



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

Date of decision: 16th FEBRUARY, 2024

IN THE MATTER OF:

+ **W.P.(C) 14378/2023 & CM APPL. 56974/2023**

THE EXECUTIVE ENGINEER & ORS

..... Petitioners

Through: Mr. Kavın Gulati, Sr. Advocate with
Mr. Rajeev Kumar Dubey, Mr.
Ruchir Ranjan and Mr. Kamendra
Mishra, Advocates.

versus

**M/S BHOLASINGH JAIPRAKASH CONSTRUCTION LTD &
ANR**

..... Respondents

Through: Mr. Sudhir Nandrajog, Senior
Advocate
Mr. Avishkar Singhvi, Mr. Naved
Ahmed, Mr. Vivek Kumar Singh and
Mr. Deokinandan Sharma, Advocates
for R-2.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. By way of the present Writ Petition, the Petitioner seeks to quash the proceedings initiated by the Respondent No.2/Micro and Small Enterprises Facilitation Council under the Micro, Small and Medium Enterprise Development Act, 2006 (*hereinafter referred to as "the MSMED Act"*) referring the dispute between the Petitioners and the Respondent No.1 to the Micro, Small and Medium Enterprise (MSME) Arbitral Tribunal and setting aside of Final Award dated 26.12.2022 and 02.01.2023, passed by the Arbitral Tribunal in MSME CASE/REF. ID: DL/10/S/SWC/00931/2022.



2. The facts, in brief, as stated by the Petitioner in the present Writ Petition, are as under:

- a. The Petitioner herein invited bids for construction of Barrage on River Adwa in District Mirzapur, Uttar Pradesh. Respondent No.1 herein applied for the contract and was declared as a successful bidder and was subsequently awarded the tender vide Letter of Award dated 20.08.2005. It is stated that a formal agreement was entered into between the Petitioner and the Respondent No.1 on 27.08.2005 and as per the agreement, the work was to be completed within 18 months from the order of commencement of works. The Order of commencement of Works was communicated to the Petitioner on 01.08.2006. Time for construction of the Barrage in question was extended from 27.06.2008 to 31.07.2008. It is stated that some more works were added to the original scope of work and further time was extended from time to time. The last extension was granted on 31.07.2017 vide which the work was to be completed by 15.09.2017. The work of the Barrage in question was finally completed on 15.09.2017.
- b. It is stated that the Respondent No.1 raised a bill of Rs.19,39,57,014.80/- on the Petitioner which was disputed by the Petitioners.
- c. It is stated that the Respondent No.1 approached Respondent No.2 for seeking conciliation. However, since conciliation proceedings failed, the matter was referred to the sole arbitrator.
- d. Respondent No.1 filed its statement of claim and the Petitioners



were called to file their reply and the Award was passed on 02.01.2023.

- e. Petitioner has, thereafter, approached this Court stating that since the contract entered into between the Petitioner and the Respondent No.1 was a works contract, the same was outside the scope of the MSMED Act. It is also contended that since the Respondent No.1 was registered as MSME on 20.05.2017, the Respondent No.1 is not entitled to invoke the provisions of the MSMED Act as the date of registration is prior to the date of contract.

3. Learned Counsel for the Petitioner contends that since the provisions of the MSMED Act could not be invoked, the proceedings under the MSMED Act, including the reference to the Arbitral Tribunal, ought to be set aside. Learned Counsel for the Petitioner places reliance on (a) Shree Gee Enterprise v. Union of India, **2015 SCC OnLine Del 13169**; (b) Sterling & Wilson (P) Ltd. v. Union of India, **2017 SCC OnLine Bom 6829** & (c) Tata Power Company Limited v. Genesis Engineering Company, **2023:DHC:2649**; to contend that only contracts relating to goods or services are covered by the MSMED Act and the works contract are not covered under the MSMED Act. He also places reliance on (d) Silpi Industries v. Kerala State Road Transport Corporation, **2021 SCC OnLine SC 439**; (e) Gujarat State Civil Supplies Corporation v. Mahakali Foods Pvt. Ltd., **(2023) 6 SCC 401**; to substantiate that MSMED Act is not applicable to contracts executed prior to the registration of the company under the MSMED Act. He also places reliance on (f) JSW Steel Ltd. v. Kamlakar V. Salvi and Ors., **2021:BHC-AS:13934-DB**, (g) Whirlpool Corporation v.



Registrar of Trademarks, (1998) 8 SCC 1; (h) Kiran Sing v. Chaman Paswan, AIR 1954 SC 340, (i) Embassy Property Development Pvt. Ltd. v. State of Karnataka, (2020) 13 SCC 308 & (j) Arun Kumar v. Union of India, (2007) 1 SCC 732, to contend that a Writ Petition against an award under the MSMED Act is maintainable when there is a lack of jurisdiction.

4. Per contra, learned Counsel for Respondent No.1 contends that the Statement of Claim was served on the Petitioner and the Petitioner was aware of the proceedings. He further states that a copy of the award was served on the Petitioner when the proceedings were initiated under Section 34 of the MSMED Act. He states that after missing out the date for challenging either the reference to the Arbitral Tribunal under the MSMED Act and after missing the last date to challenge the award, the Petitioner should not be permitted to approach this Court by filing a Writ Petition under Article 226 of the Constitution of India which would amount to circumventing the provisions of the Arbitration Act. Learned Counsel for the Respondent No.1, therefore, contends that since the proceedings under Article 226 of the Constitution of India is an equitable and discretionary remedy, the same should not be exercised.

5. Heard the Counsels for the Parties and perused the material on record.

6. Material on record indicates that the proceedings before the Arbitral Tribunal were initiated on 16.08.2022 and repeated reminders were being sent to the Petitioner informing them about the proceedings but the Petitioner refused to participate in the proceedings on the ground that there is a lack of jurisdiction. The Petitioner has admittedly not approached any Court challenging the proceedings before the Arbitral Tribunal. Award was passed on 02.01.2023 and it was open for the Petitioner to challenge the



award by taking appropriate proceedings within the time prescribed under the Arbitration Act but the Petitioner chose not to take recourse to the remedy available to her within the stipulated time. The Petitioner has now chosen to invoke Article 226 of the Constitution of India by filing the present Writ Petition challenging the Award and the proceedings under the MSMED Act.

7. It is well settled that Article 226 of the Constitution of India is an extraordinary remedy and cannot be invoked where a party has failed to invoke other remedies available to it under law.

8. MSMED Act was brought in to free Micro, Small and Medium Enterprises from the plethora of laws and regulations which they had to face with their limited awareness and resources. Micro, Small and Medium Industries have emerged as a significant contributor to the economy and is primarily labour intensive. The MSMED Act was brought in to address the concerns of Micro, Small and Medium industries. Chapter V of the MSMED Act deals with delayed payments to the MSMEs. The said Chapter has been brought in to ensure that when goods or services are supplied by the MSMEs, the payments are made to these industries within time and Sections under Chapter V provides for delayed payment at higher rate of interest. The purpose of this chapter is to ensure that the MSMEs are not pushed out of business. It is felt that failure to pay for the amount of goods and services provided by these enterprises was resulting in many of the MSMEs going out of business as they do not have the might to fight with the large scale enterprises. Section 18 of the MSMED Act provides for reference of a dispute to the MSME Facilitation Council. The MSME Facilitation Council on receipt of a reference under Sub-Section 18(1) of the MSMED Act, 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. In the present matter, prior to sending the matter to the Arbitral Tribunal, an effort for conciliation was also made and the matter was referred to the Arbitral Tribunal only after conciliation proceedings have failed. Once the matter is referred to Arbitration and an award is passed, the award can be challenged either by filing an application under Section 34 of the Arbitration Act or by filing an application under Section 19 of the MSMED Act.

9. In the present case, the Petitioner comes within the definition of State under Article 12 of the Constitution of India. The Petitioner knew about the dispute. The Petitioner knew that the matter has been referred to the Arbitral Tribunal. There has been complete inaction on the part of the State to challenge the reference proceedings. In fact, the State chose not to participate in the proceedings. After the award was passed, the State chose not to challenge the same under Section 34 of the Arbitration Act on the same grounds which have been raised in the present Writ Petition. After failing to invoke the procedures under the Arbitration Act, it is now not open for the State to approach this Court by filing a Writ Petition under Article 226 of the Constitution of India. State is not a helpless litigant who is not aware of the law and, therefore, this Court does not find it expedient to interfere with the award under Article 226 of the Constitution of India on the issue of jurisdiction. Article 226 cannot be invoked by a litigant who has failed to avail of the remedies available under law. The State is not a helpless litigant in whose favour, the Court should invoke the extraordinary



remedy under Article 226 of the Constitution of India.

10. No ground has been raised in the present Writ Petition on the merits of the case as to whether the Respondent No.1 is entitled to the amount claimed or not. Keeping in mind the objectives of the MSMED Act and also keeping in view the complete inaction on the part of the State to approach this Court during the pendency of the arbitration or taking recourse to the proceedings under Section 34 and 37 of the Arbitration Act after the Award was passed, this Court is not inclined to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India to interfere with the award passed by the Arbitral Tribunal.

11. Accordingly, the Writ Petition is dismissed. Pending applications, if any, also stand dismissed.

SUBRAMONIUM PRASAD, J

FEBRUARY 16, 2024

Rahul