Calcutta High Court
Lloyd Insulations (India) Ltd vs State Of West Bengal & Ors on 10 September, 2014
Author: Dipankar Datta

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

Present : The Hon'ble Justice Dipankar Datta

W.P. No. 384 of 2014

Lloyd Insulations (India) Ltd.
vs.
State of West Bengal & ors.

For the petitioner : Mr. Partha Sarathi Sengupta, Sr. Advocate
Mr. Anirban Ray, Advocate
Mr. C. M. Ghorawat, Advocate
Mr. Vivek Jhunjhunwala, Advocate

For the first respondent : Mr. Samrat Sen, Sr. Advocate
Mr. Supratim Dhar, Advocate

For the fourth respondent : Mr. Piyush Chaturvedi, Advocate
Ms. Anwesha Saha, Advocate

Hearing concluded on : July 25, 2014

Judgment on : September 10, 2014

1. 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 under Section 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 under Section 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 2013 (5) CHN (CAL) 375 (Agriculture Finance Co. Ltd. v. Micro & Small Enterprises Facilitation Council and ors.). 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 under Section 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 AIR 1992 SC 1555 (Shrisht Dhawan v. 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 v. Income-tax Officer, Rampur (1973) 1 SCC 633: (AIR 1973 SC 1362) 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 (2009) 1 SCC 768 (Tidip Kumar Dingal v. State of West Bengal). 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 M.P. v. Bhailal Bhai, AIR 1964 SC 1006, Moon Mills Ltd. v. Industrial Court, AIR 1967 SC 1450, and Bhoop Singh v. Union of India, (1992) 3 SCC 136]. This principle applies even in case of an infringement of fundamental right [vide Tilokchand Motichand v. H.B. Munshi, (1969) 1 SCC 110, Durga Prashad v. Chief Controller of Imports & Exports, (1969) 1 SCC 185, and Rabindranath Bose v. Union of India, (1970) 1 SCC 84].
>
> 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 v. State of T.N., (1975) 1 SCC 152 (SCC p. 154, para 2) '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 under Section 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.

(DIPANKAR DATTA, J.)