



Shakuntala

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.555 OF 2024(F)

M/S Bharat Kolkata Container Terminals Pvt. Ltd. Through its Authorized Representative a Company within the meaning of the Companies Act, 2013, having its registered office at 1st Floor, Chhabildas Tower, 6A Middleton Street, Kolkata, West Bengal – 700071

.....PETITIONER

VERSUS

1. Goa Micro and Small Enterprises Facilitation Council, Office of the Directorate of Industries, Trade and Commerce, Udyog Bhavan, Panaji, Goa - 403001

2. Karunya Overseas & Technical Services Pvt. Ltd., a Company within the meaning of the Companies Act, 2013, having its registered office at Office No. 11, Ground Floor, Evershine Mall Premises Co-operative Society Limited, Malad (W), Mumbai 400064. Through its Director Mr. Gopal Rameshwar Sawant Residing at 1016/8, Flat BS3, Near SBI Branch Kamson Residency, Vijaya Nagar, Bardez, Porvorim, North Goa-403521.

....RESPONDENTS

Mr. Nitin Sardesai, Senior Counsel alongwith Mr. Vibhav R. Amonkar, Ms. Archana Uppuluri, Mr. Siddharth Sardesai and Ms. Vaishali Mahato, Advocate for the Petitioner.

Mr. Shubham Priolkar, Additional Government Advocate for Respondent No. 1.

Respondent No.2 present in person.

CORAM:- BHARAT P. DESHPANDE, J.
DATED :- 11th July, 2024

ORAL JUDGEMENT

1. Rule.
2. Rule is made returnable forth with.
3. Matter is taken up for final disposal at the admission stage itself with consent of the parties.
4. The issue raised in the present matter is regarding the notice dated 04.01.2024 issued by the Nodal Officer for Goa Micro and Small Enterprises Facilitation Council stating therein that the hearing of the case was taken up on 08.12.2023 between the petitioner and the respondent no. 2 and since the conciliation is not possible, the Council invoked its power under Section 18 (3) of Micro, Small and Medium Enterprises Development Act 2006 (MSMED) to refer the matter for arbitration.
5. Mr. Sardesai learned senior counsel for the petitioner would submit that the said Council is not having jurisdiction even to entertain the conciliation proceedings launched on behalf of respondent no.2 and also to refer the matter to the arbitration. He submits that respondent no. 2 entered into a contract with the petitioner on 01.06.2018 which is purely a service contract. The said contract was terminated on 20.12.2018. He submits that at the

time of entering into the contract with respondent no.2, the enterprise of respondent no.2 was not registered under the Act of 2006. He would further submit that respondent no.2 filed an application for registration under the MSMED Act 2006 on 17.12.2018. The contract was terminated on 20.12.2018 and between 17.12.2018 to 20.12.2018, there were no services rendered by respondent no. 2 to the petitioners.

6. Mr. Sardesai would submit that on receipt of notice of conciliation from the Nodal Officer of the Council, petitioners appeared and raised objections with regard to the jurisdiction of the said Council even to entertain the proceedings for and on behalf of respondent no.2 on the ground that as on the date of contract of respondent no.2 was not registered as a small or medium scale under the MSMED Act 2006. Even though such objections were raised, the council failed to decide whether the said Council is having jurisdiction even to consider the matter for the purpose of conciliation and then refer it to the arbitration.

7. Mr. Sardesai while pointing out the provisions of the MSMED Act 2006 and more particularly Sections 15, 16 and 18 would submit that the petitioner would be burdened to pay interest three times the bank rate in case such dispute is referred to arbitration and taken up without jurisdiction.

8. Mr. Priolkar appearing for the Council would submit that such an issue of jurisdiction is only required to be raised when the matter is referred for arbitration by the council and not at the time of conciliation. However, he agreed that the matter requires to be remanded back to the Council for deciding the aspect of jurisdiction.

9. The respondent no. 2 who is appearing in person initially raised a jurisdiction of this court to entertain the petition, however, would agree that the Council has to decide on its own jurisdiction.

10. Facts which are emerging from the statements made by the learned counsel for the parties and respondent no. 2 in person as well as found on the records, that the agreement between petitioner and respondent no. 2 is admittedly prior to the registration of the respondent no. 2 with the said Council. In this regard Mr Sardesai has rightly pointed out that in the case of *Scigen Biopharma Private Limited vs M/S. Jagtap Horticultuer, 2019 SCC online Bombay 4542*, the learned Single Judge of this Court has observed in paragraph Nos. 29 and 30 that by taking recourse to sub-section (1) of Section 8, the service provider merely filing a memorandum would not have assumed a legal status of being classified under MSMED Act as a small scale enterprise and that too retrospectively, from the day on which he entered into a contract

with the other party. It is also observed that such party could not have become a small scale or a supplier within the purview of the MSMED Act, 2006 by such prospective filing of an entrepreneurs memorandum which on face of it had a consequence from a prospective date and not retrospectively so as to enable the other side to take benefit.

11. The above observations are again discussed by the Apex Court in the case of ***Silpi Industries and ors Vs. Kerela State Road Transport Corporation and another, (2021) 18 SCC 790*** which is found recorded in paragraph No. 26 reads 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. 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. 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. etc. 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. 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 to obtain registration subsequent to entering into the contract and supply of goods services. If any registration is obtained, the 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.

12. In the case of ***Gujarat State Civil Supplies Corporation versus Mahakali Foods Private Limited, (2023) 6 SCC, 401*** observations in paragraph 51 reads thus:

51. Following the abovestated ratio, it is held that a party who was not the "supplier" as per Section 2(n) of the MSMED Act, 2006 on the date of entering into the contract, could not seek any benefit as a supplier under the MSMED Act, 2006. A party cannot become a micro or small enterprise or a supplier to claim the benefit under the MSMED 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 MSMED Act, 2006.

13. In the present matter, it is the contention of the petitioners that they terminated the agreement vide notice dated 20.12.2018 and the response of respondent no.2 to such notice is dated 21.12.2018.

14. Mr Sardesai would submit that there is a clear admission on the part of respondent no. 2 that no services were provided to the petitioners by respondent no. 2 from 12.12.2018. However, such aspect will have to be kept open for the purpose of deciding by the Council, itself, while considering its own jurisdiction to take up the issue which has been raised by the respondent no.2 and more specifically in Section 18 of the said Act. The power of the Facilitation Council clearly runs under the provisions of Section 18 of the said act and therefore, if the party raises such jurisdiction, the Council is duty-bound to give its verdict on its own jurisdiction. The contention of Mr. Priolkar that such issue has to

be raised only at the time of taking up arbitration, to my mind, cannot be accepted. The procedure which has been laid down in the Act is to first call both the parties before the Council and to try and have a conciliation so that the small-scale enterprises would not be forced to go into litigation. The conciliation proceedings are always with consent of the parties whereas the arbitration proceedings are decided on the basis of claims raised by both the parties by an arbitrator who is appointed by the Council itself.

15. The object and propose of such procedure is to consider first whether the matter could be conciliated between the parties and only if it is not possible to give a failure report and then ask the Council to refer it to the panel of arbitrators. Thus, when a jurisdiction is raised even at the stage of conciliation, the Council must at least prima facie give its verdict about the jurisdiction even to refer the matter to Arbitrator, so that the aggrieved party could take proper recourse.

16. The impugned notice which is produced on record at page 47 would clearly go to show that it is simple failure report by the Deputy Director/Nodal Officer. There is no provisions as found in the Act itself that even at the conciliation stage the Conciliator or the Nodal Officer is not empowered to decide about the jurisdiction to take up the matter for conciliation, and then refer to Arbitration.

17. For all the above reasons, the notice of failure dated 04.01.2024 submitted by the Nodal Officer needs to be quashed and set aside. The said Officer is therefore directed to consider whether the Council is having jurisdiction to entertain such dispute even at the conciliation stage, and then have power to refer it to Arbitration, as has been done in the matter in hand.

18. The matter is remanded to the concerned authority with directions to give opportunity to both the sides and decide such issue within a period of one month from the date of receipt of copy of this order.

19. Rule is made absolute in above terms.

20. No costs.

BHARAT P. DESHPANDE, J.