**THE HIGH COURT OF JUDICATURE AT MADRAS**

Date 14.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

**O.P.No.223 of 2014 & A.No.2854 of 2021**

M/s.Bharat Heavy Electricals Ltd.,
[A Government of India undertaking],
Boiler Auxilaries Plant,
Indra Gandhi Industrial Complex,
Ranipet, Tamilnadu – 632 406. . . . Petitioner

Versus

1. M/s.Vector Engineering Company,
   10, Guindy Industrial Developed Plot,
   Ekkattuthangal, Chennai – 600 032.

2. Mr.Harmander Singh,
   Chairman,
   Micro Small Enterprises Facilitation Council,
   Mandaveli, Chennai – 600 028.

3. Mr.Ashok,
   Member,
   Micro Small Enterprises Facilitation Council,
   Mandaveli, Chennai – 600 028.

4. Mr.Periasamy,
   Member,
   Micro Small Enterprises Facilitation Council,
   Mandaveli, Chennai – 600 028.

5. Mr.S.Muralidharan,
   Member,
   Micro Small Enterprises Facilitation Council,
   Mandaveli, Chennai – 600 028. . . . Respondents

**PRAYER :** Petition filed under Section 34 [2] [B] [ii] of Arbitration and Conciliation Act, 1996 to set aside the award dated 04.12.2012 passed by the Micro Small Enterprises Facilitation Council, Chennai Region, in case No.MSEFC/CR/11/2009 by allowing this Original Petition.

For petitioner : Mr.Benjamin George

For respondents : Mr.Vishnu Mohan – R1

**ORDER**

This petition has been filed challenging the Order of Micro Small Enterprises Facilitation Council dated 14.12.2014.

2. The matter has been referred to Micro Small Enterprises Facilitation Council by the respondent stating that they are engaged in manufacture, supply erection and commissioning of items like electrostatic precipitator, Fans, Airpreheaters and desalination plaints required for power generation plants. The claimant was allotted the tender floated by the respondent and the claimant supplied the the materials as per the tender. The respondent, despite the supply, failed to make payment. Hence, the matter has been referred to the Micro Small Enterprises Facilitation Council.





3. After hearing both sides, the Micro Small Enterprises Facilitation Council

has passed an Order with mandate interest as contemplated under sections 18 and 19 of the Micro Small and Medium Enterprises Development Act.

4. Though several grounds have been raised, the learned counsel appearing for the applicant mainly canvassed his argument on the ground of jurisdiction. It is his contention that the Micro Small Enterprises Facilitation Council has no jurisdiction to entertain the claim. It is his main contention that the respondent herein is not registered under Micro Small and Medium Enterprises Development Act and the contract has been entered between the parties way back in the year 1997 and the Act came into force only in the year 2006 and the respondent has been registered under the Act and therefore, he cannot take the benefit of Micro Small and Medium Enterprises Development Act for more interest. It is his further contention that prior to Micro Small Enterprises Facilitation Council proceedings, arbitration proceedings were already initiated and both have given consent for appointment of a sole arbitrator, namely, Senior Counsel Mr.S.Parthasarathy. When the proceedings is pending before the arbitrator, the respondent has moved before the Micro Small Enterprises Facilitation Council and the Council, infact has passed the Order. Hence, it is his contention that on the date of entering into the contract, the respondent is not registered as Micro Small Scale Enterprise as required under the law. Therefore, the applicability of the Micro Small and Medium Enterprises Development Act cannot be pressed in this case to adjudicate the dispute between the parties.

5. The learned counsel appearing for the respondent Mr.Vishnu Mohan submitted that Micro Small Enterprises Facilitation Council has took note of all the factual aspects and passed the award. The jurisdiction issue has not been raised in the petition challenging the award. Hence, prayed for dismissal of this petition. However, he has not disputed the fact that prior to referring the dispute to the Micro Small Enterprises Facilitation Council, a sole arbitrator has been appointed by the parties and arbitration proceedings have already been commenced by the arbitrator chosen by both sides. During the pendency of the above proceedings, the matter has been once again referred to the Micro Small Enterprises Facilitation Council by the respondent.

6. In the light of the above submissions, when the materials perused, it is not disputed that the contract has been executed way back on 24.11.1997 prior to Micro Small and Medium Enterprises Development Act came into force. It is also not disputed that from the year 2014 itself dispute arose between the parties, as a result of which a sole arbitrator has been appointed and there were proceedings before the sole arbitrator till 07.12.2006. These facts have not been disputed. Only after Micro Small and Medium Enterprises Development Act 2006 came into force, the respondent has made a claim before the Micro Small Enterprises Facilitation Council as contemplated under the Micro Small and Medium Enterprises Development Act.

7. It is relevant to note that the Micro Small and Medium Enterprises Development Act came into force on 16.06.2006. Section 8 of the Act reads as follows :

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).

8. On a careful reading of the above Section makes it clear that if any industry is 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, having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees shall be registered any where within 180 days from the commencement of this Act and file a memorandum according to the provisions of this Act. The above section also makes it very clear that any industry or person claiming as Micro or Small Enterprise shall be registered as contemplated under section 8 of the Act within 180 days from the date of Commencement of the Act 27

of 2006.

9. When this Court posed a question to the learned counsel Mr.Vishnu Mohan, as to whether the respondent company has been registered as mandated under section 8 of the Micro Small and Medium Enterprises Development Act, the learned counsel fairly submitted that respondent has been originally registered as Small Scale Industries. However, after the Act 27 of 2006 came into force, the respondent has not registered under this Act as mandated under section 8 of this Micro Small and Medium Enterprises Development Act.

10. In this regard it is useful to refer the judgment of the Apex Court in Civil Appeal No.1570-1578 of 2021, M/s.Silpi Industries etc. Vs. Kerala State Road Transport Corporation and another Vs. M/s.Khyaati Engineering Vs. Prodigy Hydro Power Ltd., the Apex Court has held that when the supply is made prior to the registration of the supplier, to seek benefit of provisions under Micro Small and Medium Enterprises Development Act, the seller should have registered under the provisions of the Act as on the date of entering into the contract and further held that in any event for the supplies pursuant to the contract made before the registration of the unit under provisions of Micro Small and Medium Enterprises Development Act, no benefit can be sought by such entity, as contemplated under Micro Small and Medium Enterprises Development Act and it has been held as follows :

"In the present case, undisputed position is that the supplies were concluded prior to registration of supplier. The said judgment of Delhi High Court relied on by the appellant also would not render any assistance in support of the case of the appellant. In our view, to seek the benefit of provisions under MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under MSMED Act. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court in the judgment in the case of Shanti Conductors Pvt. Ltd. & Anr. Etc. V. Assam State Electricity Board & Ors. etc. has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act. There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of appellant as the unit under

MSMED Act, 2006. By taking recourse to filing memorandum under sub-section [1] of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which appellant entered into contract with the respondent. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of MSMED Act 2006, bu submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation."



Therefore, as per the above dictum, to seek benefit under the Act, the supplier or seller should have been registered under the Micro Small and Medium Enterprises Development Act, which is lacking in this case. Therefore, as per the above dictum, to seek benefit under the Micro Small and Medium Enterprises Development Act, the supplier or seller should have been registered under the Micro Small and

Medium Enterprises Development Act, which is lacking in this case. In the given case, the supplier has not filed any memorandum and registered under the Micro Small and Medium Enterprises Development Act, has approached the council and hence, they are not entitled to any benefit under the Micro Small and Medium Enterprises Development Act. In other words, the party has to be registered as per the provisions of the Micro Small and Medium Enterprises Development Act as on date of entering into the contract. In such view of the position of law, the Council has no jurisdiction to entertain the claim made by the respondent. Admittedly, in this case, the contract has been entered on 24.11.1997 and the purchase Order has been issued on 06.03.1998. On the date of the contract, Micro Small and Medium Enterprises Development Act has not come into force. Even after the Micro Small and Medium Enterprises Development Act came into force, as required under section 8 of the Micro Small and Medium Enterprises Development Act, no registration has been effected by the respondent. In such view of the matter, the award passed by the Micro Small Enterprises Facilitation Council cannot be sustained in the eye of law and is liable to be set aside.



11. At this stage, the learned counsel for the petitioner has submitted as the matter is already pending before the arbitrator, who has already been appointed for entering reference, they are ready to go before the same arbitrator for which the respondent has no objection.

12. Accordingly, it is Ordered as follows :

i) The award passed by the Micro Small Enterprises Facilitation Council, dated 04.12.2012 is set aside.

ii] by consent of both sides, Mr.S.Parthasarathy, Senior Advocate, No.7, 2nd Street, Jagadambal Colony, Royapettah, Chennai – 600 014 Mobile : 91766 37537, is appointed as the Arbitrator to continue the arbitration proceedings and adjudicate the disputes *inter se* the parties.

iii) The learned Arbitrator may, after hearing the parties, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. It is open to the parties to file their claim and counter claims and to raise all the objections before the arbitrator.

iv) The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses as per law.

v] The amount deposited by the petitioner before this Court while filing this application as Ordered by this Court under Section 19 of the MSMED Act is ordered to be returned to the petitioner.

Consequently, connected application is closed.

**14.09.2021**

Index : Yes / No
Internet: Yes
Speaking/non speaking order

vrc

To

Mr.S.Parthasarathy,
Senior Counsel,
No.7, 2nd Street, Jagadambal Colony,
Royapettah, Chennai – 600 014,
Mobile : 91766 37537

**N. SATHISH KUMAR, J.**

vrc

order in:

**O.P.No.223 of 2014**

**14.09.2021**