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

Date of decision: 11th NOVEMBER, 2024

IN THE MATTER OF:

\+ **O.M.P. (COMM) 436/2024**

IN-TIME GARMENTS PVT LTD .....Petitioner

Through: Mr. Rakesh Kumar, Mr. Abhimanu Mahajan, Mrs. Preeti Kashyap, Mr. Varun Pandit, Mr. Yash Dhawan and Mr. Yash Tewari, Advocates.

versus

HSPS TEXTILE PVT LIMITED .....Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

I.A. 42145/2024

1. This is an application on behalf of the Petitioner for condonation of delay in re-filing.

2. For the reasons stated in the application, the delay of three days in re-filing is condoned.

3. The application is disposed of.

O.M.P. (COMM) 436/2024 & I.A. 42142/2024, I.A. 42144/2024

1. The instant petition is one under Section 34 of the Arbitration & Conciliation Act, 1996 challenging an Award dated 01.06.2024 passed by the learned Sole Arbitrator.

2. By virtue of the Award, the learned Sole Arbitrator has allowed the

claim of the Respondent herein and has dismissed the counter claim of the Petitioner herein.

3. Shorn of unnecessary details, the facts which are relevant for the purpose of this challenge are as under:-

i. The Petitioner is a private limited company engaged in the manufacturing of wearing apparel. It is stated that the Respondent herein is also a private limited company engaged in the supply of fabrics.

ii. It is the case of the Petitioner that it was approached by the Respondent for supply of fabrics. It is stated that the Petitioner placed four purchase orders for supply of fabrics on the Respondent, which are as follows:-

a) Purchase Order No.305 dated 25.11.2019 for 23,000/- mtr.,

b) Purchase Order No.310 dated 19.12.2019 for 18,000/- mtr.,

c) Purchase Order No.311 dated 19.12.2019 for 12,000/- mtr.,

d) Purchase Order No.2201 dated 20.02.2020 for 6,000/- mtr.

iii. The claim of the Respondent is for the price of the goods delivered to the Petitioner. As per the statement of claim, the Respondent has made a claim of Rs.1,38,62,111.96/-, being the unpaid amount of the fabrics supplied to the Petitioner.

iv. The case of the Petitioner herein, i.e., the Respondent in the proceedings before the learned Arbitrator, was that the goods were not delivered on time by the Respondent/Claimant and due to the delay in supply of fabrics by the Respondent, the Petitioner herein failed to complete the onward orders placed by the purchaser, i.e. one M/s Trent Limited, which resulted in cancelling of the order.

v. It is the case of the Petitioner that they received a huge order from the said M/s Trent Limited for supply of wearing apparel on urgent basis. It is the case of the Petitioner herein that on coming to know of such an order, the Respondent herein approached the Petitioner for of supply of fabrics for the said order and the Petitioner herein placed orders for supply of fabrics with the Respondent herein.

vi. It is the case of the Petitioner that since the Respondent failed to deliver the fabrics on time, M/s Trent Limited cancelled all the purchase orders placed by it with the Petitioner herein. It is stated that the goods could not be sold to anybody else and the Respondent also did not take back all the material.

vii. The Respondent being a Micro, Small and Medium Enterprise (MSME), approached the MSME Council. The MSME Council referred the dispute to Delhi International Arbitration Centre (DIAC) under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (*in short* 'MSMED Act').

viii. A Sole Arbitrator was appointed by the DIAC on 29.01.2024. Along with the Claim Statement, the Respondent/Claimant also placed to its registration under the MSMED Act. A copy of the Registration of the Udyog Aadhar number was appended to the Statement.

ix. In the statement of defence, the Petitioner herein disputed the entire claim of the Respondent herein and it is the case of the Petitioner herein that they suffered severe losses and damage on account of delayed supply of material by the Respondent herein.

x. A counter-claim of Rs.96,35,204.90/- together with interest was filed by the Petitioner herein.

xi. In light of the disputes raised by the parties, the following issues were framed in the Reference before the learned Arbitrator:-

> *"(i) Whether the claimant is entitled to any payment from the respondent and to what extent?*
>
> *(ii) Whether the claimant acted in breach of the agreement by causing delay or failing to adhere to the specifications?*
>
> *(iii) Whether the respondents suffered any loss or damage on account of the claimant; and, if so, to what extent?*
>
> *(iv) To what principal reliefs and further reliefs are the parties entitled? "*

xii. The Respondent/Claimant examined one witness who was posted in the accounts department of the Respondent and the Petitioner herein examined two witnesses.

xiii. The Arbitrator after going through the material on record and after perusing the evidence held that the entire lot of goods covered by the four purchase orders were delivered by the Respondent to the Petitioner herein which was not always in accordance with the stipulated schedule. However, the learned Arbitrator observed that the goods were never sought to be returned by the Petitioner herein to the Respondent/Claimant. The Arbitrator disbelieved the story of the Petitioner herein regarding the return of goods which was sought to be made in the statement of defence.

xiv. The Arbitrator was of the opinion that under Section 55 of the Contract Act, if a supplier does not deliver goods to his buyer in the given stipulated time, there are three courses of action open to the buyer. First, the buyer may return the goods outright and return the same to the seller or at the very least, inform the seller that the seller should take back the goods. Two, the buyer may put the seller on notice and accept the goods conditionally, subject to the buyer's right to seek appropriate compensation for the delay, three, the buyer may accept the delivery without any protest.

xv. The learned Arbitrator was of the opinion that it is the conduct of the buyer which shows whether the time is really of the essence of the contract between the parties. The Arbitrator held that if the buyer does anything inconsistent with making the goods in a deliverable state for the same to be returned to the seller upon the delayed delivery thereof, the buyer cannot assert the delay or seek to cancel the agreement.

xvi. The learned Arbitrator was of the opinion that in the present case, the buyer, i.e., the Petitioner herein, had accepted the delivery without any protest. In fact, the goods had been accepted and were sent to dying immediately.

xvii. The learned Arbitrator held that it was for the Petitioner herein to establish by a cogent evidence that the Claimant was made aware prior to the purchase orders or simultaneously with the issuance of the first purchase order that the goods covered by the purchase orders placed by the Petitioner herein on the Respondent would be used for supplying garments to M/s Trent Limited and that there

was a strict time schedule for the delivery of the garments by the Petitioner herein to M/s Trent Limited, failing which the orders placed by M/s Trent Limited on the Petitioner herein would stand cancelled.

xviii. The learned Arbitrator has held that the Petitioner herein has not established that the Respondent herein was made aware prior to the time of first issuance order that the goods supplied by the Respondent/Claimant are for making garments for M/s Trent Limited that had to be delivered within the time stipulated or else the orders placed by the Petitioner would be cancelled.

xix. The learned Arbitrator held that the last purchase order was issued on 20.02.2020 and the agreement between the parties did not include the part relating to the Petitioner's part with M/s Trent Limited far less of even the possibility of M/s Trent Limited cancelling the order placed on the Petitioner herein for delayed delivery of the fabric by the Respondent/Claimant to the Petitioner herein.

xx. The learned Arbitrator therefore held that the Respondent /Claimant could not have reasonably expected to appreciate the consequences of its delayed delivery of goods and in any event damages on such account would be too remote and improbable. The learned Arbitrator held that no evidence has been led by the Petitioner that the Respondent herein had been informed of the consequence of the delayed receipt of such goods. The learned Arbitrator also rejected the argument raised by the Petitioner herein that the Reference by the MSME Facilitation Council was

not correct as the Respondent herein was not registered under the MSMED Act since the Registration Certificate of the Respondent under the MSMED Act had expired.

xxi. The learned Arbitrator was of the opinion that when the Respondent herein made a Reference to the MSME Facilitation Council and attempted mediation and when the matter was referred to DIAC after mediation attempt has failed, no objection was taken by the Petitioner herein, rather, the Petitioner herein appeared before the Facilitation Council denied his liability to the Respondent herein. The learned Arbitrator was of the opinion that it is unconceivable that if the Petitioner herein was aware that the Respondent/Claimant was not registered under the MSMED Act, the objection would have been taken and such a response would not have been taken at the very end of its submission in the Reference.

xxii. The learned Arbitrator was of the opinion that the Petitioner herein not only acquiesced in the authority of the Arbitral Tribunal but also submitted to its jurisdiction and wholeheartedly embraced the same by filing a substantial counter-claim and pursing the same in right earnest. The learned Arbitrator did not accept the argument raised by the Petitioner herein. The learned Arbitrator allowed the claim of Rs.1,36,65,867/- which was the amount which the Respondent/Claimant claimed as the balance due and payable for the supply of fabrics and rejected the counter-claim raised by the Petitioner herein.

4. Heard the Counsel for the Petitioner and perused the material on

record.

5. Learned Counsel for the Petitioner states that the specific case of the Petitioner before the Arbitrator was that while placing purchase orders, RW-2 had informed Ms. Shilpi Mathur, an employee of the Respondent/company, about the final shipment of M/s Trent Limited and its timeline. He states that CW-1/ Mr. Harish Kumar has admitted in his cross-examination that Ms. Shilpi Mathur was the person who was dealing with the Petitioner herein for the purchase orders, invoices, supply etc., and was aware about the entire transaction. He states that despite the said fact, the Respondent did not bring Ms. Shilpi Mathur to the witness box and instead brought Mr. Harish Kumar who had no idea about the transaction. He states that the only person who could have refuted the evidence of the Petitioner's witness was Ms. Shilpi Mathur, who was deliberately not called as a witness by the Respondent despite the fact that she is still employed with the Respondent.

6. Learned Counsel for the Petitioner states that despite the above acknowledgement, the learned Arbitrator has granted relief to the Respondent and denied relief to the Petitioner herein on the ground that at the relevant time, the Petitioner had not informed the Respondent that he had received the orders from M/s Trent Limited and that the final product was to be supplied to M/s Trent Limited.

7. Learned Counsel for the Petitioner states that while recording the finding, the learned Arbitrator has ignored the vital evidence which clearly stipulates that at the time when the purchase orders were placed, the Respondent herein was aware about the final shipment of M/s Trent Limited inasmuch as the learned Arbitrator has ignored Para 15 & 16 of the

Statement of Defence filed by the Petitioner herein, Para 6 & 7 of the counter-claim filed by the Petitioner herein, Para 8 & 9 of the RW-1 evidence by way of affidavit, reply to the notice under Section 8 IBC, 2016, legal notice dated 02.11.2020 issued by the Petitioner and the Whatsapp chats between RW-2 and Ms. Shilpi Mathur (representative of the Respondent). It is stated that the said chat reveals that from the very beginning, the Respondent was quite aware about the final shipment and its timelines. It is the contention of the learned Counsel for the Petitioner that the Respondent herein was aware that time was the essence of the contract.

8. Learned Counsel for the Petitioner submits that the learned Arbitrator has failed to appreciate that the Respondent was not entitled to claim benefits under the MSMED Act. He states that the Respondent obtained a Udyog Aadhar certificate on 20.12.2017 and the Ministry of MSME had issued a notification dated 26.06.2020 and as per clause 7 of the notification, the existing Udyog Aadhar certificate holders were supposed to migrate themselves to Udyam, failing which the said MSME Unit ceases to be an MSME and consequently cannot take the benefit under MSMED Act. He states that the Respondent/Claimant on the basis of the Udyog Aadhar certificate of 2017 has filed the claim on 11.05.2023. He further states that there is no iota of submission in the entire claim that the Respondent has been migrated to the Udyog Portal and has obtained registration therein. Learned Counsel for the Petitioner therefore states that the argument of the Petitioner could not be rejected only on the basis of acquiescence as the Respondent was not statutorily entitled to claim any relief under the MSMED Act.

9. The grounds on which an Award can be set aside has been

enumerated by the Apex Court in a number of judgments. Recently, the Apex Court in OPG Power Generation Private Limited v. Enexio Power Cooling Solutions India Private Limited & Anr., **2024 SCC OnLine SC 2600,** has observed as under:-

> *"**60.** Sub-section (2-A) of Section 34 of the 1996 Act, which was inserted by 2015 Amendment, provides that an arbitral award not arising out of international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is visited by patent illegality appearing on the face of the award. The proviso to subsection (2-A) states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. In Saw Pipes (supra), while dealing with the phrase 'public policy of India' as used in Section 34, this court took the view that the concept of public policy connotes some matter which concerns public good and public interest. If the award, on the face of it, patently violates statutory provisions, it cannot be said to be in public interest. Thus, an award could also be set aside if it is patently illegal. It was, however, clarified that illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against public policy.*
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> ***61.** In Associate Builders (supra), this Court held that an award would be patently illegal, if it is contrary to:*
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> *(a) substantive provisions of law of India;*
>
> *(b) provisions of the 1996 Act; and*
>
> *(c) terms of the contract.*
>
> *The Court clarified that if an award is contrary to the substantive provisions of law of India, in effect, it is in contravention of Section 28(1)(a) of the 1996 Act.*

Similarly, violating terms of the contract, in effect, is in contravention of Section 28(3) of the 1996 Act.

62. *In Ssangyong (supra) this Court specifically dealt with the 2015 Amendment which inserted sub-section (2-A) in Section 34 of the 1996 Act. It was held that "patent illegality appearing on the face of the award" refers to such illegality as goes to the root of matter, but which does not amount to mere erroneous application of law. It was also clarified that what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to 'public policy' or 'public interest', cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality. Further, it was observed, reappreciation of evidence is not permissible under this category of challenge to an arbitral award.*

63*. Perversity as a ground for setting aside an arbitral award was recognized in Western Geco (supra). Therein it was observed that an arbitral decision must not be perverse or so irrational that no reasonable person would have arrived at the same. It was observed that if an award is perverse, it would be against the public policy of India.*

64*. In Associate Builders (supra) certain tests were laid down to determine whether a decision of an arbitral tribunal could be considered perverse. In this context, it was observed that where : (i) a finding is based on no evidence; or (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving*

at its decision, such decision would necessarily be perverse. However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. ***Though, a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score.***

65*. In Ssangyong (supra), which dealt with the legal position post 2015 amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence in as much as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.*

66*. The tests laid down in Associate Builders (supra) to determine perversity were followed in Ssyanyong (supra) and later approved by a three-Judge Bench of this Court in Patel Engineering Limited v. North Eastern Electric Power Corporation Limited.*

***67**. In a recent three-Judge Bench decision of this Court in Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd. 2024 INSC 292, the ground of patent illegality/perversity was delineated in the following terms:*

> *"40. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; Or, that the view of the arbitrator is not even a possible view. A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of patent illegality. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice."*

68**. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. **It is only when an arbitral award could be categorized as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an

award as is clear from the provisions of subsection (2-A) of Section 34 of the 1996 Act."

(emphasis supplied)

10. Applying the law laid down by the Apex Court, the conclusion arrived at by the Arbitrator, on the facts of the case that, the Respondent was not made aware of the consequences of not supplying fabrics in time, does not warrant any interference by this Court while exercising its jurisdiction under Section 34 of the Arbitration Act. Under Section 34 of the Arbitration Act the Court cannot re-appreciate evidence and substitute its own conclusion to the one arrived at by the Arbitrator even though a different conclusion can be arrived at on re-appreciating evidence. As has been rightly held by the Courts that while exercising jurisdiction under Section 34 of the Arbitration Act, the Courts do not sit at a Court of appeal and the onus to show that the time was the essence of the contract is on the Petitioner herein and the Petitioner cannot make a grievance that the Respondent did not examine Ms. Shilipi Mathur. Nothing prevented the Petitioner from approaching the Arbitrator to summon Ms. Shilpi Mathur and the Arbitrator, while exercising his power under Section 27 of the Arbitration Act, could have summoned Ms. Shilpi Mathur as a witness.

11. A perusal of the Award indicates that the learned Arbitrator has meticulously gone into the evidence on record has appreciated the contentions taken by the Petitioner and the Respondent has applied the various provisions relied on by the Petitioner herein before rejecting the counter-claim of the Petitioner herein and allowing the claim of the Respondent/Claimant. Therefore, it cannot be said that the Award is based on no evidence or that the learned Arbitrator has taken into account

something irrelevant to the decision while arriving at the conclusion or has ignored any vital evidence in arriving at a decision which would make the decision perverse.

12. This Court has once again gone through the statement of defence and the counter-claim and the evidence filed by the Petitioner and is of the opinion that it cannot be stated that the conclusion arrived at by the learned Arbitrator is perverse or is such that would categorise the Award as perverse or patently illegal.

13. A view has been taken by the learned Arbitrator on the facts of the case and it is well settled that the learned Arbitrator is the ultimate master of the quality and quantity of evidence to be relied on. It is settled that a plausible view taken by the Arbitrator on facts of the case is to be respected.

14. MSMED Act was brought in to free Micro, Small and Medium Enterprises from the plethora of laws and regulations which they had to face with their limited awareness and resources. Micro, Small and Medium Industries have emerged as a significant contributor to the economy and is primarily labour intensive. The MSMED Act was brought in to address the concerns of Micro, Small and Medium industries. Chapter V of the MSMED Act deals with delayed payments to the MSMEs. The said Chapter has been brought in to ensure that when goods or services are supplied by the MSMEs, the payments are made to these industries within time and Sections under Chapter V provides for delayed payment at higher rate of interest. The purpose of this chapter is to ensure that the MSMEs are not pushed out of business. It is felt that failure to pay for the amount of goods and services provided by these enterprises was resulting in many of the MSMEs going out of business as they do not have the might to fight with the large scale

enterprises. Section 18 of the MSMED Act provides for reference of a dispute to the MSME Facilitation Council. The MSME Facilitation Council on receipt of a reference under Sub-Section 18(1) of the MSMED Act, 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. In the present matter, prior to sending the matter to the Arbitral Tribunal, an effort for conciliation was also made and the matter was referred to the Arbitral Tribunal only after conciliation proceedings have failed. Once the matter is referred to Arbitration and an award is passed, the award can be challenged either by filing an application under Section 34 of the Arbitration Act or by filing an application under Section 19 of the MSMED Act. [Refer to:- Executive Engineer & Ors. v. Bholasingh Jaiprakash Construction Limited & Anr., **2024 SCC OnLine Del 1080**].

15. The Apex Court in Gujarat State Civil Supplies Corporation Limited v. Mahakali Foods Private Limited (Unit 2) & Anr., **2023 (6) SCC 401**, has concluded as under:-

> *" **51**. Following the abovestated ratio, it is held that a party who was not the "supplier" as per Section 2(n) of the Msmed Act, 2006 on the date of entering into the contract, could not seek any benefit as a supplier under the Msmed Act, 2006. A party cannot become a micro or small enterprise or a supplier to claim the benefit under the Msmed Act, 2006 by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods or rendering services. If any registration is obtained subsequently, the same would have the effect prospectively and would apply for the supply of goods and rendering services subsequent to the registration.*

The same cannot operate retrospectively. However, such issue being jurisdictional issue, if raised could also be decided by the Facilitation Council/Institute/Centre acting as an Arbitral Tribunal under the Msmed Act, 2006."

16. Applying the said law to the facts of the present case it can be seen that the Respondent had filed a copy of the Udyog Aadhar Certificate issued in the year 2017. The purchase orders are post the date of the registration. The case of the Petitioner is that the Ministry of MSME issued a notification on 26.06.2020 and as per the said notification existing Udyog Aadhar Certificate holders were supposed to migrate themselves to Udyam. Once the Respondent has been registered under the MSMED Act, the Respondent is entitled to the benefits of the MSMED Act.

17. As stated by the learned Arbitrator, the Respondent was registered under the MSMED Act in the year 2017 itself and therefore the benefit of the MSMED Act cannot be declined to the Respondent herein and therefore the statutory right conferred by the MSMED Act cannot be taken away from the Respondent.

18. The learned Arbitrator has not rejected the argument of the Petitioner merely on the basis of acquiescence. The learned Arbitrator was of the opinion that the Petitioner herein knew that the Respondent is entitled to the benefit of MSMED Act and that is the reason the Petitioner participated before the MSME Council and in the arbitration proceedings without raising this issue. In the considered opinion of this Court, that the arguments raised by the Petitioner amounts to splitting hairs and clutching at straws which cannot be countenanced and is impermissible in law. The conclusion arrived at by the learned Arbitrator therefore cannot be found fault with under

Section 34 of the Arbitration & Conciliation Act either on the ground that it is opposed to the policy or on the ground that it is in contravention with the fundamental policy of Indian law or is in conflict with the basic notion of morality and justice or is vitiated by patent illegality. Therefore, the challenge to the impugned Award cannot be accepted.

19. In view of the above, the petition is dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

NOVEMBER 11, 2024
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