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

\+ W.P.(C) 17846/2024 & CM APPL. 75927/2024, CM APPL. 75928/2024

SADBHAV ENGINEERING LTD .....Petitioner

Through: Mr. Rajiv Bakshi, Mr. Shrey Shrivastava, Mr. Pranav Pareek and Mr. R.P. Rai, Advocates.

versus

MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL NEW DELHI & ORS. .....Respondents

Through: Mr. Vijay Kumar Wadhwa, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% **23.12.2024**

1. The Petitioner is aggrieved by the communication dated 16th August, 2024 passed by the Nodal Officer, Micro and Small Enterprise Facilitation Council.[1] Through the said order, the Nodal Officer has terminated the conciliation proceedings between the Petitioner and Respondent No. 2, and referred the case to Delhi Arbitration Centre[2] under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006.[3] Additionally, the Petitioner also seeks quashing of an order dated 09th December, 2024 passed by the sole Arbitrator in the ongoing arbitration proceedings, rejecting the Petitioner's application under Section 16 of the Arbitration and Conciliation Act, 1996.

[1] "MSEFC"
[2] "DAC"
[3] "MSMED Act"

2. The factual background leading to the initiation of the present proceedings is summarised as follows:

2.1 On 08th June, 2022, Respondent No. 2 made a reference to Respondent No. 1 under Section 18(1) of the MSMED Act for adjudication of disputes pertaining to delayed payments by the Petitioner. Respondent No. 2 claimed an amount of INR 5,05,925/- in respect of outstanding bills related to work order dated 09th September, 2014 for the period up to January 2018, and a further sum of INR 1732958.71/- in respect of an invoice dated 18th March, 2019.

2.2 Pursuant to the said reference, Respondent No. 1 issued notice to the Petitioner for initiating conciliation proceedings under Section 18(1) of the MSMED Act. The Petitioner participated in the proceedings and raised objections on to the maintainability of the reference filed by Respondent No. 2. However, the conciliation failed, and Respondent No. 2 proceeded to refer the matter to the DAC under Section 18(3) of the MSMED Act.

2.3 The DAC hence appointed Mr. Pramod Kumar as the Sole Arbitrator. The Petitioner participated in the arbitration proceedings before them and filed an application under Section 16(3) of the Arbitration and Conciliation Act, 1996, raising objections relating to the jurisdiction of the Arbitrator. However, the Arbitrator dismissed the said application through impugned order dated 09th December, 2024.

3. In view of the foregoing, the Petitioner has now invoked Articles 226 and 227 of the Constitution of India, seeking judicial intervention in the ongoing arbitration proceedings, as well as challenging the reference made by Respondent No. 1 under Section 18(3) of the MSMED Act.

4. At the outset, the Court queries the counsel for the Petitioner regarding the maintainability of the present proceedings under Article 226 of

the Constitution of India. In response, counsel for the Petitioner places reliance on the decision in ***Surender Kumar Singhal and Ors. V. Arun Kumar Bhalotia and Ors.***[4] to argue that the writ petition is maintainable. The counsel further stresses that since the foundational reference under Section 18(3) of the MSMED Act itself is being impugned, the writ petition ought to be entertained.

5. Having considered the Petitioner's contention, in the opinion of the Court, the petition is not maintainable. It has been clearly established by several judgments of the Supreme Court, as well as this Court, that the remedy under Articles 226 and 227 of the Constitution— in matters concerning the Arbitration and Conciliation Act— may only be resorted to in exceptional and rare circumstances. The aforesaid view has also been expressed by this Court in several decisions including ***C.S Construction Company Private Limited and Another v. Excelling Geo and Engineering Consultant and Others***;[5] ***Hindustan Alloys Pvt. Ltd. v. Maa Sheetla Ventures Limited;***[6] ***Lalit Mohan v. NAFED;***[7] ***M/s Lisraj Overseas Private Limited v. M/s Maa Sheetla Ventures Limited***;[8] ***Home and Soul Private Limited v. T.V. Today Network Limited***;[9] and ***Public Works Department v. Larsen and Tourbo Limited***.[10]

6. Furthermore, the Supreme Court, in ***Bhaven Construction v. Executive Engineer, Sardar Sarovar***,[11] has opined that the remedy against an order passed under Section 16 of the Arbitration and Conciliation Act, rejecting the objections is to seek recourse within the framework of the Act,

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[4] MANU/DE/0561/2021.
[5] 2024:DHC:5644.
[6] W.P.(C) 10561/2024, decided on 31st July, 2024.
[7] W.P.(C) 13833/2024, decided on 1st October, 2024.
[8] W.P.(C) 10515/2024, decided on 31st July, 2024.
[9] 2024 SCC Online Del 7252.
[10] W.P.(C) 17245/2024, decided on 13th December, 2024.

i.e., by challenging the final award under Section 34 of the Act. In response to this well-settled proposition, counsel for the Petitioner argues that this would result in substantial prejudice to the Petitioner, compelling them to participate in the arbitration proceedings. Furthermore, if an adverse award is rendered, the Petitioner would be burdened with an exorbitant rate of interest and also be required to make a deposit as a pre-condition for challenging the award in Court. However, these arguments were considered and rejected by the Supreme Court in ***Glycols Ltd. v. Micro & Small Enterprises Facilitation Council***,[12] with the observation that the alternative remedy provided under the Arbitration and Conciliation Act cannot be bypassed solely on the ground that a pre-deposit is required to be made by a party.

7. Furthermore, even on merits, the view taken by the Arbitrator in rejecting the Petitioner's contention is supported by plausible reasons as recorded in the impugned order dated 9th December, 2024:

> *"**The Analysis & Observation:***
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> *It is a well-settled principle of law that this tribunal is competent to decide its own jurisdiction based on the doctrine of Kompetenz-Kompetenz, which establishes that an arbitral tribunal has the authority to determine its own jurisdiction.*
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> *Upon a careful reading of all the grounds and submissions raised in the application under Section 16 of the Arbitration and Conciliation Act, 1996, this tribunal is of the opinion that the present application filed by the applicant/respondent is liable to be dismissed. This tribunal derives its aforesaid observation and opinion, based upon the following reasons:*
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> ***QUESTIONS:***
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> *Whether the non-applicant / claimant is entitled to adjudicate its dispute under the preview of MSMED Act, as the claimant was not a registered MSME unit at the time of entering into contract with the respondent?*

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[11] (2022) 1 Supreme Court Cases 75.

[12] 2023 SCC OnLine SC 1852.

ANSWERS:

The respondent contends that at the time of issuance of the work order dated 09.09.2014, the claimant was not registered under the MSMED Act, 2006, and the claimant subsequently obtained registration under the MSMED Act on 28.09.2021. Therefore, according to the respondent, since the work order predates the claimant's registration, the claimant cannot invoke the provisions of the MSMED Act, 2006, and is not entitled to claim relief under its provisions.

In response, the claimant has asserted that the claim before the Micro and Small Enterprises Facilitation Council (MSEFC) pertains to the recovery of the balance amount of Invoice No. TI 110 dated 18.03.2019, amounting to {82,86,842/-, which is reflected in the ledger of the respondent maintained by the claimant. The claimant has further clarified that its firm was duly registered under the MSMED Act as on 23.02.2019, prior to the issuance of the said invoice.

Additionally, the claimant has sought the recovery of costs for unreturned materials. The claimant submitted that goods/shuttering materials were supplied to the respondent on a rental basis from time to time, with the obligation on the respondent to return the materials when no longer usable and to pay rental charges until all materials were returned.

Upon careful consideration of the submissions made by both parties and the supporting documents attached to the Statement of Claim (SOC), this tribunal observes the following:

The claimant has provided its Udyog Aadhaar Memorandum (UAM) bearing No. DL11F0012205, which establishes that the claimant was registered under the MSMED Act on 23.02.2019. This registration date is prior to the issuance of Invoice No. TI 110 dated 18.03.2019.

The claimant's claim pertains to ₹ 82,86,842 /- against the invoice dated 18.03.2019, and substantial part payments have been made by the respondent to the claimant, the last of which was on 02.03.2021.

The ledger maintained by the claimant and attached as evidence demonstrates that transactions between the parties continued after the claimant's registration under the MSMED Act on 23.02.2019.

Based on these findings, the tribunal concludes that the claimant was duly registered under the MSMED Act at the relevant time and is entitled to invoke its provisions for the claim raised in the present proceedings. The arguments raised by the respondent lack merit and do not affect the maintainability of the claim under the MSMED Act.

Regarding the issue of whether the claimant was required to have registered as an MSME prior to accepting the work order from the respondent for the present claim to be maintainable, the tribunal has reviewed a series of judgments on this matter, which are discussed upon in the coming paragraphs.

In this respect, it would be appropriate to discuss the landmark judgments of Hon'ble Apex Court titled ***Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd. & Anr. 2022 SCC Online***

SC 1492 which has in para 32 has referred the judgment of the ***"Silpi Industries etc. Vs. Kerala State Road Transport Corporation &Anr.- 2021 SCC (online) SC 439",*** this same judgement is relied by the respondent in its application u/sl6. The present relevant para 32 and 33 are reproduced below as:

> *"**32.** At this juncture, a very pertinent observations made by this Court in **Silpi Industries** case (supra) on this issue are required to be reproduced: -*
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> *"**26.** ...... 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."*
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> ***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."*

*Upon a careful reading of the judgment in Gujarat State case (supra), it is derived that for a party to avail the benefits under the MSMED Act, 2006, the entity must have **either** obtained MSME registration at the time of entering into the contract and supply of goods **or** at the time of rendering services.*

*To fortify the applicability of this principle, particularly whether the provisions of the MSMED Act would be applicable if the supplies are made post-registration as an MSME, the tribunal has closely reviewed the judgment of the **Hon'ble Delhi High Court in Jaiprakash Associates Ltd. vs. Micro and Small Enterprises Facilitation Council (South East) Govt of NCT of Delhi & Ors., dated 16.03.2023 (MANU/DE/1949/2023).** The observations of the Court were:*

> *"**15.** In view of this legal position, even if the agreement was prior to the registration as an MSME, if supplies have taken place post the registration the MSME Act would be applicable and reference by the MSEFC would be liable to be upheld."*

The above Judgement is further upheld by the Hon'ble Division *bench of Delhi High Court in case no.* ***LPA 565/2023 & CM Nos.37242/2023, 37243/2023 & 37244/2023****. The para no. 15 of the judgement (LPA) held that:*

> *"**15.** While considering the first issue, this Court finds on the facts disclosed that even though KBPL was registered under the MSME Act on 07.09.2019, it had been raising bills qua work contracts/ agreements on JAL since before and furthermore the supplies took place post registration of KBPL as an MSME. As per the settled legal position laid down by the learned Single Judge in Chief General Manager (Contracts) (supra) which has been upheld by a Division Bench of this Court vide judgment dated 29.01.2020 in LPA 688/2019 and against which SLP(C) No. 9268/2020 has been dismissed by the Hon'ble Supreme Court vide order dated 22.09.2020, and also the judgment in GE T&D India Limited (supra), the aforesaid facts of work going on is sufficient for the reference by MSEFC to be legally tenable. In fact, it is an admitted position of the appellant that one of the invoices under the work contracts/ agreements is indeed post registration of KBPL as a MSME. Thus, this Court is of the opinion that the MSEFC was well within its powers to ref er the matter to arbitration and there was no error of any kind."*

Therefore, in light of the binding legal precedents established by the Hon'ble Courts, it is well understood that to avail of the benefits under the MSMED Act, 2006, the services must have been supplied post-MSME registration to bring the claim within the ambit of the MSEFC.

This Tribunal, based on this understanding and after careful observation and deliberation, concludes that the claimant supplied its services after obtaining MSME registration. Accordingly, this question is answered in the negative against the applicant and in favor of the non-applicant, by holding that the claimant was a registered MSME unit during the relevant supply period. Consequently, the claimant is well entitled to have its claim adjudicated before the MSEFC and subsequently before this tribunal.

Therefore, the plea of the respondent asserting that the present proceedings are not maintainable is hereby rejected. The present proceedings are held to be maintainable before this arbitral tribunal, and the application of the respondent is dismissed.

As the rejoinder to the Statement of Defense (SOD) and evidence by way of affidavit on behalf of the claimant has already been filed in the present proceedings, the respondent is directed to lead its entire respondent evidence (R.E.) on the next date of hearing. List on ***17.12.2024 at 05:00 PM."***

8. The Petitioner contends that the work order issued to Respondent No. 2 predates their registration under the MSMED Act, and as such, the

provisions of the MSMED Act could not be invoked. However, the Arbitrator, in the impugned order, has noted that Respondent No. 2 was registered under the MSMED Act on 23rd February 2019, which is prior to the issuance of the invoice dated 18th March 2019. The Petitioner asserts that the said invoice is erroneous, contending that no services were rendered to justify the issuance of the invoice. In the opinion of the Court, this contention involves factual disputes, necessitating the Petitioner to demonstrate that the invoice is incorrect, that the corresponding services were not provided, and establish the relevant dates of service. The adjudication of disputed questions of fact is not amenable to writ jurisdiction.

9. The Arbitration and Conciliation Act is founded on the principle of minimal judicial interference before the conclusion of arbitral proceedings. The Supreme Court, in multiple decisions, including ***Bhaven Construction***, has reiterated that a tribunal possesses "*kompetenz-kompetenz*," meaning it may rule on its own jurisdiction under Section 16 of the Act. Judicial intervention at this juncture is warranted only if one can point to manifest illegality or lack of inherent jurisdiction. Bearing this principle in mind, the Court does not find any perversity or irregularity in the Arbitrator's decision that would justify the exercise of jurisdiction under Article 226 of the Constitution. For this reason, the Petitioner's prayer for quashing of the reference under Section 18(3) of the MSMED Act also cannot be entertained. The parties are already engaged in arbitration, and all disputes concerning the invoices, including whether they were issued prior to the date of registration or thereafter, would have to be presented before the Arbitrator.

10. For the foregoing reasons, the Court does not find any ground to

entertain the present petition.

11. Dismissed along with pending applications.

SANJEEV NARULA, J

DECEMBER 23, 2024/*d.negi*