

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

Present:-

The Hon'ble Justice Subhasis Dasgupta.

**CO. No. 1931 of 2022
Security Hitech Graphics Private Limited
Vs.
LMI India Private Limited**

For the Petitioner : Mr. Kushal Chatterjee,
Mr. Saptarshi Kumar Mal

For the Opposite Party/
Claimant : Mr. Bhaskar Chakraborty,
Mr. Subrata Mukherjee.

Heard On : 04.11.2022.

Judgment : 20.12.2022.

Subhasis Dasgupta, J:-

This revisional application is directed against the order dated 5th July, 2022 passed by learned Arbitrator in an arbitration proceeding being Case No. DL/10/M/SWC/00359 (*LMI India Private Limited Vs. Security Hitech Graphics Private Limited*) making 5th, 6th and 7th schedule of Arbitration and Conciliation Act inapplicable to referred arbitration proceeding, thereby causing infraction of the provisions of Section 12 (1) and (2) of Arbitration and Conciliation Act, 1996.

The first and foremost challenge, raised by Mr. Kushal Chatterjee, learned advocate appearing for the petitioner, is that arbitrator after being appointed in connection with an arbitration proceeding, though may be

under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the 'M.S.M.E.D. Act'), the Arbitrator is under obligation to disclose his independence, or impartiality, as disclosed in Section 12(1) and (2) of the Arbitration and Conciliation Act, 1996 making sufficient disclosure as per 5th, 6th and 7th schedule of Arbitration and Conciliation Act 1996.

Mr. Chatterjee further submitted that mandatory requirement as to the independence and impartiality of an Arbitrator in a case, where impartiality of Arbitrator was doubted, could not be given a go-by on the simpliciter score that Arbitrator had been appointed by Delhi Arbitration Centre in aid of M.S.M.E.D. Act. While making elaboration of such issue, Mr. Chatterjee argued that disclosure of impartiality ought to have been made at the beginning in order to ensure independence and impartiality of the Arbitrator to the instant arbitration proceeding. Non-adherence to such mandatory provision, as disclosed in Section 12 of the Arbitration Act would render the appointment of Arbitrator illegal.

The reasonable apprehension of biasness on the part of Arbitrator, if there be any, allegedly suffered by opposite party to the arbitration proceeding, had been taken care of by the legislature upon incorporating Section 12 of the Arbitration Act, 1996, which compulsorily made an Arbitrator to disclose in writing mandatorily any circumstances creating doubt or impartiality on the part of Arbitrator to the instant arbitration proceedings, Mr. Chatterjee argued.

It was thus submitted by Mr. Chatterjee that disclosure of impartiality doing adherence to the 6th schedule in context with 5th and 7th schedule of the Arbitration Act could not be construed to be inapplicable in case of arbitration, conducted under M.S.M.E.D. Act.

Adverting to M.S.M.E.D. Act, 2006, Mr. Chatterjee further submitted that there had been no apparent contradiction of the provisions of M.S.M.E.D. Act with Arbitration and Conciliation Act, 1996. When provisions of M.S.M.E.D. Act was not in contrast with Section 12 of the Arbitration and Conciliation Act, the mandatory requirement, disclosed in Section 12, as per 6th schedule could not be disregarded holding the same to be inapplicable under M.S.M.E.D. Act.

Reliance was placed by Mr. Chatterjee on a decision reported in **(2020) 2 SCC 445** delivered in the case of ***Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coal Field Limited***, to submit that preliminary objections, pertaining to the competence and impartiality of the Arbitrator, could be raised under Section 16 of the Arbitration and Conciliation Act, 1996, which should be decided by the Arbitrator himself doing adherence to Section 12 in aid of 6th schedule of Arbitration and Conciliation Act. It was thus emphatically submitted by Mr. Chatterjee that appointment of Arbitrator was subject to the declaration to be made by Arbitrator under Section 12 of the 1996 Act with respect to his independence and impartiality of the Arbitrator, and has ability to devote sufficient time to complete the arbitration within the specified period of time.

Reliance was further placed by Mr. Chatterjee on a decision reported in **(2004) 3 SCC 447** delivered in the case of **Secur Industries Ltd. vs. Godrej & Boyce Mfg. Co. Ltd. and Anr.**, to submit that the proceedings before the Council would be proceedings under 1996 Act, pursuant to a deemed agreement between the parties to the dispute.

Upon referring such decision argument was raised that when nature of the proceedings before the Industry Facilitation Council was held to be a proceeding under the 1996 Act, pursuant to a deemed agreement between the parties to the dispute, such principle would be automatically applied over the instant arbitration proceedings, and thus Arbitrator, though appointed under M.S.M.E.D. Act, was obliged to disclose his impartiality or independence as per schedule 6 of the 1996 Act for ensuring compliance of Section 12 of Arbitration and Conciliation Act, 1996.

Apart from the fundamental challenge raised by Mr. Chatterjee, it was submitted that though the petitioner had received goods, but the same being not installed, the petitioner could not be made liable to make payment, and thereby disputed with the applicability of M.S.M.E.D. Act over the instant arbitration proceedings.

Mr. Bhaskar Chakraborty, learned advocate appearing for the opposite party at the very threshold challenged the maintainability of instant revisional application taking recourse to Section 19 and Section 24 of M.S.M.E.D. Act, 2006. According to Mr. Chakraborty, the impugned order can not be challenged taking resort to Article 227 of Constitution of

India, ignoring provisions of Section 19 of M.S.M.E.D. Act, unless the petitioner deposits 75% of the amount, sought to be recovered.

Referring the object of M.S.M.E.D. Act, it was argued by Mr. Chakraborty that M.S.M.E.D. Act was a piece of special legislation, and the provisions of the special statute would always have precedence to general statute.

Upon referring the object of M.S.M.E.D. Act together with provisions of Section 24 of M.S.M.E.D. Act, Mr. Chakraborty submitted that the provisions of Sections 15 to 23 of M.S.M.E.D. Act would have a overriding effect over any other provisions of law under Arbitration and Conciliation Act, 1996.

When there is no apparent conflict between two statutes, the provisions of special legislation, as incorporated in M.S.M.E.D. Act should be given precedence over the instant arbitration proceedings thereby restricting application of Section 12 of the Arbitration and Conciliation Act, 1996, Mr. Chakraborty argued.

Reliance was placed by Mr. Chakraborty on an unreported decision rendered by the Apex Court in Civil Appeal jurisdiction in **Civil Appeal No... of 2022 (@ SLP (C) No. 12884 of 2020)** delivered in the case of **Gujarat State Civil Supplies Corporation Ltd. vs. Mahakali Foods Pvt. Ltd. (Unit 2) & Anr.** with **Civil Appeal No. 127 of 2018** delivered in the Case of **M/s. Ramkrishna Electricals Ltd. vs. Maharashtra State Electricity Distribution Company Ltd. & Anr.** with **Civil Appeal No. 6167 of 2013** delivered in the case of **M/s Vidarbha Ceramics Pvt. Ltd.**

vs. M/s Steel Authority of India & Ors. with **Civil Appeal No. ... of 2022 (@ SLP (C) No. 31227 of 2018)** delivered in the case of **Gujarat State Petronet Ltd. vs. Krunal Engineering works & Ors.** with **Civil Appeal No. ... Of 2022 (@ SLP (C) No. 7375 of 2020)** delivered in the case of **Bharat Electronics Ltd. & Anr. vs. Ibex Integrated Business Express Private Ltd. & Ors.** with **Civil Appeal No. ... of 2022 (@ SLP (C) 2135 of 2021)** delivered in the case of **Union of India vs. M/s Sirus Global Pvt. Ltd.** with **Civil Appeal No. ... Of 2022 (@ SLP (C) No. 3166 of 2021)** delivered in the case of **JITF Water Infrastructure Limited vs. MSME Commissionerate & Ors.**, to submit that the Arbitration and Conciliation Act, 1996 provides for the requirements of the arbitration agreement, composition of arbitral tribunal, conduct of arbitration proceedings, finality and enforcement of domestic arbitral awards as well as of certain foreign awards, and covers the law relating to conciliation. It does not specify any specific dispute, or specific class, or category of persons, to which the Act shall apply, which the M.S.M.E.D. Act, 2006 has taken care of, Mr. Chakraborty argued.

Such unreported decision of Apex Court formulating the law also noticed another decision of the Apex Court rendered in the case of **Silpi Industries vs. Kerala State Road Transport Corporation & Anr.** (Civil Appeal Nos. 1570-1578 of 2021 decided on 29th June, 2021) whereby the provisions of M.S.M.E.D. Act was declared to be law overriding the provisions of Arbitration and Conciliation Act, 1996, which is a general legislation, Mr. Chakraborty further clarified.

Incidentally it was submitted by Mr. Chakraborty that the outstanding amount is about Rs. 37 lakhs, and though the goods after delivery, were all installed, but the money liable to be given, could not be paid, resulting in huge loss to the opposite parties.

Mr. Chakraborty, drawing attention to the copy of the annexure vide Page - 100 of the instant application, submitted that petitioner had already filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 (A.P No. 382 of 2022) for appointment of fresh Arbitrator for the reasons therein, together with a prayer for stay of all further proceedings of arbitration proceedings pending before the Arbitrator, and parallel filing of another application, as done in this case, in two different courts of same High Court was in colourful exercise of power, which should not be encouraged anymore. It was thus submitted that AP No.382 of 2022 is still pending before a co-ordinate Bench of this Court (Hon'ble Chief Justice of this Court), and no relief, as proposed, should be given.

Having considered the submissions of both sides, it appears that the only point requiring address by this Court is whether an Arbitrator, appointed, under the provisions of M.S.M.E.D. Act, 2006, is required to disclose his independence, impartiality in the instant arbitration proceedings to clear justifiable doubts of the parties to arbitration proceedings, doing strict adherence to 6th Schedule, in aid of Section 12 (1) (2) of the Arbitration and Conciliation Act, 1996 or not.

Section 12 of Arbitration Act, 1996 deals with grounds for challenge, and it finds its existence in Chapter – III dealing with composition of arbitral tribunal under Arbitration and Conciliation Act, 1996.

Section 12(1) of Arbitration and Conciliation Act, 1996 enunciates for compulsory disclosure by Arbitrator in writing of any circumstances touching his credibility, independence and impartiality to the proposed arbitration proceedings. Section 12(1)(a) of such Act lays down that any circumstances revealing existence, either direct or indirect, of any past or present relationship with Arbitrator, or interest in any of the parties, or relation to the subject matter in dispute, whether financial, business, professional, or other kind, likely to give rise to justifiable doubts, as to independence and impartiality of the Arbitrator, may be disclosed as per 6th Schedule of such Act.

5th Schedule has spelt out as many as 34 grounds so as to give rise to justifiable doubts touching the independence or impartiality of an Arbitrator. As per *Explanation 1*, appended to the Section 12 (1) of Arbitration and Conciliation Act, 1996, the grounds stated in the 5th Schedule, shall guide in determining, whether circumstance exists, would give rise to justifiable doubts, as to the independence or impartiality of an Arbitrator.

In the case at hand, the grounds of challenge due to non-adherence of Section 12 may be found from the application under Section 16 of the Arbitration and Conciliation Act, 1996, filed by the petitioner from Para-11 to Para-14, which may be set out hereinbelow:

“11. That the respondent states that as per Section 42 of the Arbitration and Conciliation Act, 1996, and from the bare reading of the averments made in the statement of claim all causes of action had arisen in Kolkata and therefore the Delhi Arbitration Center has no jurisdiction to appoint an Arbitrator in Delhi and assuming Delhi Jurisdiction thereby causing inconvenience to the claimant.

12. That the learned arbitrator had failed to comply with the Fifth, sixth and seventh Schedules of the Arbitration and Conciliation Act, 1996 which is Mandatory as per the Arbitration and Conciliation Act, 1996 and therefore the mandate of the Arbitrator is liable to be terminated.

13. That in the facts and circumstances of the instant case and from the admitted facts the respondent states that the Arbitrator and/or the Arbitral Tribunal lacks inherent Jurisdiction to arbitrate the dispute.

14. That the procedure of appointment of Arbitrator is mala fide and illegal and without jurisdiction in as much as having no Jurisdiction and/or inherently lacking jurisdiction to appoint arbitrator as per Section 15 read with Section 16 of the Act, 2006 and non disclosure of the Fifth, Sixth and Seventh Schedule by the learned Arbitrator calls for termination of the mandate of the Arbitrator.”

From such paragraphs it may be seen that petitioner is annoyed with the procedure of appointment of Arbitrator, which has been made by Delhi Arbitration Centre under M.S.M.E.D. Act, 2006.

It was contended *inter alia* that the cause of action having arisen in Kolkata, as would be evident from statement of claim, Delhi Arbitration Centre had no jurisdiction to appoint an Arbitrator sitting in Delhi, and therefore, assumption of Delhi jurisdiction had resulted inconvenience to the petitioner.

It was further disclosed regarding such challenge as to non-adherence of Section 12 of Arbitration and Conciliation Act, that non-disclosure of 5th, 6th and 7th Schedule by the learned Arbitrator was sufficient enough for termination of the mandate of Arbitrator.

The annoyance expressed by the petitioner against the appointment of Arbitrator under the provisions of M.S.M.E.D. Act, 2006, by Delhi Arbitration Centre, is without any substance, because under Section 18(4) of M.S.M.E.D. Act, the Arbitrator appointed shall have jurisdiction to act as an Arbitrator under this Act in a dispute between the supplier, located within its jurisdiction, and a buyer anywhere in India.

Thus presence of non-absentee clause appearing in Section 18(4) of the M.S.M.E.D. Act, 2006, provides ample power to the Arbitrator to act as an Arbitrator in a dispute between the supplier, located within its jurisdiction, and a buyer located anywhere in India.

In the instant case, goods were supplied to petitioner in his registered address at Kolkata by the opposite party, the registered office of which is in New Delhi.

The bone of contention between the parties is that even after delivery of goods, the same could not be installed, resulting in deferred

payment of dues against the goods supplied, which has been sought to be redressed inviting an Arbitration.

Thus, the appointment of Arbitrator, appointed in aid of M.S.M.E.D. Act, cannot be challenged merely on the ground that was appointed by Delhi Arbitration Centre, giving a go by to the provisions of Section 18(4) of M.S.M.E.D. Act, 2006.

Question is, therefore, pertinent to raise, whether disclosure of impartiality or independence of Arbitrator in aid of Section 12 of Arbitration and Conciliation Act, 1996, is compulsory to dispel the doubt of any of the parties to the arbitration proceedings, even if grounds for challenge, set out in application under Section 16 of Arbitration Act, 1996 may not have direct and proximate relationship with the grounds disclosed in 5th Schedule.

Regarding the applicability of Section 12 of Arbitration and Conciliation Act, 1996 over the instant arbitration proceedings, the Arbitrator of which was appointed under the provisions of M.S.M.E.D. Act, the provisions laid down in Section 18 of M.S.M.E.D. Act, may be profitably referred, which maybe reproduced as hereinbelow:

“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 it to 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 disputes 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 of 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.”

Section 18 takes care of reference to Micro and Small Enterprises Facilitation Council. As per Section 18(2), upon receipt of reference, the Council shall either itself conduct conciliation in the matter or seek assistance of any institution or centre, providing alternate dispute resolution services by making a reference to such an institution or centre for conducting the conciliation, and the provisions of Section 65 to 81 of the Arbitration and Conciliation Act, 1996, appearing in Part-3 of that Act shall apply to such dispute.

As per Section 18 (3) of M.S.M.E.D. Act, 2006, in the event of unsuccessful conciliation, there may be arbitration conducted with the appointment of Arbitrator, when the provisions of Arbitration and Conciliation Act shall apply to the dispute, as if the Arbitration Act was in pursuance of arbitration agreement, referred to in Sub-Section (1) of Section 7 of Arbitration and Conciliation Act, 1996.

Section 24 of M.S.M.E.D. Act deals with overriding effect by laying down that the provisions of Sections 15 to 23 shall have overriding effect notwithstanding anything inconsistent therewith, contained in any other law for the time being in force.

Taking recourse to the provisions of Section 24 of M.S.M.E.D. Act, 2006, argument was advanced that due to the overriding effect of Section 15 to 23 of M.S.M.E.D. Act over the Arbitration and Conciliation Act, the

Arbitrator appointed under Section 18 of Arbitration and Conciliation Act, was not obliged to disclose his independence and impartiality doing adherence to Section 12 read with Section 6th Schedule of Arbitration and Conciliation Act, 1996.

In the unreported judgment of Apex Court, as cited by learned advocate for the opposite party delivered in the case of **Gujarat State Civil Supplies Corporation Ltd. (Supra)**, some appeals were filed by the suppliers and some of the buyers within the meaning of M.S.M.E.D. Act, 2006.

The first and foremost issue involved in those appeals is whether the provisions contained in Chapter – V of M.S.M.E.D. Act, 2006, with regard to the belated payments to Micro and Small Enterprises would have the precedence over the provisions contained in the Arbitration Act, 1996, i.e. to say whether the provisions contained in Chapter – V of M.S.M.E.D. Act, 2006, would have an effect overriding the provisions contained in the Arbitration Act, 1996.

There cannot be any controversy with regard to the settled proposition of law that special statute would override the provisions of the general statute.

The relevant ratio decided by the Apex Court amongst others, relatable to our present text under reference is that the proceedings before Facilitations/Institutions/Centres appointng an arbitrator/arbitration tribunal under Section 18(3) of M.S.M.E.D. Act, 2006, would be governed by the Arbitration Act.

Therefore, the Arbitrator though appointed by the Delhi Arbitration Centre under M.S.M.E.D. Act, shall have all powers to decide the disputes referred to it, as if such arbitration was in pursuance of arbitration agreement referred to Sub-Section (1) of Section 7 of the Arbitration Act, 1996, and as a corollary all the trappings of the Arbitration Act, 1996 would apply to such arbitration.

More so, Section 18(3) of M.S.M.E.D. Act has taken care of the mode and manner of conducting the arbitration by the Arbitrator by laying down that the provisions of Arbitration and Conciliation Act shall apply to disputes to the arbitration, as if it was an arbitration in pursuance of an arbitration agreement referred to Sub-Section (1) of Section 7 of the Act.

When the petitioner had doubted the credibility, and suffered from apprehended biasness of the Arbitrator, thereby creating a doubt as to the independence and impartiality of Arbitrator, though the grounds taken in application under Section 16 of Arbitration Act are not directly relatable to the grounds disclosed in 5th Schedule of Arbitration and Conciliation Act, 1996, but to ensure more and more credibility, impartiality, independence and fairness on the part of Arbitrator, there appears to be no wrong in the process of dispensation of justice, if the Arbitrator discloses his impartiality and independence, doing adherence to Section 12(1) (2) read with Schedule 6th of Arbitration Act, 1996. Disclosure of Schedule 6th by Arbitrator has got nothing to do with subject in dispute, requiring arbitration.

Therefore, for abundant precaution, if the provisions of Section 12 (1)(2) read with 6th Schedule of Arbitration and Conciliation Act pertaining to disclosure of impartiality of Arbitrator with regard to subject of arbitration are given effect by the Arbitrator at any stage of proceedings to establish his more and more credibility, independence and impartiality, that would not frustrate the object of M.S.M.E.D. Act, 2006. With the disclosure of Schedule 6th by the Arbitrator, all the doubts expressed or apprehended touching the impartiality of the Arbitrator may be dispelled automatically without paving any further way for inviting any complication thereafter. Since Section 12(1)(2) read with Schedule 6th of Arbitration Act is intended to ensure sanctity to arbitration proceeding prohibiting inviolability against Arbitrator, with the disclosure of impartiality of Arbitrator, it may be viewed for its holiness in disposition of law.

The appointment of the Arbitrator being subject to the disclosure of Schedule 6th of Arbitration Act, 1996, can never be construed to be coming in the way against the spirit of Section 24 of M.S.M.E.D. Act. The overriding provisions of Section 15 to 23 of M.S.M.E.D. Act, thus cannot be deemed to be an absolute bar making Section 12 of Arbitration Act, 1996 inapplicable in case of arbitration, conducted under the M.S.M.E.D. Act, with appointment of Arbitrator, thereby not strictly prohibiting Arbitrator from making disclosure of his independence and impartiality to the arbitration proceedings in aid of Schedule 6th of Arbitration and Conciliation Act.

It may be put in a simpliciter way that provisions of Section 24 of M.S.M.E.D. Act giving overriding effect of Section 15 to 23 can never be construed to be an absolute bar to the disclosure of Arbitrator, as regards his independence and impartiality in aid of Schedule 6th of Arbitration and Conciliation Act, 1996.

The appointment of Arbitrator being always subject to the disclosure of declaration made under Section 12 of Arbitration Act, 1996, with respect to independence and impartiality of the Arbitrator, nothing would, however, prevent the Arbitrator, though appointed under the M.S.M.E.D. Act, from making a declaration as to his impartiality and independence doing adherence to Schedule 6th of 1996 Act in aid of Section 12(1)(2) of Arbitration and Conciliation Act, 1996.

Since, under Section 12(2) of Arbitration and Conciliation Act, 1996 an Arbitrator is under obligation to disclose in writing doing adherence to 6th Schedule immediately after the time of his appointment, or throughout the arbitral proceedings, therefore declaration of impartiality and independence of Arbitrator under Section 12 of 1996 Act, if not already disclosed, may be disclosed at the earliest so as to ensure his fairness, credibility, impartiality and independence beyond all shadow of doubt.

The revisional application is thus disposed of directing the Arbitrator, appointed in arbitration proceeding being Case No. DL/10/M/SWC/00359 (*LMI India Private Limited Vs. Security Hitech Graphics Private Limited*) (*Supra*) to ensure declaration of his independence, impartiality, as mentioned in Section 12(1)(2) read with

Schedule 6th of Arbitration and Conciliation Act, 1996, at the earliest, if not already disclosed, to eliminate and/or dispel the doubt to any of the parties as regards impartiality and his independence to the arbitration proceedings.

The revisional application is thus disposed of.

Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of all formalities, on priority basis.

(Subhasis Dasgupta, J.)