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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision:-16th March, 2023.

+ **W.P.(C) 9608/2022, CM APPL. 28679/2022**
MALANI CONSTRUCTION COMPANY Petitioner
Through: Mr. Jeetender Gupta, Adv.
(9810050748)

versus

DELHI INTERNATIONAL ARBITRATION
CENTRE AND ORS Respondents
Through: Mr. Anupam Srivastava, ASC,
GNCTD and Mr. Vasuh Misra, Adv.
(9730835755) for R-2
Mr. Animesh Kumar, Ms. Krishna
Saroff, Mr. Himanshu Ahuja Adv.
(9654546559) for R-3

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AND

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MALANI CONSTRUCTION COMPANY Petitioner
Through: Mr. Jeetender Gupta, Adv.
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versus

DELHI INTERNATIONAL ARBITRATION
CENTRE AND ORS Respondents
Through: Mr. Anupam Srivastava, ASC,
GNCTD and Mr. Vasuh Misra, Adv.
(9730835755) for R-2

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petitions challenge the reference made by the Micro & Small Enterprises Facilitation Council (hereinafter 'MSEFC'), vide its order dated 27th January, 2022. The said reference was in relation to disputes

between the Petitioner-M/s Malani Construction Company and Respondent No. 3-M/s LSR Medical Private Limited (hereinafter '*LSR*') to arbitration before the Delhi International Arbitration Centre (hereinafter '*DIAC*') in MSEFC Case No. 75/2018 and MSEFC Case No. 76/2018.

3. In **MSEFC Case No. 75/2018**- the case of the Petitioner is that Respondent No.3/LSR had made certain supplies of goods/ services to the Petitioner through various invoices for the period ***4th July 2012 to 5th March 2015*** . Subsequently, on 26th May, 2017, Respondent No. 3/LSR submitted a memorandum under the Micro Small and Medium Enterprises Development Act (hereinafter '*MSMED Act*') and got registered as a Micro enterprise. On 15th October 2018, Respondent no. 3/LSR caused a legal notice to be served upon the Petitioner, demanding a sum of Rs. 1,75,06,370/- towards supply of goods/services to the Petitioner along with interest under the MSMED Act. On 22nd November, 2018, Respondent No. 3/LSR filed an application before the MSEFC for the recovery of the outstanding amount along with interest.

4. In **MSEFC Case No.76/2018**- the case of the Petitioner is that Respondent No. 3/LSR had made certain supply of goods/ services to the Petitioner through various invoices for the period ***5th November 2012 to 24th February 2015***. Subsequently, on 26th May 2017, Respondent No. 3/LSR submitted a Memorandum to obtain registration under the MSMED Act and got registered as a Micro enterprise. On 10th October 2018, Respondent No.3 /LSR caused a legal notice to be served upon the Petitioner , demanding a sum of Rs. 1,92,34,367/-towards supply of goods/services to the Petitioner along with interest under the MSMED Act. Thereafter, on 22nd November 2018, Respondent No. 3/LSR filed an application before the

MSEFC for the recovery of the outstanding amount along with interest.

5. After the application was filed before the MSEFC on 22nd November, 2018, in both cases, the first hearing was held on 10th January, 2020. The reference, in both cases, was forwarded for arbitration on 27th January, 2022 by the MSEFC.

6. The DIAC issued notices dated 8th March, 2022, in both cases i.e. in MSEFC Case No.75/2018 and MSEFC Case No. 76/2018, calling upon the parties to deposit the fee with respect to the arbitration proceedings. On 1st June 2022, the DIAC, via e-mail, informed the parties about the appointment of a Sole Arbitrator in both cases, at which stage, the present writ petitions were filed challenging the jurisdiction of the MSEFC and the applicability of the MSMED Act itself. Vide order dated 13th July, 2022, the references were stayed and the matter has been taken up for hearing.

7. The submissions of Mr. Gupta, Id. Counsel appearing for the Petitioner are three fold.

- **First**, that the MSEFC ought to act strictly in accordance with the timelines prescribed under Section 18(5) of the MSMED Act and accordingly decide the reference within 90 days from the date of making such reference.
- **Secondly**, that the MSEFC ought to at least take a preliminary view on the basis of the date of registration as an MSEFC, in accordance with the judgment in '*Silpi Industries Etc. v. Kerala State Road Transport Corporation & Anr.*' [2021 SCC OnLine SC 439], and only after ascertaining the date of registration and the date of supplies the reference should be made. The MSEFC cannot merely operate as a post office, merely forwarding references to the DIAC.

- **Thirdly**, that in the present case, on merits, in accordance with the judgment in *Silpi Industries (supra)* read with *Gujarat State Civil Supplies Corporation Ltd. vs. Mahakali Foods Pvt. Ltd.(Unit 2) & Anr. (2022 SCC Online SC 1492)*, the MSMED Act would not be applicable.
- **Lastly**, it is submitted that the claims were barred by limitation as, in MSEFC Case No.75/2018, the last invoice was of March 2015 and in MSEFC Case No. 76/2018 the last invoice was of February 2015 but the application before the MSEFC, in both cases, was filed on 22nd November, 2018.

8. On behalf of the Respondents, Mr. Animesh Kumar, Id. Counsel submits that the MSEFC, initially, attempted conciliation. In the conciliatory meetings the Petitioner never took any objection as to jurisdiction. It is only when the DIAC issued the notice of payment of fee that the writ petition has been filed. The second submission of Mr. Kumar, Id. Counsel is that the issue of limitation has not been raised by the Petitioner either in the writ petition or before the MSEFC. He, further, submits that the claim itself is not disputed by the Petitioner and merely technical grounds are being taken in order to delay the payment.

9. In the present petitions, admittedly the registration of the Respondent No.3 as a MSME, is itself on 26th May, 2017. The list of invoices for which payments are being sought in MSEFC Case No.75/2018 is set out below:

DATE	INVOICE DETAILS	AMOUNT (IN RS.)
07.04.2012	LSR/T-001/12-13	3,14,57,677

07.20.2012	LSR/T-002/12-13	42,33,591
08.10.2012	LSR/T-003/12-13	3,35,04,864
08.30.2012	LSR/T-004/12-13	52,73,805
09.21.2012	LSR/T-005/12-13	11,86,75,084
10.24.2013	LSR/T-004/13-14	1,02,48,803
11.27.2013	LSR/T-005/13-14	4,88,472
11.27.2013	LSR/T-006/13-14	61,21,331
12.04.2013	LSR/T-007/13-14	32,24,798
01.06.2014	LSR/T-008/13-14	4,92,136
01.17.2014	LSR/T-009/13-14	2,04,91,694
01.18.2014	LSR/T-011/13-14	70,53,431
03.07.2014	LSR/T-012/13-14	24,09,446
08.01.2014	LSR/T-005/14-15	1,16,92,020
08.27.2014	LSR/T-006/14-15	3,59,520
09.19.2014	LSR/T-008/14-15	3,34,524
09.19.2014	LSR/T-009/14-15	55,755
11.14.2014	LSR/T-011/14-15	26,34,444
11.14.2014	LSR/T-012/14-15	3,12,255
02.24.2015	LSR/T-014/14-15	5,73,351
02.24.2015	LSR/T-015/14-15	5,73,355
03.05.2015	LSR/T-016/14-15	3,99,556
	TOTAL SALES	26,06,09,912

The list of invoices for which payments are being sought in MSEFC Case No.76/2018 is set out below-

DATE	INVOICE DETAILS	AMOUNT (IN RS.)
11.05.2012	LSR/T-006/12-13	8,10,22,404
12.14.2012	LSR/T-007/12-13	12,85,99,584
06.22.2013	LSR/T-001/13-14	1,22,22,357
10.11.2013	LSR/T-002/13-14	98,91,694
10.24.2013	LSR/T-003/13-14	1,16,46,605
01.17.2014	LSR/T-010/13-14	2,45,57,258
05.22.2014	LSR/T-001/14-15	9,44,179
07.23.2014	LSR/T-002/14-15	9,00,797
08.01.2014	LSR/T-003/14-15	27,46,961
08.01.2014	LSR/T-004/14-15	1,82,17,265
09.05.2014	LSR/T-007/14-15	38,08,998
09.19.2014	LSR/T-010/14-15	1,10,395
02.24.2015	LSR/T-013/14-15	5,67,618
	TOTAL SALES	29,52,36,115

10. Out of the total payments, it is the case of the Respondent No. 3/LSR that Rs.1,75,06,370/- is pending in MSEFC Case No.75/2018 and Rs.1,92,34,367/- is pending in MSEFC Case No. 76/2018.

11. In both MSEFC cases, the date of registration admittedly being after the date of the last invoice having been raised, the *ratio* in **Silpi Industries (supra)** would clearly be applicable to this case. In **Silpi Industries (supra)** the Supreme Court has clearly held 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.”

12. This judgment in *Silpi Industries(supra)* has been subsequently considered by the Supreme Court, recently, in ‘*Gujarat State Civil Supplies Corporation Limited v. Mahakali Foods Private Ltd.(Unit 2) & Anr*’, the operative portion for which reads -

“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, 2006.

34. The upshot of the above is that-...

...(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 ..."

13. The *ratio* of these two judgments is clear to the effect that if the registration under the MSMED Act, 2006 was obtained subsequently, the benefits under the said Act would not apply. Even in a situation where some portion of the goods/services are supplied prior to registration and some are supplied post registration, the Act would apply, depending on the facts, only *qua* the goods and services which are supplied subsequent to the registration.

14. The Supreme Court has further clarified that this issue can be decided by the MSEFC or the institution acting as an arbitral tribunal under the MSMED Act, 2006.

15. In the facts of these cases, the clear position that emerges is that, in both cases, the registration was subsequent to the last invoice raised by the Respondent. Though, this Court is exercising jurisdiction under Article 227, in view of the decision in '*Surender Kumar Singhal & Ors. v. Arun Kumar Bhalotia & Ors*', [2021 SCC OnLine Del 3708: (2021) 279 DLT 636] the

position that emerges is that if there is complete lack of jurisdiction in the arbitral tribunal, the writ petition would be maintainable.

“Maintainability

18. Dealing with the first aspect, the law is well settled that Arbitral tribunals are a species of tribunals over which the High Court exercises writ jurisdiction. Challenge to an order of an arbitral tribunal can be raised by way of a writ petition. In Union of India v. R. Gandhi, President Madras Bar Association (supra) the Supreme Court observed on the question as to what constitutes ‘Courts’ and ‘Tribunals’ as under:

“38. The term ‘Courts’ refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the state for administration of justice that is for exercise of the judicial power of the state to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional mechanisms, usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute, or to determine controversies arising out of any administrative law. Courts refer to Civil Courts, Criminal Courts and High Courts. Tribunals can be either private Tribunals (Arbitral Tribunals), or Tribunals constituted under the Constitution (Speaker or the Chairman acting under Para 6(1) of the Tenth Schedule) or Tribunals authorized by the Constitution (Administrative Tribunals under Article 323A and Tribunals for other matters under Article 323B) or Statutory Tribunals which are created under a statute (Motor Accident Claims Tribunal, Debt Recovery Tribunals and consumer fora). Some Tribunals are manned exclusively by Judicial Officers (Rent Tribunals, Motor Accidents Claims Tribunal, Labour Courts and Industrial Tribunals). Other statutory

Tribunals have Judicial and Technical Members (Administrative Tribunals, TDSAT, Competition Appellate Tribunal, Consumer fora, Cyber Appellate Tribunal, etc). ”

19. Similar observations were made by the Supreme Court in SREI Infrastructure Finance Limited (supra) as under:

“14. Arbitration is a quasi judicial proceeding, equitable in nature or character which differs from a litigation in a Court. The power and functions of arbitral tribunal are statutorily regulated. The tribunals are special arbitration with institutional mechanism brought into existence by or under statute to decide dispute arising with reference to that particular statute or to determine controversy referred to it. The tribunal may be a statutory tribunal or tribunal constituted under the provisions of the Constitution of India. Section 9 of the Civil Procedure Code vests into the Civil Court jurisdiction to entertain and determine any civil dispute. The constitution of tribunals has been with intent and purpose to take out different categories of litigation into the special tribunal for speedy and effective determination of disputes in the interest of the society. Whenever, by a legislative enactment jurisdiction exercised by ordinary civil court is transferred or entrusted to tribunals such tribunals are entrusted with statutory power. The arbitral tribunals in the statute of 1996 are no different, they decide the lis between the parties, follows Rules and procedure conforming to the principle of natural justice, the adjudication has finality subject to remedy provided under the 1996 Act. Section 8 of the 1996 Act obliges a judicial authority in a matter which is a subject of an agreement to refer the parties to arbitration. The reference to arbitral tribunal thus can be made by judicial authority or an arbitrator can be appointed in accordance with the

arbitration agreement under Section 11 of the 1996 Act.”

20. Thus, the Supreme Court held that arbitral tribunals are private tribunals unlike those tribunals set up under the statute or specialized tribunals under the Constitution of India. **Thus, a Petition under Article 227 challenging orders of an Arbitral Tribunal would be maintainable.**

...Scope and Extent of interference

21. Coming now to the question as to what would be the scope of interference under Article 226/227 against orders passed by the Arbitral Tribunals, though a number of judgements have been cited by both parties, recent decisions of the Supreme court and of this Court have settled the issue....

...25. A perusal of the above-mentioned decisions, shows that the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenges to orders by an arbitral tribunal including orders passed under Section 16 of the Act.

(i) An arbitral tribunal is a tribunal against which a petition under Article 226/227 would be maintainable;

(ii) The non-obstante clause in section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a Constitutional provision;

(iii) For interference under Article 226/227, there have to be ‘exceptional circumstances’;

(iv) Though interference is permissible, unless and until the order is so perverse that it is patently lacking in inherent jurisdiction, the writ court would not interfere;

(v) Interference is permissible only if the order is completely perverse i.e., that the perversity must stare in the face

(vi) High Courts ought to discourage litigation which necessarily interfere with the arbitral process;

- (vii) Excessive judicial interference in the arbitral process is not encouraged;*
- (viii) It is prudent not to exercise jurisdiction under Article 226/227;*
- (ix) The power should be exercised in 'exceptional rarity' or if there is 'bad faith' which is shown;*
- (x) Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided.;"*

16. In these facts and circumstances, therefore, the reference to the DIAC, in both cases, would not be sustainable. The same is accordingly, set aside. The Respondent is permitted to avail of its remedies in accordance with law. Insofar as the period during which the Reference was sought and remained pending, is concerned, the claim of the Respondent, if filed before the proper forum, would not be liable to counted for the purposes of determining limitation. Considering that the matter has remained pending before either the MSEFC or before this Court for a substantial period, if the commercial suit which is to be filed by the Respondent No.3, is filed, by 31st March, 2023, the period from 22nd November 2018 till date of filing of suit, shall be excluded while calculating limitation. At this stage, Mr. Gupta, Id. Counsel submits that the issue of the claim being barred by limitation was raised before the MSEFC itself. Thus, Insofar as the period between April, 2015 to 22nd November, 2018, is concerned, the case of the Petitioner is that the claim is barred as it was lodged after three years which is the prescribed limitation period. This issue of limitation is being left open to be adjudicated in accordance with law by the competent forum.

17. Insofar as the other submission *qua* the MSEFC disposing off references expeditiously under Section 18(5) of the MSMED Act is

concerned, the same shall be considered in the remaining matters of the batch cases.

18. The petitions, along with all pending applications, are accordingly disposed of.

**PRATHIBA M. SINGH,
JUDGE**

MARCH 16, 2023
dj/rp

