

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/PETN. UNDER ARBITRATION ACT NO. 25 of 2020

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M/S TBEA ENERGY (INDIA) PRIVATE LIMITED
Versus
R K ENGINEERING
=====

Appearance:

HARDIK A SHAH(8217) for the Petitioner(s) No. 1
MR MIHIR H PATHAK(5261) for the Petitioner(s) No. 1
MR PRATIK Y JASANI(5325) for the Respondent(s) No. 1
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CORAM:HONOURABLE MR. JUSTICE BIREN VAISHNAV

Date : 16/06/2023

ORAL ORDER

1. Heard Mr.Mihir Pathak learned advocate for the petitioner and Mr.Pratik Jasani learned advocate for the respondent.

2. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ('the Act' for short). The prayer in the petition is that this Court be pleased to appoint a Sole Arbitrator to resolve the disputes and differences between the petitioner and the respondent arising out of or in any way touching or concerning the purchase

order dated 20.08.2018.

3. It is the case of the petitioner that the petitioner issued purchase orders for purchase of insulation kits and like products. The respondent accepted all the terms and conditions of the purchase order and issued bills.
4. It is the case of the petitioner that the total weight received for the purchase orders were short of the actual orders and since the amount of advance was paid, the petitioner was entitled to a refund of Rs.2,02,772.96.
5. Taking cue of an arbitration clause in the agreement, the petitioner issued a notice on 20.04.2019 requesting that the parties shall resolve the dispute by appointing an arbitrator named in the notice.

6. Mr.Mihir Pathak learned counsel for the petitioner would submit that the respondent having not responded to the notice, this Court, in light of the provisions of Section 11 of the Act, shall appoint an arbitrator so named in the notice.

7. Mr.Pratik Jasani learned counsel appearing for the respondent would draw the Court's attention to the affidavit-in-reply filed and submit that prior to the invocation of the arbitration clause, the respondent has invoked provisions of The Micro, Small and Medium Enterprises Development Act, 2006 ('MSME Act' for short), especially Section 18 thereof and a notice by the Council was issued on 19.03.2019. Parties must be put to terms of approaching the MSME Council and there is no room for appointment of an Arbitrator.

8. In support of his submission, he would rely on a decision of this Court in case of ***M/S Samrat Furnaces Pvt. Ltd. v. State of Gujarat*** rendered in ***Special Civil Application No.7006 of 2020*** dated 29.06.2020.

9. Rebutting to the submissions, Mr.Pathak would rely on the provisions of Sections 15 and 18 of the MSME Act and submit that the provisions of the MSME Act can only be invoked providing that the petitioner has liability to pay the amount on appointment of the day, which, in fact, is not so in the facts of the present case. In support of his submissions, he would rely and would request the Court to consider provisions of Sections 2(b) of the MSME Act.

10. Considering the submissions made by the learned counsel for the respective parties, it will

be fruitful to refer to Section 18 of the Act.

Section 18 of the Act reads as under:

“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 subsection (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 subsection (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 to it 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 subsection (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. Considering the decision of this Court in case of ***M/S Samrat Furnaces Pvt. Ltd.*** (supra), this Court had occasion to consider the applicability of the Acts i.e. the Arbitration and Conciliation Act and the MSME Act and after considering several decisions of various Courts, the Court answered the contentions with regard to the application of Sections 7 and 11 of the Act in

paragraph nos. 12 to 14 which read as under:

“12. Reading Sec.18(3) of the MSME Act makes it clear that the conciliation and the arbitration proceedings have to be conducted by the MSME council. The Section makes it clear that where the conciliation initiated under sub section (2) is not successful and is without any settlement, the council itself takes up the dispute for arbitration or refer it to any Institution or Center providing Alternate Dispute Resolution Services for such arbitration. The sub section continues and reads that the provisions of Arbitration and Conciliation Act shall then apply to the disputes as if the arbitration was in pursuance of an arbitration agreement referred to in sub section (1) of Sec.7 of that Act. Reading the sub section (3) therefore makes it clear that irrespective of an arbitration clause or an arbitration agreement, once conciliation is failed and on a dispute being referred to arbitration, the proceedings before the arbitrator appointed by the MSME council shall be in accordance with the provisions of the Arbitration Act. In other words, there is a deem in fiction as rightly pointed out by the learned arbitrator that the provisions of the Arbitration Act would apply as if there is an arbitration agreement. The contention of Mr.Baxi that there has to be an arbitration agreement, therefore, stands negated.

12.1 Even otherwise, if section 18, sub section (1) is referred to, the section begins

with a non obstante clause and says that notwithstanding anything contend in any other law for the time being in force. Any part to a dispute may with regard to any amount due under Section 17 make a reference to the MSME council. Even Section 24 of the MSME Act provides that the provisions of Sec. 15 to 23 have an overriding effect. Secs. 18 and 24 of the Micro Small and Medium Enterprises Development Act are reproduced as under:

“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 subsection (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 subsection (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 to it 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 subsection (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.

19. APPLICATION FOR SETTING ASIDE DECREE, AWARD OR ORDER:

No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall

be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court: Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose.

20. ESTABLISHMENT OF MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL:

The State Government shall, by notification, establish one or more Micro and Small Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification.

21. COMPOSITION OF MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL:

The Micro and Small Enterprise Facilitation Council shall consist of not less than three but not more than five members to be appointed from among the following categories, namely:-

(i). Director of Industries, by whatever name called, or any other officer not

below the rank of such Director, in the Department of the State Government having administrative control of the small scale industries or, as the case may be, micro, small and medium enterprises; and

(ii) one or more office bearers or representatives of associations of micro or small industry or enterprises in the State; and

(iii). one or more representatives of banks and financial institutions lending to micro or small enterprises; or (iv) one or more persons having special knowledge in the field of industry, finance, law, trade or commerce 2. The person appointed under clause (i) of subsection (1) shall be the chairperson of the Micro and Small Enterprise Facilitation Council 3. The composition of the Micro and Small Enterprise Facilitation Council, the manner of filling vacancies of its members and the procedure to be followed in the discharge of their functions by the members shall be such as may be prescribed by the State Government 24. The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

13. Even, considering the decision in the case of Principal Chief Engineer (Supra) in Paragraph No.6.1, the Division Bench of this Court has considered the provisions of Secs.15 to 23 of the Act and categorically

held while relying on a decision of the case SBP & Co. v. Patel Engineering Ltd. reported in 2005 (8) SCC 618 that Secs.18 and 24 provide for a special mechanism of appointing an arbitrator and after such an application has been filed and the council itself acts as an arbitrator, an arbitrator appointed under the provisions of Sec.8 of the Arbitration Act cannot entertain any application. Paragraph No.6.1 of the decision in the case of Principal Chief Engineer (Supra) is reproduced herein and reads as under:

“6.1. It cannot be disputed that the Act 2006 is a Special Act and as per Section 24 of the Act, 2006, the provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, Section 18 of the Act, 2006 would have overriding effect or any other law for the time being in force including Arbitration Act, 1996 and therefore, if there is any dispute between the parties governed by the Act, 2006, the said dispute is required to be resolved only through the procedure as provided under Section 18 of the Act, 2006. Thus, considering Section 18 of the Act, 2006, after conciliation has failed as per Section 18(2) of the Act, 2006, thereafter as per sub-section (3) of Section 18, 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 to it 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 subsection (1) of section 7 of that Act. In the present case, therefore, after unsuccessful conciliation which was conducted as per subsection (2) of Section 18 the Council shall have jurisdiction to take up dispute for arbitration. Therefore, once the Council itself is acting as an Arbitrator in that case, thereafter the Council who acts as an Arbitrator has no authority and / or jurisdiction to entertain the application under Section 8 of the Arbitration Act, 1996. Section 8 of the Arbitration Act, 1996 would be applicable in case where any proceedings are pending before the "Judicial Authority". "Judicial Authority" is not defined in the Arbitration Act, 1996. However, in the case of *SBP & Co. vs Patel Engineering Ltd* and another reported in (2005) 8 SCC 618, it is observed by the Hon'ble Supreme Court that "Judicial Authority" as such is not defined in the Act. It would certainly include the Court as defined in Section 2(e) of the Act and would also, in our opinion include other courts and may even include a special Tribunal like the Consumer Forum. Even in the case of *Morgan Securities and Credit Pvt Ltd* (supra), the Hon'ble Supreme Court has*

observed that in its ordinary parlance “Judicial Authority” would comprehend a Court defend under the Act but also courts which would either be a Civil Court or other authorities which perform judicial functions or quasi judicial functions.”

14. Even reference can be made to the decision of the Hon'ble Supreme Court in the case of Secur Industries Ltd. (Supra) wherein also paragraph Nos.8 and 9 when read, suggest that there is a deem in fiction which expressly incorporated in the provisions of the MSME Act and by legal fiction disputes referred to it are deemed to be proceedings under the Arbitration Act.

14.1 Perusal of paragraph Nos.11 to 13 of the decision of the arbitrator impugned indicate that the learned arbitrator has extensively discussed these decisions and I do not find any reason to fault such findings of the arbitrator.”

12. Admittedly therefore, due to the prevailing of the MSME Act, petition under Section 11 of the Arbitration Act would not lie.

13. The order is subsequently confirmed by the Division Bench in Letters Patent Appeal No.381

of 2020.

14. In view of the above, the petition is dismissed. It is open for the parties to raise all the contentions raised in this petition before the MSME Council.

ANKIT SHAH

(BIREN VAISHNAV, J)