IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 2 OF 2022

M/s. Nyasa Enterprise ...Petitioner
Vs.
M/s. Enrich Spaces LLP ...Respondent

Mr. Sharad Bansal a/w. Mr. Ritesh K. Jain a/w. Mr. Krishkumar A. Jain a/w. Ms. Drishti Jain (Sanghvi) i/b. MJ Juris, for the Petitioner.
Mr. Sugandh Deshmukh, for the Respondent.

CORAM : MANISH PITALE, J.
DATE : 15 NOVEMBER 2022

P.C.

. This petition is filed under Section 11 of the Arbitration and Conciliation Act, 1996, for appointment of an arbitrator for resolving the disputes that have arisen between the parties.

2. Mr. Sharad Bansal, the learned counsel appearing for the petitioner has invited attention of this Court to the contents of the petition and the documents filed therewith to contend that parties have entered into leave and license agreement on 30/12/2014 whereby the respondent had licensed the subject premises to the petitioner for a period of 60 months from

1/11/2014 to 31/10/2019. A sum of Rs.19,27,800/- was deposited by the petitioner with the respondent towards security deposit under the said agreement. On 31/10/2019, the agreement expired by efflux of time and the parties entered into another agreement, renewing the license for the said premises for a period of one year i.e. from 1/11/2019 to 31/10/2020. The security deposit made by the petitioner in the context of the earlier agreement was claimed to have been carried over to the subsequent agreement.

3. In the light of the above, due to Covid 19 Pandemic and consequent Lockdown, on 16/5/2020, the petitioner sent an email to the respondent stating that it was no longer possible for him to pay the license fee and therefore, the petitioner terminated the agreement. On 20/5/2020, the respondent sent a reply to the said email stating that the notice period would expire three months from the date of the email sent by the petitioner i.e. on 16/8/2020.

4. On 1/9/2020, the petitioner sent an email to the respondent seeking refund of the security deposit and for removal of the stock of the petitioner lying in the premises. The respondent sent a communication dated 14/9/2020, refusing to refund the security deposit.

5. In the light of the dispute that arose between the parties, the petitioner invoked the arbitration clause forming part of the aforesaid agreement, by issuing notice on 7/2/2021.

6. On 12/3/2021, the respondent sent a reply disputing the claim of the petitioner. Thereafter, the petitioner received notice dated 25/11/2021 sent by the Micro and Small Enterprises Facilitation Council, under the provisions of the Micro, Small & Medium Enterprises Development Act, 2006 (hereinafter referred to as a MSMED Act), intimating the petitioner that the respondent had filed petition under Section 18(1) of the MSMED Act for arbitration of the dispute. The petitioner is contesting the jurisdiction of the said Council in the said proceeding under the provisions of the MSMED Act.

7. On 18/2/2022, the petitioner filed the present petition.

8. On notice being issued, the respondent appeared through counsel and filed affidavit-in-reply. It was submitted that since the respondent was not registered under the MSMED Act, the arbitration would proceed only before the aforesaid Council under the provisions of the said Act and that the present petition deserved to be dismissed.

9. The learned counsel appearing for the petitioner invited

attention of this Court to the arbitration clause in the agreement between the parties. He further submitted that the admitted position on facts of the present case demonstrated that the respondent was registered under the provisions of MSMED Act, not only after the execution of the license agreement between the parties, but also after the period of the agreement was over. It was submitted that therefore, the provisions of the MSMED Act would not apply to the facts of the present case and present petition deserved to be allowed under section 11 of the said Act. The learned counsel relied upon invocation of the arbitration clause by communication dated 17/1/2021 and it was submitted that since the respondent No.1 was disputing the claim of the petitioner and there was no agreement upon appointment of sole arbitrator in terms of the arbitration clause, this Court would be entitled to exercise jurisdiction to appoint the sole arbitrator.

10. The learned counsel for the petitioner has placed reliance on the judgments of Supreme Court in the case of *(i) Intercontinental Hotels Group (India) Private Limited Vs. Waterline Hotels Private Limited* [1] *(ii) Silpi Industries Etc. Vs. Kerala State Road Transport Corporation and Anr.*[2] *(iii) Vaishno Enterprises Vs. Hamilton Medical AG and Anr.*[3] *(iv) Nitesh Estate Ltd. Vs. Micro and Small Enterprises Facilitation Council*

1 *(2022) 7 SCC 662*

2 *2021 SCC Online SC 439*

3 *2022 SCC Online SC 355*

of Haryana and Ors.[4] *(v) Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd. (Unit 2) and Anr.*[5]

11. On the other hand, Mr. Sugandh Deshmukh, the learned counsel appearing for the respondent submitted that in the present case, the dispute was not restricted to the period of license expiring in October 2020 but also in respect of the period beyond the same. Reliance was placed on the response sent on behalf of the respondent to the invocation of the arbitration clause on behalf of the petitioner. It was submitted that even if the judgments on which reliance was placed on behalf of the petitioner were required to be taken into consideration, particularly, the recent judgment in the case of *Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd. (supra)*, the jurisdictional issue had to be decided by the Facilitation Council as the Arbitral Tribunal under the MSMED Act particularly when such objection was already raised by the petitioner before the said Council. The narration of events and the fact that the respondent stood registered under the MSMED Act on 17/12/2020 was not disputed on behalf of the respondent.

12. Heard learned counsel for the rival parties and perused the material placed on record. There is no dispute about the fact that

4 *2022 SCC Online SC 1198*

5 *2022 SCC Online SC 1492.*

the agreement in question was for the period between 1/11/2019 to 31/10/2020. The material placed on record shows that according to the petitioner, the agreement was terminated on 16/5/2020 and that the notice period expired on 16/8/2020. The documents placed on record also indicate that the petitioner is deemed to have handed over possession of the said premises to the respondent on 16/8/2020, when the notice period expired. There is also no dispute about the fact that certain stock of the petitioner is lying in the premises in question and that the respondent has disputed the claim of the petitioner as regards the refund of the security deposit.

13. The material on record also shows that the petitioner did invoke the arbitration clause on 7/2/2021, in response to which the respondent disputed the claim of the petitioner. The documents placed on record also indicate that admittedly the respondent stood registered under the provisions of MSMED Act on 17/12/2020, which is a date after the period of the license agreement expired on 31/10/2020.

14. The Supreme Court in the case of *Silpi Industries Etc. Vs. Kerala State Road Transport Corporation (supra)*, in the context of the applicability of the MSMED Act for arbitration before the Facilitation Council, held that if the provisions of the MSMED Act are to apply to an arbitration proceeding before the

Facilitation Council, the party seeking to invoke the provisions of the said Act has to be registered on the date of entering into the contract in question. It is also held therein that if there is supply of goods / services beyond the point in time when the entity is registered under the MSMED Act, the provisions of the said Act may apply in the facts and circumstances of the case, only prospectively after the registration of the entity under the provisions of the MSMED Act. The relevant paragraph of the said judgment reads as follows.

> *"26. Though the appellant claims the benefit of provisions under MSMED 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 MSMED 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, 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 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. vs. 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, 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."*

15. The aforesaid position of law has been followed by the Supreme Court in subsequent judgments in the case of *Vaishno Enterprises Vs. Hamilton Medical AG and Nitesh Estate Ltd Vs. Micro and Small Enterprises Facilitation Council of Haryana (supra)* and aforesaid recent judgment in the case of *Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd. (supra).* Since the learned counsel for the parties relied upon the relevant portion of the aforesaid recent judgment, it would be appropriate to quote the said paragraph, which reads as follows.

"33. Following the above-stated ratio, it is held that a party who was not the 'supplier' as per Section 2(n) of

the MSMED Act, 2006 on the date of entering into the contract, could not seek any benefit as a supplier under the MSMED Act, 2006. A party cannot become a micro or small enterprise or a supplier to claim the benefit under the MSMED Act, 2006 by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods or rendering services. If any registration, is obtained subsequently, the same would have the effect prospectively and would apply for the supply of goods and rendering services subsequent to the registration. The same cannot operate retrospectively. However, such issue being jurisdictional issue, if raised could also be decided by the Facilitation Council / Institute / Centre acting as an arbitral tribunal under the MSMED Act."

16. This Court has considered the position of law laid down by the Supreme Court in the aforesaid judgments. It is clear from the ratio laid down in the aforesaid judgments that the party seeking invocation of arbitration proceedings before the Facilitation Council, has to be registered under the provisions of the MSMED Act, on the date on which the contract between the parties is executed and that if registration is obtained subsequently, the same would have effect prospectively.

17. This Court finds that in the present case, undisputedly, the petitioner had invoked the arbitration clause by issuing notice dated 7/2/2021.

18. The notice issued by the Facilitation Council under the provisions of the MSMED Act is dated 25/11/2021 and there is no doubt about the fact that the respondent invoked the provisions of the MSMED Act after the petitioner had already invoked arbitration clause under the aforesaid agreement. In the facts and circumstances of the present case, this Court is of the opinion that as per the law laid down by the Supreme Court, referred to hereinabove, the present petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, is clearly maintainable and there is no substance in the contentions raised on behalf of the respondent. In the present case, there is no dispute between the parties on the fact that arbitration clause in the subject agreement reads as follows.

> *"(h) In case of any dispute, the parties shall try to settle it amicably at the first instance, if the parties do not arrive at amicable settlement, then the dispute shall be referred to the Sole Arbitrator and his award shall be final. The appointment of the arbitrator and the procedure of arbitration shall be governed by the Arbitration and Conciliation Act, 1996. The cost of such arbitration proceedings shall be borne equally. The*

award shall be in writing and in English language. The place of Arbitration shall be at Pune."

19. There is also no dispute about the fact that the petitioner had invoked arbitration clause by issuing notice dated 7/2/2021 and that the petitioner disputed the claim made by the respondent. Since the parties were unable to agree on the appointment of the sole arbitrator, this Court can certainly exercise jurisdiction under Section 11 of the said Act.

20. At this stage, the learned counsel for the rival parties request this Court for appointment of a sole arbitrator.

21. It is significant that since the arbitration clause specifies the seat / place of arbitrators at Pune, it would be appropriate to appoint an arbitrator who is available at Pune.

22. Accordingly, Justice S. R. Sathe, retired Judge of this Court, is appointed as the sole arbitrator for resolution of the dispute between the parties. The details of the learned arbitrator are as follows:

The Hon'ble Shri. Justice S. R. Sathe
A-802, Ruturang Apartment, Behind
Paranjape School, Kothrud, Pune – 411 038.
Tel.: 020-25396407

23. The learned arbitrator is requested to send his consent and disclosure statement as per Section 11(8) and 12(1) of the aforesaid Act, within four weeks to the Registrar (Judicial) of this Court. The fees of the learned arbitrator shall be as per schedule IV to the said Act.

24. The parties to communicate this order to the learned arbitrator immediately.

25. All contentions of the parties are kept open.

26. The petition stands disposed of, in aforesaid terms.

MANISH PITALE, J.