

GAHC010230152022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/7217/2022

NUMALIGARH REFINERY LIMITED
A COMPANY INCORPORATED IN INDIA AND HAVING ITS REGD. OFFICE AT
122A, G.S. ROAD, CHRISTIAN BASTI, GUWAHATI-781005, ASSAM AND IS
REP. BY SRI KAJAL SAIKIA, S/O. LATE MADHU SAIKIA, R/O. QUARTER NO.
D-22, NUMALIGARH REFINERY TOWNSHIP, P.O. KANAIGHAT, DIST.
GOLAGHAT, ASSAM.

VERSUS

UNION OF INDIA AND 2 ORS.
REP. BY THE SECRETARY, MINISTRY OF MICRO, SMALL AND MEDIUM
ENTERPRISES, UDYOG BHAWAN, RAJI MARG, NEW DELHI, PIN-110011.

2:THE JOINT DIRECTOR AND HEAD OF OFFICE

MSME DEVELOPMENT AND FACILITATION OFFICE
MINISTRY OF MSME
GOVT. OF INDIA
MSME BHAWAN
65/1
GST ROAD
GUINDY
CHENNAI
TAMIL NADI
INDIA-600032.

3:SOLAR DESIGN PVT. LTD.
NO.1
A WING
3RD FLOOR
PARSAN MANARE
602

ANNA SALAI
CHENNAI-600006

Advocate for the Petitioner : MR. A.K. Sahewalla

Advocate for the Respondent Nos. 1 & 2 : Mrs. A. Gayan.

Advocate for the Respondent No. 3 : Mr. D. Borah

BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

J U D G M E N T (CAV)

Date of Hearing : 04.05.2023

Date of Judgment : 15.05.2023

1. Heard Mr. AK Sahewalla, learned counsel for the petitioner. Also heard Mr. D Borah, learned counsel for the respondent No. 3 and Ms. A Gayan, learned counsel for the respondent Nos. 1 & 2.

2. The petitioner has prayed for setting aside Case No. TN/02/M/CHN/02164 filed by the respondent No. 3 for non-payment of his contractual bills, which is pending before the respondent No. 2, i.e., the Joint Director & Head of Office, Micro, Small and Medium Enterprises (MSME) Development and Facilitation Office, Ministry of MSME, Government of India, on the ground that the Micro, Small and Medium Enterprises (MSME) Facilitation Council does not have the jurisdiction to entertain the said case.

3. The issue herein pertains to the Work Order dated 28.09.2021 and the Agreement dated 18.10.2021, wherein the petitioner had given a contract to the

respondent No. 3 for interior civil and electrical work, including supply of furniture at Paradip Bhawan Building, NRL, Project Office Paradip Odisha.

4. The grievance of the petitioner is that the respondent No. 3 has filed a case against the petitioner for non-payment of his contractual bills under Section 18(1) of the Micro, Small and Medium Enterprises Development Act, 2006, though the respondent No. 3 had completed the contract work. On the other hand, the case of the petitioner herein is that the materials supplied in pursuant to the work order by the respondent No. 3, was not as per the requirement of the Tender and was required to be replaced by the respondent No. 3. As the same was not done, the prayer of the respondent No. 3 for payment of his bills could only be entertained when the contract work was completed, by replacing the materials supplied by the respondent No. 3.

5. The petitioner's case is that the respondent No. 3 filed the above case under Section 18(1) of The Micro, Small and Medium Enterprises Development Act, 2006 (herein after referred to as the "MSMED Act, 2006"), which can only be decided if the requirement of Section 15 of the MSMED Act, 2006 is met. As the requirement of Section 15 of the MSMED Act, 2006 has not been met in view of Section 2(b) and 2(n), the case before the Facilitation Council is premature and without any jurisdiction.

6. The petitioner's counsel submits that in the agreement executed between the parties on 18.10.2021, Clause 7 of the agreement provided that all disputes or differences arising out of the contract would be referred to Arbitration as per the GPC/GCC Clause, whichever is applicable and all disputes, actions and proceedings would also be as per the GPC/GCC Clause. The petitioner's counsel submits that in view of the Arbitration Clause provided in the agreement

between the parties, any dispute or differences pertaining to the contract between the parties, had to be referred to arbitration. The petitioner's counsel submits that instead of invoking the Arbitration Clause, the respondent No. 3 approached the respondent No. 2 under Section 18(1) of the MSMED Act, 2006 with his grievance, on the ground that his contract bill had not been paid despite completion of the work. He submits that a reference under Section 18(1) of the MSMED Act, 2006 can only be considered if the provisions of Section 15, 16 & 17 of the MSMED Act, 2006 are present. He submits that the petitioner, vide e-mail dated 21.03.2022, informed the respondent No. 3 that the items which had been delivered by the respondent No. 3 in pursuance to the contract, did not fulfil the tender requirements and as such, the items needed to be replaced by the respondent No. 3. Instead of replacing the items which had been supplied, which were not in terms of the tender requirement, the respondent No. 3 approached the respondent No. 2 for payment of his contract bills under Section 18 of the MSMED Act, 2006 on 06.07.2022. He submits that as the petitioner had requested the respondent No. 3 to replace the items supplied within 13 days from the date of supply of the defective items, Section 15 of the MSMED Act, 2006 was not attracted, as there was no acceptance of supplied furniture which was supplied by the respondent No. 3. In this regard, he has referred to Section 2(b)(i)(b) of the MSMED Act, 2006, which states that the day of acceptance of delivery of the goods would be the day when the objection made in respect of the delivered goods is removed. This in turn makes the reference under Section 18 of the MSMED Act, 2006 not maintainable. He further submits that at the time of submission of the bid, the respondent No. 3 never represented itself as a MSME. He submits that the existence of the non-obstante clause in Section 18 of the MSMED Act, 2006 does not make the

independent arbitration agreement entered into between the parties invalid. He submits that institutional arbitration provided under Section 18 of the MSMED Act, 2006 is only in reference to Section 15 to 17 of the said Act, which deals with delayed payment only. Thus, the question of delayed payment cannot come into the picture, as the respondent No. 3 did not fulfil its contractual obligation, as it did not replace the items which had been supplied and which were not as per the tender specifications. He accordingly prays that the impugned case No. TN/02/M/CHN/02164 pending in the office of the respondent No. 2 should be set aside.

7. Surprisingly, the learned counsel for the petitioner submits that he is not pressing prayer No. 2 made in the writ petition, which is to the following effect:-

“A direction to be issued to settle the dispute between the parties through Arbitrator under The Arbitration and Conciliation Act, 1996, in view of the fact that there is an Arbitration Clause between the parties in terms of the Agreement dated 18.10.2021.”

8. Mr. D Borah, learned counsel for the respondent No. 3, on the other hand submits that there is no infirmity with the respondent No. 3 approaching the respondent No. 2 for realising his contractual bills, inasmuch as, the MSMED Act, 2006 is applicable to the facts of this case. He further submits that in terms of the judgment of the Apex Court in the case of ***Gujarat State Civil Supplies Corporation Limited vs. Mahakali Foods Private Limited (Unit 2) & Anr.***, reported in ***AIR 2022 SC 5545***, the MSMED Act, 2006 has an overriding effect over the Arbitration and Conciliation Act, 1996 and consequently, any Arbitration Clause made in any Agreement. He also submits that in view of the petitioner's counsel having participated in the impugned Case

No. TN/02/M/CHN/02164 by filing a written statement and the petitioner having relinquished his 2nd prayer for referring the dispute to Arbitration, there is no infirmity with the MSME Facilitation Council deciding the dispute between the parties under the MSMED Act, 2006. He further submits that the writ petitioner never raised any objection with regard to the work executed by the respondent No. 3 during the subsistence of the contract between the parties. The learned counsel for the respondent No. 3 submits that even if there is an agreement between the parties for settlement of a dispute through Arbitration, the same does not preclude the respondent No. 3 from making a reference to the MSME Facilitation Council under Section 18(1) of the said Act to claim any amount due under Section 17 of the MSMED Act, 2006.

9. I have heard the learned counsels for the parties.

10. As seen from the context of the fore-going paragraphs, the dispute between the parties has arisen due to the claim of the respondent No. 3 that there has been delay in payment of his contractual dues. On the other hand, it is the case of the writ petitioner that the respondent No. 3 was informed to replace the items which were not as per tender specifications. However, the same has not been done by the respondent No. 3. As such, the contractual obligation having not been fulfilled by the respondent No. 3, the question of delayed payment in terms of Section 15, 16 & 17 of the MSMED Act, 2006 would not apply. The issue to be decided is whether the MSMED Act, 2006 would have an overriding effect over the Arbitration Clause in the agreement dated 18.10.2021 and the provisions of the Arbitration Conciliation Act, 1996, when there is a dispute/differences between the parties. Thus, whether the respondent No. 3 would be precluded from making a reference under Section

18(1) of the MSMED Act, 2006 during the subsistence of an Arbitration Clause in the contract agreement is the moot question to be decided, even though the petitioner is not pressing his 2nd prayer.

11. In the case of ***Gujarat State Civil Supplies Corporation Limited vs. Mahakali Foods Private Limited (Unit 2) & Anr.***, reported in ***AIR 2022 SC 5545***, the Apex Court was to decide the following common questions of law, which are as follows:

“(i) Whether the provisions of Chapter-V of the MSMED Act, 2006 would have an effect overriding the provisions of the [Arbitration Act, 1996](#)?

(ii) Whether any party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council under sub-section (1) of [Section 18](#) of the said Act, if an independent arbitration agreement existed between the parties as contemplated in [Section 7](#) of the Arbitration Act, 1996?

(iii) Whether the Micro and Small Enterprises Facilitation Council, itself could take up the dispute for arbitration and act as an arbitrator, when the council itself had conducted the conciliation proceedings under sub-section (2) of the Section 18 of the MSMED Act, 2006 in view of the bar contained in [Section 80](#) of the Arbitration Act, 1996?

12. The run up to the requirement of the Hon’ble Supreme Court deciding the above common questions of law was due to various appeals being filed from the judgments of various High Courts, wherein, the issues raised were with regard to whether the MSMED Act, 2006 could override the Arbitration Clause in the

agreement executed between the parties and the provisions of the Arbitration and Conciliation Act, 1996.

13. The records show that the respondent No. 3 had submitted his case (reference) under Section 18(1) of the MSMED Act, 2006 before the respondent No. 2 on 06.07.2022. Notice was issued to the writ petitioner by the MSME Facilitation Council and the petitioner thereafter submitted its written statement on 25.08.2022. The written statement of the petitioner is to the effect that the respondent No. 3 was not awarded the contract as an MSME contractor and that the respondent No. 3 had not submitted any final bill to the petitioner. Further, the petitioner had sent an email to the respondent No. 3 for replacing of the supplied furniture items. The petitioner also took the stand that the Facilitation Council was barred by law in taking up the proceedings on the case before it, as there was an Arbitration Clause covering the parties in case of any dispute/differences arising between them.

14. The above being said, the Apex Court in the case of ***Gujarat State Civil Supplies Corporation Limited vs. Mahakali Foods Private Limited (Unit 2) & Anr.*** (supra) has held in paragraph No. 34 that Chapter – V of the MSMED Act, 2006, would override the provisions of the Arbitration Act, 1996 and that no party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council, though an independent arbitrator agreement exists between the parties. The Apex Court further held that the Facilitation Council, which had initiated the conciliation proceedings under Section 18(2) of the MSMED Act, 2006 would be entitled to act as an Arbitrator despite the bar contained in Section 80 of the Arbitration. It further held that

proceedings before the Facilitation Council acting as an arbitrator/arbitration tribunal under Section 18(3) of the MSMED Act, 2006 would be governed by the Arbitration Act, 1996. It also held that a party who was not a supplier as per the definition contained in Section 2(n) of the MSMED Act, 2006 on the date of entering into contract, cannot seek any benefit as a supplier under the MSMED Act, 2006.

15. Paragraph No. 34 of the judgment of Apex Court in ***Gujarat State Civil Supplies Corporation Limited vs. Mahakali Foods Private Limited (Unit 2) & Anr.*** (supra) is reproduced below as follows:

“34. The upshot of the above is that:

(i) Chapter-V of the MSMED Act, 2006 would override the provisions of the [Arbitration Act](#), 1996.

(ii) No party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council, though an independent arbitration agreement exists between the parties.

(iii) The Facilitation Council, which had initiated the Conciliation proceedings under Section 18(2) of the MSMED Act, 2006 would be entitled to act as an arbitrator despite the bar contained in [Section 80](#) of the Arbitration Act.

(iv) The proceedings before the Facilitation Council/institute/centre acting as an arbitrator/arbitration tribunal under Section 18(3) of MSMED Act, 2006 would be governed by the [Arbitration Act](#), 1996.

(v) The Facilitation Council/institute/centre acting as an arbitral tribunal by virtue of Section 18(3) of the MSMED Act, 2006 would be competent to rule on its own jurisdiction as also the other issues in view of [Section 16](#) of the Arbitration Act, 1996.

(vi) A party who was not the 'supplier' as per the definition contained in Section 2(n) of the MSMED Act, 2006 on the date of entering into contract cannot seek any benefit as the 'supplier' under the MSMED Act, 2006. If any registration is obtained subsequently the same would have an effect prospectively and would apply to the supply of goods and rendering services subsequent to the registration.

16. In view of the law settled by the Apex Court as stated above, the provisions of Chapter-V of the MSMED Act, 2006 would have an overriding effect over any arbitration clause made in any agreement and the provisions of the Arbitration and Conciliation Act, 1996. Chapter-5 of the MSMED Act, 2006 comprises of Section 15 to 25. The question of whether the respondent No. 3 is a supplier in terms of Section 2 (n) of the MSMED Act, 2006 on the date of entering into contract with the petitioner and also whether Section 15 of the MSMED Act, 2006 is attracted in the facts of this case, keeping in view Section 2 (b) of the MSMED Act, 2006 would have to be decided for invoking Section 18(1) of the MSMED Act, 2006. These issues can be decided by the Facilitation Council. Further, conciliation proceedings under Section 18(2) and Arbitration proceedings under Section 18(3) of the MSMED Act, 2006 can be initiated.

17. In view of the reasons stated above and keeping in view the submission made by the petitioner's counsel that he is not pressing prayer No. 2, this Court is of the view that the Facilitation Council can decide the dispute/differences between the parties herein, even though there is an Arbitration Clause in the

agreement. Writ petition is accordingly dismissed.

JUDGE

Comparing Assistant