

Gujarat High Court

Principal vs Manibhai on 30 April, 2012

Author: V. M. Desai,

Gujarat High Court Case Information System

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LPA/1997/2011      6/ 6      ORDER

IN  
THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS  
PATENT APPEAL No. 1997 of 2011

In

SPECIAL  
CIVIL APPLICATION No. 2471 of 2011

With

CIVIL  
APPLICATION No. 12263 of 2011

In  
LETTERS PATENT APPEAL No. 1997 of 2011

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PRINCIPAL  
CHIEF ENGINEER - Appellant(s)

Versus

MANIBHAI  
& BROTHERS (SLEEPER) & 1 - Respondent(s)

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Appearance :  
MR  
Mukesh A Patel with Mr. RAVI KARNAVAT for the Appellant.

MR Kamal

Trivedi, Senior counsel with Mr.PARESH M DAVE for the Respondent  
no.1.

Ms.Jirga Jhaveri, Assistant GOVERNMENT PLEADER for  
Respondent no.2.

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CORAM

:

HONOURABLE

MR.JUSTICE V. M. SAHAI

and

HONOURABLE

MR.JUSTICE A.J. DESAI

Date  
: 11/04/2012

ORAL

ORDER

(Per : HONOURABLE MR.JUSTICE V. M. SAHAI)

1. Though this Appeal is listed for admission, with the consent of the learned counsel for the parties, we have taken up this matter for final hearing at the admission stage.
2. We have heard Mr.Mukesh Patel assisted by Mr.Ravi Karnavat, learned counsel appearing for the appellant, Mr.Kamal B.Trivedi, learned Senior counsel assisted by Mr.P.M.Dave, learned counsel appearing for respondent no.1 and Ms.Jirga Jhaveri, learned Assistant Government Pleader appearing for respondent no.2. Learned Assistant Government Pleader Ms.Jirga Jhaveri has produced the original record of the case for perusal.
3. The appellant is the Principal Chief Engineer, Western Railway. Respondent No.1 is a Registered Small-scale Manufacturer, who has established a Factory for manufacture of goods, such as Pre-stressed Mono-block Concrete Sleepers, that are being supplied to the Western Railways. The State Level Industries Facilitation Council has been joined as respondent No.2, by order of the Court, dated 15-03-2011. The present dispute centers around Contract CS 160, entered into between the parties, on 20-10-2008. Previous to this contract, respondent No.1 had entered into Contract CS 156 with the Western Railways. The case of the appellant is that, insofar as CS 156 is concerned, respondent No.1 failed to supply the requisite quantity of Sleepers against the total ordered quantity. A clause in the said contract provides for recovery of Liquidated Damages at 5% of the cost of the stores. The petitioner, therefore, calculated the cost of the unsupplied quantity of sleepers i.e. 1,65,997 at Rs.23,81,57,164.81 and Liquidated Damages at 5%, amounting to Rs.1,19,07,858.00, which has been recovered from the bill of respondent No.1, to be paid under the second Contract, CS 160. According to the appellant, respondent No.1 has failed to perform his contractual obligations under CS 156, therefore, an amount of Rs. 1,19,07,858.00 has been retained from the sum payable to the said respondent under the said contract, CS 160. Respondent No.1 addressed letter dated 04-05-2009 to the appellant, stating that the Railways had no legal right to appropriate any amount

from the payment of respondent No.1 meant for CS 160, towards the claim for damages pertaining to another contract, when such damages were neither accepted, nor acceptable by the said respondent. As no reply was received from the Railways in this regard, respondent No.1, being a Registered Small-scale Entrepreneur, submitted an application, as per the provisions of Section 18 of the MSMED Act, before the Council on 06/11-06-2009, claiming the outstanding amount of Rs.1,19,07,858/-, with interest. The Council initially resorted to conciliation proceedings.

4. The learned Single Judge has dismissed the writ petition filed by the petitioner by which the alleged award dated 21.8.2010 has been challenged by the appellant on the ground that this is not an award but is an order passed in conciliation proceedings. The learned counsel for the respondent no.1 on the other hand, has vehemently urged that this is an award and not conciliation order and therefore, the appellant has a statutory remedy of filing an application under Section 34 of the Arbitration and Conciliation Act, 1996 (For short "The Act"). The learned counsel for respondent no.1 has taken us to Sections 18 and 19 of The Micro, Small and Medium Enterprises Development Act, 2006 (for short "MSMED Act") as well as the provisions of The Arbitration and Conciliation Act, 1996. On the arguments advanced by the learned counsel for the parties, it appears that in February, 2010, the appellant has filed his written arguments wherein in para-6 it was stated by him that the Micro and Small Enterprises Facilitation Council (For short "Council") has to hold and declare that conciliation proceedings have failed. In their letter No.MBSC/2009-10/163 dated 25.2.2010, in the last paragraph, it is stated that since the buyer has contended that conciliation proceedings be treated as failed, under the circumstances, the respondent requested the learned counsel to commence the next step as provided under the Act and the next step was arbitration to be conducted by the council or any institute undertaking arbitration and request the council to conduct arbitration process.

5. We have gone through the impugned order/award dated 21.8.2010 and we do not find that anywhere it has been recorded that on what date the conciliation proceedings have been treated to have failed by the council. From the original record produced before us, we do not find any order passed by the council wherein it has been recorded that conciliation proceedings are treated to have to be failed and have come to an end and next step of arbitration is now conducted by the council. Though notices were issued on 20.5.2010 fixing 31.5.2010 as next date, it also does not mention that the next arbitration proceedings would be taken up or hearing on merits, would commence or parties may lead their evidence and proceed with their arguments. The council if wanted to proceed in the arbitration, then the council had to inform the parties that conciliation has failed and it is proceeding to conduct arbitration and for that purpose, the parties may lead their evidence if they so desire after fixing the date for evidence of the parties; fix the date of hearing; and thereafter conduct hearing in accordance with law and pass an award. This was not done in the present case.

6. Further, learned counsel for the appellant has also submitted that he has filed an application under Section 8 of the Act, on 5.11.2009 on which no order has been passed by the council. Records have been shown by the learned counsel for respondent no.2 to learned counsel for respondent no.1 and the appellant, but they have failed to find any order deciding the application under Section 8 of the Act nor order-sheet mentions that any hearing took place on the application under Section 8 of the Act. Learned counsel for the parties agree that interest of justice would be served if the matter is

sent bank to the council. Learned counsel for the parties agree that this Court may treat that conciliation proceedings have failed and the matter should be proceeded for next step for arbitration.

7. In view of this statement made by the learned counsel for the parties and in view of the submissions made before the council, in their written argument or in the letter, wherein it is stated that conciliation proceedings have failed and the next step has to be conducted by the council. Before conducting the next step for arbitration, council has to decide the application filed by the appellant dated 5.11.2009 under section 8 of the Act and after deciding it and serving a copy of the order on the appellant, thereafter, shall proceed to fix the date for parties to lead the evidence in support of respective claims and thereafter fix the date for hearing after giving sufficient notice to the parties and thereafter proceed to pass arbitral award in accordance with law. The learned Single Judge has dismissed Special Civil Application No. 2471 of 2011 on the ground of alternative remedy. In our opinion, the order passed by the learned Single Judge cannot be maintained as the council proceeded to pronounce the award without following proper procedure and without recording a finding that conciliation proceedings have failed and come to an end and further the council failed to decide the application of the appellant under Section 8 of the Act. The learned Single Judge has committed an error in not deciding the matter on merits and in dismissing the writ petition on the ground of alternative remedy. The order passed by the learned Single Judge suffers from the error apparent on the face of the record and therefore, it cannot be maintained. Therefore, the award passed by the council dated 21.8.2010 is illegal and in violation of principles of natural justice and is liable to be set aside.

8. In the result, this Appeal succeeds and is allowed. The order dated 21.8.2010 passed by the council is set aside. The matter is remanded back to the council to proceed with the arbitration proceedings and after serving a copy of the same on the appellant, thereafter, shall proceed to fix the date for parties to lead the evidence in support of respective claims and thereafter fix the date for hearing after giving sufficient notice to the parties and thereafter proceed to pass arbitral award in accordance with law. The order dated 11.10.2011 passed by the learned Single Judge in Special Civil Application No.1997 of 2011 is set aside. It shall be open to the parties to raise all objections which have been raised in this Appeal and the writ petition which they want to raise before the counsel. The council shall decide the application dated 5.11.2009 preferred by appellant under section 8 of the Act as expeditiously as possible. As the Appeal is allowed, Civil Application does not survive.

(V.M.SAHAI,J) (A.J.DESAI,J) \*\*\*vcdarji Â Â Â Top