

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

A.P. No. 831 of 2018

Marine Craft Engineers Private Limited

Vs.

Garden Reach Shipbuilders and Engineers Limited

For the petitioner : Mr. Sabyasachi Chowdhury, Adv.
Mr. S.E. Huda, Adv.
Mr. Arjun Mookherjee, Adv.
Mr. Shreyaan Bhattacharyya, Adv.
Mr. Avijit Guha Roy, Adv.

For the respondent : Mr. Siddhartha Banerjee, Adv.
Mr. B.K. Sen, Adv.
Mr. Sudipta Nayan Ghosh, Adv.
Mr. Soumajit Majumder, Adv.
Ms. Jyoti Rauth, Adv.

Last Heard on : 31.03.2023.

Delivered on : 05.04.2023.

Moushumi Bhattacharya, J.

1. The petitioner has prayed for setting aside of an award made and published on 23.9.2018 and served on the petitioner under cover of a letter dated 25.9.2018 by the learned Sole Arbitrator.

2. The petitioner is a registered Micro and Small Scale Enterprise and was the respondent in the arbitration proceedings before the Sole Arbitrator. The petitioner is the “supplier” of services and the respondent is the “buyer” in the dispute before the Arbitrator. The contract related to repair of a Wet Basin flap gate at Garden Reach Shipyard, Kolkata.

3. The petitioner made a reference on 11.5.2016 under the provisions of The Micro, Small and Medium Enterprises Development Act, 2006 before the West Bengal State Micro Small Enterprises Facilitation Council and the respondent was called upon to appear for conciliation before the Council on 4.7.2016. During the pendency of the reference before the Facilitation Council, the respondent appointed an Arbitrator on 23.9.2016 on the basis of a clause in the purchase order. The Arbitrator issued notice to the parties on 4.10.2016 for adjudicating disputes arising out of the purchase order. The petitioner thereafter challenged the jurisdiction of the Arbitrator under section 16 of The Arbitration and Conciliation Act, 1996 which was rejected on 28.2.2017. The Facilitation Council in the meantime fixed its meeting on 27.2.2017 by way of a notice issued to the parties on 13.2.2017.

4. The petitioner also filed writ petitions in the High Court for, inter alia, a direction on the Facilitation Council to dispose of the Reference initiated by the petitioner on 11.5.2016 and restraining the respondent from giving any effect to the invocation of clause 18 of the purchase order. By an order dated 19.4.2017, the High Court directed the Council to proceed with the Reference and to dispose of the claims in accordance with law.

5. The Arbitrator proceeded to pass the impugned Award dated 23.9.2018 which is presently under challenge.

6. The issue which presently falls for adjudication is whether the Arbitrator had jurisdiction to pass the impugned Award. The petitioner questions the jurisdiction of the Arbitrator on the ground that the Facilitation Council had the exclusive jurisdiction to decide on the reference made by the petitioner in terms of the provisions of the MSMED Act, 2006.

7. Learned counsel appearing for the petitioner relies on the fact of the Reference pending before the Facilitation Council and the *non obstante* clause contained in section 18 of the MSMED Act. Counsel submits that the Reference made by the petitioner before the Council culminated in an award in the petitioner's favour on 28.12.2017. Counsel submits that the respondent however avoided appearing before the Council and sought to invoke the contractual arbitration clause by a letter dated 22.8.2016 as a counter-blast to the Reference pending before the Facilitation Council. Counsel submits that the petitioner was compelled to continue with the arbitration proceedings in view of section 16(5) of the 1996 Act which culminated in the impugned Award and the petitioner is entitled to challenge the finding of the Arbitrator under section 16(6) of the 1996 Act by way of an application under section 34 of the said Act.

8. Learned counsel appearing for the respondent, on the other hand, submits that there was no impediment to the Sole Arbitrator entertaining and deciding the dispute between the parties. Counsel submits that the

dispute referred to arbitration could not have been adjudicated by the Facilitation Council since it was not a dispute contemplated under section 17 or 18 of the MSMED Act, 2006. Counsel submits that the petitioner was the “supplier” and the respondent was the “buyer” as defined under the MSMED Act in terms of work orders issued by the respondent to the petitioner for executing a contract for repair of the Wet Basin flap gate at the main yard on a turnkey basis.

9. Counsel submits that the Letter of Intent was issued by the respondent upon the petitioner on 27.9.2012 followed by the purchase order on 6.11.2012. According to counsel, both these documents constitute the contract between the petitioner and the respondent pursuant to which the petitioner rendered its services. Counsel submits that the petitioner was registered under the MSMED Act only on 19.4.2013 which would mean that the contract between the parties was entered into prior to the registration of the petitioner as an MSME under the 2006 Act.

10. The controversy in the present matter centres on whether the Facilitation Council under the provisions of The Micro, Small and Medium Enterprises Development Act, 2006 would have exclusive jurisdiction to entertain and decide disputes brought before it by the petitioner. The petitioner claims to be a “supplier” as defined in Section 2(n) of the 2006 Act. Section 2(n) envisages the supplier to file a memorandum with the authority under section 8(1) of the Act where the procedure is outlined. The authority under section 8(1) is as may be specified by the State Government

under section 8(4) in case of a micro or small enterprise or the Central Government under section 8(3) in case of a medium enterprise.

11. The first assessment would be whether the petitioner qualifies as a “supplier” under the Act. The answer to this question would in turn decide whether the petitioner could approach the Council for making a reference to the Micro and Small Enterprises Facilitation Council under section 18 of the Act for recovery of the amount due to the petitioner under section 17 of the Act.

12. According to respondent, the petitioner is not a “supplier” under section 2(n) of the Act since the contract was executed between the parties before the petitioner was registered as an MSME on 19.4.2013. The petitioner contends otherwise. The petitioner says that the relevant date for the respondent buyer to make payment falls on or before the date agreed upon between the buyer and the supplier under section 15 of the Act. According to the petitioner, the liability of the buyer to make payment does not relate to the Letter of Intent (LOI) or the purchase order but to the date on which the petitioner completed the services and raised the bills pursuant to the work done which was subsequent to the date of its registration as an MSME.

13. On the factual score, the petitioner was registered under the MSMED Act on 19.4.2013. The work was completed in the middle of July, 2013 and the work-done certificate was prepared and made over by the petitioner to the respondent by a letter dated 30.7.2013. The petitioner referred the

dispute to the Facilitation Council in relation to its demand made by a letter dated 27.1.2016 which referred to the bills dated 20.2.2015 with effect from 30.7.2013 for Rs. 54,54,419/- as well as further amounts of Rs. 15,58,406/- which were to be released after the defect liability period which ended in July, 2013. Hence, the petitioner's demand for payment was made with reference to the work done / services rendered by the petitioner which was after the petitioner's registration on 19.4.2013 under the MSMED Act.

14. Section 15 of the MSMED Act casts a mandatory obligation on the buyer to make payment for supply of goods or the services rendered by the supplier on or before the date agreed upon between the buyer and the supplier. Section 15 indicates that the buyer's liability to make payment to the supplier essentially arises from the supply of goods or rendering of services and receiving of such by the buyer on or before the date agreed upon between the buyer and the supplier. The payment is to be made before the "appointed day" as defined in section 2(b) meaning the day following immediately after the expiry of 15 days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier. *Explanation (i)(a)* to section 2(b) clarifies that the day of acceptance would also mean the day of the actual delivery of goods or the rendering of services.

15. There is no dispute in the present case that the petitioner completed the services in July, 2013 and raised bills subsequent thereto starting from 20.2.2015 with effect from 30.7.2013 for various amounts outstanding to the petitioner as on the date of the demand letter of 27.1.2016.

16. The decision of the Supreme Court in *Shanti Conductors Private Limited vs. Assam State Electricity Board*; (2019) 19 SCC 529 was rendered on The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 which was the predecessor of The Micro, Small and Medium Enterprises Development Act, 2006. The Supreme Court construed sections 3 and 4 of the 1993 Act which were *pari materia* to sections 15 and 16 of the present MSMED Act. *Shanti Conductors* held that the liability of the buyer to make payment of interest shall arise if supplies are made subsequent to the enforcement of the 1993 Act even if the agreement is entered into prior to the enforcement of the said Act. Paragraphs 62 and 68 of the Report specifically record that the Supreme Court agreed with the argument on behalf of the appellants (before it) and held that even if the agreement of sale is entered into prior to the enforcement of the 1993 Act, the liability to make payments under section 3 and to pay interest under section 4 shall arise if supplies are made subsequent to the enforcement of the Act. It was further observed that the liability in that case did not relate to any event which took place prior to the 1993 Act.

17. The later decision of the Supreme Court in *Silpi Industries vs. Kerala State Road Transport Corporation*; 2021 SCC OnLine SC 439 (pronounced on 29.6.2021) applied the ratio of *Shanti Conductors* and held that even if there is an agreement between the parties for resolution of dispute by arbitration the seller can certainly approach the competent authority if the seller is covered by the 2006 Act for making its claim. The Supreme Court held that being a special statute the MSMED Act will have an overriding effect vis-à-

vis The Arbitration and Conciliation Act, 1996. The Supreme Court referred to *Shanti Conductors* in paragraph 26 of the Report and held that the appellant before the Supreme Court was not entitled to seek the benefit of the MSMED Act since there was no material to show that supply of goods had taken place or any service was rendered subsequent to the registration of the appellants under the MSMED Act. This finding of the Supreme Court in *Silpi Industries* is thus distinguishable from the facts of this case where the claims of the petitioner relates to events subsequent to 19.4.2013 on which date the petitioner was registered as a micro enterprise.

18. Learned counsel appearing for the respondent has also relied on the recent judgment of the Supreme Court in *Gujarat State Civil Supplies Corporation Ltd. vs. Mahakali Foods Pvt. Ltd. (Unit 2)*; 2022 SCC OnLine SC 1492 (pronounced on 31.10.2022) on the same proposition. Paragraphs 33 and 34 (6) of this decision however reiterate the ratio of *Shanti Conductors* and *Silpi Industries* on the point discussed above. The Supreme Court held that if a party obtains registration subsequent to execution of the contract, the provisions of the MSMED Act would apply to supply of goods and rendering of services subsequent to the registration.

19. Neither *Silpi Industries* nor *Gujarat State Civil Supplies Corporation* hence assist the respondent in denuding the Facilitation Council of jurisdiction to entertain the petitioner's reference under the provisions of the MSMED Act, 2006 on the ground that the petitioner was not a "supplier" at the time of execution of the contract between the parties.

20. To contextualise the facts, the petitioner referred the dispute to the Facilitation Council in relation to the petitioner's demand letter of 27.1.2016 which specifically refers to the bill dated 20.2.2015 with effect from 30.7.2013 since the defect liability period expired in July, 2013. The services for which the payment was demanded were rendered by the petitioner subsequent to 19.4.2013 when the petitioner obtained the registration and ended on 30.7.2013 on which date the petitioner communicated the final completion certificate to the respondent. The letter issued on 20.7.2013 by the respondent would also show that all the activities were scheduled to be performed by the petitioner after 19.4.2013.

21. The unmistakable conclusion from *Gujarat State Civil Supplies Corporation*, *Silpi Industires* and *Shanti Conductors* (from the most recent) is that the petitioner had a right as a "supplier" under the MSMED Act to approach the Facilitation Council for claiming recovery of its dues from the respondent for services rendered.

22. The answer to the second issue is also decided in favour of the petitioner. The Facilitation Council had exclusive jurisdiction to entertain the dispute brought to it by the petitioner and decide on it under section 18 of the Act. Under section 18, the Council is also empowered to take up the dispute for arbitration and the provisions of The Arbitration and Conciliation Act, 1996 shall automatically kick in and apply to the dispute as if the arbitration was in pursuance to an arbitration agreement under section 7(1) of the 1996 Act. (Ref : A Division Bench decision of this Court in *Mackintosh*

Burn Limited vs. Micro and Small Enterprises Facilitation Council; AIR 2020 Cal 103).

23. In light of the above discussion, the conclusion of this Court is as follows. The date of execution of a contract between a buyer and a supplier under the MSMED Act is irrelevant for the application of the provisions of the MSMED Act provided the supplier claims recovery of the amount due under section 17 for goods supplied or services rendered after the date of registration. In other words, whether the supplier was registered as an MSME on the date of the contract would not disqualify the supplier from making reference to the Micro and Small Enterprises Facilitation Council under section 18 for recovery of outstanding amounts as long as the amounts claimed are relatable to goods supplied or services rendered after the date of registration of the supplier as a micro, small or medium enterprise under section 8(1) of the Act. If the supplier fulfils the aforesaid condition and makes a reference to the Facilitation Council under section 18, the Council steps in as the only – and exclusive forum - to decide the reference under the provisions of the MSMED Act, 2006.

24. The exclusivity of the jurisdiction of the Facilitation Council to decide on the reference is clearly spelt out by the sub-sections to section 18 including the *non obstante* clause which is a precursor to the sub-sections. Section 18(1) begins with

“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.”

25. Section 18(2) confers upon the Council seamless powers to take up the dispute in the form of conciliation and thereafter for arbitration under section 18(3) of the Act upon the failure of conciliation. Under section 18(3), the provisions of The Arbitration and Conciliation Act, 1996 spring to life and the dispute assumes the character and trappings of an arbitration, consequent upon an arbitration agreement under section 7(1) of the 1996 Act. The exclusivity of the jurisdiction of the Facilitation Council is most categorically declared in section 18(4) which also starts with a *non obstante* clause and specifies that the Facilitation Council shall have jurisdiction to act as an Arbitrator under section 18(4) in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

26. To return to the present dispute, the unilateral act of the respondent in invoking the contractual arbitration clause and appointing the learned Sole Arbitrator on 23.9.2016 after the petitioner made a reference to the Facilitation Council is thus patently contrary to the provisions of the MSMED Act. Moreover, the respondent invoked the arbitration clause and proceeded with the arbitration and made a reference before the Arbitrator appointed by it being fully aware that the reference before the Facilitation Council under the MSME Act was pending as on the date of the appointment of the Arbitrator. The impugned Award dated 23.9.2018 by which the claim of the respondent (which was the claimant in the arbitration proceedings) of Rs. 30,24,849/- was allowed in full is hence in the form of a face-off with the provisions of the MSMED Act so to speak.

27. As stated above, the Supreme Court in *Silpi Industries* held in unequivocal terms that the MSMED Act would prevail over the Arbitration and Conciliation Act since the former is a special statute. The impugned Award dated 23.9.2018 is hence liable to be set aside under section 34 of The Arbitration and Conciliation Act, 1996 as being in contravention with the fundamental policy of Indian law and being vitiated by patent illegality appearing on the face of the award.

28. AP No. 831 of 2018 is accordingly allowed and disposed of by setting aside the Award made and published on 23.9.2018 and served under cover of the letter dated 25.9.2018 by the Sole Arbitrator.

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

(Moushumi Bhattacharya, J.)