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

Date of Decision: 30.01.2023

+ O.M.P. (COMM) 343/2017 & I.A. 10512/2017.
AHLUWALIA CONTRACTS (INDIA) LTD Petitioner
Through: Mr. Shashank Garg, Ms.
Nishtha Jain, Advocates.

versus

OZONE RESEARCH & APPLICATIONS
(I) PVT. LTD. & ANR. Respondents
Through: None.

**CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN**

PRATEEK JALAN, J. (ORAL)

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1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [“the Arbitration Act”], is directed against an award rendered by the Micro and Small Enterprises, Facilitation Council, Nagpur in a claim lodged by the respondent No. 1 against the petitioner claiming to be a Micro and Small Enterprise.

2. Although respondent No. 1 is unrepresented today, I find that an objection on the ground of territorial jurisdiction is taken in the reply filed by respondent No. 1. At my request, Mr. Shashank Garg, learned counsel for the petitioner, has addressed on this aspect, particularly

keeping in view the judgment of the Supreme Court in *Gujarat State Civil Supplies Corporation Limited vs. Mahakali Foods (P) Ltd.*¹

3. The disputes between the parties arise out of a Purchase Order dated 22.05.2010 (at page 63 of the petitioner's list of documents) ["the Purchase Order"]. Clause 8 of the Purchase Order provides as follows: -

"All disputes are subject to Delhi Jurisdiction."

4. Although the Purchase Order does not contain an arbitration clause, the claims of respondent No. 1 herein were referred for conciliation and arbitration to the Facilitation Council under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 ["MSMED Act"]. Section 18(4) of the MSMED Act provides as follows: -

"18. Reference to Micro and Small Enterprises Facilitation Council.

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(4). Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India."

5. By virtue of this provision, the Facilitation Council in Nagpur, where respondent No. 1 is located, assumed jurisdiction and rendered the award.

¹ Arising out of SLP(C) No. 12884/2020.

6. The objection taken by respondent No. 1 is that the arbitration having been conducted under the MSMED Act in Nagpur and the award having been rendered in Nagpur, the seat of the arbitration in the present case was in Nagpur and, therefore, the challenge to the award would not lie before this Court.

7. It is noted in order dated 06.04.2022 that Mr. Garg sought to support the jurisdiction of this Court by reference to a judgment of the Division Bench of this Court in *Indian Oil Corporation Ltd. vs. FEPL Engineering (P) Ltd.*² In the said judgment, the Division Bench was concerned with a contract which contained an arbitration clause and a jurisdiction clause. The Division Bench found that these clauses constituted New Delhi as the venue of arbitration and also conferred exclusive jurisdiction upon the Courts in New Delhi. The Court held that, by virtue of Section 18(4) of the MSMED Act, the arbitration was, in fact, conducted by a Facilitation Council outside Delhi, but the said provision would have the effect of shifting the venue of the arbitration and not its seat. The observations of the Division Bench in paragraphs 20 and 23 of the aforesaid decision are relevant, and are reproduced below: -

“20. In the present case, both the VENUE as well as the SEAT (by way of the jurisdiction clause) has been agreed to be at New Delhi. We, therefore, have no hesitation to say that the Courts at Delhi would have the jurisdiction to entertain the petition challenging the award passed by the MSME Council. Since the parties agreed to confer exclusive jurisdiction to Courts at New Delhi, notwithstanding the fact that the purchase order in question dated 10th March 2016, was issued by the Petitioner from its Vadodra Office to the Respondent at Navi Mumbai, and even if no

² Judgment dated 26.09.2019 in FAO(OS)(COMM) 92/2019.

cause of action has arisen in Delhi, the Courts of Delhi would have jurisdiction to entertain the petition under Section 34 of the Arbitration Act. This is pertinently because in *Indus Mobile*(supra) as noted in para 19 of the judgement, the Court has held that Section 16 to 21 of CPC would not be attracted. Thus notwithstanding the fact that cause of action may not have arisen in New Delhi, since the Seat has been agreed to be in Delhi, the courts here would have the jurisdiction to entertain the petition under section 34 of the Arbitration Act.

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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.”³

8. The aforesaid judgment proceeds on an interpretation of Section 18(4) of the MSMED Act vis-à-vis the contractual provisions

³ Emphasis Supplied.

contained in the arbitration clause and the jurisdiction clause of the agreement. However, in the present case, the Purchase Order does not contain an arbitration clause at all. In such circumstances, it is, in my view, not possible to hold that the parties agreed to a particular seat of the arbitration which would vest jurisdiction in this Court despite the provisions of the MSMED Act.

9. In any event, the judgment of the Supreme Court in *Gujarat State Civil Supplies Corporation Ltd.*⁴ [which was rendered on 31.10.2022, well after the decision of the Division Bench in *Indian Oil Corporation Ltd.*⁵] makes it clear that the provisions of Chapter V of the MSMED Act would override the Arbitration Act and the contractual arrangement. In paragraph 23 of the judgment, the Supreme Court has identified the following salient features of the scheme of Chapter V of the MSMED Act: -

“23. Having regard to the purpose, intention and objects as also the scheme of the MSMED Act, 2006 and having regard to the unambiguous expressions used in Chapter-V thereof, following salient features emerge:

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(vi) The provisions of Arbitration Act, 1996 has been made applicable to the dispute only after the Conciliation initiated under sub-section (2) does not succeed and stands terminated without any settlement between the parties.

(vii) Sub-section (1) and sub-section (4) of Section 18 starting with non obstante clauses have an effect overriding the other laws for the time being in force.

(viii) As per Section 24, the provisions of Sections 15 to 23 have an effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

⁴ Supra (note 1).

⁵ Supra (note 2).

10. The question of conflict between the MSMED Act and the Arbitration Act has been addressed in paragraphs 27 and 28 of the judgment as follows: -

*“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.”⁶*

11. Aforesaid being the position of the law laid down by the Supreme Court, in the facts of the present case, I am of the view that the seat of the arbitration, conducted by the Facilitation Council, was in Nagpur and the petition filed before this Court is not maintainable.

12. The petition, alongwith the pending application, is therefore dismissed as not maintainable, with liberty to the petitioner to file a petition on the same cause of action before the appropriate Court in accordance with law.

⁶ Emphasis Supplied.

13. As respondent No. 1 is not represented today, the Registry is directed to forward a copy of this judgment to learned counsel for respondent No. 1.

PRATEEK JALAN, J

JANUARY 30, 2023

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