

Commercial Notice of Motion (L) No. 2043 of 2019

Microvision Technologies Pvt. Ltd. v. Union of India

2020 SCC OnLine Bom 642

In the High Court of Bombay
(BEFORE S.C. GUPTA, J.)

Microvision Technologies Pvt. Ltd. ... Applicant/Petitioner;

Versus

Union of India ... Respondent.

Commercial Notice of Motion (L) No. 2043 of 2019 Along With Commercial Notice
of Motion No. 1826 of 2018 In Commercial Arbitration Petition (L) No. 855 of 2018
Decided on May 15, 2020

Advocates who appeared in this case :

Mr. Rohaan Cama i/b. Ms. Sapana Rachure for Applicant/Petitioner.

Mr. T.J. Pandian for Respondent.

The Judgment of the Court was delivered by

S.C. GUPTA, J.:— This notice of motion (Commercial Notice of Motion (Lodging) No. 2043 of 2019) seeks transfer of the captioned commercial arbitration petition along with Commercial Notice of Motion No. 1826 of 2018 to the District Court at Nashik. The application for transfer, made by the original petitioner, is under Section 42 of the Arbitration and Conciliation Act, 1996 ("Act").

2. The Applicant, who is a supplier within the meaning of The Micro, Small and Medium Enterprises Development Act ("MSME Act"), had contracts awarded by the Respondent (through Central Railways) for electrification of integrated security system - video surveillance system proposed to be implemented by the Central Railways at certain places. We are concerned here with two contracts, both of which were in pursuance of tenders invited by the Respondent where the Applicant was the winning bidder. Disputes arose between the parties in connection with these contracts, which were referred to conciliation under Section 18(2) of the MSME Act. Upon failure of conciliation, the Applicant applied to the Facilitation Council to act under Section 18(3) of the MSME Act to commence arbitral proceedings. Pending consideration of that application, the Applicant moved a petition under Section 9 of the Act before the District Court at Nashik, seeking interim reliefs pending arbitration. The Applicant thereafter moved an application under Section 11 of the Act before this court seeking appointment of an arbitrator for adjudication of the disputes and differences. The Respondent objected to the application on the ground that the mandate of clauses 63 and 64 of the General Conditions of Contract, which inter alia provided for pre-arbitration steps, was not complied with by the Applicant. The Respondent also objected to the jurisdiction of this court for deciding the application under Section 11 on the ground of the prior pending application under Section 9 before the District Court at Nashik. By its order dated 16 December 2016, this court allowed the Section 11 application and appointed a sole arbitrator. The Applicant thereafter withdrew its petition under Section 9 of the Act from the District Court at Nashik with liberty to apply for interim reliefs before the arbitral tribunal. The arbitration reference thereafter proceeded before the sole arbitrator, who, by his award dated 15 January 2018, decided it. The award has been the subject matter of challenge under Section 34 of the Act in Commercial Arbitration Petition (Lodging) No. 855 of 2018 herein. There has

been a delay in filing of the arbitration petition. The companion Notice of Motion (Commercial Notice of Motion No. 1826 of 2018) has been filed for condonation of that delay. During the pendency of that motion, the present motion (Commercial Notice of Motion (Lodging) No. 2043 of 2019) has been taken out, as noted above, for transfer of proceedings from this court to the District Court at Nashik.

3. The basis of this transfer application made under Section 42 of the Act is prior to filing of the petition under Section 9 before the District Court at Nashik. Section 42 of the Act mandates that where, with respect to an arbitration agreement any application under this part (i.e. Part I) has been made in a court, it is that court alone (and no other court) which has jurisdiction over the arbitral proceedings; and any challenge to an award rendered in such proceedings lies only before that court. It is submitted that the Applicant herein having filed a petition under Section 9 before the District Court at Nashik, the jurisdiction for entertaining a challenge to the award made in pursuance of the arbitration agreement lies before the District Court, and accordingly, the proceedings be transferred to that court.

4. The application is resisted by the Respondent on the ground that the Section 9 petition, though made earlier before the District Court, was simply withdrawn by the Applicant and therefore it cannot be said to have been made in that court so as to attract the mandate of Section 42. Alternatively, it is submitted that the District Court at Nashik was not a court of competent jurisdiction to decide the application under Section 9 and accordingly, it has no jurisdiction to entertain the present challenge to the award.

5. Section 42 of the Act is in the following terms:

"42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

6. There is no doubt that application made under Section 9 of the Act comes within Part I and has the effect of restricting jurisdiction under Section 42. The question to be considered here is what is meant by making of an application to a court under this part (i.e. Part I). This question has two aspects: (a) If an application is made in a court, but withdrawn or not pressed, would it still qualify as a prior application made in that court so as to restrict all future jurisdiction to that court; and (b) what is meant by "court" here - whether it is only a court of competent jurisdiction or any court?

7. The answer to the second question, i.e. (b), is obvious. The expression 'court' used in Section 42 must take within its sweep only that court which is defined under Section 2(1)(e) of the Act. Under Section 2(1) (e), 'Court' means the principal civil court of original jurisdiction in a district (including the High Court in exercise of its ordinary original civil jurisdiction), having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit. It is only when a prior application under any provision of Part I of the Act has been made to such 'Court' that Section 42 would have a play. What needs to be considered in our case, whilst applying this law, is whether the District Court at Nashik could be said to be a 'court' within the meaning of Section 2(1)(e) of the Act, and that is dealt with later in this order.

8. The first question, on the other hand, admits of a serious controversy. A division bench of our court, in *Vachaspati Sharma v. India Cements-Capital and Finance Ltd.*, ¹, has held that a proceeding filed under Section 9 of the Act, if not pressed, would not restrict the future jurisdiction over the arbitral proceedings or all subsequent applications arising out of that arbitration agreement to the Section 9 court. It is,

however, submitted by Mr. Cama, learned Counsel appearing for the Applicant, that the decision in *Vachaspati Sharma* should be considered per incuriam, since the Supreme Court judgment in *Fiza Developers and Inter-Trade Pvt. Ltd. v. AMCI (India) Pvt. Ltd.*, ², interpreting similar language appearing in Section 36 of the Act, was not brought to the notice of the division bench which decided it. Alternatively, learned Counsel submits that the decision has been impliedly overruled in a subsequent Supreme Court judgment in *State of West Bengal v. Associated Contractors*, ³, which makes it clear that the language in Section 42 merely requires an application to be made to a competent court and does not contemplate its adjudication or make any exception in the event of its subsequent withdrawal. Further alternatively, learned counsel submits that the decision in *Vachaspati Sharma* is a precedent sub silentio without the point of law having been analyzed or the crucial words of the statute interpreted or any authority cited. Learned Counsel also submits that having regard to the amendments made to the law by the amendment of 2015, particularly, the statutory bar introduced in Section 9(3) in considering interim reliefs under Section 9 after constitution of an arbitral tribunal, the decision of *Vachaspati Sharma* (supra) cannot be said to be good law. These arguments are all quite compelling. Considering, however, that on the point of competence of the District Court, I have come to a decision against the applicant, as I shall presently discuss, I would rather leave these questions, which involve much larger issues, open, to be decided later in a suitable matter. I am also conscious of the fact that any such decision may, subject to hearing parties, possibly involve a reference to a Full Bench.

9. Coming now to the issue of competence of the District Court as a 'Court' within the meaning of Section 2(1)(e) of the Act, let me at the outset outline the controversy. The Applicant approached the District Court at Nashik presumably on the footing that the Facilitation Council to whom an application was made by it for reference to arbitration under Section 18 of the MSME Act was in Nashik, and it needed interim reliefs pending such reference. The Court at Nashik obviously did not have jurisdiction over the subject matter of arbitration in the sense in which that court would have had jurisdiction if the subject matter had been the subject matter of a suit. There is a restrictive jurisdiction clause in the agreement designating the place of arbitration as Mumbai. Besides, no part of the cause of action could have been said to have accrued within the territorial jurisdiction of the Nashik Court. That was indeed the basis on which its competence as "Court" was challenged by the Respondent. In response, it was submitted by the Applicant that the present arbitration was not under the arbitration clause contained in the General Conditions of Contract, which specified the place of arbitration; it was under Section 18 of the MSME Act and thus, the Nashik Court was the court of competent jurisdiction for entertaining an application under Section 9 of the Act. Besides, and in the alternative, it is submitted that the place of arbitration mentioned in Clause 64 of the General Conditions of Contract referred to the venue of arbitration and not its juridical seat. That is how battle-lines are drawn on this issue.

10. It is not possible to hold that the place of arbitration mentioned in clause 64 of GCC was meant to be a 'venue' and not a 'seat of arbitration'. That would be against the plain reading of Clause 64. It is also not in dispute that if the arbitral seat was in Mumbai, the Nashik Court would have had no jurisdiction to entertain any application arising out of the arbitration agreement before the parties. The real question is whether the arbitration could be said to be under the arbitration agreement between the parties or under Section 18(3) of the MSME Act. If the arbitration was under the arbitration agreement and not under Section 18(3), the fact that pending its application for a reference under Section 18(3) of the Facilitation Council, the Applicant had applied for interim reliefs under Section 9 before the Nashik Court, would have no significance from the standpoint of Section 42 of the Act.

11. It is not in dispute that the conciliation proceeding before the Facilitation Council under Section 18(2) had come to an end without any settlement. So also, it is an admitted position that the reference was made by this court under Section 11(5) of the Act and not by the Facilitation Council under Section 18(3) of the MEME Act. It is clear from the order of this court appointing the arbitrator that the appointment was under Section 11(6) of the Act. Such appointment is by definition on account of failure of appointment under an appointment procedure agreed upon by the parties. This Court specifically noted in the appointment order that there was an arbitration agreement between the parties in terms of Clauses 63 and 64 of the General Conditions of the Contract. The Court also noted that a request was made by the Applicant to the General Manager of Central Railway for appointment of an arbitrator, but there was no response to it. This Court, in the premises, went ahead with the appointment under Section 11(6) of the Act. This appointment could not be said to be under Section 18(3) of the MSME Act. Mr. Cama, learned Counsel for the Applicant, relies on references in the appointment order to conciliation before the Facilitation Council under Section 18(2), its termination and request for reference made to the Council by the Applicant. These are matters of historical recitation of the facts of the case. Merely because of such recitation, it cannot be said that the court was making a reference under Section 18(3) of the MSME Act. Under Section 18(3) of the MSME Act, it is the Facilitation Council which has to either take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration. The provisions of the Act (i.e. the 1996 Act) apply when the dispute is so taken up by the Council or referred by it to the institution or centre for arbitration. Taking up of such dispute or referring to an institution or centre for arbitration is a statutory duty of the Council; if it fails to perform it, surely the Court may, in an appropriate application, require it to perform it. But that would be by directing the Council to take up the dispute itself or refer it for arbitration. Section 18(3) of the MSME Act cannot be treated as an arbitration agreement for the Chief Justice or his designate to act upon under Section 11(6) of the Act upon failure of the Council to take up the dispute or refer it to arbitration.

12. This Court (at its Nagpur Bench) in the case of *Steel Authority of India Ltd. v. The Micro, Small Enterprise Facilitation Council*, ⁴ has held that merely because Section 18 of the MSME Act provides for a forum for arbitration, an independent arbitration agreement between the parties would not cease to have effect. Mr. Cama submits that a challenge to the decision in *Steel Authority of India's* has been pending before the Supreme Court. Learned Counsel submits that in the meantime, Allahabad High Court in *Paper and Board Converters v. U.P. State Micro & Small Enterprises Facilitation Council, Kanpur*, ⁵ has held that the MSME Act and, in particular, Section 18 thereof, confers exclusive jurisdiction on the Facilitation Council to first conciliate and later adjudicate the disputes or refer them to arbitration; it could not refer the parties to the sole arbitrator designated by the opponent under Section 8 of the Act upon being approached under Section 18 for arbitration. Learned Counsel also cites the case of *Principal Chief Engineer v. Manibhai & Brothers*, ⁶ decided by Gujarat High Court, which followed the view of Allahabad High Court in *Paper & Board Converters' case* and differed from the view of our court in *Steel Authority of India* and this Gujarat decision was held to be justified. Learned counsel submits that the decision in *Steel Authority of India* (supra), thus, does not hold good. It is not possible to say that the view of our Court in *Steel Authority of India* has been dissented from or overruled, impliedly or otherwise, by the Supreme Court in *Paper & Board Converters' case*. The decision holds good, at least so far the validity of an arbitration agreement in the face of the jurisdiction of the Council under Section 18 is concerned, and I am respectfully bound by it. It is one thing to say that notwithstanding anything contained in an arbitration agreement, the Facilitation Council may still have jurisdiction to take up a

dispute for arbitration or refer it to an institution or a centre for arbitration, and quite another that an agreement for arbitration shall continue to be valid even in the face of the Council's powers under Section 18 of the MSME Act. The Paper & Board Converters' case is concerned with the former proposition and we in the present case are, as also our court in the case of *Steel Authority of India* was, with the latter.

13. Accordingly, the District Court at Nashik not having any jurisdiction in the matter and therefore, not being a 'court' within the meaning of Section 2(1)(e) of the Act, the application originally made to it by the Applicant herein under Section 9 of the Act does not have the effect of restricting future jurisdiction over arbitral proceedings in the matter to that Court, and the proceedings of the present petition and companion motion cannot be transferred to it.

14. There is, accordingly, no merit in Commercial Notice of Motion (Lodging) No. 2043 of 2019 and the same is dismissed. The petition along with its other companion motion (Commercial Notice of Motion No. 1826 of 2018) to come up for hearing in due course.

¹ 2013 SCC OnLine Bom 1296

² (2009) 17 SCC 796

³ (2015) 1 SCC 32

⁴ 2010 SCC OnLine Bom 2208

⁵ 2014 (5) AWC 4844

⁶ FA No. 637 of 2016, Order dated 20-6-2016 (Guj)