
(2021) 03 DEL CK 0203

In the Delhi High Court

Case No : Arbitration Petition No. 209 Of 2020, Miscellaneous Application No. 4011 Of 2021

Indian Highways Management Company Limited

APPELLANT

Vs

Mukesh & Associates

RESPONDENT

Date of Decision : 16-03-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Order 8 Rule 1, Order 8 Rule 10
Arbitration And Conciliation Act, 1996 — Section 7, 11(6), 29A, 65, 76, 76(d), 81
Micro, Small and Medium Enterprises Development Act, 2006 — Section 2(n), 15, 17, 18, 18(1), 18(2), 18(3), 18(4), 18(5), 23, 24

Citation : (2021) 03 DEL CK 0203

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Shlok Chandra, S. Santanam Swaminadhan, Nishtha Khurana, Lalit Kumar

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') praying that a Sole Arbitrator be appointed to adjudicate the disputes that have arisen between the parties in terms of the Arbitration Clause as included in the Agreement dated 31.03.2015 entered into between the parties.

2. The petitioner is engaged in the business of carrying out Electronic Tolling and other allied works by National Highway Authority of India jointly with its concessionaires and Financial Institutions.

3. The respondent is a sole proprietorship concern and is a Small-Scale Enterprise registered under the Micro, Small and Medium Enterprises Development Act, 2006 (hereafter the 'MSME Act').

4. The petitioner and the respondent entered into an Agreement dated 31.03.2015 (hereafter the 'Agreement') for Project Management Consultancy Services for setting up and operations of way-side amenities on National Highways in India. The said Agreement includes a Dispute Resolution Clause. In terms of Sub-clause 15.2.1, any dispute, which is not amicably resolved, is required to be referred to arbitration. The said clause is set out below:

"15.2.1

Any Dispute or difference whatsoever arising between the Parties out of or relating to construction, meaning scope, operation or effect of this Agreement or the validity or the breach thereof which is not resolved amicably as per Clause 15.1.1, shall be settled by reference to arbitration. Such arbitration shall be referred to the sole Arbitrator selected by the Chairman, IHMCL within 30 (Thirty) days from the date of receipt of nonce of arbitration. Such arbitration shall be subject to the provision of the Arbitration & Conciliation Act 1996, as amended from time to time. The venue of such arbitration shall be at New Delhi, and the language of arbitration proceedings shall be in English."

5. Concededly, disputes have arisen between the parties in connection with the Agreement. On 01.05.2018, the respondent sent a notice of dispute to the petitioner in terms of Clause 15.1 of the Agreement and thereafter, on 02.06.2018, the respondent sent a notice invoking arbitration. The respondent, inter alia, claims that the petitioner has neglected and failed to pay a sum of ₹ 2,04,90,000/- in terms of the Agreement and seeks recovery of the said amount along with interest.

6. On 18.07.2018, the respondent sent a notice invoking the provisions of MSME Act as it had not received any response to the earlier notice. The respondent also notified the petitioner that its Chairman did not have the right to appoint an Arbitrator.

7. On the same date (that is, on 18.07.2018), the respondent referred the disputes to the Micro and Small Enterprises Facilitation Council, Coimbatore Region (hereafter the 'Facilitation Council').

8. The petitioner filed its Statement of Defence before the Facilitation Council contesting the claims made by the respondent. It also contended that the claim made by the respondent did not fall within the jurisdiction of the Facilitation Council under the MSME Act. The petitioner contended that the relationship between the parties was contractual and was thus governed by the terms of their Agreement. It also referred to the Dispute Resolution Clause (Clause 15) under the Agreement and contended that the disputes between the parties were required to be resolved by arbitration, which would be subject to the jurisdiction to the Courts at New Delhi.

9. Admittedly, the parties could not resolve the disputes through Conciliation before the Facilitation Council. Consequently, on 27.08.2019, the Facilitation

Council referred the disputes between the parties to the Arbitration Centre, Madras High Court, Chennai (hereafter the 'Arbitration Centre').

10. The Arbitration Centre has constituted the Arbitral Tribunal, which is proceeding with the arbitration under the aegis of the Arbitration Centre.

11. Mr Chandra, learned counsel appearing for the petitioner does not dispute that the disputes between the parties were referred to the Arbitration Centre for arbitration; the Arbitration Centre has constituted the Arbitral Tribunal to adjudicate disputes between the parties; the Arbitral Tribunal is in seisin of the subject disputes, and; the arbitration proceedings are being conducted under the aegis of the Arbitration Centre and in accordance with its Rules.

12. Notwithstanding the above, Mr Chandra contends that a Sole Arbitrator is required to be appointed, as according to him, the reference has lapsed. He earnestly contended that in terms of Sub-section (5) of Section 18 of the MSME Act, every reference under Section 18 of the MSME Act is required to be decided within a period of ninety days from the date of making such reference. He submits that the same would also include a reference of disputes to the Arbitration Centre for arbitration. Since the said reference was made by the Facilitation Council on 27.08.2019, the said period of ninety days has expired on 26.11.2019.

13. Mr Swaminadhan, learned counsel appearing for the respondent has countered the aforesaid submission. He submits that the provisions of Sub-section (5) of Section 18 of the MSME Act are directory and not mandatory.

14. In view of the above, the principal question to be addressed is whether the reference made to the Arbitration Centre has lapsed and the mandate of the Arbitral Tribunal stands terminated.

15. At this stage, it would be relevant to refer to Section 18 of the MSME Act, which 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 to it 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.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."

16. It is apparent from the plain language of Sub-section (5) of Section 18 of the MSME Act that the same cannot be read in an expansive manner, as contended on behalf of the petitioner. Sub-section (1) of Section 18 of the MSME Act provides a reference of disputes to a Micro and Small Enterprises Facilitation Council (hereafter 'MSEFC').

17. In terms of Sub-section (2) of Section 18, MSEFC is required to either conduct the conciliation between the parties or seek assistance of any institution or center providing alternate dispute resolution services for the said purpose by making a reference to such institution or center. It is also expressly provided that if such reference is made, the provisions of Sections 65 to 81 of the A&C Act would apply, as if the Conciliation was initiated under Part III of the A&C Act.

18. In the event conciliation under Section 18(2) of the MSME Act is not successful and is terminated without any settlement between the parties, MSEFC is required to either take up disputes for arbitration or refer it to any institution or center providing alternate dispute resolution services for arbitration. Sub-section (3) of Section 18 also expressly provides that the provisions of the A&C Act would apply as if the arbitration was in pursuance of an agreement between the parties.

19. Sub-section (4) of Section 18 contains a non-obstante clause, which expressly provides that MSEFC or any center providing alternate dispute resolution services, would have the requisite jurisdiction in respect of any dispute between a supplier located within its jurisdiction and the buyer located anywhere in India. It is clear from the scheme of Sub-sections (2) and (3) of Section 18 of the MSME Act that the import of the said provision is to enable recourse to conciliation and arbitration for resolution/adjudication for recovery of any amounts due to a 'supplier', within the meaning of Clause (n) of Section 2 of the MSME Act.

20. The provisions of Sub-section (5) of Section 18 of the MSME Act must be read in the context of the scheme of Section 18 of the MSME Act. The expression

'every reference', as is used in the opening sentence of Sub-section (5), refers to the reference of disputes by any party to MSEFC as contemplated under Sub-section (1) and Section 18 of the MSME Act.

21. If the provisions of Sub-section (5) of Section 18 of the MSME Act are interpreted in the manner as suggested on behalf of the petitioner, the same would be repugnant to the provisions of Sub-section (3) of Section 18 of the MSME Act, inasmuch as, it expressly provides that the provisions of A&C Act would be applicable as to the arbitration as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

22. In view of the above, notwithstanding that there is no agreement between the parties to refer disputes to arbitration by the MSEFC or to any Arbitration Centre or institution rendering alternate dispute resolution services, the provisions of Sub-section (2) of Section 18 of the MSME Act would apply and a party to a dispute as referred to in Section 17 of the MSME Act could refer the same for conciliation to MSEFC and failing such conciliation, MSEFC could refer the same to arbitration in terms of Sub-section (3) of Section 18 of the MSME Act.

23. Clearly, recourse to an ad hoc arbitration is not available once provisions of the MSME Act are invoked and to that extent the provisions of the MSME Act would override any provisions of the agreement between the parties or the A&C Act. However, once the disputes are referred to arbitration in terms of Sub-section (3) of Section 18 of the MSME Act, the arbitration would proceed in the same manner as it would have pursuant to an agreement under Section 7 of the A&C Act. Thus, by virtue of the MSME Act, it is imputed that the parties had agreed to refer disputes for arbitration to MSEFC or to any institution rendering dispute resolution services to which a reference is made by the MSEFC. It is obvious that the arbitration would proceed in accordance with the procedure followed by the MSEFC or the Centre/Institution for alternative dispute resolution services, as the case may be. There is no scope to further truncate the arbitral proceedings contrary to the A&C Act or the applicable rules of arbitration before the MSEFC or the Centre/Institution for alternative dispute resolution services, as the case may be.

24. The petitioner's contention that the provisions of the A&C Act or the rules of the Arbitration Centre must be further modified to provide to restrict the mandate of the Arbitration Centre to three months would militate against the scheme of Sub-section (2) and Sub-section (3) of Section 18 of the MSME Act and therefore, cannot be readily accepted.

25. It is a well settled principle of statutory construction that provisions of a statute must be construed harmoniously and must be consistent with the scheme of the statute. In *Sultana Begum v. Premchand Jain*: (1997) 1 SCC 373, the Supreme Court had observed that it is the duty of the courts to avoid "a head on clash" between two sections of the same Act and "whenever it is possible to do so, to construe the provisions which appear to conflict so that they harmonise".

In *Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd*: (1962) AIR SC 1543, Justice Gajendragadkar had observed that "sub-sections must be read as parts of an integral whole and as interdependent; an attempt should be made to reconcile them if it is reasonably possible to do so, and to avoid repugnancy". The rule of harmonious construction thus requires that the expression "every reference" as mentioned in the opening sentence of Sub-section (5) of Section 18 of the MSME Act must be construed to mean reference(s) to MSEFC. The heading of Section 18 is also indicative of the reference as contemplated under Section 18 - that is, a reference to MSEFC of any dispute with regard to any amount due under Section 17 of the MSME Act, that is, an amount due from the buyer of goods supplied or the services rendered, by a supplier.

26. This Court also finds it difficult to accept that provisions of Sub-section (5) of Section 18 of the MSME Act can be construed to mean that the mandate of MSEFC to decide the reference would stand terminated on the expiry of ninety days. Sub-section (5) merely directs that the reference must be decided within ninety days. It does not expressly provide for the consequence of failure to decide the reference within the said period. The assumption that there would be an automatic termination of MSEFC's mandate if it fails to decide within a period of ninety days is neither borne out by the language of Sub-section (5) nor can be drawn as an inference from the scheme of Section 18 of the MSME Act. The entire object of Section 18 is to provide a dispute resolution mechanism for resolution of any disputes with regard to amounts due under Section 17 of the MSME Act. To that end, consistent with the said scheme, Sub-section (5) provides that a reference must be decided within a period of ninety days. Thus, MSEFC must ensure that the conciliation proceedings, as conducted by itself, are concluded within the said period. However, if the said Conciliation is not concluded within a period of ninety days, it does not mean that its mandate stands terminated and the parties must be relegated to other remedies.

27. It is also relevant to note that there is no period which is specified for concluding of conciliation proceedings under Part III of the A&C Act. However, in terms of Section 76(d) of the A&C Act, any party to the conciliation proceedings can terminate the same by making a written declaration to the said effect and communicating the same to the other party and the conciliator. Clearly, the import of Sub-section 5 of Section 18 of the MSME Act cannot be that notwithstanding the parties desire to continue with conciliation before a centre/institution providing alternative dispute resolution services, that the mandate of the said institution would stand terminated. Thus, in cases where a reference to conciliation is made to a centre/institution providing alternate dispute resolution services, there is no question of restricting the conciliation to a period of ninety days. Such conciliation proceedings shall continue until they are terminated in terms of Section 76 of the A&C Act.

28. As stated above, this Court is unable to agree that the provisions of Sub-

section (5) of Section 18 also apply to references made to institutions rendering alternate dispute resolution services either for conciliation or for arbitration. However, even if it is accepted that the provisions of Sub-section (5) of Section 18 of the MSME Act would apply to the said proceedings it does not follow that the mandate of the Conciliator or the Arbitral Tribunal would stand terminated on expiry of a period of ninety days from the date of the said reference. As noticed above, Sub-section (5) of Section 18 of the MSME Act does not specifically provide for any such termination. Further, such termination would militate against Part III of the A&C Act insofar as conciliation is concerned and would also run expressly contrary to the provisions of Section 29-A of the A&C Act, insofar as arbitration is concerned. Whilst Section 24 of the MSME Act is a non-obstante provision which expressly provides that the provisions of Section 15 to 23 of the MSME Act would have effect notwithstanding anything contained in any other law for the time being in force; the same is not applicable as the provisions of Sub-section (5) of Section 18 of the MSME Act are not required to be interpreted to admit any repugnancy with any other statute.

29. This Court also finds merit in the contention that the provisions of Sub-section (5) of Section 18 of the MSME Act must be held to be directory and not mandatory.

30. It is well settled that the question whether a provision is mandatory or directory would depend on the legislative intent and the language of the said provision may not be determinative of the same. The legislative intent must be ascertained not only from the language but from the context and the scheme of the Statute. The question whether any consequence follow for non-compliance of the Statute is material in determining whether the Statute is mandatory or directory. In *State of Uttar Pradesh v. Babu Ram Upadhyaya*: (1961) AIR SC 751, Justice Subba Rao had highlighted that "the prime most aspect to be considered would be whether the object of the legislation would be defeated or furthered".

31. It is well settled that if a statute does not provide for a consequence or non-compliance, it may be held to be directory [See: *Sangram Singh v. Election Tribunal*: (1955) AIR SC 425, *Topline Shoes v. Corporation Bank*: (2002) AIR SC 2487, *Kailash v. Nankhu*: (2005) 4 SCC 480]. In *Salem Advocate Bar Association, Tamil Nadu v. Union of India*: (2005) 6 SCC 344, the Supreme Court held that "in construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied...there is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted the court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of ninety days to file written statement is directory".

32. As observed above, Sub-section (5) of Section 18 of the MSME Act does not provide for any consequences for not deciding the reference within the stipulated period of ninety days. Further, it is held that failure to decide the reference within the period of ninety days would result in termination of the mandate and the

parties would be relegated to other remedies and, would not further the objective of Section 18 of the MSME Act which is to provide expeditious resolution of disputes either by conciliation or by arbitration. Surely, the timelines as set out in Sub-section (5) of Section 18 of the MSME Act of the MSME Act must be substantially adhered to. However, the same does not mean that in case the time lines get exceeded for some reason, the proceedings itself stand frustrated. This militates against the scheme of Section 18 of the MSME Act.

33. In view of the above, the petition is dismissed.