

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION NO.02 OF 2022

Bajaj Electricals Limited .. Applicant
Versus
Chanda S. Khetawat & Anr. .. Respondents

...
Mr.Mayur Khandeparkar with Mr.Vikram Garewal,
Ms.Mahalakshmi Ganapathy and Ms.Saylee Sawant for the
Applicant.

Ms.Maya Majumdar for the Respondents.

...
CORAM: BHARATI DANGRE, J.
DATED : 16th JANUARY, 2023

JUDGMENT:-

1. The present application is filed under Section 11 of the Arbitration and Conciliation Act, 1996 (*for short, “the Act of 1996*) by the authorised representative of Bajaj Electricals Limited, a company incorporated and registered under the provisions of the Companies Act, 1956, seeking appointment of sole arbitrator for the purpose of adjudication of disputes and differences prevailing between the applicant and the respondent.

2. Heard the learned counsel Mr.Mayur Khandeparkar for the applicant and the learned counsel Ms.Maya Majumdar for the respondents.

Before I appreciate the contentions advanced on behalf of the rival parties, it is necessary to refer to the brief facts in the background.

M.M.Salgaonkar

The applicant, is a company engaged in the business of manufacturing, marketing and supply of consumer electrical equipment, including various Appliances, Fans, Lighting, High Mast and Poles etc. and it also undertakes the work of electric/power infra projects and claim to possess good reputation in the market. The respondents are the proprietor and authorized signatories of the Firm engaged in the business being carried out under name and style 'M/s.Windson International' and are engaged in the business of manufacturing and supply of overhead high tension cables, low tension cables, transmission and distribution line products, which includes hardware fittings, earth pipes, spikes, pins, stay sets, coils etc.

3. The dispute between the parties occurred when somewhere between 2018-19, the applicant issued Purchase Orders (**POs**) in favour of the respondent for procurement of goods/ materials intended to be used for their distinct project(s) MVVNL Project, PuVVNL Project and MP projects. The details of the distinct POs are compiled in the application. On the POs being issued, the applicant and the respondents agreed to abide by the terms and conditions stated therein and act accordingly for the purpose of smooth transaction of business. The agreement of abiding vital terms and conditions created a binding contract between the parties. The prominent term in the PO pertain to delivery, payment terms and dispatch of documents alongwith other clauses in form of recitals.

4. The POs contain a specific provision for arbitration under recital/clause 12 for resolution of disputes and differences

arising therefrom through and by mode of arbitration and it read as under :-

“Arbitration Any differences or disputes arising out of or in connection with this order shall be settled by an amicable effort on the part of both parties. An attempt to arrive at a settlement shall be deemed to have failed as soon as one of the parties to this Order so notifies to the other party in writing. The place of arbitration shall be MUMBAI, India. The language to be used in the arbitration proceedings shall be English.”

The aforesaid clause thus makes it imperative for the parties to resolve the disputes/differences arising from the POs through the process of arbitration and the clause stipulates that the arbitration shall be in Mumbai.

5. Between 2018-19, the respondents supplied goods to the applicant in pursuance of the POs and raised the invoices, which are tabulated in the application. On certain occasions, it is alleged that there was excess or over supply of the goods by the respondents. Pursuant thereto, the respondents issues credit notes of Rs.17,41,473.82 to the applicant to offset the amount of the excess or over supplied quantity. It is alleged that on other occasions, there was short or deficient supply by the respondents and, accordingly, the amounts of the invoices raised were adjusted by the amount of the short or deficient supply and penal charges were also levied as per the terms of the POs to the extent of Rs.10,86,184/-. The tabulation of the invoices raised by the respondents and payments made by the applicant and the credit notes issued by the respondents is mentioned in the application.

6. The applicant, however, contends that the respondents sought to resile from the credit notes issued and also contested

the short/deficient supplies made by them on wholly misconceived grounds. This gave rise to dispute between the parties and the claim of the applicant is, it made every attempt to resolve the dispute between the parties through correspondence and negotiation, but there was no success, which resulted in arbitration clause beings invoked by the applicant vide it's communication dated 28/12/2020, in accordance with Section 21 of the Act of 1996, seeking resolution of the dispute through the process of arbitration.

The said notice was duly delivered and received by the respondents on 04/01/2021.

7. Another important development which took place between the parties is, after receipt of the arbitration notice, the respondents on 07/01/2021, filed a claim before the Micro and Small Enterprises Facilitation Council (*in short, "the Council"*), West Bengal, bearing reference No. Application WB10B0003801/S/00003 and pursuant to the same, the Council issued Intimation Notice/Claim Notice dated 07/01/2021, which was received by the applicant was 11/01/2021 and was responded on 27/01/2021 through it's attorney.

The respondents through the claim presented before the Council staked a claim of Rs.29,50,430/0 as due and payable against the invoices and the response of the applicant is that the respondents themselves had issued a credit note towards excess supply(s) made under various invoices to the tune of Rs.17,41,474/- and, accordingly, the applicant had made payment of Rs.33,67,078/- after appropriation of the credit note amount to the respondents against the said invoices.

8. On 09/01/2021, the respondents replied to the arbitration invocation notice, but did not agree to the appointment of the sole arbitrator nor any name of the alternate arbitrator was suggested. On 05/03/2021, the applicant once again received a demand notice dated 01/03/2021 raising demand of Rs.31,04,460/- alongwith interest at the rate of 24% p.a. as due and payable by the applicant towards supply of the goods/material by respondent No.1, without any supporting documents.

Since, there was no consensus expressed by the respondent for appointment of the sole arbitrator nor any alternate arbitrator was suggested within 30 days of receipt of the request by the applicant, the applicant has chosen to approach this Court, requesting to exercise it's power under Section 11 of the Act of 1996 for appointment of a sole arbitrator.

9. The facts narrated above are not in dispute. The moot question that arises for determination is, whether clause 12 of the agreement entered between the parties, which is sought to be construed as an arbitration clause, would supersede the action initiated by the respondents before the Council, as the submission of Mr.Khandeparkar is that the arbitration was invoked on 28/12/2020 and as such the arbitration proceedings had commenced in the context of Section 21 of the Act of 1996 and this event occurred prior to the reference under Section 18(1) of the Micro, Small and Medium Enterprises Development Act, 2006 (*for short, "the MSMED Act"*) filed by the respondents on 07/01/2021 before the Council.

The argument advanced is, once the arbitration has been invoked, the subsequent reference for conciliation and arbitration under Sections 18(2) and 18(3) of the MSMED Act cannot invalidate the application filed under Section 11(5) of the Act of 1996. Admittedly, according to the applicant, it did not participate in the conciliation proceedings before the Council, as according to it, once the arbitration has been invoked, it will gain supremacy over any proceedings, before any forum, including the Council. The ultimate argument of Mr.Khandeparkar is, though Section 18(4) of the MSMED Act provides for a 'notwithstanding' provision in context of any other law, it does not nullify bilateral contract such as agreement, contemplated therein.

In short, the submission advanced is, in absence of any specific provision in the MSMED Act, taking away jurisdiction of the Court to exercise it's power upon an application being filed prior to the reference before the Council, this Court is not precluded from exercising the power, in the contingency stipulated in Section 11 of the Act of 1996. In any case, it is submitted that the nature of dispute that has arisen between the parties with a clear understanding that such dispute shall be resolved by arbitration, this Court must exercise it's power to resolve the dispute in the manner agreed by the parties, which is so recorded in writing.

10. In this context, I must briefly refer to the purport of the Micro, Small and Medium Enterprises Development Act, 2006 and the provisions contained therein.

Considering that the small scale industry play a significant role in the industrial sector, both on development and economic

front, but since there exists no legal framework for this dynamic and vibrant sector of the country's economy, it was decided to have comprehensive Central enactment to fill up the lacuna. The legislation was to aim at facilitating its growth and development and this resulted in the Parliament enacting the Micro, Small and Medium Enterprises Development Act, 2006 for facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises.

The said enactment provided for establishment of a National Board for Micro, Small and Medium Enterprises. The aim of the legislation was also intended to have provisions for ensuring timely and smooth flow of credit to small and medium enterprises to minimise the incidence of sickness among and enhancing the competitiveness of such enterprises. By a special mechanism in Chapter V, it dealt with delayed payments to micro and small enterprises. Section 15 of the Act cast an obligation on buyer to make payment for the supply of goods or rendering of services by the supplier, on or before the date agreed between them or, where there is no agreement, before the appointed day, **within the period stipulated therein**. Section 18 of the MSMED Act is a special provision for making reference to Micro and Small Enterprises Facilitation Council, which reads thus :-

"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 disputes 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.”

11. Further, Section 24 of the Act gives overriding effect to the provisions of Sections 15 to 23 over any other law for the time being in force notwithstanding anything inconsistent therewith.

12. In the background of the statutory scheme, the question that arises for consideration is, whether the arbitration agreement between the parties, for referring their dispute to an arbitrator, would stand superseded by the provisions contained in Chapter V of the MSMED Act.

This issue, with other two co-related issues arising out of the provisions of the MSMED Act, are no more res integra and have been put to rest by a bunch of Appeals decided by the Hon’ble Apex Court in the case of *Gujarat State Civil Supplies*

Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd. (Unit 2) & Anr.¹,
where the following questions were specifically formulated :-

“4. In the background of afore-stated spectrum of cases, following common questions of law arise for consideration :

(i) Whether the provisions of Chapter-V of the MSEMED Act, 2006 would have an effect overriding the provisions of the Arbitration Act, 1996?

(ii) Whether any 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 Counsel under sub-section (1) of Section 18 of the said Act, if an independent arbitration agreement existed between the parties as contemplated in Section 7 of the Arbitration Act, 1996?

(iii) Whether the Micro and Small Enterprises Facilitation Council, itself could take up the dispute for arbitration and act as an arbitrator, when the council itself had conducted for conciliation proceedings under sub-section (2) of the Section 18 of the MSMED Act, 2006 in view of the bar contained in Section 80 of the Arbitration Act, 1996?”

13. Their Lordship of the Apex Court, after exhaustively referring to the statutory scheme of the MSMED Act, deliberated upon the issue, whether the provisions contained in Chapter V of the MSMED Act with regard to delayed payments to Micro and Small Enterprises, would have the precedence over the provisions contained in the provisions of the Act of 1996, particularly when, the parties by execution of an independent agreement, as contained in Section 7 of the Act of 1996, have submitted to arbitration the disputes arisen between them.

In other words, whether the provisions contained in Chapter V would have an overriding effect on the provision contained in the Act of 1996.

This question came to be answered in paragraphs 27 and 28 in the following words :-

¹ AIR 2022 SC 5545

“27. 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-section (1) and sub-section (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 interpreting 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.

28. 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 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.”

The argument advanced on behalf of the Buyers that the Facilitation Council having acted as a Conciliator under Section 18(2) of the MSMED Act, itself cannot take up the dispute to arbitration and act of an arbitrator was also turned down by the Hon’ble Apex Court.

14. The decision rendered by a Division Bench of the Bombay High Court in the case of *M/s. Steel Authority of India Ltd. & Anr. Vs. Micro, Small Enterprise Facilitation Council, through Joint Director of Industries, Nagpur Region, Nagpur*², which also formed part of set of Appeals decided by the Apex Court, was set aside to the extent it recorded a finding that Facilitation Council could not have decided to initiate arbitration proceedings by itself under Section 18(3) of the MSMED, Act in the wake of the existence of an arbitration agreement between the parties.

15. In the wake of the aforesaid assertion, by the highest Court of this country, I do not think that the argument of Mr.Khandeparkar deserve any consideration. Despite, existence of an arbitration agreement between the parties, since the MSME Kolkata, on application of the respondents acted as a conciliator and by virtue of termination letter dated 08/12/2021, Micro &

² AIR 2012 Bom 178

Small Enterprises Facilitation Council, Kolkata, terminated the conciliation and is in the process of commencing arbitration by acting as an arbitrator as per the MSMED Act, I see no reason to grant the relief of appointment of an arbitrator, merely because the parties had an arbitration agreement amongst themselves.

16. As a sequel, the application is liable to be dismissed, and is accordingly dismissed.

(SMT. BHARATI DANGRE, J.)