

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 14th December, 2015**

+ **W.P.(C) No.7072/2015 & CM No.12960/2015 (for stay)**

UNITED ELECTRICAL INDUSTRIES LTD. Petitioner

Through: Mr. G. Prakash, Adv.

Versus

MICRO AND SMALL ENTERPRISES

FACILITATION COUNCIL & ORS

..... Respondents

Through: Mr. Manish Sharma, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition impugns (i) the orders dated 17th June, 2013 and 1st October, 2013 of the respondent No.1 Micro and Small Enterprises Facilitation Council (MSEFC); and, (ii) the order dated 15th May, 2015 of the Arbitrator in Case Reference No.DAC/498/10-13 on the file of Delhi International Arbitration Centre (DIAC).

2. Notice of the petition was issued, though no ad-interim stay sought of the arbitration proceedings aforesaid granted.

3. The respondent No.2 Eppleton Engineers Pvt. Ltd. (EEPL) filed CM No.13601/2015 in this petition seeking a direction that evidence shall be recorded in the arbitration proceedings and that the petitioner shall not seek an adjournment on the ground of pendency of this petition. The said

application was dismissed on 4th August, 2015 with the observation that the prayer therein was beyond the purview of the present petition. Only the respondent No.2 EEPL filed a counter affidavit and to which a rejoinder has been filed by the petitioner. None appeared for the respondent No.1 MSEFC inspite of service. Though the counsel for respondent no.3 Govt. of NCT of Delhi (GNCTD) had appeared earlier, does not appear today. The counsel for the petitioner and the counsel for the respondent No.2 EEPL have been heard.

4. The factual matrix is as under:

(i) The respondent No.2 EEPL, claiming to be a small enterprises within the meaning of Section 2(m) of the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act) and further claiming that the petitioner owed a sum of Rs.9,22,71,848/- to it against the supplies made by the respondent No.2 EEPL to the petitioner within the meaning of Sections 15 to 17 of the MSMED Act, on 29th November, 2012 submitted a reference to the respondent No.1 MSEFC under Section 18 of the MSMED Act to either conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services qua the dispute

which had so arisen between the respondent No.2 EEPL and the petitioner.

(ii) Contending that the respondent No.1 MSEFC did not act on the said reference, the respondent No.2 EEPL in or about March, 2013 filed W.P.(C) No.1535/2013 before this Court impleading MSEFC and GNCTD only as parties thereto and seeking a mandamus to the MSEFC to initiate action on the reference submitted by the respondent No.2 EEPL.

(iii) The said writ petition came up before this Court first on 8th March, 2013 when the counsel for MSEFC and GNCTD appeared on advance notice and stated that they will examine the reference of the respondent No.2 EEPL and act thereon in accordance with the provisions of the MSMED Act. Accordingly, the petition was disposed of with a direction to the MSEFC to within four weeks thereof examine the request of the respondent No.2 EEPL, if necessary after issuing notice to the petitioner, and do the needful thereon.

(iv) The respondent No.1 MSEFC in compliance of the aforesaid order of this Court sent a notice dated 12th April, 2013 to the petitioner

and the petitioner though sought time to file reply but did not file reply.

(v) In the circumstances, the respondent No.1 MSEFC vide order dated 17th June, 2013 supra decided that the reference under Section 18 of the MSMED Act of the respondent No.2 EEPL be referred to the Delhi Dispute Resolution Society for conciliation and in the event of the conciliation proceedings remaining unsuccessful, the matter be referred for arbitration to DIAC.

(vi) The petitioner and the respondent No.2 EEPL were unable to reach an amicable solution and the conciliation proceedings were closed.

(vii) The respondent No.1 MSEFC vide order dated 1st October, 2013 referred the dispute between the petitioner and the respondent No.2 EEPL to DIAC with a request to conclude the arbitration proceedings within forty-five days.

(viii) The petitioner filed W.P.(C) No.350/2015 in this Court impugning the orders dated 17th June, 2013 and 1st October, 2013 supra of the respondent No.1 MSEFC (though copy of this petition has

not been filed in this proceeding but I have called the files of W.P.(C) No.1535/2013 and W.P.(C) No.350/2015).

(ix) W.P.(C) No.350/2015 supra filed by the petitioner came up before this Court first on 14th January, 2015 when it was the contention of the petitioner that the orders dated 17th June, 2013 and 1st October, 2013 of the respondent No.1 MSEFC were without jurisdiction inasmuch as the agreement in pursuance to which the respondent No.2 EEPL had supplied goods to the petitioner was of a date prior to the enforcement of the MSMED Act. The said argument was however not accepted by this Court. The counsel for the petitioner then contended that there were other aspects pertaining to the jurisdiction of the respondent No.1 MSEFC and drew attention to Sections 7 & 8 of MSMED Act regarding classification of enterprises. On the said contention, notice of the petition was issued and *status quo* directed to be maintained qua the arbitration proceedings.

(x) W.P.(C) No.350/2015 supra was disposed of on 13th March, 2015 with the following orders:

“1. On return of notice, respondents have entered appearance. Mr. Sanjeev Goyal appears for

respondent Nos.1 and 3, while Mr. Manish Sharma appears for respondent No.2.

2. Mr. Sharma, learned counsel for respondent No.2, has brought to my notice an order dated 29.11.2014 passed by the learned Arbitrator which, inter alia, adverts to the fact that an application under Section 16 of the Arbitration and Conciliation Act, 1996 (in short the Act) has been filed by the petitioner herein. This application is pending consideration of the learned Arbitrator.

3. My attention has been drawn to the contents of the application filed by the petitioner under Section 16 of the Act. In the said application, several grounds have been taken as to why the learned Arbitrator, would not have, jurisdiction in the matter.

4. Mr. Prakash, learned counsel for the petitioner, however, says that one of the several objections, which have been raised in the petition, is that, the Micro and Small Enterprises Facilitation Council (in short the Council) did not have jurisdiction to make a reference to the Delhi International Arbitrator Centre. It is the learned counsel's submission that this objection has not found resonance in the application filed by the petitioner under Section 16 of the Act, with the same clarity as articulated in court before me. Therefore, the learned counsel submits that the petitioner should be entitled to press this ground as well, apart from the grounds already been referred to in the application filed under Section 16 of the Act, before the learned Arbitrator.

5. Mr. Sharma, who appears for respondent no.2, says that if such a ground is agitated before the learned Arbitrator, the said respondent would have no difficulty in the same being adjudicated upon by the learned Arbitrator subject to being allowed, in turn, to raise all arguments in defence of the said ground.

6. Accordingly, the learned Arbitrator, is requested to rule upon the ground adverted to in paragraph 4 above, while deciding the application filed before him under Section 16 of the Act. It would be open to respondent no.2 to take all defences which may be available to it.

6.1 In this behalf, the petitioner may, if it so desires, file an additional pleading. In case this route is adopted, needless to say, respondent no.2 will be given due opportunity to rebut.

7. At this stage, Mr. Prakash says that he is satisfied with the direction issued, and that, he does not wish to press the writ petition any further. It is ordered accordingly.

8. The writ is disposed of in the aforesaid terms.

9. In view of the fact that the writ petition has been finally disposed of, the interim order dated 14.1.2015, shall stand vacated.”

(xi) In pursuance to the aforesaid order, the sole Arbitrator of the DIAC has vide order dated 15th May, 2015 dismissed the application of the petitioner under Section 16 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) and posted the matter for cross-examination by the petitioner of the witnesses of the respondent No.2 EEPL.

5. Now this petition has been filed impugning, besides the orders dated 17th June, 2013 and 1st October, 2013 of the respondent No.1 MSEFC, also the order dated 15th May, 2015 of the sole Arbitrator of the DIAC.

6. It is the contention of the petitioner:

(a) that the respondent No.2 EEPL, even after coming into force of the MSMED Act had sent a notice dated 7th September, 2011 to the petitioner demanding the balance amount of Rs.1,58,83,256/- with 18% interest and threatening the petitioner with winding up; the respondent No.2 EEPL then did not state that it was making a reference under Section 18 of the MSMED Act;

(b) that the respondent No.1 MSEFC while entertaining the reference made by the respondent No.2 EEPL under Section 18 of the MSMED Act did not satisfy itself that the respondent No.2 EEPL was entitled to invoke Section 18 of the MSMED Act or that the claim made was barred by time and made reference to conciliation / arbitration feeling obliged to do so because of the order dated 8th March, 2013 in W.P.(C) No.1535/2013 supra;

(c) that the petitioner in fact filed a reply dated 10th June, 2013 before the respondent No.1 MSEFC taking various contentions, including the contention that the respondent No.1 MSEFC had no jurisdiction to entertain the claim and only the Civil Court has jurisdiction to decide any dispute relating to the supplies;

(d) that the petitioner before the Arbitrator appointed by the DIAC also has filed a reply / written submission to the statement of claim of the respondent No.2 EEPL *inter alia* taking a contention that the respondent No.1 MSEFC had no jurisdiction to entertain the reference under Section 18 of the MSMED Act, without deciding whether the respondent No.2 EEPL is a micro, small or medium enterprise within the meaning of MSMED Act;

(e) that the benefit of Chapter V of the MSMED Act in which Section 18 is located is available only to micro and small enterprises and not to medium enterprises and without it being determined whether the respondent No.2 EEPL is a small or medium enterprise and which determination has not taken place, the arbitration pursuant to the reference under Section 18 of MSMED Act is not maintainable;

(f) that though the petitioner also filed an application under Section 16 of the Arbitration Act before the Ld. Arbitrator contending that the Arbitrator has no jurisdiction to entertain the matter, as the respondent No.2 EEPL has not produced any classification certificate under Section 7 of the MSMED Act but the Arbitrator has wrongly held the respondent No.2 EEPL to be a small enterprise;

(g) that the orders dated 17th June, 2013 and 1st October, 2013 of the respondent No.1 MSEFC are *ex-parte* and without hearing the petitioner and in violation of the principles of natural justice;

(h) that the respondent No.2 EEPL before the Arbitrator also did not produce its balance sheet or any other document to show that it comes within the definition of micro or small enterprises within the meaning of MSMED Act to be entitled to the benefit of Chapter V thereof;

(i) that merely because the respondent No.2 EEPL showed having filed a memorandum before the Industries Department, GNCTD claiming itself to be a small enterprise is not enough to hold the respondent No.2 EEPL to be a small enterprise, without any verification having been done in the said respect;

(j) that the Commissioner of Industries also while acknowledging the receipt of the said memorandum did not certify the respondent No.2 EEPL as a small enterprise within the meaning of MSMED Act;

(k) that for reference under Section 18 of the MSMED Act there is no arbitration agreement between the parties;

(l) that the respondent No.2 EEPL is a company dealing with crores of rupees with various Indian and Foreign companies and had not produced any balance sheet showing the value of its present assets to qualify as a small enterprise within the meaning of MSMED Act;

(m) reliance is placed on *Purvanchal Cables & Conductors Pvt. Ltd. Vs. Assam State Electricity Board* (2012) 7 SCC 462 to contend that no benefit of the Small Scale Ancillary Industrial Act, 1993 was held to be available for supply contract executed prior to the commencement of the said Act;

(n) that the respondent No.2 EEPL though claims to be a small scale industry even prior to the coming into force of MSMED Act, did not file any memorandum within the time prescribed in Section 8 of the MSMED Act and the memorandum filed in the year 2011 would not qualify it as a small scale industry;

(o) that the benefits of the MSMED Act cannot be made available to enterprises who do not qualify therefor and merely by filing a declaration to the said effect.

7. A perusal of the counter affidavit of the respondent No.2 EEPL shows the same to be in the nature of mere denial.

8. The questions raised by the petitioner for adjudication are (I) can respondent No.1 MSEFC make a reference to arbitration under Section 18 of the MSMED Act without satisfying itself whether the respondent No.2 EEPL is a micro or small enterprise; and, (II) whether the order dated 15th May, 2015 of the sole Arbitrator of DIAC holding the respondent No.2 EEPL to be a small enterprise within the meaning of MSMED Act is erroneous.

9. The MSMED Act, as per its preamble has been enacted to facilitate the promotion and development and to enhance the competitiveness of micro, small and medium enterprises. Section 2(h) read with Section 7(1) of the Act defines a 'micro enterprise' as an enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (IDRA), where the investment in plant and machinery does not exceed twenty five lakh rupees or an enterprise engaged in providing or rendering of services where the investment in equipment does not exceed ten lakh rupees. Section 2(m) read with Section 7(1) of the Act defines a 'small enterprise' as an enterprise engaged in the manufacture or production of goods pertaining

to any industry specified in the First Schedule to the IDRA, where the investment in plant and machinery is more than twenty five lakh rupees but does not exceed five crore rupees or an enterprise engaged in providing or rendering of services where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees. Section 2(g) read with Section 7(1) of the Act defines a 'medium enterprise' as an enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the IDRA, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees or an enterprise engaged in providing or rendering of services where the investment in equipment is more than two crore rupees but does not exceed five crore rupees.

10. Section 8 of the MSMED Act provides that any person who intends to establish a micro, small or medium enterprise shall file a memorandum with the prescribed authority. The proviso thereto *inter alia* provides that any person who, before the commencement of the Act, established a small scale industry and obtained a registration certificate, shall within one hundred and eighty days from the commencement of the Act, file the memorandum as aforesaid. Section 8(2) of the Act provides that the form of the

memorandum, the procedure of its filing and other matters incidental thereto shall be such as may be notified by the Central Government; else there is no provision in the Act for verification of the contents of the memorandum filed or to record the satisfaction as to whether the entity claiming to be itself a micro, small or medium enterprise is in fact so or not. The counsels have not shown any procedure having been notified by the Central Government thereunder. I find that Micro, Small and Medium Enterprise Development (Furnishing of Information) Rules, 2009 have been framed by the Central Government and Rule 3 whereof empowers the officer appointed under Section 26(1) of the MSMED Act to require the person filing the memorandum to furnish information as to investment in plant and machinery or in equipment, as applicable under Section 7 and Rule 4 thereof provides that on receipt of information, it shall be duly registered and given a serial number. The same also do not provide for any independent verification of the information given. I also find the Central Government to have in exercise of powers under Section 8(2) of the Act notified (vide S.O. 1643(E) dated 29th September, 2006 as amended by S.O. 200(E) dated 16th January, 2009) the procedure for filing of entrepreneurs memorandum and other matters incidental thereto but the same is also not found to be providing for

any verification by any officer or authority of the contents of the entrepreneur memorandum filed under Section 8(1) of the Act. The same is however found to provide for information to be furnished periodically.

11. Though it appears strange that merely by filing of a memorandum under Section 8(1) of the Act by an enterprise claiming itself to be a micro, small or medium enterprise and from acknowledgement thereof by the authority concerned, a person becomes entitled to avail of the benefits under the MSMED Act, that is how the position appears to be.

12. The respondent No.1 MSEFC, pursuant to the order dated 8th March, 2013 in W.P.(C) No.1535/2013 filed by the respondent No.2 EEPL is also not found to have recorded any satisfaction of the respondent No.2 EEPL being a small enterprise as claimed by it. In the order dated 17th June, 2013 it is merely recorded that since the respondent No.2 EEPL had filed an entrepreneur memorandum and acknowledgment thereof was issued, the reference made by it under Section 18 of the Act was maintainable. Though the petitioner claims to have subsequently contested the factum of the respondent No.2 EEPL being a small enterprise, but the respondent No.1 MSEFC does not appear to have gone into the said aspect, even before making the reference dated 1st October, 2013 to the DIAC.

13. The sole Arbitrator of the DIAC of course in terms of the order dated 13th March, 2015 in W.P.(C) No.350/2015 filed by the petitioner has gone into the said aspect and found the respondent No.2 EEPL to be a small enterprise as claimed by it and thus dismissed the application of the petitioner under Section 16 of the Arbitration Act.

14. The question which arises for consideration is whether the said order of the Arbitrator is open to challenge in this writ petition.

15. An arbitration under the Arbitration Act is possible only if there exists an agreement to submit to arbitration, the disputes which have arisen or which may arise in respect of a defined legal relationship, whether contractual or not (refer Section 7 of the Arbitration Act). Section 2(4) of the Arbitration Act makes Part I thereof containing Sections 2 to 43 and what is commonly known as part relating to ‘domestic arbitrations’ to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement.

16. Section 18 of the MSMED Act requires the respondent No.1 MSEFC to, on receipt of the reference of a dispute of the nature referred to in Sections 15 to 17, to either itself conduct conciliation or seek the assistance of any institution or centre providing alternate dispute resolution services by

making a reference thereto and if the conciliation is not successful to, either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and further provides that the provisions of the Arbitration Act shall then apply to the dispute, as if the arbitration was in pursuance to an arbitration agreement referred to in Section 7(1) of the Act.

17. It thus follows that a dispute covered by Sections 15 to 17 of the MSMED Act, upon being referred under Section 18 to the respondent No.1 MSEFC, becomes arbitrable under the Arbitration Act.

18. It is not the case of the respondent No.2 EEPL also that it has any arbitration agreement with the petitioner. The arbitration underway is only in accordance with Section 18 of the MSMED Act read with Section 2(4) of the Arbitration Act.

19. The arbitration remedy pursuant to Section 18 of the MSMED Act becomes available only upon the reference being made thereunder and which reference is dependent upon the respondent No.2 EEPL being a micro or small enterprise. Thus, before the respondent no.1 MSEFC makes a reference under Section 18, the question whether the respondent N.2 EEPL is a micro or small enterprise becomes relevant and upon being disputed, has to

be decided by the respondent No.1 MSEFC, before reference is set in motion.

20. I find merit in the contention of the petitioner that upon the petitioner controverting that the respondent No.2 EEPL is a small enterprise as claimed by it, the respondent No.1 MSEFC was required to adjudicate the same and since there does not appear to be any remedy available against the decision of the respondent No.1 MSEFC in this regard, a writ petition would be maintainable thereagainst. It has been so held by the High Court of Hyderabad in *The Indur District Cooperative Marketing Society Ltd. Vs. Microplex (India), Hyderabad* MANU/AP/0785/2015 and by the High Court of Madhya Pradesh in judgment dated 24th July, 2015 in W.P.(C) No.19319/2014 titled *M/s Frick India Ltd. Vs. Madhya Pradesh Micro and Small Enterprises Facilitation Council*. It was held to be a jurisdictional issue.

21. However, I find that the orders dated 17th June, 2013 and 1st October, 2013 of the respondent No.1 MSEFC which the petitioner is challenging in this petition were also the subject matter of challenge in W.P.(C) No.350/2015 earlier filed by the petitioner and which ended in the order dated 13th March, 2015 which the petitioner allowed to attain finality. As per

the said order, the said question was left open to be decided by the Arbitrator. Even though I am of the opinion that the decision in this regard was required to / ought to have been taken by the respondent No.1 MSEFC and the dispute would fall into the lap of the Arbitrator, only upon the respondent No.1 MSEFC being satisfied regarding applicability of Section 18 of the MSMED Act, but the fact of the matter is that the order dated 13th March, 2015 in W.P.(C) No.350/2015 earlier filed by the petitioner cannot be re-visited by me and has attained finality. Moreover, the order dated 13th March, 2015 is in the nature of a consent order.

22. As far as the challenge to the conclusion so reached now by the Arbitrator in this regard is concerned, the said conclusion having been reached in exercise of power under Section 16 of the Arbitration Act, the challenge thereto can only be in accordance with Section 34 of the Arbitration Act and not by way of a writ petition. I have recently in *Evolve Marketing Services Pvt. Ltd. Vs. Aircel Ltd.* MANU/DE/3851/2015, referring to the case law in this regard, held that the petitions under Articles 226 & 227 of the Constitution of India are not maintainable with respect to arbitration proceedings. Reference in this context can also be made to the judgments of the Division Bench of this Court in *ATV Projects India Ltd.*

Vs. Indian Oil Corporation Ltd. 200 (2013) DLT 553 and to ***Awasthi Construction Co. Vs. Govt. of NCT of Delhi*** MANU/DE/5926/2012.

23. Thus, the petition insofar as challenging the orders dated 17th June, 2013 and 1st October, 2013 of the respondent No.1 MSEFC is held to be not maintainable, being by way of re-litigation and the petition insofar as impugning the order dated 15th May, 2015 of the Learned Arbitrator is held to be not maintainable, the remedy of the petitioner being under Section 34 of the Arbitration Act.

24. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

DECEMBER 14, 2015

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(Corrected and released on 4th February, 2016)