OD-1 to 3

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

EC/5/2024
BAID POWER SERVICES PRIVATE LIMITED
VS
THE BIHAR MEDICAL SERVICES AND
INFRASTRUCTURE CORPORATION LIMITED
WITH
AP/757/2023
IA NO:GA/1/2023, GA/2/2023
THE BIHAR MEDICAL SERVICES AND
INFRASTRUCTURE CORPORATION LIMITED
VS
BAID POWER SERVICES PRIVATE LIMITED
WITH
AP/758/2023
THE BIHAR MEDICAL SERVICES AND
INFRASTRUCTURE CORPORATION LIMITED
VS
BAID POWER SERVICES PRIVATE LIMITED

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 6th September, 2024.

Appearance:
Mr. Umesh Prasad Singh, Sr. Adv.
Mr. Kumar Manish, Adv.
Mr. Surendra Kumar, Adv.
Ms. Amrita Pandey, Adv.
…for the petitioner in item nos.2 & 3
and for the respondent in item no.1

Mr. Pranit Bag, Adv.
Mr. Anuj Mishra, Adv.
Mr. R. R. Modi, Adv.
Mr. Anousko Das, Adv.
…for the respondent in item nos.2 & 3
and for the petitioner in item no.1

In RE: IA NO: GA/1/2023

The Court: The present application has been filed seeking exclusion of time taken by the petitioner in proceeding with a writ petition on the self-same cause of action from the period of limitation applicable to the filing of the present application under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act"), being AP No.757 of 2023.

Learned senior counsel for the petitioner argues that the parties entered into an agreement on April 15, 2014, pursuant to which the respondent partially supplied equipment which did not function.

On November 10, 2016, the respondent submitted a Memorandum under Section 8(1) of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as, "the MSME Act"). On October 11, 2017, the respondent filed an application under Section 18(1) of the MSME Act before the Facilitation Council under the said Act, registered as Case No. 122 of 2017. The conciliation proceeding was accordingly initiated by the meeting held on January 19, 2019 and a final decision was taken and settlement was recorded, duly signed by the members of the Council on January 19, 2019.

After about seven months, on August 9, 2019, it was suddenly communicated to the petitioner that no settlement was arrived at. On May 12, 2021, during the Covid-19 Pandemic, an *ex parte* award was passed by the MSME Council, a copy of which was received by the petitioner on making an application, on September 21, 2021.

The Covid-19 relaxations in terms of the Supreme Court's orders ended on February 28, 2022 and on April 5, 2022, the petitioner filed WPA No. 6191 of 2022 before this Court challenging the award. The primary ground taken in the writ petition was that the requirement of deposit of 75 per cent of the awarded amount for preferring an appeal under the MSME Act was onerous, making the alternative remedy of appeal non-efficacious. In a connected application bearing CAN 1 of 2022, it was also pleaded that the respondent-unit being registered as an MSME Unit after the contract was entered into between the parties, the MSME Facilitation Council had no jurisdiction to take up the arbitration.

By an order dated October 6, 2023, WPA No. 6191 of 2022 along with CAN 1 of 2022 were dismissed by this Court on the ground of availability of an equally efficacious alternative remedy by way of a challenge under Section 34 of the 1996 Act. The dismissal, however, was with liberty to the petitioner to approach the appropriate forum in a properly constituted challenge under Section 34 of the 1996 Act, if the petitioner so chose. Accepting the contention of learned counsel for the petitioner that a lenient view ought to be taken regarding the period of limitation, since the Supreme Court in several orders had been extending the moratorium regarding limitation during the Covid-19 period, and in view of the pendency of the writ petition before this Court for some time, the time-limit as stipulated in 2006 Act for the purpose of preferring a challenge was observed to be required to be looked into leniently. In the event the petitioner preferred a challenge under Section 34 of the 1996

Act within a week from that date, the court observed that it would be deemed that the said challenge was within the limitation as stipulated in the statute.

An appeal bearing MAT 2317 of 2023 was preferred against the same, which was allowed on March 20, 2024 by the concerned Division Bench by setting aside the observations and findings regarding the 'lenient view' observations of the learned Single Judge and also regarding the date when the certified copy of the award was received by the appellant therein.

The entertainability of the application under Section 34 was kept open to be decided by the court taking up the application under the said provision and the appellant therein was given liberty to raise the issue before the said court.

Learned counsel argues that the petitioner was advised by the learned Advocate General of the State of Bihar that in terms of *Himmatlal Harilal Mehta v. State of Madhya Pradesh and others*, reported at *AIR 1954 SC 403*, the availability of an alternative remedy, if onerous, was not an absolute bar in preferring a writ petition under Article 226 of the Constitution.

Also, the Supreme Court, in the case of *Cognizance for Extension of Limitation, In re*, reported at *(2022) 3 SCC 117*, had suspended the period of limitation during the Pandemic, granting 90 days from March 1, 2022 as the limitation period for all matters where the limitation expired during the Pandemic. The writ petition was filed within the said 90 days.

It is argued that as such, the writ petition was being proceeded with by the petitioner *bana fide* on the assumption that the alternative relief was

onerous due to the mandatory prerequisite of depositing 75 per cent of the awarded amount for preferring an appeal as well as since the award was passed without jurisdiction and a nullity, since the respondent was registered as an MSME Unit post-contract between the parties.

Learned senior counsel appearing for the petitioner cites *Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department*, reported at *(2008) 7 SCC 169* and *Kalpraj Dharamshi and another v. Kotak Investment Advisors Ltd. and another*, reported at *(2021) 10 SCC 401*, in support of the proposition that the exclusion under Section 14 of the Limitation Act, 1963 is applicable to challenges under Section 34 of the 1996 Act.

It is argued that while considering the application under Section 14 of the Limitation Act, this Court is not hearing an appeal under Section 19 of the MSME Act and, as such, there is no scope of deposit of the statutory amount of 75 per cent at this stage. In support of such proposition, learned counsel cites *Khoday Distilleries Ltd. (now known as Khoday Indian Ltd.) and others v. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd., Kollega*l, reported at *(2019) 4 SCC 376*.

Learned senior counsel also relies on *Silpi Industries and others v. Kerala SRTC and another*, reported at *(2021) 18 SCC 790* and *Gujarat State Civil Supplies Corpn. Ltd. v. Mahakali Foods (P) Ltd. (Unit 2) and another*, reported at *(2023) 6 SCC 401* for the proposition that an entity which was not registered as an MSME enterprise at the time of entering into the contract between the parties does not come within the purview of the MSME Act.

Learned counsel appearing for the respondent opposes the petitioner's contentions and submits that in the main writ petition, the petitioner never raised the contention of the award being a nullity due to subsequent registration of the respondent as an MSME Unit.

In the writ petition itself, as reflected in the order of the learned Single Judge passed thereon, the petitioner had pleaded due knowledge about the availability of a remedy under Section 34 of the 1996 Act against the impugned award. Thus, the plea of *bona fide* proceeding before a wrong forum, which is a *sine qua non* for attracting Section 14 of the Limitation Act, is not available to the petitioner at all.

Learned counsel for the respondent argues that the nullity point was never argued by the petitioner before the writ court. Although such point was raised in the connected application bearing CAN 1 of 2022, the said application was never pressed by the petitioner before the writ court.

In any event, in view of the Division Bench having set aside the order of the learned Single Judge passed in the writ petition, the issue of maintainability of the application under Section 34 of the 1996 Act has been thrown wide open.

Learned counsel for the respondents cites the case of *State Trading Corporation of India Limited v. Micro and Small Enterprises Facilitation Council, Delhi and another*, where a Division Bench of the Delhi High Court observed that the objection taken by the appellant to the effect that the MSME Facilitation Council does not have inherent jurisdiction to make a reference to

arbitration under the provisions of the MSME Act and therefore a writ petition would be maintainable, was misconceived. It was held therein that a writ petition does not lie against an award passed under the MSME Act by the Facilitation Council.

Again, in *Gujarat State Civil Supplies Corpn. Ltd. (supra)*, the Supreme Court observed that the Facilitation Council/Institute/Centre acting as an Arbitral Tribunal by virtue of Section 18(3) of the MSME Act would be competent to Rule on its own jurisdiction as also other issues in view of Section 16 of the 1996 Act. Learned counsel for the respondent argues that the petitioner never raised any objection regarding jurisdiction of the MSME Council and submitted to the jurisdiction of the said Council at all stages. Thus, now it cannot resile from such position and argue lack of jurisdiction as a ground for having preferred a writ petition.

Learned senior counsel for the petitioner, on the last above submission, argues that the petitioner could not have waived a statutory provision. Even if the petitioner had submitted to the jurisdiction of the Facilitation Council under the MSME Act, in the event it is shown that the Council lacked inherent jurisdiction due to subsequent registration of the respondent as an MSME Unit, the award is rendered a nullity.

Upon hearing learned counsel for the parties, the issue of limitation/applicability of Section 14 of the Limitation Act, 1963 is decided as follows:

It has been held in *Consolidated Engineering Enterprises (supra)* and *Kalpraj Dharamshi (supra)* by the Supreme Court that the exclusion of time under Section 14 of the Limitation Act is applicable to a challenge under Section 34 of the 1996 Act. The Supreme Court categorically distinguished between extension of time under Section 5 of the Limitation Act, which is not applicable to an application under Section 34 of the 1996 Act in view of the specific bar in Section 34, and exclusion of limitation period under Section 14.

Following the said ratio, the benefit of Section 14 of the Limitation Act can also be invoked for exclusion of time in a proceeding under Section 34 of the 1996 Act.

The question which now falls for consideration is whether the petitioner's approach before the writ court was *bona fide*, to bring it within the parameters of Section 14 of the Limitation Act.

To ascertain the *bona fides*, it is to be seen whether arguably a writ petition could be maintained in the circumstances of the case. From the perspective of the petitioner, it had raised two-fold objections – first, that the alternative remedy of an appeal under Section 19 of the MSME Act was onerous in view of the pre-requisite of deposit of 75 per cent of the awarded amount and secondly, that the award itself was a nullity, being palpably without jurisdiction, which could be assailed before the writ court as well.

In *Himmatlal Harilal Mehta*'s case, the Supreme Court observed that if the remedy provided by an Act is of an onerous and burdensome character, a writ petition may be maintained under Article 226 of the Constitution.

The rigour of Section 19 of the MSME Act, mandating a prior deposit of 75 per cent of the awarded amount, in the teeth of the petitioner's contention that the award was a nullity, might very well have been construed as onerous by the petitioner. We cannot lose sight of the fact that the writ petition of the petitioner was entertained in the first place by this Court and in fact, the benefit of Section 14 was extended to the petitioner by the learned Single Judge at the first instance. It was only upon the appeal against the same being allowed that the petitioner conclusively came to know that the automatic extension of benefit under Section 14 of the Limitation Act by the writ court was bad in law, having been set aside by the Division Bench.

The very fact that the writ petition was entertained and the parties had to wait till the final disposal of the appeal to learn that the benefit of Section 14 of the Limitation Act could not be automatically extended by the writ court shows that sufficient *bona fides* could be attributed to the petitioner in preferring the writ petition.

Before the learned Single Judge dismissed the writ petition, the writ petition was entertained and thus the petitioner could not have anticipated that the same was not maintainable.

In fact, there are a plethora of judgments of the Supreme Court which lay down that in case of gross jurisdictional error, the writ jurisdiction cannot be completely shut out despite availability of an alternative remedy. The writ petitioner pleaded in its application (CAN 1 of 2022) filed in connection with the writ petition that the award itself was a nullity since the dispute did not come

within the purview of the MSME Act as well as the respondent was registered as an MSME Unit only subsequent to the contract being entered into between the parties. Such perceived jurisdictional error, as pleaded by the petitioner, would be sufficient justification for the petitioner to approach the writ court.

Hence, the *bona fides* of the petitioner could not have been doubted at any stage, as it was sufficiently arguable as to whether a writ petition under Article 226 of the Constitution could be maintained.

In *Consolidated Engineering Enterprises (supra)* and *Kalpraj Dharamshi (supra)*, the benefit of Section 14 was extended to challenges under Section 34 of the 1996 Act.

As such, it cannot be said that such benefit is not attracted even in the teeth of the bar provided in Section 34(3) of the 1996 Act, read with its proviso.

The Division Bench judgment of the Delhi High Court in *State Trading Corporation (supra)* merely held that a writ petition was misconceived in the said case, due to availability of remedy under Section 34 of the 1996 Act.

However, the said dictum is not a proposition set in stone and depends on the facts and circumstances of each case. In the least, it was arguable, before being finally decided by the judgments of the writ court and the Division Bench, that a writ petition could perhaps be maintained despite the availability of Section 34 of the 1996 Act, particularly since there was sufficient justification for the perception of the writ petitioner that the prerequisite of 75 per cent deposit was onerous, rendering the alternative remedy inefficacious.

Also, the argument as to the award being a nullity added fuel to the notion of the petitioner of maintainability of a writ petition.

Thus, the very arguability of whether a writ petition was maintainable lent *bona fides* to the approach of the petitioner before the writ court.

The respondent has raised a further question as to whether the petitioner is entitled to raise the issue of jurisdiction, having submitted to the jurisdiction of the Facilitation Council.

First, the said issue need not be gone into at length, as even without the same, the onerous nature of the alternative remedy, as held above, in the perception of the petitioner was sufficient justification for it to *bona fide* approach the writ court.

Also, it is arguable as to whether the bar to jurisdiction of the Facilitation Council due to subsequent registration as MSME of the concerned respondent-unit was an inherent, subject-matter bar so as to denude the Facilitation Council of the jurisdiction to entertain and decide the matter, which hits at the root of the jurisdiction. It is also arguable as to whether the subsequent registration of the respondent as MSME Unit vitiated the award itself. Inherent lack of jurisdiction is an issue which can be raised at any point of time and might not be waived by any of the parties to the dispute. Since such question is also arguable, it afforded further justification for the petitioner's initial approach before the writ court.

In view of the above, this Court is of the opinion that the petitioner's approach at the first instance before the writ court instead of moving a

challenge under Section 34 of the 1996 Act comes squarely within the benefit afforded by Section 14 of the Limitation Act, 1963, since it proceeded before the writ court *bona fide*, which is borne out by the facts and circumstances of the present case. The petitioner is accordingly entitled to exclusion of the time spent in pursuing its remedy before the writ court.

In such view of the matter, the objection as to time-bar raised by the respondent is turned down.

GA 1 of 2023 in AP 757 of 2023 is accordingly allowed by modifying the prayer for condonation of delay and holding that the period spent by the petitioner in proceeding with the writ petition before the learned Single Judge is excluded from the limitation period in preferring the application under Section 34 of the 1996 Act, thus deeming the present challenge under Section 34 of the 1996 Act to have been filed within the statutory limitation period.

There will be no order as costs.

AP 757 of 2023 along with GA 2 of 2023, AP 758 of 2023 and EC 5 of 2024 shall now be listed for hearing on September 24, 2024 under the appropriate heading.

(SABYASACHI BHATTACHARYYA, J.)