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

Decided on:- 06th February, 2024

+ ARB. A. (COMM.) 8/2024

JKG INFRATECH PRIVATE LIMITED

..... Appellant

Through: Mr. Parvesh Bansal & Mr. Rahul
Bansal, Advocates.

versus

LARSEN AND TOUBRO LIMITED

..... Respondent

Through: None.

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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

I.A. 2604/2024*(Exemption)*

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

ARB. A. (COMM.) 8/2024 & I.A. 2605/2024*(Condonation of delay in re-filing)*

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ["A&C Act"] is directed against an order dated 06.10.2023 of the learned arbitrator, allowing an application of the respondent under Section 16 of the A&C Act.

2. At the outset, it is recorded that I have disclosed to Mr. Parvesh Bansal, learned counsel for the appellant, that I hold some shares in the respondent-company but Mr. Bansal has stated that he has no objection to the appeal being heard by this Bench.

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3. The arbitral proceedings were instituted by the appellant under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 [“MSME Act”]. The appellant’s claim before the learned arbitrator arose out of contracts dated 19.11.2013 and 03.03.2014 by which it supplied certain services to the respondent. The appellant claims that the respondent did not release its performance bank guarantee and retention money as required under the contracts even after the prescribed defect liability period. Both contracts also contained arbitration clauses, but the appellant proceeded to invoke arbitration under Section 18 of the MSME Act.

4. The respondent made an application under Section 16 of the A&C Act before the learned arbitrator, contending that the proceedings under the MSME Act were barred as the appellant was registered under Section 8 of the MSME Act only on 03.02.2017. The learned arbitrator has accepted this position relying, *inter alia*, upon the decisions of the Supreme Court in *Silpi Industries Etc. vs. Kerala State Road Transport Corporation and Anr.*¹ and *Vaishno Enterprises vs. Hamilton Medical AG and Anr.*² and upon three decisions of this Court³. The learned arbitrator has consequently dismissed the claims of the appellant, leaving the parties to adopt their respective remedies in law.

5. Mr. Bansal submits that the decision of the learned arbitrator proceeds on a misappreciation of the effect of registration under the

¹ (2021) SCC OnLine 439 (“*Silpi Industries*”).

² (2022) SCC OnLine SC 355 (“*Vaishno Enterprises*”).

³ *JKS Infrastructure Pvt. Ltd. vs. MSME Facilitation Council and Ors.* (2023) SCC OnLine Del 5873, *Municipal Corporation of Delhi vs. Ram Prakash* [order dated 16.03.2023 in WP (C) 16891/2022 and connected matters], *Grand Mumtaz Hotel and Resort vs. Deputy Commissioner North East*



MSME Act. He submits that the MSME Act, being a beneficial legislation, the benefits of its provisions should be extended to a registered MSME, even if the registration was obtained after the goods/services were supplied. On the facts of the case, he does not dispute that the supplies under the contracts in question concluded in the year 2014, and the appellant was registered under the MSME Act only on 03.02.2017. Mr. Bansal relies upon a decision of this Court in *Ramky Infrastructure Pvt. Ltd. vs. Micro and Small Enterprises Facilitation Council and Anr.*⁴ and a decision of the Madras High Court in *M/s Khushboo Creations vs. M/s Kanpur Sivasankar Spices*⁵, against which the Supreme Court refused special leave to appeal. He also cites the judgment of the Andhra Pradesh High Court in *Indur District Cooperative Marketing Society Ltd. vs. Microplex (India), Hyderabad*⁶ and of the Allahabad High Court in *M/s Hameed Leather Finishers vs. M/s Associated Chemical Industries Kanpur Pvt. Ltd.*⁷.

6. Turning first to the judgments of the Supreme Court, in *Silpi Industries*⁸, the Court was concerned with a batch of appeals arising out of arbitrations under the MSME Act. In one of the cases before it [CA Nos. 1620-22/2021], the question specifically arose as to whether the appellant was entitled to invoke the MSME Act, having supplied goods and services prior to registration thereunder. The Supreme Court came to the following conclusion:

Government of NCT of Delhi & Ors. (2023) SCC OnLine Del 3891.

⁴ Judgment of this Court dated 04.07.2018 in WP (C) 5004/2017.

⁵ Judgment of the Madras HC dated 12.06.2023 in C.R.P (MD) No. 2450/2022.

⁶ (2015) SCC OnLine Hyd 494.

⁷ (2013) SCC OnLine All 9058.

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“42. Though the appellant claims the benefit of provisions under the 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.... **In our view, to seek the benefit of provisions under the MSME 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 the MSMED Act.**

43. ...There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of the appellant as the unit under the 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 the MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which the appellant entered into contract with the respondent.**

44. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of the 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.”⁹

7. Mr. Bansal submitted that the question of whether the MSME Act would be applicable in the case of registration subsequent to the contract having been entered into and implemented, was not in issue in *Silpi Industries*¹⁰. I do not find any merit in this submission. It is clear from paragraph 41 of the judgment that in one of the cases before the Court

⁸ Supra (note 1).

⁹ Emphasis Supplied.

¹⁰ Supra (note 1).



[CA Nos. 1620-22], this question squarely arose.¹¹

8. The same view has been taken by the Supreme Court in *Vaishno Enterprises*¹², holding that the benefit of the MSME Act cannot be claimed by a party which was not registered under the said Act at the time the contract was entered into.¹³ Paragraph 15 of the judgment reads 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

¹¹ Paragraph 41 of *Silpi Industries* is set out below for ease of reference:

*“41. In CAs Nos. 1620-22 of 2021, the High Court, while negating the plea of the appellant, on the maintainability of counterclaim, has allowed the application filed by the respondent under Section 11(6) of the 1996 Act and appointed the second arbitrator. **Though, we are of the view that counter claim and set-off is maintainable before the statutory authorities under the MSMED Act, the appellant in this set of appeals is not entitled for the relief, for the reason that on the date of supply of goods and services the appellant did not have the registration by submitting the memorandum as per Section 8 of the Act.** The bids were invited on 23-2-2010, the appellant submitted its bid on 17-5-2010, the respondent awarded contract to the appellant on 24-9-2010 and the parties signed the contract documents for supply of material, installation, commissioning of the power plant on 29-7-2011. Thereafter, supplies were made and the appellant has raised first invoice on 2-11-2011 for supply contract and also raised the first invoice pursuant to contract for installation on 7-7-2012 and the appellant has raised the last invoice in furtherance of contract for supply of material, on 29-3-2014. The appellant also claims to have raised last invoice on 29-3-2015 in furtherance of contract for installation. It is to be noticed that the appellant approached the District Industrial Centre for grant of entrepreneur memorandum only on 25-3-2015.”*

[Emphasis supplied.]

¹² *Supra* (note 2).



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.”¹⁴

9. The view taken in *Silpi Industries*¹⁵ has been followed by this Court in three judgments cited in the impugned order. In *Ram Prakash*¹⁶, the Court specifically held that if the registration is subsequent to completion of the work, the MSME Act would not be applicable. References to arbitration thereunder were quashed on this basis. *Grand Mumtaz Hotel and Resort*¹⁷ and *JKS Infrastructure*¹⁸ are also to the same effect.

10. Mr. Bansal submits that these decisions must be read in the light of the observations of the Supreme Court in paragraph 16 of *Vaishno Enterprises*¹⁹ which, according to him, dilute the observations made in *Silpi Industries*.²⁰ Paragraph 16 reads as follows:-

“16. However, at the same time, the larger question/issue whether in a case where the buyer is located outside India but has availed the services in India and/or done the business in India with the Indian supplier and the contract was executed in India the MSME Act would be applicable or not and/or another larger issue that in case

¹⁴ Emphasis supplied.

¹⁵ Supra (note 1).

¹⁶ Supra (note 3).

¹⁷ Supra (note 3).

¹⁸ Supra (note 3).

¹⁹ Supra (note 2).

²⁰ Supra (note 1).



the supplier is subsequently registered as MSME the Council would still have jurisdiction are kept open to be considered in an appropriate case bearing in mind Section 18 as well as Section 8 of the MSME Act and the judgments of this Court in the case of Silpi Industries v. Kerala State Road Transport Corporation, C.A. No. 1570-78 of 2021 [2021 SCC OnLine SC 439] arising under the provisions of MSME Act and Shanti Conductors Pvt. Ltd. v. Assam State Electricity Board, (2019) 19 SCC 529 in which case a similar provision under the Small Scale and Ancillary Industries Undertakings, Act, 1993 came up for consideration before this Court.”

11. I am unable to accept this submission; the observations quoted above do not suggest that *Silpi Industries*²¹ is not good law. In fact, in paragraph 15 of *Vaishno Enterprises*²², the Court has taken the same view, viz., that the MSME Act would not be applicable if the party was not registered as an MSME at the time when the contract was entered into. The fact that the Court appears to have kept this question open for decision in an appropriate case, does not diminish the binding nature of the authority, unless a larger Bench holds to the contrary.

12. Of the four High Court judgments cited by Mr. Bansal - *Ramky Infrastructure*²³, *Khushboo Creations*²⁴, *Indur District Cooperative Marketing Society Ltd.*²⁵, and *M/s Hameed Leather*²⁶ – three judgments pre-date *Silpi Industries*²⁷ and *Vaishno Enterprises*²⁸. The only judgment which has taken a contrary view, after the judgments in *Silpi Industries*²⁹

²¹ Supra (note 1).

²² Supra (note 2).

²³ Supra (note 4).

²⁴ Supra (note 5).

²⁵ Supra (note 6).

²⁶ Supra (note 7).

²⁷ Supra (note 1).

²⁸ Supra (note 2).

²⁹ Supra (note 1).



and *Vaishno Enterprises*³⁰, is the judgment of the Madras High Court in *Khushboo Creations*³¹. Mr. Bansal also placed on record that the Supreme Court has rejected a Special Leave Petition³² against the judgment of the Madras High Court in *Khushboo Creations*.³³ The order of the Supreme Court dated 30.10.2023 in this regard reads as follows:

“Delay condoned.

We are not inclined to interfere with the impugned judgment and hence, the special leave petition is dismissed.

We clarify that the issue of arbitrability under the Micro, Small and Medium Enterprises Development Act, 2006, can be raised by the petitioner - M/s Kushboo Creations before the Arbitrator(s) in accordance with law and, if required, post the award as permitted by the statute.

Pending application(s), if any, shall stand disposed of.”³⁴

I do not find this order to be of much assistance to Mr. Bansal. The order of the Supreme Court is one of dismissal of the Special Leave Petition in *limine*. In fact, the clarification makes it clear that the Court has left open the question, even in that very case, as to the arbitrability of the claims under the MSME Act for consideration by the learned arbitrator.

13. Having regard to the judgments of the Supreme Court in *Silpi Industries*³⁵ and *Vaishno Enterprises*³⁶, and to the consistent view taken by this Court as to the interpretation of the MSME Act in the light of those judgments, I am unable to discern any error in the view taken by the learned arbitrator in the impugned order. The appellant, having registered under the MSME Act only on 03.02.2017, well after rendering service

³⁰ Supra (note 2).

³¹ Supra (note 5).

³² SLP (C) Diary No. 39655/2023.

³³ Supra (note 5).

³⁴ Emphasis Supplied.

³⁵ Supra (note 1).



under the contracts in question until 2014, was not entitled to invoke arbitration under Section 18 of the said Act.

14. The appeal is therefore dismissed. All pending applications also stand disposed of.

15. Needless to say, the appellant will be at liberty to take appropriate remedies in accordance with law in respect of its claims. In such an event, it may approach the appropriate forum under Section 14 of the Limitation Act, 1963, for exclusion of the time spent in the proceedings under the MSME Act in this appeal, for the purposes of computation of limitation. Such a contention may be considered by the appropriate forum in accordance with law.

PRATEEK JALAN, J

FEBRUARY 6, 2024

'pv/Adhiraj'

³⁶ Supra (note 2).