



WEB COPY



O.S.A.(Comm.App.Div.) No.7 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	14.10.2024
Pronounced on	30.10.2024

CORAM :

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

O.S.A.(Comm.App.Div.) No.7 of 2023

and

C.M.P.No.2407 of 2023 and C.M.P.No.16053 of 2024

M/s.Sivadarshini Papers Limited,
2/309-A, Harini Arcade, Vadavalli (P.O.),
Coimbatore – 641 041.

... Appellant / Respondent

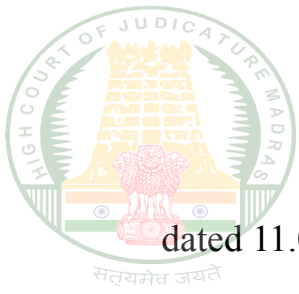
Vs.

M/s.Sunwin Papers,
Represented by its Proprietrix
R.Thilagavathi,
Having its Office at
HB-84, 80 Feet Road,
RM Colony, Dindigul – 624 001.

Presently residing at:
No.22, Chellammal Colony, 1st Street,
Samundipuram, Tiruppur – 641 602.
Represented by its Power of Attorney
Mr.P.Rajasekaran

... Respondent / Petitioner

Prayer: Appeal under Order XXXVI Rule XI of the Original Side Rules read with Section 37 of the Arbitration and Conciliation Act, 1996 (under Section 13(1) of the Commercial Courts Act, 2015), against the Fair and Decretal Order



O.S.A.(Comm.App.Div.) No.7 of 2023

dated 11.08.2022 in Arb.O.P.(Com.Div.) No.195 of 2021.

WEB COPY

For Appellant : Mr.Anirudh Krishnan

For Respondent : Mr.P.Rajasekaran
(Party-in-Person)

JUDGMENT

(Judgment of the Court was delivered by **C.SARAVANAN, J.**)

The above appeal has been filed under Order XXXVI Rule XI of the Original Side Rules read with Section 37 of the Arbitration and Conciliation Act, 1996 (under Section 13(1) of the Commercial Courts Act, 2015) against the Fair and Decretal Order dated 11.08.2022 passed by the Court in Arb.O.P.(Com.Div.) No.195 of 2021.

2. By the Impugned Order dated 11.08.2022, the Commercial Court had allowed the petition filed by the respondent whereby, the proceedings in Award dated 01.10.2020 bearing Reference I.A.F.No.32 of 2019 passed by the Sole Arbitrator purportedly under Section 16 of the Arbitration and Conciliation Act, 1996 has been set aside.

3. The brief facts of the case are that the respondent had supplied waste



papers to the appellant during the period in dispute.

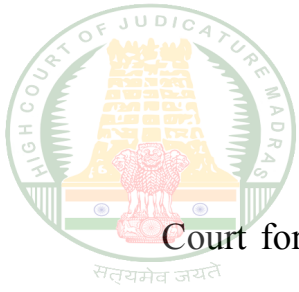
WEB COPY

4. The respondent has registered itself as a Micro, Small and Medium Enterprise (MSME) on 09.11.2016 under the provisions of the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006.

5. Since payments were not purportedly made by the Appellant to the respondent for the supplies effected by the respondent, the respondent made a reference to the Micro and Small Enterprises Facilitation Council (MSEFC), Madurai on 16.08.2018. Conciliation was conducted by the Micro and Small Enterprises Facilitation Council (MSEFC), Madurai itself.

6. Since the conciliation did not culminate in a resolution of dispute between the appellant and the respondent, the Micro and Small Enterprises Facilitation Council (MSEFC), Madurai in its meeting held on 26.07.2019 recorded that consensus was arrived between the parties to refer the case for arbitration under Section 18(3) of MSMED Act, 2006.

7. Thus, the case was transferred to the Arbitration Centre attached to this



O.S.A.(Comm.App.Div.) No.7 of 2023

Court for nominating an Arbitrator. Pursuant to the same, the Sole Arbitrator

WEB COPY

entered upon reference where the appellant had filed an application under Section 18(3) of MSMED Act, 2006 read with Section 16 of the Arbitration and Conciliation Act, 1996 in I.A.F.No.32 of 2019 questioning arbitrability of the dispute between the appellant and the respondent under the provisions of MSMED Act, 2006 read with the provisions of the Arbitration and Conciliation Act, 1996.

8. It is the case of the appellant that the respondent was not a registered MSME either at the time of purported transaction which forms subject matter of dispute or at the time of making reference to the Arbitral Tribunal and that no dispute was in existence in the subject matter referred by the respondent. It was also stated that no amount was due and payable by the appellant to the respondent.

9. The Arbitral Tribunal accepted the contentions of the appellant that the respondent was not validly registered as MSME under the provisions of MSMED Act, 2006. Having concluded that the respondent was not validly registered as MSME under the provisions of the aforesaid Act in the light of the Office Memorandum dated 27.06.2017, the Sole Arbitrator also proceeded to



decide the case on merits as well on the issue as to whether any issue escalated

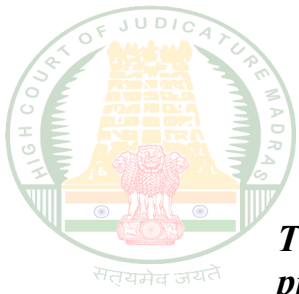
between the parties herein relating to payment of outstanding from the appellant

and whether the appellant was due and liable to pay the admitted amount.

10. Aggrieved by the aforesaid Award dated 01.10.2020 of the Sole Arbitrator, the respondent has filed Arb.O.P.(Com.Div.) No.195 of 2021 which has been ordered as prayed for with the following observations:-

“13. There are two facets qua the matter on hand. A subordinate legislation as a thumb rule (though not absolute) is prospective. This is not even subordinate legislation. This is only a notification made under a Statute. Be that as it may, as rightly pointed out by the party-in-person, a careful perusal of Office Memorandum dated 27.06.2017 makes it clear that the activities adumbrated in Table.I thereat would not be included in the manufacture and production of goods or providing or entering of services in accordance with Section 7 of MSMED Act. To be noted, Section 7 of MSMED Act deals with classification of Enterprises and Section 8 would provide for the registration. There is nothing to demonstrate that notification for the Office Memorandum is retrospective and all registrants would stand effaced qua MSMED Act. This by itself drops the curtains on the matter. Be that as it may, a careful perusal of impugned award makes it clear that AT has observed therein that registration is not mandatory. This means that first of the issues on which AT addressed itself ought to have been answered in favour of Sunwin as a sequitur but that was not to be. Furthermore, AT in paragraph 2.3 has held as follows:

'2.3.Therefore, the existence of dispute between the parties is proved and the same shall be adjudicated by the subject arbitration proceedings.'



WEB COPY

Therefore, the dispute has to be adjudicated by arbitration proceedings. The answer to the registration issue and this finding run into each other. This therefore is a clear case of patent illegality within the meaning of Section 34(2A) and it would also be in conflict with public policy of India owing to being in conflict with fundamental policy of Indian Law which in legal parlance will be Clause (ii) of Explanation 1 under Section 34(2)(b)(ii) of A and C Act.

14. As the challenge to the impugned award by the protagonist of captioned Arb OP snugly fits into two pigeon holes namely Section 34(2)(b)(ii) read with Clause (ii) of Explanation 1 thereat and Section 34(2A) namely conflict with public policy and patent illegality respectively, the prayer in the captioned Arb OP i.e., the recast prayer as set out supra elsewhere in this order is answered in the affirmative. To put it differently, captioned Arb OP is allowed by reading the prayer as 'to set aside the proceedings/impugned award dated 01.10.2020 bearing reference I.A.No.32 of 2019 made by a sole Arbitrator'. There shall be no order as to costs."

11. Aggrieved by the aforesaid Order, the appellant is before this Court by way of Original Side Appeal under Order XXXVI Rule XI of the Original Side Rules read with Section 37 of the Arbitration and Conciliation Act, 1996 (under Section 13(1) of the Commercial Courts Act, 2015).

12. The principal ground of attack to the Impugned Order of the Learned Single Judge of the Commercial Court is that no petition was maintainable under Section 34 of the Arbitration and Conciliation Act, 1996. It is submitted



O.S.A.(Comm.App.Div.) No.7 of 2023

that at best the appeal under Section 37(2)(a) of the Arbitration and Conciliation

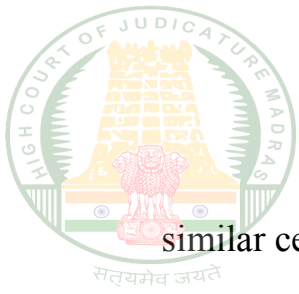
Act, 1996 ought to have been filed and therefore on this count, the Impugned

Order passed by the Commercial Court was liable to be interfered with.

13. That apart, it is submitted that in the light of the Office Memorandum dated 27.06.2017, the respondent cannot be said to be MSME to invoke jurisdiction of the Micro and Small Enterprises Facilitation Council (MSEFC) under Section 18 of MSME Act, 2006.

14. Learned counsel for the appellant would also submit that the appellant is not averse to resolve the dispute with the respondent under the provisions of the Arbitration and Conciliation Act, 1996 and therefore this Court may exercise its *suo motu* power under Section 11(6) of the Arbitration and Conciliation Act, 1996 by referring the matter to the Arbitrator outside the scope of MSME Act, 2006.

15. On the other hand the respondent, who appeared as party-in-person demonstrated before us that during the material period the respondent was a MSME and that had secured Udyog Aadhaar Memorandum on 09.11.2016 and



similar certificates as detailed below:-

Sl.No.	Date	Copies of Particulars
1.	09.11.2016	Udyog Aadhaar Registration Certificate
2.	09.11.2016	Udyog Aadhaar Memorandum
3.	18.02.2020	Acceptance of Sole Arbitrator
4.	17.08.2020	Udyog Aadhaar Memorandum (from 09.11.2016 valid till 31.03.2021)
5.	---	Udyog Aadhaar Memorandum (from 09.11.2016 valid till 31.12.2021)
6.	07.07.2021	Udyam Registration Certificate
7.	26.07.2019	MSEFC Order

16. We have carefully considered the Impugned Order dated 11.08.2022 of the Commercial Court and the Award passed by the Sole Arbitrator on 01.10.2020 in I.A.F.No.32 of 2019.

17. Practically, the learned Arbitrator has given a decision on merits as well after concluding that the respondent was not a MSME.

18. We are of the view, the Order delves into the merits of the claim of the respondent which has to be construed as an Award for the purpose of Section 34 of the Arbitration and Conciliation Act, 1996. Therefore, Arb.O.P.(Com.Div.) No.195 of 2021 filed by the respondent was within the jurisdiction of the



Commercial Division of this Court.

WEB COPY

19. Therefore, the Impugned Order does not suffers from any error of jurisdiction.

20. We are also of the *prima facie* view that there are overwhelming records that are available on record which indicates that the respondent was a MSME within the meaning of the provisions of MSMED Act, 2006 and therefore the respondent was entitled to invoke jurisdiction of the Micro and Small Enterprises Facilitation Council (MSEFC) under Section 18 of MSMED Act, 2006.

21. That apart, the records also reveal that before the Micro and Small Enterprises Facilitation Council (MSEFC), Madurai, the appellant had also acquiesced in the proceedings under the provisions of MSMED Act, 2006 and has thereafter filed an application under Section 18(3) of MSMED Act, 2006 read with Section 16 of the Arbitration and Conciliation Act, 1996 in I.A.F.No.32 of 2019 questioning *locus standi* of the respondent to invoke jurisdiction/machinery under the provisions of Section 18 of MSMED Act, 2006.



WEB COP 22. We are of the view, the appellant is not entitled to state that the respondent was not entitled to the relief if any on the supplies effected under the provisions of MSMED Act, 2006. Therefore, this Original Side Appeal filed by the appellant is liable to be dismissed.

23. Since the Award dated 01.10.2020 stands set aside, the dispute has to be still decided on merits as the Sole Arbitrator had adjudicated the merits while passing the Award on 01.10.2020 in I.A.F.No.32 of 2019 digressing into the merits of the case. Having come to a conclusion that the respondent was not a MSME and therefore not entitled to invoke the machinery under MSMED Act, 2006, the Sole Arbitrator ought not to have decided the case on merits. Since the Sole Arbitrator has already expressed his opinion on merits, it may not be prudent to refer the case for fresh arbitration to the same Arbitrator. The case can therefore be referred to a new Arbitrator.

24. Therefore, the Registry is directed to send a copy of this Order to the High Court Annexed Mediation and Conciliation Centre attached to this Court to nominate a new Arbitrator to resolve the dispute between the appellant and the respondent under the provisions of the Arbitration and Conciliation Act,



O.S.A.(Comm.App.Div.) No.7 of 2023

1996 and MSMED Act, 2006.

WEB COPY

25. This Original Side Appeal, is thus, dismissed. No costs. Connected Miscellaneous Petitions are closed.

[R.S.K., J.]

[C.S.N., J.]

30.10.2024

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No

arb

R.SURESH KUMAR, J.
and
C.SARAVANAN, J.

arb



WEB COPY



O.S.A.(Comm.App.Div.) No.7 of 2023

Pre-Delivery Judgment in
O.S.A.(Comm.App.Div.) No.7 of 2023
and
C.M.P.No.2407 of 2023 and C.M.P.No.16053 of 2024

30.10.2024