

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP 14068 of 2020 (O&M)

Date of Decision: April 27, 2021

M/s Utility Powertech Ltd.

.....Petitioner

Versus

M/s Chopra Bros (India) Pvt. Ltd. and others

.... Respondents

CORAM : HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present : Mr. Bharat Sangal, Senior Advocate with
Mr. Tarkeshwar Nath, Advocate
for the petitioner.

Mr. Ashish Chopra, Advocate
for respondent No. 1.

Service of respondents no. 2 and 3
dispensed with.

FATEH DEEP SINGH, J. (Oral)

The matter has been taken up through
video-conferencing on account of outbreak of pandemic COVID-
19.

The instant civil writ petition under Articles 226/227
of the Constitution of India has been preferred by the M/s Utility
Powertech Ltd. claiming to be a company registered under the
Companies Act 1956 and happens to be a joint venture of
National Thermal Power Corporation and Reliance Energy. The

petitioner claims that respondent No. 1 M/s Chopra Bros (India) Pvt. Ltd., too a private company engaged in business of specialized construction activities of civil engineering and claims to be registered with the Micro, Small and Medium Enterprises (in short “**the MSME**”) on the basis of memorandum filed under Section 8 of the Micro, Small and Medium Enterprises Development Act, 2006, (in short '**the Act**').

The reference was made by respondent No. 2 on the basis of reference letter dated 31.03.2020 for referring the matter to respondent No. 3 as the Arbitrator. The background of the dispute is that on the basis of tender invited by the petitioner for work of Area Grading for 2 x 600 MW plant at Hisar with complete civil works and respondent No. 1 was, accordingly, issued work order on 12.02.2007 alongwith the scope of works, wherein, all details necessary for this work were underlined.

It is claimed by the petitioner that works stood completed on 31.03.2008 and by virtue of Clause 9 of the work order, 90% of the contract price, i.e. 6.39 Crores was released to the respondent on 10th June 2008 and retention money of Rs. 50.94 lacs was released on 31.12.2008. The balance 10% of this amount was mandated to be released on handing over of

the work in satisfactory conditions to the HPGCL. It is at this juncture a dispute had arisen, whereby, the petitioner claims that in response to the correspondence of the respondent in its letter dated 08.08.2014, it was intimated to the respondent that the work had not been taken over by the HPGCL and, therefore, 10% is not due and payable to the contractor. Subsequently, respondent approached the Haryana Micro and Small Enterprises Facilitation Council Chandigarh (hereinafter to be referred as **“the Facilitation Council”**) vide its letter dated 08.08.2014 seeking recovery of Rs. 1,22,97,585/- as principal amount and Rs. 8,35,58,450/- as interest up to 29.10.2019. The petitioner claims to have filed its objections before the Facilitation Council, to which, the petition had been objected being not maintainable as the respondent was not covered under the Act. It is subsequent thereto proceedings got initiated against the petitioner by respondent No. 1 before respondent No. 3 and that is how, instant invocation has come about.

The respondent No. 1 in its counter claim by way of reply besides taking preliminary objections of suppression of material facts and that writ petition was not maintainable. On merits, the answering respondent has pleaded that as per the

memorandum filed under Section 8 of the Act, the date of commencement of the respondent-establishment is detailed as 08.01.1986 and, therefore, fell within the ambit of the Act terming the present writ petition to be an abuse of process of law claiming that after the successful completion of the entire allotted work the respondent has handed over the petitioner the works in March 2008 but the petitioner has failed to release all the amount of the final bill and on account of dilatory tactics is trying to be evasive for undergoing its obligation. It is reiterated that it is the own fault of the petitioner and it cannot take undue advantage of the same and further holding out and filing of memorandum under Section 8 of the Act is not a condition precedent to be inclusive under the Act and has claimed to have duly complied with the provisions of the service tax etc. Terming the contract to be service contract instead of work contract, the respondent has sought dismissal of the petition denying that there was any occasion of inordinate delay.

Heard Mr. Bharat Sangal, Senior Advocate assisted Mr. Tarkeshwar Nath, Advocate for the petitioner and Mr. Ashish Chopra, Advocate for respondent No. 1 and perused the records.

It is not in any manner put to question and is well illustrated from the pleadings of the two sides that the petitioner have issued work order to respondent No. 1 on 12.02.2007 and that the works stood completed on 31.03.2008. Under Clause 9 of the work order 90% of the total amount i.e. 6.39 Crores was released on 10.06.2008 and that subsequently on 31.12.2008 retention money of Rs.50.94 lacs was also released. In terms of contract 10% amount was to be released on handing over of works and on the basis of which respondent No. 1 has laid claim for recovery of principal amount of Rs.1,22,97,585/- and on which upto 29.10.2019 had sought interest amounting to Rs.8,35,58,450/- and, thus, totaling to Rs.9,58,56,035/-. The fervent submissions of the counsel for the petitioner Mr. Bharat Sangal, Senior Advocate that the undertaking of respondent No. 1 does not stand covered under the Act as the same was registered under MSME Act by filing of memorandum under Section 8 of the Act only in the year 2016 and being subsequent thereto facilitation council does not have any jurisdiction to which a vociferous counter attack has come about from the side of the contesting respondent by Shri Ashish Chopra, Advocate who has sought to claim that filing of

memorandum under Section 8 of the Act is not an essential pre-requisite and has sought to place reliance on **The Indur District Cooperative Marketing Society Ltd. Vs. M/s Microplex (India), Hyderabad and another,** 2016(3) Andh LD 588, **Welspun Corp. Ltd. Vs. The Micro and Small, Medium Enterprises Facilitation Council, Punjab and others** 2012(2) PLR 195, **M/s Ramky Infrastructure Private Limited Vs. Micro and Small Enterprises Facilitation Council and another** 2018 AIR (Delhi) 180 and CWP No. 21088 of 2018 titled as **M/s Nitesh Estates Ltd. Vs. Micro and Small Enterprises facilitation Council of Haryana and others.**

Learned counsel for the petitioner seeks support from **M/s. Scigen Biopharma Pvt. Ltd. Vs. Ms. Jagtap Horticultatuer Pvt. Ltd,** Arbitration Appeal No. 23 of 2018, **M/s Easun Reyrolle Limited Vs. M/s Nik San Engineering Co. Ltd,** R/Special Civil Application No. 6265 of 2018 with Civil Application No. 1 of 2018, **M/s Ramky Infrastructure Private Vs. Miscro and Small Enterprises,** W.P. (C) 5004/2017 and CM No. 21615/2017 and **The Indur District Cooperative Vs. M/s Microplex (India),** Writ Petition Nos. 35872 of 2012 and batch.

Appreciating the submissions, since the work order was issued on 12.02.2007 and the work under it stood completed on 31.03.2008 and the last amount was released on 31.12.2008 and to the specific query of the Court to the counsel for the contesting respondent that contesting respondents unit was registered by way of memorandum under Section 8 of the Act only in the year 2016, the counsel could not satisfactorily wriggle out of this commitment which is well illustrated from the records, thus, it ensues that the dispute was pertaining to the work and had arisen much prior to the registration of the unit of the contesting respondent, which was in the year 2016, therefore, to the mind of the Court the respondent No. 1 cannot take the embrace of facilitation council and that too when they have moved so in the year 2019 after an inordinate delay of more than 11 years when even a claim for recovery of the amount can be laid only within three years of the completion of the works.

Section 2(m) and 2(n) of the Act defines ‘**small enterprise**’ and ‘**supplier**’ which follows as under:-

(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 (1 of 1956);

(ii) the small Industries Development Corporation of a State or a Union Territory, by whatever name called, being a company registered un the Companies Act, 1956 (1 of 1956);

(iii) any company, co-operative society, trust or a body, by whatever named 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;

Plain reading of Section 2(n) shows that the contesting respondent can only come within the definition of

‘**supplier**’ after he has filed a memorandum with the authority under sub-section (1) of Section 8 and which has come about much after the dispute way back in the year 2016. More so, the Micro, Small and Medium Enterprises Development Act, 2006 mandates that all micro, small and medium enterprises shall furnish the information relating to their enterprise to the Government in the Form annexed to these Rules and which respondent No. 1 has failed to do so besides the fact that notification S.O. 1636(E), dated 29th September, 2006 enlist the General Manager, District Industries Centre or any District level officer of equivalent rank in the Directorate or the Department dealing with Micro, Small and Medium Enterprise of the State Government or the Union Territory Administration as the authority with whom the memorandum shall be filed by a person who intends to establish or has already established a medium enterprise engaged in the manufacture or production of goods, as specified in clause (c) of sub-section (1) Section 8 of the said Act and which too had not been made by the respondent and furthermore by virtue of notification S.O. 2052(E), dated 30th June, 2017 ensures by way of clause (2) that every micro, small and medium enterprises engaged in the manufacturing of goods

or rendering of services with total investment in plant and machinery within the limit specified in Section 7 of the said Act, shall file the memorandum and further that there shall be only one memorandum which will be required to be filed and till the dispute there has been no adherence to Form I and Form II prescribed with this notification. The ratios cited by the counsel for the respondent do not come to the aid of the answering respondent on account of factual disparity. Since the respondent No. 1 at the time of the dispute did not stand covered under the Act and that the claim raised by it being stale and barred even by the common law of limitation certainly is to the detriment of the contesting respondent. The feeble attempt of Mr. Chopra that the writ jurisdiction does not lie it needs to be kept in mind that though the High Court should normally restrain and not exercise jurisdiction where an effective and efficacious remedy is provided, as in the present Act by way of Section 19 shows so, how such a remedy would not operate as a bar where the order under assail is wholly unjustified within jurisdiction.

Similarly in the present case facilitation council did not have the jurisdiction to act into the matter on account of what has been detailed and discussed above.

In the light of the forgoing reasons, the instant writ petition is hereby allowed, thereby, setting aside reference letter dated 11.03.2020 (Annexure P-7) issued by respondent No. 2 referring the letter of dispute to arbitrator as well as the letter addressed to the Facilitation Council Chandigarh by respondent No. 1 and issuance of letter by the facilitation Council Chandigarh dated 25.11.2019 (Annexure P-5).

April 27, 2021
amit rana

(FATEH DEEP SINGH)
JUDGE

Whether reasoned/speaking : Yes/No
Whether reportable : Yes/No