

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****ARBITRATION APPEAL NO.23 OF 2018**

M/s. Scigen Biopharma Pvt. Ltd.)
A Private Limited Company incorporated)
under the Companies Act,1956, having its)
registered office at Plot no.18,)
International BioTech Park, Phase II,)
Hinjewadi, Dist.Pune-411057.) ...Appellant

V/S.

M/s. Jagtap Horticultuer Pvt. Ltd.)
A private Limited company incorporated)
under the Companies Act,1956, having)
its registered office at S.No.147,)
Village Ardhav, Taluka-Maval,)
Dist.Pune.) ...Respondent

Mr. Udayan S. Jain, for the Petitioner.

Mr. Bharat D. Zaveri, for the Respondent.

CORAM : G.S. KULKARNI, J.

DATED : 21 November 2019

JUDGMENT:

1. This is an appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act'), whereby the appellant challenges an order dated 16 March 2018 passed by the learned District Judge-9, Pune on an application filed by the

respondent under section 34 of the Arbitration Act. By the impugned order the respondent's application under section 34 of the Arbitration Act stands allowed in the following terms:

ORDER

[1] Application is allowed with costs.

[2] Impugned Award dtd. 15/03/2016 passed by the learned Micro and Small Enterprises Facilitation Council, Pune is hereby set aside.

[3] Petition No. 57/2013 be remanded back to the Micro and Small Enterprises Facilitation Council, Pune for deciding the dispute between parties afresh, except the point of eligibility of the applicant to get benefit under Chapter V of the MSMED Act which is decided in favour of the applicant as per this order

2. The genesis of the disputes between the parties had arisen from the proceedings which the respondent initiated before the Micro and Small Enterprises Facilitation Council (for short '**Facilitation Council**') as constituted the Micro Small and Medium Enterprises Development Act, 2016 (for short '**MSMED Act**') making a money claim against the appellant invoking Section 18 of the MSMED Act.

3. In brief the case of the respondent in the proceedings before the Facilitation Council is as under:

The Appellant had approached the respondent sometime in the year 2008 for providing services for landscaping. On 18 January 2008 the appellant placed an order on the respondent for the said work. Total value of the purchase order was of Rs. 90,00,000/-.

4. On 31 January 2008 the appellant paid 20% of the consideration to the respondent i.e. Rs.18,00,000/-. On completion of earthwork on 19 June 2008 further payment of Rs.31,50,000/- was made by the appellant to the respondent. The respondent contended that after completion of another stage, an invoice for an amount of Rs.13,50,000/- was raised on the appellant on 5 November 2008, on which the appellant made part payment of Rs.3,50,000/- but failed to make payment of Rs.10,00,000/-. Despite this the respondent completed entire balance work by planting lawns, shrubs, trees etc and completed it's contractual commitment and raised further invoice for Rs.22,50,000/- on 15 June 2019. This invoice also remained unpaid by the respondent.

5. The respondent contended that despite continuous follow-up the appellant did not make payment of outstanding amounts on the ground that the appellant was in financial difficulties and had sought time for making payment. As the payment remained outstanding, on 28 September 2011 the respondent issued a legal notice to the appellant demanding the outstanding payment.

6. The respondent thereafter took steps to approach the District Industries Center on 25 October 2012, by filing an

entrepreneur memorandum stated to be filed under Section 8 of the MSMED Act which specified that the initial date of production of the business of applicant was on 8 April 2006.

7. By virtue of the respondent filing the memorandum, the respondent considered itself eligible to avail benefits under the MSMED Act. The respondent accordingly invoking the provisions of the Act read with the Maharashtra Micro and Small Enterprises Facilitation Council Rules 2007, filed an application in the form of Annexure-I as per rule 5.5 before the Facilitation Council making a claim of Rs.74,94,511/- being the amount receivable and interest payable there also from the appellant. The proceedings were numbered as Petition no. 57 of 2013 filed under section 18 of the MSMED Act invoking the provisions of section 15 and 16 of the MSMED Act. The appellant appeared before the Facilitation Council and filed its written statement. As conciliation under Section 18 failed, the dispute was taken up under the provision of sub-section (3) of section 18, for arbitration by the Facilitation Council.

8. The appellant raised an objection before the Facilitation Council, of the respondents claim, being not maintainable on the ground that the respondent was not a small enterprise falling under the provision of the MSMED Act as at the time of entering into the contract i.e. on 18 January 2008 the respondent was not registered

under the provisions of MSMED Act. It was contended that there was no evidence placed on record that the respondent being a small enterprise was entitled for protection under the MSMED Act. There was also an objection on limitation and on merits which may not be relevant, as the Facilitation Council decided the matter on the issue of maintainability.

9. The Facilitation Council by its order dated 15 March 2016 without going into the merits rejected the respondent's claim on the ground that the respondent was not a small enterprise under the MSMED Act on the date of the contract between the parties (18 January 2008). The Facilitation Council referring to the provision of Section 2(n) which defines 'supplier' held that the prerequisite for the respondent was to qualify as a 'supplier' for the purposes of Chapter V of the MSMED Act. It was held that the respondent was admittedly not registered as a small enterprise with District Industry Center on or before the date of contract between the respondent and the appellant, that is on or before 18 January 2008 and hence the respondent had become ineligible for the benefits under Chapter V of the MSMED Act. The relevant observations as made by the Facilitation Council, in this regard, are required to be noted and read thus :

- "1. The Petitioner has submitted their declaration of Entrepreneur Memorandum dated 25.10.2012.*
- 2. Though the Petitioner claims that their activity commenced on 8.4.2006, the Petitioner did not substantiate their claim*

with relevant record that they were a small enterprise before 25.10.2012 .

3. *Sub-section (n) of Section 2 of the MSMED Act 2006 defines a supplier. As per this definition, supplier means a micro or small enterprise, which has filed a memorandum with the district industries centre of its area.*
4. *It is gathered from the records that there was an agreement between the parties which turned into contract on 18 .01.2008.*
5. *Admittedly, the Petitioner was not registered with the District Industry Centre on the date of contract i.e. on 18.01.2008.*
6. *It is a settled legal position that since filing of the Enterprise Memorandum is optional, no penalty is attracted for non-filing. However, filing a memorandum is a pre-requisite to qualify as a supplier for Chapter V purposes of the MSMED Act 2006 and non-filing will make the supplier ineligible to the benefits under Chapter V relating to right to receive timely payment and right to receive interest under Section 16 for delayed payment.*
7. *In view of the fact that the Petitioner was admittedly not registered as a small enterprise with the District Industry Centre on or before the date of contract between the Petitioner and the Respondent i.e. on or before 18.01.2008 the Petitioner becomes ineligible for the benefits under Chapter V of the MSMED Act 2006.*

In view of the above findings, without going into the merits of the claim petition, the Council is unable to entertain the claim of the Petitioner as the Petitioner is not covered as a small enterprise under the MSMED Act, 2006 on the relevant date of contract between the Petitioner and the Respondent. Hence, the following order.

Order

- 1) *For the reasons recorded in the body of judgment the reference Petition is rejected.*
- 2) *No order to the costs.*

(emphasis supplied)”

10. The respondent being aggrieved by the aforesaid award as made by the Facilitation Council approached the Court of learned

District Judge at Pune, in Civil Miscellaneous Application No. 510/2016 filed under section 34 of the Arbitration Act. The Appellant appeared as also filed its say justifying the orders passed by the Facilitation Council, inter-alia contending that the respondent at the time of entering the contract in the year 2008 was not registered under the MSMED Act nor under the previous legislation namely repealed Interest and Delayed Payment Act 1993. It was contended that there was nothing brought on record that the respondent had commenced business activities in April-2006 as a small scale enterprise. It was contended that applicant had applied for registration on 25 October 2010 under the MSMED Act, much after the dispute had arisen, and by mere filing of the memorandum as per Section 8 would not be valid and can have no relevance. It was thus contended that as per the provisions of the MSMED Act the respondent was not a supplier, hence facilitation council had rightly rejected the claim of the respondent.

11. The learned District Judge Pune by the impugned order referring to the provision of subsection (1) of Section 8 read with Section 2(n) of the MSMED Act, 2016 held that as the respondent under Section 8 had filed an entrepreneur memorandum, the respondent would become entitled to the benefits of Chapter V of the MSMED Act. The learned District Judge observed that the provisions

of Section 8(1) read with Section 2(n) cannot be construed to mean that only after getting registration under Section 8(1) of the MSMED Act, the respondent could be considered as a supplier. The learned district Judge observed that Section 8(1) confers an opportunity to any person who before commencement of the MSMED Act established a Small Scale Industry and as filing of an entrepreneur memorandum was optional and the respondent hence would be entitled to the benefits of the MSMED Act. It was observed that the Act itself gave an opportunity to file entrepreneur memorandum to any person who had established a Small Scale Industry even before the commencement of the MSMED Act. The learned District Judge, Pune observed that the object of the legislature in enacting these provisions was to grant an opportunity to a person to file memorandum of entrepreneurship, to an establishment running as a Small Scale Industry before the commencement of the Act. It was observed that MSMED Act being a beneficial legislation, a liberal interpretation ought to be made. It is observed that even Section 18 does not make it obligatory that at the time of entering into the contract, the party should have submitted a memorandum of entrepreneur under section 8(1) of the MSMED Act. It is on these observations the impugned award dated 15 March 2016 of the Facilitation Council was set aside and the petition was remanded to the Facilitation Council for a fresh decision. The relevant observations of the Learned District Judge

Pune as contained in paragraph No. 13 and 15 to 18 are required to be noted which read thus :

“13. On considering the facts of the case and submissions made on behalf of parties as well as the above mentioned case laws cited by parties, it appears that, there is main dispute between the parties whether or not the applicant should be treated as “supplier” as mentioned in Section 2(n) of the MSMED Act. No doubt in Section 2(n) it is mentioned that “supplier” means a micro or small enterprises, which has filed a memorandum with the authority referred to in sub-section (1) of Section 8. However, it does not mean that only after getting registration under Section 8(1) of MSMED Act the status of the applicant can be considered as supplier.

14.

15. It means as per Section 8(1) of MSMED Act opportunity is made available to any person who before commencement of this Act established small scale industry may file, Memorandum of Entrepreneur and it also appears that filing of Entrepreneur Memorandum is optional and no penalty is attracted for non-filing of such memorandum. Thus, it appears that, the Act itself gives opportunity to file Entrepreneur Memorandum to any person who has established as small scale industry even before commencement of this Act. Therefore, object of the legislature behind enacting this provision was to give opportunity to the person to file Memorandum of Entrepreneurship though they are running and have established their Small scale Industry before commencement of the Act. By enactment of this provision the legislature wanted to extend benefit of beneficial legislature to the Entrepreneur of small scale industry otherwise such liberty would not have been given as per proviso to sub-section (1) of Section 8 of MSMED Act. Therefore, as mentioned in the case laws cited by the applicant liberal interpretation must be given to the definition of word “supplier” so as to extend the benefit of such legislature to the persons for whose benefit the said Act brought in force.

16. No doubt as per Section 18 of the MSMED Act it is prerequisite that the party who is seeking benefit under Chapter V must have submitted Memorandum of Entrepreneur under Section 8(1) of the Act. However, said provision nowhere made it mandatory compels that at the time of execution of contract between the parties such party to the contract must have obtain registration of Entrepreneurship under the MSMED Act.

17. Thus, from the above mentioned facts and circumstances, it is crystal clear that, at the time of filing of Petition No.57 of 2013 the applicant was having registration under Section 8(1) of the MSMED Act. Therefore, it cannot be said that precondition of filing memorandum of entrepreneur was not complied with by the applicant while filing said petition before the Council.

18. For the reasons cited above I hold that, applicant is eligible to the benefits under Chapter V of the MSMED Act. I, therefore, answer point no.1 in the affirmative.

12. It is on the above premise, the appellant being aggrieved by the judgment of the learned District Judge Pune, is before this Court in the present appeal.

13. Learned counsel for the appellant in assailing the impugned order passed by the learned District Judge has made the following submissions :

- (i) that there is perversity in the impugned order holding that the respondent would be fall under the MSMED Act, in as much as on the date on which the contract was entered into between the parties in the year 2008, respondent was not a small enterprise within the meaning of the MSMED Act for the reason that neither the respondent had obtained registration as a small enterprise nor a memorandum under Section 8(1) of the MSMED Act was obtained.

- (ii) mere submission of a memorandum as per provision of Section 8(1) after the disputes has arisen between the parties, would not make the respondent eligible to avail the benefits of the Chapter V of the MSMED Act for the purposes of invoking the arbitration.
- (iii) The learned District Judge is in a patent error of law in construing the provisions of Section 2(n) and Section 8(1) of the MSMED Act in holding the respondent to be eligible under the provisions of the MSMED Act.
- (iv) It was not permissible for the respondent to assert benefits under the MSMED after the disputes had arisen and that too on the respondent merely filing a memorandum under Section 8(1) of the MSMED Act with a sole intention to take benefits of the Act and foist the arbitral proceeding on the appellants. Such approach of the respondent was in the teeth of the provision of MSMED Act.
- (v) It is submitted that the Facilitation Council had rightly held that as the respondent was not registered as a small enterprise with the District Industries Centre on

or before the date of the contract, the respondent was ineligible for the benefits under the MSMED Act. In supporting the above contentions, reliance is placed on the decision of the learned Single Judge of this Court in M/s Faridabad Metal Udyog Pvt. Ltd. and Others Vs. Anurag Deepak¹; the decision of the learned Single Judge of Madhya Pradesh High Court in M/s Frick India Ltd., Vs. Madhya Pradesh Micro And Small²; decision of the learned Single Judge of Gujarat High Court in M/S Easun Reyrolle Limited vs M/S Nik San Engineering Co Ltd³, the decision of Division Bench of the Gujarat High Court in Haathee Ventures Vs. Bankim Patel Design Consultants⁴.

14. On the other hand learned counsel for the respondent supporting the impugned order would submit that the respondent was entitled to the benefits of Section 18 of the MSMED Act in view of the respondent filing the entrepreneur memorandum under Section 8 of the Act. It is submitted that considering the provisions of Section 8(1) read with section 2(n) it is quite clear there was no embargo whatsoever for a small enterprise to avail of the benefits under the

¹ Arbitration Petition No. 1193/2013, decided on 17/06/2013.

² Writ Petition No. 19319/2014, decided on 24/07/2015.

³ Special Civil Application No.6265/2018, decided on 18/01/2019

⁴ Special Civil Application No. 2453/2019, decided on 06/02/2019

MSMED Act by obtaining a registration by submitting an enterprenuer memorandum subsequent to the dispute having arisen. This more particularly for the reason that the MSMED Act is a beneficial legislation conferring benefits to small industries like the respondent.

15. It is submitted that the learned District Judge has appropriately construed the provisions of the MSMED Act to hold that respondent was entitled to take the benefit of Section 18(3) to assert its claim against the appellant, by setting aside order passed by Facilitation Council. In support of this contention learned counsel for the respondent has placed reliance on the following decisions:

Ramky Infrastructure Private Limited Vs Micro and Small Enterprises Facilitation Council and another⁵; The Indur District Coop Marketing Soc. Ltd., Nizamabad Vs. Microplex (India) Hyderabad and another⁶; Hamed Leather Finishers Vs. Associated Chemical Industries Kanpur Pvt Ltd and another⁷. Nitesh Estates Ltd. Vs. Micro and Small Enterprises Facilitation Council of Haryana and others,⁸ Judgment of Punjab and Haryana High Court.

Reasons and Conclusion.

16. A short issue which falls for consideration is as to whether, the respondent can be said to be an 'enterprise' and/or a

⁵ AIR 2018 Delhi 180

⁶ 2015 SCC Online Hyd 494 : (2016) 3 ALD 588.

⁷ Writ C No. 52747 of 2013

⁸ CWP no.21088/18, dt.7.9.2018

‘supplier’ falling within the ambit of the provisions of the MSMED Act so as to seek benefits under ‘Chapter V’ which pertains to delayed payments to micro and small enterprises interalia providing a reference of dispute to arbitration as per the provisions of Section 18.

17. Some of the provisions of MSMED Act are required to be noted. The relevant provisions would be Section 2(b) which defines “appointed day”, Sections 2(e) which defines “enterprise”, Section 2(h) which defines “micro enterprise”, Section 2(m) which defines “small enterprise”, Section 2(n) which defines “supplier”, also Chapter III which interalia deals with Classification of Enterprises, Advisory Committee and Memorandum of Micro, Small and Medium Enterprises which contains Sections 7 and 8. Section 7 providing for classification of enterprises, Section 8 providing for Memorandum of micro, small and medium enterprises. The provisions of Chapter V dealing on “Delayed Payments to Micro and Small Enterprises” are also the provisions in focus under which Sections 15 to 18 fall. The benefits under Section 18 as prayed for by the respondent and as accepted by the learned District Judge is the principal issue. For convenience these provisions are extracted below:-

**“CHAPTER I
PRELIMINARY**

2. Definitions

- b) “**appointed day**” means the day following immediately after

the expiry of the period of fifteen days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier.

Explanation-For the purposes of this clause,-

- (i) **“the day of acceptance”** means,-
 - (a) the day of the actual delivery of goods or the rendering of services; or
 - (b) where any objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the date of the delivery of goods or the rendering of services, the day on which such objection is removed by the supplier;
- (ii) **“the day of deemed acceptance”** means, where no objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the date of the delivery of goods or the rendering of services, the day of the actual delivery of goods or the rendering of services;

... ..

- 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;
- (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;
- (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;
- (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;
 - (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;
 - (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;

CHAPTER III
CLASSIFICATION OF ENTERPRISES, ADVISORY COMMITTEE AND
MEMORANDUM OF MICRO, SMALL AND MEDIUM ENTERPRISES

7. Classification of enterprises.—

(1) Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central Government may, for the purposes of this Act, by notification and having regard to the provisions of sub-sections (4) and (5), classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, association of persons, co-operative society, partnership firm, company or undertaking, by whatever name called,—

(a) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), as—

(i) a micro enterprise, where the investment in plant and machinery does not exceed twenty-five lakh rupees;

(ii) a small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or

(iii) a medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;

(b) in the case of the enterprises engaged in providing or rendering of services, as—

(i) a micro enterprise, where the investment in equipment does not exceed ten lakh rupees;

(ii) a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or

(iii) a medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees.

Explanation 1.—For the removal of doubts, it is hereby clarified that in calculating the investment in plant and machinery, the cost of pollution control, research and development, industrial safety devices and such other items as may be specified, by notification, shall be excluded.

Explanation 2.—It is clarified that the provisions of section 29B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall be applicable to the enterprises specified in sub-clauses (I) and (ii) of clause (a) of sub-section (1) of this section.

(2) The Central Government shall, by notification, constitute an Advisory Committee consisting of the following members, namely:

—

(a) the Secretary to the Government of India in the Ministry or Department of the Central Government having administrative control of the small and medium enterprises who shall be the Chairperson, ex officio;

(b) not more than five officers of the Central Government possessing necessary expertise in matters relating to micro, small and medium enterprises, members, ex officio;

(c) not more than three representatives of the State Governments, members, ex officio; and

(d) one representative each of the associations of micro, small and medium enterprises, members, ex officio.

(3) The Member-Secretary of the Board shall also be the ex officio Member-Secretary of the Advisory Committee.

(4) The Central Government shall, prior to classifying any class or classes of enterprises under sub-section (1), obtain the recommendations of the Advisory Committee.

(5) The Advisory Committee shall examine the matters referred to it by the Board in connection with any subject referred to in section 5 and furnish its recommendations to the Board.

(6) The Central Government may seek the advice of the Advisory Committee on any of the matters specified in section 9, 10, 11, 12 or 14 of Chapter IV.

(7) The State Government may seek advice of the Advisory Committee on any of the matters specified in the rules made under section 30.

(8) The Advisory Committee shall, after considering the following matters, communicate its recommendations or advice to the Central Government or, as the case may be, State Government or the Board, namely:—

(a) the level of employment in a class or classes of enterprises;

(b) the level of investments in plant and machinery or

equipment in a class or classes of enterprises;

(c) the need of higher investment in plant and machinery or equipment for technological upgradation, employment generation and enhanced competitiveness of the class or classes of enterprises;

(d) the possibility of promoting and diffusing entrepreneurship in micro, small or medium enterprises; and

(e) the international standards for classification of small and medium enterprises.

(9) Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951) and clause (h) of section 2 of the Khadi and Village Industries Commission Act, 1956 (61 of 1956), the Central Government may, while classifying any class or classes of enterprises under sub-section (1), vary, from time to time, the criterion of investment and also consider criteria or standards in respect of employment or turnover of the enterprises and include in such classification the micro or tiny enterprises or the village enterprises, as part of small enterprises.

... ..

8. Memorandum of micro, small and medium enterprises.—

(1) Any person who intends to establish,—

(a) a micro or small enterprise, may, at his discretion; or

(b) a medium enterprise engaged in providing or rendering of services may, at his discretion; or

(c) a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):

Provided that any person who, before the commencement of this Act, established—

(a) a small scale industry and obtained a registration certificate, may, at his discretion; and

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), having investment in plant and machinery of more than one crore rupees but not exceeding

ten crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O. 477(E), dated the 25th July, 1991 filed an Industrial Entrepreneur's Memorandum, shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.

(2) The form of the memorandum, the procedure of its filing and other matters incidental thereto shall be such as may be notified by the Central Government after obtaining the recommendations of the Advisory Committee in this behalf.

(3) The authority with which the memorandum shall be filed by a medium enterprise shall be such as may be specified, by notification, by the Central Government.

(4) The State Government shall, by notification, specify the authority with which a micro or small enterprise may file the memorandum.

(5) The authorities specified under sub-sections (3) and (4) shall follow, for the purposes of this section, the procedure notified by the Central Government under sub-section (2).

CHAPTER V

DELAYED PAYMENTS TO MICRO AND SMALL ENTERPRISES

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 therefor 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 time 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 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 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.”

18. At the outset it is required to be noted that the MSMED Act succeeds the repealed ‘The Interest On Delayed Payments To Small Scale And Ancillary Industrial Undertakings Act, 1993’. Paragraph (2) of the Statement of Objects and reasons in enacting MSMED Act (brought into effect from 2 October 2006) would require a mentioned, inasmuch as one of the objects of this enactment is classification of micro, small and medium enterprises on the basis of

investment in plant and machinery or equipment and establishment of an Advisory Committee to recommend on the related matter.

Paragraph (2) of the Statement of Objects and Reasons reads thus:-

“2. In view of the above-mentioned circumstances, the Bill aims at facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises and seeks to-

(a) provide for statutory definitions of “small enterprise” and “medium enterprise”;

(b) provide for the establishment of a National Board for Micro, Small and Medium Enterprises, a high-level forum consisting of stakeholders for participative review of and making recommendations on the policies and programmes for the development of small and medium enterprises;

(c) provide for classification of micro, small and medium enterprises on the basis of investment in plant and machinery, or equipment and establishment of an Advisory Committee to recommend on the related matter;

(d) empower the Central Government to notify programmes, guidelines or instructions for facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises;

(e) make provisions for ensuring timely and smooth flow of credit to small and medium enterprises to minimise the incidence of sickness among and enhancing the competitiveness of such enterprises, in accordance with the guidelines or instructions of the Reserve Bank of India.

(f) empower the Central and State Governments to notify preference policies in respect of procurement of goods and services, produced and provided by small enterprises, by the Ministries, departments and public sector enterprises;

(g) empowering the Central Government to create a Fund or Funds for facilitating promotion and development and enhancing the competitiveness of small enterprises and medium enterprises;

(h) make further improvements in the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act, 1993 and making that enactment a part of the proposed legislation and to repeal that enactment.”

19. The statement of object and reasons specifies that the object of the legislation is also to provide a single legal framework concerning the entire small and medium enterprises sector and to address their concerns. It is in the context of this object and intention of the legislation the provisions would be required to be appreciated.

20. It needs to be observed that primarily it would not be for this Court considering the provisions of the MSMED Act, and more particularly in the nature of the present proceedings to make an endeavour to undertake an exercise of classification of enterprises and determine as to whether a particular enterprise is an enterprise falling within Section 2(e) of the Act or whether it is a small enterprise classified under Section 2(m). This for the reason that for this exercise there is a special procedure as set out and on the examination of particular parameters it is for the appropriate authority to certify as to whether a particular enterprise satisfies a category so as to fall under the Act. All this would be within the realm and jurisdiction of the respective authorities as recognized by the MSMED Act.

21. Keeping the above parameters in mind, it is to be seen that whether the respondent can claim to be a micro and small enterprise for the purposes of the present dispute, so as to avail the

benefits of the provisions of Section 18 of the MSMED Act. It needs to be noted that admittedly on the day the contract came to be entered between the parties i.e. 18 January 2008 the respondent never asserted that it was a small scale enterprise. The dispute between the parties arose when the respondent raised invoices on 19 June 2008 for an amount of Rs.31.50 lakhs and thereafter another invoice dated 5 November 2008 for an amount of Rs.13.50 lakhs, and only part payment of Rs.3.50 lakhs was made in respect of the second invoice. After the respondent completed the entire work, the respondent raised another invoice dated 15 June 2009 for Rs.22.50 lakhs, and the same was not honoured by the appellant. The appellant had informed the respondent that it was in financial difficulties. It is on this premise that the respondent took steps in October 2013 to file Entrepreneur Memorandum with the District Industrial Centre as per the provisions of Section 8 of the Act and accordingly after one year of obtaining such a memorandum filed Petition no.57 of 2013 on 19 October 2013 before the Facilitation Council at Pune making a claim of the outstanding amount against the appellant.

22. In this context with quite certainty two issues would arise. Firstly the legal status of the respondent on the date when the parties entered into a contract. The legal status of the respondent on the date of entering into the contract was not that of the respondent

being a small enterprise. The respondent asserted that it is a small enterprise, only on the respondent filing an Entrepreneur Memorandum which was filed with the District Industries Centre much later on 25 October 2012, in fact almost about three years after the disputes had arisen, and on the basis of which the respondent was taking recourse to the provisions of Section 18 of the MSMED Act to contend that an arbitration should take place between the parties. It is pertinent that in the prescribed form so submitted by the respondent with the Directorate of Industries, declared the date 25 October 2012 as the date of issuance of the memorandum. If this be so, as to how the memorandum can have effect from the date of the contract (18 January 2008) is another question.

23. On a reading of the definition of “enterprise” (Section 2(e)) would indicate an 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 (for short ‘IDR Act’) or engaged in providing or rendering of any service or services. Section 2(m) defines a small enterprise to be an enterprise classified as such under sub clause (ii) of clause (a) or sub clause (ii) of clause (b) of Section 7(1).

24. In the context of Section 15 (liability of buyer to make payment) and Section 17 (recovery of amount due for goods supplied or services rendered) and in that regard to invoke the provisions of Section 18 of the MSMED Act, the respondent ought to be a supplier within the meaning of the Act on the day on which the contract was entered into between the parties. The definition of “supplier” under the Section 2(n) of the MSMED Act is clear which defines supplier to mean a micro or small enterprise (the classification of which falls under Section 7(1)(a) or (b)), “*which has filed a memorandum*” with the authority referred to in sub-section (1) of section 8. To appreciate the true meaning of the term “supplier” the definition makes it relevant to take within its ambit Section 7 and Section 8, falling under Chapter III.

25. The provisions of Chapter III of the MSMED Act are significant which provides for “*Classification of enterprises, Advisory Committee and Memorandum of Micro, Small and Medium Enterprises.*” Sub-section (1) of Section 7 clearly provides that the Central Government may for the purposes of the MSMED Act by notification and having regard to the provisions of Section 4 and 5 classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, association of persons, co-operative society,

partnership firm, company or undertaking, by whatever name called, into a micro enterprise, small enterprise, in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951. Sub-clause (b) of Section 7 provides that in case an enterprise engaged in providing or rendering of services, as a micro enterprise, where the investment in equipment does not exceed ten lakh rupees, and a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees, and a medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees. Thus, what is imperative is that it is for the Central Government for the purposes of this Act by a notification classify any class or classes of enterprises. For this purpose sub-section (2) of Section 7 provides that the Central Government shall by a notification constitute an Advisory Committee. Sub-section (4) provides that the Central Government prior to classifying any class or classes of enterprises under sub-section (1) obtain a recommendation of the Advisory committee. Under sub-section (5) the Advisory Committee is required to be examine the matter referred to it by the board which is a National Board for Micro, Small and Medium enterprises established under Section 3, with the subjects referred to in Section 5. Thus necessarily classification of an enterprise is

required to be undertaken in a manner known to Section 7.

26. Further Section 8 which provides for filing of an entrepreneurs memorandum also provides for two categories of persons. First category as recognised by sub-section (1) pertains to any person “*who intends to establish*” a micro or small enterprise and/or a medium enterprise as specified in clauses (a), (b) and (c), then it shall file the memorandum of micro, small or medium enterprise as the case may be with the authorities, as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3). Hence, sub-section (1) in the first category clearly provides for “*intending enterprises.*” The proviso to sub-section (1) speaks of the second category interalia providing that any person who “*before the commencement of the Act*”, established as a small scale industry and obtained a registration certificate, may, at his discretion, within 180 days from the commencement of the MSMED Act, file the memorandum in accordance with the Act.

27. Thus Section 8 clearly provides for two categories of small scale industries/enterprises. Firstly an intended enterprise which is certainly a future venture and another category of existing small scale industries which had obtained registration on the date of the commencement of the Act, to file a memorandum within 180 days

of the commencement of the Act.

28. In the facts of the present case the respondent does not indicate that it is a small industry and has obtained a registration certificate on the date on which the respondent entered into a contract with the appellant and/or any further steps are taken within 180 days of the commencement of MSMED Act, hence, for the purposes of sub-section (1) of Section 8 the respondent fell into the first category of an intending enterprise, to be classified as a small enterprise from a future date and not on the date of the respondent entering into the contract with the appellant.

29. Hence, surely by taking recourse to sub-section (1) of Section 8, the respondent merely filing at its discretion an entrepreneurs memorandum, could not have assumed a legal status of being classified under the MSMED Act as a small enterprise, retrospectively from the day on which the appellant entered into a contract with the respondent. The respondent thus could not have become a small enterprise or a supplier within the purview of MSMED Act, 2006 by such prospective filing of an entrepreneurs memorandum which on the face of it had a consequence from a prospective date and not retrospectively so as to enable the respondent to take benefit of Chapter V and more particularly of Section 18. Any other

interpretation of the provisions of Section 2 sub-section (n) read with Section 8 would create a consequence not desired by the provisions of the Act. In fact it would confer an unwarranted and an illegal benefit in favour of a party, not desired by these provisions.

30. The definition of 'supplier' under Section 2(n) thus in my opinion would not contemplate that any enterprise on any future date after the contract was entered into and much later to the dispute as arisen to file a memorandum and seek retrospective application of filing of such memorandum to take benefits of the provisions of Chapter V of the MSMED Act. Such an interpretation of the provisions, in my opinion, would do violence to the provisions of the Act. This inasmuch as, a subsequent registration not on the date when the parties have entered into a contract creates legal consequences. The first consequence is of a change of legal status of one of the contracting party, unilaterally without consent and knowledge of the other contracting party, which in a given case may cause prejudice to the other party to the contract, and secondly for the reason that by virtue of filing of such memorandum a contracting party labeling itself to be a small or medium enterprise seeking to foist an arbitration on the other contracting party, which is as good as unilaterally incorporating a condition not agreed between the parties.

31. In **M/s Frick India Ltd., Vs. Madhya Pradesh Micro And Small Enterprises Facilitation Council & ors** (supra) the learned Single Judge of the Madhya Pradesh High Court has held that the subsequent registration and/or filing of memorandum would not confer benefit when on the day the contract was entered into, the party was not a supplier as defined under Section 2(n) of the Act. The learned Single Judge in paragraph 35 to 38 made the following observations:-

“35. The submissions though attractive but it is no so, because for availing the benefit under the Act, the entity, whether it is micro or small enterprise must be rendering services which are provided by such enterprises. There being no material on record to establish that respondent no.3 is rendering construction work since 25.7.2007. It is only from 21.6.2013 that the firm got registered as engaged in construction works as per the entry made in Part II of memorandum for additional service activity.

36. It will not, in the considered opinion of this Court, confer a benefit in respondent no.3 from an anterior date; in other words, respondent no.3 who got engaged in construction work by virtue of the agreement dated 18.10.2008 and completed the work on 10.5.2010 will not on the basis of subsequent registration on 21.6.2013 can avail the benefit of Chapter V of the Act 2006 to settle the dispute of the work completed on 10.5.2010 because it is not a continuing wrong.

37. Sub-section (1) of Section 18 of the Act 2006 envisages that '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'. The expression "any party" in this clause draws its reference from Sections 15, 16 and 17 i.e. it must be a supplier which, in turn, is defined under Section 2(n) of the Act, 2006.

38. Since it is the supplier alone who can avail the benefit under the Act 2006 and respondent no.3 being not the supplier in context to the dispute in question, it was beyond the jurisdiction of the Council to have entertained the reference under Section 18 of Act 2006. It having addressed

the facts in wrong manner assumed the jurisdiction in respect of the dispute in question. The assumption of jurisdiction by the Council in respect of dispute in question cannot be approved. Therefore, the impugned Award deserves to be and is hereby set aside.”

32. Similarly a learned Single Judge of this Court in **Faridabad Metal Udyog Pvt. Ltd. vs. Mr. Anurag Deepak & Anr.** (*supra*) in a converse position, in a case where the contract was entered into between the parties prior to coming into force of the Act, did not find it appropriate to confer benefits under Chapter V holding that subsequent filing of memorandum cannot change the status of a party as it stood prior to coming into force the Act. The learned single Judge in this context made the following observations:-

“13. As far as Judgment of Delhi High Court in case of M.L. Dalmiya & Co.Ltd.(*supra*) relied upon by the petitioners is concerned, in that matter respondents had committed default in filing its counterclaim. Petitioners were pressing for hearing before the learned arbitrator which the learned arbitrator failed. In the facts of that case, Delhi High Court terminated the mandate of learned arbitrator appointed by the respondents and appointed another arbitrator. In my view, facts of that case are clearly distinguishable with the facts of this case. On perusal of the facts of this case and on conjoint reading of definition of Section 2(b) and (n) of the MSME Act, it is clear that dispute between the parties to these proceedings arose much prior to the said Act having come into force. In my view, remedy under Section 18 to refer the dispute to Micro and Small Scale Enterprises Facilitation Council would not apply to the dispute arising out of existing arbitration agreement between the parties. Similarly, the said provisions also cannot be invoked in respect of the dispute having arisen between the parties prior to the said Act having come into force and prior to the “Supplier” having filed the memorandum and is registered under Section 8 of the said Act. Admittedly these first four petitioners were registered as micro small enterprises much after the dispute had arisen between the parties. In my view, the said provisions would not apply with retrospective effect to the past transaction and thus provisions of the said MSME Act have no applicability to the

facts of this case. Even otherwise reliefs under Section 14 and 11 cannot be claimed in the same proceedings. Proceedings filed under Section 14 are filed before Court whereas application filed under Section 11 is not before the Court. In any event, since mandate of arbitrator is not terminated, question of appointment of any other arbitrator did not arise.

14. On perusal of the record filed by both the parties, it is clear that though the petitioners had filed application under Section 14 along with other provisions as far back in 2003 and thereafter in 2007, petitioners filed these proceedings for a declaration that mandate of the arbitrator has terminated under Section 14 only in the month of October 2012 after the petitioners already having filed pleadings, statement of admission/denial, affidavit of witnesses and the learned arbitrator already having fixed the dates for cross examination of the witnesses to be examined by the petitioners. In my view, in view of such unexplained delay in filing these petitions for such relief, no indulgence can be granted to the petitioners for such relief at this stage.”

33. I am thus of the clear opinion that the respondent was not entitled to invoke the provisions of Chapter V and seek reference to arbitration under Section 18 of the MSMED Act as on the day on which the contract was entered into on 18 January 2008, the respondent was not a supplier within the meaning of MSMED Act and subsequent filing of memorandum under Section 8 on 25 October 2012, would not confer status of small enterprise retrospectively relating back to 18 January 2008 when the parties entered into the contract in question. The Arbitral Tribunal as constituted under Section 18 of the Act has clearly held that the date on which the contract was entered into between the parties, the respondent had not filed the memorandum as per the provisions of Section 8 of the Act and hence the respondent would not be entitled to benefits under

Chapter V of the MSMED Act and accordingly, rejected the arbitration reference petition as filed by the respondent. In my opinion, the arbitral tribunal was correct in coming to this conclusion. The learned District Judge, in my opinion, was not correct in interfering with the award of the arbitral tribunal in the absence of any legal perversity. The provisions of the Act are also not applied in their correct perspective.

34. Having taken the aforesaid view I am not persuaded to accept the contention as urged on behalf of the respondent referring to the order of the learned Single Judge of the Delhi High Court in **Ramky Infrastructure Pvt. Ltd. Vs. Micro and Small Enterprises Facilitation Council & Anr.** (supra), as I am of the clear opinion that considering the clear provisions of Section 8 read with Section 2(n), in the fact situation a retrospective applicability of the Act cannot be accepted. In any case this decision of the Delhi High Court would not be applicable inasmuch as in the said case, the learned Single Judge in paragraph 23 has observed that there was no dispute that the respondents in the said case, fell within the definition of Micro, Small Enterprises and would be classified as such even at the time of execution of the contract which was awarded by the petitioner therein. These are certainly not the facts in the present case.

35. The decision of the learned Single Judge of Andhra Pradesh High Court in “**The Indur District Co-op. Marketing Soc. Ltd. Vs. Microplex (India) Hyderabad & Anr.**”, was not a case where the Court was dealing with the category of enterprise falling under the proviso to sub-section (1) of Section 8 namely the industries established prior to commencement of the Act. This for the reason that it can be seen that when the respondent in the present case filed a memorandum in the column of “SSI” registration, it had clearly referred to a date of 25 October 2012 which is certainly the date subsequent to the parties entering into the contract.

36. Another aspect of the impugned order needs to be noted namely the direction of the learned District Judge remanding the matter to the arbitral tribunal. This is per se impermissible and would amount to a jurisdictional error in making such directions when the Court is exercising jurisdiction under Section 34 of the Arbitration Act. In “**Kinnari Mallick and Anr. Vs. Ghanshyam Das Damani**”⁹ the Supreme Court has held that the Court exercising power under Section 34, while setting aside the award, would have no jurisdiction to remand the matter to the Arbitral Tribunal.

37. As a sequel to the above discussion, in my opinion, the

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arbitral tribunal was correct in rejecting the reference as filed on behalf of the respondent under Section 18 of the MSMED Act as the respondent was not a Small Scale enterprise on the date, when the parties entered into the contract, on 18 January 2008. Accordingly, the appeal is allowed. The impugned judgment and order dated 16 March 2018 passed by the District Judge, Pune, stands set aside. No costs.

(G.S.Kulkarni, J.)\