IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 326 OF 2018
WITH
INTERIM APPLICATION (L) NO. 18766 OF 2022
WITH
NOTICE OF MOTION NO. 1714 OF 2018
WITH
INTERIM APPLICATION (L) NO. 3697 OF 2023
WITH
INTERIM APPLICATION (L) NO. 3728 OF 2023
IN
COMMERCIAL ARBITRATION PETITION NO. 326 OF 2018

National Textile Corporation Ltd. ...Petitioner

Versus

Elixir Engineering Pvt. Ltd. & Anr. ...Respondents

WITH
COMMERCIAL ARBITRATION PETITION NO. 303 OF 2018
WITH
INTERIM APPLICATION (L) NO. 18764 OF 2022
WITH
NOTICE OF MOTION NO. 1712 OF 2018
WITH
INTERIM APPLICATION (L) NO. 3733 OF 2023
WITH
INTERIM APPLICATION (L) NO. 3810 OF 2023
IN
COMMERCIAL ARBITRATION PETITION NO. 303 OF 2018

National Textile Corporation Ltd. ...Petitioner

Versus

Elixir Engineering Pvt. Ltd. & Anr. ...Respondents

* * *

- Mr. Siddhesh Sutar i/by Mr. Anjani Kumar Singh, for the Petitioner in Commercial Arbitration Petition No. 326 of 2018.
- Mr. Shardul Singh, Ms. Swapnila Rane and Ms. Vanita Kakar, for Petitioner in Commercial Arbitration Petition No. 303 of 2018.
- Mr. Suresh Dhole, Mr. S. Shamin, Mr. Murtuza Statwala i/by Shamin & Co., for Respondent No. 1 in both the petitions and for Applicants in Interim Application (L) Nos. 18766 of 2022 and

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18764 of 2022 with Interim Application (L) Nos. 3697 of 2023, 3728 of 2023 and 3810 of 2023.

- Mr. Himanshu B. Takke, AGP for Respondent No. 2 – State in both matters.

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CORAM	**:**	**MANISH PITALE, J**
RESERVED ON	**:**	**08th FEBRUARY, 2023.**
PRONOUNCED ON	**:**	**21st MARCH, 2023**

JUDGMENT:

1. The Petitioner – National Textile Corporation Ltd. in these two petitions is aggrieved by awards passed by the Facilitation Council i.e. Respondent No. 2 under the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the "MSMED Act"). These petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Arbitration Act") to challenge the said awards, *inter alia,* as being without jurisdiction.

2. The Respondent No. 1 in both these petitions is the contesting Respondent. As per the requirements of the MSMED Act, the Petitioner deposited 75% of the awarded amount in both these petitions. The Respondent No. 1 applied for withdrawal of the amounts, but considering the issues involved in the petitions, this Court took up the petitions for final disposal at the stage of admission, with the consent of the learned Counsel for the rival parties.

3. The facts leading up to filing of these two petitions are that in the November, 2008, the Petitioner floated a tender for design,

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fabrication, erection, testing and commissioning of piping systems for steam, condensate, compressed air, roof/soft water, warm water return/LPG/CNG and thermic fluid at Achalpur, Amravati in Maharashtra. The Respondent No. 1 was the successful bidder and, in that context, contracts were executed between the parties, leading to work orders issued on 24th July, 2009, 30th July, 2009 and 23rd December, 2009. The type of contract/work order was stated to be item rate works contract, wherein General and Commercial Conditions were specified for terms of payment at various stages of implementation of the contract/work order on behalf of Respondent No. 1. These documents contained arbitration agreements, which provided for resolution of disputes between the parties through Arbitration and it was stipulated that the Courts at Mumbai would have exclusive jurisdiction in the matter.

4. In pursuance of the bid of Respondent No. 1 being accepted, the aforementioned contracts/work orders were issued in its favour. It is significant that the contracts provided for supply and erection facilities as specified under the terms of the contracts. On 29th September, 2009, the Respondent No. 1 was registered under the MSMED Act and it is the case of the Petitioner – Corporation that it was not informed about the same.

5. The Respondent No. 1 was not satisfied with the final

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payments under the contracts/work orders and on 04th December, 2013, it sent a letter to the Petitioner-Corporation raising claims under various heads, including idling charges, loss of profit and drawing charges. The parties met in December, 2013 for resolving the disputes, but on 24th December, 2013, the Respondent No. 1 issued notice to the Petitioner raising claims under various heads.

6. On 28th January, 2014 and 17th February, 2014, the Respondent No. 1 made applications under Section 18 of the MSMED Act before the Facilitation Council. On 10th July, 2014, the Petitioner received notice from the Facilitation Council, indicating that the Council was entertaining the applications submitted by Respondent No. 1. In this backdrop, the Petitioner issued a communication to the Facilitation Council, stating that it would be invoking the Arbitration Clause under the General and Commercial Conditions governing the contracts between the parties and requested the Facilitation Council to keep its proceedings in abeyance.

7. On 30th July, 2014, the Petitioner invoked the Arbitration Clause under the General and Commercial Conditions governing the contract and appointed a specific individual as its nominee on the Arbitral Tribunal. This fact was informed to the Facilitation Council and on 21st August, 2014, the Petitioner issued notice to the Respondent No. 1 about appointment of the nominee of the Petitioner

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and further asked Respondent No. 1 not to proceed before the Facilitation Council.

8. On 27th September, 2014, the Petitioner filed limited affidavits in reply in the two proceedings initiated on behalf of Respondent No. 1 before the Facilitation Council. It is relevant that two separate proceedings were initiated, one pertaining to the contracts/work orders dated 24th July, 2009 and 30th July, 2009, as these were nothing but one work order split into two and the second proceeding for contract/work order dated 23rd December, 2009. In the limited affidavits filed before the Facilitation Council, the Petitioner specifically raised objection to the jurisdiction of the Facilitation Council to undertake arbitration proceedings, pertaining to the claims raised by Respondent No. 1.

9. On 28th February, 2017, the Petitioner filed written statements, specifically raising issue of jurisdiction before the Facilitation Council, in view of the arbitration clause in the General and Commercial Conditions governing the contracts/work orders. The said stand of the Petitioner was opposed by Respondent No. 1 and eventually by the impugned awards, the Facilitation Council partly allowed the claims of Respondent No. 1. By the impugned award dated 19th December, 2017, which is subject matter of challenge in Commercial Arbitration Petition No. 326 of 2018, the Facilitation

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Council directed the Petitioner to pay amount of Rs. 51,24,990/- along with interest to Respondent No. 1. By the impugned award dated 23rd January, 2018, which is subject matter of challenge in Commercial Arbitration Petition No. 303 of 2018, the Facilitation Council directed the Petitioner to pay the amount of Rs. 56,43,165/- along with interest to Respondent No. 1.

10. Aggrieved by the said awards, the Petitioner Corporation filed the present petitions. During the pendency of the petitions, as per Section 19 of the MSMED Act, the Petitioner deposited 75% of the awarded amounts in this Court. As noted hereinabove, the petitions were taken up for hearing.

11. Mr. Shardul Singh, learned Counsel appearing for the Petitioner Corporation in both the petitions submitted that the impugned awards deserve to be set aside on various grounds, including the ground of jurisdiction. It was submitted that in the present case, the Respondent No. 1 was registered under the MSMED Act, on 29th September, 2009 and that therefore, at the time when the contracts/work orders were issued, the Respondent No. 1 was not an enterprise registered under Section 8 of the MSMED Act. It was submitted that in such a situation, it could not be said that the Respondent No. 1 was entitled to approach the Facilitation Council under the MSMED Act, to invoke statutory arbitration. The learned

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Counsel for the Petitioner submitted that the judgments of the Supreme Court in this context were required to be appreciated and applied, in order to hold that in the facts of the present case, the Facilitation Council had no jurisdiction to conduct the arbitration proceedings. On this basis, it was submitted that the disputes, if any, between the parties could have been resolved only through arbitration, as provided under the relevant clause of the General and Commercial Conditions governing the contracts/work orders in the present case.

12. The learned Counsel for the Petitioner specifically referred to judgments of the Supreme Court in the cases of *Silpi Industries Vs. Kerala State Road Transport Corporation & Anr.*[1], *Vaishno Enterprises Vs. Hamilton Medical AG & Anr.*[2] *and Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd.,*[3] to contend that the Facilitation Council in the present case had no jurisdiction to undertake the Arbitration proceedings.

13. It was submitted that the Supreme Court in the case of *Vaishno Enterprises Vs. Hamilton Medical AG & Anr (supra)* was specifically concerned with the question as to whether the Facilitation Council under the MSMED Act, had jurisdiction in respect of disputes between the parties before the Court. The said question had arisen in

1 2021 SCC OnLine SC 439
2 2022 SCC OnLine SC 355
3 2022 SCC OnLine SC 1492

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the backdrop of the fact that when the Contract was entered into between the parties, the Appellant before the Supreme Court was not registered under the MSMED Act. In such a situation, even though subsequently the Appellant came to be registered under the MSMED Act, the Supreme Court held that the subsequent registration would not inure to the benefit of the Appellant and that the Facilitation Council did not have jurisdiction to conduct the arbitration proceedings. According to the learned Counsel for the Petitioner, since the question squarely arose before the Hon'ble Supreme Court and a specific view was taken in the matter, the law laid down therein ought to be applied to the facts of the present case.

14. In respect of the judgments in the case of *Silpi Industries Vs. Kerala State Road Transport Corporation & Anr. (supra) and Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd., (supra),* the learned Counsel for the Petitioner submitted that since the questions specifically framed for consideration in these two judgments had nothing to do with the question that arose in the case of *Vaishno Enterprises Vs. Hamilton Medical AG & Anr (supra),* which is the question that arises for consideration in the facts of the present case also before this Court, the observations made in the said two judgments ought not to be treated as binding precedents. It was submitted that observations made in the said two judgments of the

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Supreme Court did not concern the specific questions framed for consideration and that therefore, the position of law specifically laid down in *Vaishno Enterprises Vs. Hamilton Medical AG & Anr (supra)* deserves to be followed and applied in the facts of the present case. On this basis, it was submitted that the impugned awards deserve to be set aside due to lack of jurisdiction in the Facilitation Council.

15. It was further submitted that the Facilitation Council had no jurisdiction to enter into reference for arbitration in the facts of the present case, because a perusal of the contracts/work orders would show that they were nothing but works contracts. By relying upon judgment of this Court in the case of *M/s. P. L. Adke Vs. Wardha Municipal Corporation/Council* (judgment and order dated 01st March, 2021, passed in Arbitration Appeal (St) No. 30508 of 2019 in Arbitration Application (Commercial) No. 7 of 2019), it was submitted that the impugned awards deserve to be set aside. It was submitted that in the said judgment, this Court had specifically held that a works contract would not be amenable to the provisions of the MSMED Act and that therefore, the impugned awards in the present case also were clearly without jurisdiction. It was brought to the notice of this Court that the aforementioned judgment in the case of *M/s. P. L. Adke Vs. Wardha Municipal Corporation/Council (supra)* was followed by the Andra Pradesh High Court in the case of

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Rashtriya Ispat Nigam Ltd. vs. Union of India.[4]

16. The learned Counsel for the Petitioner further submitted that the impugned awards also deserve to be set aside on the short ground that no reasons were recorded in the impugned awards while allowing the claims in favour of Respondent No. 1. It was submitted that such awards, without an iota of reasoning, are rendered patently illegal and also in violation of public policy of India. On this basis, it was submitted that this was a sufficient ground under Section 34 of the Arbitration Act, for setting aside the impugned awards.

17. It was further submitted that the impugned awards deserve to be set aside, also for the reason that claims were granted in the teeth of the terms of the contracts. It was submitted that specific clause in the contracts/work orders stipulated that no separate payments shall be made for drawings and yet in the impugned awards, the Facilitation Council granted claims raised by Respondent No. 1 in that regard. On this basis, it was submitted that the impugned awards deserve to be set aside.

18. On the other hand Mr. Suresh Dhole, learned Counsel appearing for Respondent No. 1 in both the petitions submitted that the question of jurisdiction was unnecessarily being raised on behalf of the Petitioner, despite the fact that the Supreme Court in its

4 2022 SCC OnLine AP 970

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judgment in the case of *Silpi Industries Vs. Kerala State Road Transport Corporation & Anr.(supra) and Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd., (supra)* had specifically laid down that once the concerned unit stood registered under the provisions of the MSMED Act, even if the contract between the parties was executed prior to such registration, in respect of supply of goods and services after the date of registration, the claims raised by such a unit would certainly be maintainable before the Facilitation Council under the provisions of the MSMED Act. It was submitted that the Supreme Court in no uncertain terms had so held and that therefore, in the present case the awards passed by the Facilitation Council cannot be said to be without jurisdiction.

19. As regards the aspect of the contracts/work orders in the present case being works contracts, it was submitted that the contracts were at most composite contracts and that a perusal of the terms of the contracts would show that they were for supply of goods and services for consideration amount payable to Respondent No. 1. On this basis, it was submitted that there was no question of treating the contracts/work orders in question as works contracts and hence the contention raised on behalf of the Petitioner by placing reliance on judgment of this Court in the case of *M/s. P. L. Adke Vs. Wardha Municipal Corporation/Council (supra),* was without any substance.

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20. It was submitted on behalf of Respondent No. 1 that a perusal of the impugned awards would show that the rival contentions were recorded, considered in detailed and thereupon, the Facilitation Council had taken a reasonable view in the matter. The said approach of the Facilitation Council does not give rise to any of the grounds enumerated under Section 34 of the Arbitration Act, particularly in the light of the amendment to the Act in the year 2015 and the narrow scope of jurisdiction delineated by the Supreme Court in the case of Ssangyong Engineering & Construction Co. *Vs. The National Highway Authorities of India.*[5] On this basis, it was submitted that no ground is made out on behalf of the petitioner for interference with the impugned awards and that therefore, the present petition deserves to be dismissed.

21. Considering the nature of contentions raised on behalf of the rival parties, it would be appropriate to first consider the question as to whether the provisions of the MSMED Act would be applicable to the case of the Respondent No. 1, in the context of the arbitration proceedings conducted by the Facilitation Council. There is no dispute between the parties about the fact that Respondent No. 1 stood registered under the MSMED Act on 29th September 2009. The documents on record would show that insofar as one tender was

5 (2019) 15 SCC 131

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concerned, the contracts/work orders were split into two parts, one dated 24th July, 2009 and the other dated 30th July, 2009. Thus, insofar as the aforesaid contracts/work orders were concerned, the same stood executed between the parties before the Respondent No.1 was registered under the provisions of the MSMED Act. These contracts/work orders are subject matter of Commercial Arbitration Petition No. 303 of 2018. Insofar as the Commercial Arbitration Petition No. 326 of 2018 is concerned, the subject contract/work order is dated 23rd December, 2009. It is evident that the same was executed between the parties after 29th September, 2009, when the Respondent No. 1 stood registered under the MSMED Act.

22. Thus, it is in respect of only the contracts/work orders that are subject matter of Commercial Arbitration Petition No. 303 of 2018, that the question would arise about applicability of the MSMED Act. It is the contention of the Petitioner – Corporation that since the Respondent No. 1 stood registered after the said contracts/work orders were executed on 27th July, 2009 and 30th July, 2009, there was no question of the Facilitation Council assuming jurisdiction for arbitration under the provisions of the MSMED Act. In this regard, it is specifically contended on behalf of Respondent No. 1 that in respect of supplies after the date of registration under the MSMED Act, the Respondent No. 1 would certainly be entitled to raise claims and to

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initiate arbitration before the Facilitation Council under the MSMED Act. The judgments of Supreme Court relied upon by the rival parties are *Silpi Industries Vs. Kerala State Road Transport Corporation & Anr.(supra), Vaishno Enterprises Vs. Hamilton Medical AG & Anr., (supra) and Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd. (supra).*

23. A perusal of the aforesaid judgments shows that in the case of *Vaishno Enterprises Vs. Hamilton Medical AG & Anr., (supra)* Supreme Court held that since the Appellant therein was not registered under the MSMED Act when the contract was executed between the parties, the provisions thereof would not be applicable, thereby indicating that the Facilitation Council would have no jurisdiction to conduct arbitration proceedings in such cases. But, in the said judgment decided on 24th March, 2022, the two judge bench of the Supreme Court makes no reference to the judgment of a coordinate bench delivered earlier i.e. on 29th June, 2021, in the case of *Silpi Industries Vs. Kerala State Road Transport Corporation & Anr.(supra).*

24. In the judgment in the case of *Silpi Industries Vs. Kerala State Road Transport Corporation & Anr. (supra)*, the Supreme Court held as follows:

> *"26. Though the appellant claims the benefit of*

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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[6], 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.[7] has

6 2017 SCC OnLine Del 6978
7 (2019) 19 SCC 529

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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 and services. If any registration is obtained, 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."

25. In the judgment of the Supreme Court in the case of

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Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd., (supra), delivered on 31st October, 2022, i.e. after the aforementioned judgment in the case of *Vaishno Enterprises Vs. Hamilton Medical AG & Anr., (supra)* was delivered, the Supreme Court considered the provisions of the MSMED Act and held as follows:

> *"33. Following the above-stated 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.*
>
> *34. The upshot of the above is that:*
>
> *(i) Chapter-V of the MSMED Act, 2006 would override the provisions of the Arbitration Act, 1996.*

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(ii) No party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council, though an independent arbitration agreement exists between the parties.

(iii) The Facilitation Council, which had initiated the Conciliation proceedings under Section 18(2) of the MSMED Act, 2006 would be entitled to act as an arbitrator despite the bar contained in Section 80 of the Arbitration Act.

(iv) The proceedings before the Facilitation Council/ institute/ centre acting as an arbitrator/arbitration tribunal under Section 18(3) of MSMED Act, 2006 would be governed by the Arbitration Act, 1996.

(v) The Facilitation Council/institute/centre acting as an arbitral tribunal by virtue of Section 18(3) of the MSMED Act, 2006 would be competent to rule on its own jurisdiction as also the other issues in view of Section 16 of the Arbitration Act, 1996.

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

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26. In the said judgment, the Supreme Court extensively referred to the provisions of the MSMED Act, juxtaposed against the provisions of the Arbitration Act and reached the above quoted conclusions. In the said judgment, the Supreme Court specifically referred to the aforesaid earlier judgment in the case of *Silpi Industries Vs. Kerala State Road Transport Corporation & Anr. (supra)*. There is no reference to the judgment in the case of *Vaishno Enterprises Vs. Hamilton Medical AG & Anr., (supra)*.

27. In such a situation, the contention raised on behalf of the Petitioner cannot be accepted that this Court ought to follow the judgment in the case of *Vaishno Enterprises Vs. Hamilton Medical AG & Anr., (supra)* to hold against the Respondent No. 1. The contention raised on behalf of the Petitioner cannot be accepted that this Court can ignore the observations of the Supreme Court in the cases of *Silpi Industries Vs. Kerala State Road Transport Corporation & Anr. (supra) and Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd., (supra)* as the Supreme Court therein was actually dealing with specifically framed questions, which had nothing to do with the question decided in *Vaishno Enterprises Vs. Hamilton Medical AG & Anr., (supra).* The above quoted portions of the judgments in the case of *Silpi Industries Vs. Kerala State Road Transport Corporation & Anr.(supra)* and *Gujarat State Civil Supplies*

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Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd., (supra), indicate that the Supreme Court in no uncertain terms held that the registration of a supplier under the MSMED Act would certainly have effect prospectively and it shall apply to the supply of goods and services subsequent to such registration. Thus, the aforesaid ground raised on behalf of the Petitioner concerning lack of jurisdiction in the Facilitation Council under the MSMED Act, cannot be accepted.

28. The next contention raised on behalf of the Petitioner regarding lack of jurisdiction in the Facilitation Council is based on the assertion that the contracts/work orders in the present case were "works contracts" and that therefore, the MSMED Act was inapplicable. Reliance is specifically placed on judgment of this Court in the case of *M/s. P. L. Adke Vs. Wardha Municipal Corporation/Council (supra).* In the said case, this Court held as follows:

> "22. One major stumbling block that the appellants face is on the nature of the contract. While the appellants contend that they are suppliers and the respondents are buyers, considering the terms of the contract, I am of the view that the contract to be performed by the appellant is clearly a Works Contract. Multiple decisions have come to the common conclusion that a Works Contract is not amenable to the provisions of the MSME Act. It will be useful to look through some of the decisions on

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this aspect. In *Shree Gee Enterprises v/s. Union of India & Anr.,* the Delhi High Court has taken a view that works contracts would not attract provisions of the MSME Act. The focus there was on the procurement policy which was intended to promote the interest of Micro Small and Medium Enterprises. Yet again, in a decision of the Allahabad High Court in the case of Rahul Singh v/s. Union of India and Others, the Division Bench of the Allahabad High Court has on 25th January, 2017 held in Writ Petition no.2316 of 2016 has held as follows;

> "A reconstruction of Section 11 bears out that it empowers the Central Government to formulate reference policies in respect of (a) procurement of goods produced by MSM and (b) services provided by a MSE. The words "services provided" as used in the said provision must necessarily be read as disjunctive to the expression good produced. It cannot possibly be disputed that a 'works contract' forms a completely different and distinct genre than a contract for supply for goods or for that matter a contract for providing services. A works contract is essentially an indivisible contract which may involve not just the supply of goods but also the provision of labour and service. The particular specie of contract has rightly been understood by the railways as not to fall

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within the ambit of the 2006 Act."

The reference in this paragraph extracted from the judgment in Rahul Singh indicates that Section 11 only contemplates and brings within its fold contracts for supply of goods and providing services simpliciter.

23. The Allahabad High Court also observed that in the 2006 Act none of the provisions requires the Court to deconstruct to works contract into its elements of supplying goods and providing services. While the focus in this judgment and several others was the Public Procurement Policy 2012, we are not concerned with that aspect of the matter and dehors the applicability of the Public Procurement Policy 2012 the fundamental principle that can be gleaned from the aforesaid discussion is that a works contract being a composite contract is indivisible and cannot be deconstructed into its elements.

24. In *CCE and Customs v/s. Larsen & Toubro Ltd.*[8] the Supreme Court observed that the Assessees' contention that a works contract is a separate specie of contract, distinct from contract for services is recognized by the world of commerce as such.

25. The scheme of the 2006 Act clearly entails providing a platform for the concerned enterprises to compete, given the fact that the smaller enterprises would otherwise be at a disadvantage, compared to the larger players in industry. In *M/s. Kone Eleva-*

8 (2016) 1 SCC 170

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tors India Pvt. Ltd. v/s. State of Tamil Nadu and others,[9] the Supreme Court considered the observations in Larsen & Tubro (supra) observed that four concepts clearly emerged. Firstly a works contract is indivisible but by legal fiction is divided into two parts for sale of goods and the other for supply of labour and services. Secondly, the concept of a dominant nature tests does not apply to a works contract. Thirdly, the term 'works contract' as used in Clause (29A) of Article 366 of Constitution takes in its sweep all genre of works contract and is not to be narrowly construed. The Supreme Court reiterated in *Larsen & Tubro (supra)* that the dominant nature test or the overwhelming component test or the degree of labour and service test are not really applicable if the contract is a composite one. The court observed that in a contract requiring a contractor to install a lift in building the nature of the contract is a composite contract. Although there are two components, firstly the purchase of components of the lift from a dealer, it would be a contract of sale. If a separate contract is executed for installation that would be a composite contract for it because it is not for a sale of goods. This concept has been recognized by this court in Sterling Wilson Pvt. Ltd. Having considered all the above, I am of the view that the MSME Act could not have been invoked in the case of Works Contract such as the one

9 2014(7) SCC 1

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at hand. The respondents must therefore succeed on that count."

29. In the present case, insofar as the Commercial Arbitration Petition No. 303 of 2018 is concerned, although there are two contracts dated 24th July, 2009 and 30th July, 2009, a perusal of the contracts/work orders show that they pertaining to the same tender i.e. Tender No. GE/B/DP/1860-7. The two contracts pertained to supply of piping material and design, fabrications, erection, testing and commissioning of the piping systems, with all accessories and allied pipe works. The scope of work under the said tender, although split into two, indicates the manner in which the Respondent No. 1 was engaged by the Petitioner. The scope of work of the contract/ work order dated 24th July, 2009, reads as follows:

"Scope of work:

a) Supply of all pipelines with all accessories and allied pipe work, all as detailed in the Bill of Quantities, Specifications and Drawings.

b) Approval from IBR authorities for steam distribution system.

Detailed specifications & Bill of quantities are enclosed as Annexure "A"

30. The payment schedule reads as follow:

"PAYMENT

1) Advance:

10% of the total cost of the material shall be payable as

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advance against submission of Bank Guarantee (BG) of equivalent amount from any Nationalised bank with validity period of 12 months and shall be released only after successful completion of the work.

2) Approval of Drawings:

10% shall be payable on approval of scheme and drawings from M/s Gherzi Eastern Ltd., Official of Finlay Mills and concerned public/ statutory authorities (such as IBR for steam piping).

3) Against Delivery of Materials:

10% cost of Material against delivery at site shall be payable on certification of the same by M/s Gherzi Eastern Ltd. And Official of Finlay Mills.

4) Against Erection of Equipment:

50% cost of materials shall be payable against Erection of material.

5) Testing & Commissioning:

10% cost of materials shall be payable on testing & commissioning of the system and on final approval from M/s. Gherzi Eastern Ltd.

6) Retention Money:

10% cost of materials is to be retained as retention money but the same can be released against Bank Guarantee from any Nationalized Bank with valid period of 15 months from the date of completion certificate or defect liability period and approval for the materials used in system from all concerned Authorities."

31. In the contract/work order dated 30th July 2009, pertaining to the very same tender, the scope of work was specified as

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follows:

"Scope of work:

a) Design, Fabrication, Erecting, Testing and Commissioning of piping system with all accessories and allied pipe work, all as detailed in the Bill of Quantities, Specifications and drawings.

b) Insulation of pipelines wherever required.

c) Painting of all the pipelines as per IS.

d) Approval from IBR authorities for steam distribution system.

Detailed specifications & Bill of quantities are enclosed as Annexure "A"."

32. It was also specified in the said contracts/work orders under the head processing that payment would be done for the work of actual quantity and that the Respondent No. 1 would submit monthly running bills, as per the progress of work. The payment schedule stipulated as follows:

"PAYMENT

1) Advance:

20% of the total cost of the installation shall be payable as advance against submission of Bank Guarantee (BG) of equivalent amount from any Nationalised bank with validity period of 12 months and shall be released only after successful completion of the work.

2) Approval of Drawings:

10% shall be payable on approval of scheme and drawings from M/s. Gherzi Eastern Ltd., Official of Finlay Mills and concerned public / statutory authorities (such as IBR for

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steam piping).

3) Erection of Equipment:

50% shall be payable on Pro-rata Erection of the equipment.

4) Testing & Commissioning:

10% shall be payable on testing, commissioning and final approval from M/s Gherzi Eastern Ltd and handing over the system to NTC.

5) Retention Money:

10% of retention money can be released against Bank Guarantee from any Nationalised Bank with valid period of one year from the date of completion certificate or defect liability period and after receipt of approval for the system from all concerned Authorities."

33. In the contract pertaining to Commercial Arbitration Petition No. 326 of 2018, the contract/work order dated 23rd December, 2009, specified the scope of work as follows:

"2. Scope of work:

A. Supply, Fabrication, Erection, Testing and Commissioning of all pipelines with all accessories and allied pipe work, all as detailed in the Bill of Quantities, Specifications and drawings.

B. Insulation of pipelines wherever required.

C. Painting of all the pipelines as per IS.

D. Approval from IBR authorities for steam distribution system.

E. Approval from explosive or other statutory authority."

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34. The terms of payment were as follows:

> "6. Terms of Payment
>
> 10% of contract value shall be payable to contractor as mobilization advance alongwith work order against submission of a Demand Bank Guarantee valid upto the planned and/or extended date of completion of the like amount in the same currency from Nationalised Bank s per format supplied by us / our consultants. It is intended to cover the due fulfilling of the obligation of the contractor and shall be released only after successful completion of the work.
>
> 10% of contract value against approval of scheme and drawings from concerned public/statutory authorities (such as IBR for steam piping), TAPL/by us.
>
> 10% on delivery of material at site.
>
> 50% on progressive erection.
>
> 10% on testing and commissioning and handing over and final approval from competent authorities, Government Authorities/client.
>
> 10% on retention can be released against Bank Guarantee valid for Defect Liability Period, after the receipt of approval for the system from all concerned authorities."

35. The Supreme Court in the case of *Larsen and Toubro Limited & Anr. Vs. State of Karnataka & Anr.*[10], considered the question as to what would constitute a works contract. After referring to several precedents, the Supreme Court held that the question as to whether the contract could be said to be a works

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contract would depend on the facts and circumstances of each case. Applying the tests as indicated in the judgments of the Supreme Court, this Court finds in the present case that the contracts in question were indeed works contracts. The details of the scope of works quoted hereinabove and the payment schedule also demonstrates that the contracts in question were works contracts. Therefore, following the judgment in the case of *M/s. P. L. Adke Vs. Wardha Municipal Corporation/ Council*, it is held that the provisions of the MSMED Act could not have been invoked by Respondent No. 1. This clearly shows that the initiation of the statutory arbitration under the provisions of the MSMED Act on the part of Respondent No. 1 in the context of contracts in question before the Facilitation Council, was a stillborn exercise and that the Facilitation Council could not have exercised jurisdiction to conduct the arbitration proceedings. This renders the impugned awards without jurisdiction. As this aspect goes to the very root of the matter, the Petitioner has made out ground under Section 34 of the Arbitration Act, although the scope for interference in an arbitral award has been narrowed down after the amendment of the Arbitration Act in the year 2015 and the clarification of the position of law by the Supreme Court in the case of *Ssangyong Engineering & Construction Co., Ltd. Vs. The National Highways Authority of India (supra).* The lack of jurisdiction in the Facilitation Council to conduct the arbitration

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proceedings renders the impugned awards patently illegal.

36. The Petitioner has also urged that the impugned awards deserve interference as being in violation of public policy of India, because there are no reasons stated in the impugned awards. This Court has perused the impugned awards and it is found that although the Facilitation Council appears to have referred to the submissions made on behalf of the parties, but the discussion is not satisfactory and the most significant aspect of the matter pertaining to the jurisdiction of the Facilitation Council itself has not been dealt with in an appropriate manner at all. The Facilitation Council has also not considered the fact that the contracts/work orders specifically provided that there shall be no payment for drawings and yet it has granted the claims of Respondent No. 1 under the said head. Therefore, there is substance in the contention raised on behalf of the Petitioner that the impugned awards are against public policy of India.

37. But, since this Court has specifically found that the provisions of the MSMED Act could not have been invoked in the facts and circumstances of the case, the impugned awards are rendered without jurisdiction and hence, liable to be set aside on that ground alone.

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38. In view of the above, the petitions are allowed. The impugned awards are set aside. There shall be no order as to costs.

39. The amounts deposited by the Petitioner Corporation in this Court shall be disbursed to the Petitioner along with accrued interest, if any.

40. Pending applications also stand disposed of.

(MANISH PITALE, J.)

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