IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 19-10-2022

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

W.P.No.27564 of 2013

S.Gopalsamy ... Petitioner

-vs-

1.Micro & Small Enterprises Facilitation Council,
Coimbatore Region,
rep.by its Chairman,
Coimbatore-1.

2.K.Meenakshi ... Respondents

Petition under Article 226 of the Constitution of India, praying for issuance of a writ of certiorari to call for the records of the first respondent pertaining to its order dated 11.06.2013, in Case No.M&SEFC/CBER/3/2013, and quash the same.

For Petitioner : Mr.Sam Jayaraj Houston,
for M/s.Sarvabhauman Associates.

For Respondent 1 : Mr.A.Selvendiran,
Special Government Pleader.

For Respondent 2 : No appearance

ORDER

This Writ Petition has been filed challenging the award passed by the Micro & Small Enterprise Facilitation Council, first respondent herein, directing the petitioner to pay a sum of Rs.8,57,000/- with compound interest for pending bills with appointed due date of 45 days from Invoice date, commencing from 19.11.2010, at three times of the Bank rate notified by the Reserve Bank of India.

2. The brief facts leading to the filing of this Writ Petition are as follows :

The petitioner is said to have entered into a contract with the second respondent for construction of a residential house on 19.11.2010. An application was filed by the second respondent with the first respondent Council to the effect that the petitioner had not cleared the entire amount spent by the second respondent towards the construction of the house. Therefore, the matter was taken cognizance of by the first respondent Council. After hearing the parties, the Council proceeded to pass an award/order directing the petitioner to pay a sum of Rs.8,57,000/- with compound interest with monthly rests at three times of the Bank rate notified by the Reserve Bank of India. Challenging the said order, this Writ Petition has been filed.

3. Despite the name having been printed in the cause list, none appeared for the second respondent.

4. Learned counsel for the petitioner would submit that the order passed by the first respondent Council is without jurisdiction, as the very dispute itself does not fall within the ambit of Micro Small and Medium Enterprises Development Act,2006, in short, "the Act". It is his contention that the alleged contract, though was denied by the petitioner, was executed on 19.11.2010 and, at the relevant point of time, the second respondent was not registered under the Act, whereas they were registered only on 23.01.2012 i.e., after two years of the agreement. According to him, the decision of the Council is not maintainable. In other words, it is his contention that to claim any benefit under the Act, one of the prerequisites is the registration of membership, which was not done. In the absence of any registration under the Act, the benefits under the Act cannot be extended or the proceedings be initiated. Therefore, it is his contention that if any award is passed in a dispute between the parties, in which one is registered as a member under the Act, such award can be challenged under Section 34 of the Arbitration and Conciliation Act, whereas the Council in this case has no jurisdiction and, therefore, he has filed this Writ Petition, which is very well maintainable.

5. Learned counsel for the first respondent would submit that the petitioner appeared before the Council and suffered an award; this Writ Petition is not maintainable and that the impugned award has to be set aside only in the manner known to law. He would also submit that when there is a specific provision provided under Section 19 of the Act, the Writ Petition is not maintainable. Hence, he opposed this Writ Petition.

6. I have heard the learned counsel for the parties and also gone through the entire records.

7. In normal circumstances, an award is passed following the procedure contemplated under the Act, after conciliation. This Court would not have entertained this Writ Petition and directed the writ petitioner to file an application to set aside the award under Section 34 of the Arbitration and Conciliation Act, whereas, in this case, the very jurisdictional issue is involved as to whether the Council had jurisdiction to entertain such a reference.

8. It is relevant to note that the object of the MSMED Act is to facilitate the growth of small scale industrial sector and group or group companies and to have a

vibrant appropriate legal framework for the above sectors to facilitate its growth and development. The benefit conferred under the Act is a compounded interest at three times as notified by the Reserve Bank of India. That apart, to challenge the award passed by the Council, the prerequisite condition is a deposit of 75% of the amount of the award as per Section 19 of the Act. Therefore, any proceeding under the Act has to be strictly in accordance with the provisions of the Act. Section 8 of the Act makes it clear that any person before commencement of the Act established any business shall within 180 days from the commencement of the Act file a Memorandum in accordance with the provisions of the Act. As per Section 2 (n) of the Act, "supplier" means, micro or small enterprise, which has filed a Memorandum with the authority referred to under sub-section (1) of Section 8. Therefore, the above said provision makes it very clear that in order to get any benefit under the Act as a supplier, the industry ought to have been registered under Section 8(1) of the Act. So, only the supplier, who comes under the definition of "supplier" as defined under Section 2 (n) of the Act, is entitled to claim benefit under the Act.

9. The dispute raised in this case relates to the agreement, said to have been executed on 19.11.2010. At the relevant point of time, the second respondent had not submitted any Memorandum as per Section 8 (1) of the Act. The typed set of papers filed in this case indicates that the second respondent was registered with the

Department of Industry and Commerce, Government of Tamil Nadu, only on 23.01.2012. Therefore, on the date of contract, the industry or supplier was not registered as MSME as required under the provisions of the Act. In such a scenario, the person, who not come within the ambit of the Act at the time of contract, will not be entitled to claim benefit under the Act. In this regard, it is useful to refer to a judgment of the Apex Court in Silpi Industries v. Kerala State Road Transport Corporation in Civil Appeal No.1570-1578 of 2021, wherein the Apex Court has held that when the supply is made prior to the registration of the supplier, to seek benefit of provisions under the MSMED Act, the seller should have registered under the provisions of the Act as on the date of entering into the contract. It was also held therein that in any event for the supplies pursuant to the contract made before the registration of the unit under provisions of MSMED Act, no benefit can be sought by such entity. The relevant portion of the said judgment of the Apex Court, which was referred to by this Court in Bharat Heavy Electricals Ltd. v. Vector Engineering Company, 2021 SCC OnLine Mad 11701, is as under :

> *"11. In this regard it is useful to refer the judgment of the Apex Court in Civil Appeal No.1570-1578 of 2021, M/s.Silpi Industries etc. Vs. Kerala State Road Transport Corporation and another Vs. M/s.Khyaati Engineering Vs. Prodigy Hydro Power Ltd., the Apex Court has held that when the supply is made prior to the registration of the supplier, to seek benefit of provisions under Micro Small and Medium*

Enterprises Development Act, the seller should have registered under the provisions of the Act as on the date of entering into the contract and further held that in any event for the supplies pursuant to the contract made before the registration of the unit under provisions of Micro Small and Medium Enterprises Development Act, no benefit can be sought by such entity, as contemplated under Micro Small and Medium Enterprises Development Act and it has been held as follows :

> *"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. V. 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, bu 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."

10. Considering the above judgment of the Apex Court, this Court has also held that when the supply is made prior to the registration of the supplier, one cannot take benefit under the Act. This Court further held that mere registration at the another point of time will not entitle the supplier or seller to claim any benefit under the Act.

11. In Nitesh Estates Ltd. v. Micro and Small Enterprises Facilitation Council of Haryana, 2022 SCC OnLine SC 1198, the Apex Court set aside the order of the writ court, by dismissing the writ, challenging the notices issued under the MSMED Act. The Apex Court held that when jurisdiction itself was not with the Council, issuance of notices was not maintainable and accordingly quashed the same. Similarly, in Vaishno Enterprises v. Hamilton Medical AG, 2022 SCC OnLine SC 355, the Apex Court held that on the date of contract when the supplier was not registered as MSME and registration was done after the contract, the Act would not apply.

12. Considering the above legal position, when the second respondent was not registered under the Act, their claim ought not to have been entertained by the Council. The Council, in fact, had no jurisdiction to entertain such a claim. On perusal of the impugned order of the Council, it is seen that there is no discussion whatsoever in this regard to find out whether the second respondent would come under the category of MSME and further the order also does not show any procedure contemplated under Section 18 of the Act. Section 18 mandates that conciliation has to be conducted either by the Council or by the assistance of any other institution. Even to conciliate, the proceedings, as contemplated under Sections 65 to 81 of the Arbitration and Conciliation Act,1996, shall apply. Only in the event the conciliation fails, the arbitration proceedings will commence, where also, the proceedings have to be conducted in accordance with the provisions of the Arbitration and Conciliation Act. The impugned order does not indicate if any attempt has been made to follow the proper procedure either to conciliate or to arbitrate, whereas, the order has been passed mechanically directing the writ petitioner to pay the amount. As the very jurisdiction itself is not with the Council to entertain the claim as discussed above, this Court is of

the view that this Writ Petition is very well maintainable. As such, the impugned order stands quashed.

13. Writ Petition is allowed. No costs. Consequently, the connected M.P.Nos.1 of 2013 and 1 of 2014 are closed.

19-10-2022

Index : Yes/No
Internet : Yes/No
Speaking/Non-speaking Order

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To

Micro & Small Enterprises Facilitation Council,
Coimbatore Region,
rep.by its Chairman,
Coimbatore-1.

N.SATHISH KUMAR,J.

dixit

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