

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.201 OF 2023

M/s Bafna Udyog,

14/15, Catel Shed, Market Yard,
Camp Road, Malegaon-423 203, Maharashtra,
Email: parasbafana28@gmail.com
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...Petitioner

Versus

**1. Micro & Small Enterprises, Facilitation
Council,**

C/o District Industrial Center, Nashik (DIC),
ITI Signal, Trimbak Road, Satpur-422 027.

2. Siddhivinayak Exports,

637, 6th Floor, Nirmal Galaxy Avior,
Opp. Johnson & Johnson Co.,
L.B.S. Marg, Mulund (West)
Mumbai-400 080

Email:
siddhivinayakexports2000@gmail.com
Mobile: 9869488781

...Respondents

Mr. Alankar Kirpekar, with Mr. Ayush Tiwari, Shekhar Bhagat,
Rajas Panandikar, i/b Shekhar Bhagat, for Petitioner.
None for Respondents.

CORAM : DR. NEELA GOKHALE, J.

RESERVED ON : 12th January 2024.

PRONOUNCED ON : 16th January 2024.

JUDGMENT:

1. The Petitioner seeks appointment of any retired District Judge willing to conduct arbitral proceeding at Nashik under Section 11(6) of the Arbitration & Conciliation Act, 1996 (“Act”) and further

direction to the Micro and Small Enterprises Facilitation Council to hand over all the records and proceedings in their custody to the arbitrator so appointed.

2. The Petitioner is registered as a small entity under the Micro, Small & Medium Enterprises Development Act, 2006 (“**The MSMED Act**”). The Ministry of Micro, Small & Medium Enterprises certifying the date of incorporation of the Petitioner as 21st March 2003 has issued the Udyam Registration Certificate. The Petitioner is a supplier and the Respondent No.2 is a buyer, who according to the Petitioner is liable to pay Rs.92,41,072/- to the Petitioner till 28th February 2023 with future interest as per the MSMED Act till realization of the amount. The Respondent No.1 is the Micro & Small Enterprises Facilitation Council ("**MSEFC**").

3. The Petitioner, a registered MSME, filed the statement of claim alongwith a declaration of termination of conciliation under Section 76(d) of the Act. It is the case of the Petitioner that despite various attempts to resolve issues of discord between the parties, the dispute remained unresolved. According to the Petitioner, the Respondent No.2 had infact acknowledged the debt but failed to pay the amount. Thus, the Petitioner claims that conciliation between the parties failed and in these circumstances, has filed a certificate of termination under Section 76(d) of the Act with the Respondent No.1 along with its statement of claim. The Respondent-Council thereafter

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failed to act in accordance with Section 18(3) of the MSMED Act and failed to refer the dispute to arbitration. It is this inaction of the Respondent-Council, which led the Petitioner to file the present Arbitration Petition seeking appointment of an arbitrator under Section 11(6) of the Act.

4. Notice was issued to the Respondents, however, none appeared. Mr. Kirpekar, learned counsel appearing for the Petitioner, has taken steps to serve the Respondents by way of substituted service, i.e., paper publication in two newspapers, pursuant to order dated 7th December 2023 of this Court. Yet none appear for the Respondents. The publications are placed on record along with an affidavit of service. The petition was thus taken up for hearing *ex-parte*.

5. Mr. Kirpekar contends that failure to settle dues having once acknowledged the same, presumes failed conciliation. Hence, he filed the statement of claim with a termination certificate. Secondly, he contends that since the MSEFC failed to arbitrate the dispute between the parties within the mandatory period of ninety days as per Section 18(5) of the MSMED Act after failure of conciliation proceedings, this Court has jurisdiction to appoint an arbitrator by invoking Section 11(6) of the Act. Mr. Kirpekar placed reliance on the decision in the case of ***Microvision Technologies Private Limited v. Union of India***¹ of

¹ Review Petition (L) No.36475 of 2022 decided on 24.8.2023

this Court to buttress his contention that in a case where the MSEFC fails to arbitrate between the parties, the only recourse to the Petitioner is to approach this Court seeking appointment of an arbitrator under Section 11(6) of the Act. He also relied on decision of the Supreme Court in the matter of *Gujarat State Civil Supplies Corporation Limited & Ors. v. Mahakali Foods Private Limited*² as well as the decision in the matter of *Silpi Industries & Ors. v. Kerala State Road Transport Corporation and Ors.*³ He thus, submitted that Section 18(3) of the MSMED Act provides for deemed arbitration agreement and eliminates the need of any arbitration agreement between the parties. According to him, the combined reading of Sections 18(3) and 24 of the MSMED Act, 2006 with Sections 2(4) and 7 of the Act indicates that arbitration agreement contemplated in Section 7 of the Act is not necessary for adjudication of the dispute under a statutory arbitration.

6. Mr. Kirpekar also relied upon Section 11(6) of the Act to canvass his contention that the Court shall have jurisdiction to appoint an arbitrator if a person, including an institution, fails to perform any function entrusted to him or it, under the agreed procedure. He says that since the statutory council as an 'institution' failed to act in furtherance of its statutory function, Section 11(6) comes into play and the Court gets the power to exercise jurisdiction

² 2022 SCC Online SC 1492

³ 2021 SCC Online SC 439

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under the Act. Thus, he urges this Court to appoint an arbitrator by invoking Section 11(6) of the Act.

7. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an Arbitral Tribunal as an alternative to adjudication by the Courts or a public forum established by law. Parties by mutual agreement forego their rights to adjudicate the disputes through Courts of law. It is the arbitration agreement, which gives a contractual authority to the Arbitral Tribunal to adjudicate the disputes and bind the parties. The expression 'Arbitration Agreement' is defined in Section 7 of the Act, which reads as thus:

"7. Arbitration agreement.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication[including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

8. Section 11(6) of the Act reads as thus:-

"Section 11. Appointment of arbitrators.-

(1).....

(2).....

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

[the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

9. Section 18 of the MSMED Act provides for statutory arbitration. It is a non-obstante clause. Section 18 reads as thus;

"Section 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.

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an

institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section(1) of section 7 of that Act.

(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) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."

10. The bare reading of Section 18 clearly provides for a specific mechanism being *firstly*, the counsel shall conduct conciliation in the matter or make a reference to any institution for conducting conciliation. If the conciliation fails, then sub-clause (3) is invoked and the council shall take up the dispute for arbitration itself or refer to any institution or centre. It is only then that the provisions of the Act shall apply to the dispute as if the arbitration was in pursuance of Section 7 of the Act. Thus, it is only when the council or its designate enters into reference that the provisions of the Act will apply.

11. Section 11(6)(c) of the Act provides for vesting of jurisdiction

in the Court to appoint an arbitrator if a person, including an institution fails to perform the function entrusted to it "under that procedure". The words 'under that procedure' contemplates a procedure as agreed between the parties. This is clear from the plain reading of the provision itself which commences with the words "(6) *Where, under an appointment procedure agreed upon by the parties,-.....*". The word 'agreed' directly refers to an Arbitration Agreement referred to in Section 7 of the Act. None of the criteria laid down in Section 7 is met in the present case to indicate existence of any arbitration agreement, either express or implied. Thus, in the absence of an arbitration agreement, Section 11(6)(c) cannot be invoked.

12. I have gone through the decision in *Microvision Technologies Private Limited (Supra)* relied upon by Mr. Kirpekar. In the said case there was a separate arbitration agreement between the parties. It is on the basis of existence of an arbitration agreement that an arbitrator was appointed when there was inaction on the part of the council to proceed with the statutory arbitration. Hence, this decision is not applicable to the facts of the present case. Even in the decision of *Gujarat State Civil Supplies Corporation Limited (Supra)*, the Supreme Court has held that the MSMED Act will override the provisions of the Act. In the decision in the matter of *Silpi Industries (Supra)* the Supreme Court has also held that MSMED Act being a

special statute, will have an overriding effect *vis-a-vis* the Arbitration Act. Thus, the decisions in above two matters are also of no assistance to the Petitioner.

13. The Supreme Court referring to its prior decision in various matters, has, in the decision of ***Mahanadi Coal Fields v. IVRCL AMR. Joint Venture***⁴ held that the invocation of the jurisdiction of the High Court under Section 11(6) of the Act was not valid and there being no arbitration agreement between the parties, no reference to arbitration could have been made by the High Court. Thus, inaction by the MSMED in referring to arbitration shall not entitle the Petitioner to invoke the provisions of 11(6) of the Act and seek appointment of an arbitrator *de-hors* existence of an arbitration agreement.

14. The contention of the Petitioner that acknowledgment of debt by the Respondent No.2 and the consequent non-payment implies termination of conciliation proceedings without even reference to the MSEFC cannot be accepted since the conciliation proceedings are to be conducted by the council at the first stage and it is only upon failure of the proceedings conducted by the council that the subsequent step of reference to arbitration arises. On this ground also, the present petition is premature.

15. In view of the foregoing, the petition is dismissed as not

⁴ 2022 SCC Online SC 960
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maintainable. The Petitioner is, however, at liberty to seek recourse to the remedy available in law to pursue redressal of its grievances.

16. Pending applications, if any, stand disposed of.

(DR. NEELA GOKHALE, J.)