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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision : 05.02.2020

+ W.P.(C) 10573/2019 & CM No.43754/2019

M/S GODWIN CONSTRUCTION PVT LTD & ORS

..... Petitioners

Through: Mr. Pradeep Kumar Mathur &
Mr. Chiranjeev Joshi,
Advocates

versus

TULIP CONTRACTORS & ANR.

..... Respondents

Through: Mr.Sahil Garg, Adv.for R-1.
Mr.Ramesh Singh, SC,
Mr.Ankur Chhibbar,
Mr.Chirayu Jain and Mr.Ishan
Agarwal, Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed challenging the order dated 24.06.2019 passed by the Micro & Small Enterprises Facilitation Centre (hereinafter referred to as the 'Centre') sending the said reference to the Delhi International Arbitration Centre for initiating arbitration proceedings under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the 'Act').

2. The learned counsel for the petitioners submits that the said order is beyond the jurisdiction of the Centre inasmuch as the disputes between the parties relate to the period 2010-2011, whereas the respondent no.1 was registered under the Act only on 22.11.2017. Drawing reference to Sections 2(n), 17 and 18 of the Act, the learned counsel for the petitioners submits that a reference under Section 18 of the Act would be maintainable only on behalf of the 'supplier'; the 'supplier' means 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. He submits that therefore, when the contract was performed by the respondent no.1, the respondent no.1 was not a 'supplier' within the meaning of the said terms under the Act and therefore, could not have maintained the reference in relation to such claims. In this regard, he places reliance on the judgement of the Gujarat High Court in ***Easun Reyrolle Limited v. Nik San Engineering Co. Ltd.***, wherein relying upon the judgement dated 24.07.2015 of the High Court of Madhya Pradesh in Writ Petition No.19319/2014, the Gujarat High Court has held that the provision of the Act cannot be invoked in respect of the disputes that have arisen between the parties prior to the 'supplier' having filed the Memorandum under Section 8 of the Act.

3. The learned counsel for the petitioners further submits that the respondent no.1, before invoking the jurisdiction under the Act, had filed a petition seeking winding up of the petitioner company by way of Company Petition No.8/2015 before the High Court of Judicature at

Allahabad. The said petition was dismissed by an order dated 14.11.2017 observing that the proper remedy for the respondent no.1 is by means of a suit and not by means of a winding up petition. The respondent no.1, instead of filing a suit, filed the reference before the Centre and therefore, such reference was not maintainable.

4. On the other hand, the learned counsels for the respondents have placed reliance on the judgement of this Court in ***GE T&D India Limited v. Reliable Engineering Projects and Marketing***, 2017(238) DLT 79 and judgement dated 02.09.2019 of this Court in WP(C) 9670/2016, ***The Chief General Manager (Contracts), M/s Nevyeli Lignite Corporation Ltd. v. Driplex Water Engineering Ltd. & Anr.***, to submit that this Court has already held that for purposes of invoking the provision of Section 18 of the Act, the party must be a Micro or Small Enterprise on the date of the contract and should have obtained registration on the date of making of the reference; it is not necessary for the party to have obtained registration on the date when the contract is performed. Further, placing reliance on the judgement of this Court in ***Ramky Infrastructure Pvt. Ltd. v. Micro and Small Enterprises Facilitation Council and Ors.***, MANU/DE/2341/2018, the learned counsel for the respondent no.2 submits that even otherwise, a 'body' which provides services obtained from a Micro or Small Enterprises is also a 'supplier' within the meaning of the said terms under Section 2(n) of the Act; therefore, it is not necessary for such 'body' to have filed the Memorandum.

5. I have considered the submissions made by the learned counsels for the parties. This Court in ***GE T&D India Limited*** (supra), having considered the provision of the Act, has held as under:

“31. There is no doubt that the above provisions apply only to the services rendered and goods supplied by a ‘supplier’ as defined under Section 2(n) of the Act. The focus under Section 15 of the MSMED Act is on the actual act of providing services and supplying goods. If a small scale industry or micro or small enterprise undertakes the above tasks, then the buyer is bound under Section 15 of the MSMED Act to make payment by the appointed date which cannot exceed 45 days from the date of acceptance or deemed acceptance in terms of the proviso thereof.”

32. A unit that is not registered as a supplier does not cease to be one. The registration as a supplier under the MSMED Act makes the availing of the benefit much easier. Section 8(1) of the MSMED Act which requires the filing of a memorandum by such unit reads as under:

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33. Section 8 of the MSMED Act envisages two possible situations; one is where a unit which has not yet come into existence, and the second is where the unit is in existence. Where a unit is yet to be established, Section 8(1) requires filing of the memorandum in the manner specified by the State or the Central Government, as the case may be. Where a unit has already been established prior to the commencement of the MSMED Act, then the proviso applies and the memorandum has to be applied within 180 days from the date of commencement.

34. It, however, does not mean that a third category i.e., a unit that is established after the commencement of the Act cannot seek registration as a supplier. That could never

have been the intention of the legislature as is evident from the Statement of Objects and Reasons of the MSMED Act.

35. The case on hand falls in the third category where a supplier is already in existence at the time of commencement of the Act but has not obtained any registration till then. It is registered as a supplier beyond 180 days from the date of the commencement of the Act i.e., after 180 days from 2nd October, 2006. Clearly, such a unit can also seek registration as a supplier. That is precisely what has happened in the present case. The certificate issued to the REPM is dated 4th April, 2012, but importantly, it notifies that the date of commencement of the activities as 1st February, 2009.

36. The question that next arises is whether having been registered on 4th April, 2012, can REPM take advantage of the MSMED Act? For this purpose, it is necessary to refer to Section 18 which requires REPM to be a 'supplier' as on the date of making such reference. Clearly, that condition stood satisfied. Secondly, even according to the Petitioner, the supplies made by REPM pursuant to the PO dated 8th September, 2009 continued even under the Section PO dated 27th November, 2012. From the point of view of the Petitioner, it is seeking to rely on the Second PO having been validly issued. The supplies made by REPM to Alstom in terms of the PO dated 8th September, 2009 continued even after REPM's registration as supplier as is evident from the two MoMs dated 1st May, 2013 and 28th December, 2013. The result is that REPM can seek the application of the beneficial provisions of MSMED Act as far as its claims against Alstom arising from the said First PO are concerned." (Emphasis supplied)

6. Following the above judgment, in *The Chief General Manager (Contracts), M/s Neyveli Lignite Corporation Ltd.* (supra), this Court has held as under:

*“8. The contention whether Driplex can still claim benefit under the MSMED Act, notwithstanding that it had filed its Memorandum after entering into the Contract with Neyveli, is squarely covered by the decision of a coordinate Bench of this Court in **GE T & D India Limited v. Reliable Engineering Projects and Marketing** (supra). In that case, the Court observed that:*

“A unit that is not registered as a supplier does not cease to be one. The registration as a supplier under the MSMED Act makes the availing of the benefit much easier.”

9. The Court further held that a supplier, which was already in existence at the time of the commencement of the MSMED Act but had not obtained the registration, could do so even beyond the period of one hundred and eighty days. In that case, the respondent (Reliable Engineering Projects and Marketing) had obtained a registration on 04.04.2012, but had also specified that its activities had commenced much prior to the said date. It is relevant to note that in that case, the disputes between the parties arose in respect of a purchase order dated 08.09.2009, however, the supplier continued to make supplies even thereafter. In that context, the Court held that the supplier could take recourse to the beneficial provisions of the MSMED Act, even in respect of the first purchase order dated 08.09.2009. This was, notwithstanding, that the Memorandum under Section 8 of the MSMED Act was registered on 04.04.2012. In the present case, Driplex obtained the registration of its Memorandum

under Section 8 on 09.12.2011; however, the said registration clearly indicates that Driplex had commenced services on 27.08.1974. Thus, notwithstanding that Driplex had filed the Memorandum under section 8 of the MSMED Act after entering into the Contract with Neyveli it could, nonetheless, seek recourse to the beneficial provisions of the MSMED Act.”

(Emphasis supplied)

7. A reading of the above judgments would clearly show that for purposes of Section 18 of the Act, what is required is for a Micro or Small Enterprise to be registered on the date of the making of the reference. Once that condition is satisfied, even though the supplies have been made prior to the date of the registration, such a reference would still be maintainable.

8. In fact, in **Ramky Infrastructure Pvt. Ltd** (supra), this Court has further held as under:

“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."

9. The learned counsel for the petitioners has tried to distinguish the judgement of this Court in ***GE T&D India Limited*** (supra) on the ground that in the said case the supply had continued even post the registration. I do not find any merit in the said submission. This Court in the said judgement had upheld the applicability of the Act on two distinct grounds; one of them being that mere registration as on the date of making of the reference is sufficient to attract the provision of the Act; in addition, it was held that in any case, the petitioner therein had continued to supply post its registration. Though, the second ground may not be available to the respondents in the present case, this would not be sufficient to exclude the jurisdiction of the respondents to entertain reference under Section 18 of the Act.

10. Even otherwise, upon perusal of the Udyog Aadhar Registration Certificate of the respondent no.1, it can be seen that the said respondent has been carrying its operations since 30.04.2010, that is before the supplies were made to the petitioner company.

11. In view of the above, the objection of the petitioners to the maintainability of the reference to the Centre under Section 18 of the Act, cannot be sustained.

12. As far as the submissions of the learned counsel for the petitioners relying upon the order dated 14.11.2017 passed by the High Court of Judicature at Allahabad, I find no merit in the same. The High Court merely held that the winding up petition was not maintainable. The High Court was not concerned with the question as to whether the respondent no.1 can also file a reference under the Act.

13. In view of the above, I find no merit in the present petition and the same is accordingly dismissed. The parties shall bear their own costs.

NAVIN CHAWLA, J

FEBRUARY 05, 2020/Arya