
(2023) 03 TEL CK 0095
In the Telangana High Court
Case No : Writ Petition No. 5431 Of 2023

M/S. Iti Limited

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 28-03-2023

Acts Referred:

Constitution Of India, 1950 — Article 226

Micro Small and Medium Enterprises Development Act, 2006 — Section 2(n), 8, 8(1)

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2023) 03 TEL CK 0095

Hon'ble Judges : P. Madhavi Devi, J

Bench : Single Bench

Advocate : P.Somashekar Reddy, Sinde Mohan Devidhas

Final Decision : Allowed

Judgement

1. In this Writ Petition, the petitioner is seeking a Writ of Mandamus declaring the action of respondent No.3 Council in entertaining the claim of respondent No.4 vide Claim Petition No.1191/MSEFC/2020 dt.11.09.2020 under the MSMED Act, 2006 on the ground that respondent No.4 does not fall within the definition of 'supplier' as per Section 2(n) of the Micro Small and Medium Enterprises Development Act, 2006, as illegal and arbitrary and consequently to direct the respondent No.3 to drop the claims of respondent No.4 and to pass such other order or orders as this Court may deem fit and proper in the circumstances of the case.

2. Brief facts leading to the filing of the present Writ Petition are that the petitioner, which is a Public Sector Undertaking under the Department of Telecommunications, Ministry of Communications, Government of India, is a nodal agency to the Central and State Governments for execution of turnkey projects and other data collection projects of the Government, including the project for execution of Socio Economic & Caste Census, Ministry of Rural Development, Ministry of Housing & Urban Poverty Alleviation and Registrar

General & Census Commissioner of India, Ministry of Home Affairs, Government of India. It is submitted that the Consortium of Public Sector Undertakings had floated a tender for procuring data and processing the same on door to door basis for a 120 crore population. Respondent No.4 had entered into an agreement with the petitioner on 11.05.2012 and respondent No.4 was required to carry out all jobs related to the said Project.

3. According to the learned counsel for the petitioner, Sri P.Somashekar Reddy, all works related to the project were completed before 2016. It is submitted that respondent No.4 got registered as an MSM Enterprise on 23.02.2017, i.e., after the completion of the contract work. According to the learned counsel for the petitioner, the Micro Small and Medium Enterprises Development Act, 2006 (MSMED Act) had come into force in the year 2006 and the enterprises which are registered with Micro and Small Enterprises Facilitation Council (MSEF Council) alone are eligible to file claim petition before MSEF Council in respect of supply of goods or services. It is submitted that respondent No.4 had filed a claim petition before MSEF Council in respect of the contract entered into on 11.05.2012, i.e., before its registration under Section 8(1) of MSMED Act, 2006 and therefore, the MSEF Council ought not to have entertained the claim petition and issued notice to the petitioner. It is submitted that the Hon'ble Supreme Court in the case of Silpi Industries Etc. Vs. Kerala State Road Transport corporation and another 2021 SCC OnLine SC 439 has clearly held that the provisions of MSMED Act can be availed of only by such organizations which are registered with MSEF Council and also in respect of only such contracts which are entered into or executed after such registration under Section 8 of the MSMED Act. He therefore relied upon the said decision to argue that the MSEF Council, i.e., respondent No.3 ought not to have entertained the application. He also placed reliance upon the decision of the Hon'ble Supreme Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others (1998) 8 SCC 1 for the proposition that under Article 226 of the Constitution of India, the High Court can interfere if the order or proceeding is wholly without jurisdiction or vires of the Act is challenged. He also referred to the judgment of the Hon'ble A.P. High Court in the case of Rashtriya Ispat Nigam Limited rep. by its Authorized Signatory-R. Monikandan Vs. Union of India rep. by Secretary, the Ministry of Micro Small and Medium Enterprises 2022 SCC OnLine AP 970, wherein after taking into consideration the decision of the Hon'ble Supreme Court in the case of Silpi Industries Etc. Vs. Kerala State Road Transport corporation and another (2021 SCC OnLine SC 439 supra), it was held that the Court can interfere in the cases where the Council does not have jurisdiction to entertain and decide the dispute. Therefore, according to him, this Court can and should interfere in the matter and set aside the notice dt.09.02.2023 issued to the petitioner to appear before the MSEF Council.

4. Learned counsel for respondent No.4, Sri Sinda Mohan Devidhas, submitted that in the present case, the MSEF Council is discharging its judicial functions and therefore, it is only a forum entertaining applications under the MSMED Act, 2006

and the Arbitration and Conciliation Act, 1996 and therefore, any order or notice or proceedings before the same cannot be challenged in a Writ of Mandamus. He further submitted that the notice issued by the MSEF Council also refers to the preliminary objections to be raised by the parties which would be considered by the Tribunal. He submitted that the jurisdiction issue is a preliminary issue which has to be decided by the primary authority only and therefore, this Court under Article 226 of the Constitution of India ought not to interfere with the same at this stage. Therefore, according to him, the remedy of the petitioner lies with the MSEF Council and not before this Court. He further submitted that the case of the petitioner is not of availing an alternative remedy, but is of being before the same authority and therefore, the decision of the Hon'ble Supreme Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others ((1998) 8 SCC 1 supra) would not be applicable to this case. With regard to the judgment of Hon'ble Supreme Court in the case of Silpi Industries Etc. Vs. Kerala State Road Transport corporation and another (2021 SCC OnLine SC 439 supra), the learned counsel submitted that in the said case, the facts are distinguishable as it was at the stage of Section 34 of the Arbitration and Conciliation Act, 1996 that the matter had come up before the Hon'ble Supreme Court and that it was at this stage, that the Hon'ble Supreme Court had held that only such organizations which are registered under the MSMED Act, 2006 and their transactions made thereafter, are amenable to MSMED Act, 2006. It is submitted that in this case, the Tribunal is yet to take a decision on the jurisdictional issue and therefore, the Writ Petition is premature. He further drew the attention of this Court to various documents to submit that invoices have been raised by respondent No.4 on the petitioner in the year 2018, i.e., after registration of respondent No.4 with MSEF Council and therefore, without prejudice to his argument that all the transactions are amenable to the jurisdiction of the Tribunal, the transactions at least after such registration are amenable to MSMED Act, 2006. He therefore submitted that the supplies which are made post registration and the invoices raised thereafter are amenable to its jurisdiction and therefore, it is not a case of inherent lack of jurisdiction. He also referred to the decision of the Hon'ble Supreme Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others ((1998) 8 SCC 1 supra) to demonstrate that the said decision is in favour of respondent No.4.

5. In rebuttal, the learned counsel for the petitioner submitted that the invoices which are being referred to by the learned counsel for respondent No.4 are only amendments to the earlier invoices and it is reiterated that the entire contract was completed before the end of the year 2016. Therefore, according to him, the claim petition filed by respondent No.4 ought not to have been entertained by the MSEF Council.

6. Having regard to the rival contentions and the material on record, this Court finds that the undisputed facts are that respondent No.4 was registered in the year 2017, whereas the claim petition was in respect of the transactions done before such registration. Therefore, whether the claim petition can be

entertained by the MSEF Council is the question before this Court.

7. In the case of Silpi Industries Etc. Vs. Kerala State Road Transport corporation and another (2021 SCC OnLine SC 439 supra), the Hon'ble Supreme Court has clearly held that to seek the benefits of the provisions under the MSMED Act, 2006, the seller should have been registered under the provisions of the Act as on the date of entering into the contract and for the supplies pursuant to the contract made before the registration of the unit under the provisions of the MSMED Act and that no benefit can be sought by such entity as contemplated under the MSMED Act. For the sake of ready reference, the relevant paragraph, i.e., para 26, is reproduced hereunder:

"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 (2017 SCC OnLine Del 6978), 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 [(2019) 19 SCC 529] 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.”

By following the said decision, a Coordinate Bench of Hon’ble A.P. High Court has held that unless a memorandum is filed under Section 8 of the Act 27 of 2006 and the contract is a pure and simple supply contract, the party cannot move the Facilitation Council to entertain and decide any dispute. The A.P. High Court has also considered the issue as to whether the High Court can entertain a Writ Petition against the issue of MSME jurisdiction of the Council where there is a patent lack of jurisdiction. The Court has held that the Court should not be a silent spectator and allow the issue to go to the Facilitation Council even though the Council lacked jurisdiction as per the mandate of the Hon’ble Supreme Court in the case of Silpi Industries Etc. Vs. Kerala State Road Transport corporation and another (2021 SCC OnLine SC 439 supra). The Hon’ble Supreme Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others (2 supra) has also held that under Article 226 of the Constitution, the High court, having regard to the facts of the case, has a discretion to entertain or not to entertain a Writ Petition. and the availability of alternative remedy does not operate as a bar in three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In the case before this Court, the objection of respondent No.4 is that the petitioner should have raised the issue of jurisdiction as advised in the notice itself before the MSEF Council, but the petitioner ought not to have filed this Writ Petition. This Court is of the opinion that since the Council apparently lacks jurisdiction to entertain the application, the Writ Petition can be entertained. The petitioner is not challenging the validity of the proceedings before the Council, but is challenging the entertainment of the claim petition itself and therefore, the Writ of Mandamus is maintainable. A Writ of Certiorari is maintainable only when an order is passed and correctness of the said order is challenged before the High Court.

8. In view of the same, this Court holds that respondent No.3 has no jurisdiction to entertain the claim petition filed by respondent No.4. The notice dt.09.02.2023 requiring the petitioner to be present and file its objections before respondent No.3 is therefore set aside.

9. The Writ Petition is accordingly allowed. No order as to costs.

10. Pending miscellaneous petitions, if any, in this Writ Petition shall stand closed.