IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side
(Commercial Division)

Present :-
The Hon'ble Justice Moushumi Bhattacharya

AP 327 of 2023

Rashmi Cement Limited
Vs.
Radha Bhattad

For the petitioner	:	Mr. Soumabho Ghosh, Adv. Mr. Sidhartha Sharma, Adv. Mr. Rishav Dutt, Adv. Mr. Aman Kataruka, Adv.
For the respondent	:	Mr. Dyutimoy Paul, Adv. Mr. Souryadip Panda, Adv.
Last Heard on	:	08.06.2023.
Delivered on	:	26.06.2023.

Moushumi Bhattacharya, J.

1. The petitioner seeks appointment of a sole Arbitrator on the basis of a Letter of Invocation dated 8.4.2023. The respondent failed to reply to the said letter.

2. The dispute between the parties arises out of a contract contained in Service Order dated 9.12.2021 under which the respondent was to arrange for transportation of 50,000 MT of coal required by the petitioner from Magadh to the petitioner's plant at Jhargram for a total consideration of Rs. 2,15,35,000/-. Disputes arose between the parties which included the petitioner serving a legal notice on the respondent on 17.11.2022 for the amount due and the respondent raising a demand under section 8 of the Insolvency and Bankruptcy Code (IBC), 2016 on the petitioner alleging that the petitioner had failed to make full and complete payment of the invoices raised in connection with the Service Order. Learned counsel appearing for the parties, however, have raised certain preliminary questions on points of law which are required to be dealt with and answered.

3. The objection taken on behalf of the respondent is primarily on the ground that the respondent is an MSME or rather an entity defined under section 2 of the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006 and that the respondent should accordingly get the protection of the 2006 Act. It is also the stand that the petitioner, as the buyer who placed the Service Order on the respondent for transport of 50,000 MT of coal for a consideration of Rs. 2.15 crores, was also under an obligation to make a reference to the Micro and Small Enterprises Facilitation Council under the provisions of the MSMED Act. Learned counsel appearing for the respondent/supplier relies on section 18(1) of the 2006 Act to urge that any party to a dispute may make a reference to the Council which means that the petitioner had an equal obligation to approach the Council for relief.

4. This contention is wholly incompatible with the object of The Micro, Small and Medium Enterprises Development (MSMED) Act, 2006. Section 18(1) deals with reference to the Facilitation Council and provides for *"…. any party to a dispute may ….. make a reference to the … Council"*. The significant part is what follows *"any party to a dispute"*. The reference made to the Council must be with regard to *"any amount due under section 17 ….."*. Sections 18 and 17 are set out below:

> *"18. Reference to Micro and Small Enterprises Facilitation Council. – 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."*
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> *"17. Recovery of amount due. – 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."*

5. Sections 18 and 17 – necessarily in reverse order – makes it clear that the reference made by any party to the Council must be with regard to any amount due under section 17 which is for goods supplied or services rendered by a supplier. Section 17 also mandates that the buyer shall be liable to pay the amount with interest thereon as provided under section 16 of the MSMED Act. Section 17 read in conjunction with section 18 makes it clear that the "*any party*" under section 18 must necessarily and only mean the supplier who claims that the buyer is liable to pay the amount claimed by the supplier along with interest thereon culminating in a reference to the Council under section 18.

6. No other interpretation is possible. This view is supported by the overall scheme and object of the MSMED Act including section 18(4) which empowers the Council having jurisdiction to act as an Arbitrator/Conciliator under section 18 in a dispute where the supplier is located within its jurisdiction and a buyer is located anywhere in India. The Act is replete with sections which protect the interest and accords special treatment to suppliers. The object of the Act would be sharpened also by section 16 which makes the buyer liable to pay compound interest with monthly rests to the supplier at three times of the bank rate notified by the Reserve Bank of India as well as section 19 which makes it mandatory for the appellant challenging the award/order of the Council before any Court to deposit 75% of the amount of the decree/award but makes an exception if the appellant is a supplier.

7. Therefore, resisting the application under section 11 on the ground that the petitioner/buyer should have approached the Facilitation Council under section 18(1) of the MSMED Act is misconceived and contrary to the purport of section 18(1) read with section 17 of the MSMED Act.

8. Section 24 of the Act which provides for sections 15-23 to have overriding effect will only apply where a reference has been made to the Council under section 18(1) of the Act. Section 24 does not contemplate automatic application of the provisions of sections 15-23, including section 18 - where the jurisdiction of the Council has not been invoked by a party who seeks recovery of an amount due under section 17 of the Act.

9. The case law cited on behalf of the parties do not strictly apply to the facts of the present case. The Bombay High Court decision in *Porwal Sales vs.*

Flame Control Industries; MANU/MH/2299/2019 was on the issue whether the court under section 11 of the 1996 Act would be deprived of its jurisdiction where the respondent is an MSME. The Court held that section 18(4) of the MSME Act is not an absolute bar to any proceedings other than as provided under section 18(1) of the Act. Although, the parties had not made a reference to the Council in *Porwal Sales*, the issue before this Court is slightly different, namely, whether a buyer has an equal and corresponding obligation to make a reference to the Council under section 18(1) of the MSME Act. In *Essar Oil and Gas Exploration and Production Limited vs. Gargi Travels Private Limited; MANU/WB/0884/2023*, a Co-ordinate Bench followed *Porwal Sales* on the issue whether section 18 of the MSME Act constitutes a bar on the Court from passing an order under section 11 of the 1996 Act. In the facts of *Essar Oil* however, a reference had already been made to the Council and the conciliation was underway. The learned Single Judge was further of the view that section 24 of the MSME Act – overriding effect - would not be attracted to the facts of that case.

10. In *National Projects Construction Corporation Limited vs. West Bengal State Micro Small Enterprises Facilitation Council; W.P. No. 294 of 2016,* a Co-ordinate Bench of this Court was of the view that where one of the parties to an arbitration agreement is an entity within the meaning of the MSME Act, the Council under the said Act would have jurisdiction to arbitrate on the dispute between the parties. The facts in that case were hence substantially different as the parties had already made a reference to the Facilitation Council and the stage had already progressed through conciliation to arbitration under section 18(3) of the MSME Act.

11. The second objection raised on behalf of the respondent is the absence of an arbitration agreement as contemplated by section 7(2) of the 1996 Act.

12. This objection is belied from the material on record. The Service Order dated 9.12.2021 contains the arbitration clause that refers to a S.O No. C321364073. The S.O number finds specific mention/reference in the notice issued by the petitioner to the respondent on 8.4.2023 under section 21 of the 1996 Act. The Invocation Letter also sets out the arbitration clause in the Service Order.

13. The communications earlier exchanged by the parties in the form of mails shows that the petitioner made a reference to the specific Service Order number together with the date of the Service Order in the petitioner's mail to the respondent dated 18.7.2022. The subject of the petitioner's mail also refers to the Service Order number. The respondent replied to the mail on 22.7.2022 referring to the contract and to the respondent's performance under the same. The respondent's reply states in the very first line that it is with reference to the petitioner's mail dated 18.7.2022.

14. Section 7(4) of the 1996 Act provides that an arbitration agreement is in writing if it is contained in an exchange of letters, telex, telegrams or other means of telecommunications including through electronic means providing for a record of the agreement (7(4)(b)). Further, the mails exchanged between the parties in July, 2022 shows that petitioner referred to the contract bearing the Service Order number and date and the respondent replied to the mail without denying the existence of the arbitration agreement. The respondent did not deny or dispute the existence of the arbitration agreement as reiterated

by the petitioner in its section 21 notice of 8.4.2023. The existence of the arbitration agreement between the parties in writing as contained in the Service Order is hence established from the exchange of electronic communications between the parties under section 7(4)(b) of the Act of 1996.

15. The contention of the respondent with regard to 2 arbitrators as envisaged by the arbitration clause is against the statutory mandate of section 10(1) of the 1996 Act which provides that the parties are free to determine the number of arbitrators subject to the number not being an even number. The other point with regard to the arbitration agreement not being a stamped or a signed document is also without substance as the Service Order which contains the arbitration agreement was executed between the parties and the respondent gave effect to it as would be evident from its reply in July, 2022. It is also arguable whether the Service Order is required to be stamped. Even if it was, the respondent has not been able to disprove the case of the petitioner of a stamp of 12 annas under The Indian Stamp Act, 1899.

16. The Court also disagrees with the contention that the present application under section 11 is premature since section 7(4) of the 1996 Act would only apply where the appointment procedure is under section 11(3) involving an arbitration with 3 arbitrators. In any event, the Invocation Letter in the present case is of 8.4.2023 and the application under section 11 was made on 17.5.2023 on the failure of the respondent to reply to the letter of Invocation under section 11(4)(a) of the 1996 Act.

17. The above reasons persuade this Court to allow the present application for appointment of arbitrators under section 11(6) of the 1996 Act in terms of

the arbitration agreement contained in the Service Order. There is obviously a dispute between the parties with regard to the monetary claim made by the petitioner on account of the respondent's failure to supply the quantity of the contracted goods. There are cross-claims between the parties and the parties dispute the contentions made by the other with regard to performance of the respondent and the contractual terms contained in the Service Order.

18. AP 327 of 2023 is accordingly allowed and disposed of by appointing Mr. Jayanta Biswas, former Judge of this Court, to act as the Sole Arbitrator for resolving the disputes and differences between the parties subject to the Arbitrator communicating his consent to the Registrar, Original Side of this Court in the required format under the provisions of the 1996 Act within 3 weeks from date. This order is to be communicated to the Arbitrator forthwith.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of the requisite formalities.

(**Moushumi Bhattacharya, J.**)