

**In The High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No.2896 of 2022

**Hindustan Petroleum Corporation Limited and another
VS
The West Bengal State
Micro, Small Enterprises Facilitation Council and others**

For the petitioners	:	Mr. Kishore Dutta, Mr. P. Mukherjee, Mr. Deepak Agarwal
For the MSME Council	:	Mr. Soumitra Mukherjee
For the private respondent	:	Mr. Subir Paul
Hearing concluded on	:	13.06.2023
Judgment on	:	27.06.2023

The Court:

1. Shorn of unnecessary details, the respondent no.3 is a Micro, Small and Medium Enterprise (MSME). A contract was entered into between the petitioner no.1 and respondent no.3 by virtue of which the respondent no.3 is to supply the components and erect pipeline and accessories at the Hazaribag LPG Plant of the petitioner no.1.
2. There arising a dispute between the parties regarding such transaction, the respondent no.3 approached before the West Bengal State Micro, Small Enterprises Facilitation Council (hereinafter referred to as "the Council") under Section 18 of the Micro, Small and

Medium Enterprises Development Act, 2006 (for short, “the MSME Act”) for resolution.

- 3.** A question as to maintainability of the said proceeding was raised by the petitioner no.1. Initially, the Council proceeded to decide the matter without deciding the question of maintainability. As such, the petitioners moved a writ petition wherein a co-ordinated Bench directed that the matter may be heard afresh on the question of maintainability. In compliance with such direction, the Council passed a reasoned order dated October 14, 2022, holding that the Council does have jurisdiction to adjudicate the matter in case of contract between the parties having Arbitration Clause as well as in case of Works Contracts.
- 4.** The moot questions which have arisen herein are whether the transaction-in-question is a “Works Contract” and whether the Council has jurisdiction to take up the dispute between the parties under Section 18 of the MSME Act.
- 5.** Both sides have cited several judgments, which will be presently discussed.
- 6.** Learned senior counsel appearing for the petitioner has primarily argued, by placing reliance on certain definitions in Section 2 of the MSME Act, that the present case does not fall within the ambit of the said Act.
- 7.** In Section 2(d), “buyer” means whoever buys any goods or receives any services from a supplier for consideration.

8. In Clause (f) of Section 2, “goods” means every kind of movable property other than actionable claims and money.
9. Clause (n), sub-clause (iii) stipulates that “supplier” means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of Section 8, and includes any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises.
10. Learned senior counsel contends that in terms of the decision of the Supreme Court in *Kone Elevator India Private Limited Vs. State of Tamil Nadu*, reported at (2014) 7 SCC 1, rendered by a five-Judge Bench, it was held that after the amendment in the Constitution and Introduction of Article 366(29-A), the question as to whether a Works Contract falls within the category of an agreement for sale of goods has been settled. In paragraph 46 of the said judgment, the Supreme Court stipulated the various components which are culled out from the discussion therein, which bring the term “Works Contract” within the sweep of all genres of Works Contract, not to be narrowly construed to cover one species of contract to provide for labour and service alone.
11. It was further observed that the Works Contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services. The concept of “dominant nature test” or “degree of intention test” or “overwhelming

component test” for treating a contract as a Works Contract is not applicable, it was held. The Supreme Court further observed that once the characteristics of works contract are met in a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract.

12. The contract as to installation of a lift and consequential supply of its parts was held to be a works contract in the said judgment.
13. Learned senior counsel further submits that, following the judgment of the Supreme Court, several High Courts have held that a works contract does not fall within the purview of the MSME Act. Six such judgments are cited by learned Senior Counsel, the first being *Rahul Singh Vs. Union of India and others* [2017 SCC OnLine All 3579]; the second, a Division Bench judgment of the Bombay High Court in *Sterling and Wilson Private Limited Vs. Union of India* [AIR 2017 Bom 242]; the third, a Division Bench judgment of the Gujarat High Court in *Samvit Buildcare Private Limited Vs. Ministry of Civil Aviation* [MANU/GJ/0990/2018]; the next, *P.L. Adke Vs. Wardha Municipal Corporation* [MANU/MH/2179/2021]; the fifth, a Single Judge decision of the Allahabad High Court in *Rashtriya Ispat Nigam Limited Vs. Union of India* [2022 SCC OnLine AP 970] and the last, a Single Judge decision of the Bombay High Court in *National Textile Corporation Ltd. Vs. Elixir Engineering Pvt. Ltd. and another* [2023 SCC OnLine Bom 653].

14. While controverting such submissions, learned senior counsel for the respondent no.3/supplier cites *Bhaven Construction Vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited and another*, reported at (2022) 1 SCC 75, wherein it was held that the question, whether an agreement is a works contract or not, is one that requires contractual interpretation and is a matter of evidence, especially when both parties have taken contradictory stands regarding the issue, which will not be generally done in the writ jurisdiction.
15. In the next judgment cited by the respondent no.3, that is, *Dalapathi Constructions Vs. State of Andhra Pradesh*, reported at AIR 2022 AP 150, a learned Single Judge of the Andhra Pradesh High Court was of the opinion that there is nothing in the MSME Act which provides that the registration for a particular activity will render an enterprise liable not to be regarded as a micro, small or medium enterprise for any other activity. Once registered, the status of the enterprise is that of a registered enterprise under the MSME Act and all the provisions of the MSME Act have to apply with full force.
16. By citing another judgment of a co-ordinate Bench of this Court in *Marine Craft Engineers Private Limited Vs. Garden Reach Shipbuilders and Engineers Limited*, in AP NO.831 of 2018, it is argued that whether the supplier was registered as an MSME on the date of the contract would not disqualify the supplier from making reference to the Council under Section 18 for recovery of outstanding amounts as long as the amounts claimed are relatable to goods supplied or services rendered after the date of registration of the supplier under

Section 8(1) of the Act. If the supplier fulfils the aforesaid condition and makes a reference, the Council steps in as the only and exclusive forum to decide the reference under the provisions of the MSME Act.

17. Learned counsel for the petitioner no.1-Council primarily places reliance on the correct interpretation of *Kone Elevator (supra)* in the context that the same was passed in respect of taxation statutes and has no bearing in the context of the MSME Act. It is further argued that the MSME Act is a beneficial legislation to facilitate fair competition for MSMEs in an otherwise unfair business environment where large competitors have an uneven advantage. As such, the same should be liberally construed.
18. The expressions “goods” and “services” have been disjuncted by the conjunction “or” in several places, and, in the definition under Section 2(n), the “and” should be read in such manner so as to cover all agreements for supply of goods and services.
19. Hence, it is contended that the Council was justified in entertaining the dispute and holding that it has jurisdiction to decide it.
20. Upon hearing learned counsel, the first question which falls for consideration is whether the present agreement can be termed as a ‘works contract’ and whether the writ court has the jurisdiction to decide such issue.
21. It is well-settled that if no arguable issues of fact are to be decided on evidence, the writ court has the authority to decide even questions of fact.

- 22.** In the present case, a specimen annexed as Annexure 7A to the Tender Document itself captions the specimen as “general terms and conditions of works contract”. Clause 1.1 thereunder also stipulates that this is a contract for “execution of job” as defined in the Tender Document.
- 23.** Notwithstanding the sub-division of the documents into sections, Clause 1.6 provides that every section, part or volume shall be deemed to be supplementary or complementary to each other and shall be read as a whole. The clear understanding stipulated therein was that the contractor shall do/perform a work and/or provide facilities for the performance of the work, doing or performing or providing the facilities at the cost and expenses of the contractor, not liable to be paid or reimbursed by the owner.
- 24.** A perusal of the agreement also shows that the same is for the purpose of supply and erection of pipeline and accessories at Hazaribag LPG Plant.
- 25.** Hence, in terms of the definition of ‘works contract’ as held in *Kone Elevator (supra)*, the agreement-in-question herein is clearly one. As per the ratio of the said judgment, there is no scope to segregate the work and goods supply components in such a contract, since the dominant purpose theory has been deprecated by the Supreme Court in the said judgment. In fact, the petitioner is justified in arguing that the dominant purpose test was erroneously applied by the Council in the impugned order.

- 26.** However, we are to ascertain as to the correct position of law even if the agreement was a works contract within the contemplation of *Kone Elevator (supra)*.
- 27.** As regards the adjudication of the issue of whether the present agreement is a works contract or not, since the provisions of the contract, in unambiguous terms, indicate that the same is a works contract, no factual question requiring evidence is required to be decided at all. Hence, the matter ought not to be unnecessarily relegated to some other authority but can very well be decided by the writ court.
- 28.** Thus, we proceed on the premise that the agreement is a works contract. It is now required to be explored as to whether the MSME Council has jurisdiction in respect of such a works contract.
- 29.** With utmost respect, the six judgments of different High Courts, although having persuasive value, have not taken a correct view of the applicability of the MSME Act to works contracts. The proposition laid down in *Kone Elevator (supra)* was in an entirely different context than the MSME Act and has been misinterpreted in the context of the said Act.
- 30.** As observed in paragraph 3 of the said judgment, which was the majority view taken therein, the seminal controversy therein was whether a contract for manufacture, supply and installation of lifts in a building is a “contract for sale of goods” or a “works contract”. Such question was decided to the effect that the same was a works contract.

In paragraph 18, the Supreme Court recorded the necessity to delve into the genesis of the law in respect of “works contract” and thereafter to dwell upon how far the principle pertaining to such contract would govern the manufacture, supply and installation of lifts. In this context, the Supreme Court observed that it is seemly to appreciate the legal position as to how the impost of sales tax on “works contract” was treated prior to the insertion of Clause (29-A) in Article 366 of the Constitution by the Constitution (Forty-sixth Amendment) Act, 1982 with effect from March 1, 1983.

- 31.** The Supreme Court proceeded with such discussion and in paragraph 31, it clearly discussed the actual perspective of the said adjudication. Paragraph 31 is quoted hereinbelow:

“31. The aforesaid authorities clearly show that a works contract could not have been liable to be taxed under the State sales tax laws and whether the contract was a works contract or a contract for sale of goods was dependent on the dominant intention as reflected from the terms and conditions of the contract and many other aspects. In certain cases, the Court has not treated the contract to be a works contract by repelling the plea of the assessee after taking into consideration certain special circumstances. No straitjacket formula could have been stated to be made applicable for the determination of the nature of the contract, for it depended on the facts and circumstances of each case. As the works contract could not be made amenable to sales tax as the State Legislatures did not have the legislative competence to charge sales tax under Entry 54 List II of the Seventh Schedule of the Constitution on an indivisible contract of sale of goods which had component of labour and service and it was not within the domain of the assessing officer to dissect an

indivisible contract to distinguish the sale of goods constituent and the labour and service component. The aforesaid being the legal position, Parliament brought in the Forty-sixth Amendment by incorporating clause (29-A) in Article 366 of the Constitution to undo the base of the Constitution Bench decision in Gannon Dunkerley case.”

- 32.** In paragraph 32, Article 366 (29-A) was reproduced, which is as follows:

"366. (29-A) 'tax on the sale or purchase of goods' includes--

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;*
- (b) a tax on the transfer of property, in goods (whether as goods or in some other form) involved in the execution of a works contract;*
- (c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;*
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;*
- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;*
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,*

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the

transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;”

33. In paragraph 33 of the judgment, the Supreme Court observed that after the amendment of the Constitution, various States amended their legislations pertaining to sales tax for levy of sales tax on “works contract.”
34. It went on to observe in the same paragraph that in the context of upholding the Constitutional validity of the Forty-Sixth Amendment, the Court had observed in *Builders Association of India Vs. Union of India*, reported at (1989) 2 SCC 645, that sub-clause (b) of Clause (29-A) states that “tax on the sale or purchase of goods” includes, among other things, a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract, but does not say that a tax on the sale or purchase of goods includes a tax on the amount paid for the execution of a works contract. It refers to a tax on the *transfer of property in goods (whether as goods or in some other form) involved* in the execution of a works contract and the latter part of Clause (29-A) of Article 366 of the Constitution makes the position very clear.
35. In such context, the five-Judge Bench of the Supreme Court made the observations in paragraph 46 which have been referred above.
36. Thus, on a comprehensive reading of *Kone Elevator (supra)*, we find that the same was entirely in the context of the interpretation of

Article 366 (29-A) of the Constitution of India, as introduced by the Forty-Sixth Amendment of 1982 (with effect from February 2, 1983).

37. Clause (29-A) of Article 366 begins with the expression “tax on the sale or purchase of goods includes...”.
38. Thus, the emphasis of the said Clause is on the revenue to be earned on the sale or purchase of goods.
39. Hence, the fulcrum of the adjudication in *Kone Elevator (supra)* was the interpretation of the said Article in the context of taxing statutes. The Supreme Court quite elaborately discussed the actual perspective of the said adjudication in paragraph nos.31 and 33 of *Kone Elevator (supra)*.
40. The context was that works contracts previously could not have been liable to be taxed under the State Sales Tax Laws and whether the contract was a works contract or a contract for sale of goods was dependent on the dominant intention as reflected in the terms and conditions and many other aspects. As the works contract could not be made amenable to sales tax as the State legislatures did not have the legislative competence to charge sales tax under Entry 54, List II of the Seventh Schedule of the Constitution on an indivisible contract of sale of goods which has components of both labour and services. That being the legal position, the Supreme Court held, the Parliament brought in the Forty-Sixth Amendment by incorporating clause (29-A) to undo the basis of the Constitution Bench decision in *State of Madras Vs. Gannon Dunkerley & Co. (Madras) Ltd.*, reported at AIR

1958 SC 560. After the amendment of the Constitution, various States amended their legislations pertaining to sales tax for levy of sales tax on works contract. Clause (29-A) refers to a *tax* on the *transfer of property in goods* (whether as goods or in some other form) involved in the execution of a works contract.

41. The above observations are entirely in the words of the Supreme Court itself in *Kone Elevator (supra)*. Thus, the fulcrum of consideration in the said judgment was taxing statutes. Since there was a dispute previously as regards the dominant purpose being the test for deciding whether a works contract tantamounted to a contract for sale, which would be taxable by the States, the subsequent change of law settles such position and included work contracts within the ambit of the State Taxing Legislations pertaining to sales tax.
42. It is well-settled that taxing statutes are to be interpreted strictly, which prompted the previous strict interpretation in favour of the assessee and necessitated the introduction of Clause (29A) in Article 366 of the Constitution, which led to the decision in *Kone Elevator (supra)*.
43. As opposed to the said principle, beneficial legislations are to be interpreted liberally, to facilitate the advancement of the benefit for the intended beneficiaries under the Statute.
44. The Statement of Objects and Reasons of the MSME Act provides that a growing need is being felt to extend policy support for the small enterprises so that they are enabled to grow into medium ones, adopt

better and higher levels of technology and achieve higher productivity to remain competitive in a fast globalisation area. Thus, as in most developed and many developing countries, it is necessary that in India too, the concerns of the entire small and medium enterprises sector are addressed and the sector is provided with a single legal framework. As of then, the medium industry or enterprise is not even defined in any law.

- 45.** Projecting such purpose, the MSME Act was promulgated for facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises and for matters connected therewith or incidental thereto, as featured in the very Preamble of the Act.
- 46.** In such context, the purposive interpretation of all provisions of the said Act ought to aid the extension of such benefits to the MSMEs and not to deprive such enterprises of the benefits of the Act.
- 47.** It cannot be gainsaid that there are several benefits provided in the Act for such enterprises. Even a resolution under Section 18 is commenced, scientifically, by an endeavour of conciliation, followed by arbitration. Sub-section (5) of Section 18 of the MSME Act stipulates that every reference made under the Section shall be decided within a period of ninety days from the date of making such a reference.
- 48.** That apart, as rightly contended by learned counsel, the Council is comprised of experts having domain expertise in the field, which

would also facilitate comprehensive and expeditious disposal of such disputes.

- 49.** It is undisputed that MSMEs have been identified on the anvil of such enterprises being micro or small enterprises or medium enterprises, engaged in providing or rendering services or in the manufacture or production of goods pertaining to any nature specified in the First Schedule to the Industries (Development and Regulation) Act, 1951, and which have filed a memorandum within the contemplation of Section 8(1) of the MSME Act.
- 50.** There is no distinction whatsoever in the Act between MSMEs undertaking works contracts and those engaging in other contracts, having components of supplying goods or rendering services. Such distinction cannot be artificially incorporated into the Act by the judiciary, which would be interfering with the specific and deliberate intention of the legislature.
- 51.** We also have to keep in mind that whereas the interpretation of a taxing statute in the context of Article 366 of the Constitution is on the premise of the nature of a transaction, in a beneficial legislation such as the MSME Act, the pivot of adjudication is not the particular transaction taxed but the nature of the enterprise which seeks the benefit of the statute.
- 52.** Thus, the applicability of the MSME Act is to be tested on the anvil of the eligibility of the enterprise, that is, whether it comes within the ambit of the said Act to get its benefits, as opposed to Article 366

(29A) of the Constitution and taxing statutes in general, where the test is whether the particular transaction or activity undertaken by the assessee is taxable.

53. Examining the issue at hand from such perspective, the first decision cited by the petitioner is in *Rahul Singh (supra)* delivered by a Division Bench of the Allahabad High Court. In the said Judgment, the court took into consideration *CCE and Customs Vs. Larsen and Toubro* [(2015) 1 SCC 170] which was also considered in *Kone Elevators (supra)*.
54. Even in *Larsen and Toubro's case*, however, the context was Article 366, as clearly observed by the Supreme Court in paragraphs 171 to 174 of *Kone Elevators (supra)*.
55. Thus, as per the logic discussed above, such concept, which is applicable to taxation statutes, was borrowed by the Division Bench of the Allahabad High Court to the MSME Act, merely because there was a discussion on the nature of “works contracts” in *Kone Elevator (supra)*. However, the basic premise which was overlooked in *Rahul Singh (supra)*, with greatest respect, was that the context of consideration of works contract was not *pari materia* between the MSME Act on the one hand and Article 366 of the Constitution on the other.
56. Thereafter a cascading effect started, with a Division Bench of the Bombay High Court, in *Sterling and Wilson (supra)*, following the ratio of *Rahul Singh (supra)* in MSME matters.

- 57.** Another Division Bench of the Gujarat High Court, again, although upon great discussion, mechanically followed the same proposition. However, a distinguishing feature, as reflected in paragraph 11 of the Gujarat judgment, is that Clause 35 of the Tender Notice itself put to notice everyone that the said contract is a composite contract involving material and labours both and therefore such contracts involving transfer of property in goods in the execution of the contract are liable to be taxed under the provisions of the MVAT Act as deemed sale transactions/work contracts and differ from procurement of services and goods. Hence, the context of adjudication in the said judgment by the Gujarat High Court was on a somewhat different footing than the present one.
- 58.** Again, a learned Single Judge of the Andhra Pradesh High Court, in *Rashtriya Ispat Nigam (supra)*, applied the proposition of *Kone Elevator (supra)* erroneously to the MSME Act, which was followed by two other Single Judge decisions of the Bombay High Court in *P.L. Adke (supra)* and *National Textile Corporation (supra)*.
- 59.** As opposed to the said judgments cited by the petitioner, a rather correct approach, in the humble opinion of this Court, was adopted by a learned Single Judge of this Court and another learned Single Judge of the Andhra Pradesh High Court, respectively in *Marine Craft Engineers (supra)* and *Dalapathi Constructions (supra)*. Although the judgment of this Court was not exactly in the context of a works contract, it was rightly observed that if a registration is obtained by a micro and small enterprise under Section 8(1) of the Act, the supplier

fulfils the necessary conditions and comes within the purview of Section 18 of the MSME Act. The Andhra Pradesh High Court also clearly recorded that there is nothing in the MSME Act which provides that the registration for a particular activity will render an enterprise liable not to be regarded as a micro, small or medium enterprise for any other activity. Once registered, the status of the enterprise is that of a registered enterprise under the MSME Act and all the provisions of the said Act apply with full force.

- 60.** Thus, in the context of the above discussions, the principle of *Kone Elevator (supra)* was erroneously applied by several High Courts in the judgments cited by the petitioner, as discussed above. The correct proposition of law, in my humble opinion, is that once an enterprise, otherwise coming within the contemplation of the Act, is registered under Section 8(1), the same has to attract the provisions of the MSME act, including Section 18 of the same, vesting authority on the Council to resolve disputes in that regard.
- 61.** Even a thorough scrutiny of Section 2(n)(iii) clearly reveals that the benefit intended under the Act it to be given to suppliers, who include any company, by whatever name called, registered or constituted under any law for the time being in force and *engaged in selling goods produced by micro or small industries and rendering services which are provided by such enterprises*. Thus, there is nothing to debar such a company, which is registered under Section 8(1) of the MSME Act, engaging not only in selling goods produced by micro or small

enterprises but also rendering services which are provided by such enterprises, or anyone of the two, or both together.

- 62.** Thus, the artificial distinction, about works contracts being excluded from the ambit of the said Act, does not find place within the scheme of the MSME Act itself. The said concept was borrowed from revenue jurisprudence, which has no nexus with the benefits sought to be conferred under the MSME Act. Importing the said concept in the instant context is beside the point and not apt.
- 63.** In view of the above discussions, this Court is of the opinion that the Council had correctly assumed jurisdiction under Section 18 of the MSME Act to resolve the dispute between the parties hereto. Such exercise was well within the authority of the Council, as sanctioned by statute.
- 64.** Hence, there is no scope of interference with the impugned order of the Council holding that it has jurisdiction to resolve the dispute between the parties.
- 65.** Accordingly, WPO No.2896 of 2022 is dismissed on contest, without any order as to costs.
- 66.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)

Later:

After passing the above judgment, learned counsel for the petitioners seek limited stay of operation of the said judgment and order. Accordingly, the operation of the judgment and order is stayed for a fortnight from date.

(Sabyasachi Bhattacharyya, J.)