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

Date of decision: 18th September, 2023

\+ **W.P.(C) 297/2022**

JAIPRAKASH ASSOCIATES LIMITED ..... Petitioner
Through: Mr. Anil Dutt, Mr. Tenzen Tashi Negi, Advs. (M: 6230099000)

versus

MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL (SOUTH EAST) , GOVERNMENT OF NCT OF DELHI AND ANR ..... Respondent
Through: Mr. Vaibhav Gaggar, Ms. Monica Lakhanpal & Mr. Ketan Sarraf, Advs. for R-2. (M: 8285212361)

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 – Jaiprakash Associates Limited seeking quashing/ setting aside of the impugned reference order dated 13th December, 2021 passed by the Micro Small Enterprises Facilitation Council (MSEFC) by which the dispute between the Petitioner and Respondent No. 2 - Krishna Build Estates Private Limited was referred to Delhi International Arbitration Centre (DIAC) for arbitration.

3. The disputes arose between the parties out of an agreement dated 29th May, 2014. By the said agreement, a works contract was executed between the Petitioner and the Respondent No.2 for construction of *"Civil and*

Structural works for Cluster B-8, Boomerang Residency [2 Towers (BMR 01 & BMR 02): 2B+G+23F and 1 Club building: G+ 1] at Wish Town, Jaypee Greens, Noida (U.P.)"

4. The work was commenced by the Respondent No.2 and the same is stated to have been completed in June, 2018. The Respondent No.2 thereafter got registered under the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act, 2006) on 7th September, 2019. It filed a claim before the MSEFC that a sum of Rs. 10,44,95,315/-. was recoverable by it from the Petitioner in respect of the works executed by it. The said claim was referred to arbitration vide the impugned order.

5. The impugned reference is challenged by the Petitioner on the ground that the MSMED Act, 2006 would not be applicable in the present case as the Respondent was registered under the MSMED Act subsequent to the execution and completion of the contract. This issue is squarely covered by the recent decision dated 16th March, 2023 of this Court in ***W.P.(C) 16891/2022*** 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)***
> >
> > *"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 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.*"

6. In view of the above decision, the impugned reference order dated 13th December, 2021 is set aside. Needless to add, the Respondent No.2 is free to avail of its remedies in accordance with law.

7. 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.

8. If the Arbitrator is appointed, considering the fact that the dispute is pending since 2018, the Tribunal shall endeavour to dispose of the matter at

the earliest.

9. The writ petition is disposed of in these terms. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 18, 2023/*dk/kt*