

(2023) 07 DEL CK 0029

In the Delhi High Court

Case No : Civil Writ Petition No. 16588 Of 2022, Civil Miscellaneous Application No. 52144, 52145 Of 2022

M/S Grand Mumtaz Hotel And Resort Through Its Managing Partner Mr Wasim Mushtaq **APPELLANT**

Vs

Deputy Commissioner North East Government Of Nct Of Delhi & Ors. **RESPONDENT**

Date of Decision : 05-07-2023

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 323A, 323B
Micro, Small and Medium Enterprises Development Act, 2006 — Section 2(n), 5, 8, 8(1), 18
Arbitration and Conciliation Act, 1996 — Section 8, 11, 16
Code Of Civil Procedure, 1908 — Section 9

Citation : (2023) 07 DEL CK 0029

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Shekhar Dasi, Ayush Dassi, Mehak Nakra, Karan Kapur, Dr. Farrukh Khan, Anup Kr. Nagar, Aman Rai, Shagun Sarohi

Final Decision : Allowed

Judgement

Prathiba M. Singh, J

1. This hearing has been done through hybrid mode.
2. This petition raises important issues under the Micro Small and Medium Enterprises Development Act, 2006 (hereinafter 'MSMED Act, 2006') and has been heard time to time by this Court along with other matters raising similar issues.

3 The question that arises in this petition is –

Whether the 'Supplier' ought to be registered under the MSMED Act, 2006 on the date when the contract is executed between the parties, in order to avail of the arbitral mechanism prescribed under the said Act?

Brief Facts

4. The Petitioner - M/s Grand Mumtaz Hotel and Resort seeks quashing/ setting aside of the impugned reference order dated 8th October, 2022 passed by Respondent No.1 - Deputy Commissioner, North East, Government of NCT of Delhi, acting as Micro and Small Enterprises Facilitation Council (hereinafter 'MSEFC') under the MSMED Act, 2006. By the impugned order the MSEFC has forwarded the reference sought under Section 18 of the MSMED Act, 2006 by Respondent No.2 - M/s Dhruv Construction & Interiors, to Respondent No.3 - Delhi International Arbitration Centre (DIAC). The Petitioner also challenges the order dated 17th October, 2022 passed by the DIAC by which the parties have been directed to file a statement of claim and reply before it.

5. An agreement dated 9th March, 2018 was entered into between the Petitioner and Respondent No. 2 for the renovation of hotel rooms of the Petitioner's hotel located in Sonmarg, Jammu & Kashmir. By the said agreement the Petitioner handed over the interiors and other related works for his hotel to the Respondent No. 2.

6. The last invoices raised by the Respondent No. 2 in terms of the aforementioned agreement were on 17th September, 2019 and 18th September, 2019. Thereafter, Respondent No. 2 registered itself under the MSMED Act, 2006 on 25th September, 2020 vide Udhyaam Registration No. DL-05-0001690.

7. Certain disputes arose between the parties and a legal notice dated 23rd October, 2020 was issued by Respondent No. 2 to the Petitioner by which alleged due payments were demanded in terms of the provisions of the MSMED Act, 2006. Reply to the said notice was issued by the Petitioner which remained unresolved. In view of the disputes arising out of the agreement, the Respondent No. 2 filed a reference petition under Section 18 of the MSMED Act, 2006 before the Respondent No.1 for recovery of disputed amount to the tune of Rs.92,91,661/-.

8. The Respondent No. 1 issued notice to the Petitioner. The Petitioner raised objections as to the jurisdiction of the MSEFC both in its reply to the notice as also in its written submissions. The grievance of the Petitioner is that the said objection as to the applicability of the MSMED Act, 2006 and the jurisdiction of the MSEFC was not decided by the Respondent No. 1.

9. It is stated that six hearings were held in the conciliation proceedings before the MSEFC however, the same did not fructify into a settlement. Finally, the MSEFC referred the matter to DIAC vide the impugned order dated 08th October, 2022.

10. The DIAC vide the impugned order dated 17th October, 2022 directed the parties to file a statement of claim and reply. By the said communication the Respondent No.2 was also directed to file its claim petition before the DIAC

11. It is stated that subsequent to the filing of the present writ, the DIAC has

also sent a communication to the parties to deposit a sum of Rs. 2,63,279/-each towards the claims and counter-claims as the fee of the DIAC.

12. In view thereof, the Petitioner has filed the present petition challenging the jurisdiction of the MSEFC and the Reference order.

13. In the present writ petition, this Court vide interim order dated 2nd December, 2022 directed the DIAC to not commence arbitration proceedings in the matter.

Submissions

14. Mr. Shekhar Dasi, Id. Counsel for the Petitioner submits as under:

(i) that there is no Arbitration Clause in the agreement dated 9th October, 2018 entered into by the Petitioner and Respondent No.2;

(ii) that the registration of Respondent No.2 under the MSMED Act, 2006 was subsequent to the agreement as also subsequent to the two last invoices raised by the Respondent No. 2. Thus, the conciliation and arbitral mechanism prescribed under the MSMED Act, 2006 is not applicable in the present case;

(iii) that the initiation of the arbitral process before the DIAC is completely contrary to law and is not tenable;

(iv) that as per the judgements of the Hon'ble Supreme Court in M/s Vaishno Enterprises v. Hamilton Medical AG & Anr., CA No. 1892/2022; M/s. Silpi Industries v. Kerala State Road Transport Corporation & Anr., C.A.Nos.1570-1578 of 2021 and; Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods Pvt. Ltd. & Anr. (Arising out of SLP (C) No. 12884/2020 if the registration of the Supplier under the MSMED Act, 2006 is subsequent to the agreement in question, the provisions of the MSMED Act, 2006 shall not be applicable to the disputes arising out of the said agreement;

(v) that the judgements relied upon by the Id. Counsel for the Respondents are distinguishable on the ground that in all the said judgements, the contracts have independent Arbitration Clauses whereas in the present case, the agreement dated 9th October, 2018 does not have an Arbitration Clause;

(vi) that in the judgment dated 16th March, 2023 in W.P.(C) 9608/2022 titled Malani Construction Company v. Delhi International Arbitration Centre & Ors. in similar facts this court held that the provisions of the MSMED Act, 2006 shall not be applicable.

15. Dr. Khan, Id. Counsel appearing for the Respondent No. 2 submits as under:

(i) that the judgement of the Hon'ble Supreme Court in Gujarat State Civil Supplies Cooperation v. Mahakali Foods Pvt. Ltd., SLP No.(C) 31227/2018 clarifies the overlap between the MSMED Act and the Arbitration and Conciliation Act, 1996 (hereinafter, A&C Act, 1996);

- (ii) that it is a settled principle that writ jurisdiction of this Court cannot be invoked in case the efficacious alternative remedy is available;
- (iii) that the question as to whether the arbitral tribunal which may be constituted under the MSMED Act, 2006 would have jurisdiction or not ought not to be adjudicated by this Court in a writ petition;
- (iv) that the parties ought to be relegated to the arbitral tribunal i.e. DIAC and the Petitioner can take an objection under Section 16 of the A & C Act, 1996, as the scope of writ jurisdiction is limited in nature;
- (v) that the applicability of the MSMED Act, 2006 would be an issue which would have to be decided after considering the facts, which ought not to be considered in a writ petition;
- (vi) that the objections under Section 16 of the A&C Act, 1996 have to be decided at the inception itself as held in Bhaven Construction v. Executive Engineer Sardar Sarovar (CA No. 14665/2015) and Jeph Bev Pvt. Ltd. v. DIAC. (W.P.(C) 1478/2021);
- (vii) that as per the judgements in GE T&D India Ltd. v. Reliable Engineering Projects and Marketing, Surender Kumar Singhal & Ors vs Arun Kumar Bhalotia & Ors, CS(OS) 384/2017 as also Gujarat State Civil Corporation Ltd. (Supra) the issue being a jurisdictional issue, it can be decided by the Micro and Small Enterprises Facilitation Council or even the arbitrator;
- (viii) that interdicting the arbitral proceedings at this stage would be contrary to the scheme of the MSMED Act, 2006.

Analysis and Findings

16. The facts in the present case are not in dispute. The date of the agreement is 9th October, 2018 and the last invoices that were raised by Respondent No. 2 were in September, 2019. Admittedly, the registration of Respondent No. 2 under the MSMED Act, 2006 is of 25th September, 2020. In the present case Respondent No. 2 has invoked the powers of the MSEFC under Section 18 only on 30th November 2020. Further, there is no independent Arbitration Clause in the contract between the parties.

17. The MSMED Act, 2006 under Section 18 provides initially for conciliation by the MSEFC and thereafter reference to arbitration. The said Section reads as under:

"18. Reference to Micro and small Enterprises Facilitation 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. Thus, the sole question that is raised in the present case is as to whether the reference under the MSMED Act, 2006 is valid or not as Respondent No. 2 was registered subsequent to the date of the agreement and the rendering of the services and raising of the final invoices. In the facts of this case, the clear position that emerges is that the registration was subsequent to the last invoice raised by the Respondent No.2.

19. Dr. Khan, Id. Counsel for the Respondent No.2 has raised an objection that this issue ought to be decided under Section 16 of the A& C Act, 1996.

20. Though, this Court is exercising jurisdiction under Article 226 and 227 of the Constitution of India, in view of the decision in *Surender Kumar Singhal & Ors. v. Arun Kumar Bhalotia & Ors*’, [2021 SCC OnLine Del 3708: (2021) 279 DLT 636] the position that emerges is that if there is complete lack of jurisdiction in the arbitral tribunal, a writ petition would be entertainable under exceptional circumstances. The relevant part of the said judgement is set out as under:

“Maintainability

18. Dealing with the first aspect, the law is well settled that Arbitral tribunals are a species of tribunals over which the High Court exercises writ jurisdiction. Challenge to an order of an arbitral tribunal can be raised by way of a writ petition. In *Union of India v. R. Gandhi*, *President Madras Bar Association* (supra) the Supreme Court observed on the question as to what constitutes ‘Courts’ and ‘Tribunals’ as under:

"38. The term 'Courts' refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the state for administration of justice that is for exercise of the judicial power of the state to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional mechanisms, usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute, or to determine controversies arising out of any administrative law. Courts refer to Civil Courts, Criminal Courts and High Courts. Tribunals can be either private Tribunals (Arbitral Tribunals), or Tribunals constituted under the Constitution (Speaker or the Chairman acting under Para 6(1) of the Tenth Schedule) or Tribunals authorized by the Constitution (Administrative Tribunals under Article 323A and Tribunals for other matters under Article 323B) or Statutory Tribunals which are created under a statute (Motor Accident Claims Tribunal, Debt Recovery Tribunals and consumer fora). Some Tribunals are manned exclusively by Judicial Officers (Rent Tribunals, Motor Accidents Claims Tribunal, Labour Courts and Industrial Tribunals). Other statutory Tribunals have Judicial and Technical Members (Administrative Tribunals, TDSAT, Competition Appellate Tribunal, Consumer fora, Cyber Appellate Tribunal, etc)."

19. Similar observations were made by the Supreme Court in SREI Infrastructure Finance Limited (supra) as under:

"14. Arbitration is a quasi judicial proceeding, equitable in nature or character which differs from a litigation in a Court. The power and functions of arbitral tribunal are statutorily regulated. The tribunals are special arbitration with institutional mechanism brought into existence by or under statute to decide dispute arising with reference to that particular statute or to determine controversy referred to it. The tribunal may be a statutory tribunal or tribunal constituted under the provisions of the Constitution of India. Section 9 of the Civil Procedure Code vests into the Civil Court jurisdiction to entertain and determine any civil dispute. The constitution of tribunals has been with intent and purpose to take out different categories of litigation into the special tribunal for speedy and effective determination of disputes in the interest of the society. Whenever, by a legislative enactment jurisdiction exercised by ordinary civil court is transferred or entrusted to tribunals such tribunals are entrusted with statutory power. The arbitral tribunals in the statute of 1996 are no different, they decide the lis between the parties, follows Rules and procedure conforming to the principle of natural justice, the adjudication has finality subject to remedy provided under the 1996 Act. Section 8 of the 1996 Act obliges a judicial authority in a matter which is a subject of an agreement to refer the parties to arbitration. The reference to arbitral tribunal thus can be made by judicial authority or an arbitrator can be appointed in accordance with the arbitration agreement under Section 11 of the 1996 Act."

20. Thus, the Supreme Court held that arbitral tribunals are private tribunals

unlike those tribunals set up under the statute or specialized tribunals under the Constitution of India. Thus, a Petition under Article 227 challenging orders of an Arbitral Tribunal would be maintainable.

...Scope and Extent of interference

21. Coming now to the question as to what would be the scope of interference under Article 226/227 against orders passed by the Arbitral Tribunals, though a number of judgements have been cited by both parties, recent decisions of the Supreme court and of this Court have settled the issue

....

25. A perusal of the above-mentioned decisions, shows that the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenges to orders by an arbitral tribunal including orders passed under Section 16 of the Act.

(i) An arbitral tribunal is a tribunal against which a petition under Article 226/227 would be maintainable;

(ii) The non-obstante clause in section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a Constitutional provision; (iii) For interference under Article 226/227, there have to be 'exceptional circumstances';

(iv) Though interference is permissible, unless and until the order is so perverse that it is patently lacking in inherent jurisdiction, the writ court would not interfere;

(v) Interference is permissible only if the order is completely perverse i.e., that the perversity must stare in the face

(vi) High Courts ought to discourage litigation which necessarily interfere with the arbitral process;

(vii) Excessive judicial interference in the arbitral process is not encouraged;

(viii) It is prudent not to exercise jurisdiction under Article 226/227;

(ix) The power should be exercised in 'exceptional rarity' or if there is 'bad faith' which is shown;

(x) Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided.;"

21. Thus, even while applying the strict test for entertaining of writ petitions in arbitral proceedings, a case where the MSMED Act, 2006 may itself not be applicable, would constitute an exceptional circumstance. Thus, the issue as to whether the MSEFC had jurisdiction ought to be considered at the threshold itself inasmuch as, if the provisions of the MSMED Act, 2006 have no application, the Petitioner cannot be subjected to the arbitral proceedings under the said Act

which also entails various other consequences including extremely high rates of interest under Section 16 of the Act. In order to avoid further complications and delay in adjudication by the competent forum, the question as to jurisdiction thus deserves to be considered in this petition.

22. The legal position in respect of invocation of remedies under the MSMED Act, 2006 has been considered by the Id. Supreme Court in *M/s. Silpi Industries v. Kerala State Road Transport Corporation & Anr.*, C.A.Nos.1570-1578 of 2021), wherein the Hon'ble Supreme Court observed as under:

"26. Though the appellant claims the benefit of provisions under 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. The appellant, in support of its case placed reliance on a judgment of the Delhi High Court in the case of *GE T&D India Ltd. v. Reliable Engineering Projects and Marketing*, but the said case is clearly distinguishable on facts as much as in the said case, the supplies continued even after registration of entity under Section 8 of the Act. In the present case, undisputed position is that the supplies were concluded prior to registration of supplier. The said judgment of Delhi High Court relied on by the appellant also would not render any assistance in support of the case of the appellant. In our view, to seek the benefit of provisions under MSMED 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 MSMED Act. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court, in the judgment in the case of *Shanti Conductors Pvt. Ltd. & Anr. etc. v. Assam State Electricity Board & Ors. Etc.* has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act. There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of appellant as the unit under 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 MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which appellant entered into contract with the respondent. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of 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.”

23. Similarly, in Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods Pvt. Ltd. & Anr. (Arising out of SLP (C) No. 12884/2020, the Supreme Court took a similar view which reads as under:-

“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. 34. The upshot of the above is that...

...(vi) A party who was not the ‘supplier’ as per the definition contained in Section 2(n) of the MSMED Act, 2006 on the date of entering into contract cannot seek any benefit as the ‘supplier’ under the MSMED Act, 2006. If any registration is obtained subsequently the same would have an effect prospectively and would apply to the supply of goods and rendering services subsequent to the registration ...”

24. The decisions in Silpi Industries (supra) and Gujarat State Civil Supplies Corporation Ltd (supra) leave no manner of doubt that the registration of an entity under the MSMED Act, 2006 after the contract is executed and that too after the services have been rendered, cannot give benefit of the provisions of the Act, to such entity. The registration under the Act, would apply only prospectively and not retrospectively. After considering these two decisions of the Supreme Court, this Court in W.P.(C) 9608/2022 titled Malani Construction Company v. Delhi International Arbitration Centre & Ors. vide order dated 16th March, 2023 observed as under:

“13. The ratio of these two judgments is clear to the effect that if the registration under the MSMED Act, 2006 was obtained subsequently, the benefits under the said Act would not apply. Even in a situation where some portion of the goods/ services are supplied prior to registration and some are supplied post registration, the Act would apply, depending on the facts, only qua the goods and services which are supplied subsequent to the registration.

14. The Supreme Court has further clarified that this issue can be decided by the MSEFC or the institution acting as an arbitral tribunal under the MSMED Act, 2006.”

25. In view of the admitted facts in the present case where the registration of

Respondent No.2 under the MSMED Act, 2006 was subsequent to the agreement for services as also after the last invoice was raised, the decisions discussed above would be squarely applicable. The impugned reference order dated 8th October 2022 is thus not sustainable and is accordingly set aside.

26. Respondent No. 2 is free to avail of its remedies in accordance with law including filing of a suit seeking recovery. Insofar as the issue of limitation is concerned, for filing of such a suit or other proceeding by the Respondent No. 2, the period during which the present case remained pending, initially before MSEFC and thereafter before this Court shall be liable to be excluded for calculating the period of limitation.

27. In view of the above discussion, the writ petition is allowed with no order to costs.

28. The present petition along with all pending applications is disposed of.