# IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWP No. 4564/2022
Reserved on: 5.1.2023
Decided on : 12 .1.2023

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M/s Megha Engineering & Infrastructure Ltd. .....Petitioner

Versus

H.P. Micro Small Enterprises Facilitation Council & ors. ....Respondents

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***Coram:***

***The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.***
***The Hon'ble Mr. Justice Virender Singh, Judge.***

*Whether approved for reporting?*[1] *Yes*

For the Petitioner: Mr. Shrawan Dogra, Sr. Advocate, with Mr. Yudhvir Singh Thakur, Mr. Rakesh Kumar Sharma & Mr. Tejasvi Dogra, Advocates.

For the Respondents: Mr. Anup Rattan, A.G. with Mr. Y.P.S. Dhaulta, Addl. A.G., Mr. J. S. Guleria, Dy.A.G. and Mr. Rajat Chauhan, Law Officer, for respondent No.1.
Mr. Sunil Mohan Goel, Advocate, for respondent No.3.

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**Justice Tarlok Singh Chauhan, Judge**

The instant petition has been filed for grant of the following substantive reliefs:

> *A. That, a writ in the nature of certiorari or any other appropriate writ may be issued to set aside the notice issued by Respondent No. 1 dated 22.07.2021 (Annexure P-8) as being against the mandate of under Rule 4 (v) and 4 (vi) of the MSME Rules, 2018 AND/OR Section 2(n) r/w*

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1 Whether reporters of the local papers may be allowed to see the judgment? Yes.

*chapter 5 of the MSME Act, 2006 AND/OR Section 18(3) of the MSME Act r/w Section 61(2) of the Arbitration & Conciliation Act, 1996 r/w the enabling provisions of the Limitation Act, 1963 AND/OR also violative of Article 14 of the Constitution of India;.*

*B. That, a writ in the nature of certiorari or any other appropriate writ may be issued to set aside the order dated 02.02.2022 (Annexure P-11) passed by the Respondent No.1 as being against the mandate of under Rule 4 (v) and 4 (vi) of the MSME Rules, 2018 AND/OR Section 2(n) r/w chapter 5 of the MSME Act, 2006 AND/OR Section 18(3) of the MSME Act r/w Section 76(b) & Section 10 of the Arbitration & Conciliation Act, 1996 AND/OR also violative of Article 14 of the Constitution of India;*

*C. That, a writ in the nature of certiorari or any other appropriate writ may be issued to set aside the order dated 10.05.2022 (Annexure P-16) passed by the Respondent No.1 to the extent it is prejudicial to the interest of the Petitioner, being against the mandate under Rule 4 (v) and 4 (vi) the MSME Rules, 2018 AND/OR Section 2(n) r/w chapter 5 of the MSME Act, 2006 AND/OR Section 18(3) the MSME Act r/w Section 77 the Arbitration & Conciliation Act 1996 AND also violative of Article 14 of the Constitution of India;.*

*D. That a writ in the nature of certiorari or any other appropriate writ may be issued to set aside the order dated 02.07.2022 (Annexure P-18) passed by the Respondent No.2 as being against the mandate of Section 18(3) & 18 (5) r/w Section 24 of the MSME Act AND/OR Section 14 (a) of the Arbitration & Conciliation Act, 1996 AND/OR also violative of Article 14 of the Constitution of India."*

2 Brief facts, as pleaded in the petition, are that on 11.07.2012, the petitioner-company placed a work order for engaging manpower with respondent No. 3 at its Lambadug Hydropower Project, on the basis of terms and conditions mentioned therein. The work order was amended thereafter on 08.11.2013 & 01.07.2015.

3 In the year 2018, the petitioner, due to certain developments, decided that the services of respondent No. 3 were no more required, therefore, on 24.10.2018, it along with respondent No. 3 decided to hold a meeting to discuss various issues towards full and final settlement. Respondent No. 3 submitted its full & final settlement bill along with a covering letter with reference number RS/MEIL/18-19/47/07.

4 After the detailed checking and voluminous old records/documents by all the concerned departments in the petitioner's organization, the petitioner informed respondent No. 3 that there was no amount pending towards it and respondent No. 3 was satisfied with the same. As both the petitioner and respondent No. 3, decided and mutually agreed that no sum is

now payable from the petitioner to respondent No. 3, accordingly respondent No. 3, issued "No Market Liability Certificate" to the petitioner.

5 Subsequent to conclusion of the business with the petitioner, respondent No. 3 on 25.08.2020, got itself registered with the Ministry of the Micro, Small and Medium Enterprises by submitting a memorandum provided under Section 8(a) of the Micro, Small and Medium Enterprises Development Act, 2006 (for short, “the MSMED Act”) and after more than three years (i.e. reckoned from 25.10.2018 when final invoice was submitted without any protest/prejudice), respondent No. 3 issued a communication towards monthly bills w.e.f. August 2012-October 2018.

6 On 12.04.2021, the petitioner replied to the communication of respondent No. 3 dated 18.01.2022 towards monthly bills w.e.f. August 2012-October 2018, whereby the petitioner categorically denied there being any outstanding dues and further asserted that respondent No. 3 itself has issued “No Market Liability Certificate” in favour of petitioner.

7 Respondent No. 3 invoked the jurisdiction of respondent No. 1 for the grievance towards the monthly bills w.e.f. August 2012-October 2018. Respondent No.1 after

examining the reference at the preliminary stage and after getting satisfied about its competency to entertain the reference by respondent No. 3 issued a notice to the petitioner.

8 The petitioner after receipt of notice dated 22.07.2021 issued by respondent No. 1, filed its reply before respondent No. 1 stating therein that the petitioner has not received any calculation sheet along with the notice.

9 Thereafter, the petitioner attended the conciliation proceedings and informed the conciliation officer that the reference is not maintainable. The petitioner also endeavoured in settlement of the dispute by trying to satisfy respondent No. 3, by inviting him to the office of the petitioner.

10 On 21.01.2022, respondent No. 1 conducted its proceedings through online mode (video conferencing) when the petitioner was present there but due to the network issues and interruptions thereto owing to extreme bad weather in H.P., could not hear the proceedings. However, taking advantage of the situation by respondent No. 3 and without hearing the stand of the petitioner, respondent No. I decided to refer the matter to the sole arbitrator for the adjudication of the original claim.

11 It is further averred that as per the decision dated 21.01.2022, respondent No. 1 passed a formal order for reference

of the matter to respondent No.2 and sent a copy of original claim for further adjudication. On 21.02.2022, the petitioner after receiving the order of the reference dated 02.02.2022 addressed its objections related to the said order.

12 On 24.02.2022, respondent No.2 sent a notice of appearance to the petitioner and respondent no. 3 for 14.03.2022.

13 Thereafter, on 04.03.2022, respondent No. 1, after being addressed and received the communication dated 21.02.2022 took the issue on the regular board and passed an order by calling the appearance of both the parties for 08.04.2022. Respondent No.1 also requested respondent No.2 not to proceed with any arbitration proceedings. Respondent No.1 had no legal right conferred under the MSMED Act to stop the proceedings before respondent No. 2.

14 The issue was taken up by respondent No.1 on 08.04.2022 and 10.05.2022. Respondent No.2 also continued with the proceedings and the petitioner as well as respondent No. 3 attended the proceedings before respondent No. 2 on 08.04.2022 and 10.05.2022. However, respondent No.1 never issued any order of staying the proceedings at any relevant point of time. Respondent No. 1 while passing the order has given

liberty to the petitioner to challenge its order before competent court of law.

15 Respondent No.3 submitted its fresh statement of claim before respondent No.2 but copy of same was not supplied to the petitioner. Respondent 2 scheduled arbitration proceedings for 25.06.2022 and again on 02.07.2022 and the petitioner raised an objection that jurisdiction of respondent No.2 stands barred by virtue of Section 18 (5) of the MSMED Act read with Section 24 of the MSMED Act read with Section (1) (a) Arbitration & Conciliation 1996. Upon the objection of the Petitioner, respondent No.2 passed order dated 2.7.2022 rejecting the objection raised by the petitioner and scheduled the proceedings for 18.7.2022 for statement of defense. Hence, the petition.

16 Respondent No.3 has filed the reply, wherein certain disputes on merits of the case have been raised, however the fact that respondent No.3 came to be registered under the MSMED Act only on 25.8.2020 has not been disputed.

17 In such circumstances, the moot question is whether the Micro Small Enterprises Facilitation Council (for short, “the Council”) could have entertained the claim of respondent No.3 much less referred the same for arbitration.

18 The answer is clearly in the negative as the issue stands settled in view of the judgment rendered by the Hon'ble Supreme Court in ***M/s Silpi Industries vs. Kerala State Transport Corporation & anr.***, ***2021 SCC Online SC 439***, wherein it was held 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. <u>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.</u> 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. 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. <u>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 etc. to obtain registration subsequent to entering into the contract and supply of goods and services.</u> 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.*

19 There is no acceptable material on record to show that supply of goods has taken place or any services were rendered,

subsequent to registration of respondent No.3 as an 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 respondent No.3 entered into contract with the petitioner. Respondent No.3 cannot become micro or small enterprise or supplier to claim the benefits within the meaning of MSMED Act by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, the same will only 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.

20 The view taken in *M/s. Silipi Industries'* case (supra) was thereafter reiterated by the Hon'ble Supreme Court in ***M/s Vasishno Enterprises vs. Hamilton Medical AG & anr, JT 2022 (3) SC 406***, more particularly, in para 8.2, which reads as under:-

*"8.2 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 subsection (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 subsection (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."

21 Similar reiteration of law in fact can be found in another judgment of the Hon'ble Supreme Court in ***Civil Appeal No.5276/2022, titled as Nitesh Estates Ltd. vs. Micro and Small Enterprises***, decided on 12.8.2022, wherein the Hon'ble Supreme Court observed as under:-

> *"4. Having heard learned counsel appearing on behalf of the respective parties, the question which is posed for consideration of this Court is whether the proceedings initiated by respondent No.2 under MSMED Act would be maintainable and/or permissible as at the time of entering into the borkerage agreement, respondent no.2 was not registered as micro enterprise. The issue involved is squarely covered against the respondents in view of the decision of this Court in Silpi Industries Etc. Vs. Kerala State Road Transport Corporation and Another 2021 SCC OnLine SC 439 as well as the subsequent decision of this Court in Vaishno Enterprises Vs. Hamilton Medical AG and Another 2022 SCC OnLine SC 355, taking the view that for initiation of proceedings under the MSMED Act, the registration of the complainant/application as micro enterprise shall be must. The subsequent registration of respondent no.2 with retrospective effect from 10 years back will not be of any assistance and/or help to respondent No.2."*

22 Thus what stands settled by the Hon'ble supreme Court is that when jurisdiction itself is not vested with the Council, issuance of notice or appointment of arbitrator or taking any further action under the MSMED Act by the Council is void ab initio and the same is liable to be quashed and set aside.

23 Considering the above legal position when respondent No.3 was not registered under the MSMED Act, its claim ought not to have been entertained by the Council as it in fact had no jurisdiction to entertain such claim and as such, could not have even referred the same for arbitration, therefore, this Court is left with no other option, but to quash the entire proceedings and set aside the notice, dated 22.7.2021 (Annexure P-8), order dated 2.2.2022 (Annexure P-11), order dated 10.5.2022 (Annexure P-16) and order dated 2.7.2022 (Annexure P-18). Ordered accordingly.

24 The instant petition is allowed in the aforesaid terms, so also the pending application(s), if any, leaving the parties to bear their own costs.

**(Tarlok Singh Chauhan)**
**Judge**

**(Virender Singh)**
**Judge**

**12.1.2023**
*(pankaj)*