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Arb.O.P.(Comm.Div.) No.200 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **03.11.2022**

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THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

Arb.O.P.(Comm.Div.) No.200 of 2022

M/s.Deetech Projects Pvt. Ltd.
Rep. by its Managing Director, Mr.S.Sivaraman,
No.129, 2nd Floor, Aani Street,
Chinmaya Nagar, Chennai - 600 092. ... Petitioner

(Amended as per order dated 28.04.2022 in A.No.1912 of 2022)

vs.

M/s.Batliboi Environmental Engineering Ltd.
Represented by its Divisional Manager Mr.Vilas M.Gharat
Spartan House, 1st Floor,
Plot No.B/29, Road No.18/S, Wagle Estate,
Thane (W) - 400 604. ... Respondent

PRAYER: Arbitration Original Petition filed under Section 11 4(a) of the Arbitration and Conciliation Act, 1996, pleased to appoint an arbitrator for adjudicating the dispute arising between the applicant and respondent in respect to the Work order that was awarded to the consortium, vide LOA



Arb.O.P.(Comm.Div.) No.200 of 2022

No.CMWSSB/CNT/C2/W/CNT/SEW/NCB/JNNURM/122/2010-2011,

dated 21.11.2011.

For Petitioner : Mr.N.Umapathi

For Respondent : Mr.B.Sudarshan

ORDER

By relying on clause 11 of the Consortium Agreement dated 12.04.2012 (the Agreement), the petitioner seeks the constitution of an arbitral tribunal to resolve the dispute between the parties.

2. The petitioner states that the parties entered into the Agreement and that the said Agreement provides for the resolution of disputes through arbitration. Upon arising, initially, the respondent issued a notice on 09.08.2021 proposing the names of two senior advocates for appointment as sole arbitrator. In response thereto, by letter dated 18.08.2021, the petitioner informed the respondent that the dispute had been referred to the Facilitation Council under the Micro Small and Medium Enterprises Development Act, 2006 (the MSMED Act) and, therefore, the petitioner is unwilling to accept the proposal of the respondent. Thereafter, by order



dated 13.09.2021, the Facilitation Council concluded that the petition is not maintainable before the said forum. In those circumstances, the petitioner issued a notice dated 12.03.2022 requesting the respondent to accept the person proposed for appointment as sole arbitrator by the petitioner. By reply dated 12.04.2022, the respondent informed the petitioner that it is not agreeable for the appointment of the person proposed by the petitioner. This petition was filed in the above facts and circumstances.

3. Learned counsel for the petitioner relied on the arbitration clause in the Agreement and stated that the petition is liable to be allowed in view of the refusal of the respondent to adhere to the appointment procedure prescribed therein.

4. The petition is opposed by learned counsel for the respondent on two grounds. The primary ground is that the petitioner elected to adjudicate the dispute under the MSMED Act. By doing so, the petitioner waived or abrogated its right under clause 11 of the Agreement. By relying on Section 18(3) of the MSMED Act, learned counsel contended that the arbitration



clause stands superseded once parties take recourse to the statutory mechanism under the MSMED Act. The second ground is that the petition is not maintainable under Sub-section 4 of Section 11 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

5. Upon reference of the dispute to the Facilitation Council, if the Facilitation Council had adjudicated the dispute on merits, such decision would have operated as *res judicata* and precluded the institution of contractual arbitral proceedings in respect of the same dispute. In fact, it is for purposes of extending and applying the provisions of the Arbitration Act to matters before the Facilitation Council that Section 18(3) of the MSMED Act contains a legal fiction by which an agreement in terms of Section 7 of the Arbitration Act is statutorily imported once parties take recourse to Section 18 of the MSMED Act. It is instructive to examine the language of Section 18(3) of the MSMED Act, which is set out below:

“(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.”

6. In the case at hand, the Facilitation Council declined to exercise jurisdiction by stating that "the petition is not maintainable in this forum". As a result of the said order, the petitioner was not in a position to avail of the statutory remedy under the MSMED Act. The contention of learned counsel for the respondent that Section 18(3) has the effect of novating the Agreement by deleting the arbitration clause therefrom is completely misconceived. As in the case of any legal fiction, its scope cannot be extended beyond the purpose. The legal fiction in Section 18(3) cannot be relied upon to contend that it has the effect of novating the Agreement by deleting the arbitration clause therefrom. Learned counsel relied on the judgment of the *Hon'ble Supreme Court in WAPCOS Limited -vs- Salma*



Dam Joint Venture and another, (2020)3 SCC 169, particularly paragraph

34 thereof. In the said judgment, the Supreme Court was dealing with a situation where parties executed a subsequent document, namely, an amendment of agreement in terms of which the contractor relinquished specific claims and also agreed that there will be no arbitration for the settlement of such claims in future. Thus, in that case, there was an express novation of the original contract containing the arbitration clause. By contrast, in this case, there is no evidence of novation. Consequently, clause 11 of the arbitration clause survives in the context of the Facilitation Council declining to exercise jurisdiction on the ground that the petition is not maintainable in the said forum.

7. The other objection on the ground that the petition is not maintainable under Section 11(4) is liable to be rejected out of hand because the petition clearly falls within the scope of Section 11 of the Arbitration Act.

8. For reasons set out above, the petitioner is entitled to succeed.



Arb.O.P.(Comm.Div.) No.200 of 2022

Accordingly, Arb.O.P.(Comm.Div.) No.200 of 2022 is allowed by appointing Mr.P.Giridharan, Advocate, “Vanguard House”, 3rd Floor, No.48, Second Line Beach, Parrys, Chennai – 1, Mobile No.9884672733 as the sole arbitrator. The sole arbitrator is called upon to enter upon reference and adjudicate the dispute. The fees and expenses in relation to the arbitral proceedings may be fixed by the arbitral tribunal in consultation with the parties.

03.11.2022

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Index : Yes / No

Internet : Yes / No

SENTHILKUMAR RAMAMOORTHY,J



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Arb.O.P.(Comm.Div.) No.200 of 2022

rna

Arb.O.P.(Comm.Div.) No.200 of 2022

03.11.2022