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

**Date of Decision: 17.03.2025**

+ **ARB.P. 1119/2024**

M/S VALLABH CORPORATION .....Petitioner

Through: Mr. Ramesh Singh, Sr. Adv. with Ms.  
Monisha Nanda, Mr. Rajul  
Shrivastav, Advs.

versus

SMS INDIA PVT LTD .....Respondent

Through: Mr. Sujoy Datta, Mr. Surekh Kani  
Baxy, Mr. Aarsheya Sharda, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE JASMEET SINGH**

: **JASMEET SINGH, J (ORAL)**

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") seeking appointment of an Arbitrator for adjudication of disputes between the parties arising out of Service Order dated 31.12.2018 and Purchase Order dated 08.01.2019.

2. It is stated by Mr. Singh, learned senior counsel for the petitioner that the petitioner is a Micro, Small and Medium Enterprise registered under the Micro, Small and Medium Enterprises Development Act, 2006 ("**MSME Act**") and thus entitled to the benefits of the MSME Act.

3. Brief facts are that on 06.11.2018, the respondent placed a Letter of Intent for execution of civil and associated work for construction of New Flash Butt Weld Engineering Workshop at Sabarmati. On 14.11.2018, the respondent placed a revised Letter of Intent for execution of the said work.



The respondent also issued purchase order for supply of civil and associated materials for foundations finishing and associated works for its construction.

4. Both the Service Order as well as the Purchase Order contained identical arbitration clause as Clause 34 which reads as under:

*“34.0 ARBITRATION*

*34.1 In the event of any dispute or differences arising from or in connection with this Purchase Order, the same shall be resolved amicably in good faith, failing which the dispute or differences shall be referred to Arbitration. The Managing Director of the Purchaser or his nominee shall, be the sole Arbitrator. The arbitration shall be governed by the Arbitration and conciliation Act,1996. The Arbitrator shall give reasoned award. The venue of Arbitration shall be Delhi.*

*34.2 It is clarified that pending reference to arbitration, the parties shall comply with their obligations under the contract and the supplies/work shall not be stopped unless dispute is of such a nature that it is not possible to continue the work.*

*35.0 Jurisdiction*

*35.1 any dispute arising out of or in connection with this Purchase order shall be subject to the jurisdiction of courts in Delhi to the exclusion of every other Court.”*

5. On 25.03.2021, Provisional Completion Certificate was issued by the respondent and it records that the contracted work has been completed satisfactorily. On 06.08.2023, the petitioner requested the respondent to release outstanding contractual payment of Rs.37,20,31,671/- both under the Purchase Order as well as the Service Order. Parties tried to resolve their



disputes but failed to arrive at consensus. On 29.02.2024, the petitioner invoked arbitration and proposed 5 names to the respondent for choosing any one of them as a Sole Arbitrator.

6. Since there were disputes pending between the parties, the petitioner moved under Section 18 of MSME Act before the MSME, Gandhinagar, Gujarat. As there was no response, the petitioner has filed the present petition.

7. Mr Singh, learned senior counsel for the petitioner submits that the respondent has not disputed the arbitration clause nor the respondent has raised a dispute regarding arbitrability of the subject matter of the dispute. The mandatory requirement of mediation as per section 18 of MSME Act has also been complied with by the petitioner. Upon failure of mediation, the petitioner is constrained to approach this Court under section 11(6) of 1996 Act. Reliance is placed on *Microvision Technologies (P) Ltd. v. Union of India, 2023 SCC OnLine Bom 1848*.

8. *Per Contra*, Mr. Datta, learned counsel for the respondent opposes the present petition. He states that in accordance with section 18 of MSME Act, if the mediation process has failed, the petitioner is required to approach the MSME Facilitation Council seeking appointment of an Arbitrator. Further, the Facilitation Council has not been given the right to appoint an Arbitrator on account of failure of the mediation process.

9. He also submits that the petitioner has a choice either to initiate action under Section 11 of 1996 Act or make a reference under the MSME Act, 2006. Once the petitioner has invoked the provisions of MSME Act, the petitioner is required to take it to a finality and cannot midway approach this Court by filing a petition under Section 11 of 1996 Act. Additionally, after



making the reference on 16.05.2024, there have been no subsequent follow-up by the petitioner. Hence, the petitioner cannot take advantage of its own failure to follow the process as mandated under Section 18 of MSME Act.

10. To buttress his arguments, learned counsel for the respondent has placed reliance on *Gujarat State Civil Supplies Corpn. Ltd. v. Mahakali Foods (P) Ltd., (2023) 6 SCC 401.*

11. I have heard learned counsel for the parties.

12. Section 18 of MSME 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 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 nor 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.]*

***(Emphasis added)***

**13.** Sub section 2 quoted above states that the Facilitation Council upon receiving reference under sub-section (1) shall either conduct mediation itself or refer the matter to any mediation service provider as provided under the Mediation Act, 2023. Sub section 3 quoted above clearly states that when the mediation is not successful or stands terminated without any settlement between the parties, the Council shall refer either itself take up the dispute for arbitration or refer it to any institution or centre providing alternative dispute resolution services

**14.** Also, Section 11(6) of 1996 Act reads as under:-

*11. Appointment of arbitrators.—*

.....

*(6) Where, under an appointment procedure agreed upon by the parties,—*

*(a) a party fails to act as required under that procedure; or*



*(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure;*

*or*

*(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,*

*a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court]to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”*

***(Emphasis added)***

**15.** The Hon’ble Supreme Court in ***Gujarat State Civil Supplies Corpn. Ltd. (supra)*** has extensively dealt with the interplay of MSME Act and 1996 Act. The relevant paras of the said judgment are extracted below:-

*“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 case [Silpi Industries v. Kerala SRTC, (2021) 18 SCC 790 : 2021 SCC OnLine SC 439] 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 Msmmed Act, 2006 that the Msmmed 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 Msmmed 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 Msmmed 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 Msmmed 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 Msmmed Act, 2006 at a stage when the conciliation process initiated under sub-section (2) of Section 18 of the Msmmed 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 v. P. Jayarajan [K. Prabhakaran v. P. Jayarajan, (2005) 1 SCC 754 : 2005 SCC (Cri) 451] , 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 Msmad Act, 2006 and the unambiguous expressions used therein, this Court has no hesitation in holding that the provisions of Chapter V of the Msmad Act, 2006 have an effect overriding the provisions of the Arbitration Act, 1996.*

*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 Msmad 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.”*

**16.** On perusal, the Hon’ble Supreme Court has observed that the MSME Act will prevail over the 1996 Act as the object of MSME Act is to ensure 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 MSME Act.

**17.** Section 2(4) of 1996 Act reads as under:-

*“(4) This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder.”*

**18.** The provisions of 1996 Act are not inconsistent with MSME Act as there is no other mechanism for appointment of an Arbitrator except under Section 18 of MSME Act. Relying on section 11(6) of 1996 Act, it says that



if any institution fails to appoint any arbitrator, as the case may be, the Supreme Court or High Court will appoint the same.

**19.** Accordingly, the petitioner, in the present case, wrote to MSME Council on 16.05.2024 seeking reference to mediation under the MSME Act as per the provisions of Section 18 of 1996 Act. The petitioner moved this Court on 16.07.2024, till that period, there was no response by the MSME Facilitation Council. Even more, till today, there has been no response by the Facilitation Council.

**20.** In addition, the parties have undertaken the exercise of mediation *vide* Order dated 27.01.2025 before the Delhi High Court Mediation and Conciliation Centre and the same has failed.

**21.** I am of the view that the MSME Facilitation Council did not initiate the process of mediation under section 18 of MSME Act and hence, the present petition filed under section 11(6) of 1996 Act needs to be allowed.

**22.** In *Microvision Technologies (P) Ltd. (supra)*, the Bombay High Court has observed as under:-

*“32. Another factor to be considered is that the Application made by the Petitioner was under Section 11(6) (c) of the Arbitration Act for referring the dispute to arbitration.....*

*33. Thus, an Application under Section 11(6) is made when the institution as in the present case, the Facilitation Council fails to perform any function entrusted to it under the procedure contemplated in Section 18(3) of the (MSMED Act) and pursuant to which appointment is made for referring the disputes to arbitration. This Court in the said Order dated 15th May, 2020 has treated the*



*application as if it was made under Section 11(5) and not under Section 11(6) of the Arbitration Act. Thus, this Court in the said Order has overlooked the relevant provision of law.*

.....

35. *The said provision expressly provides for the Facilitation Council in the event conciliation is not successful and stands terminated without any settlement between the parties to refer to any institution or centre providing alternate dispute resolution services for such arbitration and then the provisions of Arbitration Act shall 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. Upon the failure on the part of the Facilitation Council to refer the dispute to arbitration, an Application may be made under Section 11(6) (c) and accordingly in the present case the application was made for appointment of an Arbitrator. Thus, Section 18 of the MSMED Act has to be read harmoniously with Section 11 of the Arbitration Act.*”

***(Emphasis added)***

**23.** For the said reasons, the petition is allowed and the following directions are issued:-

- i. Ms. Justice Rekha Palli, (Retd. Judge Delhi High Court) (Mob. No. 9810012120) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.



- ii. The provisions of MSME Act will apply and 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').
  - iii. The remuneration of the learned Arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators' Fees) Rules, 2018.
  - iv. The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of 1996 Act prior to entering into the reference.
  - v. 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/counter-claims and merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
  - vi. The parties shall approach the learned Arbitrator within two weeks from today.
- 24.** With these directions, the petition is disposed of.

**JASMEET SINGH, J**

**MARCH 17, 2025/DM**

*Click here to check corrigendum, if any*