IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.7216 Of 2020
(Through hybrid mode)

M/s. Bajaj Electricals Limited .... ***Petitioner***

Mr. Ram Chandra Panigrahi, Advocate

-versus-

Micro Small and Enterprisers Facilitation and another .... ***Opposite Parties***

Mr. A.K. Sharma, AGA for opposite party no.1
Mr. S.P. Mishra, Senior Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER

Order No. **05.01.2022**

5. **1.** Mr. Panigrahi, learned advocate appears on behalf of petitioner. He submits, impugned is award dated 10th December, 2019 made by Director of Industries, Odisha. This award was purportedly made under section 18 of Micro, Small and Medium Enterprises Development Act, 2006. He submits, there should be interference in writ jurisdiction because there are no reasons given in the award, in dealing with his client's contention that the claims are barred by limitation. He relies on **judgment dated 29th June, 2021** of the Supreme Court in **Silpi Industries vs. Kerala State Road Transport Corporation** available at **2021 SCC Online SC 439** (**Civil Appeal**

nos. 1570-1578 of 2021), paragraphs 13 and 18. Two issues were framed in the adjudication. First issue was whether provisions of Indian Limitation Act, 1963 are applicable to arbitration proceedings initiated under section 18(3) of the 2006 Act. The Supreme Court in paragraph-18 declared that provisions of Limitation Act, 1963 are applicable to arbitration proceedings under section 18(3) of the 2006 Act. He laid emphasis on following sentence in paragraph 18, reproduced below.

> *"Thus, we are of the view that no further elaboration is necessary on this issue and we hold that the provisions of Limitation Act, 1963 will apply to the arbitrations covered by Section 18(3) of the 2006 Act."*

2. Mr. Mishra, learned senior advocate appears on behalf of opposite party and submits, the writ petition is not maintainable. He relies on the following.

(i) **Order dated 2nd November, 2020** in **Petition for Special Leave to Appeal (C) no.11883 of 2020**. Text of the order is reproduced below.

> *"Having heard Shri Kalra, learned counsel appearing for the petitioner, for some time, we may only reiterate what we have stated in Deep*

Industries Limited v. Oil and Natural Gas Corporation Limited and Another (2019) SCC Online SC 1602 and several other cases that we have frowned upon persons knocking at the doors of the Writ Court in arbitration matters. This is one more such case.

As a result, we dismiss the matter with costs of Rs.50,000/- to be paid to the Supreme Court Legal Services Committee within two weeks."

(ii) **Order dated 10th December, 2021** made by a Division Bench of this Court in **W.A. no.836 of 2021 (M/s. Anupam Industries Ltd. v. State of Orissa and others)**. The entire order is reproduced below.

"1. Mr. S.C. Tripathy, learned counsel for the Appellant urges that since in the present case there is a clear violation of principles of natural justice, the learned Single Judge ought not to have relegated the Petitioner to the appellate remedy provided under the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act). He refers to the decision of the Supreme Court in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1.

2. Having considered the submissions of Mr. Tripathy, the Court is unable to find any error having been committed by the learned Single Judge in observing that all the grounds urged in the writ

petition would be urged before the Appellate Authority, under the MSME Act, in accordance with law.

3. Accordingly, the Court is not persuaded to interfere with the writ appeal. Accordingly, it is dismissed.

(iii) **Order dated 20th December, 2021** made by this Bench in **W.P.(C) no.28464 of 2020** (**Rolta India Ltd. v. Micro and Small Enterprises Facilitation Council and another).** He relies particularly on paragraphs 4 and 5, reproduced below:

"4. He also submits, order dated 10th December, 2021 made by the 1 st Division Bench of this Court in dismissing appeal against order dated 22nd September, 2021 made by coordinate Bench in Anupam Industries Ltd. (supra) cannot bind this Bench, in the circumstances of law declared by the Supreme Court.

5. Committee of Court demands that view taken by order dated 22nd September, 2021 in Anupam Industries Ltd. (supra) by coordinate Bench, confirmed in appeal by order dated 10th December, 2021, be followed. As such, there is no room for interference."

3. Without prejudice to above contention he submits, there is alternative efficacious statutory remedy available to petitioner. The

remedy lies under section 19 of the 2006 Act read with section 34 in Arbitration and Conciliation Act, 1996. Petitioner's grounds of challenge herein against the award are to be urged under section 34 of the 1996 Act. The Court should not be moved to interfere in exercise of its extraordinary writ jurisdiction. He reiterates, the Supreme Court has frowned upon persons knocking at the doors of the writ Court, in arbitration matters. He then relies on another judgment of the Supreme Court in **SBP & Co. v. Patel Engineering Ltd.,** reported in **(2005) 8 SCC 618** paragraph-45. The paragraph is reproduced below.

> ***"****It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration*

> *agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible."*

One more judgment of the Supreme Court in **Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department** reported in **(2008) 7 SCC 169**, paragraph-43 he relies. Separate view was taken by **Raveendran, J.** in said paragraph. Same is reproduced below.

> *"Where the Schedule to the Limitation Act prescribes a period of limitation for appeals or applications to any court, and the special or local law provides for filing of appeals and applications to the court, but does not prescribe any period of limitation in regard to such appeals or applications, the period of limitation prescribed in the Schedule to the Limitation Act will apply to such appeals or applications and consequently the provisions of sections 4 to 24 will also apply. Where the special*

or local law prescribes for any appeal or application, a period of limitation different from the period prescribed by the Schedule to the Limitation Act, then the provisions of section 29(2) will be attracted. In that event, the provisions of section 3 of Limitation Act will apply, as if the period of limitation prescribed under the special law was the period prescribed by the Schedule to Limitation Act, and for the purpose of determining any period of limitation prescribed for the appeal or application by the special law, the provisions contained in sections 4 to 24 will apply to the extent to which they are not expressly excluded by such special law. The object of section 29(2) is to ensure that the principles contained in sections 4 to 24 of Limitation Act apply to suits, appeals and applications filed in a court under special or local laws also, even if it prescribes a period of limitation different from what is prescribed in the Limitation Act, except to the extent of express exclusion of the application of any or all of those provisions."

4. Mr. Sharma, learned advocate, Additional Government Advocate appears on behalf of opposite party no.1 and submits, his client duly acted, in good faith.

5. Mr. Panigrahi, in reply submits, **M/s. Anupam Industries Ltd.** (supra) and **M/s. Ved Prakash Mithal and Sons** (supra) are not

orders made on adjudication. There is no ratio decidendi. They are not precedents. He submits, every case is unique and there must be adjudication for ascertaining whether or not there can be exercise of writ jurisdiction.

6. For purpose of adjudication on the question of maintainability, it is required that impugned order be looked at, to see whether interference is warranted. Impugned award begins with brief history of the case. It proceeds under heading 'counter' to record contentions of petitioner. That is followed by further record of contentions of opposite party, as appearing from the rejoinder filed before the Council.

7. On perusal of impugned award, it is clear that petitioner took the point of the claims being barred by limitation. Paragraphs 4 and 5, under heading 'counter' in impugned award, are reproduced below.

> *"4. That the petition is heavily barred by law of limitation and is bound to be dismissed.*
>
> *5. That, the petitioner claims to have raised bills on 06.08.2010, 28.06.2010 and 15.12.2010. A look at the invoices reveals that none of the invoices have any acknowledgement from the Opposite Party."*

Opposite party had a contention pleaded in the rejoinder as recorded in impugned order and reproduced below.

"3. That, this Act statutorily prohibits the applicability of provision of any other Act including the Limitation Act, 1963. It is well settled principle of law that in the event of dispute between a general Act versus special Act, the later will always prevail over the provision of the former. Therefore, the claim of the claimant being with regard to the provisions of the MSMED Act, 2006 which is a special Act, the provision of Limitation Act, 1963 will have no applicability to present case which is protected under a special Act. Thus, the objection of the respondent in this regard is baseless."

8. Basis for the award is reproduced below:

"*Heard the matter.*

The petitioner submitted before the Council that he has supplied the Electrical Conductors to the different destination of Bajaj Electricals Ltd., Mumbai as against P.O. during the year 2010. Accordingly, he has raised the bills and O.P. made part payment leaving a balance of Rs.14,32,517.62. Thus, it is implied that he has supplied the materials & it has been utilized. It is obligatory that O.P. is to pay the balance amount of Rs.14,32,517.62 towards principal and Rs.70,06,820.36 towards interest and no coercive action should be taken by the O.P. against the petitioner thereof. It was decided to make an amicable settlement by both the parties with each

other within 15 days from today and report its outcome for final hearing on 30.10.2019.

The case was adjourned to 30.10.2019 for final hearing. Due to administrative exigencies, the case was deferred to 16.11.2019.

Both the parties were present in the 75th Sitting of MSEFC held on 16.11.2019. The petitioner submitted before the Council that they have supplied the materials and raised the bills during the year 2010-11. ***The points raised by the O.P. were perused by the Council and it was decided that O.P. is to establish the facts of delay for such nonpayment instead of asking for non-maintainability of the case.***

The petitioner has supplied the materials as per the P.O. and these materials have been received and utilized without any objection. Hence, O.P. is to pay the dues of the petitioner."

(emphasis supplied)

9. It appears from above extracts of the contentions and basis of award, reproduced in last two preceding paragraphs, the point of limitation was not adjudicated at all. The situation emerged is petitioner was not heard.

10. Even under the Act of 2006 a person is entitled to plead in defence at the first instance, against a claim lodged before the

Council. Remedy on a person being aggrieved by an award passed under section 18 is there but it is coupled with condition precedent of deposit, in event challenge to the award is to be looked into for adjudication. This condition the law requires for the party aggrieved, to fulfill before there is adjudication. Question is whether petitioner is aggrieved by a reasoning or he has not been heard at all.

11. The Supreme Court in **Silpi Industries** (supra) declared the law to be that provisions of Limitation Act, 1963 apply to arbitrations covered by section 18(3) of the 2006 Act. Mr. Mishra pointed out that impugned award is dated 10th December, 2019, made at a time when the judgment was not there. In that context, he had relied on paragraph-43 in **Consolidated Engineering Enterprises** (supra). View taken in said paragraph is that by section 29 in Limitation Act, 1963, savings have been provided. Sub-section (2) in section 29 saves application of limitation prescribed by special or local laws. The Act of 2006 is a special law. It, however, does not provide for limitation separately, with non-obstante clause ousting operation of the Act of 1963. So far as the declaration of law by **Silpi Industries** (supra) coming at a date later than impugned award is concerned, it is to be gainsaid that a declaration of law cannot be said to be prospective.

12. The question for consideration, adjudication and answer is whether petitioner was heard. Court is convinced that in facts and circumstances aforesaid, petitioner was not heard or given the right of hearing it was entitled to under the Act of 2006. Petitioner cannot be compelled to seek setting aside of the award, on being aggrieved. As such, it is a clear case where there must be interference in writ jurisdiction. The writ petition is found to be maintainable. **Patel Engineering** (supra) is not applicable in this case. Paragraph-45 must be read in context of adjudication by the Supreme Court regarding whether or not appointment made by the Chief Justice under sub-section (6) of section 11 (in the Act of 1996 before amendment), is an administrative or judicial order. On declaring that the order is a judicial order, it was said that there was no warrant for the approach to proceed on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under articles 226 or 227 of the Constitution. The scheme of the Act of 1996 was referred to, for holding as would appear from the passage in paragraph 45, extracted and reproduced below.

> *"The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status*

> *of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.*"

It must be remembered that an arbitration concluded by award on a reference under section 18(3) of the Act of 2006 cannot be equated with an arbitration under an arbitration agreement between the parties, even if compelled as constituted by the Chief Justice. In **Patel Engineering** (supra) there was disapproval of the stand taken by some High Courts that any order passed by the arbitral tribunal is capable of correction in writ jurisdiction. Case in hand is not a matter of correction but to address grievance of petitioner that he was not heard at all. In compelling petitioner to statutory remedy of seeking setting aside of award, necessarily petitioner will be required to deposit 75% of the award. All this in consequence of omission to hear and adjudicate at the first instance.

13. **M/s. Ved Prakash Mithal and Sons** (supra) obviously is deprecation of sharp practice adopted by the litigant(s). In **Rolta India Ltd.** (supra) this Bench refused to interfere in writ jurisdiction in spite of petitioner therein having relied on judgments of the Supreme Court to urge statutory compliance of provisions in section 18 of the Act

2006, mandating, inter alia, conciliation before reference to arbitration. No view was expressed by this Bench since, on similar point, there was no interference by **Anupam Industries Ltd.** (supra). This case is distinguishable on facts. Petitioner's contention was rejected out of hand, on observation that petitioner instead ought to have established the facts of delay for non-payment. Therefore, petitioner was not heard at all, for there to be said there was adjudication for passing of award.

14. A further point was taken by Mr. Mishra regarding the writ petition not being in form. He submitted, the writ petition was filed by a person claiming to be authorized representative. That is not permissible as per view taken by a Division Bench of this Court in **judgment dated 16th July, 2010** in **Eimco Elecon (India) Ltd. v. Mahanadi Coalfields Ltd.** reported in **(2011) 167 Company Cases 596 (Orissa)**, paragraph-6. In that case there was scrutiny of the writ petition filed, on question raised regarding its form. It was found that the writ petition was filed by the Sales Manager as constituted attorney of the Director, duly authorized in that behalf. The Board of Directors of the company passed resolution authorizing the Director to institute the proceeding on behalf of the company. As such view taken was, the Director had no further authority to execute power of attorney in favour of the Sales Manager, to act on his behalf. In this case the writ petition has been filed by the authorized representative of the

company. Said person has affirmed affidavit on 21st February, 2020, in which he said, inter alia, as follows:

> *"1) That I am the Power of Attorney holder of M/s. Bajaj Electricals Limited having its registered office at 45-47, 1st Floor, Veer Nariman Road, Mumbai-400001, Maharashtra and in pursuance of the resolution of the Board of Directors duly authorized to carry out all activities of company and duly authorized to swear this affidavit on behalf of the company."*

Eimco Elecon (supra) is of no assistance to opposite party.

15. Impugned award is set aside and quashed. Claim of opposite party no.2 is restored, along with the subsequent pleadings. Opposite party no.1 will hear and dispose of the claim in accordance with law, as expeditiously as possible.

16. The writ petition is disposed of.

(Arindam Sinha)
Judge

Sks