

VAISHNO ENTERPRISES v. HAMILTON MEDICAL AG , (2022-2)206 PLR 183 (SC) ,

Supreme Court of India

Before : Justice M. R. Shah, Justice B. V. Nagarathna.

M/S. VAISHNO ENTERPRISES – Appellant,

versus

HAMILTON MEDICAL AG & Anr. – Respondents.

Civil Appeal No.1892 of 2022

(i) Contract/agreement – Laws applicable at the time of contract/agreement shall be applicable – Parties shall be governed by the laws of India prevailing/applicable at the time when the [contract](#) was executed – Micro, Small and Medium Enterprises Act, 2006. [Para 8.2]

(ii) Micro, Small and Medium Enterprises Act, 2006, Section 2(n) read with Section 8 – Contract/agreement between the parties was executed i.e. on 24.08.2020 – Appellant was not registered an MSME on that day and was registered on 28.08.2020 – When the contract was entered into the appellant was not MSME and therefore the parties would not be governed by the MSME Act and the parties shall be governed by the laws of India applicable and/or prevailing at the time of execution of the contract – Council under the MSME Act would have no jurisdiction to entertain the dispute between the parties, in exercise of powers under Section 18 of the MSME Act. [Para 8.2]

(iii) Micro, Small and Medium Enterprises Act, 2006, Section 2(n) read with Section 8(1) – Provisions of the MSME Act shall be applicable in case of supplier who has filed a memorandum with the authority referred to in subsection (1) of Section 8 – Therefore, the supplier has to be a micro or small enterprise registered as MSME, registered with any of the authority mentioned in subsection (1) of Section 8 and Section 2(n) of the MSME Act. [Para 8.2]

Cases referred :

1. 2021 SCC Online SC 439, *Shilpi Industries v. Kerala State Road Transport Corporation*, C.A. No.157078 of 2021

2.(2019) 19 SCC 529, *Shanti Conductors Pvt. Ltd. v. Assam State Electricity Board*

Abid Ali Beeran P, for Petitioner. *Ankit Anandraj Shah*. For Respondent.

JUDGEMENT

M. R. Shah, J. - (24.03.2022) – Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court for the State of Telangana at Hyderabad in Writ Appeal No. 201 of 2021 by which the High Court has dismissed the said appeal and has confirmed the order passed by the learned Single Judge quashing the IntimationcumNotice dated 22.10.2020 and Notices dated 04.11.2020 and 12.11.2020 issued by Micro and Small Medium Enterprises Facilitation Council (hereinafter referred to as ‘the Council’), the original applicant has preferred the present appeal.

2. That the appellant is a registered partnership consultant which provides consultancy services to foreign medical equipment companies in the form of liaising services with hospitals and government departments and entities for procurement of medical equipment like ventilators. That Respondent No.1 herein is a company registered under the laws of Switzerland, having its office at Bonaduz, Switzerland and is a manufacturer and supplier of critical care ventilation solutions for a variety of patient segments, applications and environments across the world. According to the respondent, it has its own consultants, engaged in India, who facilitate the installation of their equipment and undertake related ancillary work. That the appellant herein which provides consultancy services, approached the respondent Company and requested to be associated with the Company in implementation of their projects in India. One HLL Infra-Tech Services Limited, a Nodal Agency of the Government of India, floated a tender dated 20.08.2018 to purchase/procure 1186 high end ventilators and other medical equipment to be supplied to various hospitals/medical colleges/departments across India. The respondent also participated in the said tender by offering its bid through its authorized local agent, M/s Medelec Health Care Solutions. The tender was awarded in favour of the said Medelec Solutions. That thereafter the appellant and the respondent entered into a Consulting Agreement on 10.02.2020, with a restricted term of six months, agreeing that the appellant herein shall act as a consultant for the respondent – Company. That thereafter the appellant raised various invoices claiming certain amounts. The same were alleged to have been paid by the respondent. That the earlier Consulting Agreement dated 10.02.2020 expired on 10.08.2020, the appellant and the respondent entered into a fresh Consulting Agreement on 24.08.2020 for a period of six months. That the appellant herein got registered under the Micro, Small and Medium Enterprises Act, 2006 (hereinafter referred to as, ‘MSME Act’) on 28.08.2020. That thereafter the dispute arose between the parties. A legal notice dated 09.09.2020 was sent by the appellant calling upon the respondent to pay the amounts covered by Invoice No. 5 dated 22.06.2020 and Invoice No. 6 dated 07.09.2020 and one another along with damages of Rs.50 lakhs. In the said notice, the appellants informed that it was registered under the MSME Act. The respondent terminated the Consulting Agreement dated 24.08.2020 vide termination letter dated 22.10.2020. That the appellant herein replied to the termination notice vide reply dated 16.11.2020. That as the dispute arose between the parties, the appellant herein approached the Council on 22.10.2020 which case was registered as Reference No.1581/MSEFC/2020. The appellant prayed for the following reliefs:

“(a) That the opposite party is liable to pay the petitioner a sum of USD 711,845/ equivalent to Rs.5,21,85,357/ towards Invoice No.5 dated 22.6.2020,

(b) that the Opposite Party is liable to pay the Petitioner a sum of USD 104,205/ equivalent to Rs. 76,26,073/ towards Invoice No.6 dated 7.9.2020,

(c) That the termination letter dated 2.10.2020 issued by the Opposite Party is illegal, void and contrary to the terms of the Consulting Agreement dated 24.5.2020.

(d) that the Opposite party is liable to pay the Petitioner a sum of USD 304,964/ equivalent to Rs.2,23,56,910/ towards the Proforma invoice dated 21.10.2020 towards balance 25% commission payable in respect of 1158 ventilators pursuant to the Consulting Agreement dated 24.8.2020,

(e) that the Opposite party is liable to pay the petitioner interest as per Section 16 of the MSMED Act 2006 as enumerated in Form I of this Application till date of payment.”

3. On 22.10.2020 itself an intimation was sent by the Council to the respondent. That on receipt of the said notice, the respondent addressed a letter to the Chairman of the Council and contended that they are a company that is based in Switzerland and therefore MSME Act shall not be applicable to companies located outside country. It was also stated that the respondent has no office in India more particularly in New Delhi as mentioned in the complaint/notice. On 04.11.2020 the Council sent Form 2 notice calling for statement of defence to the Respondent herein. One another notice dated 12.11.2020 was sent by the Council. Thereafter a notice for a conciliation meeting dated 23.11.2020 was served upon the respondent and the meeting was scheduled on 28.11.2020. Thereafter the respondent filed Writ Petition No. 21623 of 2020 before the High Court challenging the legality and validity of the aforesaid notices. By judgment and order dated 20.04.2021, the learned Single Judge allowed the said writ petition and set aside the notices issued by the Council by observing that the Council has no jurisdiction to resolve the dispute between the parties. That the appellant herein challenged the judgment and order passed by the learned Single Judge in Writ Appeal No. 201 of 2020 before the Division Bench. By the impugned judgment and order the Division Bench of the High Court has dismissed the said appeal and has confirmed the judgment and order passed by the learned Single judge. The impugned judgment and order passed by the Division Bench is the subject matter of the present appeal.

4. Learned Counsel appearing on behalf of the appellant has vehemently submitted that in the facts and circumstances of the case, both, the learned Single Judge as well as the Division Bench of the High Court have erred in holding that the Council has no jurisdiction to entertain the dispute between the appellant and the respondent.

4.1 It is submitted that, both, the learned Single Judge as well as the Division Bench have erred in holding that in the present case as the supplier was outside the territorial jurisdiction of India, considering Section 18 of the MSME Act, the Council has no jurisdiction to entertain a dispute between the supplier located outside the jurisdiction. It is submitted that as such the initial agreement dated 10.02.2020 between the parties was executed at Delhi, the second Agreement dated 24.08.2020 was also executed in New Delhi and the services were rendered by the appellant in India and even the respondent was conducting

its business in India through its registered service centres at New Delhi, Mumbai, Kolkata, Bangalore and it had appointed a power of attorney holder/Special Agent who is based in Delhi, to act on his behalf, and therefore the cause of action can be said to have arisen in India and no part of cause of action has arisen in Switzerland, the Council is vested with the jurisdiction to entertain the claim petition filed by the appellant. It is submitted that therefore the appellant rightly approached the Council to resolve the dispute under the MSME Act and the Council assumed the jurisdiction vested under Section 18 of the MSME Act.

4.2 It is further submitted by learned counsel appearing on behalf of the appellant that even otherwise considering the objects and purpose of the Act as the MSME Act being a beneficial legislation enacted for facilitating promotion, development for enhancement of the competitiveness of micro, small and medium enterprises and for resolving the incidental and ancillary matters related thereto, the High Court ought not to have entertained into the writ petitions against the notice issued by the Council and ought to have relegated the Respondent No.1 – original writ petitioner to appear before the Council for conciliation and thereafter on failure for arbitration and the issue with respect to jurisdiction ought to have been left to the Arbitrator.

5. Shri Shyam Divan, learned Senior Advocate appearing on behalf of the respondent has supported the judgment and order passed by the learned Single Judge as well as that of the Division Bench holding that with respect to the dispute between the appellant and the Respondent No.1 the Council has no jurisdiction under Section 18 of the MSME Act.

5.1 Shri Divan, learned Senior Advocate has taken us to the various definitions under Section 2 of the MSME Act more particularly the definition of “buyer” and “suppliers”. He has also taken us to Section 18 of the MSME Act.

5.2 Relying upon the above provisions it is vehemently submitted by Shri Divan, learned Senior Advocate appearing on behalf of Respondent No.1 that in the present case the Respondent No.1 – buyer is having registered office in Switzerland. It is submitted that even the address of the Respondent No.1 mentioned in both the Agreements dated 10.02.2020 and 24.08.2020 is also Switzerland. It is submitted that therefore it is rightly held that as the Respondent No.1 – buyer being located outside India, the Council would have no jurisdiction to entertain the dispute between the appellant and the Respondent No.1.

5.3 It is further submitted by Shri Divan, learned Senior Advocate for Respondent No.1 that even otherwise considering the relevant provisions of the Arbitration Agreement the parties to the Agreement shall not be governed by the MSME Act. It is submitted that in the present case the date of contract was 24.08.2020. The appellant herein is registered as MSME on 28.08.2020 i.e. after the execution of the contract on 24.08.2020. It is submitted that as per the Arbitration Agreement the parties shall be governed by the law applicable in India which shall be the law prevailing at the time of the execution of the contract. It is submitted that for that reason also the parties shall not be governed by the MSME Act and therefore the Council would have no jurisdiction to entertain the dispute between the appellant and the Respondent No.1.

6. In rejoinder learned counsel appearing on behalf of the appellant has submitted that as the dispute arose subsequently i.e. subsequent to 28.08.2020 and therefore at the time when the dispute arose the appellant was the registered MSME and therefore, for the dispute between the appellant and the respondent which has arisen subsequent to 28.08.2020, the Council would have jurisdiction.

7. Heard learned counsel for the respective parties at length.

8. The short question which is posed for consideration before this Court is the jurisdiction of the Council under the MSME Act with respect to the dispute between the appellant and the respondent.

8.1 It was the case on behalf of Respondent No.1 – Buyer that as the Respondent No.1 buyer is located outside India and is having its registered office at Switzerland the Council would have no jurisdiction to enter into the dispute between the appellant and the respondent. On the other hand, it is the case on behalf of the appellant that the agreements were executed between the parties at Delhi and the services were rendered by the appellant in India and even the Respondent No.1 is conducting its business in India through registered service centres at New Delhi, Mumbai, Kolkata, Bangalore and it had appointed a power of attorney/special agent which is based in Delhi, and after having availed the services rendered by the appellant and doing business in India, thereafter it will not be open for Respondent No.1 to contend that with respect to the dispute between the appellant and the respondent, the Council would have no jurisdiction under the MSME Act. However, while considering the main issue whether the parties shall be governed by the MSME Act or not, the relevant clause under the Agreement is required to be considered which reads as under:

“9. CHOICE OF LAW

This Agreement and the rights of the parties hereunder shall be governed by and construed in accordance with the laws of India. The parties agree to resolve their differences, disputes, if any, mutually, within 30 days of the initiation of the dispute which can be extended by the mutual consent of the parties, if necessary. In the event the parties are not able to resolve the differences by way of the said mutual dialogues, they are at a liberty to initiate appropriate actions as per law.”

8.2 It is not in dispute that the contract/agreement between the appellant and the respondent has been executed on 24.08.2020. Therefore, the laws of India applicable at the time of contract/agreement shall be applicable and therefore the parties shall be governed by the laws of India prevailing/applicable at the time when the contract was executed. It is admitted position that the date on which a contract/agreement was executed i.e. on 24.08.2020 the appellant was not registered MSME. Considering the relevant provisions of the MSME Act more particularly Section 2(n) read with Section 8 of the MSME Act, the provisions of the MSME Act shall be applicable in case of supplier who has filed a memorandum with the authority referred to in subsection (1) of Section 8. Therefore, the supplier has to be a micro or small enterprise registered as MSME, registered with any of

the authority mentioned in subsection (1) of Section 8 and Section 2(n) of the MSME Act. It is admitted position that in the present case the appellant is registered as MSME only on 28.08.2020. Therefore, when the contract was entered into the appellant was not MSME and therefore the parties would not be governed by the MSME Act and the parties shall be governed by the laws of India applicable and/or prevailing at the time of execution of the contract. If that be so the Council would have no jurisdiction to entertain the dispute between the appellant and the Respondent no.1, in exercise of powers under Section 18 of the MSME Act. Therefore, in the aforesaid peculiar facts and circumstances of the case, more particularly the terms of the Agreement, the order passed by the learned Single Judge confirmed by the Division Bench holding the Council would have no jurisdiction with respect to Respondent No.1 is not required to be interfered with.

8.3. However, at the same time, the larger question/issue whether in a case where the buyer is located outside India but has availed the services in India and/or done the business in India with the Indian supplier and the contract was executed in India the MSME Act would be applicable or not and/or another larger issue that in case the supplier is subsequently registered as MSME the Council would still have jurisdiction are kept open to be considered in an appropriate case bearing in mind Section 18 as well as Section 8 of the MSME Act and the judgments of this Court in the case of *M/s Shilpi Industries v. Kerala State Road Transport Corporation*, C.A. No.157078 of 2021 [2021 SCC Online SC 439] arising under the provisions of MSME Act and *Shanti Conductors Pvt. Ltd. v. Assam State Electricity Board*, (2019) 19 SCC 529 in which case a similar provision under the Small Scale and Ancillary Industries Undertakings, Act, 1993 came up for consideration before this Court.

9. In view of the above and for the reason stated above, we are in agreement with the ultimate conclusion reached/arrived at by the learned Single Judge confirmed by the Division Bench that with respect to the dispute the appellant and the Respondent No.1 the Council would have no jurisdiction under Section 18 of the MSME Act. Under the circumstances, the present appeal deserves to be dismissed and is accordingly dismissed.

There shall be no order as to costs.

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