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

Date of Decision: 06th August, 2024

+ W.P.(C) 7440/2023

M/S HFCL LTD. (FORMERLY HIMACHAL FUTURISTIC
COMMUNICATIONS LTD.)

.....Petitioner

Through: Mr. Dayan Krishnan, Senior
Advocate with Mr. K. Sasi Prabhu,
Mr. Aditya Swarup, Mr. Vishnu
Sharma A.S., Mr. Manan Shishodia
and Ms. Kriti Gupta, Advocates.

versus

MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL
& ORS.

.....Respondents

Through: Mr. Rahul Miglani and Ms. Devika
Samant, Advocates for R-2.
Mr. Avishkar Singhvi, Mr. Naved
Ahmed, Mr. Vivek Kr. Singh,
Mr. Shubham Kumar, Advocates for
GNCTD.

**CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA**

JUDGMENT

SANJEEV NARULA, J. (Oral):

CM APPL. 44730/2024 (for early hearing on behalf of R-2)

1. For the grounds and reasons stated in the application, the same is allowed and with the consent of counsel, the writ petition is taken on board and heard.
2. Disposed of.



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3. The Petitioner has invoked the jurisdiction of this Court under Article 226 of the Constitution of India, 1950. The challenges are twofold: a) against initiation of proceedings under Micro, Small and Medium Enterprises Development Act, 2006,¹ by Respondent No. 1/ Micro and Small Enterprises Facilitation Council,² through notice dated 06th October, 2022 consequent to filing of reference under Section 18(1) of the Act by Respondent No. 2; b) Notice of reference dated 14th March, 2023 issued by Respondent No. 1 to Delhi International Arbitration Centre.³

BACKGROUND OF THE CASE

4. Briefly stated, the facts of the case are as follows:

4.1. The Petitioner and Respondent No. 2 entered into various work orders between the period 2014-2018 for laying optical fibres cables and other works in Delhi and its adjoining areas. On 11th April, 2019, Respondent No. 2 sent a demand notice to Petitioner claiming an amount of INR 1,11,55,268/- and also sought explanation regarding the deductions made by them. After two years, on 14th April, 2021, Respondent No. 2 registered themselves as a 'supplier' under Section 2(n) of MSMED Act and filed the requisite memoranda under Section 8 of the Act.

4.2. Subsequently, on 07th September, 2022, Respondent No. 2 filed an application under Section 18(1) of the Act before the Facilitation Council, claiming an amount of INR 1,24,24,073/- as outstanding dues against the work orders.

¹ "the MSMED Act"/ "the Act"

² "the Facilitation Council"

³ "DIAC"



4.3. Pursuant thereto, Respondent No. 1 issued the impugned notice dated 06th October, 2022 intimating the Petitioner about the initiation of proceedings under the MSMED Act. The Petitioner engaged in these proceedings on a ‘without prejudice’ basis to preserve their rights while contesting the applicability and jurisdiction of the MSMED Act.

4.4. The conciliation proceedings failed and thereafter, Respondent No. 1 referred the matter to DIAC through impugned notice dated 14th March, 2023, under Section 18(3) of the MSMED Act. On 16th May, 2023, the Petitioner was notified about the formation of the Arbitral Tribunal. Subsequently, on receipt of notice dated 17th May, 2023 from the Tribunal, the Petitioner participated in the proceedings and raised a preliminary objection regarding the Tribunal’s jurisdiction. This concern led directly to the initiation of the present writ petition.

CONTENTIONS ON BEHALF OF THE PARTIES

On behalf of the Petitioner

5. Mr. Dayan Krishnan, Senior Counsel for the Petitioner, urges the following submissions on merits as well as on the question of maintainability:

5.1. At the time of issuance/ execution of work orders i.e., from 2014-2018, Respondent No. 2 was not a ‘supplier’ as defined under the Act, and was registered subsequently on 14th April, 2021. Hence, Respondent No. 1 does not have the jurisdiction to adjudicate any dispute between Petitioner and Respondent No. 2.

5.2. This Court in exercise of its jurisdiction under Articles 226 and 227 of the Constitution of India, has the power to examine the present jurisdictional



issue and quash the references made under MSMED Act. In the instant case, the Petitioner has approached the Court not to challenge the arbitral award, but at the nascent stage, to contest the initiation of proceedings under the Act. Reliance is placed upon *Malani Construction Company v. Delhi International Arbitration Centre*.⁴, *Vaishno Enterprises v. Hamilton Medical AG & Anr.*⁵ and *Nitesh Estates Ltd. v. Micro and Small Enterprises Facilitation Council*,⁶ where in similar factual circumstances, the writ petitions have been entertained.

On behalf of the Respondents

6. *Per contra*, Mr. Rahul Miglani, counsel for Respondent No. 2 makes the following submissions:

6.1. The claim advanced by Respondent No. 2 in the arbitration proceedings encompasses transactions both prior and subsequent to their registration under the MSMED Act. This dual timeframe is substantiated by documents included in their counter affidavit, particularly work order No. 159/13036556 dated 18th February, 2021, corroborated by the email exchanges between the parties. Notably, Respondent No. 2 undertook work specified in the work order post-registration, i.e., after 14th April, 2021. Therefore, the Petitioner's jurisdictional challenge lacks factual basis. Given these factual disputes, the Arbitral Tribunal is fully competent to address these issues, rendering the instant writ petition non-maintainable.

6.2. The present proceedings are not maintainable under Articles 226 and 227 of the Constitution of India as the appropriate recourse for the Petitioner

⁴ 2023 SCC Online Del 1665.

⁵ 2022 SCC OnLine SC 355.

⁶ 2022 SCC Online SC 1191.



lies within the framework of the Arbitration and Conciliation Act, 1996. This position is supported by the precedent set in the Division Bench judgment in *State Trading Corporation of India v. Micro and Small Enterprises Facilitation Council*,⁷ where it has been affirmed that matters concerning arbitration under the MSMED Act should proceed under the legal framework provided for arbitration rather than through writ petitions.

ANALYSIS AND FINDINGS

7. The Court has considered the afore-noted facts and contentions. While the Court was initially hesitant to entertain the present petition, however, after much deliberation, the Court finds merit in the contention of the Petitioner regarding the maintainability of the writ petition. The reason for the same is as follows:

7.1. The case of *State Trading Corporation* serves as a pivotal reference point. In this Letter Patent Appeal, the Division Bench affirmed the decision of the Single Judge that refrained from intervening in an arbitral award under the MSMED Act in writ jurisdiction, aligning with the judicial perspective on limiting interference in arbitral processes outside the Arbitration Act. While determining the question of maintainability of a writ petition in relation to challenge to an award passed in the arbitral proceedings under MSMED Act, the Division Bench, relying upon the judgment of the Supreme Court in *India Glycols Ltd. & Anr. v. Micro and Small Enterprises Facilitation Council, Medchal- Malkajgiri & Ors.*,⁸ held that writ petitions under Articles 226 and 227 ought not to be entertained

⁷ 2024: DHC:1065-DB.

⁸ 2023 SCC OnLine SC 1852.



when a statutory remedy for challenging the award under Section 34 of the Arbitration and Conciliation Act, 1996, has been provided under Section 18 of MSMED Act. The Division Bench also considered the question of requirement of pre-deposit under Section 19 of the MSMED Act, which was also a ground of challenge before the Single Judge to maintain the petition under Article 226 and 227 of the Constitution of India. On that issue, the Division Bench by relying upon the judgment of the Supreme Court in **India Glycols Ltd.**, upheld the judgment of the Single Judge holding that writ petitions cannot be initiated to circumvent statutory financial obligations imposed by the framework of MSMED Act.

7.2. To the above extent, there cannot be any cavil. Indeed, the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India cannot be invoked to challenge an arbitral award in light of the statutory remedy provided under Section 18 of the MSMED Act to assail the award under Section 34 of the Arbitration and Conciliation Act, 1996.

7.3. However, in the instant case, the situation is entirely different. Here the challenge is directed not against an arbitral award but against the preliminary referral of a dispute to arbitration by the Facilitation Council. This nuance is critical as it shifts the focus from challenging the outcome of arbitration to questioning the procedural propriety of its initiation. On this issue, there is a pertinent ruling of this Court in **Malani Construction Company** where the Single Judge had exercised its writ jurisdiction at a stage where the Facilitation Council had referred the dispute for arbitration before DIAC, which is quite similar to the facts to the present case. However, this judgment can no longer be relied upon as a precedent as the Division Bench in **State Trading Corporation** has categorically held that the



view taken in ***Malani Construction Company*** is not correct in law. The observation of the Division Bench to this effect is as follows:

*“13. In light of the aforesaid judgments of the Supreme Court and more specifically the judgment **M/s India Glycols Ltd. v. MSEFC, Medchal-Malkajgiri** (supra) we are of the considered opinion that the judgment of the learned Single Judge of this Court in **Malani Construction Company** (supra) holding that a writ petition under Article 227 of the Constitution can be maintained, is not the correct view.”*

7.4. Mr. Krishnan, while acknowledging the Division Bench’s overruling of ***Malani Construction Company***, distances his argument by not relying on this precedent. Instead, he underlines the relevance of authoritative Supreme Court decisions that support his case.

7.5. The Supreme Court’s judgments in ***Vaishno Enterprise*** and ***Nitesh Estate*** are directly pertinent as they recognise the High Courts’ writ jurisdiction in matters which challenge the decisions of the Facilitation Council. These precedents establish that the Facilitation Council’s decisions can be scrutinized prior to the culmination of arbitration proceedings.

7.6. In ***Vaishno Enterprise***, the Supreme Court addressed a situation closely resembling the current dispute, where the contract was executed at a time when the appellant therein was not registered as a micro or small enterprise, thereby questioning the Facilitation Council’s jurisdiction over the matter. The Court emphasized the importance of the registration status at the time of contract execution, influencing the applicability of the MSMED Act. By highlighting that the date of the contract/agreement and the registration status dictate the jurisdiction under the MSMED Act, the Supreme Court set a clear precedent that the jurisdiction of the Facilitation Council is confined to disputes involving parties who were registered as micro or small enterprises at the time the relevant contracts were made. The



Supreme Court also relied upon its earlier decision in ***Silpi Industries & Ors. v. Kerela State Road Transport Corporation & Anr.***⁹ and ***Shanti Conductors Pvt. Ltd. v. Assam State Electricity Board***,¹⁰ and observed as follows:

“15. It is not in dispute that the contract/agreement between the appellant and the respondent has been executed on 24.08.2020. Therefore, the laws of India applicable at the time of contract/agreement shall be applicable and therefore the parties shall be governed by the laws of India prevailing/applicable at the time when the contract was executed. It is admitted position that the date on which a contract/agreement was executed i.e. on 24.08.2020 the appellant was not registered MSME. Considering the relevant provisions of the MSME Act more particularly Section 2(n) read with Section 8 of the MSME Act, the provisions of the MSME Act shall be applicable in case of supplier who has filed a memorandum with the authority referred to in sub-section (1) of Section 8. Therefore, the supplier has to be a micro or small enterprise registered as MSME, registered with any of the authority mentioned in sub-section (1) of Section 8 and Section 2(n) of the MSME Act. It is admitted position that in the present case the appellant is registered as MSME only on 28.08.2020. Therefore, when the contract was entered into the appellant was not MSME and therefore the parties would not be governed by the MSME Act and the parties shall be governed by the laws of India applicable and/or prevailing at the time of execution of the contract. If that be so the Council would have no jurisdiction to entertain the dispute between the appellant and the Respondent no. 1, in exercise of powers under Section 18 of the MSME Act. Therefore, in the aforesaid peculiar facts and circumstances of the case, more particularly the terms of the Agreement, the order passed by the learned Single Judge confirmed by the Division Bench holding the Council would have no jurisdiction with respect to Respondent No. 1 is not required to be interfered with.”

7.7. In ***Nitesh Estate Ltd.***, the Supreme Court elaborated on the importance of the timing of registration under the Act. It was unequivocally held that for a party to invoke the jurisdiction of the Facilitation Council under the MSME Act, the entity must have been registered as a micro or

⁹ (2021) 18 SCC 790.

¹⁰ (2019) 19 SCC 529.



small enterprise at the time the contract was executed. The Court stressed that registrations effected after the contractual relationship was established, do not confer any retrospective rights or obligations under the MSMED Act. This clarification serves as a significant benchmark for evaluating the legitimacy of invoking the MSMED Act.

7.8. Moreover, the factual distinctions between *State Trading Corporation* and the instant case render the former inapplicable. In *State Trading Corporation*, the focus was on the post-arbitral award scenario under the MSMED Act, where specific provisions of the Act regarding arbitral awards were in question. In contrast, the present dispute involves a challenge at the preliminary stage of arbitration reference, where the jurisdictional authority of the Facilitation Council itself is contested. Notably, the significant precedents of *Nitesh Estate Ltd.* and *Vaishno Enterprise*, which directly address similar pre-arbitration jurisdictional challenges, were not considered in *State Trading Corporation*. These precedents are more apt for the circumstances at hand and guide this Court's understanding of the applicable legal framework.

7.9. The jurisprudence established by the Supreme Court explicitly supports the High Courts' jurisdiction in matters where the jurisdictional authority of the Facilitation Council itself is under scrutiny prior to culmination of arbitral proceedings. Thus, considering the compelling legal precedents, this Court holds that the present writ petition is maintainable.

8. The central issue now shifts to the validity of the impugned reference made by Respondent No. 1 to DIAC and the ensuing arbitral proceedings. This requires an examination of applicability of the MSMED Act.

9. On this issue there is no factual controversy, although Respondent No.



2 has argued otherwise. The date of registration of Respondent No. 2 is not in dispute but rather an admitted fact. It is also an uncontested fact that the registration occurred after the execution of the contracts between 2014 and 2018. As such, at the time of these agreements, Respondent No. 2 did not qualify as a ‘supplier’ under Section 2(n) of the MSMED Act. This absence of registration at the relevant time precludes Respondent No. 2 from retrospectively invoking the provisions of the MSMED Act, specifically those outlined in Section 18. The Supreme Court has consistently ruled that such registrations are to be considered effective prospectively, reinforcing that the MSMED Act’s protections cannot be applied retroactively to disputes arising from contracts entered into before such registration.

10. Contrary to Mr. Miglani’s assertions that the claims involve periods post-registration, the factual basis laid out in the arbitration proceedings clearly contradicts this position. The Statement of Claim submitted to DIAC explicitly specifies that all contractual works were completed by June, 2020, a timeline that undeniably precedes Respondent No. 2’s registration under the MSMED Act. The Statement of Claim avers:

“xi) That in the meantime, despite all odds, the Claimant company under the leadership of Mrs. Geeta Manchanda finished all pending works as directed by the said Sh. Sanjay Soni, even at the cost of making Claimants representative's work during permitted hours of lockdown as impose during Covid period and were successful in finishing the said works by June 2020. On 15.6.2020, upon the demand as raised by the said Sh. Sanjay Soni, the Claimant sent its further statement of account and demanded Rs. 70 lacs approximately against the Delhi circle. The said demand did not include the other pending amount due against various other heads. The same is annexed herewith as ANNEXURE C-10 (Colly.)”
[Emphasis Supplied]

Moreover, the reference notice dated 30th May, 2022, fortifies this position wherein Respondent No. 2 has categorically stated as follows:



“2. As there were huge outstanding pending from RJIL/ HFCL to us, we requested RJIL vide E-mail dated 11.04.2019 to release our pending payments amounting to Rs. 1,11,55,268.66/- at the earliest. To our said request, we were informed that payments will be released very soon, but this also was not to be. However, in the meanwhile we finished all works assigned to us, even the work left by other contractors, by June 2020 to the complete satisfaction of HFCL and RJIL. Against the said works done up to June 2020, bills were also duly raised by us.”

[Emphasis Supplied]

11. Further scrutiny reveals that the tax invoice issued by Respondent No. 2, clearly defines the service period as 15th March, 2016, to 16th March, 2016 and 22nd June, 2016, which is well before their registration under the MSMED Act.

12. In view of the above, the contention of Mr. Miglani that the claims pertain to a period post-registration is not substantiated. His reference to the work order No. 159/13036556 dated 18th February, 2021 is irrelevant, as it predates the registration of Respondent No. 2. Thus, the Arbitral Tribunal is not vested with jurisdiction under the MSMED Act for these transactions, making the reference notice by Respondent No. 1 and subsequent proceedings by the Arbitral Tribunal *ultra vires*.

13. Accordingly, in the above circumstances, notices dated 06th October, 2022 and 14th March, 2022, and the subsequent proceedings bearing No. DIAC/6120D/03-23 before DIAC are set aside.

14. The Petition is allowed in above terms.

SANJEEV NARULA, J

AUGUST 6, 2024

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