

IN THE HIGH COURT OF ORISSA AT CUTTACK

**W.P.(C) No.5935 Of 2022
(Through hybrid mode)**

M/S. Bridge and Roof Co. (India) Ltd., Kolkata

Petitioner

Mr. Shiv Shankar Banerjee, Advocate
Mr. Jyotirmaya Prasad Behera, Advocate
-versus-

State of Odisha and others

Opposite Parties

Mr. A.K.Sharma, AGA

Mr. Gouri Mohan Rath, Advocate
Mr. S.S.Padhy, Advocate
for O.P.4

CORAM: JUSTICE ARINDAM SINHA

**ORDER
22.04.2022**

**Order No.
03.**

1. Mr. Banerji, learned advocate appears on behalf of petitioner and submits, his client seeks relief of quashing MSEFC Case no.68 of 2021 (M/s. Adarsh Nobel Corporation Ltd. v. Bridge & Roof Construction Company India Ltd.), pending before the Council. He submits, the contract was entered into by opposite party no.4 with his client on 11th June, 2010, prior to its registration as a small enterprise, pursuant to date of filing on 18th December, 2015. He relies on judgment of Supreme Court in **Silpi Industries etc. v. Kerala State Road Transport Corporation** available at **AIR Online 2021 SC 993**,

paragraph-26. He relies on another judgment of the Supreme Court in **M/s. Vaishno Enterprises vs. Hamilton Medical AG** available at **AIR online 2022 SC 386**. He draws attention to paragraphs 8.2 and 8.3 in the print.

2. On leave obtained he files additional affidavit disclosing, inter alia, minutes/order dated 23rd March, 2022 passed by the Council. He points out that the Council, being the arbitral tribunal under Micro, Small and Medium Enterprises Development Act, 2006, consists of four members. In terms of section 18, the arbitration under the Act has applicable to it, provisions of the Arbitration and Conciliation Act, 1996. The 1996 Act clearly mandates composition of the tribunal to be of uneven number of members.

3. Mr. Rath, learned advocate appears on behalf of opposite party no.4 (supplier). He submits, law declared by the Supreme Court is for applicability of the 2006 Act on dates of supply, as also relevant for the purpose. For this he also relies on **Silpi Industries** (supra) and **Shanti Conductors (P) Limited vs. ASSAM SEB**, reported (2019) 19 SCC 529, paragraph 61.

4. He submits, in paragraph 26 of **Silpi Industries** (supra) there was reference to view taken by the Delhi High Court in **GE T and D**

India Limited v. Reliable Engineering Projects and Marketing.

The Supreme Court did not overrule the view taken but distinguished it as not applicable on facts. This was because in **Silpi Industries** (supra), facts were that supplies had also been made prior to the registration. In **Shanti Conductors** (supra), he relies on the following passage in paragraph 61, reproduced below.

“ 61. ... When the date of agreement is not referred as material or incidence for fastening the liability, by no judicial interpretation the said date can be treated as a date for fastening of the liability. The 1993 Act being beneficial legislation enacted to protect small scale industries and statutorily ensure by mandatory provision for payment of interest on the outstanding money, accepting the interpretation as put by the learned counsel for the Board that the day of agreement has to be subsequent to the enforcement of the Act, the entire beneficial protection of the Act shall be defeated. The existence of statutory liability depends on the statutory factors as enumerated in Section 3 and Section 4 of the 1993 Act. Factor for liability to make payment under Section 3 being the supplier supplies any goods or renders services to the buyer, the liability of buyer cannot be denied on the ground that the agreement entered into between the parties for supply was prior to the 1993 Act. To hold that liability of buyer for payment shall arise only when agreement for supply was entered into subsequent to enforcement of

the Act, it shall be adding words to Section 3 which is not permissible under the principle of statutory construction.”

5. On constitution of the arbitral tribunal he submits, the objection is premature. It is just that failure of conciliation has been recorded and the arbitration is yet to commence. According to him the tribunal will consist of such members as is possible under provisions in the 1996 Act.

6. Relevant extracts from **Silpi Industries** (supra) and **Shanti Conductors** (supra) have been reproduced above. The declaration of law relating regarding agreement/contract and supplies made before registration under the 2006 Act is that provisions thereunder are not available to be invoked by the supplier. In **Shanti Conductors** (supra), Interest on Delayed Payment to Small Scale and Ancillary Undertakings Act, 1993 was under consideration. The facts were that the agreement was executed prior to commencement of the 1993 Act. The Supreme Court said in the passage from paragraph 61 reproduced above, the 1993 Act being beneficial registration, operation thereof could not be resisted on contention that the Act had not commenced operation when the agreement was entered into. The Court said further that existence of statutory liability, as enumerated under sections 3 and

4 of the 1993 Act, are to be taken into consideration, to prevent the buyer from denying the benefit of the Act to the supplier, on the ground that the agreement was prior to commencement of it.

7. In **Vaishno Enterprises** (supra) facts were that the buyer was a foreign company. The agreement with the Indian supplier was executed on 24th August, 2020. Registration under the 2006 Act was obtained by the supplier on 28th August, 2020. In those facts the Court said in paragraph 8.2 (AIR on line print) as reproduced below.

“8.2. It is not in dispute that the contract/agreement between the appellant and the respondent has been executed on 24.08.2020. Therefore, the laws of India applicable at the time of contract/agreement shall be applicable and therefore the parties shall be governed by the laws of India prevailing/applicable at the time when the contract was executed. It is admitted position that the date on which a contract/agreement was executed i.e. on 24.08.2020 the appellant was not registered MSME. Considering the relevant provisions of the MSME Act more particularly Section 2(n) read with Section 8 of the MSME Act, the provisions of the MSME Act shall be applicable in case of supplier who has filed a memorandum with the authority referred to in Sub-section (1) of Section 8. Therefore, the supplier has to be a micro or small enterprise registered as MSME, registered with any of the authority mentioned in sub-section (1) of Section 8 and Section 2(n) of the MSME

Act. It is admitted position that in the present case the appellant is registered as MSME only on 28.08.2020. Therefore, when the contract was entered into the appellant was not MSME and therefore the parties would not be governed by the MSME Act and the parties shall be governed by the laws of India applicable and/or prevailing at the time of execution of the contract. If that be so the Council would have no jurisdiction to entertain the dispute between the appellant and the Respondent No.1, in exercise of powers under Section 18 of the MSME Act. Therefore, in the aforesaid peculiar facts and circumstances of the case, more particularly the terms of the Agreement, the order passed by the learned Single Judge confirmed by the Division Bench holding the Council would have no jurisdiction with respect to Respondent No.1 is not required to be interfered with."

8. Between 24th and 28th August, 2020 there was no change in Indian law, made applicable by the agreement between parties therein. In the circumstances, **Vaishno Enterprises** (supra) saying that therefore, the supplier has to be a micro or small enterprises registered as MSME, registered with any of the authority mentioned in sub-section(1) of section 8 and section 2(n) of the Act, it being admitted position that appellant was registered only on 28th August, 2020, therefore, when the contract was entered into, appellant was not MSME and therefore, the parties would not be covered by the 2006

Act, appears to be the view taken on applicability of the Act as can be invoked by a supplier.

9. Shanti Conductors (supra) in interpreting the 1993 Act to be beneficial legislation, (subsequently repealed by the 2006 Act), was delivered by stronger-Bench, than the decisions in **Silpi Industries** (supra) and **Vaishno Enterprises** (supra). However, it was not on the 2006 Act. **Vaishno Enterprises** (supra) was delivered after **Silpi Industries** (supra) and referred to therein. By **Vaishno Enterprises** (supra) the Court also left the question of whether in a contract of supply between a foreign buyer and an Indian buyer, the 2006 Act would be applicable in view of sub-section (4) in section 18, to be decided in an appropriate case.

10. This Court will not venture to take a view in situation of the contract, entered into in year 2010 and the supplier having obtained registration 5 years thereafter and supplies whether or not were subsequently made. Mr. Rath draws attention to the rejoinder filed by petitioner, wherein there is mention that on 10th May, 2018 ‘mechanical completion certificate’ in favour of opposite party no.4, was issued.

11. Regarding the objection on composition of the Council as

arbitral tribunal, it appears from order/minutes dated 23rd March, 2022 that there was a sitting held on 20th January, 2022 and the Council observed that conciliation between the parties had failed. There was direction to list the matter in the next sitting for arbitration. The sitting was held on 23rd February, 2022, pursuant to notice. The order made was of adjournment in view of production, before the Council, of order dated 14th March, 2022 made herein. What is clear is that the Council, consisting of four members, commenced the arbitration sitting as appears from minutes/order dated 23rd March, 2022. This is not permissible under the 1996 Act and no exception to the contrary has been provided in the 2006 Act, for there to be overriding effect on the provision on composition of arbitral tribunals.

12. Following **Vaishno Enterprises** (supra) there should and will be interference, in quashing the MSEFC Case no.68 of 2021, pending in office of the Director of Industries, Odisha, Cuttack.

13. The writ petition is disposed of.

(Arindam Sinha)
Judge

Prasant