

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION APPLICATION NO.433 OF 2024.

Shapoorji Pallonji and Company Private Limited	...Applicant
<u>Versus</u>	
Sanjay R. Wadekar	...Respondent

*Mr. Amir Arsiwala a/w. Ms. Shivani Kumbhojkar and Mr. Siddhant Trivedi
i/b The Law Point for the Applicant.
Mr. Alankar Kirpekar a/w. Mr. Ayush Tiwari i/b Ayush Tiwari for the
Respondent.*

CORAM : MANISH PITALE, J.

DATE : 11th MARCH, 2025.

P. C. :

1. Heard Mr. Arsiwala, learned counsel for the applicant and Mr. Kirpekar, learned counsel for the respondent.
2. This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the Arbitration Act”) for appointment of sole arbitrator in the light of arbitration clause contained in sub-contract agreement dated 13/1/2022 executed between the parties. As per the aforesaid agreement the respondent was to supply labour to the applicant, which was executing certain construction contract.
3. The dispute arose between the parties in the context of the aforesaid sub-contract. Certain e-mails were exchanged between the

parties in the backdrop of aforesaid dispute. The applicant issued a notice of dispute on 16/6/2023 in terms of relevant clauses of general terms and conditions of sub-contract agreement, making certain allegations against the respondent and claiming that due to the deficiencies in the services provided by the respondent, the applicant had suffered losses that were required to be compensated by way of damages by the respondent. The respondent did not send any response to the said notice of dispute and in this backdrop on 20/7/2023 the applicant addressed a notice to the respondent, under Section 21 of the Arbitration Act invoking arbitration and calling upon the respondent to choose a sole arbitrator from amongst four names suggested by the applicant in terms of the arbitration agreement between the parties.

4. The respondent sent its reply dated 23/8/2023 to the applicant denying the claims made on behalf of the applicant and objecting to the appointment of a sole arbitrator. At this stage on 30/9/2023 the applicant filed the instant application under Section 11 of the Arbitration Act for appointment of arbitrator in the backdrop of the invocation notice issued under Section 21 of the said Act and relying upon the arbitration agreement between the parties. Thereafter, on 26/10/2023, the respondent filed an application under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short, “the MSMED

Act”) before the Facilitation Council constituted under the MSMED Act. On 3/4/2024, the Facilitation Council issued notice to the applicant under Section 18 (2) of the MSMED Act, calling for its response/ defence in the backdrop of mediation/conciliation being undertaken by the Facilitation Council.

5. It is not disputed that seven meetings took place as part of the conciliation proceedings between April 2023 to August 2024 between the parties before the Facilitation Council under Section 18(2) of the MSMED Act. On 22/8/2023 the respondent informed the Chairman of the Facilitation Council under the the MSMED Act that the conciliation efforts did not yield satisfactory result and that therefore, the conciliation proceedings may be treated as terminated. Section 18(4) of the MSMED Act provides that where the mediation/conciliation between the parties does not succeed and stands terminated without any settlement between the parties, the Facilitation Council itself or through any Institution shall take up the process of arbitration of dispute between the parties.

6. In this factual backdrop, the instant application has come up for consideration before this Bench. It is to be noted that this application has been assigned by an order on the administrative side to this Bench for hearing.

7. The learned counsel appearing for the applicant submits that in the

instant case notice under Section 21 of the Arbitration Act was admittedly issued on 20/7/2023, much prior to the respondent approaching the Facilitation Council constituted under the MSMED Act and even the instant application under Section 11 (6) of the Arbitration Act was filed prior to the respondent approaching the Facilitation Council. It is submitted that this fact is crucial in appreciating the prayer made in the present application. It is emphasized that the grievance of the applicant in the present case against the respondent is with regard to the deficiency on the part of the respondent in providing services and labour in terms of the sub-contract, leading to serious loss being suffered by the applicant, which the applicant is entitled to be compensated by way of damages.

8. It is emphasized that the aforesaid grievance of the applicant and the dispute that arises between the parties in that context is beyond the scope of the disputes that can be the subject matter of arbitration under the provisions of the the MSMED Act. He submitted that in any case, arbitration having been invoked by the applicant under Section 21 of the Arbitration Act on 20/7/2023 itself, even the aforesaid question would be the subject matter before the Arbitral Tribunal to be appointed by this Court while exercising jurisdiction under Section 11 of the Arbitration Act. It was brought to the notice of this Court that the respondent

invoked the MSMED Act for redressal of his grievance much later and admittedly after the instant application under Section 11 of the Arbitration Act was filed. It was emphasized that the grievance sought to be raised by the respondent pertains to amounts allegedly due to the respondent as a supplier under Section 17 of the Arbitration Act along with interest thereon. It is this grievance /dispute that the respondent intends to find a solution by invoking Section 18 of the MSMED Act.

9. In this situation, it is submitted that the applicant having invoked the Arbitration clause under Section 21 of the Arbitration Act and having filed present proceedings under Section 11 thereof, this Court while exercising jurisdiction under Section 11(6) of the Arbitration Act can only go into the limited question as regards existence of arbitration agreement between the parties and all other questions are necessarily to be left open for consideration by the Arbitral Tribunal. It is submitted that Section 11 (6A) of the Arbitration Act is still on the statute book, which restricts the jurisdiction of this Court under the present proceedings to examine the existence of the Arbitration agreement/clauses and no more.

10. The learned counsel for the applicant also dealt with the effect of judgments of the Supreme Court in the cases of *Gujarat State Civil Supplies Corporation Ltd. vs. Mhakali Foods Pvt. Ltd. (Unit 2), (2023) 6 SCC 401* and *Silpi Industries vs. Kerala State Road Transport Corporation,*

(2021) 18 SCC 790. He submitted that even if the position of law clarified in the aforesaid judgments of the Supreme Court is taken into account, applying the same to the facts of the present case would show that, not only is the present application under Section 11 of the Arbitration Act maintainable, but in light of the limited jurisdiction exercised by this Court, the application deserves to be allowed and hence, this Court may consider appointing the sole arbitrator to resolve the disputes between the parties.

11. On the other hand, Mr. Kirpekar, learned counsel for the respondent submitted that the instant application filed under Section 11 of the Arbitration Act ought to be dismissed for the reason that in terms of law laid down by the Supreme Court in the case of *Gujarat State Civil Supplies Corporation Ltd. (supra) and Silpi Industries vs. Kerala State Road Transport Corporation (supra)*, the provisions of the MSMED Act prevail over the Arbitration Act. Since the respondent is a Micro and Small Enterprise covered under the provisions of the MSMED Act and it has invoked Section 18 thereof, with the matter having travelled to the stage of arbitration being initiated before the Facilitation Council under the provisions of the MSMED Act, the arbitration clause in the sub-contract executed between the parties is completely eclipsed and the instant application cannot be entertained.

12. The learned counsel referred to various paragraphs of the aforesaid judgment and submitted that even if the applicant had issued notice under Section 21 of the Arbitration Act and the instant application under Section 11 thereof was filed prior to proceedings under Section 18(1) of the MSMED Act being initiated, the said fact cannot affect the applicability of the position of law to the facts of the present case. It is submitted that if the contentions raised on behalf of the applicant are accepted there would be two parallel arbitral proceedings which cannot be contemplated as per the judgment of the Supreme Court in the case of *Silpi Industries (supra)*.

13. This Court has considered the rival submissions. It is an admitted position that in the present case proceedings under Section 18(1) of MSMED Act were initiated. The reference was filed on 26/10/2023 and the conciliation proceedings between the parties having failed, the proceedings under Section 18(4) of MSMED Act are to be invoked. In such a situation, the question that arises for consideration is, as to whether the instant application filed under Section 11 of the Arbitration Act can be taken up for consideration.

14. The Supreme Court in the case of *Gujarat State Civil Supplies Corporation Ltd. (supra)* has emphatically held that MSMED Act is a special law while Arbitration Act is a general law and that the provisions

of MSMED Act prevail over the Arbitration Act. Therefore, there can be no doubt about the fact that the arbitration clause that forms part of sub-contract between the parties must give way to the statutory arbitration contemplated under the MSMED Act.

15. The Supreme Court in the aforesaid judgment in the case of *Gujarat State Civil Supplies Corporation Ltd. (supra)* also referred to the earlier judgment in the case of *Silpi Industries (supra)* with approval.

16. In the case of *Silpi Industries (supra)* the Supreme Court specifically considered the question as to whether a buyer could file a counterclaim in a statutory arbitration proceeding undertaken before the Facilitation Council on the basis of the supplier approaching the Facilitation Council for settlement of dispute. In the said case, the Supreme Court analysed the provisions of the MSMED Act, particularly Sections 17 and 18 thereof, to reach to a conclusion that if the contention raised on behalf of a buyer to the effect that counterclaim cannot be raised before the Facilitation Council in statutory Arbitration process is accepted, the buyer would be successful in frustrating the facility of statutory arbitration provided under the MSMED Act and in that sense the protection available to Micro and Small Enterprises under the provisions of the MSMED Act would be taken away. In that context, the Supreme Court made certain observations which would apply to the facts

of the present case also.

17. This Court is of the opinion that the applicant in the present case cannot insist upon the present application being considered and ordered on the ground that notice under Section 21 of the Arbitration Act was issued prior to the respondent filing reference before the Facilitation Council under the MSMED Act. In fact, filing of the instant application under Section 11 of the Arbitration Act prior to the filing of the said reference before the Facilitation Council is also a fact that cannot enure to the benefit of the applicant, for the reason that if such factual distinction is to be accepted then the observation of the Supreme Court in the case of *Silpi Industries (supra)* that there cannot be two parallel arbitration proceedings would be rendered meaningless. Therefore, the said distinction sought to be made on behalf of the applicant cannot be accepted.

18. The position of law as laid down by the Supreme Court in the cases of *Gujarat State Civil Supplies Corporation Ltd. (supra)* and *Silpi Industries (supra)* is absolutely clear to the effect that in such a situation where one of the parties is a Micro and Small Enterprise, the provisions of the MSMED Act would prevail over Arbitration Act. Applying the said position to the facts of the present case it can be said that the notice issued under Section 21 of the Arbitration Act, even if prior to the

reference being lodged before the Facilitation Council under the provisions of the MSMED Act, can be said to be stillborn and meaningless.

19. The learned counsel for the respondent is justified in relying upon a recent judgment/order passed by the Delhi High Court in *Idemia Syscom India Private Limited vs. M/s. Conjoinix Total Solutions Private Limited, Arbitration Petition No.1284/2024 dated 24/2/2025*. In the said case when an objection was raised on behalf of the buyer to the effect that the nature of the contract executed between the parties was a works contract, even such an objection was not accepted by the Court and by relying upon the position of law clarified by the Supreme Court in the case of *Gujarat State Civil Supplies Corporation Ltd. (supra)*, it was held that the petition filed under Section 11 of the Arbitration Act for appointment of arbitrator on the basis of arbitration clause contained in the agreement executed between the parties could not be entertained.

20. Since the judgment in the case of *Silpi Industries (supra)* clarifies that a buyer i.e. a party in the same position as the applicant herein can indeed file counter claim in respect of its grievances in a statutory arbitration proceeding initiated at the behest of a seller before the Facilitation Council constituted under the MSMED Act, the present application filed under Section 11 of Arbitration Act cannot be

entertained and hence, the application is dismissed.

[MANISH PITALE, J.]