



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

% ***Reserved on: July 25, 2023***
Pronounced on: August 2, 2023

+ **LPA 565/2023 & CM Nos.37242/2023, 37243/2023 & 37244/2023**

JAIPRAKASH ASSOCIATES LTD. **Petitioner**
Through: Mr. Anil Dutt and Mr. Tenzen Tashi
Negi, Advocates.

Versus

**MICRO AND SMALL ENTERPRISES FACILITATION
COUNCIL AND ANR.** **Respondents**
Through: Mr. Avishkar Singhvi, Mr. Naved
Ahmed and Mr. Vivek Kumar,
Advocates for R-1.
Mr. Vaibhav Gaggar and Mr. Ketan
Sarraf, Advocates for R-2.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

SAURABH BANERJEE, J.

1. The Micro and Small Enterprises Facilitation Council (South-East), GNCTD (MSEFC)¹ issued two Reference Orders both dated 07.02.2022 in MSEFC Case No.F.DL/08/S/SEC/00134 and F.DL/08/S/SEC/00135 under The Micro, Small and Medium Enterprises Development Act, 2006² with respect to civil works, electrical works and other structural works at

¹ Hereinafter "*MSEFC*"

² Hereinafter "*MSME Act*"



‘Wishtown Klassic Block Towers, Jaypee Greens, Noida (UP)’ against Jaiprakash Associates Ltd.³ subsequent to certain disputes arising out of work contracts/agreements *inter-se* JAL and respondent no.2/ Krishna Buildestates Pvt. Ltd.⁴.

2. Being aggrieved, JAL filed W.P.(C) 4520/2020 and W.P.(C) 4470/2020 challenging both of the orders separately. Though both the writ petitions were dismissed vide common order dated 16.03.2023⁵ and the reviews preferred thereagainst were disposed of vide common review order dated 12.04.2023⁶ by the learned Single Judge, *however*, by virtue of the present appeal, JAL has sought to challenge the orders impugned in W.P.(C) 4520/2020 only.

3. *Admittedly*, though KBPL was registered under the MSME Act on 07.09.2019, it was raising bills qua work contracts/agreements from time to time on JAL prior to its registration and the supplies took place post registration of KBPL as an MSME. Thereafter, in view of the disputes arising out of the work contracts/agreements, KBPL invoked the jurisdiction of MSEFC seeking reference of the disputes to arbitration resulting in Reference Orders dated 07.02.2022 passed by MSEFC referring the disputes to the Delhi International Arbitration Centre⁷ for initiation of arbitration proceedings.

4. This prompted JAL to file two separate writ petitions before the learned Single Judge contending that as the entire work came to a halt by

³ Hereinafter “JAL”

⁴ Hereinafter “KBPL”

⁵ Hereinafter “*first impugned order*”

⁶ Hereinafter “*second impugned order*”

⁷ Hereinafter “DIAC”



31.08.2019 and the bills were raised prior to the registration of KBPL as an MSME, the references were not valid and the MSEFC had no jurisdiction to refer the disputes to arbitration. It was further contended that since these were work contracts involving services as well, and only one bill had been raised post registration of KBPL, the disputes arising out of all the agreements could not have been referred to arbitration.

5. In support thereof, learned counsel for JAL relying upon *Vaishno Enterprises v. Hamilton Medical AG*⁸, submitted that the references were not maintainable and thus the same were liable to be set aside.

6. *Per contra*, as per learned counsel for KBPL, as one of the various bills raised was with respect to the billing period from 01.05.2019 till 31.08.2019, wherein the completion date was extended to 30.09.2019, i.e., beyond the date of registration of KBPL as an MSME, the reference orders were rightly passed referring the disputes to arbitration. In support thereof, the learned counsel for KBPL relying upon *GE T&D India Limited vs. Reliable Engineering Projects & Marketing*⁹, *Silpi Industries etc. vs. Kerala State Transport Corporation & Anr.*¹⁰, *Chief General Manager (Contracts), Neyveli Lignite Corporation Ltd. vs. Driplex Water Engineering Ltd. & Anr.*¹¹ and lastly upon *BHEL v. Bhatia Engineering Co.*¹², submitted that in cases where supplies were continued to be made after the registration of an entity as a MSME, the same shall fall within the ambit of the MSME Act.

⁸ 2022 SCC OnLine SC 355

⁹ 2017 SCC OnLine Del 6978

¹⁰ 2021 SCC Online SC 439

¹¹ NC: 2019:DHC:4282

¹² 2022 SCC OnLine Del 2166



7. By virtue of the first impugned order, the learned Single Judge held that though the work contracts/agreements were prior to the registration of KBPL as an MSME, the bills arising out of some of the agreements show that work qua some agreements including the supplies had taken place even post its registration, i.e., even as of November 2019, hence the MSME Act was applicable and thus the reference by the MSEFC was upheld. It was also observed that they were not merely service contracts but also involved supplies of goods and specifically considered the following factors:-

- i) *All these agreements relate to the same project of the Petitioner.*
- ii) *The agreements are interlinked with each other and relate to different works in respect of the same towers/projects i.e. civil works structural works and electrical works.*
- iii) *The work qua some of the agreements, is continued even post the registration of the Respondent No. 2 as MSME.*
- iv) *These are not separate contracts which involved purely services but also involved supply of goods as well.*

10. In fact, relying upon ***Gammon India Ltd. & Anr. vs. National Highways Authority of India***¹³ wherein it has been held that in case of multiple disputes arising out of the same or interlinked contracts, endeavour should be made that all such separate claims and disputes are adjudicated upon by the same Arbitral Tribunal so as to avoid multiplicity of proceedings and confusion, the learned Single Judge held that in view of the established legal position, the MSEFC was correct in referring all disputes to arbitration and accordingly directed the DIAC to appoint a Sole Arbitrator as bifurcation of disputes and appointment of different arbitrators

¹³ 2020 SCC OnLine Del 659



would not be appropriate as the agreements in the present case were interlinked and qua the same project.

11. JAL sought review of the first impugned order, contending that their submission qua work contracts was wrongly recorded in the order. The learned Single Judge while disposing of the review petitions vide the second impugned order modified only a part of the first impugned order recording the submission on behalf of JAL that those were work contracts as there were services also involved, but left the question as to whether the contracts involved were work contracts at all, to be adjudicated by the learned Arbitrator.

12. In the aforesaid background, JAL has sought to challenge both impugned orders primarily on the ground that the subject agreements were work contracts which is a separate specie of contracts distinct from contract for services and contract for supply of goods, as the same were composite work contracts involving both the elements which were indivisible. Learned counsel for the appellant contended that KBPL did not inform about its registration under the MSME Act to JAL and that there is only one solitary bill that has the period mentioned as 01.05.2019-25.11.2019, but all other bills qua all the agreements mention the date prior to the date of registration. It is also stated that the reference of all disputes to Arbitration has the effect of nullifying the Arbitration Clause agreed upon by the parties wherein the jurisdiction of Arbitration was exclusively Noida, Gautam Buddha Nagar, Uttar Pradesh and Allahabad High Court. In support of his contentions, learned counsel for appellant has cited various judgments, many of which have been filed for the first time. In any case, in the opinion



of this Court, as they are not applicable to the facts of the present case and reliance thereon is misplaced.

13. Opposing the case set up by the appellant, learned counsel for KBPL, appearing on advance notice, contends that the well-reasoned and speaking impugned orders do not suffer from any infirmity and the determination as to whether the agreements involved were work contracts has rightly been left open to be adjudicated before the DIAC. He further contends that even if the subject agreements were work contracts, they were *per se* not excluded from the scope of MSME Act and there is no bar for a supplier such as the respondent no.2 herein, to file a reference therein. He further submits that in any event, the issue of applicability of MSME Act to work contracts is pending before the Hon'ble Supreme Court in SLP (C) 4970/2023 titled *M/s. P.L. Adke vs. Wardha Municipal Corporation*.

14. In a nutshell, going by the facts and legal issues involved, there are primarily two short issues for consideration before this Court, namely [i] whether the reference orders under the MSME Act are tenable or not, and, if so, [ii] whether the reference orders for work contracts could be collectively referred for arbitration before the same learned Arbitrator.

15. While considering the first issue, this Court finds on the facts disclosed that even though KBPL was registered under the MSME Act on 07.09.2019, it had been raising bills qua work contracts/agreements on JAL since before and furthermore the supplies took place post registration of KBPL as an MSME. As per the settled legal position laid down by the learned Single Judge in *Chief General Manager (Contracts) (supra)* which has been upheld by a Division Bench of this Court vide judgment dated



29.01.2020 in LPA 688/2019 and against which SLP(C) No. 9268/2020 has been dismissed by the Hon'ble Supreme Court vide order dated 22.09.2020, and also the judgment in *GE T&D India Limited (supra)*, the aforesaid facts of work going on is sufficient for the reference by MSEFC to be legally tenable. In fact, it is an admitted position of the appellant that one of the invoices under the work contracts/agreements is indeed post registration of KBPL as a MSME. Thus, this Court is of the opinion that the MSEFC was well within its powers to refer the matter to arbitration and there was no error of any kind.

16. In the opinion of this Court, the contention of learned counsel for the appellant that the work contracts/agreements involved were composite indivisible contracts for different works itself ousts the jurisdiction of the MSEFC, cannot be accepted as the mere nomenclature used therein is not enough to determine the nature thereof. The learned Single Judge in the first impugned order has not gone into the determination of the subject work contracts/agreements as such and has *rightly* left the issue, as to whether the work contracts/agreements were in fact work contracts which are indivisible contracts including the '*supply of goods*' and which '*render a service*' open to be adjudicated by the learned Arbitrator. As such, this Court cannot go into the said determination.

17. In any event, the contentions raised as to the lack of inherent jurisdiction of the MSEFC and that the agreements involved are work contracts, have been raised to enlarge the scope of the appeal which is not permissible in law. In the garb of an appeal, the appellant cannot raise new and fresh grounds not raised before the learned Single Judge, and this Court



cannot consider these fresh grounds.

18. While considering the second issue, this Court agrees with the findings of the learned Single Judge in the first impugned order which are based upon the reliance placed on *Gammon India Ltd. (supra)* with reference to the dicta of the Hon'ble Supreme Court in *Dolphin Drilling Ltd. vs. ONGC*¹⁴ wherein it was held that if there are multiple disputes arising out of connected work contracts/agreements *inter se* the same parties involved, then an attempt ought to be made of referring them to the same Arbitrator.

19. Considering the factual matrix and the settled legal position, this Court finds that the appellant has no case on merits or in law. Finding no plausible grounds for interfering with the well-reasoned first impugned order containing sound reasonings passed by the learned Single Judge, this Court has no other option but to dismiss the present appeal.

20. Before parting, this Court is unable to find any reasonable grounds of challenge to the second impugned order raised by JAL in the present appeal. In view thereof, challenge thereto being misplaced, is also dismissed.

21. Accordingly, the present appeal, alongwith all the pending applications therein, being without any merit, is *dismissed in limine*, leaving the parties to bear their own respective costs.

SAURABH BANERJEE, J

SATISH CHANDRA SHARMA, CJ

AUGUST 2, 2023/rr

¹⁴ (2010) 3 SCC 267