

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.77 OF 2017

M/s. Porwal Sales .. Petitioner
Versus
M/s. Flame Control Industries .. Respondent

Mr. Nilesh Wable for the petitioner.

Mr. Amrut Joshi I/b. Sanket Mungale for respondent.

CORAM : G.S.KULKARNI, J.
DATE : 14th August 2019.

ORAL JUDGMENT:

This is a arbitration petition filed under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter for short “the said Act”), whereby the petitioner is before the Court praying that an arbitral tribunal be appointed to adjudicate the disputes between the parties under an agreement entered between the petitioner and the respondent, whereby the petitioner was appointed by the respondent as an exclusive stockists of the respondent’s products.

2. The question which arises for consideration in this Petition is as to whether the jurisdiction of this Court under section 11 of the Arbitration and Conciliation Act, 1996 is taken away merely because the respondent is a small scale enterprise falling under the **Micro, Small and Medium**

Enterprises Development Act, 2006 (for short “**MSMED**” Act), and when no application/reference has been made by the respondent invoking the provisions of Section 18(1) of the MSMED Act.

3. The petitioner is a proprietary concern of Mr. Vijay Porwal, and is engaged in selling and marketing all kinds of kitchen appliances/products, at Pune in Maharashtra at the address shown in the cause title. The respondent is stated to be engaged in the business of manufacturing and supply of several kinds of kitchen appliances, having its manufacturing unit at Himachal Pradesh.

4. The case of the petitioner is that by a letter dated 24th February 2012, (for short “**the appointment letter**”) the respondent appointed the petitioner as an exclusive stockists for the Maharashtra region (excluding Mumbai and Nagpur) for marketing and promoting the respondent's products which were marketed under the brand name “Surya City” for the HPCL and IOCL distributors in the State of Maharashtra (excluding Mumbai and Nagpur). This appointment letter issued by the respondent is stated to be the contract between the parties. The appointment letter sets out various terms and conditions permitting written or oral purchase orders to be placed by the petitioner on the respondent for supply of materials to be delivered to the petitioner within seven days of the receipt of such

written or oral purchase order. Clause 12 provides that in case of any disputes between the parties the same shall be resolved through arbitration.

5. There is much controversy about this appointment letter, which the petitioner contends to be a concluded contract between the parties. It would thus be appropriate to note the contents of the said letter in its entirety, which read as under:-

“Flame Control Industries

Mfg. Of : High Thermal Efficiency L.P. Gas Stoves (Green Label)

Date : 03.02.2010

To,
Aadinath Sales
(Prop: Shailesh Vijay Porwal)
110/02 Shivaji Nagar, Shop No: 03
Near Premier Garage, Pune 411005

**Sub: Appointment as exclusive stockiest for region of Maharashtra
(Ex: Mumbai & Nagpur)**

Respected Sir,

We hereby appoint you as our exclusive stockiest for marketing and promoting the company's product named & styled as “Surya City” to the BPCL distributors in the state of Maharashtra, on the following terms & condition :

1. We hereby appoint you as our exclusive stockiest for stocking, marketing and selling company's product to BPCL LPG distributors in the state of Maharashtra (Ex: Mumbai & Nagpur). You shall promote and market company's product in entire state of Maharashtra.

2. You shall promote and market the products to the various authorized BPCL LPG distributors only in area as mentioned in the Point no.1 and whereas company assures not to appoint / authorized any other person(s) or entity(s) for marketing and selling company's product in the area allotted to you.

3. Company will within 7 days of the receipt of the written or oral purchase order from you, would arrange to consign its material from its work place (factory), through road transport or any other mode of transport, to be delivered at your warehouse situated in Pune, which you shall receive and stock the same.
4. For dispatch of Material to BPCL distributors, you shall arrange for door delivery on freight paid basis by suitable mode of transport. The freight and other charges for reaching the stock to distributors will be on your account. Any claim on damages / shortages while dispatching the material to distributors will be settled by you, the company shall not be liable on this account.
5. You will keep the portal of BPCL updated every day, with details of dispatches made by you to the distributors of BPCL.
6. The relationship between the parties hereto shall be on principal-to-principal basis. You shall at no point of time hold yourself as agent or representative of the company and the company shall not be responsible for omission or commission on your part.
7. You will raise the invoice for the material dispatch/ delivered to the BPCL distributors, provided in no case the invoice raise should be over & above the price as specified on BPCL portal and you shall be responsible to collect payments from them. The company at its discretion will only help the Stockiest to recover the money by representing the matter to the concerned officials of BPCL.
8. Company further assures and agrees to give 100% replacement of the defective, damaged, expired / absolute goods within 15 days of receiving or reporting the same. Company further agrees to provide free of charge the Spare Parts up to 1% in value of the Annual Turnover.
9. All the persons employed, hired or engaged by you to carry out you function and obligation shall remain your employees, you shall ensure that you pays the salary and other dues to the said persons and also complies with the statutory requirements in respect of such persons. The Company shall have no obligations or responsibility of whatsoever nature in this regard.
10. You shall release the payment within 60 days from the date of raising invoice.
11. The contract awarded to you shall be perpetual. Both the parties cannot terminate this contract for initial period of five years. Thereafter, either party can terminate the contract by giving 180 days written notice to other party.

12. In case of any dispute or difference between you and Company the same shall be resolved through arbitration in accordance with the provisions of Arbitration and Conciliation Act 1996 and its subsequent statutory modification. All such proceedings shall be subject to jurisdiction of courts in Pune.

13. Two copy of the contract is sent to you. Please sign the second copy towards your acceptance of stockiest.

For Flame Control Industries

Sd/-
Accepted

Sd/-
Sanjay Gupta
Authorized Signatory)

Regd. Off. 41, Rama Park, Kishan Ganj, Delhi-110007 (INDIA)
Ph. +91-11-23699944, 23693040 Tele Fax : +91-11-23694488.
Mob.: +91-9810039282, 9810039285, 9971655552
E-mail: flame.suryacity@gmail.com
Works:- Khasra No. 421, Village Naryal, Near Sec. 4, PARWANOO-173220
Dist. Solan (H.P) India Ph.: 01792-235223

(emphasis supplied)

6. It is the petitioner's case that the above contract was acted upon and purchase orders were placed on the respondent and supplies were accordingly made by respondent so also the payments are made by the petitioner to the respondent therefor. The averments to that effect are to be found at paras 4 and 5 of the petition. The petitioner has also placed on record the communication dated 18th June 2015 whereby the petitioner informed the respondent on its complaint of material not being received by the petitioner, so also certain spare parts of material not being dispatched and that this was blocking the sales of the petitioner. The petitioner has also referred to an e-mail of 30th July 2015 of the respondent in response to the petitioner's communication dated 18th June 2015 whereby the

respondent apologised to the petitioner for delays. The said e-mail reads thus:-

“Flame Control Industries
<fci.suryacity@gmail.com>
To : PORWAL SALES <porwalsales@gmail.com>

Dear Sir,

In reference to the above Mail, we would like to sincerely apologize for the delay in dispatch of the material. As you must be aware due to the EID Festival we had to face a lot of problems concerning the Polish of the Body. The Polishers did not turn for nearly around 13 Days, Due to which we were unable to process your Order. It has been our irresponsibility that we did not inform you about the delay, for which I sincerely seek your apology.

We shall make sure in the near future that this negligence does not happen again. We shall Fulfill your Orders within 4 days of the Order Received of the Gas Stove.

Sd/-
Yashasvi Gupta
(Chief Executive Officer)
FLAME CONTROL INDUSTRIES “

7. There is substantial correspondence between the parties in regard to the business transactions and the unsatisfactory performance on the part of respondent. There are exchanges of e-mails from 30th July 2015 to 9th February 2016 and ultimately on 20th October 2016, the respondent informed the petitioner that the respondent has started supply of materials to another stockist and that the respondent did not wish to carry on business with the petitioner any more and hence would stop all dispatches to the petitioner.

8. The petitioner's Advocate, thereafter, by his letter dated 27th March

2017 addressed to the respondent recorded that between the parties there were transactions of more than Rs.12 crores. It was also pointed out that spare parts were not supplied by respondent to the petitioner and considering the percentage of turnover, the petitioner was entitled to spare parts worth Rs.12 lakhs and accordingly made a claim for the said amount. It was also stated that if the respondent fails to pay the said amount, the petitioner would be required to approach a sole arbitrator as agreed between the parties in the said letter dated 24th February 2012 of respondent no. 1. Thereafter, the advocate for the petitioner again addressed a notice on 6th May 2017 to the respondent, inter alia, recording that the respondent had failed to revoke the illegal termination and also to make payment of Rs.12 lakhs to the petitioner, hence the petitioner had no option but to refer the disputes to arbitration as agreed between the parties under clause 12 of the appointment letter. Three names of the proposed arbitrators were also suggested. The said notice was sent by speed post and a postal acknowledgement is also endorsed at page 26 of the paperbook. The respondent failed to respond to this notice and to appoint a sole arbitrator. The petitioner has thus filed this petition under section 11(6) of the Act praying for appointment of an Arbitrator.

9. The respondent has filed a reply affidavit to this petition dated 25th

October 2017. A preliminary objection is raised on behalf of the respondent to the effect that there is no arbitration agreement between the parties as the appointment letter dated 24th February 2012 itself is forged and fabricated. To support this contention, the respondent contends that the said appointment letter executed on behalf of the respondent by Mr. Sanjay Gupta as authorized signatory, cannot be acted upon as Mr. Sanjay Gupta had no authority to enter into such an agreement with the petitioner to appoint the petitioner as stockist. It is further contended that the said document being a fabricated document, can be clearly seen from the fact that the letter head of the said letter, in the address portion of the respondent refers to an e-mail id “flame.suryacity@gmail.com” which was created by the respondent for the first time in the year 2013 and to be precise on 13th March 2013. It is therefore contended that since the “e-mail id” itself was not in existence on the day the said appointment letter dated 24th February, 2012 was issued, there was no question of e-mail id being printed on the letterhead and thus the document is a forged one.

10. The respondent contends that although no reference of the dispute has been made to the facilitation council under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short “MSMED Act”); nonetheless considering the provisions of Section 18(4) of the Act,

this Court would not have jurisdiction to entertain this Petition under section 11 of the Arbitration and Conciliation Act, as the respondent is a small scale enterprise. The objection as raised in the reply affidavit is as under:

“5. That the present petition of the petitioner is not maintainable in law because the provisions of Section 11 of the Arbitration and Conciliation Act, 1996 can only be invoked when both the parties admit and accepts execution of the agreement and there is specific clause of arbitration. But in the present case in hand, the first requirement is not fulfilled because the respondent has disputed the execution of so-called agreement dated 24/02/2012 hence, the present petition of the petitioner is liable to be dismissed.

6. That even if, for the sake of argument, it is presumed (though not admitted) that there is an agreement dated 24/02/2012 between the parties and there is specific clause of arbitration even, then the Hon'ble Court has no jurisdiction to try and entertain the present petition as per provisions of Section 24 of Micro, Small & Medium Enterprises Development Act, 2006, which reads as under:

“24. Overriding effect. The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

In this regard, it is submitted that manufacturing unit of the respondent is an SSI Unit governed under the MSME Development Act, 2006. Hence, this Hon'ble Court has no jurisdiction to try and entertain the present petition and is liable to dismissed on this ground alone.”

11. It is next contended that the document containing the arbitration agreement is a fabricated document is also clear from the fact that the correspondence which was entered into between the parties during the relevant period namely 10th March 2012 to 22nd March 2012 (pages 52 and 53 of paperbook) would indicate that the e-mail id as referred to in the letter dated 10th March 2012 and 22nd March 2012 is different than the one

claimed by the petitioner. This according to the respondent is an additional factor to be considered.

12. The petitioner has filed a rejoinder affidavit to contend that the respondent has taken a false stand. It is contended that the signatory to the said letter dated 24th February 2012 was the authorised signatory of the respondent at the relevant time. To support this contention the petitioner has also placed on record an agreement entered into between BPCL and the respondent dated 16th November, 2011 (pages 43 to 51 of paperbook) which was executed by Mr. Sanjay Gupta on behalf of the respondent. The petitioner has also referred to an e-mail dated 23rd March 2012.

13. As one of the contentions of the respondent was that the said e-mail id of the respondent was not in existence when the appointment letter dated 24th February, 2012 was issued by the respondent in favour of the petitioner, this Court on 8th October 2018 (S.J.Kathawalla, J) had passed the following order calling upon Google India to verify and make a report as to the existence of the subject e-mail id.

“Since the Advocate for the Respondent has contended that the e-mail address flame.suryacity@gmail.com was not in existence when the parties by a letter dated 24th February, 2012 entered into an Agreement to refer their disputes to Arbitration, Google India Private Limited, North Avenue,

Maker Maxity, Bandra Kurla Complex, Bandra (East), Mumbai – 400 051, shall inform the Court on 15th October, 2018 as to when the e-mail address flame.suryacity@gmail.com was created/opened. Stand over to 15th October, 2018, first on board.”

15. In pursuance of the said order dated 8th October 2018, Google India filed a report on 26th October 2018 stating therein that the said e-mail account was created on 13th March 2013.

16. It is well settled and more particularly considering the amended provisions of section 11(6A) of the Arbitration and Conciliation Act that while adjudicating the application under section 11 of the Act, the basic premise for the court would be to consider whether there exist an arbitration agreement between the parties. The law in that regard is well settled (*see Duro Felguera S.A. Vs. Gangavaram Port Ltd., reported in (2017) 9 S.C.C. 729*). The Supreme Court in the case of *Velugunbanti Hari Babu Vs. Parvathini Narasimha Rao and Anr.*¹ has held that the plea regarding the validity and genuineness of the arbitration agreement is required to be decided by the Court so as to come to a conclusion as to whether arbitration agreement exists between the parties. Learned Counsel for the parties have also argued their respective case on these

¹ (2016) 14 SCC 126

issues, accepting the above legal position and on the basis of documents as placed on record.

17. Considering the facts and circumstances of the case, I am not persuaded to accept the submission as urged on behalf of respondent that the document dated 24th February 2012 (supra) being an agreement between the parties containing the arbitration clause (clause 12), is a forged and fabricated document. This for the reason that the respondent at no point of time earlier to the filing of these proceedings, disputed this document and more particularly the arbitration agreement as contained therein. There are categorical averments made in the memo of the petition that post the contract in question, that is after the issuance of this appointment letter dated 24th February, 2012 (containing the arbitration clause), purchase orders were placed by the petitioner on the respondent and supplies were effected from time to time based on these purchase orders. There are transaction worth crores of rupees. It is difficult to accept that the respondent in the absence of any contract would enter into such large transactions.

18. Further the said appointment letter dated 24th February, 2012 (being an agreement between the petitioner and respondent) sets out that the petitioner was appointed as stockist (excluding Mumbai and Nagpur), on

clear terms and conditions as set out in the clauses contained therein. Clause 1 clearly refers that the petitioner is appointed as exclusive stockiest for stocking, marketing and selling company's product to BPCL and LPG distributors in the state of Maharashtra (Excluding Mumbai and Nagpur). Clause 4 refers to dispatch of materials to BPCL distributors for which petitioner has to arrange for door to door delivery on freight paid basis by suitable mode of transport. Clause 5 refers to keeping the portal of BPCL updated every day with details of dispatches made by you to the distributors of BPCL. This agreement is signed by Mr. Sanjay Gupta stated to be authorized signatory of the respondent. Though respondent has denied Mr. Sanjay Gupta being its authorized signatory, what is significant is that this very authorized signatory (Mr. Sanjay Gupta) has entered into an agreement with BPCL on 16th November 2011 just before the agreement in question was entered with the petitioner on 24th February, 2012. A copy of the same is placed on record by the petitioner. This agreement is executed between BPCL, a public sector undertaking and signed by Mr. Sanjay Gupta on behalf of respondent. This is an agreement whereby the respondent agreed that products manufactured by the respondent- 'Flame Control Industries', would be marketed through BPCL distributors for sale amongst Bharatgas customers. This clearly shows that Mr. Sanjay Gupta was the authorized signatory of the respondent at the relevant time, who

was authorized to enter into an agreement not only with BPCL but also in the usual course of business to execute the contract dated 24th February 2012, with the petitioner, which was acted upon and transactions had taken place between petitioner and respondent on that basis. Apart from the bare words of the respondent, there is nothing on record, for the respondent to support its contention that Mr. Sanjay Gupta was not their authorized signatory.

19. There is thus much substance in the petitioner's contention that the respondent has not placed on record any document (other than agreement/letter dated 24th February 2012) or any other material on the basis of which the respondent's contention that Mr. Sanjay Gupta was not authorized to issue the appointment letter can be accepted. In fact clause 3 of the said contract dated 24th February 2012 clearly indicates that the petitioner is expected to receive and stock the material which will be sent by respondent within seven days of receipt of a written or oral purchase order from petitioner. It is in this manner the transactions had taken place between the parties. It is thus difficult to believe that the respondent in the absence of any agreement supplied its products for such large amounts to the petitioner for such a long period. Hence it is also difficult to believe that the agreement in question was not acted upon and/or the same is

forged and hence there is no question of a sole arbitrator to be appointed as per clause 12 of the said agreement, on the specious plea that the agreement is forged for the reason as contended by the respondent that as the e-mail id was not in existence on the date of the agreement and that Mr. Sanjay Gupta was not authorized to execute the agreement as he had resigned. In fact there is no material for the respondent to support this contention as noted above.

20. The plea as raised by the respondent that since the e-mail id was not in existent on the date the appointment letter dated 24th February, 2012 (contract) was issued in favour of petitioner, as the document is forged and fabricated also cannot be accepted, as it would be equally important to note the conduct of the parties, when such a plea is being advanced. Firstly the said contract was clearly acted upon as clear from the transactions between the parties for several years. Secondly, the invocation notices as issued on behalf of the petitioner dated 27th March 2017, there is a clear reference to the appointment letter/agreement dated 24th February 2012. This notice was received by the respondent as there is a reference to the receipt of the postal authority. This is the occasion when the respondent had a clear notice of the appointment letter (the contract) containing arbitration clause, which was pressed into service not only for the purpose

of petitioner's seeking compliance with the contractual terms and conditions, but also for appointment of an arbitrator as provided under clause 12 of the said letter. However, the respondent did not deny or take a position that the reference to the appointment letter/agreement dated 24th February 2012 was invalid or that no such appointment letter was issued or that such an agreement did not exist. This itself would amount to a clear admission on the part of the respondent of the existence of the contract and embedded in it, the arbitration agreement. It appears that the plea of the documents being forged is clearly taken as an after thought and on the basis of irrelevant circumstances being e-mail id not created etc.

21. In so far as the respondent's contention that the said e-mail id was not in existence on the day the appointment letter (contract), was issued on 24th February, 2012, I would not be satisfied that this sole circumstance is sufficient to accept the respondent's contention that the document is forged and fabricated. As argued on behalf of the petitioner, the respondent in advance had desired to have such an e-mail id and which was in fact registered subsequently, and the respondent was using it. Mere reference to incorrect e-mail id thus would not be sufficient to hold that the document is forged or fabricated in the absence of any other supporting circumstances as noted in detail in the foregoing paragraphs. Further the

insurmountable facts showing the dealing between the parties would also prevent me from accepting this weak defence of Mr. Sanjay Gupta not being an authorized signatory or that the said appointment letter is required to be discarded on its reference to the email id, as noted above. The document was signed by Mr. Sanjay Gupta, who was admittedly accepted by the respondent as its employee at the relevant time. This coupled with the fact that the agreement was acted upon and there were transactions undertaken between the parties for four years is undisputed.

22. In the circumstances, the respondent's contention that there is no arbitration agreement between the parties needs to be rejected. The appointment letter (contract) was issued by the respondent. It is in writing. It contains an arbitration agreement. The contract was acted upon. The test for existence of an arbitration with reference to section 7 of the Act is sufficiently satisfied. There is also appropriate invocation of the arbitration agreement.

23. Now coming to the next submission as advanced on behalf of the respondent on the MSMED Act. Learned counsel for the respondent has argued that in view of the provisions of Section 18 of the MSMED Act, this Court would not have jurisdiction to entertain this Petition under Section 11 of the Arbitration and Conciliation Act. In support of this submission,

learned counsel for the respondent has placed reliance on the decision of the Division Bench of the Allahabad High Court in **M/s. Paper & Board Convertors through partner Rajeev Agarwal vs. U.P. State Micro and Small Enterprise and Ors.**²; in **Bharat Heavy Electricals Ltd. vs. The Micro and Small Enterprises Facilitations Centre & Anr.** of the learned Single Judge of the Delhi High Court³; and in **Welspun Corporation Ltd. vs. Micro and Small, Medium Enterprises Facilitation Council, Punjab & Ors.** of the learned Single Judge of Punjab and Harayana High Court⁴. The contention as urged on behalf of the respondent referring to these decisions is that Section 18(4) of MSMED Act creates a bar on the jurisdiction of this Court to entertain any application under section 11 of the Act and/or that the arbitration agreement between the parties stands obliterated, extinguished and superseded by the provisions of sub-section (4) of Section 18 of MSMED Act.

24. To appreciate this submission as urged on behalf of the respondent, Sections 17 and 18 of MSMED Act is required to be noted, which reads thus:

“Section 17 - Recovery of amount due

17. For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided

² 2014 SCC Online All. 5825

³ 2017 SCC Online Delhi 10604

⁴ 2013(1) I.L.R. Punjan & Haryana 709

under section 16.

Section 18 - Reference to Micro and Small Enterprises Facilitation Council

(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.”

25. On a plain reading of sub-section (1) of Section 18, it is quite clear that sub-section (1) would be applicable when any amount is due under section 17 to a supplier and when there is a liability of the buyer to make payment to the supplier. Thus the supplier falling under the provisions of the Act “notwithstanding anything contained in any

other law for the time being in force” would be entitled to make a reference to Micro and Small Enterprises Facilitation Council. Sub-section (2) provides for a conciliation after such reference is received. Sub-section (3) provides for a situation when the conciliation is not successful, then the ‘Facilitation Council’ shall 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 for such reference, the provisions of the Arbitration and Conciliation Act, 1996 shall apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of the Arbitration and Conciliation Act, 1996. Sub-section (4) saves the jurisdiction of the ‘Facilitation Council’, notwithstanding anything contained in any other law for the time being in force, to act as an Arbitrator or Conciliator in respect of a dispute between between the supplier located within its jurisdiction and a buyer located anywhere in India.

26. Considering the scheme of Sections 17 and 18, in my opinion sub-section (4) of Section 18 cannot be read in isolation. It is required to be read in conjunction with sub-section (1) of Section 18. Section 18 of the MSMED Act is attracted when the jurisdiction of the

Facilitation Council is invoked by a party to a dispute with regard to any amount due under section 17 of the Act.

27. In the present case, it is not in dispute that the respondent has so far not raised any claim against the petitioner and the jurisdiction of the Facilitation Council has not been invoked by either the respondent or the petitioner. It thus cannot be accepted that the provisions of sub-section (4) of Section 18 of MSMED Act are attracted in any manner in the absence of any reference being made to the Facilitation Council. When there are no proceedings before the Facilitation Council, it is difficult to accept the submission as urged on behalf of the respondents that provisions of Section 18 of the MSMED Act are attracted in the facts of the present case.

28. In any event, sub-section (4) of Section 18 cannot be read as a provision creating an absolute bar to institution of any proceedings other than as provided under section 18(1) of the MSMED Act, to seek appointment of an arbitral tribunal. If the argument as advanced on behalf of the respondent that Section 18(4) creates a legal bar on a party who has a contract with a Small Scale Enterprise, to take recourse to Section 11 under the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator, then the legislation would have

so expressly provided, namely that in case one such party falls under the present Act, the arbitration agreement, as entered between the parties would not be of any effect and the parties would be deemed to be governed under the MSMED Act in that regard. However, sub-section (4) of Section 18 of the MSMED Act does not provide for such a blanket consequence in the absence of any reference made by a party to the Facilitation Council. Also if Section 18 is read in the manner the respondent is insisting, it would lead to a two-fold consequence – firstly, it would amount to reading something in the provision which the provision itself does not provide, which would be doing a violence to the language of the provision; secondly such interpretation in a given situation would render meaningless an arbitration agreement between the parties and it may create a situation that the party who is not falling within the purview of Section 17 and Section 18(1) would be foisted a remedy, which the law does not actually prescribe. Further sub-section (1) uses the word “may” in the context of a dispute which may arise between the parties under Section 17. In the present context, the word “may” as used in sub-section (1) of Section 18 cannot be read to mean “shall” making it mandatory for a person who is not a supplier (like the petitioner) to invoke the jurisdiction of the Facilitation Council. Thus, the interpretation of sub-section (4) of

Section 18 as urged on behalf of the respondent of creating a legal bar against the petitioner to file a petition under section 11 of the Arbitration and Conciliation Act cannot be accepted.

29. In regard to the decisions as relied by the learned counsel for the respondents, in my opinion, these decisions are certainly not applicable in the facts of the present case. In each of these cases, there was admittedly a reference made to the Facilitation Council and once a reference was made to the Facilitation Council, the Court, in the facts of each of these cases, has come to the conclusion that an argument would not be available to urge that the Facilitation Council has no jurisdiction. There cannot be any dispute on this proposition these decision(s) advance. Moreover this Court following the decision of Division Bench of this Court in **Gujarat State Petronet Ltd. vs. Micro and Small Enterprises Facilitation Council & Ors.**,⁵ has also consistently taken a view that once a reference is already made to the Facilitation Council, an application under section 11 of the Act would not be maintainable. In fact in a dispute which has arisen between the present respondent and another entity connected with the petitioner, namely, M/s. Adhinath Sales, this Court has passed an order rejecting Section 11 Application, permitting the petitioner therein to approach

5 AIR 2018 Bom 265

the Facilitation Council and make a claim, as the respondent had already invoked the jurisdiction of the Himachal Pradesh Facilitation Council under Section 18 of the Act. However, such is not the situation in the present case as noted above.

30. In the above circumstances, this petition needs to succeed. A Sole arbitrator will have to be appointed. Hence, the following order:-

ORDER

- (i) Dr. Justice Smt. Shalini Phansalkar Joshi, Former Judge of this Court is appointed as a sole Arbitrator to adjudicate the disputes between the parties.
- (ii) The learned prospective sole arbitrator, ten days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Registrar (Judicial-I), to be placed on record of this application with a copy to be forwarded to both the parties;
- (iii) The fees payable to the arbitral tribunal shall be as prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018.
- (iv) All contentions of the parties are expressly kept open.

- (v) At the first instance, the parties shall appear before the prospective arbitrator within a period of 10 days from today on a date which may be mutually fixed by the prospective sole arbitrator;
- (vi) The petition is disposed of in the above terms. No costs.
- (vii) Office to forward a copy of this order to the learned Arbitrator on the following address:

Bungalow No. 12,
Bhagya Chintamani Society,
Opp. Kachra Depot, Paud Road,
Kothrud, Pune – 411 038.
(M) – 9657188676
Email – phansalkarjoshi@gmail.com

(G.S.KULKARNI, J.)