IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3080 OF 2024.

Marine Electricals India Ltd. .. Petitioner

Versus

Union of India and Anr. .. Respondents

ANJALI TUSHAR ASWALE Digitally signed by ANJALI TUSHAR ASWALE Date: 2024.08.13 19:44:52 +0530

Mr. Rohan Kadam *a/w Ms.Rucha Vaidya, Mr. Nadeem Shama and Mr. Prashant Bothre i/b M/s. Pan India Legal Services LLP, Advocate for the Petitioner.*

Mrs. Savita Ganoo *a/w Ms. Sangeeta Yadav and Mr. Umesh Gupta, Advocate for Respondents.*

CORAM : B. P. COLABAWALLA &
FIRDOSH P. POONIWALLA, JJ.
Reserved on : AUGUST 8, 2024
Pronounced on : AUGUST 13, 2024

ORAL JUDGMENT: (PER FIRDOSH P. POONIWALLA, J.)

1. Rule. Rule made returnable forthwith and heard finally by consent of the parties.

2. The issue in the present Writ Petition is whether the Petitioner can take advantage of the *"Vivad Se Vishwas I-Relief for MSMEs Scheme"* [for short the **"*VSV Scheme*"**] floated by the

Finance Ministry of the Government (Union of India) by an Office Memorandum dated 11th April 2023. Under this Scheme, the Government proposed to refund 95% of the liquidated damages deducted under contracts entered into with the Government/PSUs on the fulfillment of the eligibility conditions, more particularly set out in the said Office Memorandum. It is in this context that the Petitioner, although seeking various reliefs in the above Petition, has restricted itself to prayer clauses (iii-a) and (iii-b) which read thus:-

> *"(iii-a) A writ of Certiorari and/or a Writ in the nature of Certiorari and/or any other appropriate Writ, Order and/or direction under Article 226, calling for the records leading to the issuance of the decisions communicated vide emails dated 12th March 2024 (at Exhibit "S") and 13th March 2024 (at Exhibit "T") and after examining the legality and propriety thereof, be pleased to quash and set aside the same.*
>
> *(iii-b) A Writ of Mandamus and/or a Writ in the nature of Mandamus and/or any other appropriate Writ, Order and/or direction under Article 226 directing the Respondent to accept the Petitioner's application for relief under the Vivad Se Vishwas I Scheme as per Office Memorandum dated 10.04.2023 and subsequent Office Memorandums and to process the same in accordance with law."*

3. The Petitioner is a Company engaged in rendering services of electronic automation, information, communication, and technical solutions, and manufacturing of Meteorological Instruments, Radar

Equipment, GPS Devices, Search Devices, Navigators etc., to various Government bodies and PSU undertakings carrying out shipbuilding.

4. In exercise of powers conferred by sub-section (1), read with sub-section (9), of Section 7 and sub-section (2), read with sub-section (3), of Section 8 of the *Micro, Small and Medium Enterprise Development Act, 2006* (**"the MSME Act"**), the Ministry of Micro, Small and Medium Enterprise, on 26th June 2020, issued Notification No.S.O.2119(E). Under this notification, the Government framed criteria, *inter alia,* for classifying an Enterprise as a Micro, Small and a Medium Enterprise under the MSME Act and also the form and procedure for filing the Memorandum known as 'Udyam Registration', which was to take effect from 1st July 2020. Clause 8 of the said Notification provided for updation of information and the transition period in classification. Clause 8(5), and which is relevant for our purpose, stated that in case of an upward change in terms of investment in plant and machinery or equipment, or turnover, or both, and consequent re-classification, an Enterprise would maintain its prevailing status till the expiry of one year from the close of the year of registration. Thereafter, by another Notification dated 18th October 2022, Clause 8(5) [of the Notification dated 26th June 2020] was

substituted. The substituted Clause 8(5) provided that in case of an upward change in terms of investment in plant and machinery or equipment, or turnover, or both, and consequent re-classification, an Enterprise shall continue to avail of all non-tax benefits of the category (Micro or Small or Medium) it was in before the re-classification, for a period of three years from the date of such upward change.

5. On 10th May 2021, the Petitioner was registered as a "Medium" Enterprise under the MSME Act and obtained an Udyam Registration Certificate.

6. Between 19th February 2020 and 31st March 2022, the Petitioner was unable to deliver / complete various projects contracted with the Government / Public Sector Undertakings due to constraints arising from the COVID-19 Lockdown. Due to these defaults, the contracting Government undertaking / authority deducted liquidated damages under the contracts entered into with the Petitioner.

7. Since the Government received many references from Micro, Small and Medium Enterprises (MSMEs) regarding difficulties faced by them due to the COVID – 19 pandemic, by an Office

Memorandum dated 6th February 2023, the Finance Ministry framed the *VSV Scheme* under which it proposed to refund 95% of the liquidated damages deducted under contracts with Government / PSUs inter alia on the conditions that the contractor/supplier should be registered as a Medium, Small or Micro Enterprise with the Ministry of MSME, as on 31st March 2022, and the original delivery period/completion period [under the concerned contract] was between 19th February 2020 and 31st March 2022. The Government e-Marketplace (the **"GeM"**) was also directed to provide an online portal for the purpose of implementing the *VSV Scheme*.

8. Thereafter, the Finance Ministry issued an Office Memorandum dated 10th April 2023 whereby the eligibility conditions for applying under the *VSV Scheme* were modified. It was provided that the supplier/contractor would be eligible for the *VSV Scheme* if it is registered as a Medium, Small or Micro Enterprise as per the prevalent scheme of the Ministry of MSME on the date of the claim made by the supplier/contractor. It was also provided that an MSME may be registered for any category of goods and services.

9. Subsequently, another Office Memorandum dated 11th April 2023 was issued superseding the earlier Office Memorandums dated 6th February 2023 and 10th April 2023. However, the eligibility criteria mentioned in the Office Memorandum dated 10th April 2023 remained the same. Under the said Office Memorandum dated 11th April 2023, the date for submission of claims was extended to 30th June 2023 and which was further extended to 31st July 2023 [vide Office Memorandum dated 2nd June 2023], and thereafter to 31st March 2024 [vide Office Memorandum dated 22nd December 2023].

10. In the Interregnum, on 9th May 2023, the Petitioner was upgraded/re-classified as "not an MSME". In Order to take advantage of the *VSV Scheme*, in February 2024, the Petitioner tried to make a claim on the GeM portal. However, it was not permitted to make the claim on the ground that it was not an MSME. By an email dated 10th February 2024, the Petitioner conveyed the same to the GeM helpdesk informing them that it was unable to make the claim on the GeM portal and that an error cropped up stating that it was not an MSME.

11. Further, in this regard, the Petitioner also addressed a letter dated 13th February 2024 to the Director, Department of

Expenditure, Ministry of Finance. By the said letter, the Petitioner brought to the attention of the concerned authority that the GeM portal was not facilitating the uploading of the claim. The Petitioner further stated that while it was trying to make use of the link of the *VSV Scheme* at the GeM portal, a message appeared that it was not eligible to file the claim as it was "not an MSME". The Petitioner also pointed out that, by virtue of Clause 8(5) of the Notification dated 26th June 2020, as substituted by the Notification dated 18th October 2022, it was eligible to make the claim under the *VSV Scheme*, and, hence, it should be permitted to upload its claim on the GeM portal. This was again reiterated by the Petitioner vide its letter dated 15th February 2024.

12. Thereafter, the Petitioner received emails dated 12th March 2024 and 13th March 2024 from the GeM helpdesk. By the said emails, the Petitioner was informed that it would not be able to make a claim under the *VSV Scheme* as it was "not an MSME". It is in these circumstances that the Petitioner has been constrained to file the present Petition seeking the reliefs set out above.

13. In this factual backdrop, and which is undisputed, Mr. Kadam, the learned counsel appearing on behalf of the Petitioner,

submitted that by the impugned emails dated 12th March 2024 and 13th March 2024, the Respondents have wrongfully held that the Petitioner is not entitled to make a claim under the *VSV Scheme* on the ground that the Petitioner was not a MSME. Mr. Kadam submitted that for the Petitioner to be entitled to avail of the *VSV Scheme*, it had to be registered as a Medium, Small or Micro Enterprise as per the prevalent scheme of the Ministry of MSME on the date of making the claim. He submitted that the Petitioner made the claim in February 2024. He further submitted that the Petitioner was registered as a Medium Enterprise with the MSME Ministry on 10th May 2021. He submitted that the Petitioner was upgraded/re-classified as "not an MSME" w.e.f. 9th May 2023. However, the Udyam Registration Certificate, by which the Petitioner was re-classified as "not an MSME", itself provided that in case of graduation of status of an Enterprise, the benefit of Government Schemes can be availed as per the provisions of Notification No. S.O. 2119 (E) dated 26th June 2020.

14. Mr. Kadam submitted that Clause 8(5) of the Notification dated 26th June 2020, as substituted by the Notification dated 18th October 2022, clearly provided that in case of an upward change/re-classification in terms of investment in plant and machinery or

equipment, or turnover, or both, and consequent re-classification, an Enterprise shall continue to avail of all non-tax benefits of the category (micro or small or medium) it was in before the re-classification, for a period of three years from the date of such upward change. Mr. Kadam submitted that therefore, the Petitioner was to be considered as a Medium Enterprise for the purpose of the *VSV Scheme* for a period of three years from 9th May 2023. Consequently, in February 2024, the Petitioner had to be considered as a Medium Enterprise for the purpose of the *VSV Scheme*, and, therefore, was entitled to make a claim thereunder.

15. Mr. Kadam submitted that if one peruses the Notification dated 26th June 2020, as amended by the Notification dated 18th October 2022, it creates a legal fiction of treating a Micro or Small or Medium Enterprise as such, for a period of three years from an upward change in its status, despite the said upward change, for the purpose of availing of all non-tax benefits. Mr. Kadam submitted that when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, even then, the Court has to give full effect to such a statutory fiction after examining and ascertaining as to for what purpose and between what

parties such statutory fiction has been resorted to. In support of this proposition, Mr. Kadam relied upon a decision of the Hon'ble Supreme Court in ***Voltas Limited vs. Union of India***[1]**.**

16. Taking all these facts and circumstances into consideration, Mr. Kadam submitted that the Petitioner has been wrongly denied the benefit of the *VSV Scheme*, and hence, it is entitled to reliefs in terms of prayer clauses (iii-a) and (iii-b) reproduced earlier.

17. The Respondent, through its Ministry of Finance, has filed an Affidavit in Reply dated 5th April 2024 opposing the Petition.

18. In the said Affidavit in Reply dated 5th April 2024 the Ministry of Finance has taken a stand that to avail of the benefit of the *VSV Scheme*, an Enterprise had to be a Micro or Small or a Medium Enterprise on the date of the claim made by it. When the Petitioner submitted its claim in February 2024, it was admittedly not a Micro or Small or a Medium Enterprise because w.e.f. 9th May 2023 it had been classified as 'not an MSME'.

1 (1995) Supp (2) SCC 498

19. The said Affidavit further stated that Clause 8(5) of the Notification dated 26th June 2020, as substituted by Notification dated 18th October 2022, was not applicable to the *VSV Scheme*, because the said Scheme inter alia stipulated that on the date of making the claim, the said Enterprise would have to be registered as a MSME. Admittedly, in February 2024 the Petitioner was not a MSME, and hence, could not avail of the *VSV Scheme*. The said Affidavit then stated that an upward re-classification/change as contemplated under Clause 8(5) of the Notification dated 26th June 2020, as substituted by Notification dated 18th October 2022, could never apply where, by virtue of the upward change, the MSME ceases to be a MSME. The upward change contemplated is only a change from a Micro Enterprise to a Small Enterprise, and from a Small Enterprise to a Medium Enterprise. The said Affidavit therefore submitted that the interpretation sought to be given by the Petitioner to clause 8(5) of the Notification dated 26th June 2020, as substituted by Notification dated 18th October 2022, is totally fallacious, which, in turn, entailed dismissal of the Petition with costs.

20. On the other hand, the Ministry of Micro, Small and Medium Enterprises of the Respondent has filed an Affidavit in Reply dated 8th August 2024, wherein it has taken the stand that the Petitioner would continue to avail of all non-tax benefits of the category “Medium” as it was in before the re-classification on 9th May 2023, for a period of three years till 8th May 2026. The relevant portion of the said Affidavit, reads as under:-

> *“It is pertinent to mention that M/s Marine Electricals (India) Limited (UDYAM-MH-19-0059391) graduated from "Medium" to "Not a MSME" on dated 09.05.2023.*
>
> *In view of the above fact, M/s Marine Electricals (India) Limited (UDYAM-MH-19-0059391) shall continue to avail of all non-tax benefits of the category "Medium" as it was in before the re-classification on 09.05.2023, for a period of three years till 08.05.2026."*

21. Although, the Ministry of Micro, Small and Medium Enterprises, through its Affidavit in Reply dated 8th August 2024, has taken a stand in favour of the Petitioner, since the Ministry of Finance, by its Affidavit in Reply dated 5th April 2024, has taken a contrary stand, we have, despite the admission of the Ministry of Micro, Small and Medium Enterprises, decided to adjudicate this Petition on its merits.

ANALYSIS AND FINDINGS

22. The short question that arises for our consideration is whether the Petitioner is entitled to take the benefit of the *VSV Scheme* in February 2024 when it was re-classified as 'not an MSME' w.e.f. 9th May 2023. The relevant eligibility criteria for being entitled to make a claim under the *VSV Scheme* is contained in the Office Memorandum dated 11th April 2023, and reads as under:

"SN	***Parameter***	***Eligibility condition***
i	.....	
ii	.....	
iii	*Nature of the supplier/contractor eligible for the scheme.*	*Registered as a Medium, Small or Micro Enterprise (MSME) as per prevalent scheme of Ministry of MSME on the date of claim by supplier/contractor.* *MSME may be registered for any category of Goods and Services.*
iv	.....**"**	

23. As per the said eligibility criteria, for the supplier/contractor to be eligible for the *VSV Scheme*, it should be registered as a Medium, Small or Micro Enterprise as per the prevalent scheme of the Ministry of MSME on the date of the claim by the supplier / contractor.

24. As mentioned earlier, the Ministry of MSME has issued a Notification dated 26th June 2020 notifying certain criteria for classifying Enterprises as Micro, Small and Medium Enterprises, and for specifying the form and procedure for filing the Memorandum known as Udyam Registration w.e.f. 1st July 2020. Clause 1 thereof provides for classification of Enterprises and reads as under:

> *"1. Classification of enterprises.-An enterprise shall be classified as a micro, small or medium enterprise on the basis of the following criteria, namely:--*
>
> *(i) a micro enterprise, where the investment in plant and machinery or equipment does not exceed one crore rupees and turnover does not exceed five crore rupees;*
>
> *(ii) a small enterprise, where the investment in plant and machinery or equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees; and*
>
> *(iii) a medium enterprise, where the investment in plant and machinery or equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees."*

25. Clause 8 of the said Notification dated 26th June 2020 provides for updation of information and the transition period in classification. Clause 8(5) of the Notification dated 26th June 2020, and which is relevant for our purpose, reads as under:

> *"(5) In case of an upward change in terms of investment in plant and machinery or equipment or turnover or both, and consequent re-classification,* ***an enterprise will maintain its prevailing status*** *till expiry of one year from the close of the year of registration."*
>
> (emphasis supplied)

26. The above Clause 8(5) was thereafter substituted by Notification dated 18th October 2022 and reads as under:

> *"(5) In case of an upward change in terms of investment in plant and machinery or equipment or turnover or both, and consequent re-classification,* ***an enterprise shall continue to avail of all non-tax benefits of the category (micro or small or medium) it was in before the re-classification, for a period of three years from the date of such upward change."***
>
> (emphasis supplied)

27. By the substituted Clause 8(5), it was made explicitly clear that whether an Enterprise was a Micro or Small or a Medium Enterprise, in case of an upward change and consequent re-classification, it would continue to avail of all non-tax benefits of the category it was in before re-classification, for a period of three years from the date of such upward change. The use of the word "medium" in the bracketed portion of Clause 8(5) makes it clear that Clause 8(5) applied to an upward change and re-classification of even a Medium Enterprise. If we were to accept the submission of the Ministry of

Finance that Clause 8(5) [as substituted by Notification dated 18th October 2022], only contemplated an upward change from a Micro Enterprise to a Small Enterprise, and from a Small Enterprise to a Medium Enterprise, and not an upward change from a Medium Enterprise to "not an MSME", then the word "medium" in the bracketed portion of Clause 8(5) would be rendered otiose. It is now well settled in law that any legislation, or even a delegated legislation, cannot be read in a manner that would render any word otiose or superfluous. Therefore, it is not possible to accept the said submission of the Ministry of Finance.

28. In our view, Mr. Kadam is right in submitting that Clause 8(5), as substituted by Notification dated 18th October 2022, creates a legal fiction of treating a Micro or Small or a Medium Enterprise as such, for a period of three years, from an upward change/re-classification in its status, notwithstanding the fact that its status may have changed due to its upward change/re-classification. This, of course, is for the limited purpose of availing of all non-tax benefits. In other words, for example, if a Small Enterprise becomes a Medium Enterprise [by virtue of its upward re-classification], for availing of all non-tax benefits, it will continue to be treated as a Small Enterprise for

a period of three years from such upward change/re-classification. Similarly, if a Medium Enterprise is classified as "not an MSME" by virtue of its upward re-classification, for availing of all non-tax benefits, it will continue to be treated as a Medium Enterprise for a period of three years from such upward change/re-classification. In this context, the Judgement of the Hon'ble Supreme Court in ***Voltas Limited (Supra)*** is very instructive. The relevant portion of this decision reads as under:-

> **"8.** The effect of a statute containing a legal fiction is by now well settled. The legislature by a statute may create a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, but even then Court has to give full effect to such statutory fiction after examining and ascertaining as to for what purpose and between what parties such statutory fiction has been resorted to. In the well known case of *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council* [1952 AC 109 : (1951) 2 All ER 587] , Lord Asquith has said:
>
> > **"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. ...The statute says that you must imagine a certain state of affairs. It does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."**

> This Court in the cases of *State of Bombay* v. *Pandurang Vinayak* [(1953) 1 SCC 425 : AIR 1953 SC 244 : 1953 SCR 773] ; *Chief Inspector of Mines* v. *Karam Chand Thapar* [AIR 1961 SC 838 : (1962) 1 SCR 9] ; *J.K. Cotton Spg. and Wvg. Mills Ltd.* v. *Union of India* [1987 Supp SCC 350 : 1988 SCC (Tax) 26 : AIR 1988 SC 191 : (1988) 1 SCR 700] ; *M. Venugopal* v. *Divisional Manager, LIC*[(1994) 2 SCC 323 : 1994 SCC (L&S) 664 : (1994) 27 ATC 84 : JT (1994) 1 SC 281] and recently in the case of *Harish Tandon* v. *Addl. District Magistrate* [(1995) 1 SCC 537 : JT (1995) 1 SC 290] has dealt with in detail the effect of a statutory fiction and the limitation of the court to ignore the mandate of the legislature, unless it is violative of any of the provisions of the Constitution. So far as sub-section (1) of Section 33 is concerned, it mandates that agreements covered under different clauses of sub-section (1) of Section 33 shall be deemed for the purposes of the Act to be agreements relating to restrictive trade practices. By the deeming clause one is not required to treat any imaginary state of affairs as real but to treat the agreements specified and enumerated in sub-section (1) of Section 33 as agreements relating to restrictive trade practices. It can be said that Parliament after having examined different trade practices, has identified such trade practices which have to be held as restrictive trade practices for the purposes of the Act. To keep such trade practices beyond controversy in any proceeding, a deeming clause has been introduced in sub-section (1) of Section 33 saying that they shall be deemed to be restrictive trade practices. In this background, according to us, there is not much scope for argument that although a particular agreement is covered by one or the other clauses of sub-section (1) of Section 33, still it shall not amount to an agreement containing conditions which can be held to be restrictive trade practices within the meaning of the Act.**"**
>
> (emphasis supplied)

29. In these circumstances, in our view, even though the Petitioner was re-classified as "not an MSME" [by virtue of upward re-classification] w.e.f. 9th May 2023, for a period of three years from 9th

May 2023, it was entitled to avail of all non-tax benefits available to a Medium Enterprise. Since the *VSV Scheme* is a non-tax benefit applicable even to a Medium Enterprise, in our view, the Petitioner was entitled to make a claim under the *VSV Scheme*. We may add here that this view is also supported by the Affidavit in Reply dated 8th August 2024 of the Ministry of Micro, Small and Medium Enterprises. In these circumstances, we are of the view that the emails dated 12th March 2024 and 13th March 2024 have wrongly held that the Petitioner was not entitled to make a claim under the *VSV Scheme*.

30. In the light of the aforesaid discussion, and for all the reasons set out earlier, the emails dated 12th March 2024 and 13th March 2024 are required to be quashed and the Respondents will have to be directed to entertain the Petitioner's claim under the *VSV Scheme*.

31. In these circumstances, we allow the Writ Petition in terms of prayer clauses (iii-a) and (iii-b) thereof, and which are reproduced earlier. Rule is made absolute in the aforesaid terms and the Writ Petition is also disposed of in terms thereof. In the facts and circumstances of the case, there will be no order as to costs.

32. We hasten to clarify that this Court has not gone into the merits of the Petitioner's claim under the *VSV Scheme*, and the merits thereof will have to be considered and decided by the Respondents as per the provisions of the *VSV Scheme* and in accordance with law. All that we have decided is the eligibility of the Petitioner to avail of the said Scheme.

33. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[FIRDOSH P. POONIWALLA, J.] **[B. P. COLABAWALLA, J.]**