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ORDER SHEET

AP/215/2018
IA NO:GA/1/2024

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

HINDUSTAN STEELWORKS CONSTRUCTION LIMITED
VS
M/S. NARMADA EQUIPMENT AND SPARES CO.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 14th August, 2024.

Appearance:
Mr. Somnath Ganguly, Adv.
...for the petitioner

Mr. Sabyasachi Chowdhury, Adv.
Mr. Shonak Mukhopadhyay, Adv.
Mr. Sanjib Dawn, Adv.
...for the respondent

The Court: The present challenge has been preferred under Section 34 of the Arbitration and Conciliation Act, 1996. The grounds of challenge, as per the arguments of learned counsel for the petitioner, are two-fold:-

First, that the supplier/claimant (present respondent) was registered as a micro and small industry after the date of the relevant transactions which are the subject-matter of the dispute; as such, the Facilitation Council under the MSME Act, 2006 did not have jurisdiction to take up the arbitration.

Secondly, that the contract from which the dispute arises being a 'works contract', the same did not come within the purview of the 2006 Act and as such, the arbitral award under challenge is bad for inherent lack of jurisdiction, which hits at the root of the matter.

In support of his contentions, learned counsel cites *Kone Elevator India Private Limited vs. State of Tamil Nadu* reported at *(2014) 7 SCC 1* with regard to the proposition advanced by the petitioner on works contracts. On the self-same proposition, learned counsel also cites *Gujarat State Civil Supplies Corporation Limited vs. Mahakali Foods Private Limited (Unit 2) and Another* reported at *(2023) 6 SCC 401.*

Learned counsel for the petitioner cites *Silpi Industries and Others vs. Kerala State Road Transport Corporation and Another* reported at *(2021) 18 SCC 790* in support of the contention that since the registration of the respondent as a micro and small industry took place after the goods and services were rendered, the MSME Council did not have any jurisdiction to take up the arbitration.

Learned counsel appearing for the respondent contends that none of the points now sought to be argued by the petitioner were raised before the Facilitation Council which took up the arbitration, nor have those been set out as grounds in the present application under Section 34 of the 1996 Act.

Learned counsel points out that although the petitioner seeks to rely on the averments of the present respondent in GA 1 of 2024 filed in connection with the present challenge, in its affidavit-in-reply, the respondent clarified that it was already registered as a small industry under the predecessor Act of the 2006 act, that is, under the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993.

With regard to the works contract, learned counsel argues that the said point was also not urged either before the Arbitrator or as a ground in the present challenge under Section 34.

Learned counsel cites a judgment of this Court in the matter of *WPO 2896 of 2022 (Hindustan Petroleum Corporation Limited and Another vs. The West Bengal State Micro, Small Enterprises Facilitation Council and Others)* where this Court distinguished some of the prior judgments of different High Courts on the issue, including *Kone Elevator (supra)* on the premise that the said judgments, including *Kone Elevator (supra)* was rendered in the context of taxing statutes.

It was held that whereas the interpretation of a taxing statute in the context of Article 366 of the Constitution is on the premise of the nature of the transaction, in a beneficial legislation such as the MSME Act, the adjudication is not on the basis of the particular transaction but the nature of the enterprise which seeks the benefit of the statute.

It was held in the said judgment, upon an elaborate discussion on the previous judgments in the field, that to come within the purview of the 2006 Act, what has to be looked into is whether the unit concerned is an MSME enterprise and not the nature of activity rendered by the said unit, for example supplying goods and/or services.

Learned counsel further cites an unreported judgment of a learned Single Judge of the Delhi High Court in the matter of *New Delhi Municipal Council vs. Decor India Pvt. Ltd.* where it was reiterated, on the basis of judgments of the Supreme Court and a coordinate Bench of this Court, that if a ground was not specifically taken in an application under Section 34 of the 1996 Act, the same cannot be incorporated later, even by way of an amendment, after the statutory limitation period for filing such an application under Section 34, that is, after the expiry of three months plus thirty days from the date of receipt of the award by the challenger.

Thus, it is contended that neither of the grounds taken by the petitioner, which were also not taken either before the Arbitrator or before this Court at any earlier point of time, can be entertained at all by the Court.

Upon a comprehensive consideration of the judgments cited by the petitioner, it transpires that the context of *Kone Elevator (Supra) and Gujarat State Civil Supplies Corporation Limited (Supra)* was elaborately considered in the judgment of this Court in *Hindustan Petroleum Corporation Limited (Supra).* The line of distinction which was relied on in the latter decision was that in respect of taxing statutes, there may very well be a distinction between works contract and contracts solely and exclusively for supply of either goods or services.

However, from the focal point of the MSME Act, 2006, the only consideration for bringing a unit within the purview of the said Act is that the unit has to be an MSME Enterprise within the definition of Section 2(n) of the said Act.

In the present case, as such, the argument regarding the contract being a works contract need not be entered into at all, since the said consideration is entirely irrelevant for invoking the jurisdiction of the MSME Council.

Even with regard to the other point of registration, the respondent has successfully pointed out from the affidavit in reply that it was already registered as a small industry much prior to the enactment of the 2006 Act. As per the saving clause incorporated in Section 32 of the 2006 Act, such a unit also comes within the ambit of 'micro and small industries' as envisaged in the 2006 Act.

In such view of the matter, neither of the arguments made by the petitioner qualifies as a valid ground of challenge under Section 34 of the Arbitration and Conciliation Act, 1996.

That apart, the cardinal point remains that the present petitioner never urged any of these grounds before the Arbitral Tribunal (the MSME Facilitation Council) and/or in its application under Section 34 of the 1996 Act at any point of time.

In such view of the matter, the application under Section 34 of the 1996 Act fails. Accordingly, AP/215/2018 is dismissed on contest without, however, any order as to costs.

In view of the above judgment, the amount deposited by the petitioner with the Registrar, Original Side, along with the interest which has accrued thereon, shall be encashed and paid by the Registrar, Original Side of this Court to the present respondent upon being so approached by the respondent, preferably within three weeks from such approach being made, after deducting the commission due to the Registrar.

The respondent/award holder will be at liberty to recover the balance of the awarded amount in due process of law, if not paid by the petitioner/award debtor.

IA No.GA/1/2024 is disposed of, accordingly, in the light of the above observations.

(SABYASACHI BHATTACHARYYA, J.)

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