

IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

(Original Side)

A.P.O No. 11 of 2022

With

W.P.O No. 1231 OF 2021

IA No.: GA 1 of 2022

(Through Video Conference)

Reserved on : 08.04.2022

Pronounced on: 18.05.2022

NBCC (India) Ltd..

...Appellant

-Vs-

The State of West Bengal & Ors.

...Respondents

Present:-

Mr. Arnab Chakraborty,

Ms. Pragya Bhowmick, Advocates

.... for the Appellant

Mr. Samrat Sen, Sr. Advocate,

Mr. Soumitra Mukherjee, Advocate

..... for the State of WB

Mr. Jishnu Chowdhury,

Mr. Samim Ahmed,

Md. Danish Taslim,

Mr. Shahrukh Raja,

Mr. Souradeep Banerjee,

Ms. Somashree Dey, Advocates

.....for the Respondent No. 4

**Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE**

**THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE**

Rajarshi Bharadwaj, J:

1. The instant writ petition has been filed in the Original side of this Hon'ble Court. The appellant/writ petitioner being aggrieved by and dissatisfied with the order dated 16.12.2021 as modified by another order dated 24.12.2021 passed by the Hon'ble Justice Rajasekhar Mantha in WPO No.1231 of 2021 has preferred the instant appeal.

2. The facts in a nutshell are that the appellant/writ petitioner, herein NBCC (India) Limited, a Government of India enterprise during a time period of 30.07.2015 to 19.08.2016 had issued four work orders of different values, inter alia, awarding respondent no.4, herein Saket Infra Developers Private Limited for undertaking the same. Again, on 15.09.2017, the appellant awarded the work contract of MSTC Building at New Town to respondent no.4.

3. On 19.11.2016, the respondent no.4 registered itself as a small enterprise under the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006. Amongst the five work orders undertaken by respondent no.4, two have been terminated for breach of contract by the respondent no.4 and the work has been taken up by new agencies at the risk and cost of the respondent no.4. However, two project works are still continuing and one has been completed. Furthermore, some disputes and discords have arisen between the appellant and the respondent no.4 in connection with the aforesaid five contracts out of which the MSTC Limited's project work has already culminated into a commercial suit before the Commercial Court at Rajarhat. The respondent no.4 in connection with all the aforementioned five projects, had lodged a claim before the respondent no.2, herein the Chairman of the West Bengal

State Micro and Small Enterprise Facilitation council under the MSMED Act to which the appellant objected on the ground of maintainability and also made representation for recalling of the order of reference on jurisdictional grounds. However, upon the receipt of the claim the authorities took cognizance and on failure of the conciliation sought to initiate statutory arbitration.

4. On 22.09.2021, the respondent no.2 issued a notice fixing the first date of arbitration under the said MSMED Act, referring disputes and differences to Arbitration under five several contracts with the respondent no.4 under Section 18(2) and 18(3) of the MSMED Act, 2006 which states :

“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.”

5. However, the appellant again objected on some elementary issue stating that the respondents cannot proceed under the MSMED Act and further, on the date of the awarding of the four work contracts, the respondent no.4 was not registered under the said act and thus, as per the decision of the Hon'ble Supreme Court, the MSME Authorities cannot proceed under the said Act. By a letter dated, 30.09.2021, it was further requested by the appellant to the respondents to not proceed, till the date the impugned order has not been recalled. Owing to which the respondent no.4 filed a rejoinder against the letter dated 30.09.2021.

6. The appellant/writ petitioner preferred an application under Section 226 of the Constitution of India with the following prayers:

(a) A Writ of or in the nature of Mandamus do issue directing the respondent No.2 and 3 and each one of them, their men, agents, assigns or sub-ordinates to recall the order dated 19.01.2021 (being Annexure “P-5”) and 22.09.2021 (being Annexure “P-9”) and to set aside and/or rescind the order by which they assumed the role of arbitrator in the present case for want of requisite jurisdiction;

(b) A Writ of or in the nature of Certiorari do issue commanding the respondent No.2 and 3 and each one of them, their men, agents, assigns, sub-ordinates to certify and transmit all documents pertaining to the orders dated 19.01.2021 (being Annexure “P-5”) and 22.09.2021 (being Annexure “P-9”) by which the respondent authorities have

tried to enter into an Arbitral reference under the said MSMED Act, 2006, before this Hon'ble Court so that conscionable justice may be administered by quashing the said orders and/or decisions stated in the order dated 19.01.2021 and 22.09.2021;

(c) A Writ of or in the nature of Mandamus do issue directing the respondents specifically respondent No.2 to decide on the preliminary objections regarding the maintainability and the jurisdictional issues as raised by the petitioner, before entering into any arbitral reference in the matter;

(d) A Writ of or in the nature of Prohibition do issue prohibiting the respondents especially the respondent No.2 and 3 and each one of them, their men, agents and sub-ordinates etc. from continuing with the reference of arbitration which has been sought to be commenced by the letter 19.01.2021 upon termination of the purported conciliation proceeding and further prohibit them from taking any coercive steps or passing any penal order or impose any order against the petitioner;

(e) A Writ of or in the nature of Mandamus do issue directing the respondent No.2 and 3 and each one of them to consider the jurisdictional issue and objection raised by the defendant before proceeding any further with the reference upon giving the petitioner an opportunity of personal hearing without taking the same as a proceeding before the Arbitral Tribunal;

7. After hearing all the parties, the Learned Single Judge passed his order on 16.12.2021. Thus, being aggrieved by the Order and Judgment of the Learned Single Judge as modified by the order dated 24.12.2021, the instant petition has been filed. The appellant raised a preliminary objection regarding the jurisdiction of the Facilitation council and the maintainability of the entire proceeding under the MSMED Act. From the very inception, the appellant has categorically taken its preliminary objection that no proceeding is maintainable before the Facilitation Council constituted under the MSMED Act so far as the work contract between the parties is concerned. It was contended that the MSMED Act, 2006 has no manner of application apropos the 'Work Contract' since neither section 11 nor the Public Procurement Policy, 2012 envisages a composite and distinct category of contracts such as work contract.

8. It was held in *Kone Elevator India Private Limited v. State of Tamil Nadu* reported in 2014(7) SCC 1 that "the work contract is an individual contract but, by legal fiction, is divided into two parts, one for sale of goods and the other for supply of labour and services."

9. As held in *Principal Chief Engineer vs M/S Manibhai and Bros (Sleeper)* reported in MANU/SCOR/24287/2017, The Supreme Court upheld the Gujarat High Court's judgment on the interpretation of Section 18 of the Act. The High Court held that since the Act is a special legislation and has an overriding effect, the parties governed by it are bound to follow the mechanism provided under Section 18 of the Act. It was further reiterated in *Mackintosh Burn Limited v. Micro and Small Enterprises Facilitation Council* reported in 2020 (209) AIC323.

10. The Learned Single Judge rightly observed that “without prejudice to any of the rights and contentions of the writ petitioner, the petitioner shall participate in arbitration and that the Tribunal shall decide on its jurisdiction on inter alia the questions raised by the writ petitioner before entering into other questions.”

11. We are not interfering with the order of the Learned Single Judge and the appeal is dismissed. All other applications connected thereto are also dismissed.

**(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE**

**(RAJARSHI BHARADWAJ)
JUDGE**

Kolkata

18.05.2022

PA(BS)