

MHNS010000232021	Presented on :	01/01/2021
	Registered on :	02/01/2021
	Decided on :	31/03/2022
	Duration :	01Y 03 00D

**IN THE DISTRICT COURT, NASHIK AT : NASHIK.
CNR No.:MHNS010000232021**

(Presided over by Ms. Mridula V. K. Bhatia)

COMMERCIAL ARBITRATION APPLN. NO. 02/2021

Exh. No.18

M/S. VIRTUOSO OPTO ELECTRONICS PVT. LTD.,
HAVING ITS OFFICE AT;
7 MIDC AREA, SATPUR,
TRIMBAK ROAD, NASHIK-422007.
MAHARASHTRA.

Through its Director

Mr. Sukrit Arvind Bharati **...Applicant.**

V/s.

DIRECTORATE OF URBAN LOCAL BODIES,
BAY NO.- 11-14, SECTOR-4,
PANCHKULA, HARYANA. **...Respondent.**

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Appearances :

- 1) Ld. Senior Adv. Mr. Mihir Desai i/b learned Advocate Shri. A. A. Sonawane for the applicant
 - 2) Ld. A.G.P. Dr. S. S. Kotwal for the respondent.
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: J U D G M E N T :

(Delivered on this 31st day of March, 2022)

1] This is an application purportedly under Section 29-A(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act) for substituting the arbitral tribunal, i.e., Facilitation Council by a sole Arbitrator with Seat and Venue of Arbitration at Nashik and further directions to complete the Arbitration Proceedings within 90 days.

2] The case of the applicant is as follows :

a) The applicant is a registered MSME (Micro, Small & Medium Enterprise) unit. The applicant is a seller as contemplated under the Micro, Small And Medium Enterprises Development Act, 2006 (hereinafter referred to as the MSMED Act).

b) The respondent is a State Government Department, viz., Directorate of Urban Local Bodies in Haryana and is a buyer as per the provisions of the MSMED Act. The applicant and respondent had entered into a contract for replacing existing street lights with energy efficient LED street lights, installation of centralized control and monitoring system (CCMS) panel and/or smart lighting system along with operation and maintenance for 10 years in Sonipat, Haryana.

c) On 01/12/2015, the applicant filed the Memorandum as per Section 8 of the MSMED Act and therefore at least from that date, it is covered by the said Act. On 19/09/2017, the Government of Haryana issued 3 tenders for LED street lights for different districts of Haryana. The applicant bid for all the three tenders and was awarded the contracts for all three tenders on 28/02/2018 (Annexure P-1). Each of the contracts was for a period of 10 years. At the time of bidding, the applicant had disclosed to the respondent that it was registered under the MSMED Act. However, on 22/02/2019, all the three contracts were cancelled without assigning any reason which resulted in the present dispute. By this time, the applicant had spent tens of crores of rupees towards fulfillment of the contract. On 03/05/2019, the applicant sent notices to the respondent challenging the termination of the contract and demanding expenses and compensation (Annexure P-2). Since the respondent did not comply with the requisitions stated therein, a reference was made by the applicant to the facilitation Council under the MSMED Act. On 24/07/2019, an intimation (Annexure P-3) was sent by the Facilitation Council to the Respondent. It was mentioned in the said intimation that the dispute should be referred for conciliation.

(d) Since no further steps were taken for nearly 6 months, the applicant wrote to the Facilitation Council on 18/01/2020 (Annexure P-4) asking them to expedite and complete conciliation within 7 days or declare failure of

conciliation. However, even thereafter, no steps were taken by the Council and, therefore, by a letter dated 27/01/2020, the applicant requested the Council to end the conciliation and called upon the respondents to appoint an arbitrator. It was categorically mentioned in this letter that since Conciliation was sought to be done by Facilitation Council, the arbitrator will have to be someone else nominated by the Facilitation Council. There was no progress for nearly a year and finally on 25th December, 2020, an on-line meeting was called by the Facilitation Council for arbitration. Although the said meeting was attended by the applicant and the officers of respondent, however, there was no fruitful outcome of the said meeting and even till today (after a lapse of another year), no meeting whatsoever has been called for arbitration. It is in these circumstances that the applicant has approached this Court under Section 29A of the Arbitration Act for appointment of an independent arbitrator whom the applicant has nominated from the panel of arbitrators (Annexure P-6) and who has filed his Disclosure Statement at Annexure P-7.

3] Learned Advocate for the applicant has filed on record his written notes of arguments wherein it is, *inter-alia*, contended as follows:

a] The applicant is based in Nashik while the respondent is based in Haryana. However, under Section 18 (4) of the MSMED Act, the jurisdiction will be at Nashik where the

applicant is based. Therefore, this court has territorial jurisdiction to entertain the application.

b] Secondly, it is very clear from the judgments of **Devendra Shirodkar (2088 SCC ONLine BOM 368)** of the Goa Bench of the Bombay High Court that the District Court will have jurisdiction under Section 29A to appoint an arbitrator. In a previous judgment of this court also, the court had followed the citation in the case of **Devendra** (supra) and had allowed the application under section 29A (6) of the Arbitration Act.

c] The third issue concerns the validity of the applicant's claim on substantive grounds. The applicant has acted in the letter and spirit of Section 18 of the MSMED Act. The Section requires that initially Conciliation should be resorted to, but, if it does not work, it can be terminated. The section itself states that Conciliation will be as per Section 65 to 81 of the Arbitration Act and the applicant acted as per Section 76(d) of the Arbitration Act in terminating the Conciliation. Similarly, Arbitration commences upon such termination and the applicant asked the Facilitation Council and also requested by a letter to appoint any other Arbitrator as permitted under Section 18 (3) of the MSMED Act. There is no progress in the matter since last 2 years. The Act is beneficial in nature to ensure that disputes get resolved in 90 days as mentioned in Section 18 (5). It appears that there are 450 to 500 references are pending before the Facilitation Council since 2014 and thus this is a fit

case where Section 29A of the Arbitration Act can be invoked as was held by this court by an order dated 28/10/2021 in Commercial Arbitration Application No. 01/2021 (**Girna Infra Projects Pvt. Ltd. Vs. Union of India**).

4] Per contra, it is contended by the respondent that the provisions of the MSMED Act will not be applicable to the case since the contract was a 'works contract'. Secondly, assuming for the sake of argument that the provisions of the MSMED Act are applicable, even then the said application is not maintainable by virtue of Section 18 (3) of the MSMED Act.

5] The said section stipulates that where the conciliation has terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration. Therefore, it is for the Council to either take up the said dispute for arbitration or refer it to any institution/body which would adjudicate the matter as per the provisions of the Arbitration Act. As per the own case of the applicant, since it is registered as an MSME, provisions of the MSMED Act would be applicable to the said dispute. It is only logical that the Council either take up the matter for arbitration or appoint an arbitrator. Making an application to this court for appointment of arbitrator would be tantamount to violating the provisions of the MSMED Act itself. It is also an admitted position that the applicant had written to

the Council to take up the matter for arbitration. A meeting to that effect was also admittedly held. It is open for the applicant to again make a request to the Council to either conduct the arbitration or refer it to any institution for the same. In view of Sec.24, the MSMED Act, 2006 has overriding effect. Sec. 18(3) of the MSMED Act categorically confers the power to the Council to act as an arbitrator or appoint an arbitrator in case conciliation has failed. This court thus has no jurisdiction to appoint the arbitrator in this case pertaining to the MSMED Act.

6] The citation in the case of **Devendra** (supra) will not be applicable to the facts of the present case since it does not pertain to a matter under the MSMED Act. Secondly, a previous judgment of this court in the case of **Girna** (supra) will also not be applicable since in that case the above argument about the application not being maintainable under section 18 (3) of the MSMED Act was neither canvassed nor considered. In addition, even section 18 (3) of the MSMED Act does not empower the Council to appoint an independent arbitrator. It merely empowers the Council to either arbitrate the dispute itself or appoint any institution to arbitrate the dispute. Therefore, by no stretch of imagination, the District Court is authorized to appoint an independent arbitrator to adjudicate the disputes under the said Act or to substitute an arbitrator. The application, therefore, ought to be rejected.

7] I have heard both the learned Advocates at length

and have also perused the material on record.

8] At the outset, it would be worthwhile to reproduce Section 18 (3) of the MSMED Act which reads thus :

- “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 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 and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.*
- (3) *Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act,*

1996 (26 of 1996) shall then apply to disputes as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of the Act.

- (4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.*
- (5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.”*

9] A perusal of the said section clearly indicates that when the conciliation terminates without any settlement between the parties, the Facilitation Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration. Therefore, the section envisages that it is for the Council to adjudicate the dispute in arbitration or refer it to any institution/body which would adjudicate the dispute as per the provisions of the Arbitration Act. Admittedly, since the applicant is registered as an MSME, provisions of the MSMED Act would be applicable. It would be relevant to mention here that as per

section 24 of the MSMED Act, the provisions of Sections 15 to 23 shall have an overriding effect over anything inconsistent therewith in any other law for the time in force. Section 24 of the MSMED Act reads thus:

“24. Overriding effect.- *The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”*

10] In this backdrop, Section 18 (3) of the MSMED Act does not envisage the court to appoint an arbitrator, much less substitute an arbitrator. Admittedly, the applicant had written to the Council to take up the matter for arbitration pursuant to which a meeting attended by both the parties was held. In my opinion, the applicant should (as per the said provision) pursue the matter before the council or request it to refer the matter to any other body for arbitration. Merely because the Council may be over-flooded with matters, it would not be appropriate to give a go-by to the provisions of Section 18 (3) of the MSMED Act.

11] The citation in the case of **Devendra** (supra) will not be applicable to the facts of the present case since it does not pertain to a matter under the MSMED Act. Secondly, a previous judgment of this court in the case of **Girna** (supra) will also not be applicable since in that case the above argument about the application not being maintainable under section 18 (3) of the

MSMED Act was neither canvassed by the applicant nor considered by the Court. In view of the foregoing discussion, I am inclined to dismiss the application.

ORDER

1. Application is hereby rejected with no order as to cost.
2. Application is disposed of accordingly.

Judgment dictated and pronounced in open Court.

Nashik.
31/03/2022

Mridula Vinod Kumar Bhatia
District Judge-2, Nashik.