



\$~39

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

Decided on: 20.02.2024

+ O.M.P. (COMM) 392/2023, I.A. 18599/2023 & I.A. 22069/2023

INDIAN HIGHWAYS MANAGEMENT
COMPANY LTD.

..... Petitioner

Through: Mr. A.P. Singh, Ms. Akshada
Mujwar and Mr. Varnit
Vashishtha, Advocates.

versus

PRAKASH ASPHALTINGS AND
TOLL HIGHWAYS (INDIA) PVT LTD

..... Respondent

Through: Mr. Dharmendra Rautray, Ms.
Ginny J. Rautray, Mr. Navdeep
Singh, Ms. Devika Thakur and Mr.
Ranvijay Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

PRATEEK JALAN, J. (ORAL)

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 [“the A&C Act”], is to an Award dated 05.06.2023, rendered by the Madhya Pradesh Micro and Small Enterprises Facilitation Council, Bhopal [hereinafter, “the Facilitation Council”], under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 [“the MSME Act”], against the petitioner and in favour of the respondent, adjudicating disputes between the parties under an Agreement dated 29.04.2015 [“Agreement”].



2. The Agreement between the parties provides for provision of toll management services by the respondent to the petitioner. The term of the Agreement was stated to be five years, which was extendable by mutual agreement of the parties.

3. The principal contention of Mr. A.P. Singh, learned counsel for the petitioner, is that the impugned award is required to be set aside, as the respondent's claims did not fall within the ambit of jurisdiction of the Facilitation Council under Section 17 or 18 of the MSME Act at all.

4. Section 17 and 18 of the MSME Act read as follows:

*“17. Recovery of amount due.—**For any goods supplied or services rendered by the supplier**, the buyer shall be liable to pay the amount with interest thereon as provided under Section 16.*

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 conduct mediation itself or refer the matter to any mediation service provider as provided under the Mediation Act, 2023.

(3) The conduct of mediation under this section shall be as per the provisions of the Mediation Act, 2023.

(4) Where the mediation initiated under sub-section (3) 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 alternative 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.

(5) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternative dispute resolution services shall have jurisdiction to act as an Arbitrator or mediator under this section in a dispute between the supplier located within its jurisdiction



and a buyer located anywhere in India.”¹

5. Mr. Singh submits that the respondent is admittedly not a micro or small enterprise. He submits that the judgments of the Supreme Court in *Silpi Industries v. Kerala SRTC*² and *Vaishno Enterprises v. Hamilton Medical AG*³ clearly hold that the MSME Act would be applicable only to a supplier registered thereunder at the time the contract between the parties was signed.

6. Mr. Dharmendra Rautray, learned counsel for the respondent, does not dispute that the respondent has never been and is not registered as a micro or small enterprise under the MSME Act. Indeed, he accepts that it is not a micro, small or medium enterprise at all, in terms of the MSME Act. However, he contends that the respondent falls within the definition of a ‘supplier’ in terms of Section 2(n)(iii) of the MSME Act. Section 2(n) of the MSME Act reads as follows:

“2. *Definitions.*—*In this Act, unless the context otherwise requires,—*

(n) **"supplier" means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes,—**

- (i) *the National Small Industries Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956);*
- (ii) *the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956);*
- (iii) **any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods**

¹ Emphasis supplied.

² (2021) 18 SCC 790.

³ 2022 SCC OnLine SC 355.



produced by micro or small enterprises and rendering services which are provided by such enterprises;⁴

7. Mr. Rautray submits that the MSME Act does not necessarily require a 'supplier' to be a micro or small enterprise which has filed a memorandum under Section 8(1) of the MSME Act, but that, by virtue of Section 2(n)(iii), any entity which is engaged in selling goods produced by a micro or small enterprise, or rendering services provided by such an enterprise, would fall within the definition of 'supplier'. According to Mr. Rautray, the only condition would be that the benefit of the sale transaction is passed on by the said entity, directly to the micro or small enterprise producing the goods or providing the services, as the case may be. He further submits that the MSME Act contemplates this provision in keeping with its objects and reasons, i.e., to ensure timely and smooth flow of credit to micro or small enterprises and to minimize the incidence of sickness of such enterprises.

8. Factually, Mr. Rautray submits that, in the present case, the respondent had procured certain equipment and material from micro or small enterprises registered under the MSME Act, for the purposes of installation at the petitioner's toll plazas and provision of services under the Agreement. He states that the respondent has paid its vendors [the micro and small enterprises] within the stipulated period under the MSME Act, but when the respondent raised invoices upon the petitioner, the petitioner failed to pay the same. He submits that in these circumstances, the jurisdiction of the Facilitation Council under Section 18 of the MSME Act, was attracted. Therefore, the respondent in its

⁴ Emphasis supplied.



capacity as a 'supplier', approached the Facilitation Council seeking recovery of such amounts which were to be finally passed on to the micro or small enterprises which originally produced the goods.

9. I am of the view that this larger issue, as to whether Section 2(n)(iii) of the MSME Act necessarily requires a 'supplier' to be a micro or small enterprise, need not be gone into in the facts of the present case, as I do not find the respondent to satisfy the definition of a 'supplier', even on Mr. Rautray's expansive interpretation of Section 2(n)(iii) of the MSME Act.

10. The Agreement did not provide for sale of any goods by the respondent to the petitioner and the services rendered by the respondent to the petitioner were provided by the respondent itself, and not a micro or small enterprise. The Agreement tasked the respondent with acquiring and installing equipment at the toll plazas of the petitioner, and maintain the same for five years thereafter alongwith other contracted services. Mr. Rautray does not contend that the services being rendered by the respondent in this regard were provided by a micro or small enterprise, but that the equipment and materials purchased by respondent for provision of the services, were sourced from micro or small enterprises.

11. The scope of work, provided in section 5 of the Agreement, does not refer to any sale of goods by the respondent. It requires the respondent to procure equipment of provided specifications and install it at the petitioner's toll plazas, to maintain the equipment, and to provide the specified services. Neither the tender issued by the petitioner, nor the bid submitted by the respondent, required provision of goods or services by a micro or small enterprise. The parties were engaged on a principal-



to-principal basis, and the petitioner was not liable under the MSME Act for the invoices raised by vendors upon the respondent, even if the respondent, in turn, procured goods from a micro or small enterprise.

12. As to the question of whether the respondent was engaged in sale of goods under the Agreement, clause 5.4.6 of the Agreement specifically deals with the ownership of the goods provided by the respondent to the petitioner, which reads as follows:

“5.4.6 Ownership of Equipment & other conditions:

All the equipment shall be owned^[4] by the Service Provider throughout the duration of contract. The Service Provider will be paid on Quarterly basis a lump sum amount for the complete end-to-end services made available to IHMCL, subject to deductions, if any, towards deficiencies in services as per service level agreements mentioned herein.

It may please be noted that procurement of any Toll Systems/ Equipment/Hardware/Software/ AVCC System / WIM System etc. has not been envisaged through this tender. The Service Provider shall be required to provide the services as per the scope of work prescribed herein.”⁵

xxx

xxx

xxx

[Footnote No. 4: **“The Service Provider may take back his equipment after completion of contract and/or termination of services (as the case maybe).** However, the data generated in the system shall be handed over to IHMCL in readable format.”⁶]

Thus, it is clear that the ownership of the equipment/goods provided by the respondent [described as the “Service Provider” in the Agreement] remained with the respondent throughout the duration of the Agreement. The footnote to the aforesaid clause further clarifies that the respondent was at liberty to take back its equipment/goods after completion of the Agreement. In this regard, Mr. Rautray also clarified upon instructions,

⁵ Emphasis supplied.

⁶ Emphasis supplied.



that the respondent was in fact not liable to leave the equipment upon lapse of the contractual period. It requires the respondent to process equipment of provided specification and install it at the petitioner's toll plazas, to maintain the equipment, and to provide the specified services.

13. In such circumstances, it cannot be said that the respondent was “engaged in selling goods produced by micro or small enterprises” in terms of Section 2(n)(iii) of the MSME Act. As stated above, Mr. Rautray does not contend that the services rendered by the respondent were provided by a micro or small enterprise.

14. The petitioner's objection on this ground is dealt with in the award as follows:

“From the perusal of the contract dated 29/04/2015 between the parties and the bill sent by the applicant to the non-applicant, it is clear that the applicant had entered into a contract with the non-applicant for toll plaza management services and security surveillance arrangements there, and as per the table shown above, it is certified that the applicant has procured the equipment/material and service from the MSE units.”

15. The table referred to in the award contains the names of five micro and small enterprises, from which the respondent claims to have procured equipment for the purposes of the present Agreement. However, the Facilitation Council has not appreciated the central aspect of the matter at all, which is that the respondent's acquisition of material and equipment from micro and small enterprises for the purpose of its services to the petitioner, does not render it a ‘supplier’ under the MSME Act. This is a jurisdictional error which goes to the root of the matter.

16. For the aforesaid reasons, the award is entirely unsustainable and is set aside. The parties are free to take their contractual remedies under the



Agreement. As the award has been set aside, the amount deposited by the petitioner in this Court, pursuant to order dated 22.09.2023, will be released to the petitioner alongwith interest accrued thereupon.

17. Two small clarifications are necessary. The first is that I have not considered the other objections raised by the petitioner, as the jurisdictional objection was, in my view, merited. The second is that I have not decided the larger interpretative issue, as to whether Section 2(n)(iii) of the MSME Act extends the scope of jurisdiction of the Facilitation Council to non-micro and small enterprises in any circumstances.

18. The petition is allowed in these terms, but without any order as to costs. Pending applications stand disposed of.

PRATEEK JALAN, J

FEBRUARY 20, 2024

SS/Tejas/