

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.09.2020

CORAM

**THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR**

O.P.No.300 of 2019

Leitwind Shriram Manufacturing Private Limited  
4<sup>th</sup> Floor, Sigapi Achi Building,  
18/3, Rukmani Lakshmipathy Salai,  
Egmore, Chennai - 600 008.  
Rep. by its General Manager,  
Ms.Gomathythamarai Selvi.

... Petitioner

Vs.

GR Green Life Energy Pvt. Ltd.  
SR No.81, Flat No.09, Indira Memories  
Near Sakal Nagar,  
Aundh, Pune - 411007.

... Respondent

**Prayer :** Original Petition is filed under Section 11(6)(b) of the Arbitration and Conciliation Act, 1996, to appoint an Arbitrator in terms of Clause 22 of the Development Agreement dated 10.02.2014 to adjudicate upon the differences and disputes between the parties under the Development Agreement dated 10.02.2014.

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For Petitioner : Mr.Vishnu Mohan

For Respondent : Mr.Aditya Reddy

**ORDER**

This application has been filed for appointment of arbitrator in terms of Clause 22 of the Development Agreement dated 10.02.2014 to adjudicate upon the differences and disputes between the parties under the Development Agreement dated 10.02.2014.

2. By agreement dated 10.02.2014, the petitioner herein entered an agreement with the respondent for setting up a wind farm project, wherein, the respondent agreed to purchase the land parcels, provide some services and ultimately handover the wind manufacturing project to the petitioner herein.

3. The Clause 20 of the agreement reads as follows :

*"20. Governing Law and Jurisdiction and Service of Process :*

*.....*

*(c) All disputes, difference and claims or any non-payment concerning the project work hereby created and/or touching this presents, arising out of or in relation to anything contained herein shall be referred to arbitration to be held at Chennai, under the provisions of Arbitration and Conciliation Act, 1996 (in force time to time). The arbitration panel shall consist of three arbitrators, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint the presiding arbitrator. The parties hereto shall duly observe and person any interim award/s or direction/s of the arbitration tribunal and the award in pursuance to arbitration shall be final and binding on the parties hereto. The arbitration*

*proceedings shall be conducted in English language.”*

4. It is the contention of the petitioner that they released a sum of Rs.6.475 Crores on an account basis as envisaged by the agreement. However, no proper services were forthcoming from the respondent as per the terms of the agreement. Requisite land parcels were also not provided within the time as agreed in the agreement. When the matter stood thus, the respondent issued a legal notice on 21.04.2018 making an untenable and baseless demand for the damages to the tune of Rs.3,26,08,545/-, which was denied by the petitioner by issuing a reply dated 21.01.2019. As there was an issue raised, the petitioner invoking the arbitration clause. As the respondent has not shown any interest, the present petition is filed.

5. It is the contention of the respondent that the respondent is registered under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as MSMED Act). Therefore, it is the contention that any dispute in respect of amount due to the supplier has to be referred to the arbitrator as provided under the MSMED Act. His further contention is that they already raised dispute under Section 18 of the MSMED Act. Therefore, the present application is not maintainable. They also denied various other facts and allegations made by the petitioner.

6. Mr.Vishnu Mohan, learned counsel appearing for the petitioner submitted that the agreement was executed on 10.02.2014. The respondent having agreed to purchase the land parcels has not purchased the properties as agreed in the agreement and the service which was undertaken has not been provided in time. In such view of the matter, the parties agreed to refer the dispute to the arbitrator. It is his further contention that the petitioner has also raised counter claim against the respondent. MSMED Act does not provide for entertaining the counter claim. Hence, it is the contention that the matter has to be referred only to the arbitrator as per the agreement between the parties. His further contention is that the respondent has registered under the MSMED act only in 2017, whereas, the dispute is much prior to that and no service has been given as agreed in the agreement. Therefore, merely because the respondent is registered under the MSMED Act at later point of time, such act cannot be invoked and the overriding effect of Section 24 cannot be applied in the present case. His further contention is that Chapter V read in entirety, makes it very clear that only the ascertainable amount due to the supplier could be recovered by way of referring the matter to the mechanism as provided in the MSMED Act and Section 18 also does not indicate anything about the entertaining the counter claim. Hence, his contention is that arbitrator to be appointed. The overriding effect cannot be pressed into service to non-suit the right of the petitioner to refer the dispute.

7. Whereas, the learned counsel appearing for the respondent submitted that MSMED Act being special statute and overriding all other provisions of law. Therefore, when there is a mechanism provided under the Act for the reference for mediation and arbitration, there is no specific exclusion in the Act to entertain the counter claim. The respondent already invoked arbitration clause before the MSME council. In such view of the matter, the present petition is not applicable.

8. He also placed reliance on the judgment in **Ved Prakash, Karmic Energy Private Limited V. S.Ponram Unicorn Engineers, [2017 (5) CTC 18]**, wherein, it has been held that as per the MSMED Act, there is no bar in entertaining the counter claim.

9. The factual background leading to dispute has not been disputed. The parties entered agreement on 10.02.2014, wherein, the respondent has agreed to purchase the land parcels and also provide some services within the time. It is the contention of the petitioner that they already paid more than a sum of Rs.6 Crores, however, the service has not been properly provided by the respondent.

10. The legal notice was issued by the respondent on 21.04.2018 claiming a sum of Rs.3,26,08,545/- which was denied by the petitioner. The petitioner has also raised counter claim in the reply. It is an undisputed fact that the agreement was entered on 10.02.2014. Though the dispute has been raised by legal notice

on 21.04.2018, there is no whisper whatever as to whether the respondent is registered under the MSMED Act. Even in the agreement entered between the parties on 10.02.2014, there is no whisper as to whether the respondent fall under the category of the Micro, Small and Medium Enterprises, as provided under the Act.

11. Be that as it may, as per the definition of the MSMED Act, "The appointed day" means the day following immediately. One to become a supplier under the Act, the concerned industry should have been registered under Section 8(1) of the MSMED Act.

12. As per Section 2 Sub Clause n, "supplier" means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of Section 8. The above sub clause makes it very clear that to get a benefit under the Act as a supplier, the industry ought to have registered under Section 8(1). Though the Chapter 3 deals with classification of enterprises and what are the industries or enterprises fall within the ambit of the Act whether or not the respondent herein fall within Section 7, they have not disclosed anywhere even in the year 2018. It is relevant to note that first time, it appears that they have registered under the Act on 13.06.2017 under Section 8(1) to claim the benefit under the Act.

13. Though the respondent claimed that they are entitled to more than a sum of Rs.3,26,00,000/-, the very nature of service referred by the respondent is disputed by the petitioner. Apart from that, the title of the land parcels is also disputed by the petitioner. When the dispute is emanated from the date of agreement in the year 2014 and the project has not been materialised, this Court is of the view that merely to get an advantage, the registration under the Act has been made after 3 years of the agreement. Such a registration in view of this Court will lead to only interference that such a registration is normally done only to get the benefit under the Act. If any person comes under the purview of the Act as a supplier and any amount to be recovered from the petitioner or other person, the supplier is entitled to claim interest three times higher than the bank interest. This is one advantage under the Act. Similarly, in the event of award being passed in favour of the supplier, to challenge such award other side has to deposit 75% of the amount before the Court of Law as per Section 19 of the Act. There are two advantages to the person who registered under the MSMED Act. Therefore, this Court is of the view that having entered an ordinary contract, the possibility of registering under the Act to derive benefits conferred under the special Act also cannot be ruled out. Therefore, mere registration under the Act which was done after 3 years of the original contract, in view of this Court cannot be given much importance to extend the benefit under MSMED Act.

14. The MSMED Act gives benefit and protect the interest of the Micro, Small and Medium Enterprises. Though the above object is laudable, at the same time, the industries cannot be given undue importance only in order to get the benefits provided under the Act by just registering themselves as Micro, Small and Medium Enterprises, under the Act. If such registration given any undue importance, the possibility of any person or any industry getting registered under the Act later point of time for the sole purpose of gaining the advantage cannot be ruled out.

15. Be that as it may, now the issue involved in this petition is whether the dispute can be referred to the arbitrator under the Arbitration & Conciliation Act or has the dispute be resolved only under the MSMED Act. It is to be noted that Chapter V deals with delayed payments to Micro and Small Enterprises. Section 15 of the Act makes it clear that where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day. The above Section makes it clear that only to limit the time period for payment of money by the buyer to the supplier and in the event the amount due to the supplier is not paid as required under Section 15, the supplier is entitled to claim interest three times of the bank rate notified by the Reserve Bank as per Section 16 of the Act.

16. Section 17 deals with recovery of the amount due. Reading of Section 17 makes it very clear that for any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under Section 16.

17. The category of any goods supplied, the amount would be certainly ascertainable. Similarly, if there is no dispute as to the payment to the services rendered and amount payable is not disputed in both the cases. If the amount has not been paid within the time, then the buyer is liable to pay the interest at three times as indicated in Section 15 of the MSMED Act. The combined reading of Section 15, 16 and 17 makes it clear that the ascertainable amount which has not been paid by the buyer within the time, the buyer is liable to pay the interest.

18. Combined reading of Sections 17 and 18 makes it clear that only when there is a dispute as to payment, such dispute can be referred to the Micro, Small and Medium Enterprises Facilitation Council under section 18 of the Act. Sub Clause 2 deals with the manner in which the conciliation effected by the council. Sub Clause 3 deals with in the event of 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 any institution or centre providing alternate dispute

resolution services for such arbitration. Sub-Section 4 provides that the Micro, Small and Medium Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator.

19. The combined reading of Sections 15 to 18, this Court is of the view that only the amount payable to the supplier is due and if there is any dispute with regard to the amount payable to the supplier, the same can be referred to the Council as provided under Section 18. The council has to initiate the conciliation thereafter an arbitration. The council itself can also act as an arbitrator.

20. Nowhere the above sections deals with any other dispute, in the name of counter claim etc. Therefore, the non-obstante Clause and overriding the effect of the Act, Section 24 can be invoked only when there is a dispute with regard to the amount payable to the supplier and not the amount payable to the buyer by the supplier. Therefore, this Court is of the view that as long as there is no provision for raising the counter claim and the parties are agreed to refer the dispute under the Arbitration and Conciliation Act for reference as early as on 10.02.2014 in the agreement. At the relevant point of time, the respondent is neither shown to be a Micro, Small and Medium Enterprises nor registered under the Act. In such view of the matter, this Court is of the view that this is a fit case where the arbitrator to be appointed.

21. The contract provides for 3 members of arbitral tribunal. The petitioner has already nominated Hon'ble Mr.Justice R.Balasubramanian, Former Judge of the Hon'ble Madras High Court, as their arbitrator and the learned counsel for the respondent submitted that they have not got any instruction in this regard. In such view of the matter, the respondent shall nominate their arbitrator within a period of 15 days from the date of receipt of a copy of this order. On such nomination, both the learned arbitrators shall appoint a nominator within a period of 15 days after the nomination by the respondent. The fees of the arbitral tribunal shall be fixed by the arbitral tribunal and borne by both the sides.

22. With the above direction, this Original Petition is disposed of.

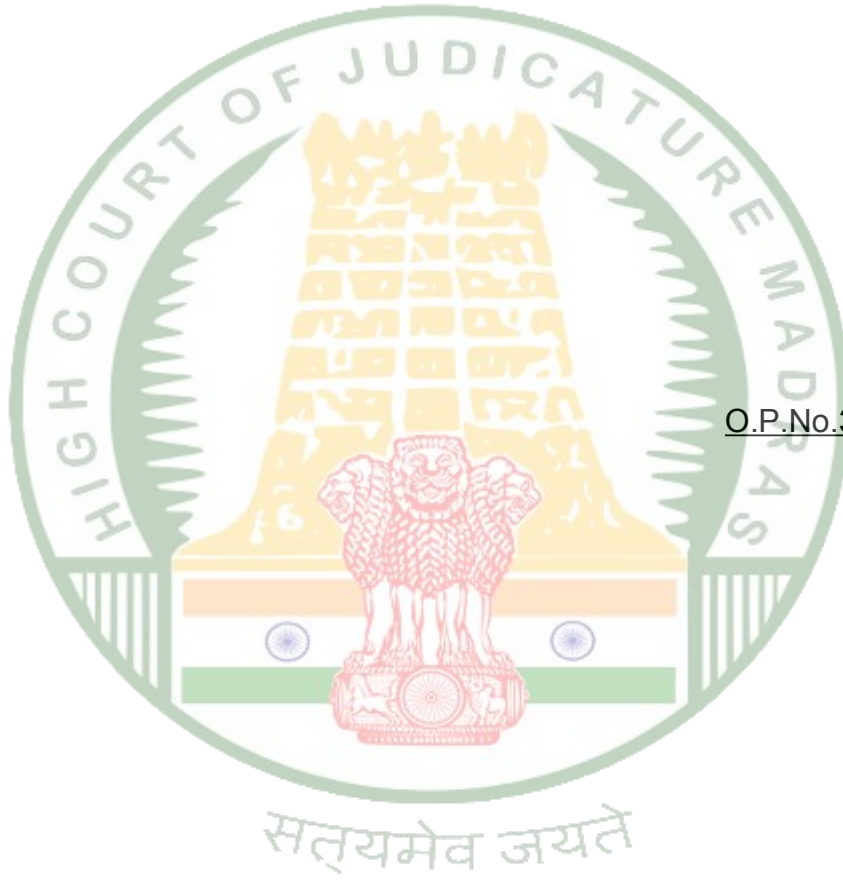
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**N.SATHISH KUMAR, J.**

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