

THE HONOURABLE SRI JUSTICE B. VIJAYSEN REDDY

ARBITRATION APPLICATION No.205 of 2023

ORDER:

This application is filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') to appoint a sole arbitrator in terms of Clause 16 of the Work Order bearing No.VSLPL/WO/21-22/061 dated 17.03.2022 to adjudicate the disputes/claims disputes between the applicant and the respondent.

2. It is stated that the applicant is engaged in the business of production, collection and distribution of electricity through its lignite based plant in Gurha, Bikaner, Rajasthan. The respondent is engaged in the manufacture of refractory monolithic and precast pre-fired shapes and refractory engineering and installation services having its registered office at Srilalitha Apartment, 71 C New Avadi Road, Kilpauk, Chennai- 600010, Tamil Nadu.

3. It is submitted that the applicant intended to purchase refractories for their power plant. The applicant entered into negotiations with the respondent on 30.06.2022 and in pursuance thereof, the applicant issued Work Order VSLPPL/WO/21-22/061 on 17.03.2022 for supply, application and dry-out of Refractories Works having a work order value of Rs.5,90,00,932/- including

GST. The applicant along with the respondent conducted a joint inspection for the conclusion of the actual requirement of refractory and anchors and on mutually agreed terms and conditions. Consequently, the Minutes of Meeting was signed and an amended work Order dated 10.05.2022 bearing No.VSLPPL/WO/21-22/061-1 was issued to the respondent having a work order value of Rs.6,74,60,647/- including GST to be completed by 25.05.2022.

4. It is the case of the applicant that despite repeated requests, the respondent failed to complete the jobs within the agreed period and jobs were completed only on 07.06.2022, thereby, delaying the plant start-up by seven (7) days. Furthermore, there were material deviations, quality issues and poor workmanship in the supplies provided by the respondent. The applicant made timely payments to the respondent in terms of the Work order and as per clause 5 of the work order, liquidated damages would be imposed for any delay in supplies beyond 31.05.2022.

5. It is submitted that after the boilers were delivered, the light-up of the boilers was done as permitted by the respondent and immediately after the light-up, a heavy flue gas leakage was observed from the RHS loop seal and the refractory fell in the 35-meter cyclone area. Due to the leakage, the plant had to be stopped again. During the inspection, it was found that the

refractory was not applied in the leaking area and clearance was given by the respondent without completing the job as per the terms of the work order. It is stated that due to the deficiency in service and poor workmanship of the respondent, the applicant had to face damages in the refractory again on 25.05.2023, which subsequently led to the temporary shutdown of the plant for further repairs from 28.05.2023 to 11.06.2023 causing them huge losses as the supplies provided by the respondent could not even sustain the warranty period of twelve (12) months.

6. It is submitted that as per the letter dated 05.06.2023, the applicant invoked the warranty clause as given in the work order intimating the respondent regarding the damages in the refractory lining and requested the respondent to get the damages fixed. The respondent completely disregarding the fact revoked the warranty clause by letter dated 19.06.2023. In the above circumstances, disputes arose between the applicant and the respondent and as no response was forthcoming from the respondent, the applicant was constrained to invoke arbitration contained in Clause 18 of the work order.

7. It is submitted that applicant issued arbitration notice through their counsel, which was received by the respondent on 10.7.2023, nominating Mr. Tariq Khan, Registrar, International

Arbitration and Mediation Centre (IAMC), Hyderabad, as the sole arbitrator to settle the disputes between the parties. The applicant called upon the respondent to confirm the appointment of Mr. Tariq Khan within 15 days from the date of the receipt of the notice. The notice was served on the respondent on 10.07.23 vide registered post. However, there was no response from the respondent, pursuant to the said notice, as such, the applicant approached this Court invoking Clauses 18 and 19 of the Work Order dated 17.03.2022 for appointment of an arbitrator.

8. In the counter filed by the respondent, it is stated that the arbitration application is not maintainable in view of the statutory proceedings under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, which was already initiated before the Micro and Small Enterprises Facilitation Counsel, Chennai, vide MSCF/CR/No.36 of 2023. The averment made in the application regarding work order dated 17.03.2022 and first amendment to the work order on 10.05.2022 and second amendment to the work order on 03.08.2022 is not denied. There is no delay from the respondent side. The delay was not on account of supply and application of refractory but due to payment delay, quantity revision and work order amendment and pending mechanical activities. As per the applicant's commitment, the RHS and LHS cyclone was to be handed over to the respondent for

breaking and application on 28.04.2022, but the mechanical team handed over these cyclones - LHS on 05.05.2022 and RHS on 13.05.2022. The delay was 7 days and 15 days respectively. It is stated that various e-mails exchanged between the respondent and the applicant demonstrate that the delay is not from the respondent's side and on the other hand establishes abnormal delay in effecting prompt payment to the respondent.

9. *Inter alia*, it is stated that the respondent received a mail about the damages only on 05.06.2023. The applicant claimed that they have started the repair work. Though the refractory lining was within the warranty period as per the subject work order, the applicant carried out the repair work without asking the respondent to do the repair work at the respondent's cost. It is stated that the respondent would have attended the shutdown if they were asked to do so, but since, a financial claim was made by the applicant without giving opportunity to the respondent to repair the damaged lining and as the applicant engaged another vendor to undertake repairs, the warranty period stood absolved from then.

10. It is further stated that the respondent was continuously following up for the payments to which the applicant did not respond. As such, the respondent decided to file a case with the

MSEFC (Micro and Small Enterprises Facilitation Council) Chennai. The case was filed on 12.01.2023 with MSEFC and the first hearing was on 23.03.2023. After that the applicant issued arbitration notice through their counsel on 06.07.2023. As the proceedings were pending before a legally recognized forum - MSEFC, it was not proper to initiate a parallel proceeding for the same issue.

11. It is stated that the claim of Rs.17,90,00,000/- along with interest made by the applicant is baseless whereas the respondent's claim with MSEFC for an amount of Rs.1,58,13,759/- is based on actuals and the respondent is also entitled for interest from the date of supply till the date of realization. The instant arbitration application is not maintainable in as much as the statutory proceedings were already invoked by the respondent under Section 18 (1) of the Micro, Small and Medium Enterprises Development Act, 2006 vide MSCF/CR/No.36 of 2023 for realisation of the outstanding amounts from the applicant.

12. In the rejoinder filed by the applicant, it is stated that the cause of action for invoking arbitration proceedings in terms of Clause 18 of the work order dated 17.03.2022 and the ongoing proceedings initiated by the respondent before the MSEFC is different. The pendency of proceedings before the MSEFC would not have any bearing on the arbitration proceedings.

13. Learned counsel for the applicant submitted that there is no denial by the respondent regarding the disputes arisen between the parties, existence of arbitration under Clause 18 of the work order dated 17.03.2022 and invocation of arbitration clause by notice dated 06.07.2023. He submitted that this Court has got limited jurisdiction under Section 11(6) of the Act. Even if there is any clash between the arbitration proceedings and those initiated under the Micro, Small and Medium Enterprises Development Act, 2006, it is for the arbitrator to decide the maintainability of the claim of the applicant and if necessary by framing preliminary issue of jurisdiction.

14. On the other hand, learned counsel for the respondent submitted that the Supreme Court in **SILPI INDUSTRIES AND OTHERS v. KERALA STATE ROAD TRANSPORT CORPORATION**¹ held, in similar circumstances, that the dispute has to be decided under the Micro, Small and Medium Enterprises Development Act, 2006, which will have overriding effect over the Arbitration and Conciliation Act, 1996. In the said decision, the Supreme Court held that even a counter claim is maintainable before the statutory authority under the MSMED Act.

¹ (2021) 18 SCC 790

15. In reply, the learned counsel for the applicant submitted that the cause of action for initiating the arbitration proceedings is different from the counter claim being made by the respondent. The above decision of the Supreme Court is not applicable to the facts of the case.

16. In view of the above background facts and circumstances of the case, the only issue, which arises for consideration by this Court, is as under:

"Whether the arbitration application is maintainable in view of the ongoing proceedings initiated by the respondent before the Micro and Small Enterprises Facilitation Counsel, Chennai, vide MSCF/CR/No.36 of 2023."

17. The Supreme Court in **SILPI INDUSTRIES**'s case (1 supra) held as under:

"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 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."

18. The facts of the present case are similar to the facts in **SILPI INDUSTRIES's** case (1 supra). The respondent in Civil Appeal Nos.1620-22 of 2021 filed O.P.No.617 of 2017 before the High Court of Madras under Section 11(6) of the 1996 Act for appointment of a second arbitrator to decide upon disputes between the parties (para 10). The said application was opposed by the appellant on the ground that it has already moved the Micro and Small Enterprises Facilitation Council and prayed for dismissal of application under Section 11(6) of 1996 Act (para 11). The Supreme Court has noted down the contention of the respondent that the Facilitation Council has been constituted primarily to deal with the disputes that are raised by the supplier and does not envisage the laying of counter claim by other party to a contract, as such, it cannot seek appointment of arbitrator under Section 11(6) of the 1996 Act (para 12). The Supreme Court

framed a specific issue "*whether, counter claim is maintainable in such arbitration proceedings?*"

19. Having dealt in detail with the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 and the Statement of Object and Reasons of the Act, the Supreme Court held that if counter claim made by seller before the Facilitation Council is not allowed, it may lead to parallel proceedings before various fora. The seller may approach the Facilitation Council under the provisions of the 2006 Act, at the same time, the buyer may approach the civil Court/arbitrator and it may result in conflicting findings (para 34). By observing that Sections 15 to 23 of the Act are given overriding effect under Section 24 of the 2006 Act, which is a beneficial legislation, the Supreme Court held that even if buyer has any claim, he can make a claim/counter claim as otherwise it will defeat the objects of the Act.

20. It is the contention of the learned counsel for the applicant that the cause of action for the claim made by the applicant and the counter claim made by the respondent is different.

21. It may be noted that the claim and counter claim arise out of disputes between the parties regarding performance of obligations under Work order dated 17.03.2022. The claim of the applicant is that there is deficiency of service on the part of the respondent,

as the work entrusted to it was not completed and there is poor workmanship. On the other hand, the claim of the respondent is that it has already approached the Facilitation Council vide MSCF/CR/No.36 of 2023. In the light of the aforesaid authoritative pronouncement of the Supreme Court that counter claim of the buyer is also maintainable before the Facilitation Council, the instant arbitration application is not maintainable.

The issue is answered accordingly.

22. The arbitration application is accordingly dismissed. However, the applicant is given liberty to file fresh arbitration application under Section 11(6) of the Act subject to the result of MSCF/CR/No.36 of 2023.

The miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

June 3, 2024
DSK

B. VIJAYSEN REDDY, J