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

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.08.2022

CORAM

THE HONOURABLE Mr.JUSTICE **M.SUNDAR**

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

M/s.Sunwin Papers
Rep. by Proprietorix R.Thilagavathi
Having its Office at
HB-84, 80 Feet Road,
RM Colony, Dindigul-624001
Presently residing at
No.22, Chellammal Colony 1st Street,
Samundipuram, Tiruppur-641 602.
Represented by its power of attorney Mr.P.Rajasekaran

... Petitioner

- Vs -

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

... Respondent

Prayer: Arbitration Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to (a) set aside partially in issue No.1 of the Arbitral Award dated 01.10.2020 bearing No.I.A.F 32/2019 passed by Sole Arbitrator (b) direct the respondent to pay the costs.

For Petitioner : Mr.P.Rajasekaran
Party-in-Person
For Respondent : Mr.Adarsh Subramanian



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ORDER

Captioned 'Arbitration Original Petition' [hereinafter 'Arb OP' for the sake of brevity, convenience and clarity] has been presented in this Court on 21.12.2020 under Section 34 of 'The Arbitration and Conciliation Act, 1996 [Act No.26 of 1996]' (hereinafter 'A and C Act' for the sake of convenience and clarity). The prayer in captioned Arb OP has been set out in paragraph 10 of the Arb OP petition and the same reads as follows:

'10. It is therefore prayed that this Hon'ble Court may be pleased:
a) To set aside partially in issue No.1 of the Arbitral Award dated 01.10.2020 bearing No.I.A.F 32/2019 passed by Sole Arbitrator.
b) To direct the respondent to pay the costs and
c) To grant such further reliefs as this Hon'ble Court may deem fit under the circumstances of the case and thus render justice.'

2. Mr.P.Rajasekaran, party-in-person [power of attorney of his spouse Mrs.R.Thilagavathi, carrying on business in the name and style 'Sunwin Papers' as sole proprietrix] petitioner and Mr.Adarsh Subramanian, learned counsel for lone respondent are before this Court.

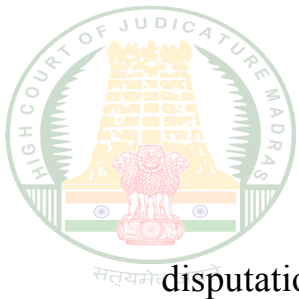
3. The prayer in the captioned Arb OP is not happily worded. The submissions made at the Bar and the case file bring to light that captioned Arb OP is essentially a challenge to 'proceedings dated 01.10.2020 bearing



reference I.A.F.No.32 of 2019' [hereinafter 'impugned award' for the sake of convenience] made by a sole Arbitrator i.e., 'Arbitral Tribunal' ['AT' for the sake of brevity]. To be noted, this impugned proceedings dated 01.10.2020 is being referred to as 'impugned award' for the sake of convenience and clarity though it is essentially proceedings made under Section 16 of A and C Act.

4. Short facts shorn of granular particulars will suffice as this is a legal drill under Section 34 of A and C Act.

5. Short facts are that 'Sunwin Papers' [hereinafter 'Sunwin' for the sake of convenience and clarity] has registered itself with the Ministry of Micro, Small and Medium Enterprises and obtained registration from 20.06.2015, there has been some add on (on and from 09.11.2016); that such registration is under Serial No.46 captioned Wholesale trade, except motor vehicles and motorcycles and sub-classifications 4669-Wholesale waste, scrap and other products & 46696-Wholesale of paper in bulk; that Sunwin claiming that it had made certain supplies to 'Sivadarshini Papers Pvt. Ltd.,' [hereinafter 'SPPL' for the sake of convenience] and alleging that payments towards the same are pending, triggered the mechanism under 'The Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006)' which shall hereinafter be referred to as 'MSMED Act' for the sake of brevity, convenience and clarity; that there is no



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disputation that Section 18 of MSMED Act is one where the A and C Act has been incorporated and therefore, it is legislation by incorporation; that after Conciliation, the authority under MSME made a reference to Arbitration qua 'Madras High Court Arbitration Centre under the aegis of this Court' ['MHCAC']; that AT entered upon reference; that before AT, SPPL raised a preliminary issue under Section 16 of A and C Act; that the preliminary issue is that Sunwin ceased to be a MSME on and from 10.01.2017 owing to notification S.O.85(E) on the strength of which Office Memorandum dated 27.06.2017 has been issued; that serial No.46 and the sub-classification thereunder vide which Sunwin has obtained registration has been excluded by this Office Memorandum was the primary issue; that AT took up this as a preliminary issue of jurisdiction; that AT decided the preliminary issue in favour of SPPL; that owing to the decision qua this preliminary issue, arbitrable disputes that have been raised were not gone into; that Sunwin saying that they are aggrieved by the impugned award have presented the captioned Arb OP in this Court.

6. In the hearing today, learned counsel for SPPL raised two points and they are as follows:

a) A Section 34 petition is not maintainable qua impugned



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award as it is proceedings under Section 16;

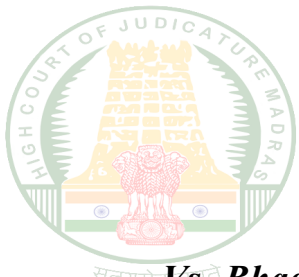
b) Sunwin ceased to be a MSME owing to the 10.01.2017 notification and therefore reference to arbitration itself is bad under Section 18 of MSMED Act which is a legislation by incorporation (as already alluded to supra).

7. As a protagonist of captioned Arb OP and in response to the aforementioned objections, party-in-person Thiru.P.Rajasekaran made submissions, which are as follows:

- a) The impugned award brings the proceedings to a closure and therefore, Section 34 is maintainable;
- b) Notification dated 10.01.2017 is prospective and therefore, it does not affect existence registrants. In other words, it would apply only to fresh applicants.

8. This Court now proceeds to consider the rival submissions, discuss the same and give its dispositive reasoning.

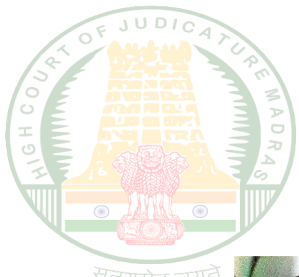
9. As regards the first point on maintainability, this Court is of the considered view that ***Bhadra Products*** principle being ratio laid down by Hon'ble Supreme Court in ***Indian Farmers Fertilizer Co-Operative Limited***



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Vs. Bhadra Products reported in (2018) 2 SCC 534 is a complete answer to this question. Though *Bhadra Products* penned by Hon'ble Mr. Justice Rohinton Fali Nariman turns on a case where limitation was decided by AT, the principle is, if an order under Section 16 has the effect of concluding the arbitral proceedings, the same would be subject to an appeal under Section 37. Sauce to Goose is sauce for the Gander too. Therefore, I am inclined to entertain captioned Arb OP essentially because what is now being referred to as impugned award i.e., proceedings dated 01.10.2020 gives a closure to the arbitral proceedings.

10. This takes us to the next point. This is fairly simple and straight forward. Sunwin is a registrant and a scanned reproduction of the registration is as follows:



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भारत सरकार
Govt. of India
सूक्ष्म, लघु और मध्यम उद्यम मंत्रालय
MINISTRY OF MICRO, SMALL & MEDIUM ENTERPRISES

MSME
सूक्ष्म, लघु और मध्यम उद्यम
MICRO, SMALL & MEDIUM ENTERPRISES

उद्योग आधार
UDYOG AADHAAR
MSME Udyog Aadhaar

Type of Enterprise	Micro	Small	Medium
Manufacturing	A	B	C
Services	D	E	F
UAN	TN06E0003087		

E

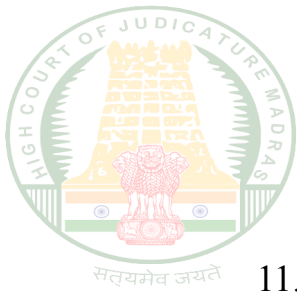
Udyog Aadhaar Memorandum - Online Verification

Name of Enterprise: SUNWIN PAPERS
Major Activity: Services
General Category: General
Location of Plant Details:
Enterprise Type: Small
National Industry Classification Code:

ISIC	NIC 2 Digit	NIC 4 Digit	NIC 5 Digit Code	Activity Type	Added On
46	Wholesale trade, except of motor vehicles and motorcycles	4669-Wholesale of waste and scrap and other products n.e.c.	46696-Wholesale of paper in bulk	Service	09/11/2016

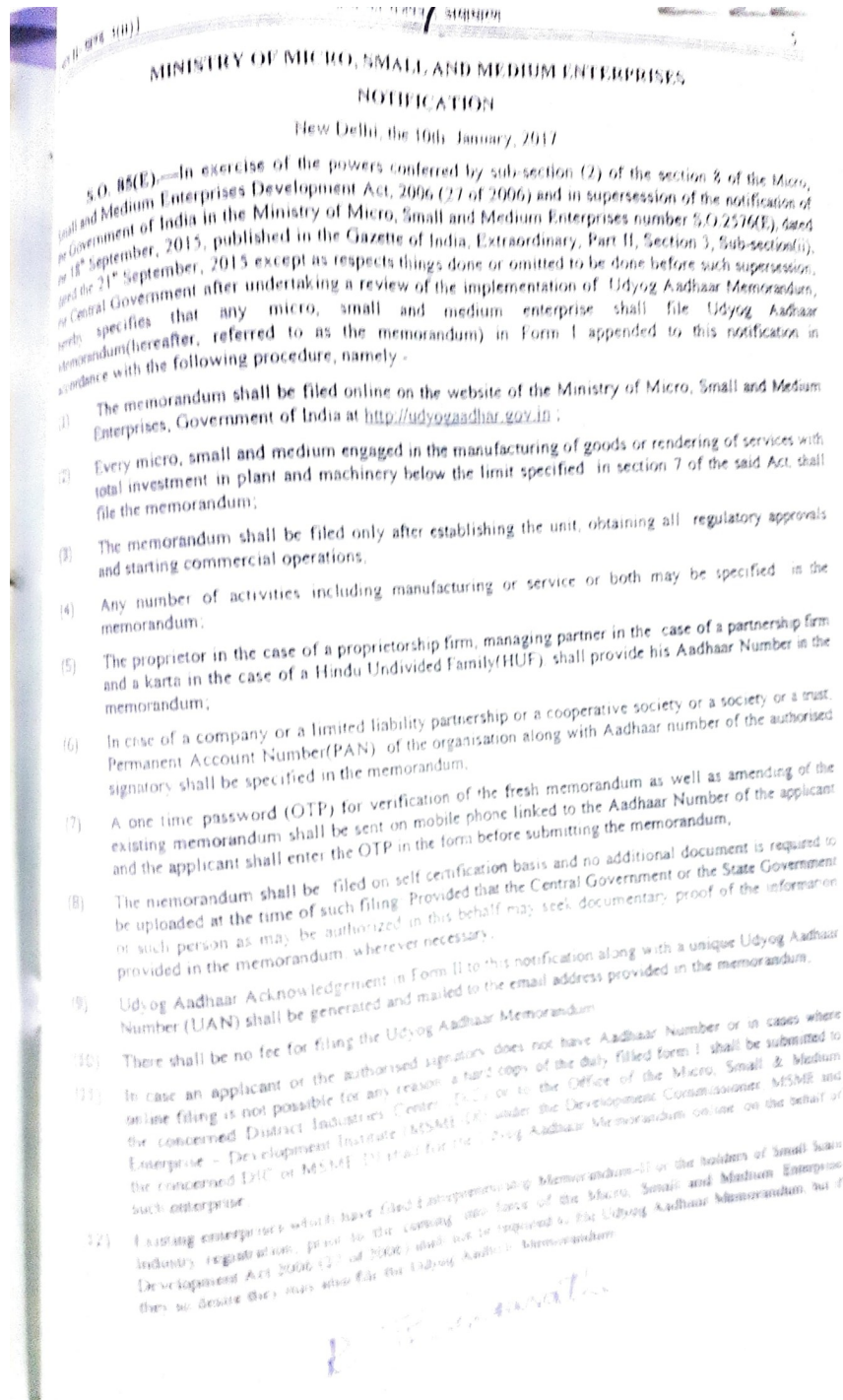
Date of commencement: 20/06/2015
DIC Name: DINDIGUL
State: TAMIL NADU
Applied Date: 09/11/2016
Modified Date: N/A

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11. Thereafter, 10.01.2017 notification being S.O.85(E) came to be issued and a scanned reproduction of the same is as follows:





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THE GAZETTE OF INDIA: EXTRAORDINARY

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[PART II—Sec. 3(ii)]

- (13) No enterprise shall file more than one memorandum;
- (14) In case of change in address or addition or deletion of activities by the enterprises or for other changes, the proprietor or the managing partner or an authorized person may apply for amendment of the existing memorandum in accordance with the guidelines for filing the online Udyog Aadhaar Form provided in the website of the Ministry of Micro, Small and Medium Enterprises, at <http://udyogaadhaar.gov.in>. The procedure for amendment in the Udyog Aadhaar Memorandum would be same as that for filing new Memorandum;
- (15) General Manager of the District Industries Center of the concerned district shall be authorised to undertake enquiry for verifying the memorandum submitted by the enterprise and in case of any discrepancy, he shall issue a notice to the enterprise, giving it an opportunity to present its case and based on the findings, the authorised officer may amend or cancel the memorandum;
- (16) UAM registration has replaced Entrepreneurship Memorandum-II (EM-II) and Small Scale Industry Registration for all purposes. Central or State Government regulatory bodies, tax authorities, utilities providing water, power, etc. banks and other financial institutions and similar organisations should accept UAM in place of EM - II for all purposes. Earlier there was a provision to take Enterprise Memorandum-I (EM-I) registration before setting up an enterprise. Applicants used to file applications for obtaining utilities, building plan approval from local bodies, consent to establish from State Pollution Control Board or applying for term loan from bank or a financial institution to set up the enterprise along with a copy of EM-I. UAM registration is given after an enterprise starts commercial operations. Now there is no registration before establishing an enterprise. The practice of EM-I registration is stopped. There is no counterpart document to EM-I. Therefore, utilities, local bodies, regulatory bodies, tax authorities, banks and financial institutions and other similar bodies should not ask for EM-I from the applicants who want to set up an enterprise.

[F. No. A-54/1/2014-CDN]

MANOJ JOSHI, Jr. Secy.

FORM-I



भारत सरकार
Govt. of India
सूक्ष्म, लघु और मध्यम उद्यम मंत्रालय
MINISTRY OF MICRO, SMALL & MEDIUM ENTERPRISES



Type of Enterprise	Micro	Small	Medium
Manufacturing	A	B	C
Service	D	E	F

Udyog Aadhaar Memorandum

1	Aadhaar Number				
2	PAN Number*				
3	Name of Entrepreneur				
4	Social Category	SC	ST	OBC	General
5	Gender	Male	Female		
6	Physically Handicapped	Yes	No		
7	Name of Enterprise				

R. Thilagavathi



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12. The Office Memorandum dated 27.10.2017 predicated on the aforementioned 10.01.2017 notification is as follows:

F.No. UAM/MC/01/2017-SME
Government of India
Ministry of Micro, Small & Medium Enterprises
(SME Section)

Udyog Bhawan, New Delhi
Dated: 27.06.2017

OFFICE MEMORANDUM

Sub: Activities (NIC codes) not covered under MSMED Act, 2006 for registration of Udyog Aadhaar Memorandum(UAM)- regarding

The undersigned is directed to inform that Sub Section 1 of Section 7 of Micro Small or Medium Enterprises Development Act 2006 provides for classification of enterprises engaged in manufacturing or production of goods as well as enterprises engaged in providing or rendering of services as micro, small and medium based on investment in plant and machinery and equipment respectively. Sub Section 1 of Section 8 provides that any person who intends to establish a micro or small or medium enterprise engaged in manufacture or production of goods or providing or rendering of services may at his discretion shall file a memorandum of micro, small or medium enterprises in accordance with the provisions of Act. Subsequently, Ministry of Micro Small or Medium Enterprises notified vide notification number S.O. 2576 (E) dated 18.9.2015 and subsequent notification No. SO 85(E) dated 10.1.2017 for registration of Udyog Aadhaar Memorandum for Micro, Small or Medium Enterprises. In this context it is further clarified that the activities in **Table.1** below would not be included in the manufacture or production of goods or providing or rendering of services in accordance with Section 7 of the Micro, Small and Medium Enterprise Development Act, 2006:-

Table.1

NIC Code	Activity
02	Forestry and logging
03	Fishing and aquaculture
45	Wholesale and retail trade and repair of motor vehicle and motorcycles
46	Wholesale trade except of motor vehicles and motor cycles 47
47	Retail Trade Except of Motor Vehicles and motor cycles
97	Activities of households as employees for domestic personnel
98	Undifferentiated goods and services producing activities of private households for own use
99	Activities of extraterritorial organization and bodies

2. The NIC 2-digit activity **01- crop, animal production, hunting and related activities** would also not be included as per Section 7 of the Act **except** for the sub-classes of activities at 5-digit level given in Table 2.:



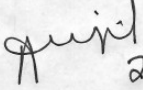
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Table. 2

NIC Code	Activity
01462	Production of eggs
01463	Operation of poultry hatcheries
01492	Bee- keeping and production of honey and beeswax
01493	Raising of silk worms, production of silk worm cocoons
01612	Operation of agricultural irrigation equipment
01620	Support activities for animal production
01631	Preparation of crops of primary markets i.e. cleaning, trimming, grading disinfecting
01632	Cotton ginning, cleaning and bailing
01633	Preparation of tobacco leaves
01639	Other post-harvest crop activities, n.e.c
01640	Seed processing for propagation


27/6/17

(K. S. Ngangbam)
Deputy Director (SME)
Tel.No. 23061546

Distribution:

- (i) AS&DC, O/o Development Commissioner, Ministry of MSME.
- (ii) JS(SME)/JS(ARI)/JS(TC), Ministry of MSME.
- (iii) All Director, MSME-DIs
- (iv) All GM, District Industries Centres.

Copy to:

- (i) PS to Minister(MSME)/PS to MoS(GS)/PS to MoS(HPC)
- (ii) PPS to Secretary(MSME)

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.'

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



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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.F.No.32 of 2019 made by a sole Arbitrator*'. There shall be no order as to costs.

11.08.2022

Speaking/Non-speaking order

Index : Yes / No

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