

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

Present :-

The Hon'ble Justice Moushumi Bhattacharya

AP 252 of 2023

With

AP 179 of 2023

The Board of Major Port Authority for
the Shyama Prasad Mookerjee Port, Kolkata.

VS

Marine Craft Engineers Private Limited.

For the State

:

Mr. Kishore Datta, Sr. Adv.

Mr. Ashok Kr. Jena, Adv.

For the respondent

:

Mr. Sabyasachi Chowdhury, Adv.

Mr. S. E. Huda, Adv.

Mr. Arjun Mookherjee, Adv.

Mr. Shounak Mukhopadhyay, Adv.

Mr. Shreyan Bhattacharyya, Adv.

Ms. Anwesha Guha Ray, Adv.

Mr. Abhijit Guha Ray, Adv.

Last Heard on

:

24.07.2023

Delivered on

:

31.07.2023

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Moushumi Bhattacharya, J.

1. This is an application for stay of an arbitral award passed by the West Bengal State Micro Small Enterprises Facilitation Council on 28th April, 2022. The impugned award was passed by the Council under section 18(3) of The Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act).
2. The stay has been sought under section 36(2) of The Arbitration and Conciliation Act, 1996.
3. The petitioner seeks unconditional stay of the impugned award under the second *proviso* to section 36(3) of the 1996 Act; the ground taken is that the Council became *de jure* unable to perform its functions and consequently the award is without jurisdiction and void.
4. Learned counsel appearing for the petitioner submits that the mandate of the Council stood terminated on the expiry of the period prescribed under section 18(5) of the MSMED Act which requires that a reference made under that section shall be decided within 90 days from the date of making the reference. According to counsel, the reference was made on 4th December, 2017 while the award was passed on 28th April, 2022. Counsel also relies on section 29-A(1) of the 1996 Act which requires that the arbitral tribunal must make the award within 12 months from the date of completion of pleadings in the case of domestic arbitrations. Counsel submits that the impugned award fails on both counts as it was passed way beyond the windows prescribed under the MSMED as well as 1996 Acts. Counsel seeks unconditional stay of the impugned award on that ground.

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Counsel seeks to draw a distinction between the words “filed” in section 36(2) of the 1996 Act and “entertained” in section 19 of the MSMED Act to say that filing of the section 34 application will be sufficient for the Court to consider stay of an award under section 36(2) of the 1996 Act.

5. Learned counsel appearing for the respondent/award-holder (claimant-supplier in the arbitration) takes a preliminary objection to the maintainability of the application. According to counsel, the petitioner must first comply with the requirement of section 19 of the MSMED Act in the matter of depositing 75% of the awarded amount before applying for setting aside of the award. Counsel submits that this requirement would have overriding effect over all existing laws under section 24 of the MSMED Act. It is submitted that not having deposited 75% of the awarded amount, the petitioner cannot seek stay of the award since the application for stay would be “stillborn” within the meaning of section 19 of the MSMED Act.

6. The issues for adjudication are as follows:

A. Whether compliance of section 19 of the MSMED Act is mandatory for seeking stay of an award; and

B. Whether filing of an application under section 34 of the 1996 Act, without the pre-deposit under section 19 of the MSMED Act, makes the application for seeking stay of the award under section 36(2) of the 1996 Act, imperfect in the eye of law.

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A. Whether compliance of section 19 of the MSMED Act is mandatory for seeking stay of an award

7. Section 19 of the MSMED Act, 2006, contains a mandate on a "Buyer" to deposit 75% of the amount of the decree or award or an order or such other percentage as may be directed by a Court, for setting aside any award made by the Facilitation Council. "Buyer" is defined in section 2(d) and the Facilitation Council under section 20 of the Act. There is no scope for any ambiguity in construing the mandate since the words in section 19 are peremptory in nature and pins a buyer down to the mandate if the buyer chooses to apply for setting aside the award made by the Council.

8. The only exception made in the section is for a supplier; there is no other exit route under the section for a buyer to seek setting aside of an award without the pre-deposit. The framing of the section also makes it clear that the 75% deposit is a condition precedent for a buyer for seeking setting aside of the award of the Council.

9. Section 24 of the MSMED Act seals the mandate of section 19 by declaring that sections 15-23 shall have overriding effect over any other law for the time being in force.

10. Section 19 read with 24 thus leaves little doubt that a buyer cannot seek setting aside of an award made by the Council unless the buyer first deposits 75% of the awarded amount. Only upon fulfilment of the condition will a Court "entertain" the application for setting aside of the award. More about that in the later part of the judgment.

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11. The mandate of section 19 was reinforced by the Supreme Court in *Tirupati Steels v. Shubh Industrial Component; (2022) 7 SCC 429* which held section 19 of the MSMED Act to be mandatory. The Supreme Court however relied on *Gujarat State Disaster Management Authority v. Aska Equipments; (2022) 1 SCC 61* to allow the pre-deposit to be made in installments in particular cases of hardship.

12. The above leads to the unerring conclusion that a buyer must first deposit 75% of the awarded amount, as a one-time deposit or in installments, before inviting a Court to entertain an application for setting aside of the award made by the Facilitation Council.

B. Whether filing of an application under section 34 of the 1996 Act without the pre-deposit under section 19 of the MSMED Act renders imperfect an application for stay of the award under section 36(2) of the 1996 Act

13. To understand the competing positions taken on behalf of the petitioner and the respondent, the submissions made are briefly stated below :

Respondent - says that the present application for stay of the award is not maintainable since the petitioner has not made the pre-deposit of 75% of the awarded amount as required under section 19 of the MSMED Act for setting aside of the award.

Petitioner – the Court can consider the application for stay of the award since the requirement under section 36(2) of the 1996 Act is only to “file” an

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application under section 34 for setting aside of the award whereas section 19 of the MSMED Act debars the Court from 'entertaining' the section 34 application until the buyer/the applicant has made the pre-deposit of 75%. Further, since the two proceedings are entirely different, the present application for stay of the award can be maintained on the filing of a section 34 application without the pre-deposit required under section 19 of the MSMED Act.

14. To put the arguments in context under the MSMED Act and The Arbitration and Conciliation Act, 1996, the provisions relevant to the discussion are set out below:

“Section 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.”

“Section 36(2)

.....

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not

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by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.”

15. Read together and in light of the decision in the first section of this judgment, it is clear that the requirement of a pre-deposit under section 19 read with section 24 of the MSMED Act is mandatory.

16. The tightness of the contours of section 19 is such that only the act of making the pre-deposit would breathe life into a section 34 application which remains inert until the buyer makes the pre-deposit. The pre-deposit lends shape and form to the section 34 application which then becomes capable of being entertained by a Court.

17. In the present case, since the petitioner has admittedly not made the pre-deposit, the section 34 application remains stillborn which, in other words, means that there is no section 34 application at all in the eye of law for the purposes of maintaining an application under section 36(2) for stay of the award. The Court is hence statutorily-precluded from entertaining the application for stay of the award.

18. To go a little deeper for this view, the only pre-condition of a Court granting an order of stay of an arbitral award under section 36(2) is of a valid application for setting aside of the award being embedded in the section 36(2) application. The correct sequence should hence be:

i) An application for setting aside the award under section 34; followed by

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ii) An application for stay of the award, while the above is pending;

The “File” vs “Entertain” dichotomy relevant to the present discussion

19. On a conjoint reading of section 19 of the MSMED Act and section 36(2) of the 1996 Act, there appears to be a dissonance in the words “entertain” in section 19 and “file” in section 36(2). The conflict however must be resolved in favour of section 19 that is the section 34 application must be entertain-able for maintaining a Section 36(2) application in view of the overriding effect of section 19 as provided under section 24 of the MSMED Act.

20. Section 24 contains a non-obstante clause and declares that sections 15-23 of the MSMED Act shall override any inconsistent provisions in any law for the time being in force. Therefore, the inescapable conclusion is that a Court cannot “entertain” an application under section 36(2) unless a buyer puts in 75% of the awarded amount before seeking setting aside of an award under section 19 of the MSMED Act. Until that is done, the section 34 application is stillborn.

21. In other words, without a pre-deposit, a non-existent section 34 application cannot be used as a substratum for an application for stay of an award under section 36(2) of the 1996 Act.

22. The petitioner intends to take advantage of the word ‘file’ with regard to the section 34 application for stay of an award under section 36(2) of the 1996 Act as opposed to the word ‘entertain’ under section 19 of the MSMED Act. The petitioner’s stand is that mere filing of an application under section

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34 would be sufficient for following condition-precedent for the Court to consider whether the arbitral award can be stayed under section 36(2) of the 1996 Act.

23. This argument however suffers from an inherent fallacy. The reason for this is as follows.

24. The 'filing' of a section 34 application for the purpose of stay of an award under section 36(2) cannot be construed to imply the mere ministerial act of filing an application for setting aside of an award under section 34 of the said Act. This is by reason of the statutory window within which an award has to be filed under section 34(3) of the 1996 Act. Section 34(3) requires an application for setting aside to be 'made' within three months from the date on which the party receives the arbitral award with a proviso for the Court assessing the sufficiency of the cause shown by the applicant for making the application within an additional period of 30 days. The word 'entertain' comes within the wording of the proviso. For easy reference, section 34 (3) along with proviso is set out below.

"Section 34(3).- An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

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25. The above indicates that the Court can entertain an application for setting aside of an award only if the application is filed within the time period provided under section 34(3) or on the extended time frame under the *proviso* on the Court being satisfied of the sufficiency of the cause shown. The Court is thus statutorily-barred from entertaining the application if an application is filed after 3 months without leave being taken for the additional 30 days or the final window of 3 months + 30 days.

26. Further, the only possible construction of the “filing” of a section 34 application for the purpose of stay of an award under section 36(2) would be an effective and valid section 34 application which has been filed within the limitation period under section 34(3). Naturally therefore, an application filed under section 34 after 120 days or contrary to the requirement of section 34(3) would cease to be an application at all under section 34 for fulfilling the condition precedent for a section 36(2), namely, for the Court to entertain or consider grant of stay of the award.

27. To draw an analogy, the pre-requisite to a valid section 34 for considering stay of the award under section 36(2) is akin to a suit instituted in the Original Side of this Court remaining un-entertainable until the plaint is presented and admitted upon leave being granted by the Court and scrutiny of the Department. Without that, the suit remains merely a number in the filing section of the Court.

28. The conclusion, doubtless, is thus:

a. As a general proposition, the section 34 application embedded in an application for stay of an award must be a valid section 34 application.

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b. The conclusion specific to this case:

The application under section 34 must be a valid application in terms of section 19 of the MSMED Act for the Court to consider stay of the arbitral award under section 36(2). (Underlined for emphasis)

29. The correct sequence under the Acts would therefore be :-

- ◆ Award passed by the Facilitation Council under section 18(3) of the MSMED Act.

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- ◆ Application filed by the buyer for setting aside of the award under section 19 of the MSMED Act.

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- ◆ The buyer / applicant puts in 75% of the awarded amount under section 19 of the MSMED Act.

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- ◆ The application under section 34 of the 1996 Act becomes entertainable by the Court as a valid application for stay of the award under section 36(2) of the 1996 Act.

Conclusion:

30. Since the petitioner has admittedly not made the pre-deposit under section 19 of the MSMED Act, the section 34 application filed by the petitioner remains eclipsed in the eye of law as the foundation for a prayer for stay of the arbitral award under section 36(2) of the 1996 Act. Therefore, the present application for stay of the impugned award filed under section 36(2) of the 1996 Act cannot be entertained as the said application is foisted on a stillborn section 34 application. The petitioner must first comply with section 19 of the MSMED Act to breathe life into the application.

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31. AP 252 of 2023 is accordingly dismissed as not maintainable for the above reasons. There shall be no order as to costs.

32. AP 179 of 2023 which is for setting aside of the award, is accordingly de-tagged. The petitioner shall take appropriate steps therein.

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

(Moushumi Bhattacharya, J.)



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