directed to comply with the requirement of section 19 of the MSMED Act in terms of putting in 75% of the awarded amount. Learned counsel, who is representing the petitioner award-debtor, sought adjournment to take instructions on this point and the matter was made returnable on 12.7.2023. On the returnable date, counsel for the petitioner sought leave to deposit 75% of the awarded amount and was accordingly directed to deposit Rs. 26,25,000/- with the Registrar, Original Side within 3 weeks from the date of the order. The quantum of deposit was in accordance with the calculation presented by the counsel to the Court on that day.

8. The applicant award-holder seeks modification of the order dated 12.7.2023 by way of the present application essentially on the quantum directed to be paid by the petitioner. According to learned counsel for the applicant award-holder, the petitioner award-debtor should pay Rs. 4,25,35,173/- which is 75% of the entire awarded amount, i.e., Rs. 5,67,13,564/-.

9. Counsel appearing for the award-debtor agrees that the quantum should be modified but says that the amount should be 75% of the principal sum which is Rs. 35,83,588/- which would amount to Rs. 26,87,691/-. Counsel argues that the Facilitation Council did not calculate the interest component in the amount awarded but left the entire calculation to be quantified by a

Chartered Accountant of the award-holder's choice. It is further argued that the Chartered Accountant's Certificate contains several factual errors.

10. Learned counsel appearing for the applicant award-holder disputes the above contentions and urges that 75% must be calculated on the entirety of the awarded sum and not only on the principal amount.

11. The issue which is to be decided is whether adjudication of the Facilitation Council is on the entire awarded amount. Second, would the petitioner's obligation under section 19 be impacted if the answer is in the negative.

12. To answer this question, section 19 of the MSMED Act, which contains the mandate of the 75% deposit, should be set out.

“19. Application for setting aside decree, award or order.- No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, 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 decree, award or, as the case may be, the other order in the manner directed by such court.

Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case, subject to such conditions as it deems necessary to impose.”

13. The interest component of an award made by the Facilitation Council is governed by sections 16 and 17 of the MSMED Act which are also relevant for the present adjudication and are accordingly set out below :

“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.

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.”

14. As would be clear from the mandate in section 19, a Court is statutorily - precluded from entertaining any application for setting aside of an award passed by the Council unless the buyer-applicant has deposited 75% of the amount in terms of the award. The effect of this provision was recognised by the Supreme Court in several decisions including in *Tirupati Steels vs. Shubh Industrial Component*; (2022) 7 SCC 429 and in *Gujarat State Disaster Management Authority vs. Aska Equipments Ltd.*; (2022) 1 SCC 61. Apart from the decisions of the Supreme Court, section 19 itself constitutes a bar to such an application crossing the threshold unless the appellant - buyer complies with the requirement of the 75% deposit.

15. The issue whether the petitioner award-debtor should put in 75% is not under challenge. The issue is whether 75% of the principal amount *sans* interest would satisfy the rigour of section 19 of the MSMED Act.

16. The issue may find a measure of clarity from section 18 of the MSMED Act which contains the hierarchy of a reference made by a party for recovery of an amount under section 17 of the MSMED Act. Section 18(1) is the start of that process leading to making of an award under section 18(3) by the Council on such reference. The relevant part of section 18 is set out 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 dispute as if the arbitration was in pursuance of an

arbitration agreement referred to in sub-section(1) of section 7 of that Act.”

The extracted portion is a precursor to the 75% requirement under section 19 and vests the Facilitation Council with the power to arbitrate on the reference and make an award under the provisions of the Arbitration and Conciliation Act, 1996.

17. Section 18(3) transitions from a failed conciliation to the Council donning the role of an arbitrator for deciding the reference under the provisions of the 1996 Act. The award passed by the Council would hence be an award under the provisions of the 1996 Act. The statutory seal to this deeming provision is found in section 18(3) of the MSMED Act itself where the parties are to proceed as if the dispute is in pursuance of an arbitration agreement as defined in section 7(1) of the 1996 Act. Further, section 18(3) of the MSMED Act sanctifies the award passed by the Council within the structure and Scheme of the 1996 Act.

18. The contemplation of section 18(3) of the MSMED Act also bolsters the procedure adopted by the Council by bringing it under the provisions of the 1996 Act. The Council becomes the arbitral tribunal for all intents and purposes of the 1996 Act. The provisions of the 1996 Act, in effect, are bodily-lifted to sit in for the procedure and the award of the Council. If this be the case, section 31 of the 1996 Act which deals with the form and content of an arbitral award would also apply to the decision of the Council in the present case.

19. Section 31(7)(a) authorises the arbitral tribunal to include the interest component in the sum for which the award is made at a rate which the tribunal deems to be reasonable. Section 31(7)(a) pertains to pre-reference and *pendent lite* interest and section 31(7)(b) to post-award interest at a rate 2% higher than the rate of interest prevalent on the date of the award. While section 31(7)(a) is subject to party autonomy, 31(7)(b) is governed by the directions contained in the award.

20. Section 31(7) makes it clear that the interest component is a part of the awarded amount and cannot be seen as the subject matter of a separate or severable decision-making process. Since the interest is integral to the award, the interest component would also be subject to the requirement of reasons under section 31(3) of the 1996 Act, unless the parties agree to the contrary. This would entail the arbitral tribunal to apply its mind to the facts and attending circumstances for coming to a decision on the award of interest. The award of interest is certainly not a mechanical process where the arbitral tribunal can randomly pick on a percentage on the principal sum or a time frame for which the interest is to be made payable. In most awards, the interest component translates to a substantial sum of money and the award-debtor must necessarily know the reason for which the award-debtor has been made liable for the interest. Indicating a time period for which the interest is to be calculated is equally important for precision and clarity.

21. The duty of an arbitral tribunal to adjudicate on the interest with due application of mind and accompanied with reasons assumes particular

significance in the context of the provisions of the MSMED Act. This is in view of section 16 of the said Act. Section 16 provides for the date from and the rate at which the interest is to be payable by a buyer. The section presumes failure on the part of a buyer to make payment of the agreed amount to the supplier and prescribes the rate of payment regardless of any law or agreement between the buyer and supplier. Section 16 makes the buyer liable for payment of compound interest with monthly rests on the amount which the buyer was to pay to the supplier from the appointed day at 3 times of the bank rate notified by the Reserve Bank of India.

22. Section 16 entails a detailed procedure for determining the rate at which a buyer must pay interest to the supplier on the amount which falls due from the supply of goods made to the buyer. The rate to be determined not only involves calculation of compound interest on the amount with monthly rests but also the starting point from which the amount is to be paid. The amount will then be multiplied 3 times in accordance with the prevalent bank rate. To add to the mix of calculations, section 2(b) of the MSMED Act defines “appointed day” as the day following immediately after the expiry of the period of 15 days from the day of acceptance or the day of deemed acceptance of any goods/services by a buyer from a supplier. The day of acceptance and the day of deemed acceptance have both been explained in section 2(b)(i) and (ii) of the Act.

23. It is thus clear that calculation of the rate at which and the date from which the buyer is liable to pay interest under section 16 of the MSMED Act is

no child's play. The Facilitation Council, anointed as the arbitral tribunal for the purposes of the 1996 Act, must deal with the interest component head-on by engaging with the relevant dates and figures and coming to a considered decision on the specific amount of interest which a buyer must pay to a supplier under section 16 of the Act. This adjudication would form an inalienable part of the award and be treated as integral to the decision of the Council.

24. The concluding part of the Award records the following :

“Buyer unit is liable to pay total principal amount outstanding to Rs. 35,83,588/- plus interest thereon @ 3 times of Bank rate of RBI, compounded with monthly rest to the supplier unit under section 16 of chapter V of MSMED Act, 2006.

The supplier unit is directed to submit his claim of principal amount to the buyer unit along with the interest accrued on principal amount duly quantified and certified by a Chartered Accountant.”

25. This shows that the Facilitation Council has delegated the determination of the interest to the Chartered Accountant of the applicant's / award-holder's choice. The Council, as the arbitral tribunal, has failed to adjudicate the amount of interest payable by the petitioner to the respondent and made the decision entirely dependent on the computation to be done by the Chartered Accountant. The delegation of adjudication was despite the respondent/supplier claiming interest on the principal amount as part of its reference before the Council.

26. This would be clear from the Chartered Accountant's Certificate of 30.12.2019 annexed to the application which contains a calculation of the principal outstanding of Rs. 35,83,588/- and the accrued interest of Rs. 5,31,29,976/- amounting to a total Rs. 5,67,13,564/-. It is evident from the Certificate that the obligation of the Council /arbitral tribunal to decide on the rate of interest and the date from which the interest is to be payable was made dependent on the decision of the Chartered Accountant. The Certificate also reflects the accrual of statutory liability from 2.7.2015 which has been taken as the "appointed day" in terms of sections 16 and 17 of the MSMED Act.

27. This Court is of the view that the delegation of an important part of the adjudication process of the arbitral tribunal is not permissible under the provisions of the 1996 Act. Section 31 of the 1996 Act delineates the form and content of an arbitral award and makes award of interest an inseparable part thereof. The 1996 Act does not envisage adjudication of the quantum of interest in an award to be a function which can be de-coupled and be delegated to another forum / entity and thereafter accept the determination as a part of the award. Further, the impugned award in the present case depends entirely on the calculation of the Chartered Accountant.

28. In the same vein, section 18(4) of the MSMED Act makes it clear that the deeming fiction contained therein would bestow the Facilitation Council with all the trappings of an arbitral tribunal for the purpose of and under the 1996 Act : Ref. *Gujarat State Civil Supplies Corporation Limited vs. Mahakali Foods Private Limited (Unit 2)*; (2023) 6 SCC 401. This means that the Council was

under an obligation to adjudicate on the entirety of the claim including that of interest and not shift the responsibility of the adjudication to the Chartered Accountant. Co-ordinate Benches of this Court noticed the infirmity of partial adjudication of the dispute on substantially similar facts in *Hindusthan Engineering and Industries Ltd. vs. Metaflux Company Pvt. Ltd.*; (2018) SCC OnLine Cal 166 and *Usha Martin Limited vs. Eastern Gases Ltd.*; 2022 SCC OnLine Cal 3342.

29. The requirement of 75% of deposit was considered by this Court in *Bharat Heavy Electricals Limited Electric Division v. Optimal Power Synergy India Pvt. Ltd.*; AIR 2021 Cal 274. The Court also adjudicated on whether 75% should be confined to the principal amount. The buyer who sought for stay of the award passed by the Facilitation Council was directed to deposit 75% of the total amount consisting of the principal amount + interest as calculated by the Chartered Accountant. The only argument made before the Court however was on the “appointed day” as defined under the MSMED Act as opposed to whether the Council was under a mandate to adjudicate on the quantum of interest under the provisions of the 1996 Act. The decision of the Court was based on the legislative intent in enacting section 19 requiring the buyer to deposit 75% read with object of the MSMED Act. Moreover, the decision in *Metaflux* of the learned Single Judge, as His Lordship then was, was not placed before the Court.

30. It may also be relevant to mention that the Supreme Court decision in *M/s. Hyder Consulting (UK) Ltd. v. Governor State of Orissa Tr. Chief*; (2015) 2

SCC 189 which was concerned with grant of pre-award interest under section 31(7)(a) and post-award interest under section 31(7)(b) of the 1996 Act and held (by the majority judgment) that the interest component becomes part and parcel of the “sum” awarded, was given on a set of facts where the interest component had already been adjudicated. In any event, decision-making is a process of evolution of the thinking of Judges based on the development of law in the context of the issues peculiar to the case as presented by counsel appearing before the Court. Therefore, it would be myopic for this Court to fetter itself to the decision in *Optimal* and not allow the argument made in this application to reach its logical conclusion. A Judge, after all, is allowed to grow wiser – with or without the sadness quotient.

31. Section 16 of the MSMED Act casts an onerous responsibility on the Council to fix the rate of interest and also the time period for which it is to be paid. The Council must also determine the relevant bank rate as notified by the RBI at the relevant point of time together with any fluctuations spanning the period. The last determination is significant since interest under section 16 of the MSMED Act is to be at 3 times of the bank rate. The contention made on behalf of the award-debtor that there were revisions in the RBI Bank rate from June, 2015 – September, 2019 becomes relevant. The Council should have taken this issue into consideration and adjudicated on the specific rate of interest on the multiple planks of section 16 of the Act instead of shifting the responsibility of adjudication to the Chartered Accountant.

32. The Council cannot desert the task of decision-making and leave it to a Chartered Accountant and depend on the arid landscape of the figures presented by the latter who is not the arbitral tribunal under the MSMED Act. The Facilitation Council would be well-advised to complete the awarded sum by adjudicating on the interest component and declare the entire award consisting of the principal sum + interest calculated with specificity under section 16 of the MSMED Act. The Council would otherwise be undermining the very object of the MSMED Act and the legislative intent in enacting it.

33. Section 31(3) of the 1996 Act requires the arbitral tribunal to give reasons upon which the award is based subject to the parties agreeing otherwise. The reasons given by the Chartered Accountant in the present case for fixing the quantum of interest cannot be accepted to be the reasons of the Facilitation Council / arbitral tribunal in satisfaction of the mandate of section 31(3) of the 1996 Act.

34. This Court is accordingly of the view that the calculation of 75% under section 19 of the MSMED Act would only be on the amount which has been adjudicated upon and awarded by the Facilitation Council i.e., Rs. 35,83,588/-. 75% of this amount would be Rs. 26,87,691/-. The Council has not specified a figure for the applicable interest. This has been quantified by the Chartered Accountant. The award-debtor will deposit the amount of Rs. 26,87,691/- with the Registrar, Original Side of this Court within 7 days from the date of this judgment.

35. This Court was initially inclined to pass appropriate orders on the apparent delay in filing the application for setting aside of the award since the award is of 2019 and the application has been filed in 2023. However it transpires from the facts brought to the notice of the Court that the petitioner award-debtor received a signed copy of the award only on 19.11.2022. This would be evident from the material disclosed by of the parties.

36. The alleged errors contained in the Chartered Accountant's Certificate is a matter for adjudication in the section 34 application as are the other contentions made on behalf of the award-debtor.

37. However, considering that 4 years have passed since the award and the award-debtor has been directed to deposit 75% of the principal amount only today, the award-holder shall be entitled to withdraw this amount, i.e. Rs. 26,87,691/- within 2 days of the deposit upon furnishing a bank guarantee of an equivalent amount to the Registrar, Original Side of this Court. This is statutorily-permitted under the proviso to section 19 of the Act.

38. GA 2 of 2023 is disposed of in terms of this judgment.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)