

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :

Hon'ble Justice Moushumi Bhattacharya

IA No: GA 1 of 2023

IA No : GA 2 of 2023

in

A.P Com. 365 of 2024

Odisha Power Generation Corporation Limited.

Vs.

M/s. Techniche Consulting Service and Others.

For the petitioner : Mr. Suman Kumar Dutt, Adv.
Mr. A. A. Chakraborty, Adv.
Mr. Jit Ray, Adv.

For the respondent : Mr. Anubhav Sinha, Adv.
Mr. Victor Mukherjee, Adv.
Mr. Subhasis Dey, Adv.
Ms. Shruti Shaw, Adv.

Last heard on : 06.04.2024

Delivered on : 19.03.2024

Moushumi Bhattacharya, J.

1. The petitioner/award-debtor prays for stay of operation and setting aside of an arbitral award dated 18.10.2022 passed by the West Bengal Micro Small Enterprises Facilitation Council. The impugned award was based on a claim of the respondent no. 1 against the petitioner in a reference made before the Facilitation Council under the provisions of The Micro, Small and Medium Enterprises Development (MSMED) Act, 2006.

2. The respondent no. 1/award-holder raises a preliminary objection to the application on the ground that the Calcutta High Court does not have territorial jurisdiction to entertain the application for stay and setting aside of the award. The respondent's argument is premised on the fact that the office of the MSME Council was only the venue for the arbitration and that the dispute resolution clause provides for conciliation and arbitration to be conducted at Bhubaneswar. Learned counsel places the other clauses of the agreement executed between the parties to urge that the parties agreed that the Courts of Odisha shall have exclusive jurisdiction for any disputes, differences and claims arising out of the agreement. Counsel submits that the venue of the arbitration i.e. office of the MSME Council cannot be read as the seat for the purpose of the arbitration proceedings. Counsel submits that in the absence of the arbitration clause the parties would have to fall back on the exclusive jurisdiction clause which has not been waived by the parties.

3. Learned counsel appearing for the petitioner/award-debtor urges that although the arbitration agreement contemplates the venue to be at

Bhubaneswar with exclusive jurisdiction conferred to the Courts of Bhubaneswar, the respondent no. 1 by-passed the arbitration agreement by taking recourse to the provisions of the MSMED Act, 2006. Counsel submits that the petitioner invoked section 18(4) of the said Act and the statutory arbitration under that section decides the seat of the arbitration. Counsel relies on section 24 of the MSMED Act to argue that the arbitration agreement entered into between the parties was superseded by operation of section 18 of the MSMED Act. It is submitted that once the respondent gave a go-by to the arbitration agreement and availed of the statutory dispute resolution mechanism under the MSMED Act, 2006, the respondent cannot be permitted to go back to the arbitration agreement which the respondent waived by electing the statutory remedy under the MSMED Act.

4. The dispute resolution clause is contained in an agreement for Design, Supply, Installation, Commissioning of local area network and post implementation support at “OPGC-CC/2016/01” dated 20.01.2016 between the petitioner and the respondent for implementing the services to be provided by the respondent to the petitioner. Clause 9.27 of the agreement contains the dispute resolution clause. Clause 9.27.2 provides for conciliation between the parties and clause 9.27.3 provides for Arbitration. The relevant part of the Arbitration clause is set out below:

“All proceedings shall be conducted, including all documents presented in such proceedings, in the English language. The venue of arbitration shall be at Bhubaneswar only and jurisdiction for any proceedings arising out of or concerning or connected with such arbitration shall be exclusively of appropriate Court at Bhubaneswar under the jurisdiction of Odisha High

Court. For all disputes, appropriate Court at Bhubaneswar under the jurisdiction of Odisha High Court alone shall have exclusive jurisdiction in all matters arising under this Agreement.”

5. Clause 9.36(2) further provides for a general exclusive jurisdiction clause, the relevant part of which is set out below:

“The Venue & the Owner agree that the Courts of Odisha shall have the exclusive jurisdiction for any and all disputes, differences and claims arising out of, regarding or in relation to this Agreement or any work issued hereunder.”

6. The above clauses from the agreement would show that the parties intended to approach the Courts at Odisha for adjudication of disputes arising out of the agreement and more important, the parties agreed to designate Bhubaneswar as the “venue” of arbitration.

7. The intention of the parties is thus clear. The question, however is whether the parties can revert to the venue of their choice, that is Bhubaneswar and the Odisha High Court, after the award has been made by the Facilitation Council within the jurisdiction of the Calcutta High Court.

8. The question to be answered is therefore - would the arbitration agreement between the parties and the chosen venue be overridden/superseded by the provisions of the MSMED Act, 2006?

If the answer is Yes, the Calcutta High Court would have jurisdiction over the application for stay and setting aside of the impugned award passed by the Facilitation Council.

If No, the present application would have to be filed before the appropriate court under the jurisdiction of Odisha High Court.

9. Section 18 of the MSMED Act, 2006 provides for the sequence of stages pursuant to a reference made by a party of a dispute before the Micro and Small Enterprises Facilitation Council with regard to any amount due to the party under section 17 of the Act. Although, section 18 refers to “any party to a dispute”, section 17 restricts the right of reference to a supplier for goods supplied or services rendered where a buyer is liable to pay the amount with interest as provided under section 16 of the Act. In the present case, the respondent before this Court is the supplier who filed the reference before the Facilitation Council.

10. Before the Court proceeds further into the adjudication, it should be clarified that the respondent supplier does not insist on compliance of section 19 of the Act for the deposit of 75% of the amount in terms of the award as the respondent has questioned the maintainability of the present application before the Calcutta High Court. This Court is hence inclined to first decide the question of jurisdiction and only thereafter on the statutory compliance of section 19 if the respondent does not succeed in the maintainability argument.

11. Returning to the controversy at hand; section 18 of the MSMED Act transitions from the stage of reference to the Council to conciliation between the parties [18(1) and (2)] to arbitration upon the failure of conciliation. Section 18(3) mandates the Council to either take up the arbitration itself or refer it to any institution providing alternative dispute resolution services for arbitration.

Section 18(3) further provides that the provisions of The Arbitration and Conciliation Act, 1996 shall apply to the dispute in the same manner as would have been applicable in an arbitration agreement under section 7(1) of the 1996 Act. Section 18(4) lays down the jurisdictional parameters to the effect that the Council shall act as arbitrator in a dispute where the supplier is within its jurisdiction and a buyer located anywhere in India. Section 18(5) provides for an outer limit of 90 days from the date of making the reference for a decision by the Council.

12. It is evident from the above that section 18 operates only during pendency of the conciliation/arbitration and ends with the decision of the Council. There is no other provision in the MSMED Act which points to jurisdiction of any Court akin to section 20 of the 1996 Act. Section 19 of the MSMED Act is the only provision which operates post-award but only in the matter of the pre-deposit of 75% to be put in by the appellant buyer before the appeal/application challenging the award is entertained by a Court.

Does the statutory arbitration under section 18(4) of the MSMED Act read with Rule 9 of the 2016 Rules decide the seat of the statutory arbitration?

13. The West Bengal Micro and Small Enterprises Facilitation Council Rules, 2016 was notified on 22.2.2016.

Rule 9 provides for the following :

“9. Place of arbitration. – The place of arbitration shall be determined by the Council or any institution or centre providing alternate dispute resolution services according to the provisions of the Act.”

14. The petitioner / award-debtor relies on Rule 9 to argue that the Council assumes the responsibilities of deciding on the “place” of arbitration; or in other words, obliterates any chosen seat of arbitration which the parties may have decided earlier.

15. The petitioner’s argument however disturbs the underpinnings of arbitration as an appropriate dispute resolution mechanism underscored by free and informed choice. The parties’ agreement to a designated seat or a venue for the arbitration serves as the base document for all future adjudications in the Courts. The arbitration cannot be un-seated simply by the statutory arbitration under the provisions of the MSMED Act which, in any event, is meant to last till the Facilitation Council decides on the reference under section 18(1) of the said Act.

16. Further, section 18(3) of the MSMED Act itself provides that the Facilitation Council shall either take up the arbitration or refer the arbitration to any institution or centre providing alternate dispute resolution services. This means that the situs of the Facilitation Council alone, even if the petitioner’s argument is accepted, cannot become the seat of the arbitration. Moreover, the location of the Council can also change in accordance with administrative exigencies. Hence, a peripatetic Council surely cannot be equated to the seat of arbitration.

17. There is judicial consensus on an arbitration being anchored to a “seat” as the un-alterable place of arbitration; as opposed to the place where the arbitral tribunal meets for conduct of the arbitration, subject to the agreement

by the parties. The former is the un-changing seat and the latter is the venue which is decided according to the convenience of the parties. Section 20(1) and (2) of the 1996 Act have been judicially settled as the “seat” and section 20(3) as the venue of the arbitration. Refer: *Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc*; (2012) 9 SCC 552.

18. The unerring conclusion would therefore be that Rule 9 of the 2016 Rules must be read in the above context and be construed as the venue and not the seat of arbitration. This is also by reason of the fact that the arbitration provided by the Facilitation Council cannot take away the free choice of the parties in the matter of seat and venue and override the same by the situs of the statutory arbitration.

Does the non-obstante clause in section 18(1) and (4) of the MSMED Act override any Arbitration Agreement executed between the parties?

With reference to the earlier part of the judgment- No.

19. Section 18(1) and (4) which are the only provisions begins with *non obstante* clauses is set out below:

“18. Reference to Micro and Small Enterprises Facilitation Council. – (1) 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.

.....

(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.

.....”

20. For a brief reiteration, the arbitration conducted by the Council under section 18 of the MSMED Act is only for facilitating the dispute mechanism provided under the Act between the Supplier and a Buyer within the framework of a Statute. The arbitration is for the limited purpose of the conduct of the arbitration if the Council is the arbitrator adjudicating on a claim of a supplier against the respondent buyer. Section 18(5) of the MSMED Act gives quietus to that process. The jurisdiction of the Council under section 18(4) is only for the purpose of locating the supplier within its jurisdiction and a buyer outside at any place in India. Section 18(4) does not alter the seat-venue as decided in the arbitration agreement independently executed between the parties.

21. The non obstante clauses in section 18(1) and (4) marks the status of the MSMED Act as a special statute enacted for the purpose of promotion and development of Micro, Small and Medium Enterprises and saves the right of the supplier to approach the Facilitation Council for recovery of the amount due from the buyer for goods supplied/services rendered by the supplier to the buyer. Section 18(4) makes the location of the (defendant) buyer irrelevant for the purpose of initiating all proceedings before the Facilitation Council as long as the supplier is within its jurisdiction. The non obstante clauses must therefore be given a limited meaning only in respect of section 18(1) and (4) and not beyond those provisions.

22. The MSMED Act simply provides an alternative dispute resolution mechanism to an aggrieved Supplier against an errant Buyer. The Act does not contemplate a lock-in dispute resolution mechanism where a party who approaches the Council must necessarily relinquish its rights or freedom to choose the manner of dispute resolution under an independent arbitration agreement executed by that party.

23. Thus, a party (in this case the respondent), making a reference before the Council cannot be said to have waived its rights under the arbitration agreement or the dispute resolution clauses therein. More important, even if clause 9.27.3 (the arbitration agreement) is discounted, the parties can still fall back on the exclusive jurisdiction clause under clause 9.36.2 which records the agreement of the parties to confer the Courts of Odisha with exclusive jurisdiction for all disputes, differences and claims arising out of the Agreement.

24. It is even more relevant that the petitioner's case is not that the entire agreement has been given a go-by. This means that the general exclusive jurisdiction clause will prevail even in the absence of the arbitration clause.

25. The Court, of course, does not accept that the arbitration agreement stood obliterated once the respondent went to approach the Facilitation Council. Hence, section 18 of the MSMED Act including section 18(1) and (4) thereto does not exclude or obliterate the arbitration agreement executed between the parties.

26. The dispute resolution clause of the Design, Supply, Installation and Commissioning agreement which provides for arbitration to be conducted at Bhubaneswar and any proceedings arising out of the agreement to be adjudicated exclusively in Courts at Bhubaneswar under the jurisdiction of the Orissa High Court, forms the substratum of the agreement between the parties. There can be no second view on this. The only niggle in that certainty is whether the chosen venue of Bhubaneswar is permanently un-settled by the Facilitation Council taking over the arbitral proceedings in the interregnum.

The Arbitration Agreement pending adjudication by the Facilitation Council is eclipsed, not obliterated

27. A short recap of the earlier section of this judgment; the deeming fiction of the Facilitation Council taking on the role of the arbitral tribunal under the 1996 Act springs to life in section 18(3) of the MSMED Act. The object of the MSMED Act, which is for enhancing the competitiveness of Micro, Small and Medium Enterprises, confers the Facilitation Council with the powers of an Arbitrator for the period during which the Supplier and the Buyer subject themselves to arbitration before the Council. In that sense, the Council becomes the facilitator of the arbitration for adjudication of the reference made by the supplier for the money due to the supplier under sections 17 and 18 of the said Act. The Facilitation Council as arbitrator makes the deeming fiction of section 18(3) a necessity for that adjudication.

28. However, the above role-play (of the Council as arbitrator) lasts till the pronouncement of the decision on the reference. Significantly, although

sections 18(3) and (4) refer to the Council as an “Arbitrator”, section 18(5) simply mentions a decision (as opposed to an award) fixing the outer limit of 90 days from the reference to a decision on the reference.

29. The framework of section 18 makes it clear that the legislature intended to clothe the Facilitation Council with the powers of an arbitrator only for the limited purpose of adjudicating upon the reference under section 18(1) and for the necessity of grounding the adjudication on a statute, namely, The Arbitration and Conciliation Act, 1996. Any question including that of enforcement or setting aside of the award passed by the Facilitation Council would be decided by the Court under section 2(1)(e)(i) of the 1996 Act. As stated above, section 19 of the MSMED Act only operates on the mandatory requirement of the 75% deposit to be made by an appellant / applicant buyer before the appeal / application is entertained by any Court.

30. The scheme of The Arbitration and Conciliation Act, 1996 would reinforce the above. Sections 34(1) for setting aside of an arbitral award and section 36(1)(2) and (3) for enforcement / stay of an arbitral award speak of “recourse to a Court” against an arbitral award and the “Court” granting an order of stay of the operation of the arbitral award. Sections 13, 14 and 15 of the 1996 Act contemplate challenge to an appointment of an arbitrator and termination of arbitrator’s mandate and envisages arbitrators who are removed from any statutory arbitration and function on an individual level. The Court adjudicates on applications under all the aforesaid provisions.

31. Reference to these provisions is being made for two reasons. First, for the purpose of understanding the transition from statutory arbitration under the MSMED Act to a Court adjudication on any question with regard to the arbitration agreement after the decision / award is passed by the Facilitation Council. The second is for reinforcing that the legislative intent of the limited shelf-life of the arbitration conducted by the Facilitation Council under section 18(3) of the MSMED Act was not meant to usurp the terrain of The Arbitration and Conciliation Act, 1996. The only objective is to speed up the process of adjudication by the Facilitation Council between a supplier and a buyer when the supplier is a micro, small or medium enterprise, within the framework of a Statute.

32. The only possible conclusion from the above discussion is that section 18(3) of the MSMED Act imports the provisions of The Arbitration and Conciliation Act, 1996 for the limited purpose of conduct of the arbitration with the agreement between the supplier and the buyer being treated as an arbitration agreement under section 7(1) of the 1996 Act. There is nothing in the MSMED Act to suggest, least of all section 18, that the arbitration conducted by the Facilitation Council would subsume the arbitration agreement between the parties or alter the seat / venue chosen by them. At best, the arbitration agreement is eclipsed during the adjudication by the Facilitation Council – only to rise again after the Council pronounces its decision.

33. Thus, the arbitration agreement between the parties takes precedence after publication of the award by the Facilitation Council.

34. The statutory position which emerges from the plethora of cases shown on behalf of the parties, is this. The cases are referred in chronological order from the earliest to the most recent. The first is *Emkay Global Financial Services Limited vs. Girdhar Sondhi*; (2018) 9 SCC 49 where the Supreme Court explained the concept of an exclusive jurisdiction clause. The Supreme Court referred to *Indus Mobile Distribution (P) Ltd. vs. Datawind Innovations (P) Ltd.*; (2017) 7 SCC 678 to hold that designation of a seat is akin to an exclusive jurisdiction clause. The second decision is that of a Division Bench of the Delhi High Court; *Indian Oil Corporation Ltd. vs. FEPL Engineering (P) Ltd.*; (2019) SCC OnLine Del 10265. The Delhi High Court held that 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. In paragraph 44 of *Gujarat State Civil Supplies Corporation Limited vs. Mahakali Foods Private Limited*; (2023) 6 SCC 401, the Supreme Court held that a private agreement between the parties cannot obliterate the statutory provisions of the MSMED Act. The next is *Gammon Engineers & Contractors Pvt. Ltd. vs. Sahay Industries*, a Single Bench decision of the Bombay High Court reported in *AIR 2023 Bom 65*. The Bombay High Court restricted the interpretation of the *Gujarat State Civil Supplies Corporation* only to the effect that arbitration proceedings undertaken before the Facilitation Council under section 18 of the MSMED Act are at the “venue” where the Facilitation Council is located but the place of the arbitration continues to be the place over which the Court has

exclusive jurisdiction as agreed between the parties. The Bombay High Court further clarified that in the facts of that case, the Courts at Mumbai would continue to have exclusive jurisdiction since the parties agreed to that while the “venue” of arbitration would be Madurai where the Facilitation Council passed the impugned award. A Division Bench of the Delhi High Court in *Ircon International Limited vs. Pioneer Fabricators Private Limited*; (2023) SCC OnLine Del 1811 followed the decision pronounced by the division Bench of the Delhi High Court in *FEPL Engineering* that the jurisdiction of the MSME Council would only determine the venue and not the seat of arbitration. *Ircon* disagreed with a Single Bench decision of the Delhi High Court in *Ahluwalia Contracts (India) Limited vs. Ozone Research & Applications*; 2023 SCC OnLine Del 581 which was of the view that the seat of arbitration would be the place where the Facilitation Council is situated. The last decision is of a Single Bench of this Court, *Indian Oil Corporation Limited vs. Union of India*; 2023 SCC OnLine Cal 4599 where the Court opined that section 18(3) of the MSMED Act does not preclude a party to an arbitration agreement from seeking interim relief under section 9 of the 1996 Act before the arbitration takes place before the Facilitation Council or enforcement of the award under section 36 of the 1996 Act. A Division Bench of the Allahabad High Court in *Marsons Electrical Industries vs. Chairman, Madhya Pradesh Electricity Board*; 2023 SCC OnLine All 2675 held that the MSMED Act, being a special statute, would have overriding effect over The Interest on Delayed Payments to Small Scale And Ancillary Industrial Undertakings Act, 1993 and that the MSMED Act would have precedence over any agreement between the parties.

35. The petitioner's / award-debtor's entire case rests on *Gujarat State Civil Supplies* and the thrust of the argument is that an independent arbitration agreement executed between a party and another would be subsumed into the proceedings before the Council thereon once a party files a reference before the Facilitation Council under the provisions of the MSMED Act. In other words, the argument is that a private agreement between the parties gives way to the statutory provisions of the MSMED Act once a party elects to subject itself to statutory arbitration. The doctrine of election is pressed into service and the petitioner relies on *National Insurance Co. Ltd. vs. Mastan*; (2006) 2 SCC 641 and *Bank of India vs. Lekhimoni Das*; (2000) 3 SCC 640 in this context. Both the decisions are distinguishable on facts as two distinct remedies were available to the parties in these cases. In the instant case, no such rights with regard to remedies were exercised by the respondents.

Conclusion

36. The statutory construction of section 18 of the MSMED Act read with the case law definitively points to the parties being directed to their chosen venue, which in the absence of a designated seat, would anchor the arbitration to Bhubaneswar. The arbitration conducted by the Facilitation Council in the interregnum cannot confer jurisdiction on the Calcutta High Court in derogation of the venue/seat chosen by the parties. The office of the MSME Facilitation Council was the venue of the arbitration proceeding. The office of the Facilitation Council was not the seat. Jurisdiction cannot be conferred on this Court in the challenge to the Award passed by the Facilitation Council

since that would be against the preferred venue/seat of the arbitration agreement.

37. This Court would therefore be denuded of jurisdiction to hear the present application for setting aside the award passed by the Facilitation Council.

38. The respondent's argument on the maintainability of the present application thus, succeeds.

39. AP 647 of 2023 (A.P. Com. 365 of 2024) is accordingly dismissed. There shall be no order as to costs. The two connected application are also disposed of in terms of this judgment.

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

(Moushumi Bhattacharya, J.)