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

Date of decision: 18th September, 2023

\+ **W.P.(C) 12085/2022 & CM APPL. 36132/2022**

ANUPAM GHOSH ..... Petitioner

Through: Mr. Sameer Nandwani & Mr. Rohin Singh Pande, Advocates (M-9810528802).

versus

MICRO SMALL ENTERPRISES FACILITATION COUNCIL & ANR. ..... Respondents

Through: Mr. Anil Soni, CGSC with Mr. Deuurat Yadav and Mr. Archil Mishra, Advocates for UOI (M: 8285815626).
Mr. K.G. Gopalakrishnan & Ms. Nisha Mohandas, Advocates for R-1 (M- 9810813707).
Mr. Vaibhav Jain, Advocate for R-2.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done though hybrid mode.

2. The present petition has been filed by the Petitioner – Anupam Ghosh (Proprietor of Anodita Healthcare) seeking quashing/ setting aside of the impugned reference order dated 1st July, 2022 passed by the Micro Small Enterprises Facilitation Council (MSEFC) by which dispute between the Petitioner and Respondent No. 2 - Rishabh Jain (Proprietor of R. A.

Enterprises) was referred to Delhi International Arbitration Centre (DIAC) for arbitration.

3. The dispute between the parties arose out of certain agreements for the purchase of Cent Latex Rubber.

4. The case of Respondent No. 2 is that it had supplied the goods to the Petitioner and there were outstanding dues of INR 10,09,461/-. However, the Petitioner failed to pay the same. Accordingly, he had approached the MSEFC.

5. The case of the Petitioner is that the registration of Respondent No. 2 under the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act, 2006) is dated 7th October, 2020. The last invoice raised by the Respondent No. 2 is in the year 2019, i.e. prior to the registration of Respondent No. 2 under the MSMED Act, 2006.

6. Ld. Counsel for the Respondent No. 2 lays emphasis on the fact that in the present case the Petitioner does not dispute that the amount of INR 10,09,461/- is due to Respondent No. 2 but the Petitioner seeks to set it off against some other dues which it allegedly has to receive from another entity which is run by the Respondent No. 2's father. The plea to this effect is set out at page 20 para F of the present writ petition. Ld. Counsel for Respondent No. 2 urges that these two are separate transactions and could not have been combined in this manner to deprive the Respondent No. 2 of its legitimate dues.

7. Mr. Gopalakrishnan, ld. Counsel for Respondent No. 1 raises an issue of alternate remedy under Section 19 of the MSMED Act, 2006.

8. In the opinion of this Court, the writ petition under Article 226 of the Constitution would not be barred, especially, when the issue of jurisdiction is raised as has been done in the present case.

9. The present petition raises the issue whether the 'supplier' ought to be registered under the MSMED Act, 2006 on the date when the contact is executed between the parties, in order to avail of the arbitral mechanism prescribed under the said Act. This issue is squarely covered by the recent decision of this Court dated 16th March, 2023 in ***W.P.(C) 16891/2022*** titled ***Municipal Corporation of Delhi v. Ram Prakash*** where after considering the judgments in ***Shilpi Industries (Supra) and Gujarat State Civil Supplies Corporation ltd. v. Mahakali Foods Pvt. Ltd. (unit 2) & Anr. (2022 SCC Online SC 1492)*** passed by the Hon'ble Supreme Court, this Court has observed as under:

> *"7. Heard. In the judgements of* ***Shilpi Industries (Supra) and Gujarat State Civil Supplies Corporation ltd. v. Mahakali Foods Pvt. Ltd. (unit 2) & Anr. (2022 SCC Online SC 1492)*** *passed by the Hon'ble Supreme Court it has been held as under:*
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> > ***"M/s Shilpi Industries vs. Kerala State Road Transport Corporation, (2021 SCC Online SC 439)***
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> > *"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. <u>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</u>

<u>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.</u> Any other interpretation of the provision would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation.

Gujarat State Civil Supplies Corporation ltd. v. Mahakali Foods Pvt. Ltd. (unit 2) & Anr. (2022 SCC Online SC 1492)

"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:

(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."*
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> *8. In view of above two judgments, it is clear that if the registration is subsequent to the completion of the works, the MSME Act would not be applicable. In view of the same as also the submissions by the ld. Counsels for the parties, the impugned references shall stand quashed.*"

10. In view of the above decision, the impugned reference order dated 1st July, 2022 is set aside. Needless to add, the Respondent No.2 is free to avail of its remedies in accordance with law.

11. If the Respondent No. 2 avails of its remedies by 31st October, 2023, the concerned forum shall extend the benefit of Section 14 of the Limitation Act, 1963 for the period commencing from the date when the application was filed before the MSEFC till 31st October, 2023.

12. The Petition is disposed of. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 18, 2023
mr/kt