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

+ **ARB.P. 754/2023**

M/S BIOTECH INTERNATIONAL LIMITED Petitioner

Through: Mr. Ankit Virmani, Ms. Ruchika
Agarwala, Advs.

versus

MUNICIPAL CORPORATION OF DELHI & ANR.

..... Respondents

Through: Ms. Shivangi Kumar, Adv.
Mr. Nikhilesh Krishnan, Mr.
Abhishek Bhushan Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER
24.01.2024

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1. This is a petition seeking appointment of the Sole Arbitrator for adjudication of disputes between the parties in connection with the contract.
2. The brief facts are that the respondent No. 2 for and on behalf of respondent No. 1 floated the tender bearing No. HLL/PCD/e-MCD-02/18-19 dated 16.08.2018 for supply of various items including Bacillus Thuringiensis Var Israelensis. The petitioner being the successful bidder was awarded the tender from 28.01.2019 till 27.01.2020 by letter of award No. HLL/PCD/e-MCD-02/18-19/5866 dated 28.01.2019. Accordingly, a contract was executed between respondent No. 2 and petitioner on 05.02.2019 and supply order No. HLL/PCD/e-MCD-02/18-19/6975 dated 19.03.2019 was



issued by respondent No. 2. Thereafter, on 02.04.2019, respondent No. 2 issued an addendum to the supply order.

3. As the respondents defaulted in making payments to the petitioner for the supply of the 2nd instalment, petitioner sent repeated reminders for the payment but the respondents failed to make payments. Thereafter, petitioner sent a demand notice dated 18.04.2023 to the respondents calling upon them to pay all the outstanding dues. After the expiry of thirty days from the receipt of the demand notice, petitioner sent another notice dated 24.05.2023 to the respondents invoking Arbitration in terms of Clause 20.2 of General Conditions of Contract (“GCC”). Clause 20.2 of GCC reads as under:-

“If the parties fail to resolve their dispute or difference by such mutual consultation within thirty days of its occurrence, then, unless otherwise provided in the SCC, either the Purchaser/Consignee or the supplier may give notice to the other party of its intention to commence arbitration, as hereinafter provided the applicable arbitration procedure will be as per the Arbitration and Conciliation Act, 1996 of India. In case of a dispute or difference arising between the Purchaser/Consignee and a domestic Supplier relating to any matter arising out of or connected with the contract, such dispute or difference shall be referred to the sole arbitration of an officer, appointed to be the arbitrator by the Chairman and Managing Director of HLL Lifecare Limited. The award of the arbitrator shall be final and binding on the parties to the contract subject to the provision that the Arbitrator shall give reasoned award in case the value of claim in reference exceeds Rupees One Lac (Rs. 1,00,000.00).”

4. Mr. Krishnan, learned counsel for the respondent No. 2 states that in the present case, the petitioner is a small enterprise and is governed by the provisions of Micro, Small and Medium Enterprises Development Act, 2006 (“MSMED Act”). He draws my attention to Section 17 and 18 of the



MSMED Act which reads as under:

17. Recovery of amount due.- For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under Section 16.

[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 conduct mediation itself or refer the matter to any mediation service provider as provided under the Mediation Act, 2023.

(3) The conduct of mediation under this section shall be as per the provisions of the Mediation Act, 2023.

(4) Where the mediation initiated under sub-section (3) 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 alternative 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.

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

5. He further draws my attention to the judgment passed by the Hon'ble Supreme Court in ***Gujarat State Civil Supplies Corporation Ltd vs. Mahakali Foods Pvt. Ltd. (Unit 2) & Anr., (2023) 6 SCC 401*** and more



particularly to para 42, 43 and 52 which reads as under:

“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 Arbitration Act, 1996 being a general law, the provisions of MSMED Act would have precedence over or prevail over the Arbitration Act, 1996. In Silpi Industries case (supra) 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 MSME's 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 Section 15 to 23 of the Act over any other law for the time being in force, which would also include Arbitration Act, 1996.

43. The court also cannot lose sight of the specific non obstante clauses contained in sub-section (1) and sub-section (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 Legislative 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 the 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 v. P. Jayarajan, 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.

52. The upshot of the above is that:

52.1 Chapter-V of the MSMED Act, 2006 would override the provisions of the Arbitration Act, 1996.

52.2 No party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council, though an independent arbitration agreement exists between the parties.

52.3 The Facilitation Council, which had initiated the Conciliation proceedings under Section 18(2) of the MSMED Act, 2006 would be entitled to act as an arbitrator despite the bar contained in Section 80 of the Arbitration Act.

52.4 The proceedings before the Facilitation Council/institute/centre acting as an arbitrator/arbitration tribunal under Section 18(3) of MSMED Act, 2006 would be governed by the Arbitration Act, 1996.

52.5 The Facilitation Council/institute/centre acting as an arbitral tribunal by virtue of Section 18(3) of the MSMED Act, 2006 would be competent to rule on its own jurisdiction as also the other issues in view of Section 16 of the Arbitration Act, 1996,

52.6 A party who was not the 'supplier' as per the definition contained in Section 2(n) of the MSMED Act, 2006 on the date of entering into contract cannot seek any benefit as the 'supplier' under the MSMED Act, 2006. If any registration is



obtained subsequently the same would have an effect prospectively and would apply to the supply of goods and rendering services subsequent to the registration.”

6. I have heard learned counsel for the parties.
7. The question which arises for this court to consider is whether the provisions of MSMED Act will be applicable to the present case at hand.
8. Para 45 of ***Gujarat State Civil Supplies Corporation (supra)*** reads as under:

“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., 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 is 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.”

9. Para 52.2 extracted above clearly states that no party to a dispute is precluded from making a reference to the Micro and Small Enterprises Facilitation Council. The terminology used in Section 18(1) also gives an option to the supplier to approach the Facilitation Council.

10. The gist of the above quoted judgment is that in case there is an arbitration agreement between the parties being Micro and Small Enterprises, then notwithstanding any of the party may under section 18 of MSMED Act can approach the Facilitation Council and thereafter the mechanism envisaged under section 18 of MSMED Act will take course.

11. In the present case, the petitioner did not choose to approach the Micro and Small Enterprises Facilitation Council under section 18(1) of MSMED Act and hence the mechanism envisaged under section 18 has not been triggered. The provisions of Section 18 of MSMED Act will only be triggered if the party regardless of the arbitration clause approaches the Micro and Small Enterprises Facilitation Council under section 18 of MSMED Act. The said view is also endorsed by the Bombay High Court in ***Porwal Sales v. Flame Control Industries, 2019 SCC OnLine 1628***. The relevant portion is extracted below:-

“26. In the present case, it is not in dispute that the respondent has so far not raised any claim against the petitioner and the



jurisdiction of the Felicitation Council has not been invoked by either the respondent or the petitioner. It thus cannot be accepted that the provisions of subsection (4) of Section 18 of MSMED Act are attracted in any manner in the absence of any reference being made to the Facilitation Council. When there are no proceedings before the Facilitation Council, it is difficult to accept the submission as urged on behalf of the respondents that provisions of Section 18 of the MSMED Act are attracted in the facts of the present case.

27. In any event, sub-section (4) of Section 18 cannot be read as a provision creating an absolute bar to institution of any proceedings other than as provided under section 18(1) of the MSMED Act, to seek appointment of an arbitral tribunal. If the argument as advanced on behalf of the respondent that Section 18(4) creates a legal bar on a party who has a contract with a Small Scale Enterprise, to take recourse to Section 11 under the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator, then the legislation would have so expressly provided, namely that in case one such party falls under the present Act, the arbitration agreement, as entered between the parties would not be of any effect and the parties would be deemed to be governed under the MSMED Act in that regard. However, subsection (4) of Section 18 of the MSMED Act does not provide for such a blanket consequence in the absence of any reference made by a party to the Facilitation Council. Also if Section 18 is read in the manner the respondent is insisting, it would lead to a two-fold consequence - firstly, it would amount to reading something in the provision which the provision itself does not provide, which would be doing a violence to the language of the provision; secondly such interpretation in a given situation would render meaningless an arbitration agreement between the parties and it may create a situation that the party who is not falling within the purview of Section 17 and Section 18(1) would be foisted a remedy, which the law does not actually prescribe. Further sub-section (1) uses the word “may” in the context of a dispute which may arise between the parties under Section 17. In the present context, the word



“may” as used in sub-section (1) of Section 18 cannot be read to mean “shall” making it mandatory for a person who is not a supplier (like the petitioner) to invoke the jurisdiction of the Facilitation Council. Thus, the interpretation of sub-section (4) of Section 18 as urged on behalf of the respondent of creating a legal bar against the petitioner to file a petition under section 11 of the Arbitration and Conciliation Act cannot be accepted.”

12. The Hon’ble Supreme Court in ***Gujarat State Civil Supplies Corporation (supra)*** recognizes that the MSMED Act is a special statute and overrides the Arbitration and Conciliation Act, 1996 but does not seem to suggest that in case a Micro, Small and Medium Enterprises chooses not to trigger Section 18 of MSMED Act then the party is precluded from initiating arbitration under the Arbitration and Conciliation Act, 1996.

13. For the said reasons, the petition is allowed and disposed of with the following directions:

- vi) Mr. Satyakam (Adv.) (Mob. No. 9868219633) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- vii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the ‘DIAC’). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.
- viii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- ix) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of



either of the parties, are left open for adjudication by the learned arbitrator.

- x) The parties shall approach the learned Arbitrator within two weeks from today.
- xi) The rights of respondent No. 2 that liability, if any, under the tender would be that of respondent No. 1 and respondent No. 2 is liable on account of being an agent of a disclosed principal is left open to be adjudicated by the learned arbitrator.

JASMEET SINGH, J

JANUARY 24, 2024/DM

Click here to check corrigendum, if any