IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 04.07.2018

\+ **W.P.(C) 5004/2017 & CM No. 21615/2017**

M/S RAMKY INFRASTRUCTURE PRIVATE LIMITED ..... Petitioner

versus

MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL & ANR ..... Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Moni Cinmoy.

For the Respondents: Mr Varun Nischal, Advocate for R-1 with Mr Nikhil Nimesh, Sr. Assistant, MSEFC. Mr Shashank Garg and Mr Tariq Khan, Advocates for R-2.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'RIL') has filed the present petition impugning the reference (hereafter 'the impugned reference') made by respondent no.1 (hereafter 'the Council') on 15.02.2017, whereby the disputes between RIL and respondent no.2 (hereafter 'GCIL') were referred to arbitration to be conducted under the aegis of Delhi International Arbitration Centre (hereafter 'DIAC'). The impugned reference was made by the Council in terms of the provisions of Section 18 of the Micro, Small and Medium Enterprises Development

Act, 2006 (hereafter 'the Act') as the Council found that the efforts for an amicable conciliation of disputes between RIL and GCIL had failed.

2. RIL has assailed the decision of the Council to make the impugned reference, essentially, on two grounds. First, it claims that the disputes between RIL and GCIL, which have been referred to arbitration, had arisen in respect of transactions that were entered into in the year 2010. At the material time, GCIL was not registered under the Act and, as a consequence, was not a 'supplier' as defined under Section 2(n) of the Act, and, therefore, the Council has no jurisdiction to refer the subject disputes or parties to arbitration. Second, RIL contends that the impugned reference was made without affording RIL sufficient opportunity to present its case and, therefore, the impugned reference is arbitrary. These contentions are disputed by the respondents.

3. Briefly stated, the relevant facts necessary to address the controversy involved in the present petition are as under:-

3.1 RIL is a company incorporated under the Companies Act, 1956 and is an integrated construction, infrastructure development and management company. It is stated that RIL has executed a number of projects in various sectors such as water and waste water management, transportation, irrigation, industrial construction, power transmission and distribution etc.

3.2 GCIL is a company incorporated under the Companies Act, 1956 and is, *inter alia*, engaged in the business of civil, electrical and mechanical construction and other allied activities.

3.3 The parties entered into a contract whereby RIL awarded civil work relating to Anoxic Tank and Pipe Line etc at RIL's project at Delhi International Airport, to GCIL. RIL issued two work orders in the later part of the year 2009 (the date of the one Work Order is not legible and the other Work Order is dated 10.10.2009). GCIL claims that it completed the civil works as awarded to it on 10.12.2010. Further, GCIL claims that besides the initial work, it also carried out further work of the value of ₹6,09,61,727/- against which ₹5,85,26,685/- was paid by RIL.

3.4 GCIL claims that despite several reminders, RIL failed to pay the balance amounts due to it.

3.5 On 04.07.2015, the Commissioner of Industries, Govt of NCT of Delhi issued "Entrepreneurs Memorandum Part-II Acknowledgement" indicating GCIL's registration as a Service Enterprise for Civil Construction.

3.6 On 04.08.2015, GCIL made a reference to the Council under Section 18 of the Act, claiming a sum of ₹1,91,71,260/- including interest, as due and payable by RIL. The amounts claimed by GCIL are disputed by RIL.

3.7 On receipt of reference, the Council issued a notice dated 31.08.2015 scheduling a hearing on 08.09.2015. On that date, none was present on behalf of RIL and, therefore, the Council decided to issue a fresh notice to RIL to appear along with its reply. The next meeting was scheduled on 09.10.2015 and a notice dated 24.09.2015 for the said meeting was also issued by the Council. However, RIL did not attend the hearing on 09.10.2015. Thereafter, the Council once again issued a notice dated 02.02.2016 for a meeting scheduled on 12.02.2016.

3.8 Thereafter, four meetings were held on − 12.02.2016, 10.03.2016, 05.04.2016 and 17.10.2016 – before the Council. On 17.10.2016, the Council concluded that conciliation was not possible and decided to terminate the conciliation proceedings and refer the case to DIAC for initiating arbitration proceedings.

3.9 On receipt of reference, DIAC issued a notice to RIL. RIL also filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 before the Arbitral Tribunal. However, this Court is informed that the same has also been dismissed.

Submissions

4. Mr Moni Cinmoy, the learned counsel appearing for RIL advanced submissions, essentially, on two fronts. First, he submitted that the Council has no jurisdiction to entertain the reference under Section 18 of the Act or make a reference under Section 18(3) of the Act since the disputes in question related to the works that were

completed in 2010 and at the material time, GCIL had not filed the Memorandum as contemplated under Section 8(1) of the Act. He submitted that the Memorandum submitted by GCIL was registered on 04.07.2015 and, therefore, prior to the said date, GCIL could not be considered as a 'supplier' within the meaning of Section 2(n) of the Act. Second, he submitted that the decision of the Council to make the impugned reference was in violation of the principles of natural justice, as RIL was not afforded adequate opportunity to respond to the claims made by GCIL.

5. The learned counsel appearing for the Council countered the aforesaid submissions. Mr Garg, the learned counsel appearing for GCIL also countered the submission made on behalf of RIL. He contended that six hearings were held before the Council, out of which four were attended by the representatives of RIL and, therefore, there was no merit in the submission that RIL was not afforded sufficient opportunity to present its case. He submitted that since RIL had participated in four meetings before the Council without any reservations, RIL had waived its right to object to the jurisdiction of the Council to entertain a reference under Section 18 of the Act or to make a reference under Section 18(3) of the Act. Next, he submitted that there was no dispute that GCIL had filed the Memorandum as required under Section 8(1) of the Act and, therefore, was a supplier as defined Section 2(n) of the Act. He further stated that on the date of making a reference under Section 18 of the Act, GCIL was registered with the Industries Department, Government of NCT of Delhi and,

therefore, the jurisdiction of the Council to make a reference could not be questioned. He also referred to the decision of a Coordinate Bench of this Court in ***GE T & D India Limited v. Reliable Engineering Projects and Marketing: (2017) 238 DLT 79***; the decision of the Division Bench of the Allahabad High Court in ***M/s Hameed Leather Finishers v. M/s Associated Chemical Industries Kanpur Pvt. Ltd. & Another: (2013) SCC OnLine All 9058***; and the decision of the High Court of the State of Telangana and the State of Andhra Pradesh in ***The Indur District Cooperative Marketing Society Ltd. v. Microplex (India), Hyderabad and Ors.: MANU/AP/0785/2015*** in support of his contention that it was not necessary that GCIL be registered with the Industries Department at the time of rendering services or supplying products in order to qualify for making a reference under Section 18 of the Act.

Reasons and Conclusion

6. The first and foremost question to be addressed is whether the proceedings before the Council that culminated in making the impugned reference can be at fault as being violative of the principles of natural justice. The counter affidavit filed on behalf of the Council and the documents produced along with it clearly establish that notices had been issued to RIL. RIL claims that it did not receive the notices for the meetings held on 08.09.2015 and 09.10.2015. But, there is no dispute that representatives of RIL had attended the meeting held on 12.02.2016. On the said date, RIL was given an opportunity to file a reply. However, RIL failed to do so. It is claimed on behalf of RIL that

it did not have a copy of the documents submitted by GCIL and, therefore, was unable to file a response. This contention is not persuasive. In the event, RIL did not have the necessary documents, it was always open for RIL to demand the same. However, no communication has been produced on record whereby RIL had made any such demand on GCIL or respondent no.1. Representatives of RIL also attended the meeting held on 10.03.2016, which was adjourned at the request of RIL. RIL was once again directed to file a reply within a period of ten days. Thus, RIL can have no grievance of not being afforded sufficient opportunity to put forth its case. Representatives of RIL also attended the next conciliation meeting, which was held on 05.04.2016. On the said occasion, RIL sought further time to settle the disputes amicably. However, no further progress was made and, therefore, on 17.10.2016, the Council decided to terminate the conciliation proceedings and refer the disputes to DIAC.

7. In view of the above, RIL's contention that the impugned reference was made in violation of the principles of natural justice is wholly unmerited.

8. The next question to be addressed is whether the impugned reference made by the Council under Section 18(3) of the Act was without jurisdiction.

9. In order to address the aforesaid issue, it is necessary to refer the relevant provisions of the Act. Section 15 of the Act provides that where a supplier supplies any goods or renders any services, the buyer would be obliged to make payment for the same on or before the date agreed between him and the supplier and if there is no such agreement, then on or before the appointed day. The 'appointed day' is defined under Section 2(b) of the Act to mean the day following immediately after expiry of the period of 15 days from the day of acceptance or deemed acceptance of any goods or services by a buyer from a supplier.

10. Section 16 of the Act mandates that in the event, the buyer fails to pay the amount due as specified under Section 15 of the Act, the buyer would be liable to pay compound interest with monthly rests to the supplier at the rate equivalent to three times the bank rate as notified by the Reserve Bank of India. Section 17 of the Act provides that the buyer would be liable to pay the amounts with interest as provided under Section 16 of the Act.

11. Sub-section 1 of Section 18 of the Act enables any party to the dispute with regard to the amounts due under Section 17 of the Act, to make a reference to the Council. Sections 15, 16, 17 and 18 are relevant and are set out below:-

> "**15. Liability of buyer to make payment.**− Where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefore on or before the date agreed upon between

him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:

Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

16. Date from which and rate at which interest is payable. − Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

17. Recovery of amount due. − For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16.

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 to it 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 the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that 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."

12. As is apparent form the above, the reference as contemplated under Section 18(1) of the Act is a reference of a dispute with regard to any amount due under Section 17 of the Act. Thus, the first and

foremost question to be considered is whether the disputes referred to by the Council are with regard to the amount due under Section 17 of the Act. A plain reading of Section 17 of the Act indicates that it provides for recovery of amounts due in respect of the goods supplied or services rendered "by the supplier". Further, Section 17 of the Act has to be read in conjunction with Section 15 and 16 of the Act. As noticed above, Section 15 of the Act obliges the buyer to make payments for the goods or services supplied by "any supplier" within the time specified. Similarly, Section 16 of the Act contemplates payment of interest where the buyer has failed to pay the amount due to the supplier as required under Section 15 of the Act.

13. In view of the above, it is necessary that the disputes that can be referred under Section 18(1) of the Act arise in respect of non payment of goods supplied or services rendered by a supplier. It obviously follows that for a reference to be made to the Council under Section 18(1) of the Act, it must relate to the disputes arising out of amounts due for goods supplied or services rendered by a supplier at the material time.

14. The contention that if a party to the dispute falls within the definition of "supplier" at the time of making the reference, the Council would have jurisdiction to resolve the disputes or refer the same to arbitration, is unmerited. Section 18(1) of the Act does not refer to a reference being made by a supplier; it enables "any party" to a dispute to make a reference to the Council. However, the dispute

must be one which is in regard to “any amount due under Section 17 of the Act”.

15. As noticed above, the provisions of Section 17 of the Act have to be read in conjunction with Section 15 and 16 of the Act. Thus, the obligation contemplated under Section 17 of the Act relates to the liability of a buyer and is only with respect of goods supplied or services rendered by a ‘supplier’.

16. The term ‘supplier’ is defined under Section 2(n) of the Act, which reads as under: -

> “2(n). “supplier” means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes. –
>
> (i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956);
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> (ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956);
>
> (iii) any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services

which are provided by such enterprises;

17. A plain reading of the definition of the term 'supplier' – Section 2(n) of the Act – indicates that it is not an expansive definition but an exhaustive one. A supplier is defined to mean a micro or small enterprise, which has filed a Memorandum with the authority and includes three other types of entities as indicated in the three clauses of Section 2(n) of the Act. It is settled law that the definition, which uses the expression "means" and "includes" to define a term, is exhaustive. (See: ***Thalappalam Service Cooperative Bank Limited and Others v. State of Kerala and Others: (2013) 16 SCC 82***).

18. A "micro enterprise" is defined under Section 2(h) of the Act to mean an enterprise as classified as such under Section 7(1)(a)(i) or Section 7(1)(b)(i) of the Act and a "small enterprise" is defined under Section 2(m) of the Act to mean an enterprise classified as such under sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b) or sub-section 1 of Section 7 of the Act.

19. Section 2(e) of the Act defines the term 'enterprise' to, *inter alia*, mean an industrial undertaking or a business concern or any other establishment engaged in providing or rendering of any services.

20. Sections 2(e) of the Act is set out below:

> (e) "enterprise" means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any

industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951) or engaged in providing or rendering of any service or services;

21. Clauses (h) and (m) of Section 2 of the Act defines the term "micro enterprise" and "small enterprise". The said clauses are set out below:-

> "(h) "micro enterprise" means an enterprise classified as such under sub-clause (i) of clause (a) or sub-clause (i) of clause (b) of sub-section (1) of section 7;
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> * * * * *
>
> m)"small enterprise" means an enterprise classified as such under sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b) of sub-section (1) of section 7."

22. In terms of Section 7(1)(a) of the Act, an enterprise, which is engaged in the manufacturing and production of goods pertaining to any industries specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 is categorized as a micro enterprise if the investment in the plant and machinery does not exceed 25 lakh rupees. The said enterprise is classified as a small enterprise if the investment in plant and machinery exceeds 25 lakhs but does not exceed 5 crore rupees. In terms of Section 7(1)(b) of the Act, an enterprise engaged in providing or rendering of services is categorized as a micro enterprise if the investment in equipment does not exceed 10 lakh rupees, and such enterprise is classified as a small enterprise if the investment in equipment is more than 10 lakh rupees but does not exceed 2 crore rupees. Thus, if an enterprise is classified

as a micro or a small enterprise within the meaning of Section 7(1)(a)(i) and (ii) & Section 7(1)(b)(i) and (ii) of the Act, and has filed the Memorandum under Section 8(1) of the Act, it would plainly fall within the definition of a supplier.

23. There is no dispute in the present case that CGIL falls within the definition of the micro/small enterprise and would be classified as such even at the time of execution of the contract awarded by RIL. The only controversy raised is that at the material time (at the time of execution of the contract), GCIL had not filed a Memorandum as required under Section 8(1) of the Act. This brings us to the central question – whether it was mandatory for a small/medium enterprise to file the Memorandum under Section 8(1) of the Act in order to fall within the definition of a supplier under Section 2(n) of the Act.

24. An examination of Section 2(n) of the Act indicates that it is in two parts. The first limb defines a supplier to mean a micro or small enterprise which has filed a memorandum with the authority referred to in sub-section (1) of Section 8 of the Act and the second limb refers to (i) National Small Industries Corporation; (ii) the Small Industries Development Corporation of a State or a Union territory; and (iii) a company, co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises. The two limbs are joined by the word "and". Usually, this would mean that the conditions as specified in both the limbs must be satisfied. However, it is obvious that the same is not the apposite way to read Section 2(n) of the Act.

This is so because, admittedly, neither the National Small Industries Corporation – which is a Government of India Enterprise – nor the Small Industries Development Corporation of a State or a Union territory is required to file a memorandum as referred to under Section 8(1) of the Act. Thus, the two limbs of Section 2(n) of the Act are required to be read to exhaust all categories. The second limb, which specifies three categories to fall within the definition of the term 'supplier', is in addition to the category of small and medium enterprises that have filed the Memorandum under Section 8(1) of the Act. Thus, the term 'supplier' as defined under Section 2(n) of the Act must be read to comprise of four categories: (i) micro or small enterprises that have filed the Memorandum under Section 8(1) of the Act; (ii) National Small Industries Corporation; (iii) Small Industries Development Corporation of a State or a Union territory; and (iv) a company co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises or rendering services provided by such enterprises.

25. The aforesaid view is also fortified by the decision of the Supreme Court in the case of ***Thalappalam Service Cooperative Bank Limited and Others*** (*supra*). In that case, the Supreme Court was concerned with interpreting the definition of the term "public authority" as defined under Section 2(h) of the Right to Information Act, 2005. The said definition is also in two parts. The first limb consists of four categories and the second limb comprises of two other categories. Although, the definition of the said term uses both the

expressions "means" and 'includes" – as in the case of Section 2(n) of the Act – the second limb consists of two categories that do not fall within the four categories indicated in the first limb. The relevant extract of the said decision is set out below:-

> "**29.** The expression "public authority" is defined under Section 2(h) of the RTI Act, which reads as follows:
>
> > "**2. *Definitions***. – In this Act, unless the context otherwise requires:
> >
> > *　　　　*　　　　*　　　　*
> >
> > (h) "public authority" means any authority or body or institution of self-government established or constituted -
> >
> > (a) by or under the Constitution;
> >
> > (b) by any other law made by Parliament;
> >
> > (c) by any other law made by State Legislature;
> >
> > (d)by notification issued or order made by the appropriate Government,
> >
> > and includes any—
> >
> > (i) body owned, controlled or substantially financed;
> >
> > (ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government"
>
> XXXX　　　　XXXX　　　　XXXX
>
> **31.** Section 2(h) exhausts the categories mentioned therein. The former part of 2(h) deals with:

> (1) an authority or body or institution of self-government established by or under the Constitution,
>
> (2) an authority or body or institution of selfgovernment established or constituted by any other law made by the Parliament,
>
> (3) an authority or body or institution of self-government established or constituted by any other law made by the State legislature, and
>
> (4) an authority or body or institution of self-government established or constituted by notification issued or order made by the appropriate government.
>
> **32.**The Societies, with which we are concerned, admittedly, do not fall in the abovementioned categories, because none of them is either a body or institution of self-government, established or constituted under the Constitution, by law made by the Parliament, by law made by the State Legislature or by way of a notification issued or made by the appropriate government. Let us now examine whether they fall in the latter part of Section 2(h) of the Act, which embraces within its fold:
>
> (5) a body owned, controlled or substantially financed, directly or indirectly by funds provided by the appropriate government,
>
> (6) non-governmental organizations substantially financed directly or indirectly by funds provided by the appropriate government."

26. As noticed above, there is no dispute that GCIL would fall within the definition of micro/small enterprise even at the material time when it had executed the contract with RIL. GCIL is a company and the services provided by GCIL are clearly services rendered by a

micro/small enterprise and, therefore, GCIL – being engaged in supply of services rendered by a micro/small enterprise – would fall within the fourth category of entities that are included as a 'supplier': that is, a company, co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises or rendering services provided by such enterprises. It is not necessary for such entities to have filed the Memorandum under Section 8(1) of the Act.

27. The contention that the entities falling under Section 2(n)(iii) of the Act are only those entities that source goods/services from other micro/small enterprises, is not persuasive as it is difficult to accept that an entity sourcing goods/services from a third party micro/small enterprise would be 'supplier' but would cease to be one if it sources the same from its undertaking.

28. In view of the above, the contention that the impugned reference is without jurisdiction is unmerited.

29. For the reasons stated above, the petition is dismissed. The pending application is also disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

JULY 04, 2018
MK/RK