

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: March 27, 2023

+ FAO (COMM) 200/2022, CM APPL. 53724/2022

IRCON INTERNATIONAL LIMITED.

..... Appellant

Through: Mr. Chandan Kumar and
Ms. Kirti Atri, Advs.

versus

PIONEER FABRICATORS PVT. LTD.

..... Respondent

Through: Mr. Vilas Sharma, Mr. Ajay
Sharma and Mr. Mohit
Siwach, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

J U D G M E N T

V. KAMESWAR RAO, J

1. The present Appeal has been filed by the appellant herein against the order dated November 29, 2022 passed by the District Judge (Commercial Court), Shahdara, Karkardooma Delhi, rejecting the petition filed by the appellant under section 19 of the Micro, Small, and Medium Enterprises Development Act, 2006 ('MSMED Act') read with Section 34 of the Arbitration and Conciliation Act, 1996 ('Act of

1996'). The appellant has specifically prayed for the following reliefs through this instant petition:

"In the premises, aforesaid, the Appellant prays that this Hon'ble Court may be pleased to:

- 1. May call for the records of the OMP (COMM) 01 of 2022 lying in the court of Ld. District Judge (Commercial Court) 04, Shahdara, Karkardooma Delhi;*
- 2. And may set aside the impugned order dated 29.11.2022 passed in OMP (COMM) No. 01 of 2022.*
- 3. And may make any such other and further Orders as it may deem fit"*

2. The facts which led to the filing of the present appeal are as follows:

2.1 It is stated that the appellant issued Purchase Order dated September 25, 2013 to the respondent for Supply, Erection, testing & commissioning of 02 nos. 20 MT Mounded underground LPG Storage Bullet & Pipeline for a Rail Coach Factory, Rae Bareli (U.P).

2.2 It is further stated that the subject work was completed by July 21, 2015. The respondent had also issued a 'No Claim Certificate' dated November 05, 2015 for ₹1,12,95,207/- which was the agreed amount towards full and final payment between the appellant and the respondent.

2.3 It is stated that the respondent had applied for the registration under section 8 of the MSMED Act, on July 25, 2016 and consequently got registered under the provisions of the MSMED Act.

2.4 It is further stated that the respondent had also sent a legal notice dated February 02, 2017, to the appellant, wherein it was admitted that it had issued a 'No Claim Certificate' after having agreed on ₹1,12,95,207/- being the full and final payment. It is further submitted that out of this, an amount of ₹1,01,81,349/- had been received by the respondent. However, the amount of ₹ 11,13,858/- was withheld by the appellant subject to the respondent submitting proof of actual tax paid by it under Clause 5.2 of the Conditions of Contract (entered between the parties herein). This fact was also clarified by the appellant by submitting its reply dated March 08, 2017, wherein it sought proof of tax having been paid by the respondent for the said amount.

2.5 Aggrieved by not receiving of the said amount, the respondent lodged its claim with Micro and Small Enterprises Facilitation Council, on December 11, 2018. Specifically, it had raised a claim of ₹36,49,707/- towards deduction qua Liquidated Damages and ₹33,53,694.15/- towards interest thereon.

2.6 It is further stated that conciliatory process had failed and thus the matter was further referred to arbitration in September 2019.

2.7 Thereafter, vide award dated January 09, 2022, an award amounting to ₹63,35,077/- was passed in favour of the respondent and against the appellant.

2.8 To challenge the afore-said award passed against the appellant, the appellant filed a petition under section 19 of the MSMED Act read with section 34 of the Act of 1996, bearing No. OMP (COMM) No.01/2022, before the District Judge, Commercial Court, Shahdara, Karkardooma, Delhi.

2.9 Aggrieved by the impugned order dated November 29, 2022, passed in the afore-said case, whereby the said petition was dismissed by the District Court on the ground of lack of territorial jurisdiction to entertain the petition, the appellant has filed the instant FAO.

3. It is stated by Mr. Chandan Kumar, learned counsel appearing for the appellant that the impugned order is illegal on the following grounds:

3.1 The impugned order has been passed contrary judgment of the Supreme Court in the case of ***Gujarat State Civil Supplies Corporation Ltd. vs. Mahakali Foods Pvt. Ltd.(Unit 2) and Another, 2022 SCC OnLine SC 1492***, which entirely covers the issue of whether Courts in Delhi shall have the territorial jurisdiction to entertain the challenge against the award passed by the arbitrator at Kanpur, Uttar Pradesh.

3.2 The District Court had accepted the fact that the MSMED Act has an overriding effect over the Act of 1996, however, on the issue of the jurisdiction, it had given primacy to the concept of ‘seat of arbitration’ over the

mandate of section 19 of the MSMED Act.

3.3 The ratio adopted by the District Court, as laid down in the judgments of the Supreme Court in the cases of ***BGS SGS SOMA JV vs. NHPC LTD.***, arising out of ***Civil Appeal No. 9307 of 2019***, decided on ***December 10, 2019*** and ***Hindustan Construction Company Ltd. vs. NHPC Ltd. & Anr.***, arising out of ***Transfer Petition (C) no. 3053 of 2019*** decided on ***March 04, 2020***, cannot be applied in the facts and circumstances of the instant FAO, because in the said cases, the arbitration process undergone between the parties therein, took place arising out of an arbitration agreement entered between them, wherein both the parties also had an agreement over the seat of arbitration. However, the arbitration that took place in the present case did not arise out of the arbitration agreement between the parties herein. It is a statutory arbitration under the MSMED Act, wherein parties have no opportunity to choose a seat of arbitration. It is his submission that the District Court completely ignored the observation of the Supreme Court in paragraph 35 of the ***Gujarat State Civil Supplies Corporation Ltd. (supra)***.

3.4. Section 19 of the MSMED Act, allows filing of objection before ‘any court’ having the jurisdiction, which includes both territorial and pecuniary jurisdiction. He submitted that the interpretation by the District Court to hold that Section 19 of the MSMED Act does not grant

territorial jurisdiction, is without any basis and suffers from flaw of interpretation. He substantiated this submission by contending that the words ‘any court’ inserted by the Legislature under Section 19 of the MSMED Act, is not merely a surplusage. In order to emphasis on its interpretation and to contend that whilst interpreting a statute, efforts should be made by the Courts to give effect to each and every word used by the legislature, reliance has been placed upon the judgment of the Constitutional Bench of the Supreme Court in the case of ***Nath Devi vs. Radha Devi Gupta, (2005) 2 SCC 271***. In order to further substantiate this submission, reliance was also placed upon the recent judgment of the Supreme Court in the case of ***Noor Mohammed vs. Khurram Pasha, 2022 SCC OnLine SC 956***.

3.5 If the District Court had no jurisdiction to entertain the subject petition then as a corollary it could not have exercised its jurisdiction to direct the release of the pre-deposit to the respondent as well. It was his submission that the District Court’s reliance on the order dated ***July 06, 2021*** passed in the ***FAO (COMM) 103 of 2021*** titled as ***Bhartia Non Conventional Products (Jamshedpur) vs. Akshit Enterprises Private Limited***, is misplaced, inasmuch as, it can be reflected from paragraphs 10 and 11 of that order that it was an order passed with the consent of the parties therein. Moreover, it has also been his

submission that the said order was passed in 2021, without having taken the benefit of authority of the Supreme Court in the case of *Gujarat State Civil Supplies Corporation Ltd. (supra)*.

3.6 Reliance has also been placed upon another judgment of the Supreme Court in the case of *M/s Silpi Industries etc. vs. Kerala State Road Transport Corporation and Anr., 2021 SCC OnLine SC 439*, specifically on paragraph 23 of the said judgment, to contend that the MSMED Act contemplates a statutory arbitration as compared to the Act of 1996 inasmuch as the former Act, being a special statute, overrides the provisions of the Act of 1996, which is a only general Act.

3.7 The MSMED Act, is inconsistent with the Act of 1996, thus, distinction had also been drawn between the provisions of the MSMED Act and the Act of 1996, to highlight the following inconsistencies between the two Acts:-

- a. Section 18 (4) of the MSMED Act allows the same person to act either as Conciliator or Arbitrator. However, there is no such provision in the Act of 1996;
- b. Section 19 of the MSMED Act, prescribes for pre-deposit of the amount awarded, while Section 34 of the Act of 1996 does not have such provision;
- c. Moreover, Section 19 of the MSMED Act sets out a

procedure vis-à-vis a decree, award or other orders made either by the counsel or any other institution or centre providing the alternative dispute resolution services to which reference has been made. While Section 34 of the Act of 1996 only allows challenge to an award and that too by the Arbitrator so chosen by the parties;

- d. Further Section 19 of the MSMED Act allows filing of the petition to challenge a decree / award or other order in ‘any court’ while Act of 1996 mandates such challenge to be made in the ‘the Court’ only.
- e. Furthermore, Section 19 of the MSMED Act reads as ‘Application for setting aside decree / award or order’, while Section 34 of the Act of 1996 merely reads as ‘Application for setting aside arbitral award’;
- f. In the terms of mandate of Section 2(4) of the Act of 1996, the challenge procedure given in Section 34 of the Act of 1996 is inconsistent with the challenge procedure given in Section 19 of the MSMED Act. So, it is his submission that the MSMED Act will definitely have precedence over the Act of 1996.
- g. Even otherwise, the concept stipulated under Section 24 of the MSMED Act makes it clear that the provisions of the MSMED Act, override any other provision which is found to be inconsistent with

them.

- h. So, it was his submission that the jurisdiction for adjudication of the disputes arising out of the facts of the instant FAO should be governed by the provisions of the MSMED Act, specifically, Section 19 of the same, which stipulates that ‘any Court’ having the jurisdiction can entertain an application filed under it for setting aside a decree, award or order.

4. So, on the basis of the afore-mentioned grounds, the appellant is seeking that the impugned order be set aside.

5. On the other hand, the submissions made by Mr. Vilas Sharma, learned counsel appearing on behalf of the respondent, before the learned District Judge, have been reiterated in the following manner:

5.1 That the agreement executed between the parties herein, does not have the arbitration clause.

5.2 That since the supplier/respondent herein, is located in Kanpur and the award was rendered by the Facilitation Council at Kanpur, the seat of arbitration would be at Kanpur. So, as a corollary, the challenge to the arbitral award should be filed before the Court in Kanpur.

5.3 That since the seat of arbitration was at Kanpur, as per the ratio laid down by the Supreme Court in the cases of **BGS SGS SOMA JV (supra)** and **Hindustan Construction Company Ltd. (supra)**, the Court of place where the seat is designated, shall have the territorial jurisdiction to entertain the challenge against the arbitral award.

5.4 That the District Judge was right, to put reliance upon the order

dated **July 06, 2021**, passed in **FAO (COMM) 103/2021** titled as ***Bhartia Non Conventional Products (Jamshedpur) (supra)*** for directing the appellant herein to release the pre-deposit amount in favour of the respondent herein, on the ground that the District Judge did not have the territorial jurisdiction to entertain the challenge filed against the arbitral award passed by the Facilitation Council at Kanpur.

6. So, on the basis of the aforesaid submissions, Mr. Sharma has prayed that the impugned order passed by the District Judge should not be interfered with.

ANALYSIS

7. Having heard the learned counsel for the parties and perused the record, the short issue which arises for consideration is whether the learned District Judge was right in rejecting the petition filed by the appellant challenging the award dated January 09, 2022 passed by the Facilitation Council at Kanpur, whereby the learned Arbitrator has awarded an amount of ₹63,35,077/- in favour of the respondent herein on the ground that the learned District Judge does not have the territorial jurisdiction to entertain the petition. Suffice to state that the District Judge has come to such a finding only on the basis of the fact that the arbitration proceedings which were held in terms of the provisions of MSMED Act, took place under the aegis of the Facilitation Council at Kanpur.

8. The relevant clause in the agreement entered between the parties herein is reproduced as under:

“JURISDICTION

The contract shall in all respect be construed and operative

in conformity with the Indian Law and be subject to the jurisdiction of Delhi Courts (India).”

9. Mr. Kumar, had relied upon the Judgment of the Supreme Court in the case of ***Gujarat State Civil Supplies Corporation Ltd. (supra)***, to contend that the issue is entirely covered by the said Judgment inasmuch as the jurisdiction of the Facilitation Council which overrides the agreement executed between the parties is only with regard to the conduct of proceedings of the Facilitation Council and in no way shall affect the jurisdiction of Courts in Delhi to entertain a petition challenging the award under Section 34 of the Act of 1996, in view of clear stipulation in the agreement wherein the parties have conferred exclusive jurisdiction to the Courts in Delhi.

10. The plea of the learned counsel for the respondent is otherwise, inasmuch as the Facilitation Council being based in Kanpur, it would be the exclusive jurisdiction of the Court in Kanpur to entertain a petition under Section 34 of the Act of 1996. This he says, on the premise, the award has been rendered by the Facilitation Council based in Kanpur. In other words, it is his plea, the cause of action having arisen within the jurisdiction of Kanpur, it is the Court in Kanpur which shall have a jurisdiction to entertain a petition challenging the arbitral award. He submits that the learned District Judge has rightly relied upon the judgments of the Supreme Court in the case of ***BGS SGS SOMA JV (supra)*** and ***Hindustan Construction Company Ltd. (supra)***, to come to the conclusion that the Court in Kanpur shall have the jurisdiction to entertain a challenge against the

award rendered by the Facilitation Council at Kanpur.

11. We are unable to agree with the submissions advanced by the leaned counsel for the respondent, for the reason that the issue in hand is covered by the Judgment of the Division Bench of this Court in the case of *Indian Oil Corporation Ltd. v. FEPL Engineering (P) Ltd. & Ors.*, MANU/DE/3140/2019, wherein it is held, the jurisdiction of the MSME Council, which is decided on the basis of the location of the supplier, would only determine the ‘venue’, and not the ‘seat’ of Arbitration. Therefore, the place of arbitration for the purpose to entertain a challenge to an arbitral award continues to be the place over which the Court has been conferred with exclusive jurisdiction, as agreed between the parties. The Court further held that the MSMED Act despite being the Special Legislation would not eclipse and nullify the jurisdiction clause agreed upon between the parties. It means, post-rendering of the arbitral award by the Facilitation Council, the exclusive jurisdiction clause entered between the parties shall not be affected.

12. That being said, it is a settled law that a place which is provided under the exclusive jurisdiction clause agreed between the parties determines the territorial jurisdiction of the Court to entertain a petition under Section 34 of the Act of 1996. Though in the present case, there was no arbitration clause, but still the parties have conferred exclusive jurisdiction to the Courts in Delhi. The same shall mean that any challenge to the arbitration award in terms of Section 19 of the MSMED Act would necessarily lie before the Court in Delhi. So, it follows that a challenge to the award passed under the MSMED

Act shall necessarily be in terms of Section 34 of the Act of 1996 and surely the principles as governed under the Act of 1996 shall apply to such challenge.

13. It is in that context, the Division Bench of this Court has in paragraph 23 held that the place where the proceedings were held by the Facilitation Council must be construed as a venue as different from a seat which is determined because of the jurisdiction conferred by the parties on a particular Court by a mutual agreement. In this regard, we reproduce paragraph 23 of the said judgment as under:

“23. Undoubtedly, the MSME Act is a special legislation dealing with Micro, Small and Medium Enterprises and would have precedence over the general law. There are decisions of several Courts holding that the provisions of MSME Act would override the provisions of the Contract between the parties. However, we are not engaged with the said controversy and, in fact, we had made it clear to the learned counsel for the Appellant, during the course of arguments, that the questions relating to the jurisdiction of the MSME Council to act as an Arbitrator and other similar issues will not be examined by us, as the learned Single Judge has not considered any of those aspects and has decided the objection petition only on the ground of territorial jurisdiction. However, this does not mean that the jurisdiction clause agreed between the parties has to be given a go-by. The overriding effect of the MSME Act, cannot be construed to mean that the terms of the agreement between the parties have also been nullified. Thus, jurisdiction of the MSME Council which is decided on the basis of the location of the supplier, would only determine the 'VENUE', and not the 'SEAT' of arbitration. The 'SEAT' of arbitration would continue to be governed in terms

of the arbitration agreement between the parties, which in the present case as per jurisdiction Clause No. 35 is New Delhi. As a result, in terms of the decision of the Supreme Court in Indus Mobile (supra), it would be the Courts at New Delhi that would have exclusive jurisdiction to entertain the petition under Section 34 of the Act.”

(emphasis supplied)

14. More so, in a very recent judgment passed by the High Court of Bombay in the case of *Gammon Engineers & Contractors Pvt. Ltd. and Ors. v. Sahay Industries and Ors.*, MANU/MH/0217/2023, the Court, whilst deciding the challenge against the award rendered by the Facilitation Council, Madurai, has, in paragraphs 14 to 17, held as under: -

“14. There can be no quarrel with the said proposition, as it is law of the land. But, the crucial question is, as to which Court shall have jurisdiction when an aggrieved party intends to challenge an Arbitral Award passed by the Facilitation Council under the provisions of the MSMED Act. It is an admitted position that under the provisions of the MSMED Act, there is no avenue of challenge or appeal provided to the aggrieved party. In fact, sub Section (3) of Section 18 of the MSMED Act, specifically provides that when the Facilitation Council takes up the dispute for Arbitration, the provisions of the Arbitration Act shall apply to the dispute, as if the Arbitration was in pursuance of an Arbitration Agreement under Section 7(1) of the Arbitration Act. In the said judgment in the case of Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd. (supra), the Hon'ble Supreme Court concluded that the proceedings before the Facilitation Council, acting as the Arbitral Tribunal, would be governed by the Arbitration Act.

Consequently, when the Facilitation Council renders its Arbitration Award, any challenge raised against the same is governed by the provisions of the Arbitration Act. The only provision under which the Arbitration Award can be challenged is Section 34 of the Arbitration Act. The Court having jurisdiction to entertain such a challenge is the Court where the place of Arbitration was agreed between the parties. The Hon'ble Supreme Court in the cases of Swastik Gases Pvt. Ltd Vs. Indian Oil Corporation Ltd. MANU/SC/0654/2013 : (2013) 9 SCC 32 and Indus Mobile Distribution Pvt. Ltd. Vs. Datawind Innovations Pvt. Ltd. MANU/SC/0456/2017 : (2017) 7 SCC 678 laid down that even though the venue of Arbitration may be different from the place of Arbitration agreed between the parties, the challenge to an Arbitration Award shall be entertained only by the Court having jurisdiction over the place of Arbitration. It was held that the place of Arbitration would be determined on the basis of agreement between the parties, including an agreement to exclusively provide for jurisdiction in a particular Court.

15. It is relevant that the Hon'ble Supreme Court in the case of Indus Mobile Distribution Pvt. Ltd. Vs. Datawind Innovations Pvt. Ltd.(supra), in the context of exclusionary jurisdiction clause contained in an arbitration agreement held as follows:

"19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference

to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction -- that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties."

16. This Court is of the opinion that even though, in the case of Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd. (supra), the Hon'ble Supreme Court has observed that statutory Arbitration under Section 18 of the MSMED Act, would override the agreement between the parties, it necessarily applies to the agreed procedure of Arbitration between the parties. It is clear that if parties agreed for Arbitration by a sole Arbitrator or by an agreed procedure of constituting an Arbitral Tribunal, the same would stand obliterated by operation Section 18 of the MSMED Act. But once the Arbitration Award is pronounced, and there is an exclusionary clause of jurisdiction agreed between the parties, thereby agreeing upon jurisdiction of only one Court, in exclusion to others, the challenge initiated by the aggrieved party under the Arbitration Act, even against an award passed by the Facilitation Council under the MSMED Act, will lie only before the Court upon which the parties agreed to place exclusive jurisdiction. This Court is in agreement with the view taken by the Division Bench of the Delhi High Court in the case of Indian Oil Corporation Ltd. Vs. Fepl

Engineering (P) Ltd & Anr. (supra), to the effect that Arbitration proceedings undertaken before the Facilitation Council under Section 18 of the MSMED Act are undertaken at the venue where the Facilitation Council is located. The place of the Arbitration continues to be the place over which the Court has exclusive jurisdiction, as agreed between the parties. By the operation of the provisions of the MSMED Act, only the procedure of constitution of the Arbitral Tribunal is overshadowed in terms of the law laid down by the Hon'ble Supreme Court in case of Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd. (supra) and it does not eclipse the agreement between the parties of foisting exclusive jurisdiction on a particular Court. In law, it is that place which is covered under the exclusive jurisdiction of the Court agreed between the parties, which continues to be the place of Arbitration, thereby determining the Court that shall have territorial jurisdiction to entertain a petition under Section 34 of the Arbitration Act, to challenge the award passed by the Facilitation Council under the MSMED Act.

17. In the present case, there is no dispute about the fact that the parties agreed that the Courts at Mumbai shall have exclusive jurisdiction. Therefore, the place of Arbitration continues to be Mumbai, although the venue of Arbitration was Madurai, where the Facilitation Council under the MSMED Act passed the impugned award. Thus, this Court finds that there is no substance in the preliminary objection raised on behalf of the Respondent regarding territorial jurisdiction of this Court to entertain the present petition.”

(emphasis supplied)

15. It may be stated here that a learned Single Judge of this Court in the case of **Ahluwalia Contracts (India) Ltd. vs. Ozone Research &**

Applications (I) Pvt. Ltd. and Ors., OMP(COMM) 343/2017 decided on **January 30, 2023**, by noting the judgment of the Division Bench of this Court in the case of *Indian Oil Corporation Ltd. (supra)* and by referring to the judgment of the Supreme Court in the case of *Gujarat State Civil Supplies Corporation Ltd. (supra)*, is of the view that the seat of arbitration shall be the place where Facilitation Council is situated (Nagpur in that case). Hence, a petition filed before this Court under Section 34 of the Act of 1996, shall not be maintainable. In support of his observation, he has referred to paragraphs 27 and 28 of the Judgment of the Supreme Court in the case of *Gujarat State Civil Supplies Corporation Ltd. (supra)*, which we reproduced as under:

“27. The submissions made on behalf of the counsel for the Buyers that a conscious omission of the word “agreement” in sub-section (1) of Section 18, which otherwise finds mention in Section 16 of the MSMED Act, 2006 implies that the arbitration agreement independently entered into between the parties as contemplated under Section 7 of the Arbitration Act, 1996 was not intended to be superseded by the provisions contained under Section 18 of the MSMED Act, 2006 also cannot be accepted. A private agreement between the parties cannot obliterate the statutory provisions. Once the statutory mechanism under subsection (1) of Section 18 is triggered by any party, it would override any other agreement independently entered into between the parties, in view of the non obstante clauses contained in sub-section (1) and sub-section (4) of Section 18. The provisions of Sections 15 to 23 have also overriding effect as contemplated in Section 24 of the MSMED Act, 2006 when anything inconsistent is contained in any other law for the time being in force. It cannot be gainsaid that while interpreting a statute, if two interpretations are possible, the one which enhances the object of the Act should be preferred than the one which would frustrate the object of

the Act. If submission made by the learned counsel for the buyers that the party to a dispute covered under the MSMED Act, 2006 cannot avail the remedy available under Section 18(1) of the MSMED Act, 2006 when an independent arbitration agreement between the parties exists is accepted, the very purpose of enacting the MSMED Act, 2006 would get frustrated.

28. There cannot be any disagreement to the proposition of law laid down in various decisions of this Court, relied upon by the learned counsel for the buyers that the Court has to read the agreement as it is and cannot rewrite or create a new one, and that the parties to an arbitration agreement have an autonomy to decide not only on the procedural law to be followed but also on the substantive law, however, it is equally settled legal position that no agreement entered into between the parties could be given primacy over the statutory provisions. When the Special Act i.e., MSMED Act, 2006 has been created for ensuring timely and smooth payment to the suppliers who are the micro and small enterprises, and to provide a legal framework for resolving the dispute with regard to the recovery of dues between the parties under the Act, also providing an overriding effect to the said law over any other law for the time being in force, any interpretation in derogation thereof would frustrate the very object of the Act. The submission therefore that an independent arbitration agreement entered into between the parties under the Arbitration Act, 1996 would prevail over the statutory provisions of MSMED Act, 2006 cannot countenanced. As such, sub-section (1) of Section 18 of the MSMED Act, 2006 is an enabling provision which gives the party to a dispute covered under Section 17 thereof, a choice to approach the Facilitation Council, despite an arbitration agreement existing between the parties. Absence of the word 'agreement' in the said provision could neither be construed as casus omissus in the statute nor be construed as a preclusion against the party to a dispute covered under Section 17 to approach the Facilitation Council, on the ground that there is an arbitration agreement existing

between the parties. In fact, it is a substantial right created in favour of the party under the said provision. It is therefore held that no party to a dispute covered under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Facilitation Council under Section 18(1) thereof, merely because there is an arbitration agreement existing between the parties.”

16. With respect, we are not in agreement with the view taken by the learned Single Judge, for the reasons stated by the learned Single Judge of the Bombay High Court in paragraph 16 of the judgment, which we have reproduced above, which we reiterate in the following manner:-

- (i) Once the Arbitral Award is pronounced, and there is an exclusionary clause of jurisdiction agreed between the parties, thereby, agreeing upon the jurisdiction of only one Court, in exclusion to others, the challenge initiated by the aggrieved party under the Act of 1996, even against an award passed by the Facilitation Council under the MSMED Act, will lie only before the Court upon which the parties have agreed to place exclusive jurisdiction.
- (ii) Similar is the conclusion of the Division Bench of this Court in the case of ***Indian Oil Corporation Ltd. (supra)***, to the effect that Arbitration proceedings undertaken before the Facilitation Council under Section 18 of the MSMED Act, are undertaken at the ‘venue’ where the Facilitation Council is located.
- (iii) The place of the Arbitration continues to be the place over

which the Court has exclusive jurisdiction, as agreed between the parties.

- (iv) By operation of the provisions of the MSMED Act, only the procedure of constitution of the Arbitral Tribunal is obliterated in terms of the law laid down by the Supreme Court in the case of *Gujarat State Civil Supplies Corporation Ltd. (supra)*.
- (v) The same does not eclipse the agreement between the parties of foisting exclusive jurisdiction on a particular Court.

17. In view of our above discussion, we are of the view that the impugned order passed by the learned District Judge rejecting the petition filed by the appellant herein under Section 19 of the MSMED Act read with Section 34 of the Act of 1996, on the ground that the Court has no territorial jurisdiction is contrary to the settled position of law and the same is liable to be set aside.

18. Insofar as the judgments in the case of *BGS SGS SOMA JV (supra)* and *Hindustan Construction Company Ltd. (supra)*, relied upon by the learned District Judge and the counsel for the respondent are concerned, they also hold that the seat as designated by the parties by an agreement shall govern the territorial jurisdiction of Courts to entertain a challenge to the award, which is what, we have held in the above paragraphs, except that in the case in hand, the proceedings held at Kanpur, where facilitation council is situated has been held as a ‘venue’ which is different from ‘seat’ that is Delhi, in view of the fact that parties have agreed to the jurisdiction of Courts in Delhi, which shall include a challenge to the arbitral award.

19. The objections filed by the appellant, being OMP (COMM)

01/2022, are restored on the file of the learned District Judge (Commercial Court), Shahdara, Delhi, for adjudication of the same on merits in accordance with law. It is ordered accordingly. No Costs.

V. KAMESWAR RAO, J.

ANOOP KUMAR MENDIRATTA, J.

MARCH 27, 2023/jg/aky

