IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.01.2024

CORAM

THE HON'BLE MR. JUSTICE P.D. AUDIKESAVALU

W.P. No. 1236 of 2020
and
W.M.P. No. 1497 of 2020

Malaviya National Institute of Technology (MNIT),
Represented by its Registrar,
Mr. Jai Narain,
Jawahar Lal Nehru Marg,
Jaipur – 302 017,
Rajasthan. … Petitioner

-vs-

1. Micro and Small Enterprises & Facilitation Council,
   Represented by its Regional Officer/General Manager,
   District Industries Centre,
   No. 2, Raja Street,
   Town Hall,
   Coimbatore – 641 001.

2. M/s. Mukesh & Associates,
   Rep. by its Managing Partner,
   Having registered office at Division – 2, 2/6,
   Ranganathar Avenue,
   Perumal Malai Main Road,
   Narasothipatty,
   Salem – 636 004. ... Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India, 1950, praying to issue a Writ of Prohibition, prohibiting the First Respondent from continuing the proceeding bearing No. MSEFC/CBER/16/2019 on the file of the First Respondent as without jurisdiction.

For Petitioner	:	Mr. R.Bharath Kumar
For Respondents	:	Mr. S.J.Mohamed Sathik, Government Advocate (for R1) Mr. Vishnu Mohan (for R2)

O R D E R

Heard Mr. R.Bharath Kumar, Learned Counsel for the Petitioner, Mr. S.J.Mohamed Sathik, Learned Government Advocate appearing for the First Respondent and Mr. Vishnu Mohan, Learned Counsel for the Second Respondent and perused the materials placed on record, apart from the pleadings of the parties.

2. The Petitioner had availed the services of the Second Respondent for providing comprehensive architectural and engineering consultancy for hostels, studio apartments and allied facilities for its institution. The Second Respondent raised a demand by Invoice No. M&A/1692/15-16/004 dated 09.04.2015 claiming Rs. 35,75,918/- for approval of Stage-1 Component Services along with interest at the rate of 12.36% for the same, followed by reminder in e-mail dated 06.02.2017 informing that if the payment was not

made, it was intended to invoke the arbitration clause in terms of Clause 5.6.5 of the agreement between the parties, which reads as follows:-

> ***"5.6.5. Arbitration***
>
> *During the period of the project, MNIT JAIPUR will endeavor to provide Mukesh & Associates any assistance as required, which will not involve any financial implications. In the unfortunate situation of any and all disputes, disagreement and controversies arising in any manner, which cannot be settled by mutual agreement between MNIT JAIPUR and Mukesh & Associates, the matter shall be submitted to arbitration.*
>
> *For, this MNIT JAIPUR and Mukesh & Associates shall nominate (in writing) one Arbitrator each. In turn, these two Arbitrator shall nominate an umpire. In case these two Arbitrators do not agree on any particular matter, the decision of the Umpire shall be final and binding on both MNIT JAIPUR and Mukesh & Associates. All other provisions of the Arbitration and Conciliation Act, 1996 (with amendments) shall apply and the venue of Arbitration shall be MNIT Jaipur. The Courts at Jaipur shall have the exclusive jurisdiction to try all disputes, if any arising out of this agreement between the parties."*

The High Court of Rajasthan by order dated 23.02.2018 in S.B.Arbitration Application No. 112 of 2017 filed by the Second Respondent appointed Hon'ble Mr. Justice Bhanwaroo Khan, Former Judge, Rajasthan High Court as the Independent Sole Arbitrator (hereinafter referred to as 'the Arbitral Tribunal' for short) to resolve the disputes between the parties. Though the Second Respondent had submitted its claim on 23.06.2018 to the Arbitral Tribunal for which the Petitioner had submitted its reply on 02.10.2018, none of the parties had appeared on the hearing on 23.10.2018 before the Arbitral Tribunal, which dismissed that claim for non-appearance of the parties. The application made by the Second Respondent to re-call or review of that order was rejected by the Arbitral Tribunal on 19.01.2019 holding that it has become *functus officio* and had attained finality. Thereafter, the Second Respondent made a claim in Case No. MSEFC/CBER/16/2019 before the First Respondent under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'the MSMED Act' for short) for payment of Rs. 73,86,896/- from the Petitioner towards the value of services rendered with interest calculated in terms of that Act in which a notice dated 07.05.2019 has been sent to the parties to attend the hearing on 31.05.2019 before it. While the matter stood as narrated supra, the Petitioner has on 20.01.2020 filed this Writ Petition contending that its objection as to the maintainability of the proceedings under the MSMED Act have not been considered by the First Respondent placing reliance on the ruling of the Division Bench of the Bombay High Court in ***M/s. Steel Authority of India Ltd. and another -vs- Micro, Small Enterprise Facilitation Council*** (AIR 2012 Bombay 178) in which it has been held as follows:-

> *"11. .... it cannot be said that because Section 18 provides for a forum of arbitration, an independent arbitration agreement entered into between the parties will cease to have effect. There is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996."*

3. This Court at the time of admission on 22.01.2020 passed an order of interim injunction restraining the First Respondent from proceeding further in the matter, which continues to be in force till date.

4. It has been placed on record that the Hon'ble Supreme Court of India in the decision in ***Gujarat State Civil Supplies Corporation Limited -vs- Mahakali Foods Private Limited*** [(2023) 6 SCC 401] has set aside the said decision of the Bombay High Court holding that as Chapter V of the MSMED Act has an overriding effect over the provisions contained in the Arbitration and Conciliation Act, 1996, the MSMED Facilitation Council would be entitled to proceed further with the reference made by the supplier under Section 18(1) of the MSMED Act despite an independent arbitration agreement existing between the parties.

5. Having due regard to the contentions raised by the Petitioner in this Writ Petition, it would be relevant to extract the relevant passages from that binding decision of the Hon'ble Supreme Court of India in ***Gujarat State Civil Supplies Corporation Limited -vs- Mahakali Foods Private Limited*** [(2023) 6 SCC 401], which reads as follows:-

> *"32. Now, the first and foremost issue involved in these appeals is whether the provisions contained in Chapter V of the MSMED Act, 2006 with regard to the Delayed Payments to Micro and Small Enterprises would have precedence over the provisions contained in the Arbitration Act, 1996, more particularly when the parties by*

execution of an independent agreement as contemplated in Section 7 of the Arbitration Act had agreed to submit to arbitration the disputes arising between them? In other words, whether the provisions contained in Chapter V of the MSMED Act, 2006 would have an effect overriding the provisions contained in the Arbitration Act, 1996?

33. It is trite to say that the provisions of the special statute would override the provisions of the general statute. It is also well settled that while determining the effect of a statute overriding the other statute, the purpose and policy underlying the two statutes and the clear intendment conveyed by the language of the relevant provisions therein would be the relevant consideration. This Court in ***CIT -vs- Shahzada Nand & Sons*** *(AIR 1966 SC 1342), while stating the fundamental rule of construction, had observed that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the court as to what is just and expedient.*

34. One of principles of statutory interpretation relevant for our purpose is contained in the Latin maxim leges posteriores priores *contrarias abrogant (the later laws shall abrogate earlier contrary laws). Another relevant rule of construction is contained in the maxim generalia specialibus non derogant (General laws do not prevail over Special laws). When there is apparent conflict between two statutes, the provisions of a general statute must yield to those of a special one.*

35. As observed in ***Kaushalya Rani -vs- Gopal Singh*** *(AIR 1964 SC 260), a "Special Law" means a law enacted for special cases, in special circumstances, in contradiction to the general rules of law laid down, as applicable generally to all cases with which the general law deals.*

36. Keeping in view the aforestated principles of statutory interpretations as also the proposition of law laid down by this Court with regard to the general rules of construction, let us proceed to examine whether the MSMED Act, 2006 is a special enactment having an effect overriding the Arbitration Act, 1996 which is perceived to be a general enactment? As stated earlier, the very object of enacting the MSMED Act, 2006 was to facilitate the promotion and development, and enhance the competitiveness of micro, small and medium enterprises. The Act also aimed to *ensure timely and smooth flow of credit to the micro, small and medium enterprises, and to minimise the incidence of sickness. One of the main objects of the Act was to delete the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, and to include stringent provisions as also to provide dispute resolution mechanism for resolving the disputes of non-payment of dues to the micro and small enterprises. Thus, the seed of the MSMED Act, 2006 had sprouted from the need for a comprehensive legislation to provide an appropriate legal framework and extend statutory support to the micro and small enterprises to enable them to develop and grow into medium ones.*

37. Sections 15 to 25 contained in Chapter V of the MSMED Act, 2006 pertain to the "delayed payments to micro and small enterprises". A bare perusal of the said provisions contained in Chapter V shows that a strict liability is fastened on the buyer to make payment to the supplier who supplies any goods or renders any services to the buyer, prescribing the time-limit in Section 15. Section 16 further fastens the liability on the buyer to pay compound interest if any buyer fails to make payment to the *supplier as required under Section 15. Such compound interest is required to be paid at three times of the bank rate notified by the Reserve Bank, notwithstanding contained in any agreement between the buyer and supplier or in any law for the time being in force. An obligation to make payment of the amount with interest thereon as provided under Section 16 has been cast upon the buyer and a right to receive such payment is conferred on the supplier in Section 17. Thus, Section 17 is the ignition point of any dispute under the MSMED Act, 2006. Section 18 thereof provides for the mechanism to enable the party to the dispute with regard to any amount due under Section 17, to make a reference to the Micro and Small Enterprises Facilitation Council.*

38. Section 18 starts with a non obstante clause i.e. "notwithstanding anything contained in any other law for the time being in force". It means that the said provision has been enacted with the aim to supersede other laws for the time being in force. Further a dedicated statutory forum i.e. the Micro and Small Enterprises Facilitation Council (as established under Section 20 of the MSMED Act, 2006), has been provided to which a reference could be made by any party to the dispute. Sub-section (2) of

Section 18 empowers the Facilitation Council, on receipt of such reference made under sub-section (1), to conduct conciliation in the matter or seek assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation, as contemplated in Sections 65 to 81 of the Arbitration Act, 1996. If the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council is further empowered under sub-section (3) to either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration. The provisions of the Arbitration Act, 1996 are then made applicable to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act, 1996. Sub-section (4) of Section 18 again starts with a non obstante clause i.e. "notwithstanding anything contained in any other law for the time being in force", and confers jurisdiction upon the Facilitation Council to act as an arbitrator or a conciliator in a dispute between the supplier located within its jurisdiction and a *buyer located anywhere in India. Sub-section (5) of Section 18 fixes the time-limit of ninety days to decide such reference.*

39. Section 19 prescribes the procedure to be followed when any application is made in the court for setting aside any decree, award or other order made either by the Council itself or by any institution or centre to which reference is made by the Council. Section 24 of the MSMED Act, 2006 states that the provisions of Sections 15 to 23 shall have an effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

40. 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:

40.1. Chapter V is "party-specific", inasmuch as the party i.e. the "buyer" and the "supplier" as defined in Sections 2(d) and 2(n), respectively are covered under the said Chapter.

40.2. A specific provision is made fastening a liability on the buyer to make payment of the dues to the supplier in respect of the goods supplied or services rendered to the buyer, as also a *liability to pay compound interest at three times of the bank rate notified by the Reserve Bank, if the buyer fails to make payment within the prescribed time-limit. The said liability to pay compound interest is irrespective of any agreement between the parties or of any law for the time being in force.*

40.3. A dedicated statutory forum i.e. Micro and Small Enterprises Facilitation Council is provided to enable any party to a dispute with regard to any amount due under Section 17, to make reference to such Council.

40.4. A specific procedure has been prescribed to be followed by the Facilitation Council after the reference is made to it by any party to the dispute.

40.5. The Facilitation Council or the centres providing alternative dispute resolution services have been conferred with the jurisdiction to act as an arbitrator or conciliator under Section 18(4), notwithstanding anything contained in any law for the time being in force, in a dispute between the supplier located within its jurisdiction.

40.6. The provisions of the Arbitration Act, 1996 have 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.*

40.7. 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.

40.8. 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.

41. As against the above position, if the purpose, objects and scheme of the Arbitration Act, 1996 are considered, as stated hereinabove, the said Act was enacted to consolidate and amend the law relating to the domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also to define the law relating to conciliation. It was enacted taking into account the UNCITRAL *Model Law on international commercial arbitration. The main objectives amongst others of the said Act were to make provision for an arbitral procedure which was fair, efficient and capable to meet the needs of the specific arbitration and to minimise the supervisory role of courts in the arbitral process, as also to permit* *the Arbitral Tribunal to use mediation, conciliation or other procedures during the arbitral proceedings in the settlement of disputes, etc [**Bharat Sewa Sansthan -vs- U.P. Electronics Corpn. Ltd.**, [(2007) 7 SCC 737]. The Arbitration Act, 1996 focuses and covers the law relating to the Arbitration and Conciliation, providing for the requirements of the arbitration agreement, composition of Arbitral Tribunal, conduct of arbitration proceedings, finality and enforcement of domestic arbitral awards as well as of certain foreign awards, and covers the law relating to conciliation. Having regard to the entire scheme of the Arbitration Act, 1996, it appears that it is a general law relating to the domestic arbitration, international commercial arbitration and for conciliation. It does not specify any specific dispute or specific class or category of persons to which the Act shall apply, as has been specified in the MSMED Act, 2006.*

42. Thus, the Arbitration Act, 1996 in general governs the law of Arbitration and Conciliation, whereas the MSMED Act, 2006 governs specific nature of disputes arising between specific categories of persons, to be resolved by following a specific process through a specific forum. Ergo, the MSMED Act, 2006 being *a special law and the Arbitration Act, 1996 being a general law, the provisions of the MSMED Act would have precedence over or prevail over the Arbitration Act, 1996. In* ***Silpi Industries -vs- Kerala SRTC*** *[(2021) 18 SCC 790] also, this Court had observed while considering the issue with regard to the maintainability and counter-claim in arbitration proceedings initiated as per Section 18(3) of the MSMED Act, 2006 that the MSMED Act, 2006 being a special legislation to protect MSMEs by setting out a statutory mechanism for the payment of interest on delayed payments, the said Act would override the provisions of the Arbitration Act, 1996 which is a general legislation. Even if the Arbitration Act, 1996 is treated as a special law, then also the MSMED Act, 2006 having been enacted subsequently in point of time i.e. in 2006, it would have an overriding effect, more particularly in view of Section 24 of the MSMED Act, 2006 which specifically gives an effect to the provisions of Sections 15 to 23 of the Act over any other law for the time being in force, which would also include the Arbitration Act, 1996.*

43. The Court also cannot lose sight of the specific non obstante clauses contained in sub-sections (1) and (4) of Section 18 which *have an effect overriding any other law for the time being in force. When the MSMED Act, 2006 was being enacted in 2006, the legislature was aware of its previously enacted Arbitration Act of 1996, and therefore, it is presumed that the legislature had consciously made applicable the provisions of the Arbitration Act, 1996 to the disputes under the MSMED Act, 2006 at a stage when the conciliation process initiated under sub-section (2) of Section 18 of the MSMED Act, 2006 fails and when the Facilitation Council itself takes up the disputes for arbitration or refers it to any institution or centre for such arbitration. It is also significant to note that a deeming legal fiction is created in Section 18(3) by using the expression "as if" for the purpose of treating such arbitration as if it was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act, 1996. As held in* ***K. Prabhakaran -vs- P. Jayarajan*** *[(2005) 1 SCC 754], a legal fiction presupposes the existence of the state of facts which may not exist and then works out the consequences which flow from that state of facts. Thus, considering the overall purpose, objects and scheme of the MSMED Act, 2006 and the unambiguous expressions used therein, this Court has no* *hesitation in holding that the provisions of Chapter V of the MSMED Act, 2006 have an effect overriding the provisions of the Arbitration Act, 1996.*

44. 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 sub-section (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-sections (1) and (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 interpretating 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.*

45. 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. the 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.*

46. 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 the MSMED Act, 2006 cannot be 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."*

As such, there does not appear to be any justification to restrain the First Respondent from conducting the impugned arbitral proceedings following the prescribed procedure under the MSMED Act.

6. Learned Counsel for the Petitioner next relied on the decision of the Hon'ble Supreme Court of India in ***K.K.Modi -vs- K.N.Modi*** [(1998) 3 SCC 573] to show that the conduct of the Second Respondent in this case would amount to re-litigation, which is abuse of legal process, and yet another decision of the Hon'ble Supreme Court of India in ***Ishwar Dutt -vs- Land Acquisition Collector*** [(2004) 7 SCC 190] to contend that the non-prosecution of the claim in the earlier arbitral proceedings would operate as *res judicata* for the subsequent claim made before the First Respondent under the MSMED Act. It must be straightaway noticed here that the Hon'ble Supreme Court of India in the decision in ***Gujarat State Civil Supplies Corporation Limited -vs- Mahakali Foods Private Limited*** [(2023) 6 SCC 401] has emphatically laid down that when the MSMED Act provides rights to the parties, it would have

an overriding effect on any other independent arbitration agreement between the same parties, meaning thereby that the earlier proceedings between the Petitioner and the Second Respondent before the Arbitral Tribunal was *non est* in the eyes of law and cannot affect the rights of either of the parties.

7. In view of the foregoing discussion, the matter shall be listed before the First Respondent for next hearing on 10.04.2024 after issuing due notice to the Petitioner and the Second Respondent in that regard and if the First Respondent is not able then to take up the matter, the date to which it is adjourned shall be informed to the parties under written acknowledgment. It shall be ensured by the First Respondent that there are atleast two effective hearings every month showing progress of the case, that full opportunity of hearing is afforded to all parties concerned following the prescribed procedure in consonance with the principles of natural justice, that reasoned orders are passed dealing with each of the contentions raised with reference to the evidence lead by the parties on merits and in accordance with law and that the decision taken shall be communicated to them under written acknowledgment and the report of such compliance is filed before the Registrar (Judicial) of the Court.

In the result, the Writ Petition is disposed on the aforesaid terms. Consequently, the connected Miscellaneous Petition is closed. No costs.

29.02.2024

Index: Yes/No
NCC: Yes/No
Note: Issue order copy by 04.03.2024.

vjt

To

The Regional Officer/General Manager,
Micro and Small Enterprises & Facilitation Council,
District Industries Centre,
No. 2, Raja Street,
Town Hall,
Coimbatore – 641 001.

Copy to

1.The Registrar (Judicial),
Madras High Court,
Chennai – 600 104.

2.Malaviya National Institute of Technology (MNIT),
Represented by its Registrar,
Mr. Jai Narain,
Jawahar Lal Nehru Marg,
Jaipur – 302 017,
Rajasthan.

3. M/s. Mukesh & Associates,
Rep. by its Managing Partner,
Having registered office at Division – 2, 2/6,
Ranganathar Avenue,
Perumal Malai Main Road,
Narasothipatty,
Salem – 636 004.

P.D. AUDIKESAVALU, J.

vjt

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