

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

Present :

Hon'ble Justice Moushumi Bhattacharya.

A.P. 492 of 2023

With

A.P. 495 of 2023

Smt. Bharati Ojha

vs

Simplex Infrastructures Limited

For the petitioner : Mr. Supratim Laha, Adv.
Mr. Bikash Shaw, Adv.

For the respondents : Mr. Snehashis Sen, Adv.

Last heard on : 06.09.2023

Delivered on : 12.09.2023.

Moushumi Bhattacharya, J.

1. The petitioner has filed the present application under section 11 of The Arbitration and Conciliation Act, 1996 for appointment of an arbitrator in

respect of the disputes and differences which have arisen between the petitioner and the respondent.

2. The petitioner claims that the disputes arose out of a work order dated 28.6.2017 as extended by a work order dated 1.6.2018. The petitioner, through learned counsel, also claims that the petitioner had initially approached the MSME Facilitation Council under the provisions of the Micro Small and Medium Enterprises Development Act, 2006 which was ultimately dropped by the Council on 20.9.2022. The petitioner thereafter issued a notice to the respondent on 19.4.2023 under section 21 of the 1996 Act invoking the arbitration clauses in the two work orders and making a claim approximately of Rs. 29.19 lakhs as of 1.4.2023 on account of unpaid bills. The petitioner was admittedly engaged as a contractor by the respondent for a project in Chennai.

3. The respondent takes a point of maintainability and urges through learned counsel that the present application is not maintainable on two grounds. First, that the petitioner has clubbed separate and independent claims arising out of two separate work orders where the equipments referred to in the work orders as well as the rates are admittedly different. Counsel submits that the petitioner should hence have made two separate references under each of the work orders. Second, the claims made by the petitioner are barred by limitation. According to counsel, the alleged claims are for the period 2018-2019 and the petitioner is not entitled to get any relief under section 14

of the Limitation Act, 1963 since the MSME Council is not a Court and the petitioner did not initiate the proceedings in “good faith”.

4. The first ground of objection to the maintainability of the application is that the petitioner has clubbed the claims arising out of two separate and distinct work orders. The two work orders are of 28.6.2017 and 1.6.2018. Both the work orders contain arbitration clauses which stipulate that in the event of any dispute or difference arising out of or in connection with “this work order” and that if the parties fail to settle their differences or disputes, the same shall be referred to arbitration. Contrary to the stand taken on behalf of the respondent, namely, that the two work orders issued by the respondent to the petitioner are completely different in scope and purpose, it appears that both the work orders in fact relate to the same project. Moreover, the order numbers namely S3176 and C3176 in the two work orders are also identical together with the scope of the work under the orders. Both the work orders relate to “Construction of civil, structural and architectural works including piling, ground improvement etc. in entire area, construction of RCC Chimney and NDCT for Unit 1& 2 of 2X660 MW Sets Super Thermal Power Project at Chennai”.

5. There is no difference at all in the scope of work delineated in the two work orders and both the work orders are headlined with “Work Order for Hiring Equipment”.

6. Hence, the respondent's argument of the petitioner attempting to club claims under two separate and distinct work orders is completely misplaced and misconceived. There is little doubt that both the work orders, apart from containing identical clauses, relate to the same project, namely, "Super Thermal Power Project at Chennai". There is no material disclosed before the Court to hold that the petitioner is trying to make a composite reference in relation to two different or unconnected work orders. The first ground of objection is therefore rejected.

7. The second ground relates to the claims allegedly being barred by limitation. The respondent relies on the earlier notice issued by the petitioner on 25.11.2022 which was later withdrawn by the petitioner. The respondent also says that the order of the MSME Council of 20.9.2022 dropping the petitioner's reference cannot save limitation.

8. Upon considering the order passed by the Facilitation Council on 20.9.2022, it is found that the petitioner (supplier unit) made a reference for its claims relating to unpaid bills in 2020; the Council refers to "Case no. 61 of 2020" in the order. The order contains the view of the Council in light of the Supreme Court decision in *M/s. Vaishno Enterprises vs. Hamilton Medical Ag* and *M/s. Silpi Industries vs Kerala State Road Transport Corporation* whereby according to the Council, the petitioner was disentitled from getting any relief under the MSMED Act, 2006. The Council hence proceeded to dispose of the petitioner's case on the ground of maintainability and gave liberty to the

petitioner (supplier unit) to file its claim before the appropriate forum for realisation of its dues.

9. The order passed by the Facilitation Council shows that the petitioner referred its claim to the Council in 2020 on the assumption that the Facilitation Council is the appropriate forum for adjudicating the petitioner's claim as a supplier unit. The Supreme Court decision in *Silpi Industries and Vaishno Enterprises* came much later in 2021 and 2022 respectively. Thus the petitioner could not have known at the time of filing the reference in 2020 that its case would be dropped in September, 2022 in view of the judgments of the Supreme Court.

10. Therefore, the delay in the interregnum from 2020-2022 cannot be attributed to the petitioner. The Court finds the respondent's argument of the petitioner not being entitled to seek recourse under section 14 of the Limitation Act, 1963 to be unacceptable. Section 14 of the Limitation Act provides for extension of time with regard to any civil proceeding which the plaintiff has been prosecuting with due diligence against the defendant and the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which is subsequently found to be incompetent.

11. There is little doubt that the petitioner referred to its claim to the Facilitation Council under the provisions of the MSMED Act, 2006 in good faith that the Council is the appropriate forum for adjudicating on the dispute. There is nothing on record to suggest that the petitioner instituted the

proceeding in bad faith as has been contended on behalf of the respondent. As stated above, the decisions of the Supreme Court in *Silpi Industries* and *Vaishno Enterprises* were delivered subsequently and the petitioner's reference hence cannot be sublimated on the ground of being bad in faith.

12. The respondent's other contention of the Facilitation Council not being a Court is equally suspect. The Facilitation Council has been invested with wide powers, notwithstanding any other law for the time in force, for adjudicating a claim for recovery of amounts due under the MSMED Act. Sections 18(3) and (4) clothe the Council with jurisdiction to act as an Arbitrator or Conciliator in a dispute between a supplier and the buyer. The respondent's objection to the Council being referred to as a "Court" is simply a desperate attempt to avoid the applicability of section 14 of the Limitation Act since the respondent seeks to shut out the petitioner's claim as being time barred.

13. The facts persuade the Court to hold that the petitioner's reference before the Council in 2020 and the disposal of it in September, 2022, would entitle the petitioner to take advantage of section 14 of the Limitation Act where the petitioner has been able to tick all the boxes, mainly of the subject matter and the parties to the dispute being the same and the petitioner prosecuting the proceeding before the Council in good faith. Therefore, the second objection of the respondent is also rejected.

14. The respondent's argument of whether the petitioner was registered as an MSME on the date of entering into the contract with the respondent is

completely irrelevant to the issue before the Court. The petitioner is not seeking any relief from this court on the basis of the petitioner being an MSME. Hence the decisions relied upon by the respondent are not relevant. *Ram Bhawan Singh vs. Jagdish*; (1990) 4 SCC 309 on section 14 of the Limitation Act was decided on the appellants before the Supreme Court being unable to show any affidavit for condonation of delay or any other material to prove that the appellants had exercised due diligence in availing of their remedies. The Supreme Court hence found lack of good faith on the part of the appellants. In *Silpi Industries vs. Kerala State Road Transport Corporation*; 2021 SCC OnLine SC 439, the Supreme Court found that section 43 of the Act makes the provisions of the Limitation Act applicable to arbitrations. This case may not assist the petitioner at this stage since arbitration is still to commence between the parties.

15. The Court has already found that the respondent has not been able to make out any case on the non-maintainability of the application. The merits of the matter are accordingly being dealt with.

16. There is no doubt that a dispute exists between the parties as would be evident from the very submissions made on behalf of the parties. The petitioner's notice under section 21 of the 1996 Act dated 19.4.2023 clearly states the matters in dispute relating to unpaid bills. The petitioner has claimed an outstanding amount of Rs. 29,19,028.66/- as of 1.4.2023. The respondent has not replied to the notice. The work orders issued by the

respondent to the petitioner contain arbitration clauses. The work relates to a common project and the second work order of 1.6.2018 is in continuation of the first work order of 28.6.2017. The arbitration clauses provide for reference of the disputes to arbitration of a single arbitrator.

17. The facts placed before the court show that the petitioner has been able to establish a case under section 11(6) of the 1996 Act.

18. AP 492 of 2023 is accordingly allowed and disposed of by appointing Mr. Arindam Banerjee, Advocate to act as the arbitrator subject to the learned arbitrator indicating his consent in the prescribed format to the Registrar Original Side of this Court within 3 weeks from date. The advocate on record of the petitioner shall communicate this order to the arbitrator within 3 days from the date of this judgment with the required details of the contact person of the petitioner.

AP 495 of 2023

19. Learned counsel appearing for the petitioner hands up the list of dates today at the time of pronouncement of judgment in AP 492 of 2023. Counsel submits that the dates in AP 495 of 2023 are identical and the only difference is of the type of equipment supplied by the petitioner to the respondent. Both parties are represented by counsel. Since both matters are connected and involve the same sets of events, Mr. Arindam Banerjee is appointed as the arbitrator in AP 495 of 2023 subject to the usual compliances.

20. The Court therefore proposes to dispose of AP 495 of 2023 also in terms of the judgment delivered in AP 492 of 2023.

21. AP 492 of 2023 and AP 495 of 2023 are accordingly disposed of in terms of this judgment.

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

(Moushumi Bhattacharya, J.)