
(2018) 03 OHC CK 0009
In the Orissa High Court
Case No : ARBP No.39 of 2017

MS SHRI MAHAVIR FERRO ALLOYS PVT LTD	APPELLANT
Vs	
MS PASSARY MINERALS LTD	RESPONDENT

Date of Decision : 09-03-2018

Acts Referred:

Micro, Small and Medium Enterprises Development Act, 2006 — Section 17, 18, 18(3)
Arbitration and Conciliation Act, 1996 — Section 6, 6(2), 7(1), 11(5)
Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 — Section 6

Citation : (2018) 03 OHC CK 0009

Hon'ble Judges : VINEET SARAN

Bench : Single Bench

Advocate : Tanmaya Mishra, J.K. Mohapatra, Pratap Ch. Mishra

Final Decision : Allowed

Judgement

Vineet Saran, C.J.

1. On 09.04.2015, the petitioner had placed purchase order with the opposite party for supply of refractory materials. After the supply was made, the opposite party raised certain claim with the petitioner-company, which was refuted by the petitioner by its reply dated 12.01.2016. The opposite party then, for its claim/recovery of amount due for the goods supplied by it to the petitioner, made a reference to the Micro, Small Enterprises Facilitation Council, Cuttack (for short, 'MSEFC') under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short, 'MSME Act 2006'). The MSEFC thereafter allowed the claim of the opposite party on 07.02.2017 and directed the petitioner to pay a sum of Rs.35,36,683 along with interest. The said order of the MSEFC has been challenged by the petitioner by filing a writ petition bearing W.P.

(C)No.10685 of 2017, wherein an order of stay has been passed. The petitioner thereafter on 19.04.2017 wrote to the opposite party, pointing out that

the plant operations of the petitioner-company have been affected due to sub-standard materials supplied by the opposite party and thus raised a

demand, clearly stating that if the demand was not met, the petitioner would be constrained to invoke Arbitration clause under the agreement/purchase

order dated 09.04.2015.

2. Since there was no response to the said communication, invoking the Arbitration clause under the agreement/purchase order, on 13.05.2017 the

petitioner suggested the name of an arbitrator to decide the dispute between the parties relating to the claim of the petitioner. The opposite party sent

a reply dated 12.06.2017, stating therein that the opposite party does not agree for appointment of any arbitrator and that the dispute has already been

settled by the MSEFC, in which the petitioner has raised its counter claim and thus the question of reference of any further dispute to the arbitrator

under the provisions of the agreement/purchase order would not arise.

3. It is in this background that the petitioner has approached this Court under Section 11(5) of the Arbitration and Conciliation Act, 1996 praying for

appointment of an arbitrator under the relevant clause of the agreement/purchase order.

4. I have heard Shri T. Mishra, learned counsel for the petitioner as well as Shri P.C. Mishra, learned counsel for the opposite party and perused the

record. Pleadings between the parties have been exchanged and with consent of learned counsel for the parties, this petition is being disposed of at

this stage.

5. The purchase order dated 09.04.2015, in terms of which the supply had been made by the opposite party to the petitioner, is not in dispute. Clause-

19 of the same reads as under:

19. Arbitration & jurisdiction: All disputes arising out of this contract shall be resolved through arbitration as per the provisions of the Indian

Arbitration and Reconciliation Act, 1996 and rules thereunder to be read with all statutory amendments and modification of the said Act and will be

subject to the jurisdiction of the Law Courts of Rourkela, Odisha. The place of arbitration will be Rourkela, Odisha. The other relevant Clause-12

relating to liquidated damage is also reproduced below:

Liquidated Damage will be applicable if there is a delay beyond the scheduled delivery period as per the annexed bar chart and shall entitle

SMFAPL to deduct LD @ 0.5% of total basic Purchase order value per week or part thereof delay subject to a maximum of 5% of the total basic

Purchase Order value. LD shall be deducted from any amount payable to the seller. Liquidated Damage will be applicable if there is a delay beyond

the application schedule as per the annexed bar chart and shall entitle SMFAPL to deduct LD @ 0.5% of total application value per week or part

thereof delay subject to a maximum of 5% of the total value. LD shall be deducted from any amount payable to the Seller.

In the event of shortfall or non-fulfilment of Performance of refractory as mentioned in the PO, the Seller shall be liable to replace the refractory free

of cost. In case, parameters do not meet the value as stipulated in the Purchase Order and performance guarantee clause, the seller will do necessary

replacement and rectification at his own cost. Section 6 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings

Act, 1993 (for short, "1993 Act") which is also relevant for this case, reads as under:

6. Recovery of amount due: (1) The amount due from a buyer, together with the amount of interest calculated in accordance with the provisions

of sections 4 and 5, shall be recoverable by the supplier from the buyer by way of a suit or other proceeding under any law for the time being in force.

(2) Notwithstanding anything contained in sub-section (1), any party to a dispute may make a reference to the Industry Facilitation Council for acting

as an arbitrator or conciliator in respect of the matters referred to in that sub-section and the provisions of the Arbitration and Conciliation Act, 1996

(26 of 1996) shall apply to such dispute as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub-section (1) of

section 7 of that Act. The relevant Sections 17 and 18 of the MSME Act, 2006 read as under:

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.

18. Reference to Micro and Small (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. 6. The contention of learned counsel for the petitioner is that though the dispute with regard to non-payment in lieu of the supply may have been raised by the opposite party before the MSEFC under the provisions of the MSME Act, 2006, but the MSEFC could only decide the claim for non-payment of supply made by the opposite party-supplier (which was registered under the MSME Act, 2006) to the purchaser-petitioner. It is contended that the MSEFC would not have the jurisdiction to decide the claim of the petitioner (which was not a unit registered under the MSME Act, 2006) relating to supply of defective materials, for grant of liquidated damages provided under Clause-12 of the Purchase Order, which can only be considered and decided in terms of Clause-19 of the Purchase Order relating to arbitration proceedings. It is submitted by learned counsel for the petitioner (and also categorically stated in paragraph-15 of the arbitration petition) that the petitioner has not

raised any counter claim before the MSEFC in MSEFC Case No.14/2016 filed by the opposite party against the petitioner. In the said paragraph, it

has also been stated that there is a legal bar for the petitioner for raising any claim before the MSEFC, for which reason, the petitioner can raise its

claim only before the arbitrator appointed under Clause-19 of the Purchase Order. Although such specific averments have been made in paragraph-15

of the petition, but in reply to the same, in paragraph-18 of the counter affidavit, there is no denial to the fact that the petitioner had never raised any

counter claim or that there was legal bar for the petitioner to raise any such claim before the MSEFC. It is contended by learned counsel for the

petitioner that the dispute raised by the petitioner should be directed by this Court to be decided in terms of Clause-19 of the Purchase Order and the

provisions of the Arbitration Act, 1996. In support of his submission, learned counsel for the petitioner relied on a Division Bench decision of the

Bombay High Court in M/s. Steel Authority of India Ltd. vs. Micro Small Enterprise Facilitation Council, AIR 2012 Â Bombay 178.

7. Per contra, Shri P.C. Mishra, learned counsel for the opposite party has been persisting in contending that the counter claim was filed by the

petitioner before the MSEFC and, in view of the same, once the petitioner had raised its counter claim before the MSEFC, no further proceeding with

regard to the claim of the petitioner for damages or otherwise would be maintainable.

8. Learned counsel for the opposite party has further contended that any claim of the parties could be decided by the MSEFC as provided under

Section 18 of the MSME Act, 2006, which would include the claim for damages, if any, made by the petitioner, and once a counter claim had been

filed by the petitioner before the MSEFC, the question of appointment of arbitrator, for the issue involved in the counter claim, would not arise. In

support of his submission that the issue raised by the petitioner could have been adjudicated by the MSEFC, learned counsel for the opposite party has

relied on a decision dated 15.04.2010 of the Apex Court rendered in Civil Appeal Nos.3305-3306 of 2010 (M/s. Modern Industries v. M/s. Steel

Authority of India Ltd. & Ors).

9. Even though learned counsel for the opposite party has vehemently argued that counter claim had been filed by the petitioner in MSEFC Case

No.14/16, and also even when a voluminous counter affidavit (running up to 469 pages) has been filed by the opposite party, but no counter claim,

stated to have been filed by the petitioner, has been placed before this Court. What has been filed along with the counter affidavit is the counter

statement/objection of the petitioner filed in MSEFC Case No.14/2016. In paragraph-41 of the said objection filed by the petitioner, it has been stated

â??that the poor quality of material supplied by the Claimant coupled with negligence in application thereof has caused damages to the Respondent to

the tune of Rs.17 crores for which the Respondent is contemplating to refer the matter to arbitration for recovery of damagesâ??.

10. It is on this paragraph-41 on which learned counsel for the opposite party relies upon to state that the petitioner had filed the counter claim in the

proceedings before the MSEFC. What this Court understands from a reading of the said paragraph is that though the petitioner had a claim of

Rs.17.00 crores against the opposite party, but it reserved its right to raise the same separately in arbitration proceeding. It is thus clear that before the

MSEFC the petitioner did not raise any such claim nor the said paragraph can be in any way construed to be a counter claim.

11. In fact, the provisions of the Arbitration Act, 1996 have not been made applicable under the MSME Act, 2006. The contention of learned counsel

for the opposite party that by virtue of Section 18(3) of the MSME Act, 2006, the provisions of the Arbitration Act, 1996 would be made applicable to

the proceedings before the MSEFC is not worthy of acceptance. The said sub-section(3) of Section 18 only provides that where the conciliation

initiated under sub-section (2) is not successful, then the Council (MSEFC) may refer the matter to arbitration, in which case the Arbitration Act, 1996

shall apply to the proceedings for deciding the dispute.

12. The issues before the Apex Court in M/s. Modern Industries case (supra) spelt out in paragraph-2 of the said judgment, read as under:

â??Two main questions arise for consideration â?" first, as to the meaning of the expression, â??amount due from a buyer, together with the amount

of interestâ?? under sub-section (1) of Section 6 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993

(for short, â??1993 Actâ??) and then, as to whether the Industry Facilitation Council (IFC) cannot go beyond the scope of interest on delayed

payments upon the matter being referred to it by any party to dispute under sub-section (2) of the Section 6.â The matter before the Apex Court

related to the 1993 Act. Sub-section (2) of Section 6 of the said Act makes it clear that any reference made to the Council for acting as an Arbitrator,

the provisions of the Arbitration Act, 1996 would apply as if the arbitration was in pursuance of the arbitration agreement under Section 7(1) of the

Arbitration Act, 1996.

13. From the same, it would be clear that the provisions of the Arbitration Act were applicable when a dispute under Section 6 of the Act of 1993 had

been raised and once the provisions of the Arbitration Act, 1996 were made applicable, the provisions for filing a counter claim would automatically

come into force. Since the present case is covered by the provisions of the MSME Act, 2006 and not the 1993, Act under which the Supreme Court

was considering the case of M/s. Modern Industries (supra), this Court is of the opinion that the facts of the case being different, the ratio decided by

the Apex Court in M/s. Modern Industries case (supra) would not be applicable in the present case.

14. Section 18 of the MSME Act, 2006 under which the case of the opposite party was referred to the MSEFC would make it clear that the said claim

could only be with regard to any amount due under Section 17 of the MSME Act, 2006 which relates to recovery of amount due for any goods

supplied or services rendered by the supplier for which buyer shall be liable to pay the amount with interest.

15. As such, it is clear that the claim before the MSEFC under Section 18 could only be that of the supplier against the buyer and not the claim of any

buyer for liquidated damages or otherwise against the supplier. Such claim, if any, of the buyer would be independent and would thus not be governed

by the provisions of the MSME Act, 2006, which is not in dispute by any of the party in the present case. Even otherwise, since it is only the opposite

party which is registered under the MSME Act, 2006 and not the petitioner, the petitioner would, in any case, not have a right to get its dispute decided

by the MSEFC.

16. It is noteworthy that in the case of M/s. Steel Authority of India Ltd (supra), the Bombay High Court, while dealing with the case under the

MSME Act, 2006, has in paragraph-11 of the judgment held as under:

11. Having considered the matter, we find that Section 18 (1) of the Act, in terms allows any party to a dispute relating to the amount due under

Section 17 i.e. an amount due and payable by buyer to seller; to approach the facilitation Council. It is rightly contended by Mrs. Dangre, the learned

Addl. Government Pleader, that there can be variety of disputes between the parties such as about the date of acceptance of the goods or the deemed

day of acceptance, about schedule of supplies etc. because of which a buyer may have a strong objection to the bills raised by the supplier in which

case a buyer must be considered eligible to approach the Council. We find that Section 18(1) clearly allows any party to a dispute namely a buyer and

a supplier to make reference to the Council. However, the question is; what would be the next step after such a reference is made, when an

arbitration agreement exists between the parties or not. We find that there is no provision in the Act, which negates or renders an arbitration

agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the

provisions of Section 15 to 23-including section 18, which provides for forum for resolution of the dispute under the Act-would not have the effect of

negating an arbitration agreement since that section overrides only such things that are inconsistent with Section 15 to 23 including Section 18

notwithstanding anything contained in any other law for the time being in force. Section 18(3) of the Act in terms provides that where conciliation

before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate

dispute resolution and that the provisions of the Arbitration and Conciliation Act, 1996 shall thus apply to the disputes as an arbitration in pursuance of

arbitration agreement referred to in Section 7 (1) of the Arbitration and Conciliation Act, 1996. This procedure for arbitration and

conciliation is precisely the procedure under which all arbitration agreements are dealt with. We, thus find that it cannot be said that because Section

18 provides for a forum of arbitration an independent arbitration agreement entered into between the parties will cease to have effect. There is no

question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith

and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause

since both are governed by the provision of the Arbitration Act, 1996â??.

17. As such, since there is an arbitration clause 19 of the Purchase order/ agreement between the parties which binds them and it provides that all

disputes arising out of the contract shall be resolved through arbitration as per the provisions of the Arbitration and Conciliation Act, 1996 and the

dispute was raised by the petitioner (buyer) against the opposite party (seller) is not such which can be resolved by the MSEFC, I am of the opinion

that an arbitrator is required to be appointed to resolve the dispute between the parties with regard to the claim of the petitioner in terms of the

arbitration clause and the Arbitration Act, 1996. The petition thus deserves to be allowed.

18. At this stage, learned counsel for the parties made a joint request that the matter may be adjourned for a week so that they may obtain instructions

from the respective parties with regard to the name of the arbitrator who may be appointed to decide the dispute. List this matter on 23.03.2018 for

appointment of arbitrator.