

Prakash Industries Limited vs Sumeet International Private Limited on 23 April, 2024

Author: Dinesh Kumar Sharma

Bench: Dinesh Kumar Sharma

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IN THE HIGH COURT OF DELHI AT NEW DELHI
ARB.P. 516/2023 & I.A. 9010/2023
PRAKASH INDUSTRIES LIMITED

SUMEET INTERNATIONAL PRIVATE LIMITED

Through: Mr. Kartik Kurmy,
Kumar, Mr. Raghwen
Ms. Mamta Tiwari,

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA
OR

% 23.04.2024

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act 1996 (hereinafter referred to as "the A&C Act") for appointment of an arbitrator for adjudication of disputes inter-se between the parties.

2. The fact in brief as stated by the petitioner is that the respondent has failed to comply with the terms of the agreement between the parties for appointment of an arbitrator in terms of Clause 16 of the General Terms and Conditions contained in various work orders issued by the petitioner in This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 29/04/2024 at 20:42:03 continuation of Work Order PIL/HO/2013-14/01 dated 02.04.2013 (referred to as „Initial Work Order). This work order was amended subsequently from time to time during the period between 2013-2022 with various such work orders dated 09.03.2017, 19.05.2018, 12.04.2019, 27.05.2020, 08.04.2021 and 11.05.2022.

3. Learned senior counsel for the petitioner submits that in terms of Clause 16 of Work Order dated 09.03.2017, the petitioner nominated Hon ble Mr. Justice Vijay Kumar Jhanji, Former Judge of High Court of Himanchal Pradesh as their nominated arbitrator. However, the respondent has failed to appoint an arbitrator. Thus, the present petition is filed.

4. Learned senior counsel for the petitioner submits that the genesis of the dispute between the parties is the outcome of the continuing default by the respondent during the period from 2013 to 2022 by the respondent. He further submits that the petitioner had to incur huge costs for disposing off the non-metallic dust material. It has been further submitted that the petitioner company had duly earmarked and designated a given area within its factory premises where the respondent was obligated to dispose of the non-metallic dust after extracting the finished material from slag. He submits that as the respondent failed to discharge its obligation, the petitioner company was constrained to engage an additional service and manpower besides mobilizing trucks to dispose of the non-metallic dust at designated space from area where the slag processing was carried out. He further submits that the petitioner company has been raising the demand on this account from time to time since 2013; however, the respondent has neither been responding nor making the payment. He further submits that it was running account between the parties. Learned Senior Counsel submits This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 29/04/2024 at 20:42:03 that the various work orders that were issued were renewed from time to time for slag recovery material/ solvage material from slag process and for slag crushing and processing plant at Champa plant. However, the respondent failed to comply with the Clause „J of the work order dated 11.05.2022 despite the earlier work orders containing the same clause as well.

5. Learned senior counsel further submits that due to respondent default the petitioner had to incur huge cost for disposing of the said material and the petitioner has raised various debit notes of different amounts from time to time which were duly received by the respondent. However, the respondent has failed to carry out its persistent obligations. It has further been submitted that as on date, the respondent is liable to pay to the tune of Rs.25 crores and two debit notes dated 30.06.2022 and 31.12.2022 which were issued along with the petition. He also invited the attention of the Court to the copy of monthly statement of slag crusher for the period from September 2013 to December, 2022.

6. Learned senior counsel submits that the jurisdiction of the Court at the stage of making reference under Section 11 of the Act is very limited. He submits that disputes which have been raised by the petitioner are prior to the registration of the respondent under the Micro Small & Medium Enterprises Development Act, 2006 (hereinafter referred to as the MSME Act). He submits that therefore arbitrator appointed under the MSME would not able to look into the claims/counter claims raised by the petitioner herein. He submits that an arbitrator may be appointed by this Court.

7. The respondent in their detailed reply have denied all the averments made in the petition. It has been submitted that the respondent is registered This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 29/04/2024 at 20:42:04 under The MSME Act, 2006 w.e.f. 21.10.2021. It has further submitted that the respondent is a supplier within the meaning of Section 2(n) of The MSME Act, 2006. It has been further submitted that only the supplier not the buyer is subject to the requirement of registration under MSME Act, 2006. It has further been submitted that MSEFC has already taken up arbitration vide order dated 27.09.2023 upon the claim being filed by the respondent herein in accordance with Section 18 (3) of the MSME Act upon failure of conciliation between the parties. It has further been submitted that the petitioner has an independent right of counter claim with respect of period of claim and claim of the plaintiff. He submits that in the detailed reply filed in response to the petition, it has specifically been stated that the work order dated 02.04.2013 and 15.10.2023 which are indisputably the initial work order, there was no arbitration clause therein. It has been submitted that the arbitration clause came into existence only in the amended work order dated 09.03.2017. He further submits that therefore, in any case the disputes being raised by the petitioner which pertain to the period of 2013 onwards are badly barred by the limitation. It has further been submitted that there are no arbitrable disputes. It is further submitted that debit notes dated 23.06.2022 and 31.12.2022 are, in fact, a counter blast of the demand notice issued by the respondent dated 23.01.2023. Learned counsel submits that therefore, the preset petition is liable to be dismissed.

8. Both parties have relied upon the judgment of Silpi Industries & Ors. vs. Kerala State Road Transport Corporation & Anr., (2021) 18 SCC 790 wherein it has, inter-alia, been held as under:

"37. The 2006 Act contemplates a statutory arbitration when conciliation fails. A party which is covered by the provisions of 2006 Act allows a party to apply to the Council constituted under the Act to first This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 29/04/2024 at 20:42:04 conciliate and then arbitrate on the dispute between it and other parties. There are fundamental differences in the settlement mechanism under the 2006 Act and the 1996 Act. The first difference is, the Council constituted under the 2006 Act to undertake mandatory conciliation before the arbitration which is not so under the 1996 Act. Secondly, in the event of failure of conciliation under the 2006 Act, the Council or the centre or institution is identified by it for arbitration. The 1996 Act allows resolution of disputes by agreed forum. The third difference is that, in the event of award in favour of seller and if the same is to be challenged, there is a condition for pre-deposit of 75% of the amount awarded. Such is not the case in the 1996 Act. When such beneficial provisions are there in the special enactment, such benefits cannot be denied on the ground that counterclaim is not maintainable before the Council. In any case, whenever buyer wish to avoid the jurisdiction of the Council, the buyer can do on the specious plea of counterclaim, without responding to the claims of the seller. When the provisions of Sections 15 to 23 are given overriding effect under Section 24 of the Act and further the 2006 Act is a beneficial legislation, we are of the view that even the buyer, if any claim is there,

can very well subject to the jurisdiction before the Council and make its claim/counterclaim as otherwise it will defeat the very objects of the Act which is a beneficial legislation to micro, small and medium enterprises. Even in cases where there is no agreement for resolution of disputes by way of arbitration, if the seller is a party covered by Micro, Small and Medium Enterprises Development Act, 2006, if such party approaches the Council for resolution of dispute, the other party may approach the civil court or any other forum making claims on the same issue. If two parallel proceedings are allowed, it may result in conflicting findings.

38. At this stage, it is relevant to notice the judgment of this Court in *Edukanti Kistamma v. S. Venkatareddy* [*Edukanti Kistamma v. S. Venkatareddy*, (2010) 1 SCC 756 : (2010) 1 SCC (Civ) 244] where this Court has held that a special statute would be preferred over general one where it is beneficial one. It was explained that the purport and object of the Act must be given its full effect by applying the principles of purposive construction.

39. Thus, it is clear that out of the two legislations, the provisions of the MSMED Act will prevail, especially when it has overriding provision under Section 24 thereof. Thus, we hold that the MSMED Act, being a special statute, will have an overriding effect vis-à-vis the Arbitration and Conciliation Act, 1996, which is a general Act. Even if there is an agreement between the parties for resolution of disputes by arbitration, if a seller is covered by Micro, Small and Medium Enterprises Development Act, 2006, the seller can certainly approach the competent authority to make its claim. If any agreement between the parties is there, same is to be This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 29/04/2024 at 20:42:04 ignored in view of the statutory obligations and mechanism provided under the 2006 Act. Further, apart from the provision under Section 23(2- A) of the 1996 Act, it is to be noticed that if counterclaim is not permitted, buyer can get over the legal obligation of compound interest at 3 times of the bank rate and the "75% pre-deposit" contemplated under Sections 16 and 19 of the MSMED Act.

40. For the aforesaid reasons and on a harmonious construction of Section 18(3) of the 2006 Act and Section 7(1) and Section 23(2-A) of the 1996 Act, we are of the view that counterclaim is maintainable before the statutory authorities under the MSMED Act.

41. In CAs Nos. 1620-22 of 2021, the High Court, while negating the plea of the appellant, on the maintainability of counterclaim, has allowed the application filed by the respondent under Section 11(6) of the 1996 Act and appointed the second arbitrator. Though, we are of the view that counterclaim and set-off is maintainable

before the statutory authorities under the MSMED Act, the appellant in this set of appeals is not entitled for the relief, for the reason that on the date of supply of goods and services the appellant did not have the registration by submitting the memorandum as per Section 8 of the Act. The bids were invited on 23-2-

2010, the appellant submitted its bid on 17-5-2010, the respondent awarded contract to the appellant on 24-9-2010 and the parties signed the contract documents for supply of material, installation, commissioning of the power plant on 29-7-2011. Thereafter, supplies were made and the appellant has raised first invoice on 2-11-2011 for supply contract and also raised the first invoice pursuant to contract for installation on 7-7-2012 and the appellant has raised the last invoice in furtherance of contract for supply of material, on 29-3-2014. The appellant also claims to have raised last invoice on 29-3-2015 in furtherance of contract for installation. It is to be noticed that the appellant approached the District Industrial Centre for grant of entrepreneur memorandum only on 25-3-2015.

42. Though the appellant claims the benefit of provisions under the MSMED Act, on the ground that the appellant was also supplying as on the date of making the claim, as provided under Section 8 of the MSMED Act, but same is not based on any acceptable material. The appellant, in support of its case placed reliance on a judgment of the Delhi High Court in GE T&D India Ltd. v. Reliable Engg. Projects & Mktg. [GE T&D India Ltd. v. Reliable Engg. Projects & Mktg., 2017 SCC OnLine Del 6978] , but the said case is clearly distinguishable on facts as much as in the said case, the supplies continued even after registration of entity under Section 8 of the Act. In the present case, undisputed position is that the supplies were concluded prior to registration of supplier. The said judgment of the Delhi High Court relied on by the appellant also would This is a digitally signed order.

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43. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court, in the judgment in Shanti Conductors (P) Ltd. v. Assam SEB [Shanti Conductors (P) Ltd. v. Assam SEB, (2019) 19 SCC 529 :

(2020) 4 SCC (Civ) 409] has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act. There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of the appellant as the unit under the MSMED Act, 2006. By taking

recourse to filing memorandum under sub-section (1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under the MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which the appellant entered into contract with the respondent.

44. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of the MSMED Act, 2006, by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation.

45. It is also not in dispute that the appellant approached the District Industrial Centre and filed entrepreneur memorandum under Section 8 of the MSMED Act 2006 only on 25-3-2015 and later has approached the Council invoking the provisions of the MSMED Act by filing application under Section 18 of the Act. It is the specific case of the respondent that the appellant has abandoned the incomplete work having made deficient and defective supplies in the month of February/March 2015. In that view of the matter, we are of the firm view that the appellant is not entitled to invoke the provisions of Chapter V and seek reference to arbitration under Section 18 of the MSMED Act, 2006. Further, as it is also not in dispute that there is an agreement for arbitration between the parties for This is a digitally signed order.

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9. At the outset, it is not disputed that the initial work order was placed in the year 2013. The record also reveals that the arbitration clause came into existence in the year 2017. It has also not been disputed that the respondent was registered under MSMED Act on 21.01.2021. It is also not disputed that the arbitration has already been commenced under the MSMED Act, 2006. The petitioner is basing its case upon debit notes dates 23.06.2022 and 31.12.2022 which have been stated to have culminated out of the transactions in the period 2013 to 2022. The plea of the petitioner is that the arbitrator appointed under MSMED Act cannot entertain claim/counter claim which are prior to the registration of the supplier i.e. the respondent under MSMED Act. The plea of the respondent is that in fact these debit notes are documents manufactured only in order to frustrate the proceedings before the MSMED Act.

10. The bare perusal of MSMED Act provides a complete mechanism for the dispute resolution. It provides for statutory arbitration upon the failure of the conciliation proceedings. In Silpi Industries & Ors, the fundamental differences between the settlement mechanism under the MSMED Act 2006 and the Arbitration & Conciliation Act, 1996 Act have been noted which have reproduced hereinabove and for brevity's sake, the same are not repeated herein.

11. The overall scheme of the MSMED Act makes it clear that it is a beneficial legislation for Micro Small & Medium Enterprises. The scheme also provides that a buyer can also raise counter claims before the statutory This is a digitally signed order.

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12. There is no doubt that the supply of the goods and services are prior to the registration of the supplier firm under the MSMED Act. It is evident that this court may appoint an arbitrator upon its jurisdiction being invoked under Section 11 of Act. However, in the present case, the debit notes on the basis of which claim have been raised are after the registration of the supplier firm under the MSMED Act. The jurisdiction of the Court at the stage of making reference under section 11 of the A & C Act is very limited and it cannot enter into a roving enquiry or meticulous appreciation of the facts. However, prima facie fact is that the debit notes are issued after the registration of respondent under MSMED. Further, except a statement, there is no document on record to show that any such claim has been made prior to the registration of the respondent firm with the MSMED Act.

13. I consider that the since arbitration has already been started before MSME and the debit notes on the basis of which the present application has been filed are subsequent to the registration of the supplier under MSME, the present petition is liable to be dismissed.

14. Hence, the present petition is dismissed.

DINESH KUMAR SHARMA, J APRIL 23, 2024/ssc This is a digitally signed order.

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