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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 16th March, 2023

+ **W.P.(C) 4470/2022, CM APPL. 13317/2022**

JAIPRAKASH ASSOCIATES LTD Petitioner
Through: Mr. Anil Dutt & Mr. Tenzen Tashi
Negi, Advocates (M: 6230099000).

versus

MICRO AND SMALL ENTERPRISES FACILITATION
COUNCIL (SOUTH EAST) GOVT OF NCT
OF DELHI & ANR. Respondents
Through: Mr. Shourya Dasgupta, Advocate for
R-1 (M: 8017061359).
Mr. Shadan Farasat, ASC with Ms.
Mreganka Kukreja, Advocate
GNCTD for R-2 (M: 7049007777).
Mr. Vaibhav Gaggar, Ms. Monica
Lakhanpal and Mr. Ketan Sarraf,
Advocates.

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WITH

+ **W.P.(C) 4520/2022, CM APPL. 13541/2022, CM APPL.
13543/2022**

JAIPRAKASH ASSOCIATES LTD Petitioner
Through: Mr. Anil Dutt & Mr. Tenzen Tashi
Negi, Advocates (M: 6230099000).

versus

MICRO AND SMALL ENTERPRISES FACILITATION
COUNCIL (SOUTH EAST) GOVERNMENT OF NCT OF
DELHI AND ANR. Respondents
Through: Mr. Vaibhav Gaggar, Ms. Monica
Lakhanpal and Mr. Ketan Sarraf,

Advocates.

**CORAM:
JUSTICE PRATHIBA M. SINGH**

Prathiba M. Singh, J.(Oral)

1. This hearing has been done through hybrid mode.
2. In these petitions, the Petitioner - Jaiprakash Associates Limited has challenged two reference orders dated 7th February, 2022 passed by the Micro and Small Enterprises Facilitation Council (North West), GNCTD (MSEFC) in MSEFC case no. F.DL/08/S/SEC/00134 and F.DL/08/S/SEC/00135. The impugned reference orders were passed under the Micro, Small and Medium Enterprises Development Act, 2006 (MSME Act).
3. The impugned reference orders were issued by the MSEFC pursuant to certain disputes arising out of works contract/agreements between the Petitioner and the Respondent No.2 - Krishna Buildstates Pvt. Ltd. The agreements between the parties were in respect of civil works, electrical works and other structural works at the '*Wishtown Klassic Block Towers, Jaypee Greens, Noida (UP)*'. The details of the said works contract/agreements, which are the subject matter of the impugned reference orders are as under:

<i>Writ Petition no.</i>	<i>MSEFC case no. and date of reference</i>	<i>Agreements between Petitioner & Respondent No.2</i>
W.P.(C) 4470/2022	F.DL/08/S/SEC/0 0134 07.02.2022	i) CA No. JAL/REP/LD-1/305/862 dated 09.07.2012 ii) CA No. JAL/REP/LD-1/305/918 dated 17.07.2012

		iii) CA No. JAL/REP/L D-1/305/2026 dated 23.11.2012
W.P.(C) 4520/2022	F.DL/08/S/SEC/0 0135 07.2.2022	i) CA No. JAL/REP /LD-1/305/ 4124 dated 31.03.2012 ii) CA No. JAL/REP/LD-1/305/918 dated 17.07.2012 iii) CANo. JAL/REP/LD-1/EXE/213 /3011 dated 18.11.2013 iv) CA No. JAL/REP/LD-1/EXE/213/ 1707 dated 03.09.2014. v) CA No.JAL/REP/EXE /213/1687 dated 02.12.2013

4. It is stated that the bills *qua* these works contract/agreements were raised from time to time by the Respondent No.2 and were submitted to the Petitioner. Some of the said bills have been placed on record.

5. It is submitted that Respondent No. 2 got registered as an MSME under the MSME Act on 7th September, 2019. In view of the disputes arising out of the aforementioned work contracts/ agreements, the Respondent No. 2 invoked the jurisdiction of MSEFC for referring the disputes to arbitration. Thereafter, vide the two impugned reference orders dated 7th February, 2022, the MSEFC referred the disputes to arbitration by the Delhi International Arbitration Centre (DIAC)

6. Mr. Anil Dutt, Id. Counsel appearing for the Petitioner submits that the admitted position is that the entire work had come to a halt by 31st August, 2019 and bills were also raised prior to the registration of the Respondent No. 2 as an MSME. He relies on the written submissions filed

by the Respondent No.2 before the MSEFC and submits that under these circumstances, the registration being post the execution and completion of work, the MSEFC has no jurisdiction to direct reference of disputes to arbitration.

7. Reliance is placed upon the judgement of the Hon'ble Supreme Court in *M/s. Vaishno Enterprises v. Hamilton Medical AG & Anr., Civil Appeal No.1892 of 2022* to argue that under similar circumstances, the Hon'ble Supreme Court has held that the MSME Act would not be applicable. The relevant paras of the judgment read as under:

“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.1570-78 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.

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9. In view of the above and for the reason stated above, we are in agreement with the ultimate conclusion reached/arrived at by the learned Single Judge confirmed by the Division Bench that with

respect to the dispute the appellant and the Respondent No.1 the Council would have no jurisdiction under Section 18 of the MSME Act. Under the circumstances, the present appeal deserves to be dismissed and is accordingly dismissed.”

8. On the other hand, Mr. Vaibhav Gaggar, Id. Counsel appearing for the Respondents No. 2 submits that various bills have been raised by the Respondent No. 2 and one of the bills i.e. bill No. Final Bill (38th RA) at page 252 has a completion date beyond the date of registration of the Respondents No. 2 as an MSME. In the said bill, the billing period is from 1st May, 2019 to 31st August, 2019 and the extended date of completion is 30th September, 2019 which is beyond the Respondents No. 2's date of MSME registration i.e. 7th September, 2019. Thus, the disputes are liable to be referred to arbitration in terms of the decision of this Court in ***GE T&D India Limited v. Reliable Engineering Projects and Marketing, 2017 SCC OnLine Del 6978.***

9. Mr. Vaibhav Gaggar, along with Mr. Sharraf, Id. Counsel submits that in the judgement of ***Silpi Industries etc. Vs. Kerala State Transport Corporation and Anr. (2021 SCC Online SC 439)***, the Hon'ble Supreme Court has distinguished ***GE T&D India Limited (Supra)*** to the effect that insofar as a case where supplies continued after the MSME registration, the matter would fall under the MSME Act. Reliance is also placed upon the decision of this Court in ***WP(C) 9670/2016*** titled ***Chief General Manager, (Contracts), Neyveli Lignite Corporation Ltd. v. Driplex Water Engineering Ltd. & Anr.*** wherein a similar view has been taken following the judgement of ***GE T&D India Limited (Supra)***. The said judgment has been upheld in ***LPA 688/2019*** and the SLP in respect of the same has also

been dismissed.

10. Mr. Amit George, Id Counsel appearing in one of the matters has relied upon a recent decision of the Id. Division Bench of this Court in **FAO (COMM) 117/2021** titled **BHEL v. Bhatia Engineering Company** to canvass the same proposition that if the supplies were made post the registration, the MSME Act would be applicable.

11. The Court has perused the record and has considered these judgments. An analysis of all the above judgments would show that the clear position that emerges is that if the supplies take place post the registration as an MSME, the provisions of the MSME Act would be applicable. This is because in **Vaishno Enterprises (Supra)**, on facts, it is not clear as to whether there was any work carried out post the registration or only an invoice was raised after the registration in the said case. Moreover in the said judgement, the Hon'ble Supreme Court clarified that the judgement is passed in the peculiar facts and circumstances of the said case and the questions of law are kept open as per paragraph 8.3 of the judgement.

12. In **GE T&D India Limited (Supra)**, the Id. Single Judge of this Court in paragraph 36 holds as under:

“36. The question that next arises is whether having been registered on 4 April, 2012, can REPM take advantage of the MSMED Act? For this purpose, it is necessary to refer to Section 18 which requires REPM to be a ‘supplier’ as on the date of making such reference. Clearly, that condition stood satisfied. Secondly, even according to the Petitioner, the supplies made by REPM pursuant to the PO dated 8 September, 2009 continued even under the Section PO dated 27 November, 2012. From the point of view of the Petitioner, it is seeking to rely on the Second PO

having been validly issued. The supplies made by REPM to Alstom in terms of the PO dated 8 September, 2009 continued even after REPM's registration as supplier as is evident from the two MoMs dated 1 May, 2013 and 28 December, 2013. The result is that REPM can seek the application of the beneficial provisions of MSMED Act as far as its claims against Alstom arising from the said First PO are concerned."

13. This judgment has been subsequently followed in **Chief General Manager (Supra)** both by the Id. Single Judge and the Division Bench as also recently in the judgement of the Division Bench of this Court in **BHEL (Supra)**.

14. In **Silpi Industries (Supra)**, the Hon'ble Supreme Court has clearly distinguished **GE T&D India Limited (Supra)**. The relevant part of the same is as under:

"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. 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, 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. In view of this legal position, even if the agreement was prior to the registration as an MSME, if supplies have taken place post the registration,

the MSME Act would be applicable and reference by the MSEFC would be liable to be upheld.

16. A perusal of the bills in these matters would show that the work arising out of some of the agreements as mentioned above has been continued even as of November, 2019 i.e., post the registration of Respondent No. 2 as an MSME.

17. At this stage, Mr. Dutt, Id. Counsel raises another submission that these are not works contracts as there are services also which are involved and that, post registration as an MSME, only in respect of one of the contracts, a bill has been raised. So disputes under all agreements ought not to be referred to arbitration.

18. Considering the nature of the supplies and the agreements, it is observed that these are not merely service contracts but also involve supplies of goods. In the facts and circumstances of these petitions, the Court considers the following factors:

- i) All these agreements relate to the same project of the Petitioner.
- ii) The agreements are interlinked with each other and relate to different works in respect of the same towers/projects i.e. civil works, structural works and electrical works.
- iii) The work qua some of the agreements, is continued even post the registration of the Respondent No. 2 as MSME.
- iv) These are not separate contracts which involved purely services but also involved supply of goods as well.

19. Thus, in view of the aforementioned legal position, the MSME Act would be applicable in these petitions. There is an additional issue that arises. If under some of the agreements, the disputes would be arbitrable

under the MSME Act, should only the disputes under the said agreements or should all the disputes be referred to arbitration. The judgement of ***Gammon India Ltd. & Anr. V. National Highways Authority of India, OMP 680/2011 (New no. OMP (COMM)392/2020)*** would be applicable to the present petitions. The relevant part of the said judgement is as under:

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27. Multiple arbitrations before different Arbitral Tribunals in respect of the same contract is bound to lead to enormous confusion. The constitution of multiple Tribunals in respect of the same contract would set the entire arbitration process at naught, as the purpose of arbitration being speedy resolution of disputes, constitution of multiple tribunals is inherently counter-productive.

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32. However, what can lead to enormous uncertainty and confusion which ought to be avoided is the constitution of separate Arbitral Tribunals for separate claims in respect of the same contract, especially when the first Arbitral Tribunal is still seized of the dispute or is still available to adjudicate the remaining claims. ***In Dolphin Drilling Ltd. v. ONGC***, the Supreme Court, while considering the question as to whether a second reference for arbitration ought to be made, observed as under:

“5. The plea raised by the respondent voices a real problem. It is unfortunate that arbitration in this country has proved to be a highly expensive and time-consuming means for resolution of disputes. But on that basis it is difficult to read the arbitration clause in the agreement as suggested by the respondent. ...

6. The plea of the respondent is based on the words "all disputes" occurring in paragraph 28.3 of the agreement. Mr. Agrawal submitted that those two words must be understood to mean "all disputes

under the agreement" that might arise between the parties throughout the period of its subsistence. However, he had no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get barred by limitation till the time comes to refer "all disputes" at the conclusion of the contract. The words "all disputes" in Clause 28.3 of the agreement can only mean "all disputes" that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In its present form Clause 28 of the agreement cannot be said to be a one-time measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future."

33. A perusal of the above finding of the Supreme Court clearly shows that the Court has expressed its displeasure about the arbitration process becoming a highly expensive and time-consuming means for resolution of disputes. Owing to the wording of the clause, in the said case, the Supreme Court referred the parties to arbitration for the second time. The underlying ratio of **Dolphin (supra)**, on a careful reading, is that all disputes that are in existence when the arbitration clause is invoked, ought to be raised and referred at one go. Though there is no doubt that multiple arbitrations are permissible, it would be completely contrary to public policy to permit parties to raise claims as per their own convenience. While provisions of the CPC do not strictly apply to arbitral proceedings, the observations of the Supreme Court in **Dolphin (supra)** show that when an arbitration clause is invoked, all disputes which exist at the time of invocation ought to be referred and adjudicated together. It is possible that subsequent disputes may arise which may require a second reference, however,

if a party does not raise claims which exist on the date of invocation, it ought not to be given another chance to raise it subsequently unless there are legally sustainable grounds. This is necessary in order to ensure that there is certainty in arbitral proceedings and the remedy of arbitration is not misused by parties. The constitution of separate arbitral tribunals is a mischief which ought to be avoided, as the intent of parties may also not be bona fide.

34. It is the settled position in law that the principles of *res judicata* apply to arbitral proceedings. The observations of the Supreme Court in **Dolphin (supra)** also clearly show that principles akin to Order II Rule 2 CPC also apply to arbitral proceedings. The issue as to whether any claims are barred under Order II Rule 2 CPC or whether any claim is barred by *res judicata* is to be adjudicated by the arbitral tribunal and not by the Court. Keeping in mind the broad principles which are encapsulated in Order II Rule 2 CPC, as also Section 10 and Section 11 of the CPC, which would by itself be inherent to the public policy of adjudication processes in India, it would be impermissible to allow claims to be raised at any stage and referred to multiple Arbitral Tribunals, sometimes resulting in multiplicity of proceedings as also contradictory awards. Thus, this Court is of the considered opinion that:

i. In respect of a particular contract or a series of contracts that bind the parties in a legal relationship, the endeavour always ought to be to make one reference to one Arbitral Tribunal. The solution proposed by the Supreme Court (Aftab Alam, J.,) in paragraph 9 of **Dolphin (supra)** i.e., to draft arbitration clauses in a manner so as to ensure that claims are referred at one go and none of the claims are barred by limitation, may be borne in mind. The said observation in **Dolphin (supra)** reads:

“9. The issue of financial burden caused by the

arbitration proceedings is indeed a legitimate concern but the problem can only be remedied by suitably amending the arbitration clause. In future agreements, the arbitration clause can be recast making it clear that **the remedy of arbitration can be taken recourse to only once at the conclusion of the work under the agreement or at the termination/cancellation of the agreement and at the same time expressly saving any disputes/claims from becoming stale or time-barred etc. and for that reason alone being rendered non-arbitrable.**"

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iii. If an Arbitral Tribunal is constituted for adjudicating some disputes under a particular contract or a series thereof, any further disputes which arise in respect of the same contract or the same series of contracts, ought to ordinarily be referred to the same Tribunal. The Arbitral Tribunal may pronounce separate awards in respect of the multiple references, however, since the Tribunal would be the same, the possibility of contradictory and irreconcilable findings would be avoided."

20. In **Gammon (Supra)**, the position laid down is that in respect of the same contract or interlinked contracts, an attempt ought to be made to have the same Tribunal adjudicate the disputes. If the agreements in the present case are separated and some disputes go into a civil court and some go for arbitration, it could result in multiplicity of proceedings and conflicting rulings. All, the agreements relate to the same real estate project. They are all interlinked and are thus inseparable. Since, all work contracts/agreements out of which the impugned reference orders are arising are interlinked and related to the same projects, appointment of different arbitrators is not deemed appropriate.

21. This is a classic case where due to the interlinking of the agreements

and the project being the same, one common arbitrator can be appointed to decide and adjudicate upon the disputes between the parties.

22. Accordingly, the DIAC shall proceed further and appoint a sole arbitrator to decide and adjudicate the disputes arising between the Petitioner and Respondent No.2 in the work contracts/ agreements as provided above.

23. The appointment shall be made within a period of six weeks from today.

24. Considering that these disputes relate to work contracts/ agreements which were entered into way back in 2015, the Id. Arbitrator shall expeditiously adjudicate the said disputes.

25. In so far as the applicability of the interest related provisions of the MSME Act, or otherwise, is concerned, the same shall be decided by the Id. Arbitrator, at the final stage, depending upon the merits of the matter.

26. With these above observations, both these petitions, along with all pending application are disposed of.

PRATHIBA M. SINGH
JUDGE

MARCH 16, 2023

mr/kt