

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

+ LPA 688/2019

Date of decision: 29.1.2020

IN THE MATTER OF:

THE CHIEF GENERAL MANAGER (CONTRACTS) M/S NEYVELI
LIGNITE CORPORATION LTD. Appellant
Through : Mr. Anil Nag, Advocate.

versus

DRIPLEX WATER ENGINEERING LTD. & ANR Respondents
Through : Mr. Vikram Nandrajog, Mr. Sheetesh
Khanna, Advocates for respondent No.1.
Ms. Tara Naural, Advocate for respondent No.2.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE ASHA MENON

HIMA KOHLI, J.

1. The appellant/petitioner has questioned the judgment dated 2.9.2019, passed by the learned Single Judge dismissing a writ petition filed by it, impugning an order dated 16.6.2016, passed by The Micro and Small Enterprises Facilitation Council (in short, 'MSEF Council') whereby the request of the respondent No.1/claimant for referring the parties to arbitration, was acceded to and as a result, the conciliation proceedings between the parties were terminated and their disputes were referred for arbitration to the Delhi International Arbitration Centre (in short, 'DIAC') under Section 18 (3) of The Micro, Small and Medium Enterprises Development Act, 2006 (in short, 'MSMED Act').

2. Before advertizing to the arguments advanced by learned counsel for the parties, it is considered necessary to refer briefly to the facts leading to filing of this appeal. The appellant/petitioner, a Public Sector Enterprise that is engaged in production of power by using Lignite as a fuel, invited tenders in the year 2004, for the work relating to Water Treatment Plant and Effluent Treatment Plant for setting up of 2×250 Mega Watt Thermal Power Stations. One of the eligibility conditions stipulated in the NIT was that the bidder must have a turnover of over Rs.11 crores. Respondent No.1 while submitting its bid, claimed that it had a turnover of Rs.20.09 crores in the year 2001-02, Rs.20.36 crores in the year 2002-03 and Rs.23.51 crores in the year 2003-04. On 25.9.2006, the parties entered into a contract for the captioned work whereunder, an amount of Rs.63 crores was payable to the respondent No.1. Claiming that the respondent No.1 was unable to complete the work within the time stipulated in the contract, the appellant/petitioner withheld the Performance Bank Guarantee offered by it for a sum of Rs.6.30 crores as against the total contractual value. Aggrieved by the said act, the respondent No.1 filed an application before the MSEF Council claiming an amount of Rs.34,08,36,747/- which includes interest to the tune of Rs.20,15,61,585/-.

3. On 28.12.2015, the appellant/petitioner filed a reply in opposition before the MSEF Council raising a preliminary objection that it lacked the jurisdiction to entertain the reference as the respondent No.1 was registered with the respondent No.2/Commissioner of Industries, Government of NCT of Delhi on 9.12.2011, which was much after the date the parties had entered into a contract i.e., 25.9.2006. It was also stated that the respondent No.1 could not project itself as a “*Small Enterprise*”, as contemplated under the

MSMED Act since the value of the contract was Rs.63 crores and to qualify as a “*Small Enterprise*” under the Act, respondent No.1 was required to have made an investment in equipments of more than Rs.10 lakhs, but below Rs.2 crores. Thus, arguing that the respondent No.1 did not fulfill the eligibility criteria prescribed in Section 7 (1)(b)(ii) of the MSMED Act, the appellant/petitioner stated that the reference made by it under Section 18 of the Act, ought to be rejected.

4. On 19.2.2016, the respondent No.1 filed a rejoinder to the reply filed by the appellant/petitioner wherein, it was averred that it was registered as a “*Small Scale Industrial Unit*” with the Department of Industries, Haryana vide certificate dated 8.5.1981 and though it was registered as a “*Small Enterprise*” on 9.12.2011, the registration certificate had clearly stated that it had come into existence since 27.8.1974.

5. To this, the appellant/petitioner contended that on the date of entering into the contract, respondent No.1 had failed to disclose that it was registered as a “*Small Scale Unit*” with the Department of Industries, Haryana. The appellant/petitioner also filed an affidavit on 29.2.2016, enclosing therewith a Schedule of Assets of the respondent No.1 for the Financial Years ending on March, 2010 and March, 2011 to urge that the said documents clearly demonstrated that the respondent No.1’s investment in equipments was over Rs.2 crores and therefore, it could not be classified as a “*Small Enterprise*”. By the impugned order dated 16.6.2016, the MSEF Council referred the disputes between the parties to arbitration under Section 18 (3) of the MSMED Act. Aggrieved by the said action, the appellant/petitioner filed a writ petition [W.P. (C) 9670/2016] that has been

dismissed as meritless vide judgment dated 2.9.2019. Hence, the present appeal.

6. Mr. Anil Nag, learned counsel for the appellant/petitioner has assailed the impugned judgment on the ground that the learned Single Judge has committed an error in arriving at the conclusion that the appellant/petitioner had not challenged the Memorandum by virtue of which the respondent No.1 claims the status of a “*Small Scale Enterprise*” as it was executing contracts of huge values not only with the appellant/petitioner, but also with other Public Sector Enterprises; that the learned Single Judge failed to appreciate the fact that when the subject contract was awarded in favour of the respondent No.1 on 29.12.2005, the MSMED Act had not even come into force for the reason that it was notified only on 2.10.2006 and therefore, the respondent No.1 could not claim any benefit under the said Act; that the Act could not have retrospective operation to cover transactions that were entered into prior to it coming into force; that once the learned Single Judge agreed with the appellant/petitioner that the MSEF Council was required to examine the preliminary objection raised by it regarding the jurisdiction of the Council to entertain a reference under Section 18 of the Act then, he ought to have allowed the writ petition and remanded the matter back to the Council for conducting a detailed enquiry into the matter instead of taking over the task of determining the question as to whether the respondent No.1 was a “*Small Scale Enterprise*” or not.

7. *Per Contra*, Mr. Vikram Nandrajog, learned counsel for the respondent No.1 supported the impugned judgment and submitted that respondent No.1 it has been in the business since 27.8.1974 and it was earlier registered as a “*Small Industrial Unit*” with the Department of

Industries, Haryana, vide certificate dated 8.5.1981. Thereafter, the MSMED Act was legislated in the year 2006 and a notification was issued by the Central Government in exercise of the powers conferred on it under Section 7 (1) of the Act on 29.9.2006, as amended on 16.1.2009, classifying enterprises as micro enterprise, small enterprise and medium enterprise and stipulating that in the case of an enterprise providing/rendering services where the investment in the equipments is upto Rs.10 lakhs, but does not exceed Rs.2 crores, it would be treated as a “*Small Enterprise*”. The respondent No.1 applied to the respondent No.2/Commissioner of Industries, GNCT of Delhi for being registered as a “*Small Enterprise*” under the Act, it was issued a certificate dated 9.12.2011. Immediately thereafter, the respondent No.1 had duly communicated its certification as a “*Small Enterprise*” to the appellant/petitioner vide letter dated 9.12.2011 but the latter having failed to raise any objection regarding the said certification, it is precluded from doing so now.

8. Learned counsel for the respondent No.1 also referred to Section 24 of the MSMED Act, a non-obstante clause which prescribes that the provisions of Sections 15 to 23 shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force and submitted that the said Section would have an overriding effect over all other laws. He submitted that the work under the contract was duly completed by his client and the appellant/petitioner had even issued a completion certificate but it was illegally withholding the monies payable/guarantees required to be released and had failed to pay the respondent No.1 amounts due for the extra work and additional work got done by it. He thus concluded that the findings returned in the impugned judgment do not deserve any interference.

9. We have perused the impugned judgment and the pleadings in the writ petition and carefully considered the arguments advanced by learned counsel for the parties. Before dealing with the submissions made by them, it is considered appropriate to refer to the relevant provisions of the MSMED Act, which is a beneficial legislation enacted for facilitating promotion, development, for enhancing the competitiveness of micro, small and medium enterprise and for resolving incidental and ancillary matters related thereto. Section 2, which is the definition clause, defines “*small enterprise*” in sub-clause (m) and “*supplier*” in sub-clause (n) as follows:-

“2.(m) “small enterprise” means an enterprise classified as such under sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b) of sub-section (1) of section 7;”

“(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 produced by micro or small enterprises and rendering services which are provided by such enterprises;”

10. Section 7 deals with “classification of enterprises”. For the purposes of examining the dispute in hand, Section 7 (1)(b)(ii) and the explanations appended thereto are relevant and are reproduced herein below:-

“7. Classification of enterprises.-

x x x x x

(1)(b)(ii) a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or

x x x x x

Explanation 1.-For the removal of doubts, it is hereby clarified that in calculating the investment in plant and machinery, the cost of pollution control, research and development, industrial safety devices and such other items as may be specified, by notification, shall be excluded.

Explanation 2.-It is clarified that the provisions of section 29B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall be applicable to the enterprises specified in sub-clauses (i) and (ii) of clause (a) of sub-section (1) of this section.”

11. Section 8 prescribes filing of a Memorandum by micro, small and medium enterprises in the following words:-

“8. Memorandum of micro, small and medium enterprises.—(1) Any person who intends to establish,—

(a) a micro or small enterprise, may, at his discretion, or

(b) a medium enterprise engaged in providing or rendering of services may, at his discretion; or

(c) a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):

Provided that any person who, before the commencement of this Act, established—

(a) a small scale industry and obtained a registration certificate, may, at his discretion; and

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O. 477(E), dated the 25th July, 1991 filed an Industrial Entrepreneur's Memorandum,

shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.”

12. Section 18 that deals with making of a reference to the Micro and Small Enterprise Facilitation Council prescribes as follows:-

“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 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 and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) 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 alternate 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.

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

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.”

13. As is apparent from the facts of the instant case, it is not in dispute that the respondent No.1 was earlier registered as a “*Small Scale Industrial Unit*” with the Department of Industries, Haryana vide certificate dated 08.05.1981. On the enactment of the MSMED Act, the respondent No.1 had filed a Memorandum prescribed under Section 8 pursuant where to, the respondent No.2/Commissioner of Industries, GNCTD had issued a certificate dated 9.12.2011, registering it as a “*Small Enterprise*” under the Act. The nature of the activity of the respondent No.1 has been mentioned as ‘service’. The Memorandum furnished by the respondent No.1 under Section 8 of the Act states that it had commenced providing services on 27.8.1974 and its investment in plant and machinery was to the tune of Rs.86 lakhs. It is not in dispute that though the respondent No.1 had conveyed its certification as a “*Small Enterprise*” under the MSMED Act to the appellant/petitioner vide letter dated 9.1.2012, it did not take any steps to challenge the same before any forum. It is only when the respondent No.1 approached the MSEF Council with a reference that for the first time, the appellant/petitioner raised a question as to the status of the respondent No.1 as a “*Small Scale Industrial Unit*” on the ground that it did not qualify to be a “*Small Enterprise*” since its investment in equipments was over Rs.2 crores and its turnover was more than Rs.11 crores in the year 2005.

14. On pursuing the impugned judgment, we find that the learned Single Judge has noted the pleas taken by the appellant/petitioner before the MSEF Council in para 7. The first plea that the MSEF Council lacked the jurisdiction to entertain the reference on the ground that the contract was awarded to the respondent No.1 much before the Act had come into force, was turned down on the ground that the respondent No.1 had obtained

registration of its Memorandum under Section 8 on 9.12.2011, but the said registration clearly stated that the respondent No.1 had commenced services on 27.8.1974. Relying on a judgment of a learned Single Judge of this court in the case of ***GE T&D India Limited Reliable Engineering Projects and Marketing*** reported as **(2017) 238 DLT 79**, the learned Single Judge held that a supplier who was already in existence at the time of the commencement of the MSMED Act but had not obtained registration, could do so even beyond the period prescribed under Section 8 i.e., 180 days. Thus, it was concluded that even though the respondent No.1 had filed the Memorandum prescribed under Section 8 of the MSMED Act after entering into a contract with the appellant/petitioner, it was well entitled to seek recourse to the beneficial provisions of the MSMED Act.

15. We are inclined to concur with the view expressed above. The Act being a beneficial legislation, the respondent No.1 was entitled to file a Memorandum with the Competent Authority prescribed under Section 8 which contemplates a situation where a micro, small or medium enterprise may have been established before the Act was legislated, but was still permitted to file a Memorandum in accordance with the provisions of the Act to avail of all the benefits provided therein. The respondent No.1 having followed that route and the respondent No.2/Commissioner of Industries, GNCTD having issued a certificate in its favour, which has remained unchallenged, the appellant/petitioner is disentitled from questioning the said registration or claiming that the MSEF Council lacked jurisdiction to entertain the reference.

16. Coming to the second plea taken by learned counsel for the appellant/petitioner that the turnover of the respondent No.1 far exceeded

the maximum turnover of Rs.2 crores as prescribed under Section 7(1)(b)(ii) of the MSMED Act, we are of the opinion that the same has been rightly rejected by the learned Single Judge by holding that the criteria of turnover is irrelevant for the purpose of classification of an enterprise. Once the respondent No.1 had disclosed its investment in the equipment at Rs.86 lakhs, which was duly noted by the respondent No.2/Commissioner of Industries, GNCTD in its acknowledgement, then the same cannot be questioned by the appellant/petitioner and nor can it gain any benefit by referring to the Schedule of Assets annexed with the final accounts of the respondent No.1 wherein the equipments as in the year ending March, 2011, have been valued at Rs.2.61 crores. The reasons given in paras 12 and 13 of the impugned judgment for turning down the aforesaid plea taken by the appellant/petitioner are found to be sound and do not deserve any interference. For ease of reference, paras 12 and 13 of the impugned judgment are reproduced herein below:-

“12. The said contention is also unpersuasive. The Schedule of Assets relied upon by Neyveli indicates that the gross value of equipment, as on 31.03.2011, was ₹2,61,35,834/-. This is the sum total of the gross value of office equipment and computer equipment. The said amount did not take into account either depreciation or obsolescence. The net value of computer equipment as on 31.03.2011 was only ₹27,29,98/-, as against gross value of ₹1,57,30,575/-. Similarly, the net value of the Office Equipment is reflected at ₹43,18,226/-. It is also relevant to note that the accounts are usually drawn up to reflect values as per the Income Tax Act, 1961. The block of assets under the Income Tax Act, 1961 is not reflective of the value of the assets in hand. This is so because even if

an asset is sold at scrap value, only the amount realized is deleted from the value of the block of assets.

13. In any view, the Schedule of Assets relied upon by Neyveli do not reflect that the value of equipment in the hands of Driplex as on 31.03.2011, exceeds ₹2 crores. As noticed above, the investment/equipment and plant and machinery, as reflected in the registration certificate issued by the Government of NCT of Delhi on 09.12.2011, indicates the said value to be ₹86 lakhs.”

17. Lastly, learned counsel for the appellant/petitioner had submitted that when the learned Single Judge had observed in para 15 of the impugned judgment that the MSEF Council was required to examine the preliminary objection taken by the appellant/petitioner questioning its jurisdiction to entertain a reference under Section 18 of the Act, which it had failed to do, though in para 1 of the order dated 16.6.2016, the MSEF Council had duly noted the said objection, then it was incumbent upon the learned Single Judge to have remanded the matter back to the Council instead of adjudicating the same on merits.

18. The aforesaid submission is devoid of merits for the simple reason that while assailing the order dated 16.6.2016, passed by the MSEF Council, terminating the conciliation proceedings between the parties and referring them to arbitration under Section 18 (3) of the Act, the appellant/petitioner did not confine the challenge in the writ petition to the failure on the part of the MSEF Council to decide the preliminary objection raised by it regarding jurisdiction in relation to the disputes between the parties. Instead, the appellant/petitioner had gone a step further and taken all the pleas available to it, both in law and on facts which were also argued by its counsel at some

length before the learned Single Judge. In those circumstances, the learned Single Judge cannot be faulted for proceeding to deal with all the issues raised before him on merits, instead of remanding the matter back to the MSEF Council for adjudication.

19. Even otherwise, Section 18 contains a *non-obstante* clause which clearly states that notwithstanding anything contained in any other law for the time being in force, the MSEF Council would have the jurisdiction to act as an Arbitrator or a Conciliator in a dispute between the parties. Therefore, Article 16 of the Contract Agreement dated 5.9.2016 that prescribes that a civil court having original jurisdiction alone shall have the exclusive jurisdiction to try any matter arising out of the contract, pales into insignificance in view of Section 18 of the MSMED Act.

20. We may emphasize that the real intent behind challenging the jurisdiction of the MSEF Council and the applicability of the MSMED Act to the respondent No.1 is that having been certified as a “*Small Enterprise*” by the respondent No.2/Commissioner of Industries, GNCTD as contemplated under Section 8 of the Act, the appellant/petitioner would be saddled with the liability of paying compound interest at one and a half time of the prime lending rate charged by the State Bank of India on any outstanding payment. On the application of the Act to respondent No.1, the liability of the appellant/petitioner would rise to Rs.20,15,61,585/- towards interest alone, besides the principal sum, if the respondent No.1 ultimately succeeds in its claim. But fact remains that the respondent No.1 was duly registered under the enactment as a “*Small Enterprise*” as long back as on 9.12.2011. Therefore, it would be entitled to all the benefits that are extended to a “*Small Enterprise*” under the provisions of the Act including

specified rate of interest on delayed payments, credit facilities, benefit of preference policies, compound interest with monthly rest on the outstanding payments, in consonance with the measures that the Central Government may take for facilitating promotion, development and enhancement of competitiveness of micro, small and medium enterprises.

21. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned judgment does not warrant any interference. The appeal fails and is dismissed with costs of Rs.25,000/- payable to the respondent No.1.



HIMA KOHLI, J,

ASHA MENON, J

JANUARY 29, 2020
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