

OD-01

ORDER SHEET
WPO/1152/2022
IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

BALMER LAWRIE AND COMPANY LIMITED
-VS-
THE STATE OF WEST BENGAL & ORS.

BEFORE:
HON'BLE JUSTICE RAJASEKHAR MANTHA
DATE: 4TH MARCH 2022.
(Through video conference)

APPEARANCE:
Mr. D. Bhattacharjee, Adv.; Mr. R.K. Ganguly, Adv., for petitioner.
Mr. B.K. Dey, Adv.; Ms. A. Banerjee, Adv., for respondent no.5.
Mr. S. Bandopadhyay, Ld. Jr. Standing Counsel, W.B.; Mr. A.K. Nag, Adv.,
for State.

THE COURT: The writ petitioner is aggrieved by a
conciliation proceeding instituted before the WBMSME Facilitation Council
in pursuance of the provisions of Rule 4(13) of the WBMSMEFC Rules,
2016.

The brief facts relevant to the instant proceedings are that sometime in the year 2015, the writ petitioner entered into an agreement with M/s. Prism Logistics Pvt. Ltd. for transportation of goods. By reason thereof, as per the provisions of the MSMED Act 2006, the said Prism Logistics Pvt. Ltd., being the respondent no.5 herein, became a “supplier” and the petitioner became the “buyer”.

Sometime in the year 2016, the Respondent No. 5 had claimed unpaid dues from the Petitioner on a series of invoices all dated 31.05.2016. Thereafter, the respondent no. 5 obtained its registration as a micro, small and medium enterprise under the MSMED Act, 2006 on February 16, 2019. Following this, on June 29 2020, almost 4 years from the date of invoice, the Respondent No. 5 filed an application before the Facilitation Council for recovery of unpaid dues under the aforementioned invoices, being Application No. WB10E0017614/S/00001. On invocation of the dispute settlement mechanism under the Act of 2006, the Facilitation Council assumed jurisdiction and issued notice for Conciliation under the provisions of Rule 4(13) of the WBMSMEFC Rules, 2016.

The writ petitioner represented in writing before the Facilitation Council on June 29, 2020 that the Council had no jurisdiction to entertain the dispute since the respondent no. 5 was not registered as an

MSME at the time when the original contract between the writ petitioner and the respondent no.5 was entered into, i.e. in the year 2015. The Facilitation Council refused to cede jurisdiction and went on with the conciliation process. The process eventually failed. The next stage would be to refer the parties to arbitration under the said Act of 2006.

This writ petition has been filed challenging the entire proceeding before the Facilitation Council. The principal ground urged is that since the respondent no.5 was registered only in the year 2019, while the contract between the parties was entered into in the year 2015, the Facilitation Council would not have jurisdiction to receive, entertain or try the said dispute. It is also argued that the registration before the Council was taken by the respondent no.5 only with a view to enforce an earlier contract and to avail the summary dispute settlement procedure thereat.

Counsel for the petitioner would place reliance upon a decision of the Hon'ble Supreme Court in the case of **Silpi Industries Etc.–vs- Kerala State Road Transport Corporation and Another reported in 2021 SCC Online SC 439**. At paragraph 26 thereof, the Supreme Court states as follows:

“26. Though the appellant claims the benefit of provisions under MSME Act, on the ground that the appellant was also supplying as on the date of making the claim, as provided under Section 8 of the MSME Act, but same is not based on any

acceptable material. The appellant, in support of its case placed reliance on a judgment of the Delhi High Court in the case of *GE T&D India Ltd. v. Reliable Engineering Projects and Marketing*, reported in 2017 SCC OnLine Delhi 6978, but the said case is clearly distinguishable on facts as much as in the said case, the supplies continued even after registration of entity under Section 8 of the Act. 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 week 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 v. Assam State Electricity Board*, reported in (2019) 19 SCC 529, 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, by 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.”

It is clear and explicit from the aforesaid paragraph that the object and purpose of the Act is to come to the aid and assistance of medium and small enterprises, inter alia, by prescribing a dispute settlement process. The Act also provides a framework for such medium and small scale enterprises to develop their businesses without having to go through the rigours which large commercial enterprises with the wherewithal to go through the usual rigmarole would be forced into. Such large enterprises are not in need of the benefits of this Act. It is another issue that irrespective of the size of an organization, every stakeholder in the country would be inclined to avail an inexpensive dispute redressal mechanism. However, in the facts and circumstances of this case, one must bear in mind the object and purpose of the Act and the category/class of businesses and/or industries it aims to address.

It is equally clear and unequivocal from the aforesaid decision and interpretation given by the Hon'ble Supreme Court, that the pre-requisite for a dispute resolution mechanism to apply, and/or the pre-requisite for availing the dispute resolution mechanism under the MSMED

Act , 2006, by an enterprise, would be to notify the other party that in the event of any dispute, the mechanism under the Act of 2006 would be binding on the other side.

Admittedly, in the instant case, when the contract was entered into between the parties in the year 2015, there was no notice and/or agreement on the 2006 Act being the dispute resolution mechanism. There would have been deemed notice to the writ petitioner had the respondent no.5 been registered under the Act in the year 2015 itself. It is a choice that would have to be made, and a consistent decision that would have to be taken by the writ petitioner, when entering into the contract in the first place with the knowledge that the same would be governed by the provisions of the 2006 Act.

In the instant case, the writ petitioner had no notice, information or intimation that the dispute settlement mechanism under the Act of 2006 would govern the relations between the parties. Such notice and concurrence thereto is a vital ingredient of any contract under the laws of the land.

Mr. Sirsanya Bandopadhyay, learned Advocate appearing for the State, has aggressively defended the jurisdiction of the Council. It is argued, and such argument is agreed to by the learned counsel for the private

respondent No. 5, that the provisions of the Act of 2006 are beneficial in nature and that it would assist an expeditious dispute resolution between the writ petitioner and the private respondent and such expeditious dispute resolution would be in the interest of all the parties. It is also argued that the writ petitioner, by reason of submission to conciliation, is estopped from contending that the arbitration mechanism thereafter is without jurisdiction.

It is also argued with reference to a circular and/or clarification of the Ministry of MSME, New Delhi, dated August 1, 2007, that it had permitted the registered enterprises to bring any dispute before the Council in respect of contracts entered into even prior to its registration as well. Such permission is inferred, since the enterprises have been given leverage to register themselves expeditiously even after 180 days of coming into force of this Act. This, according to Mr. Bandopadhyay, must be read and applied to permit even the private respondent no.5 to avail the benefits of the Act notwithstanding the fact that the contract was entered into much prior to its registration as an MSME. It is also argued that the arbitration mechanism must be read as a continuation of the conciliation process.

In view of the interpretation given in the preceding paragraphs, this Court is of the view that the arguments of the State cannot be accepted. The benefits of the legislation may indeed favour the medium and small

enterprises. It would, however, be improper, if the liabilities under the MSME Act are saddled onto a party who had no notice whatsoever of the likelihood of the application of the 2006 Act. The parties cannot be allowed to change the terms of the contract and/or alter their positions, contrary to their agreements, after the contract has been entered into, given effect to and concluded.

For the reasons stated hereinabove, the writ petition succeeds. The reference being Application No.WB14E0000102/S/000/12 shall stand quashed and set aside. In the facts and circumstances of the case, there shall be no order as to costs.

Since a pure question of law has been decided herein, this Court has not chosen to call for any affidavit. Since affidavits have not been called for by this Court, the allegations on the merits of the case shall not be deemed to have been admitted by the respondents.

Urgent photostat certified copies of this order, if applied for, be supplied to the parties subject to their compliance with all the requisite formalities.

(RAJASEKHAR MANTHA, J)

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