IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.07.2018

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.648 of 2017

M/s.BGR Energy Systems Limited
Having its Reg. Office at :
A-5, Pannamgadu Industrial Estate,
Ramapuram Post,
Sullurpet Taluk, Nellore District
Andhra Pradesh, India

Having its Corporate Office at :

No.443, Anna Salai,
Teynampet, Chennai-600 018. .. Petitioner

Vs.

P.S. Techcom Pvt. Ltd.,
(Division Vecaun Projects)
2C, 728 I Block, HRBR Layout,
Bangalore – 560 043. .. Respondent

* * *

Prayer : Petition filed under Section 11(6)(a) of the Arbitration and Conciliation Act, 1996, praying to appoint a Sole Arbitrator in terms of Clause 10 of Annexure-I to the Purchase Order dated 16.06.2011, to adjudicate upon the differences and disputes between the parties under the Purchase Order dated 16.06.2011.

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For Petitioner	:	Mr.Rahul Balaji
For Respondent	:	Mr.Navkesh Batra for M/s.Adithya Reddy

ORDER

This Original Petition is seeking for appointment of a sole Arbitrator in terms of Clause 10 of Annexure I to the Purchase Order dated 16.06.2007 to adjudicate upon the differences and disputes between the parties under the said Purchase Order (PO).

2. Before proceeding to the question of appointment of Arbitrator, as prayed for, the question that arises for consideration is : when the respondent being a Micro, Small and Medium Enterprise registered with the Micro, Small and Medium Enterprises Council, whether the agreement contrary to the statutory provisions is prohibited ?

2.1. Secondly, whether a counter claim is maintainable before the the Micro, Small and Medium Enterprises Council ?

3. The brief facts leading to the differences and disputes between the parties and filing of this petition run thus :

3.1. The petitioner is a public listed company in engineering and developed good reputation and goodwill in its field of operation with several high profile projects in its name. One such project is the 2 X 500 MW Marwa Thermal Power Plant for the Chhattisgarh State Power

Generation Company Limited (CSPGCL).

3.2. In execution of the above project, the petitioner entered into a contract for Design, Procurement, Manufacture and Supply of Fire Detection and Protection Equipments including Accessories with the respondent vide the Purchase Order dated 16.06.2011 for a total contract price of Rs.9.50 Crores. These items were procured as a requirement for setting up a power plant by the petitioner for their employer.

3.3. It is stated that the date for erection and commissioning of the equipments, as per the terms of the contract, though fixed as 07.04.2012, was extended at the behest of the respondent from time to time. However, the respondent defaulted in payments and there was a delay in supply, which was admitted by the respondent in their e-mail dated 21.12.2012. Though the respondent was expected to supply the materials required for the project in a continuous and time bound manner, the supply was made only on piecemeal basis resulting in the petitioner receiving a cautionary e-mail from its employer. It is stated that at one stage, the respondent was unable to complete the supply of balance materials and the petitioner was forced to engage another contractor to complete the same.

3.4. The petitioner addressed a letter dated 26.06.2015 bringing to the notice of the respondent that the contractual default on its part and raised a claim of Rs.93.81 lakh. The respondent also raised a claim of Rs.2,44,54,139/- on the petitioner.

3.5. While so, the respondent had proceeded to file a claim before the Micro, Small Medium Enterprises Facilitation Council, Karnataka ("MSME Council") making its claims. Admittedly, the petitioner is also denying the same on factual and legal grounds. It is pointed out that there is an arbitration clause in the PO providing resolution of disputes. Therefore, the preliminary objections raised by the petitioner before the MSME Council was rejected. It was challenged before the Karnataka High Court in W.P.No.42414 of 2016 and the Karnataka High Court granted an interim order directing the MSME Council to defer the passing of the final orders.

3.6. There was yet another writ petition filed by the petitioner in W.P.No.55303 of 2017 before the Karnataka High Court challenging the order rejecting the preliminary objection raised by the petitioner, which is said to be pending.

3.7. It is in the above factual background, the present Original Petition is filed for seeking appointment of an Arbitrator.

4. Learned counsel for the petitioner argued that the petitioner is only a 'buyer', as defined under Section 2(d) of the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act). Section

2(n) of the said Act defines 'supplier' which means a micro or small enterprise. Chapter V of the MSMED Act deals with the delayed payments to micro and small enterprises. It is contended by the learned counsel for the petitioner that the recovery under the MSMED Act should only relate to Section 17, which speaks of the recovery of amounts due for any goods supplied or services rendered by the supplier, the buyer shall be liable to pay interest thereon. When the Act is silent about the recovery by the buyer from the supplier, MSMED Act has got no application. It was further pointed out that the arbitration clause agreed upon by the parties in spite of the MSMED Act goes to show that the arbitration clause has got an overriding effect over the MSMED Act.

5. Learned counsel for the respondent contended that the MSMED Act, being a special act, will prevail over the Arbitration and Conciliation Act, 1996, (in short “Arbitration Act”) which is a general act. As stated earlier, the petitioner had participated in the proceedings before the MSME Council and only the pronouncement of the award is pending, as the same is stayed by virtue of the order passed by the Honble Karnataka High Court.

6. The MSMED Act does not provide for category of disputes as arbitrable and non-arbitrable. Hence, Chapter II provides for the jurisdiction of the MSME Council for acting as an Arbitrator. A reading of Section 20 of the MSMED Act makes it clear that it is mandatory upon each State Government to establish one or more MSME Councils for the purpose of the MSMED Act. Thus, the intention of the Legislature was focused on the entire small and medium enterprises sector and to provide a single legal framework.

7. A similar question arose for consideration earlier before this Court and a decision has been rendered in **Ved Prakash, Karmic Energy Private Limited V. S.Ponram Unicorn Engineers, 2017 (5) CTC 18,** holding as follows :

> "*.... 7. Having seen the object of the Act, the necessity to preserve the Micro, Small and Medium Scale Industries, the method of protecting the interest of Investor, the composition of Council and the nature of jurisdiction to be exercised by the Council, the next to be considered is, when the Arbitration and Conciliation Act, 1996, is a special enactment, which is Special to the mode of resolution of dispute, giving preference to party autonomy and when the MSMED Act is Special Act, providing special mode of dispute resolution through specially qualified persons providing specific mode of enforcing payment, which method is preferable.*

*8. At this juncture, it is appropriate to consider the case of **Edukanti Kistamma (Dead) through LRs V. S.Venkatareddy (dead) through LRs., 2010 (1) SCC 756,** where the Supreme Court explained that a Special Statute would be preferred over a general one where it is beneficial. It was explained that the purport and object of the Act must be given its full effect by applying the principles of "Purposive Construction". The question whether the Dispute Resolution Mechanism under Section 18 of the MSMED Act overrides the Arbitration clause under the Contract has to be answered in the affirmative. As was explained in **Waman Shriniwas Kini V. Ratilal Bhagwandas & Co., AIR 1959 SC 689,** an Agreement contrary to a statutory provision that prohibits it would be unenforceable.*

8.1. Thus, it is clear that, out of two enactments, the provisions of the MSMED Act would prevail especially when it has an overriding provision under Section 24 where it has been clearly said that Sections 15 to 23 shall have the overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, the contention that the award passed by the Council is patently illegal, has to be rejected and it is rejected accordingly. ...."

7.1. An appeal in O.S.A.No.96 of 2017 was preferred against the aforesaid order of the learned Single Judge. A Division Bench of this Court, by the judgement dated 25.10.2017, refused to interfere with the order of the learned Single Judge. Thus, it is clear that the

MSMED Act will have overriding effect over the Arbitration Act and this Court is in total agreement with the said proposition.

8. Having participated in the proceeding before the MSME Council, which is now stayed only by virtue of the order of the Karnataka High Court at the instance of the petitioner, the petitioner is estopped from raising the issue of arbitrality by the MSME Council. Albeit, it is not in dispute that there exists an arbitration agreement, which is found in the Purchase Order. However, the question is as to whether the dispute raised by the petitioner, the claim and the counter-claim are capable of settlement through arbitration.

9. As stated supra, MSMED Act does not make any provision excluding any category of disputes treating them as non-arbitrable. The MSMED Act itself is for the benefit of micro, small and medium enterprises, it speaks about only the recovery of amounts due from the buyer. Section 17 of the MSMED Act provides for the jurisdiction of the MSME Council to act as an Arbitrator or Conciliator in respect of the matters referred to in Section 17. However, the Act does not exclude the rights of the Supplier. Section 24 of the MSMED Act provides for an overriding effect over anything inconsistent therewith in any other law for the time being in force. Thus MSMED Act, being a

special statute will have an overriding effect on the Arbitration Act, which is a general Act.

10. In **A.Ayyasamy V. A.Paramasivam (2016) 10 SCC 386,** arbitrable and non-arbitrable disputes is being discussed by the Apex Court as follows:

> *".... 14. In the instant case, there is no dispute about the arbitration agreement inasmuch as there is a specific arbitration clause in the partnership deed. However, the question is as to whether the dispute raised by the respondent in the suit is incapable of settlement through arbitration. As pointed out above, the Act does not make any provision excluding any category of disputes treating them as non-arbitrable. Notwithstanding the above, the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The Courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. Following categories of disputes are generally treated as non-arbitrable[4]:*
>
> *(i) patent, trademarks and copyright;*
>
> *(ii) anti-trust/competition laws;*
>
> *(iii) insolvency/winding up;*
>
> *(iv) bribery/corruption;*
>
> *(v) fraud;*
>
> *(vi) criminal matters.*

Fraud is one such category spelled out by the decisions of this Court where disputes would be considered as non-arbitrable.

15. 'Fraud' is a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment. Fraud can be of diffeent forms and hues. Its ingredients are an intention to deceive, use of unfair means, deliberate concealment of material facts, or abuse of position of confidence. The Black's Law Dictionary defines 'fraud' as a concealment or false representation through a statement or conduct that injures another who relies on it[5]. However, the moot question here which has to be addressed would be as to whether mere allegation of fraud by one party against the other would be sufficient to exclude the subject matter of dispute from arbitration and decision thereof necessary by the civil court."

11. The Apex Court in the judgment rendered in **Himangni Enterprises V. Kamaljeet Singh Ahluwali, (2017) 10 SCC 706,** following the judgements in **Natraj Studios (P) Ltd. V. Navrang Studios, (1981) 1 SCC 523** and **Booz Allen and Hamilton Inc. V. SBI Home Finance Limited, (2011) 5 SCC 532,** held that when as per the special statute one of the parties enjoys statutory protection, then the Special Act will have overriding effect. The MSMED Act, being a special enactment, has an overriding effect over the Arbitration Act, which is a general Act.

12. The petitioner is not precluded from making its claim before

the MSME Council, independent of the claim made by the respondent or as a counter claim. The applicant cannot be allowed to proceed parallely by filing arbitration claim with respect to the same transaction, for which, the respondent has already moved the MSME Council, as if the same is allowed, it will result in conflict of decisions jeopardising the interest of the parties.

13. With the above observations, the Original Petition is dismissed. The parties are directed to bear their own costs.

05.07.2018

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PUSHPA SATHYANARAYANA.J

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