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

Date of Decision: 18th September, 2023

+ **W.P.(C) 16567/2022 & CM APPL. 52091-92/2022**

JKS INFRASTRUCTURE PRIVATE LIMITED Petitioner

Through: Mr. Dheeraj Sharma, Advocate (M-9560434606)

versus

MSME FACILITATION COUNCIL AND ORS Respondents

Through: Mr. Ashish Verma, Advocate (M-9717944394)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done though hybrid mode.
2. This petition has been filed by the Petitioner- JKS Infrastructure Pvt. Ltd. seeking order/writ for setting aside the reference UDYAM-DL-10-0032365/M/00003 dated 10th September, 2022 made by Respondent No.1 - MSME Facilitation Council under section 18(2) of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter, "MSME Act") and all other subsequent proceedings initiated pursuant to the aforesaid reference made by the Respondent No.1.
3. Disputes had arisen between the Petitioner and the Respondent No.3 - Lamba Techno Flooring Solutions, in which the Respondent No.1 made a reference to arbitration to the Respondent No.2 - Delhi Arbitration Centre (DAC).
4. On 2nd December 2022, the Petitioner argued that the MSME Act did not apply as the purchase order and invoice between the Petitioner and



Respondent No.3 were dated before Respondent No.3's registration as an MSME on 8th February 2021. On the said date, notice was issued to all Respondents in the present petition.

5. Vide order dated 11th January 2023, it was clarified that no arbitral tribunal was to be constituted till the pendency of the present petition.

6. The Petitioner submits that the purchase order and invoice for supplies were dated 7th July, 2018 and 1st September, 2018. However, Respondent No. 3 had got registered only on 8th February, 2021. Thus, the case of the Petitioner is that the MSME Act would not be applicable.

7. This legal issue has now been decided by this Court recently vide judgement dated 16th March 2023 in *W.P.(C) 16891/2022* titled '***Municipal Corporation of Delhi v. Ram Prakash***', and judgment dated 5th July, 2023 in *M/s. Grand Mumtaz Hotel v. Deputy Commissioner North East Government of NCT of Delhi (2023:DHC:4523)*.

8. In *Ram Prakash (supra)*, this Court after considering the judgments rendered by the Supreme Court in *M/s Shilpi Industries vs. Kerala State Road Transport Corporation, (2021 SCC Online SC 439)* and *Gujarat State Civil Supplies Corporation ltd. v. Mahakali Foods Pvt. Ltd. (unit 2) & Anr. (2022 SCC Online SC 1492)* observed as follows:

"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:

"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. 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.

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."

8. In view of the 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 Id. Counsels for the parties, the impugned references shall stand quashed.

9. The Respondents are free to avail of its remedies in accordance with law."



9. Thereafter in *Grand Mumtaz (supra)*, this Court observed as under:

*“24. The decisions in Silpi Industries (supra) and Gujarat State Civil Supplies Corporation Ltd (supra) leave no manner of doubt that the registration of an entity under the MSMED Act, 2006 after the contract is executed and that too after the services have been rendered, cannot give benefit of the provisions of the Act, to such entity. The registration under the Act, would apply only prospectively and not retrospectively. After considering these two decisions of the Supreme Court, this Court in W.P.(C) 9608/2022 titled *Malani Construction Company v. Delhi International Arbitration Centre & Ors.* vide order dated 16th March, 2023 observed as under:*

“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.”

25. In view of the admitted facts in the present case where the registration of Respondent No.2 under the MSMED Act, 2006 was subsequent to the agreement for services as also after the last invoice was raised, the decisions discussed above would be squarely applicable. The impugned reference order dated 8th October 2022 is thus not sustainable and is accordingly set aside.

26. Respondent No. 2 is free to avail of its remedies in accordance with law including filing of a suit seeking recovery [....]”



10. In view of the above legal position, Id. Counsel for Respondent No. 3 submits that the said Respondent had withdrawn its claim petition from the MSEFC, and has approached the Commercial Court in Gurugram.

11. Accordingly, the Respondent No.3 is free to avail of its remedies in accordance with law.

12. Needless to add that the time period from when the claim was filed before the MSEFC till the institution of the suit before the Commercial Court, Gurugram, shall not be counted for the purposes of calculating limitation.

13. The petition is disposed of in the above terms. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 18, 2023

Rahul/dn