IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.06.2023

CORAM

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

W.P No.3046 of 2023
and WMP No.3134 of 2023

L&W Building solutions P Ltd
No.801, 8th Floor, Pride Hulkul,
No.116, Lalbagh Road,
Bangalore – 560 027

..Petitioner

vs.

1. Micro and Small Enterprises Facilitation Council,
Coimbatore Region,
No.2, Raja Street,
Coimbatore – 641 001.

2. M/s.Kaveri Irrigations
102, Gomukhi Point,
E.B. Complex Back side,
Collectorate Post

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari to call for the records in MSEFC/CBER /67/2021 online Application No.TN07E0037067/S/00001 on the files of the Micro and Small Enterprises Facilitation Council, Coimbatore Region and quash the order dated 08.06.2022 (Impugned order) and the proceedings initiated forthwith.

For Petitioner : Mr.R.S.Diwaagar
For Respondents : Dr.C.Paranthaman for R2

O R D E R

The proceedings of the 1st respondent dated 08.06.2022 has been put to challenge in the present writ petition.

2. The 2nd respondent had offered certain work orders for supply and installation of irrigation system for the projects that were handled by the petitioner. According to the 2nd respondent, the petitioner did not pay the amount that was due and payable to the tune of Rs.26,00,000/- inspite of completion of the obligation on the part of the 2nd respondent. Hence, the 2nd respondent filed a reference before the 1st respondent under Section 18(1) of the Micro, Small and Medium Enterprises Development Act, 2006 (herein after called as the MSMED Act), for the recovery of the sum of Rs.26,00,000/- along with interest.

3. The further case of the petitioner is that immediately after the notice was issued to the petitioner, the objections were filed. Apart from raising certain grounds on merits, the petitioner

also raised the ground of jurisdiction by taking a stand that the 2nd respondent was not registered under the MSMED Act as on the date of entering into the contract and hence, the 2nd respondent is not entitled for the benefit under Section 18 of the Act.

4. An attempt was made to amicably settle the dispute between the parties but however the conciliation failed. Through the impugned proceedings dated 08.06.2022, the 1st respondent recorded the failure of the conciliation and referred both the parties for arbitration before the Madras High Court Arbitration Center. Aggrieved by the same, the present writ petition has been filed before this Court.

5. The 2nd respondent has filed a counter affidavit. Apart from dealing with the various contentions on merits that were raised by the petitioner, insofar as the issue of jurisdiction is concerned, the 2nd respondent has taken a stand in the counter to the effect that the contract involved the supply, installation and maintenance and in all the work orders, the period of maintenance ends only in

the year 2020 to 2022 and whereas, the 2nd respondent was registered under Section 8 (1) of the Act on 03.05.2019 and it was much before the time that was stipulated for undertaking the maintenance work. Hence, according to the 2nd respondent, the 2nd respondent is entitled to invoke Section 18 of the Act. The 2nd respondent therefore sought for the dismissal of the writ petition.

6. Heard Mr.R.S.Diwaagar, learned counsel for the petitioner and Dr.C.Paranthaman, learned counsel for 2nd respondent.

7. This Court has carefully considered the submissions made on either side and the materials available before this Court.

8. The first and foremost submission that was made by the learned counsel for the petitioner touched upon the very jurisdiction of the 1st respondent to entertain the reference under Section 18(1) of the MSMED Act. To elaborate this submission, the learned counsel brought to the notice of this Court the fact that the 2nd respondent was claiming for the recovery of the amount based on invoices that

were raised from 22.08.2017 to 08.09.2018 and it was contended that admittedly during this point of time, the 2nd respondent was not registered and the registration happened much later only on 03.05.2019. The learned counsel further submitted that this issue was specifically taken in the objections that was filed before the 1st respondent and the 1st respondent without considering the same, had proceeded further to refer the parties for Arbitration after recording the failure of the conciliation proceedings between the parties.

9. The learned counsel for the petitioner in order to further elaborate the above submissions also brought to the notice of this Court the fact that the 2nd respondent did not file the relevant work orders / invoices either before the 1st respondent or before this Court and a copy was not furnished to the petitioner and hence, there was no occasion to understand the scope of the contract between the parties.

10. Per contra, the learned counsel for 2nd respondent

submitted that there are totally 12 work orders that are involved in this case which were issued during the period from 2017 to 2019. The work order contemplates the supply, installation and maintenance of the irrigation system which was supplied to the projects that were handled by the petitioner. The learned counsel for 2nd respondent contended that the contract contemplated right from the stage of supply up to the stage of maintenance and the period of maintenance in all the nine work orders comes to an end only during the year 2020-2022. Hence, the learned counsel submitted that the registration of the 2nd respondent on 03.05.2019 clearly enables the 2nd respondent to file a reference under Section 18(1) of the Act.

11. The learned counsel appearing on either side brought to the notice of this Court some of the judgments that were passed in this regard.

12. In ***[Shilpi Industries and others Vs. Kerala State Road Transport Corporation and others] reported in Manu/SC/0390/2021***, wherein, the Apex Court specifically deals

with this issue and it was held 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 Marketing5, 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. v. Assam State Electricity Board & Ors. etc.6 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.*

13. The Apex Court once again dealt with this issue in ***[M/s. Vaishno Enterprises Vs. Hamilton Medical AG and another]*** reported in ***Manu/SC/0357/2022*** and it was held as follows :-

> *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.

8.3. However, at the same time, the larger question/issue whether in a case where the buyer is located outside India but has availed the services in India and/or done the business in India with the Indian supplier and the contract was executed in India the MSME Act would be applicable or not and/or another larger issue that in case the supplier is subsequently registered as MSME the Council would still have jurisdiction are kept open to be considered in an *appropriate case bearing in mind Section 18 as well as Section 8 of the MSME Act and the judgments of this Court in the case of M/s Shilpi Industries vs. Kerala State Road Transport Corporation, C.A. No.157078 of 2021 [2021 SCC Online SC 439] arising under the provisions of MSME Act and Shanti Conductors Pvt. Ltd. Vs. Assam State Electricity Board, (2019) 19 SCC 529 in which case a similar provision under the Small Scale and Ancillary Industries Undertakings, Act, 1993 came up for consideration before this Court.*

14. The next judgment that was brought to the notice of this Court is [***Gujarat State Civil Supplies Corporation Ltd Vs. Mahakali Foods Pvt Ltd., and another] reported in 2022 SCConline SC 1492*** and the relevant portions are extracted hereunder :-

34. The upshot of the above is that:

(i) Chapter-V of the MSMED Act, 2006 would override the provisions of the Arbitration Act, 1996.

(ii) No party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council, though an independent arbitration agreement exists between the parties.

(iii) The Facilitation Council, which had initiated the Conciliation proceedings under Section 18(2) of the MSMED Act, 2006 would be entitled to act as an arbitrator despite the bar contained in Section 80 of the Arbitration Act.

(iv) The proceedings before the Facilitation Council/institute/centre acting as an arbitrator/arbitration tribunal under Section 18(3) of MSMED Act, 2006 would be governed by the Arbitration Act, 1996.

(v) The Facilitation Council/institute/centre acting as an arbitral tribunal by virtue of Section 18(3) of the MSMED Act, 2006 would be competent to rule on its own jurisdiction as also the other issues in view of Section 16 of the Arbitration Act, 1996.

(vi) A party who was not the 'supplier' as per the definition contained in Section 2(n) of the MSMED Act, 2006 on the date of entering into contract cannot seek any benefit as the 'supplier' under the MSMED Act, 2006. If any registration is obtained subsequently the same would have an effect prospectively and would apply to the supply of goods and rendering services subsequent to the registration.

15. The learned counsel for the petitioner also placed reliance upon the judgement of the Orissa High Court in ***[M/s..Bridge and Roof Co. (India) Ltd., Kolkata Vs. State of Odhisha and others] in W.P.(C) No.5935 dated 22.04.2022***. The Orissa High Court after considering the above judgements held as follows :-

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 // 7 // Act, appears to be the view taken on applicability of the Act as can be invoked by a supplier.

16. The learned counsel for 2nd respondent also placed reliance upon the judgement of the Apex Court referred supra. However, in order to substantiate his contention to the effect the contract extends up to the period of service and therefore, the reference under Section 18(1) of the Act is maintainable, the learned

counsel relied upon the judgement of the Calcutta High Court in ***[Marine Craft Engineers Private Limited Vs. Garden Reach Shipbuilders and Engineers Limited]*** in ***AP No.831 of 2018 dated 05.04.2023***. The learned counsel specifically placed reliance upon Paragraph No.23 of the judgement and for proper understanding, the same is extracted hereunder :-

> *23. In light of the above discussion, the conclusion of this Court is as follows. The date of execution of a contract between a buyer and a supplier under the MSMED Act is irrelevant for the application of the provisions of the MSMED Act provided the supplier claims recovery of the amount due under section 17 for goods supplied or services rendered after the date of registration. In other words, whether the supplier was registered as an MSME on the date of the contract would not disqualify the supplier from making reference to the Micro and Small Enterprises Facilitation 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 as a micro, small or medium enterprise under section 8(1) of the Act. If the supplier fulfils the aforesaid condition and makes a reference to the Facilitation Council under section 18, the Council steps in as the only - and exclusive forum - to decide the reference under the provisions of the MSMED Act, 2006.

17. The above judgments in no uncertain terms makes it abundantly clear that a seller to seek the benefit of the provision of the MSMED Act, should have registered under the provisions of the Act, as on the date of entering into the contract. It is also abundantly clear that supplies that were made pursuant to the contract but before the registration of the unit under the provisions of the MSMED Act, cannot be made a subject matter of reference since the benefit under the Act will enure only from the date of registration. In short, the registration under the Act cannot be given a retrospective operation and it takes effect only perspectively. There is no dispute on the declaration of law insofar as these

fundamental issues are concerned.

18. The issue that has been raised by the 2nd respondent is that the contract starts with the supply of the material and it ends with the maintenance and the amount that is payable towards each work order covers the supply, installation and maintenance. Since the maintenance period towards all the work orders came to an end only after the registration of the 2nd respondent under the Act on 03.05.2019, the 2nd respondent claims that they are very much entitled to file the reference under Section 18(1) of the Act and the 1st respondent certainly had the jurisdiction to entertain the same.

19. The learned counsel for the petitioner submitted that if the 2nd respondent admits the fact that they had supplied, installed and are also liable to maintain, the nature of work performed by the 2nd respondent must be classified as a works contract and according to the learned counsel for the petitioner, the 2nd respondent will not be entitled to invoke the provisions of the MSMED Act. In addition to this submission, the learned counsel for the petitioner also

submitted that only a manufacturer is governed under the Act and whereas, the 2nd respondent is only a dealer who had supplied the materials and hence, the 2nd respondent will not be entitled to take advantage of the provisions of the Act. This Court is not inclined to get into these issues raised by the learned counsel for the petitioner since this Court wants to confine itself to focus on the preliminary objection raised by the petitioner on the jurisdiction of the 1st respondent to even entertain the reference under Section 18(1) of the Act.

20. In order to understand the nature of the contract between the parties, it is necessary for this Court to look into the work order / invoices which are relied upon by the 2nd respondent in this regard. The nature of work cannot be a matter of presumption and it all depends upon the terms that have been prescribed in those work orders/ invoices and only on going through the same, it can be ascertained as to whether the contract confines itself only with respect to supply of materials or the same extends up to the end of the maintenance period. Unfortunately, the 2nd respondent has not

filed the work orders / invoices either before the 1st respondent nor before this Court. A copy was also not furnished to the learned counsel for the petitioner.

21. The learned counsel for 2nd respondent submitted that there is a reference to enclosure in the order passed by the 1st respondent. Just because, there is a reference to the word enclosure, there is no presumption that those enclosures included the work orders / invoices also. If it was readily available, nothing prevented the 2nd respondent to file the same along with the counter affidavit filed by them before this Court.

22. The 1st respondent unfortunately did not deal with the preliminary objection that was raised by the petitioner touching upon the jurisdiction of the 1st respondent. The 1st respondent has straightaway recorded the failure of the conciliation proceedings and referred the parties for arbitration. Before undertaking that exercise, the 1st respondent ought to have decided on its jurisdiction to entertain the reference filed by the 2nd respondent.

23. In the light of the above discussion, the impugned order passed by the 1st respondent dated 08.06.2022 is liable to be interfered by this Court and accordingly, the same is set aside. The matter is remanded back to the file of the 1st respondent. The 1st respondent is directed to hear both the parties and consider all the relevant documents and first decide upon its jurisdiction to entertain the reference filed by the 2nd respondent. The 1st respondent shall keep in mind the above judgements referred by this Court and also the law that has been spoken to in all those judgements. In the event the 1st respondent finds that it has the jurisdiction to entertain the reference filed by the 2nd respondent, the 1st respondent shall give one opportunity to the petitioner and the 2nd respondent to conciliate among themselves and see if a settlement can be reached. If the parties are not able to reach the settlement, it is left open to the 1st respondent to refer the parties for arbitration.

24. It is made clear that this Court has not expressed any opinion on the merits of the case and it is left open to the parties to

raise all the contentions and the same will be considered on its own merits and in accordance with law.

25. The 1st respondent shall pass orders on the issue of jurisdiction within a period of four weeks from the date of receipt of a copy of this order, after affording an opportunity to both sides. Depending upon the decision arrived at by the 1st respondent, the further course of action shall be taken.

26 In the result, this writ petition is allowed in the above terms. No costs. Consequently, the connected miscellaneous petition is closed.

06.06.2023

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation Case : Yes/No
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To

1. Micro and Small Enterprises Facilitation Council,
   Coimbatore Region,
   No.2, Raja Street,
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N. ANAND VENKATESH, J.

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