



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

Date of decision: 16<sup>th</sup> FEBRUARY, 2024

IN THE MATTER OF:

+ **W.P.(C) 15874/2023 & CM APPL. 63853/2023**

NBCC INDIA LTD.

..... Petitioner

Through: Mr. Rajnish Kumar Jha, Advocate

versus

MICRO SMALL AND MEDIUM ENTERPRISES FACILITATION  
COUNCIL & ANR. .... Respondents

Through: Mr. Avishkar Singhvi, ASC with Mr.  
Naved Ahmed, Mr. Deokinandan  
Sharma and Mr. Vivek Kumar Singh,  
Advocates for R-1.

Mr. Samrat Nigam and Mr. Mayank  
Banniyal, Advocates for R-2.

**CORAM:**

**HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD**

**JUDGMENT**

1. The Petitioner has challenged a Reference dated 04.03.2023 passed by Respondent No.1 referring the dispute raised by Respondent No.2 against the non-payment of its dues to the Delhi International Arbitration Centre for arbitration.
2. The facts in brief leading to the writ petition are as follows:-
  - i. On 12.08.2023, a Notice Inviting Tender (NIT) was issued by the Petitioner for construction of a 200 bedded hospital at Ambedkar Nagar, New Delhi.
  - ii. It is stated that on 18.11.2013, a Letter of Award was issued by the Petitioner in favour of one Pratibha Industries Limited and



- an agreement was entered into on 06.05.2014 for construction of a 200 bedded hospital by the name of 'Ambedkar Hospital'.
- iii. Admittedly, all Electrical works for the construction was sub-contracted by the said Pratibha Industries in favour of Respondent No.2/AT&T Engineers Private Limited. The sub-contract was approved by the Petitioner on 22.05.2014.
  - iv. A perusal of the order of the letter accepting the sub-contract by the Petitioner indicated that the Petitioner accepted that all the works will be executed as per the agreement entered into between the Petitioner and Pratibha Industries, and overall responsibility for the execution rests with Pratibha Industries.
  - v. It is stated that Respondent No.2 applied for registration as Micro, Small and Medium Enterprise under the Udyog Aadhaar Scheme on 15.02.2016. The Udyog Aadhaar Memorandum (UAM) Certificate was printed on 11.12.2023.
  - vi. It is stated that Respondent No.2 applied for registration under the Udyog Aadhaar Scheme on 15.02.2016 and UAM No. DL04A0000631 was generated on the very same date and a certificate of registration was issued.
  - vii. Material on record also indicates that a revised purchase order was issued to Respondent No.2 on 23.12.2017 by which the capacity of the hospital was increased from 200 beds to 600 beds. A payment of sum of Rs.6,82,06,094/- was made by the Petitioner to Respondent No.2 herein.
  - viii. In the written submission, it is mentioned that by virtue of Notification No. S.O. 2119(E) dated 26.06.2020, a new process



of MSME/Udyog Aadhaar Registration was launched by the Ministry of Micro, Small and Medium Enterprises effective from 01.07.2020. It is stated that from this date, the MSME Registration/Udyog Aadhaar has been migrated to a new system called as Udyam Portal.

- ix. The Udyam Registration Portal was introduced under which all existing MSME entities previously registered under the Udyog Aadhaar Scheme which were granted a UAM Certificate were required to re-register under the Udyam Registration Portal on or after 01.07.2020 by the operation of Clause 7 of the Notification No. S.O. 2119(E) dated 26.06.2020 whereby the UAM number continued to remain the same even after re-registration on the new portal.
- x. It is stated that Respondent No.2 filed a complaint against the Petitioner and Pratibha Industries alleging non-payment of dues amounting to Rs. 8,15,02,125/- along with interest of Rs.1,76,57,574/-.
- xi. It is pertinent to mention that Respondent No.2 had filed a writ petition being W.P.(C) 13032/2022 for payment of outstanding dues of Rs. 8.15 crores which was rejected by this Court *vide* Order dated 08.09.2022 on the ground that the Respondent No.2 herein has invoked proceedings under the Micro, Small & Medium Enterprises Development Act (*in short* 'MSMED Act'). The writ petition was dismissed and liberty was given to the Petitioner to pursue the proceedings before the MSME Facilitation Council.



- xii. Notice was issued by the MSME Facilitation Council and various conciliation proceedings took place between the petitioner and the respondent. Upon termination of the conciliation proceedings, the matter was referred to the Delhi International Arbitration Centre on 04.03.2023 for initiating arbitration proceedings.
- xiii. The reference of the dispute to the DIAC is a subject matter of challenge of the instant writ petition.
3. It is the contention of the learned Counsel for the Petitioner that Respondent No.2 had gotten itself registered as an MSME under the MSMED Act only after the date of sub-contract and, therefore, Respondent No.2 is not entitled to avail the benefits of the MSMED Act which are available to such of those entities which have been registered prior to the MSMED Act. The Petitioner has placed reliance on the judgment of the Apex Court in Silpi Industries v. Kerala State Road Transport Corporation, (2021) 18 SCC 790. The relevant portion of the said judgment reads as under:-

*“42. Though the appellant claims the benefit of provisions under the Msmmed 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 Msmmed 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 GE T&D India Ltd. v. Reliable Engg. Projects & Mktg. [GE T&D India Ltd. v. Reliable Engg. Projects & Mktg., 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 the 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 the Msmmed 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 Msmmed Act, no benefit can be sought by such entity, as contemplated under the Msmmed Act.”*

4. It is also contended that the Petitioner has no privity of contract with Respondent No.2 and, therefore, the matter could not have been referred to the DIAC. He also states that the date of Udyam Registration is 10.09.2020 and, therefore, since the Respondent No.2 has registered itself post the award of sub-contract by Pratibha Industries, the dispute could not have been entertained by the MSMED Council. It is further contended that the contract entered into between the Petitioner and the Respondent No.2 is a works contract and, therefore, not amenable to the jurisdiction under the MSMED Act.

5. *Per contra*, Mr. Samrat Nigam, learned Counsel for Respondent No.2 contends that what is shown to the Court in Annexure P-3 is the registration of Respondent No.2 on the Udyam Registration Portal. He states that the Petitioner had already registered itself as an MSME under the Udyog Aadhaar Scheme and a UAM Certification being UAM No. DL04A0000631 was issued by the Ministry of Micro Small and Medium Enterprises on 15.02.2016.

6. Learned Counsel for Respondent No.2 has drawn the attention of this



Court to a Notification dated 26.06.2020 issued by the Ministry of Micro, Small and Medium Enterprises which states that all existing enterprises registered under the erstwhile scheme shall register again on the Udyam Registration Portal on or after 01.07.2020 and all enterprises registered till 30.06.2020 shall be re-classified according to the said notification and the existing enterprises registered prior to 30.06.2020 will be valid till 31.03.2021. He states that the earlier certification showing the UAM No. DL04A0000631 was valid till 31.03.2021, and, therefore, the Respondent No.2 re-registered itself on the new Udyam Registration portal on 10.09.2020. He contends that it is not the case that the Respondent 2 was not registered as an MSME prior to that date as it was registered as an MSME as far back as 2016.

7. The short question which arises for consideration is whether this Court while exercising its jurisdiction under Article 226 of the Constitution of India should interfere at this stage or should permit the Arbitrator to proceed ahead with the matter and decide the issue as to whether the Petitioner should be entitled to the benefit under the MSMED Act or not.

8. The issue as to whether an enterprise which is registered as MSME after entering into a contract would be entitled to the benefits of the MSMED Act has already been decided by the Apex Court in a number of judgments.

9. In Gujarat State Civil Supplies Corporation v. Mahakali Foods Limited, **2023 (6) SCC 401**, after noticing paragraphs 42, 43 and 44, the judgment of the Apex Court in Silpi Industries (supra), the Apex Court has observed as under:-

*”51. Following the abovestated ratio, it is held that a*



*party who was not the "supplier" as per Section 2(n) of the Msmmed Act, 2006 on the date of entering into the contract, could not seek any benefit as a supplier under the Msmmed Act, 2006. A party cannot become a micro or small enterprise or a supplier to claim the benefit under the Msmmed 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 Msmmed Act, 2006.*

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*52.6. A party who was not the "supplier" as per the definition contained in Section 2(n) of the Msmmed Act, 2006 on the date of entering into contract cannot seek any benefit as the "supplier" under the Msmmed 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."*

10. A perusal of the said order would show that a supplier of services who has got himself registered during the pendency of the ongoing contract would be entitled to take the benefit of the MSMED Act for the services supplied post the date of registration. It is, therefore, always open to the learned Arbitrator to decide this issue even as a preliminary issue.

11. At this juncture it is pertinent to extract the Paragraph 7 of the Notification being S.O. No. 2119(E) dated 26.06.2020 issued by the



Ministry of Micro Small and Medium Enterprises, which reads as under:-

*“7. Registration of existing enterprises.---*

*(1) All existing enterprises registered under EM–Part-II or UAM shall register again on the Udyam Registration portal on or after the 1st day of July, 2020.*

*(2) All enterprises registered till 30th June, 2020, shall be re-classified in accordance with this notification.*

*(3) The existing enterprises registered prior to 30th June, 2020, shall continue to be valid only for a period up to the 31st day of March, 2021.*

*(4) An enterprise registered with any other organisation under the Ministry of Micro, Small and Medium Enterprises shall register itself under Udyam Registration.”*

12. The case of Respondent No.2 is that the enterprise had been registered in the year 2016 itself and what has been shown in Annexure P-3 of the writ petition is only registration pursuant to Paragraph 7 as quoted above. This Court is not inclined to proceed further to adjudicate on this issue because it is in the interest of justice for the parties to lead evidence on the issue as to when Respondent No.2 was registered as an MSME and what was the quantum of supply made before and after that date.

13. There is also a dispute regarding the nature of contract entered into between the parties as to whether the contract was a works contract or one for supply of services. As this issue also pertains to a mixed question of fact and law, this Court deems it expedient to let the learned Arbitrator deal with the said issue as well.





14. In view of the fact that the material on record does not point out whether the contract was in the nature of a works contract or a contract for supply of services, and the exact date from which Respondent No.2 would be entitled to the benefit under the MSMED Act, this Court while exercising its jurisdiction under Article 226 of the Constitution of India does not want to adjudicate on pure factual issues which would have to be established by leading evidence.

15. The DIAC is directed to proceed with the matter and appoint an Arbitrator and it shall be in the domain of the Arbitrator to decide the said dispute as to whether the contract is a works contract or not and, as and when the Respondent No.2 was registered as MSME, as a preliminary issue.

16. With these observations, the writ petition is disposed of, along with pending application(s), if any.

**SUBRAMONIUM PRASAD, J**

**FEBRUARY 16, 2024**

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