

Appointment of arbitrator under section 11—when not excluded by MSMED Act (Bombay High Court)

Update by Janak Pradhan

Published on 13 October 2019

Porwal Sales v. Flame Control Industries

Court: Bombay High Court | **Case number:** Arbitration Petition No.77 OF 2017 | **Citation:** 2019 SCC OnLine Bom 1628 | **Bench:** G. S. Kulkarni J | **Date:** 14 August 2019

The petitioner Porwal Sales had to recover twelve lakhs from the respondent, an enterprise under the Micro, Small and Medium Enterprises Development Act, 2006 (“**MSMED Act**”). Porwal filed a petition for appointment of arbitrator under section 11(6) of the Arbitration and Conciliation Act, 1996 (“**ACA**”). The respondent resisted the application on two grounds: –

1. The arbitration agreement was fabricated. It was contained in a letter of 24 February 2012 which mentioned an email address that was created in 2013!
2. The court did not have jurisdiction in view of section 18 of the MSMED Act (under which any party “may ... make a reference” of the dispute to Micro and Small Enterprises Facilitation Council, which then has the power to conduct itself or refer to an institution for conciliation followed by arbitration if required)

Rejecting both objections, the court held:

On the arbitration agreement

1. The basic premise for the court would be to consider whether there exists an arbitration agreement between the parties. [citing to *DuroFelguera S.A.Gangavaram Port Ltd.*, reported in (2017) 9 SCC 729]. Plea regarding the validity and genuineness of the arbitration agreement is required to be decided by the Court. [citing to *Velugunbanti Hari Babu v. Parvathini Narasimha Rao* (2016) 14 SCC 126]
2. Argument of fabrication was an afterthought. Requirements of section 7 of ACA were satisfied: –
 - a. Document not disputed any time before (for example, at the time of invocation of arbitration).
 - b. Difficult to accept that the respondent in the absence of any contract would enter into such large transactions worth crores.
 - c. Apart from mere words, there was nothing on record to show that the person who had signed the contract on behalf of the respondent was not the authorised signatory.
 - d. Reference to an incorrect email would not make the document forged.

On jurisdiction under ACA v. MSMED Act

1. Court had jurisdiction under section 11 of ACA because: –
 - a. Section 18 of the MSMED Act is attracted when a party refers the matter to the facilitation council, which was not the case here.

- b. Section 18 does not absolutely bar proceedings under ACA. Had that been so, the legislature would have made that express. Also, a contrary interpretation would mean that a party not falling within Section 17 and Section 18(1) would be foisted a remedy, not prescribed by law. The expression “may” as used in sub-section (1) of Section 18 cannot be read to mean “shall” making it mandatory for a person who is not a supplier (like the petitioner) to invoke the jurisdiction of the Facilitation Council.
- c. Where, however, reference has been made an application under section 11 of the Act would not be maintainable (citing to several precedent).