* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of order : 12th April, 2023**

\+ ARB.P. 1415/2022

TATA POWER COMPANY LIMITED ..... Petitioner

Through: Appearance not given

versus

GENESIS ENGINEERING COMPANY ..... Respondent

Through: Appearance not given

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

<u>O R D E R</u>

<u>CHANDRA DHARI SINGH, J (Oral)</u>

1. The instant petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act") has been filed on behalf of the petitioner seeking the following reliefs:

> *"(a) Allow the present Petition and appoint Justice G.S Sistani (Retd.) as the Ld. Sole Arbitrator in terms of Clause 23 of the GCC for adjudicating the disputes between Petitioner and Respondent;*
>
> *(b) Pass such other and further orders which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and in the interest of justice."*

2. Learned counsel for the petitioner submitted that the instant

petition has been filed in terms of the liberty granted by this Court *vide* Order dated 20.09.2022 passed in Arbitration Petition No. 1237 of 2021, seeking the Court's directions for appointment of an Arbitrator to adjudicate upon the disputes which has arisen between the Petitioner and the Respondent with respect to the Work Orders dated 11.02.2019 and 28.05.2019 read with General Conditions of Contract (hereinafter referred to as the "**GCC**") executed between parties.

3. It is stated that on 05.06.2017, the Municipal Corporation of Ludhiana issued Request for Proposal (hereinafter referred to as the "**RfP**") for selection of concessionaire for implementing smart LED streetlights and Centralized Control and Monitoring System (hereinafter referred to as the "**CCMS**") for the city of Ludhiana on Energy Services Companies (hereinafter referred to as the "**ESCO**") model (hereinafter referred to as the "**Project**"). Accordingly, Tata Project Limited (hereinafter referred to as the "**TPL**") emerged as the successful bidder for carrying out works for the Project. Thereafter, TPL delegated the works for the Project to the Petitioner. The Petitioner to sub-delegate the works for the Project issued a Notice Inviting Tender thereby inviting bidders for replacement of conventional street lights for the Project. It is submitted that the Respondent emerged as a successful bidder for undertaking the work for the Project and a Letter of Comfort (hereinafter referred to as the "**LoC**") in this regard was issued to the Respondent by the Petitioner.

4. It is stated that pursuant to the LoC being issued to the Respondent, the Petitioner issued Work Orders in favour of the Respondent. However,

soon after the work was commenced by the Respondent, the Petitioner observed various laxities in the work of Respondent. Accordingly, the Petitioner from time to time issued Notice for Non Performance of Services, Show Cause Notice, several emails and letters to the Respondent thereby pointing out various deficiencies in the work pertaining to the Project. It is submitted that despite various notices, emails and letters issued to the Respondent, the Respondent failed to rectify the deficiencies.

5. It is stated that on 04.08.2021, Petitioner issued a Show Cause Notice and a Final Reminder letter calling upon the Respondent to perform its obligations within one week from receipt of the Show Cause Notice, failing which the Petitioner may take appropriate actions in terms of the GCC. The Respondent in response to the Show Cause Notice issued by the Petitioner issued a letter dated 22.08.2021 disputing the claims as raised by the Petitioner and raised its own claim to the tune of Rs. 4,86,67,058/-. Moreover, the Respondent in order to shy away from its contractual obligations issued a Termination Notice dated 23.08.2021 to M/s Tata Power Delhi Distribution Company Limited alleging that it has acted in violation of contractual obligation and directed to release its alleged dues under the Work Order. Thereafter on 03.09.2021, TPDDL issued a response to the Termination Notice issued by Respondent stating that:

(a) There is no contract between TPDDL and the Respondent.

(b) TPDDL is not a party to the Work Order dated 11.02.2019 and

28.05.2019 entered between the Petitioner and the Respondent.

(c) The Termination Notice has been wrongly issued to TPDDL and directed the Respondent to withdraw the Termination Notice.

6. It is stated that since, the Respondent failed to perform its obligation within the time prescribed under the Show Cause Notice, the Petitioner was constrained to issue the Termination Notice dated 03.09.2021 and 07.09.2021 in terms of the procedure prescribed under Clause 22.1 of the GCC. Accordingly, the Petitioner on 30.09.2021 issued a Notice to the Respondent and also apprised the Respondent that the Respondent is liable to pay Rs. 8,45,44,269/- to the Petitioner. Hence, there exists a dispute *inter-se* the parties.

7. It is submitted that the Petitioner on 08.11.2021, issued a Notice under Section 21 of the Act read with Clause 23 of the GCC (hereinafter referred to as the **"Arbitration Notice"**) to the Respondent nominating Justice G.S. Sistani (Retd.) as the Ld. Sole Arbitrator and requested the Respondent to provide its consent for the same. On 19.11.2021, the Respondent issued a response to the Arbitration Notice admitting the dispute *inter-se* parties and requested the Petitioner to provide a panel of five Arbitrators, out of which the Respondent shall nominate one Arbitrator or in the alternative the Respondent shall provide with five names of the Arbitrator and the Petitioner can nominate one Arbitrator out of the list.

8. In view of the background that parties were not able to mutually nominate an Arbitrator in order to amicably resolve the dispute, therefore,

Petitioner filed an Arbitration Petition No. 1237 of 2021 before this Court seeking appointment of a Sole Arbitrator. While the Arbitration Petition was pending adjudication before this Court, the Respondent invoked Section 18 of the Micro, Small and Medium Enterprises Development Act (hereinafter referred to as the **"MSME Act")** and filed its claim before the Facilitation Council, Mohali.

9. It is further stated that during the pendency of the Arbitration Petition and the reference made by Respondent before the Facilitation Council, the parties were making joint efforts to amicably resolve the dispute and duly conducted meeting from time to time. As a positive step towards amicably settling the dispute, on 20.09.2022, the Petitioner withdrew the Arbitration Petition with liberty to approach this Court in the event the parties failed to arrive at a settlement.

10. It is, however, stated that in view of the fact that parties have failed to arrive at an amicable settlement, therefore, the Petitioner is constrained to file the present Petition seeking an appointment of an Arbitrator in terms of the Agreement executed between the parties. Therefore, it is prayed that the present Petition be allowed and this Court can appoint Justice G.S Sistani (Retd.) as the Ld. Sole Arbitrator in terms of Clause 23 of the GCC for adjudicating the disputes between Petitioner and Respondent.

11. *Per Contra,* learned counsel for the Respondent vehemently denied the averments made by the learned counsel for the Petitioner and submitted that the petition is not maintainable and liable to be rejected. It

is stated that the respondent is an entity registered under the MSME Act, bearing Udyog Aadhar Number PB20D0003167 and has been registered as on 28.07.2017 i.e. before entering into agreement with petitioner.

12. It is also stated that the Respondent has already invoked proceedings under section 18 of MSME Act before Facilitation Council at Mohali, Punjab. It is stated that even the petitioner has also joined proceedings therein and has also filed its reply before the Facilitation Council at Mohali, Punjab.

13. Learned counsel also placed reliance on the judgment of the Hon'ble Supreme Court in the Case of ***M/s Silpi Industries v. Kerala SRTC,*** **AIR 2021 SC 5487**, to state that MSME Act being a special legislation, the provisions of MSME Act shall prevail over the Arbitration Act.

14. In view of the aforesaid, it is prayed that the appropriate proceedings are already ongoing before the Facilitation Council under Section 18 of the Act. It is accordingly prayed that this Court may kindly dismiss the present petition with heavy costs and further direct the petitioner to pay up the dues of the respondent in terms of the agreement.

15. In rejoinder to the submissions by the Respondent it is stated by the learned counsel for the Petitioner that the reference made by Respondent under Section 18 of the MSME Act is not maintainable as the nature of work awarded to Respondent is composite in nature which is evident from the perusal of the scope of work which was awarded to Respondents under the respective Work Orders. Reliance has been placed on a plethora

of judgments including ***Kone Elevator India Private Limited vs State of Tamil Nadu,* (2014) 7 SCC 1,** ***Sterling and Wilson Private Limited vs. Union of India & Ors.,*** **AIR 2017 Bom 242,** and ***Shree Gee Enterprises vs. Union of India,*** **2015 SCC OnLine Del 13169** to contest that the MSME Act is not applicable to the case at hand.

16. Heard learned counsels for the parties and perused the record.

17. The primary question to be adjudicated before coming to the arbitrability of the disputes in question is the applicability of the MSME Act to the case at hand. In order to determine, the applicability of the said Act, it is pertinent to peruse the contract and determine the nature of the contract.

18. Pursuant to the issuance of the LoC, the parties entered into the following Work Orders along with the General Conditions of Contract:

(a) Work Order No. 6000040502 for Replacement of Street Lights along with LEDs; and

(b) Work Order bearing No. 6000042695 for Supply & Installation of Tubular poles, Supply & Installation of Earth Wire, Supply & Installation of PVC Cable and other relevant accessories and services as per BOQ.

19. In order to ascertain whether the scope of work as awarded to Petitioner would qualify as a 'work contract' or 'composite supply', the judgment of the Hon'ble Supreme Court of India in ***Kone Elevator India Private Limited vs. State of Tamil Nadu*, (2014) 7 SCC 1** is relevant to

appreciate the categories of contract, i.e. (a) Contract for work to be done for remuneration and for supply of materials to be used in the execution of work for a price (b) Contract for work in which the use of the materials is necessary or incidental to the execution of the work (c) Contract for supply of goods where some work is required to done as incidental to the sale. The Hon'ble Supreme Court has opined that category (a) as composite contract consisting of two contracts, one of which is for the sale of goods and the other which is for work and labour. It was held that the involvement of supply of goods and material as well as installation of the lift had concluded that the contracts awarded to Kone Elevators satisfy the characteristics of Works Contract and held that it cannot be considered as contract of sale.

20. Applying the judgment to the instant case, the Works Orders as executed by the parties in the instant case falls within category (a) as it comprises of two contracts which include supply of goods such as Cables, wire, connectors, street lights and poles and subsequent involvement of work and labour for its installation. Further, the element of both supply of goods and element of labour and service is involved in the Work Orders. It is also a settled principled of law that that dispute/claims arising from Works Contract are not amenable to the jurisdiction of Facilitation Council constituted under the MSME Act.

21. In terms of Section 11 of the MSME Act, Central Government had to notify policies in respect of procurement of goods and services produced and provided by Micro and Small Enterprises. Accordingly, on 23.03.2012, Public Procurement Policy for Micro and Small Enterprises

was notified which envisaged that Central Ministry or Department or Public Sector Undertaking shall set an annual goal of procurement of products produced and services from Micro and Small Enterprises. Thereafter, on 25.03.2022, Office of Development Commissioner, Government of India issued an Office Memorandum clarifying that Public Procurement Policy is not applicable to Works Contracts. In view of the aforesaid and considering the definition of Enterprise and on a combined reading of the said Policy and subsequent clarification issued by the Ministry, it is evident that benefit of MSME Act and Policies issued thereunder can only be availed by enterprises which fall within the ambit of goods and services which are manufactured and reproduced by the enterprises.

22. In the case of ***Sterling and Wilson Private Limited vs. Union of India & Ors.*** **2017 SCC OnLine Bom 6829,** the Bombay High Court held as under:

> *"42. The provisions of Section 11 of the Act and clause 3 of the Policy envisage procurement of "goods and services" produced and provided by MSEs. The provisions of the Act and the Policy are therefore applicable to procurement of "goods and services" produced and provided by MSEs. Answer to FAQ No. 18 also makes it abundantly clear that the policy is meant for procurement of only goods produced and services rendered by MSEs. However, traders are excluded from purview of Public Procurement Policy.*
>
> *43. The provisions of the Act would therefore not be applicable to work contracts, which are essentially contracts of composite nature involving supply of goods as well as labour/services etc.*

Similar view has been taken by Delhi High Court in Shree Gee Enterprises (supra) wherein it has been held that the policy is not applicable to work contracts simplicitor and that it is only meant for goods produced and services rendered by MSEs.

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52. A perusal of these clauses reveal that the contract under tender is a composite contract, which involves supply of goods, as well as erection, installation and commissioning in accordance with the plans/drawings, procedures, and specific specifications. The nature of work requires expertise, special skill in designing, engineering and various other technical aspects in erecting, installing, commissioning and making the firewater spray system operational and functional. The tender contract of this nature is not for sale of goods simplicitor, but is a composite contract, which has to be treated as work contract.

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56. In the instant case, as stated earlier, the contract under tender is a composite contract for supply of goods as well as installation of fire water spray system, which is a permanent fixture. The goods supplied under the contract are eventually assembled and installed at site and become part of the permanent fixture. The said contract satisfies fundamental characteristics of work contract and hence cannot be considered as a contract simplicitor for sale of goods and services.

57. As stated earlier, the MSMED Act and the Public Procurement Policy is applicable only to procurement of goods and services. The contract under tender not being a contract for sale of goods and predominantly a work contract, the benefits of the Act and the Policy could not be extended to the MSEs registered under the Act…"

23. This Court in the matter titled ***Shree Gee Enterprises vs. Union of India*** **2015 SCC OnLine Del 13169**, held as under:

> *"10. Reference may also be had to the office memorandum dated 20.02.2014 issued by the Director of the Office of the Development Commissioner, Ministry of MSME, Union of India, wherein frequently asked questions and their answers had been circulated to the various Ministries and in particular to question No. 18 and their answers thereto which reads as under : -*
>
> > *Ques.18. Whether this policy is applicable for works/trading activities also? Ans. Policy is meant for procurement of only goods produced and services rendered by MSEs.*
>
> *11. A reading of the policy along with the frequently asked questions and the answers, referred to above, clearly shows that the policy is meant for giving preference in respect of procurement of goods produced and services rendered by Micro, Small and Medium Enterprises (MSME). It would not be applicable to a "works contract" simpliciter.*
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> *12. Learned counsel appearing for the Respondent No. 1 representing the Ministry of Micro, Small and Medium Enterprises, admitted that the policy was not applicable to works contracts and would be applicable only for procurement of goods produced and services rendered by MSME(s). The learned counsel fairly conceded that the subject tender being for a simpliciter works contract was not covered under the Public Procurement Policy for MSEs Order, 2012.*
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> *13. Since the subject contract is a simpliciter works contract, it is not covered by the Public Procurement Policy for MSEs Order, 2012 and as such, the Respondent No. 2 could not have*

given preference to the Respondent No. 3 by applying the said policy. The petitioner being L-1 was thus entitled to the award of the tender."

24. In view of the aforesaid judgments and the nature of Works Order awarded to Respondent clearly establishes that the Work Orders in question are essentially Works Contract. It is a settled principle of law that dispute/claims arising from Works Contract are not amenable to the jurisdiction of Facilitation Council constituted under the MSME Act. It is evident that the Work Orders under question qualify as Work Contracts, therefore, the Respondent is not entitled to take the benefit of provisions of MSME Act and to assail the maintainability of the instant proceedings.

25. Section 23 of the GCC pertaining to dispute resolution reads as under:

"23.0 DISPUTE RESOLUTION & ARBITRATION

In case of any dispute or difference the parties shall endeavour to resolve the same through conciliatory and amicable measures within 15 Days failing which the matter may be referred by either party for resolution by the sole arbitrator to be appointed mutually by both the parties. The arbitral proceedings shall be conducted in accordance with Arbitration and Conciliation Act 1996 and the place of arbitration shall be Delhi. The language to be used at proceedings shall be English and the award of the arbitrator shall be final and binding on the parties. The parties shall bear their respective costs of arbitration. The associate shall continue to discharge its obligations towards due performance of the works as per the terms of the contract during the arbitration proceedings unless otherwise directed in writing by Tata Power Company or suspended by the arbitrator. Further, Tata Power Company *shall continue making such payments as may be found due and payable to the associate for such works."*

26. A bare perusal of the aforementioned clause denotes that the agreement between the parties provide for arbitration. The disputes between the parties are also arbitrable in nature. An application under Section 11 restricts the Court's intervention to examine whether there is a valid arbitration agreement between the parties and any dispute has arisen between them out of such agreement which may call for the appointment of an arbitrator to decide such disputes. In the instant case, both the essentials stand fulfilled. Notice under Section 21 of the Arbitration Act has also been served upon the respondent for appointment of Arbitrator. In view of the same, this Court is inclined to refer the disputes and differences arising between the parties to arbitration, by appointing a sole arbitrator. Hence, the following Order:

ORDER

(i) Mr. Rohan Jaitley, Advocate is appointed as a sole arbitrator to adjudicate the disputes and difference between the parties;

(ii) The learned sole arbitrator, before entering the arbitration reference, shall ensure the compliance of Section 12(1) of the Arbitration and Conciliation Act, 1996;

(iii) The learned sole arbitrator shall be paid fees as prescribed under the he Delhi International Arbitration Centre (DIAC) (Administrative Cost and Arbitrators Fees) Rules, 2018 as amended vide notification dated 15th November, 2022;

(iv) At the first instance, the parties shall appear before the learned sole arbitrator within 10 days from today on a date which may be mutually fixed by the learned sole arbitrator;

(v) All contentions of the parties are expressly kept open;

27. A copy of the order be forwarded to the learned sole arbitrator for necessary compliance on the following address:

Mr. Rohan Jaitley, Advocate
Address- A-44, Kailash Colony, New Delhi-110048
Phone No. +91 – 9958757777
Email ID- rohan@rohanjaitley.com

28. The petition is disposed of in the aforesaid terms along with pending applications, if any.

29. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

APRIL 12, 2023
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Click here to check corrigendum, if any