Lloyd Insulations (India) Ltd. Vs State of West Bengal

Court: Calcutta High Court

Date of Decision: Sept. 10, 2014

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 34, 36, 65, 66, 67
Constitution of India, 1950 â€" Article 226
Micro, Small and Medium Enterprises Development Act, 2006 â€" Section 18, 19

Citation: (2015) 1 CHN 156

Hon'ble Judges: D. Datta, J

Bench: Single Bench

Advocate: Partha Sarathi Sengupta, Sr. Advocate, Anirban Ray, C.M. Ghorawat and Vivek Jhunjhunwala, Advocate for the Appellant; Samrat Sen, Sr. Advocate, Supratim Dhar, Piyush Chaturvedi and Anwesha Saha, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Dipankar Datta, J.
The legality and/or validity of an award dated February 10, 2012 passed by the West Bengal State Micro & Small

Enterprises Facilitation Council (hereafter the Council) in purported exercise of power conferred by Section 18 of the Micro, Small and Medium

Enterprises Development Act, 2006 (hereafter the 2006 Act) is under challenge in this writ petition at the instance of the petitioning company. It

was a respondent in a reference that arose out of a claim for money lodged by the fourth respondent herein. The award required the petitioning

company to pay to the fourth respondent Rs. 1,02,41,730.27 (Rs. 9,47,752/- on account of outstanding principal amount together with interest of

Rs. 92,93,978.27) within one month from the date of communication of the same.

2. Preliminary objections to the maintainability of the writ petition were raised by Mr. Chaturvedi, learned advocate for the fourth respondent and

Mr. Sen, learned senior advocate appearing for the first respondent. The points are:

1. Since in terms of Section 18 of the 2006 Act the Council acted as an arbitrator and its award dated February 10, 2012 for all intents and

purposes is an award within the meaning of the Arbitration and Conciliation Act, 1996 (hereafter the 1996 Act), the remedy of the petitioning

company lay in filing an application u/s 34 of the 1996 Act for having such award set aside and Section 34 being the only remedy available to the

petitioning company on facts and in the circumstances, the writ petition may not be entertained.

2. The writ petition suffers from unexplained delay and laches. The writ court has been approached only after the fourth respondent presented an

application for execution of the impugned award and since the petitioning company allowed third party interest to accrue over the years, the writ

court ought to be loath to interfere and the fourth respondent would be subjected to immense hardship and inconvenience if at this belated stage

the writ petition is entertained.

3. Although the award is that of the Council, the petitioning company has not impleaded the Council as a respondent; therefore, the writ petition

suffers from non-joinder of a necessary party and as such the writ petition is liable to dismissal.

3. Mr. Sengupta, learned senior advocate representing the petitioning company responded to the preliminary objections by submitting as follows:

1. What his adversaries perceive to be an award is in substance an order of the Council only; it is really not an award. By appearance the order

may look like an award but in reality it is a mere cloak. The reference has been decided by the Council in a manner that is completely contrary to

the statutory mandate in Section 18 of the 2006 Act. Referring to sub-sections (2) and (3) of Section 18, it was submitted that an arbitration could

have commenced only after a process of conciliation that is initiated between the parties and required to be conducted in terms of the provisions of

Section 65 to 81 of the 1996 Act is not successful and stands terminated without any settlement between them. Stressing on the words ""shall then

in sub-section (3), it was submitted that the parties were not informed of termination of conciliation and the commencement of arbitration in terms

thereof, and the order purporting to decide the dispute between the private parties without any opportunity of hearing not being an award at all,

question of taking recourse to Section 34 of the 1996 Act does not and cannot arise.

2. The petitioning company did not feel affected by the order of the Council so long the application for execution was not presented by the fourth

respondent and immediately after the execution application was presented before the High Court at Madras did the petitioning company consider it

proper to invoke the writ jurisdiction to have the said order set aside. There has, accordingly, been no delay in presentation of the writ petition.

3. The Chairperson and the Director of the Council being parties to the writ petition, non-impleadment of the Council as a respondent should not

be considered fatal and since the Court has wide powers, leave can always and may be granted to implead the Council as a respondent.

4. It was additionally submitted by Mr. Sengupta that Article 226 jurisdiction is exercised when there is patent injustice, and the infirmities in the

impugned order are so patent that refusal to exercise jurisdiction would amount to injustice to the party who has suffered the same. Referring to

Section 19 of the 2006 Act, it was submitted that even if recourse to Section 34 of the 1996 Act is taken, the pre-deposit that the award-debtor is

required to make is too onerous for the remedy u/s 34 to be considered an efficacious alternative remedy. According to him, in a similar case

where the Council had passed an order labelling it as its award, a coordinate bench of this Court had interfered as would appear from the decision

reported in Agriculture Finance Co. Ltd. Vs. Micro and Small Enterprises Facilitation Council and Another, Since in similar circumstances this

Court entertained the challenge, it was urged that interference is warranted to safeguard the interest of the petitioning company which had been

grossly wronged.

5. I have heard learned advocates appearing for the parties at substantial length and the authorities cited by each of them.

6. It is true that in the circumstances quite similar to the present one, the writ court interfered with a purported order/award of the Council while

deciding Agriculture Finance Co. Ltd. (supra). It is also not in dispute that exercise of discretion by the writ court was not interfered with by the

Hon"ble Division Bench when such decision was carried in appeal.

7. It is equally true that another coordinate bench of this Court had the prior occasion to decide W.P. 871 of 2011 [Jupiter Alloys and Steels

(India) Limited & anr. v. Union of India & ors.]. By the unreported decision dated September 21, 2011, the learned judge, inter alia, held as

follows:

*****

In view of these statutory provisions under which the award was made and according to which it could be challenged by the petitioners, I am

unable to accept the argument that their remedy available under s. 34 of the Arbitration and Conciliation Act, 1996 was an alternative to the art.

226 remedy.

As clearly provided in s. 34, it was the only remedy; and in the name of error of jurisdiction committed by the Council and treating it as a statutory

authority whose orders and decisions can be judicially reviewed by the Writ Court, the proceedings cannot be derailed by the High Court under

art. 226.

The remedy under s. 34 of the Arbitration and Conciliation Act, 1996 could be considered an alternative to the art. 226 remedy, if the petitioner

were entitled to choose between the two the one or the other. In view of the provisions of s. 34 the petitioners were not entitled to choose any

remedy other than the remedy under s. 34.

The decisions in Harbanslal and Tantia Construction both were given applying the principle that in a given case the Writ Court can permit a party

to approach it bypassing the arbitral tribunal he is supposed to approach in terms of the arbitration agreement between the parties. That is not the

case here. I am unable to see how the decision in Kusaldas can be of any assistance in this case.

Besides, I do not find any reason to accept the argument that the award of the Council is vitiated by a jurisdictional error. The Council had

jurisdiction to pass the award. The petitioners" allegation is that immediately after failure of conciliation under sub-s. (2) of s. 18, instead of

proceeding following the provisions of r. 4 of the rules, the Council passed the award straight in exercise of power available under sub-s. (3) of s.

18.

This case, even if accepted to be correct, may at best lead to a conclusion that the award is vitiated either by an illegality or by a material

irregularity, and in such case the question of remand to the Council will arise. There is no reason to permit the petitioners to approach the Writ

Court for the purpose.

For these reasons, the petition is dismissed.

*****.

8. The same Hon"ble Division Bench which decided the appeal preferred against the decision in Agriculture Finance Co. Ltd. (supra) had the

occasion to decide the appeal that was preferred against the decision dated September 21, 2011 in Jupiter Alloys (supra). On this occasion, the

Hon"ble Division Bench declined to interfere with non-exercise of discretion by the learned Judge while dismissing the writ petition.

9. The question that arises for an answer in view of the above facts and circumstances is, whether the order passed by the Council which is labeled

as an award merits interference or not.

10. Law has been authoritatively settled by this Court almost half a century ago, duly approved by the Supreme Court nearly forty-five years back,

that Courts ought to be careful to distinguish exercise of jurisdiction from existence of jurisdiction. However, the consequences of failure to comply

with statutory requirements in the assumption and in the exercise of jurisdiction are fundamentally different. Assumption of jurisdiction to decide an

issue which the adjudicator does not possess renders the ultimate decision ""coram non judice"". A judgment pronounced by a Court without

jurisdiction is void; however, an error committed in the exercise of jurisdiction does not result in the ultimate decision becoming void ab initio. An

order of a particular kind which a Court has the jurisdiction to pass but which it should not have passed in the circumstances of the litigation does

not indicate total want or loss of jurisdiction so as to render the order a nullity.

11. Mr. Sen is right in submitting that in terms of Section 18 of the 2006 Act, the Council has the power to make an award. He is also right in

submitting that if power to make an award were not traceable and even then an award had been made, the award would be defective for total

want of jurisdiction; on the contrary, if the Council in the making of the award does not follow the steps or procedure prescribed by the relevant

statute it would be an error in the exercise of jurisdiction. He also urges me to agree with the view expressed by the learned Judge in Jupiter Alloys

(supra) that the purported order/award of the kind impugned herein, even if the contention advanced that the statutory provisions were not

complied with, would stand vitiated not on the ground that a jurisdiction was usurped but that the jurisdiction was illegally exercised. In my view, if

the purported order/award that is under challenge in this writ petition falls in the second category, it would not be proper to hold that despite a

remedy being available u/s 34 of the 1996 Act, the writ court ought to interfere.

12. Mr. Sengupta, however, argued that before the dispute could be referred for resolution by arbitration, there ought to have been an order to the

effect that the process of conciliation had failed resulting in such process standing terminated and in the absence of such order being recorded, the

jurisdictional fact for referring the dispute for resolution by arbitration did not exist and, therefore, the award has been made by the Council, if at

all, without the precondition being satisfied and, therefore, this is an erroneous assumption of jurisdiction which ought to be interdicted by the writ

court.

13. The Supreme Court in the decision reported in Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers, was confronted with the question as to what is

an error in respect of a jurisdictional fact. It was observed therein as follows:

19. .....A jurisdictional fact is one on existence or non-existence of which depends assumption or refusal to assume jurisdiction by a Court,

Tribunal or an authority. In Black''s Legal Dictionary it is explained as a fact which must exist before a Court can properly assume jurisdiction of a

particular case. Mistake of fact in relation to jurisdiction is an error of jurisdictional fact. No statutory authority or tribunal can assume jurisdiction in

respect of subject-matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends the Court or

tribunal exercises the jurisdiction then the order is vitiated. Error of jurisdictional fact renders the order ultra vires and bad [Wade Administrative

Law]. In Raza Textiles Ltd. Vs. Income Tax Officer, Rampur, it was held that a Court or Tribunal cannot confer jurisdiction on itself by deciding a

jurisdictional fact wrongly.....

14. I accept the contention of Mr. Sengupta that the Council assumed jurisdiction without the existence of a jurisdictional fact i.e. an order,

recording that there was no settlement in the process of conciliation and the conciliation stood terminated warranting resolution of the dispute by

reference to arbitration. The order terminating the conciliation, commencement of arbitration and a decision on the dispute by way of an award

could not have been rolled up in one order and labelled as an award, and the manner in which the Council proceeded was not in accordance with

the provisions contained in Section 18 of the 2006 Act.

15. However, does it follow that the Court ought to interfere with the purported order/award? I am afraid, the question must be answered in the

negative for the reasons that follow.

16. Several authorities have been cited laying down the law when the writ court ought not to entertain a writ petition on the ground of delay and

laches. I need only refer to one more or less recent decision that was not cited, but which considered several earlier decisions (out of which some

were cited before me). It is reported in Tridip Kumar Dingal and Others Vs. State of West Bengal and Others, It has been held there as follows:

57. If the petitioner wants to invoke jurisdiction of a writ court, he should come to the Court at the earliest reasonably possible opportunity.

Inordinate delay in making the motion for a writ will indeed be a good ground for refusing to exercise such discretionary jurisdiction. The underlying

object of this principle is not to encourage agitation of stale claims and exhume matters which have already been disposed of or settled or where

the rights of third parties have accrued in the meantime (vide State of Madhya Pradesh Vs. Bhailal Bhai and Others, The Moon Mills, Ltd. Vs.

M.R. Meher, President, Industrial Court, Bombay and Others, and Bhoop Singh Vs. Union of India and others, This principle applies even in case

of an infringement of fundamental right [vide Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, Durga Prashad Vs. Chief

Controller of Imports and Exports, and Rabindranath Bose and Others Vs. The Union of India (UOI) and Others,

58. There is no upper limit and there is no lower limit as to when a person can approach a court. The question is one of discretion and has to be

decided on the basis of facts before the court depending on and varying from case to case. It will depend upon what the breach of fundamental

right and the remedy claimed are and when and how the delay arose.

59. We are in respectful agreement with the following observations of this Court in P.S. Sadasivaswamy Vs. State of Tamil Nadu,

''2. ... It is not that there is any period of limitation for the courts to exercise their powers under Article 226 nor is it that there can never be a case

where the courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion

for the courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for

relief and who stand by and allow things to happen and then approach the court to put forward stale claims and try to unsettle settled matters''.

(emphasis supplied in original)

17. Consideration of the objection to the belated approach cannot be made without bearing in mind the above principles. The purported

order/award was received by the petitioning company in the middle of March, 2012 (see paragraph 15 of the writ petition). From the

authorities/orders that have been cited, it appears that the petitioning company had the occasion to invoke the writ jurisdiction of this Court

sometime in early August, 2012 for quashing of a separate order/award dated December 20, 2010 passed by the Council by presenting a writ

petition (W.P. No. 577 of 2012). In such writ petition, they had also challenged the vires of certain provisions of the 2006 Act. I had the occasion

to consider the writ petition on August 6, 2012 and had observed that ""(B)ut for the challenge to the vires of certain provisions of the Act, this writ

petition ought to have been summarily dismissed on the ground of unexplained delay and laches in its presentation"". The writ petition was admitted

making it clear that unless the petitioning company succeeds on the point of vires, the impugned order shall not be examined on merits. The

petitioning company felt aggrieved by the refusal to grant interim relief and carried the said order in appeal (APOT No. 437 of 2012). An Hon''ble

Division Bench by order dated September 17, 2012 observed that if the purported award had been put into execution as a deemed decree u/s 36

of the 1996 Act, it would be open to the petitioning company to take all points before the executing court without prejudice to its rights and

contentions in the pending writ proceedings. I have been informed that the said writ petition is yet to be finally disposed of.

18. Reference to the aforesaid proceedings has been considered necessary to assess the conduct of the petitioning company. On August 6, 2012,

interim relief was denied on the ground that the petitioning company had approached the Court late. The purported order/award impugned in this

writ petition had come into existence by that date. The petitioning company again exemplified its indolent, lethargic and tardy attitude. This writ

petition was presented only after the execution application has been filed by the fourth respondent. Mr. Chaturvedi and Mr. Sen are right in their

submission that there is hardly any explanation in the writ petition justifying the belated approach. Mr. Sengupta advanced a submission that in

terms of Rule 4(12) of the West Bengal Micro & Small Enterprises Facilitation Council Rules, 2006, the award was required to be stamped in

accordance with the relevant law in force and since it is not so stamped, the petitioning company considered the purported order/award not to be

in accordance with law and, therefore, did not feel the urge to challenge it. It was reiterated that only after the execution application had been filed

that the necessity to challenge the purported order/award arose. This explanation is not to be found in the writ petition. In the absence of any

pleading to this effect, the explanation offered by Mr. Sengupta cannot be accepted.

19. That apart, there is merit in the submission of Mr. Sen that it would be open to the petitioning company to raise the point of the award not

being stamped before the Court which is urged to execute it.

20. There cannot be any iota of doubt that the delay and laches in filing this writ petition without any explanation at all is fatal for its maintainability

and it ought to be dismissed only on this ground, apart from the fact that interference may lead to affectation of third party interest.

21. I do order accordingly that the writ petition stands dismissed. However, the parties shall bear their own costs.

22. It is made clear that the observations made hereinabove are only for the purpose of deciding this writ petition and shall not influence any other

court before which invalidity of the impugned order/award is urged.

Urgent certified copy of this judgment and order, if applied for, may be furnished to the applicant at an early date.