



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

Date of decision: 03rd MAY, 2024

IN THE MATTER OF:

+ **W.P.(C) 2354/2024**

ARMY WELFARE HOUSING ORGANISATION Petitioner

Through: Mr. Anand Shankar Jha, Mr. Sachin
Mintri, Ms. Meenakshi Sharma
Devgan, Mr. Abhilekh Tiwari and
Mr. Parvez Rehman, Advocates.

versus

HALKO INFRAPROJECTS & ANR. Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

CM APPL. 9722/2024 (Exemption)

Allowed, subject to all just exceptions.

W.P.(C) 2354/2024 & CM APPLs. 9720/2024, 9721/2024

1. The present writ petition has been filed under Article 226 of the Constitution of India challenging the Order dated 05.10.2023 in Petition No. 2847/2022 titled as M/s. Hal-Ko Infraprojects vs. M/s. Army Welfare Housing Organisation (AWHO) passed by the Member Secretary, MSE Facilitation Council, Mumbai Region, Mumbai whereby the Council has decided to initiate arbitration in the above-mentioned petition upon failure of conciliation proceedings under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'the MSMED Act').

2. The facts leading upto filing of the writ petition are as follows:



3. The petitioner issued a Notice Inviting Tenders (NIT) dated 28.05.2014 for the construction of Residential Accommodation at Belgaum, Kudachi, Karnataka (Phase-II) including 53 dwelling units of duplex types and other ancillary buildings including all Internal and External Services such as Sewerage, Boundary Wall, Water Supply and External Electrification.
4. The Tender was submitted by the Respondent 1 and was accepted by the Petitioners herein on 05.08.2015 for a total work price of Rs. 22,45,00,947. A Contract Agreement being CA No. AWHO/BELGAUM/03/2015 was entered into between the parties on 17.08.2015 for construction of Residential Accommodation at Belgaum and a Work Order was issued on 17.08.2016 by the petitioner to the respondent 1 stipulating the duration of the project as 2 years i.e. between 31.08.2015 and 31.08.2017
5. Due to slow progress at the work site for want of resources and funds due to poor financial flow of the Respondent 1 firm, the Respondent 1 approached the petitioner for financial assistance to complete the work issued vide order dated 14.08.2018 pursuant to which 2 separate Memorandum of Understandings (MoU) dated 29.08.2019 and 06.12.2018 were entered into between the parties for a total disbursal of Rs. 1,50,00,000 to the firm. The parties also agreed to extend the date of completion of the work order from 31.08.2017 to 10.01.2019 by the virtue of the MoU dated 06.12.2018 in the interest of the allottees of residential flats by the petitioner.
6. The Respondent 1/Contractor registered itself as an Micro, Small and Medium Enterprises on the UDYAM Portal on 03.12.2019



7. The work was finished by the Respondent 1 on 13.03.2020 and the a final bill was raised against the petitioner by the respondent on 13.11.2020. Disputes arose between the parties regarding payments for the work order. A revised final bill was submitted by the Respondent 1 for an amount of Rs. 2,50,04,129 which gave rise to further disputes between the parties.

8. Pursuant the final bill, a Memorandum of Understanding was entered into by the parties for a final settlement for the amount arising out of the work order where it was decided that a sum of Rs. 98,59,469 will be paid by the petitioner to the respondent 1 subject to scrutiny and audit by the Head Quarter of AWHO. After scrutiny of the bills, it was found that the amount paid by the Petitioner on behalf of the Respondent 1 to the Vendors was much in excess of the amount which was due and payable to the Respondent 1 by the petitioner.

9. The disputes between the Parties regarding complications arising out of payments of dues and the delayed completion of the project culminated into the Respondent 1 filing an application in front of Micro and Small Enterprises Facilitation Council (MSEFC), Mumbai under Section 18 of the MSME Act against the Petitioner on 28.01.2022 claiming an amount of Rs.9,52,93,720 for the memos dated 31.08.2019, 06.08.2020 and 09.09.2020.

10. A reference petition was filed by the Respondent 1 in front of the Council pursuant to the application on 06.06.2022 claiming an amount of Rs. 20,85,88,646 against the petitioner herein alleging delay in payments of various invoices, and sought for interest under Section 15 and 16 of the MSME Act. The petitioner filed their reply to the Reference Petition justifying the payments and raised objections to the maintainability of the



reference under Section 18 of the MSME Act. Hearings for the reference petition for conciliation and amicable settlement between the parties were held on 20.07.22 and 04.11.2022. The Respondent 1 filed their evidence on 21.02.2023 and the final hearing took place in front of the MSME Facilitation Council on 15.03.2023.

11. Pursuant to the final hearing, the impugned order dated 05.10.2023 was passed by the Micro Small Enterprises Facilitation Council whereby the council decided to terminate conciliation proceedings between the parties and initiate arbitration proceedings in the reference petition under Section 18(3) of the MSME Act conferring powers on itself to act as an arbitration tribunal for the dispute.

12. It is this Order which is under challenge in the present Writ Petition.

13. This court pointed out to the Ld. Counsel for the petitioner that due to the application dated 28.01.2022 and the Reference Petition dated 06.06.2022 being filed in front of the Micro Small Enterprises Facilitation Council, Mumbai and the Respondent 1/contractor having their registered office in Borivali(west), Mumbai, only the Courts in Mumbai would have jurisdiction to adjudicate on the reference made under Section 18 of the MSMED Act.

14. Ld. Counsel for the petitioner submits that the Courts in Delhi will have exclusive Jurisdiction to adjudicate upon the dispute of between the petitioner by referring to Clause 179 of the Agreement and states that the contract confers exclusive jurisdiction to the courts at Delhi to adjudicate and settle any disputes between the parties. He further indicated that the clause specifically states that no courts located outside Delhi shall have jurisdiction on any matter requiring a reference to a civil court. He therefore



states that the appropriate forum to challenge a reference to Arbitration under Section 18(3) of the MSMED Act will be the courts at Delhi. The Ld. Counsel places reliance on the judgement of a Division Bench of this High Court in Ircon International Ltd. v. Pioneer Fabricators (P) Ltd., (2023) 2 HCC (Del) 359, and submits that the decision therein pertained to the challenge of an award passed under Section 19 of the MSMED Act r/w Section 34 of the Arbitration and Conciliation Act where this court held that the provisions of the MSMED Act merely overrides the constitution of an Arbitral Tribunal, but the same does not do away with the exclusive jurisdiction conferred to a court under the Contract Agreement. He therefore states that even though the reference order has been passed by the MSE Council, Mumbai, this court will have jurisdiction to entertain the current petition challenging the reference to arbitration under the MSMED Act.

15. At this juncture, it is necessary to reproduce condition 179 of the contract and the same reads as under:

(iii) Condition 179 of Contract Agreement . Notwithstanding the fact that the station of work is at Belgaum only the courts at Delhi shall have the jurisdiction to adjudicate and settle any disputes between the employer and the Contractor. No other court located outside Delhi shall have jurisdiction on any matter requiring reference to the Civil Court.

16. Condition 179 of the Contract states that only the courts at Delhi shall have the jurisdiction to adjudicate and settle any disputes between the employer and the Contractor. Here the issue before this Court is as to whether the reference made by the Council under Section 18 is correct or not. The Council is situated outside the jurisdiction of Delhi. When the



Council is not subject to the judicial superintendence of this Court, the reference made by that Council cannot be subject to the judicial superintendence of this Court and only the Court having territorial jurisdiction over the place where the Council is situated, i.e. Mumbai, shall have the judicial superintendence to adjudicate upon the issue. The reliance placed by the Counsel on IRCON (supra) is, therefore, of no consequence.

17. It is also pertinent to examine the provisions under the MSMED Act, 2006. Section 18 of the MSMED Act, which deals with the reference of a dispute regarding amounts claimed by an MSME from a buyer reads as under -

“18.Reference to Micro and Small EnterprisesFacilitation Council.—

(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either



itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section(1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.”

18. The Petitioner has approached the Facilitation Council under Section 18 of the MSMED Act to refer the disputes to Arbitration and the Council has passed the impugned Order. The Council passed the impugned Order in Mumbai which is outside the territorial jurisdiction of Delhi. No cause of action has, therefore, arisen within the jurisdiction of this Court.

19. The Apex Court in “State of Goa vs. Summit Online Trade Solutions (P) Ltd.”, **2023 SCC OnLine SC 254**, while dealing with the question of territorial jurisdiction to be exercised by the High Courts under Article 226 of the Constitution of India, has observed as under:

“13. From the above, it is clear that according to the petitioning company the cause of action has arisen in Sikkim only, meaning thereby the whole of the cause of



action and not part of it; additionally, it is stated that all the respondents are located within the territorial jurisdiction of the High Court which is factually incorrect.

14. While dealing with an objection as to lack of territorial jurisdiction to entertain a writ petition on the ground that the cause of action has not arisen within its jurisdiction, a High Court essentially has to arrive at a conclusion on the basis of the averments made in the petition memo treating the contents as true and correct. That is the fundamental principle. Bearing this in mind, we have looked into the petition memo of WP (C) No. 38 of 2017 and searched in vain to trace how at least part of the cause of action has been pleaded by the petitioning company, to have arisen within the territorial jurisdiction of the High Court.

15. This is a case where clause (2) of Article 226 has been invoked by the High Court to clothe it with the jurisdiction to entertain and try the writ petitions. The constitutional mandate of clause (2) is that the “cause of action”, referred to therein, must at least arise in part within the territories in relation to which the High Court exercises jurisdiction when writ powers conferred by clause (1) are proposed to be exercised, notwithstanding that the seat of the Government or authority or the residence of the person is not within those territories.

16. The expression “cause of action” has not been defined in the Constitution. However, the classic definition of “cause of action” given by Lord Brett in Cooke v. Gill [Cooke v. Gill, (1873) LR 8 CP 107] that “cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court”, has been accepted by this Court in a couple of decisions. It is axiomatic that without a cause, there



cannot be any action. However, in the context of a writ petition, what would constitute such “cause of action” is the material facts which are imperative for the writ petitioner to plead and prove to obtain relief as claimed.

17. Determination of the question as to whether the facts pleaded constitute a part of the cause of action, sufficient to attract clause (2) of Article 226 of the Constitution, would necessarily involve an exercise by the High Court to ascertain that the facts, as pleaded, constitute a material, essential or integral part of the cause of action. In so determining, it is the substance of the matter that is relevant. It, therefore, follows that the party invoking the writ jurisdiction has to disclose that the integral facts pleaded in support of the cause of action do constitute a cause empowering the High Court to decide the dispute and that, at least, a part of the cause of action to move the High Court arose within its jurisdiction. Such pleaded facts must have a nexus with the subject-matter of challenge based on which the prayer can be granted. Those facts which are not relevant or germane for grant of the prayer would not give rise to a cause of action conferring jurisdiction on the court. These are the guiding tests.

18. Here, tax has been levied by the Government of Goa in respect of a business that the petitioning company is carrying on within the territory of Goa. Such tax is payable by the petitioning company not in respect of carrying on of any business in the territory of Sikkim. Hence, merely because the petitioning company has its office in Gangtok, Sikkim, the same by itself does not form an integral part of the cause of action authorising the petitioning company to move the High Court. We hold so in view of the decision of this Court in National Textile Corpn. Ltd. v. Haribox Swalram [National Textile Corpn. Ltd. v. Haribox Swalram, (2004) 9 SCC 786] . The immediate civil or evil consequence, if at all, arising



from the impugned notification is that the petitioning company has to pay tax @ 14% to the Government of Goa. The liability arises for the specific nature of business carried on by the petitioning company within the territory of Goa. The pleadings do not reflect that any adverse consequence of the impugned notification has been felt within the jurisdiction of the High Court. At this stage, we are not concerned with the differential duty as envisaged in Schedule II (@ 6%) vis-à-vis Schedule IV (@ 14%) of the impugned notification. That is a matter having a bearing on the merits of the litigation.

19. The long and short of the matter is that the petitioning company has to bear the liability of paying tax @ 14% levied by the Government of Goa for selling lottery tickets in the State of Goa under Schedule IV of the impugned notification. It does not bear out from the petition memo how the impugned notification levying tax for carrying on business in the State of Goa subjects the petitioning company to a legal wrong within the territory of Sikkim for the writ petition to be entertained by the High Court.

20. In our opinion, the High Court ought not to have dismissed the applications of the appellant without considering the petition memo which has no semblance of a case having been made out as to how part of cause of action arose within the territorial limits of the High Court or without any pleading as to how any right has been affected within the territory of Sikkim.

21. Even otherwise, the High Court was not justified in dismissing the interim applications. Assuming that a slender part of the cause of action did arise within the State of Sikkim, the concept of forum conveniens ought to have been considered by the High Court. As held by this Court in Kusum Ingots & Alloys Ltd. v. Union of India [Kusum Ingots & Alloys Ltd. v. Union of India,



(2004) 6 SCC 254] and *Ambica Industries v. CCE* [*Ambica Industries v. CCE*, (2007) 6 SCC 769], even if a small part of the cause of action arises within the territorial jurisdiction of a High Court, the same by itself could not have been a determinative factor compelling the High Court to keep the writ petitions alive against the appellant to decide the matter *qua* the impugned notification, on merit.”

(emphasis supplied)

20. A Co-ordinate Bench of this Court in “NBCC (India) Limited vs. Dakshin Haryana Bijli Vitran Nigam and Others”, **2023 SCC OnLine Del 6118** has observed as under:

14. The jurisdiction of the High Court to issue writs to any person or authority within its territorial jurisdiction thus flows from Article 226(1) of the Constitution. Additionally, Article 226(2)1 extends the jurisdiction of the High Court to Government, authorities or persons seated outside its jurisdiction if the cause of action, wholly or in part, arose within the jurisdiction of the High Court. It has been held by the Supreme Court that, akin to Section 20(c) of the Civil Procedure Code, 1908, “cause of action” for the purposes of Article 226(2) of the Constitution constitutes the bundle of facts which are required to be proved in order for the writ to be issued.

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17. Nonetheless, the matter requires further examination in the context of the doctrine of forum conveniens. This principle has been laid down in several decisions of the Supreme Court and this Court. It provides a key exception to the exercise of jurisdiction, even when it does vest in the Court, and essentially mandates that a High Court will not exercise jurisdiction if the proceedings are most intimately connected with another High Court.



18. In Kusum Ingots & Alloys Ltd. v. Union of India, which was cited by learned counsel on both sides, the question framed by the Supreme Court was whether the seat of Parliament or the State legislature would be a relevant factor for determining the territorial jurisdiction of a High Court to entertain a writ petition. The Supreme Court held that even a small part of the cause of action arising with the jurisdiction would vest jurisdiction under Article 226(2) of the Constitution. For this purpose, the averments in the writ petition must be taken at face value, subject to the condition that they bear a nexus to the prayers sought. However, it was held that passing of a legislation at a particular place, by itself, does not confer jurisdiction. The Court then referred to the concept of forum conveniens in the following terms:

“Forum conveniens

30. We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens. [See Bhagat Singh Bugga v. Dewan Jagbir Sawhney, Madanlal Jalan v. Madanlal, Bharat Coking Coal Ltd. v. Jharia Talkies & Cold Storage (P) Ltd., S.S. Jain & Co. v. Union of India and New Horizons Ltd. v. Union of India.]”

19. The recent decision of the Supreme Court in State of Goa v. Summit Online Trade Solutions (P) Ltd. has elaborated upon the concept of “cause of action” in the context of Article 226(2) of the Constitution. The Court held that the writ petitioner in that case had not shown that any part of the cause of action had arisen in the State of Sikkim, so as to avail of the writ jurisdiction of



the High Court of Sikkim. Having so held, the Supreme Court further observed as follows:

“21. Even otherwise, the High Court was not justified in dismissing the interim applications. Assuming that a slender part of the cause of action did arise within the State of Sikkim, the concept of forum conveniens ought to have been considered by the High Court. As held by this Court in Kusum Ingots & Alloys Ltd. v. Union of India and Ambica Industries v. CCE, even if a small part of the cause of action arises within the territorial jurisdiction of a High Court, the same by itself could not have been a determinative factor compelling the High Court to keep the writ petitions alive against the appellant to decide the matter qua the impugned notification, on merit.”

20. A Five-Judge Full Bench of this Court in Sterling Agro Industries v. Union of India has reiterated the principles laid down in Kusum Ingots. The following extracts from the conclusions recorded by the Full Bench provide useful guidance in dealing with the present case:

“33. In view of the aforesaid analysis, we are inclined to modify, the findings and conclusions of the Full Bench in New India Assurance Company Limited (supra) and proceed to state our conclusions in seriatim as follows:

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(b) Even if a miniscule part of cause of action arises within the jurisdiction of this court, a writ petition would be maintainable before this Court, however, the cause of action has to be understood as per the ratio laid down in the case of Alchemist Ltd..

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(e) The finding that the court may refuse to exercise jurisdiction under Article 226 if only the jurisdiction is invoked in a malafide manner is too



restricted/constricted as the exercise of power under Article 226 being discretionary cannot be limited or restricted to the ground of malafide alone.

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(f) While entertaining a writ petition, the doctrine of forum conveniens and the nature of cause of action are required to be scrutinized by the High Court depending upon the factual matrix of each case in view of what has been stated in Ambica Industries (supra) and Adani Exports Ltd. (supra)”

21. Other than the judgments referred to above, in the written submissions filed by the petitioner, reference has been made to the judgment in Maharashtra Chess Assn. v. Union of India. In the said judgment, the Supreme Court has emphasised the broad nature of the principles which inform the exercise of the Court's writ jurisdiction. However, for the purposes of the present case, it is significant that even while so doing, the Court has acknowledged both the discretionary nature of the jurisdiction and the limitations of territoriality which the writ Court must be conscious of, including the concept of forum non-conveniens

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23. Mr. Tiwari, learned counsel for respondent No. 3 cited two decisions of this Court which predate Kusum Ingots, but lay down a similar principle. Like in the present case, the Division Bench in Sector Twenty-one Owners Welfare Association (STOFWA) v. Air Force Naval Housing Board was faced with a dispute with regard to a housing society outside Delhi. A welfare association of owners of flats in a society in Noida, Uttar Pradesh invoked the writ jurisdiction of this Court in respect of execution of registration of sale deeds and sub-lease deeds. Although one of the respondents was located



within the jurisdiction of this Court, the Division Bench declined jurisdiction for the following reasons:

“13. The law as reflected by the above said decisions is that the emphasis has shifted from the residence or location of the person or authority sought to be proceeded against to the situs of the accrual of cause of action wholly or in part. It is also clear that a trivial or insignificant part of the cause of action arising at a particular place would not be enough to confer writ jurisdiction; it is the cause of action mainly and substantially arising at a place which would be determinating factor of territorial jurisdiction. So also it shall have to be kept in view who are the real persons or authorities sought to be proceeded against or against whom the writ to be issued by the Court would run. Joining of proforma or ancillary parties, and certainly not the joining of unnecessary parties, would be relevant for the purpose of Article 226(1).

14. Reverting back to the case at hand, it is clear that the cause of action has wholly arisen in NOIDA within the State of U.P. The principal and substantial grievance of the petitioner association is against the respondents No. 2 and 3, The writ to be issued by the Court shall run against the respondents No. 2 and 3 though incidentally, the respondent No. 1 may also be required to be bound by the writ. The reverse is not correct. The writ, if any, to be issued by the Court would not serve any purpose if issued against respondent No. 1 alone....”

(emphasis supplied)

21. Another Co-ordinate Bench of this Court vide Order dated 08.02.2022 passed in **W.P.(C) 2162/2022** in the case of “Rupesh Kakkad vs. Union of India and Ors” has observed as under:

“9. New India Assurance thus authoritatively reiterates the settled legal position that for the purposes of



considering the issue of territorial jurisdiction, even if a part of the cause of action falls within the territorial limits of a court, the petitioner would be entitled to invoke its jurisdiction and recognise the right of “forum conveniens” as inhering in the litigant. Even a miniscule but relevant facet of the cause compelling the litigant to approach that particular court would be sufficient. However, in the facts of the present case, learned counsel, despite repeated queries was unable to establish that the respondents Nos. 1 to 3 had to discharge some obligation with respect to mutation or that any direction was required to be framed commanding them to proceed in the matter for the purposes of facilitating mutation by respondent No. 4. In fact and as a reading of the reliefs as sought in the writ petition would reveal, no specific direction against respondent nos. 1 to 3 is either framed or sought.

10. The principles which must govern were succinctly enunciated by the Supreme Court in Alchemist Ltd. Vs. State Bank of Sikkim, (2007) 11 SCC 335 in the following terms:-

“37. From the aforesaid discussion and keeping in view the ratio laid down in a catena of decisions by this Court, it is clear that for the purpose of deciding whether facts averred by the appellant-petitioner would or would not constitute a part of cause of action, one has to consider whether such fact constitutes a material, essential, or integral part of the cause of action. It is no doubt true that even if a small fraction of the cause of action arises within the jurisdiction of the court, the court would have territorial jurisdiction to entertain the suit/petition. Nevertheless it must be a “part of cause of action”, nothing less than that.”

22. The registered offices of the Respondent 1 is in Mumbai, and the reference under Section 18 of the MSMED Act has also been filed before



the MSE Facilitation Council situated in Mumbai who have further passed the impugned order of referring the matter to arbitration appointing itself as an arbitrator in the dispute between the petitioner and Respondent 1.

23. In the opinion of this court, no cause of action has arisen within the jurisdiction of this court, and this court will not have the jurisdiction to entertain a petition challenging an order of reference to arbitration under Section 18(3) of the MSMED Act passed by a MSE Facilitation Council not situated within the territorial jurisdiction of this court.

24. With the above-mentioned observations, this court is inclined to dispose of the current petition for lack of jurisdiction.

25. The writ petition is accordingly disposed of, along with the pending application(s), if any.

SUBRAMONIUM PRASAD, J

MAY 03, 2024
T/R