Once Registered As MSME, The Nature Of Activity Cannot Be A Bar To Any Relief Under The Act: Andhra Pradesh High Court

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IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI
R. RAGHUNANDAN RAO; J.
W.P.No.4652 of 2022; 05.08.2022
M/s. Dalapathi Constructions *versus* **State of Andhra Pradesh**

Counsel for Petitioner: Sri S. Ram Babu; Counsel for Respondent No.1: G.P. for Industries; Counsel for Respondent No.3: Sri Ashok Returi

O R D E R

The case of the petitioner is as follows:

The petitioner, who is a partnership firm, is in the business of Civil Constructions in 2014. The petitioner had registered itself as an Enterprise under the Micro, Small and Medium Development Enterprises Act, 2006, (for short "the Act") on 28.11.2020.

2. The petitioner had entered into a contract with the 3rd respondent on 14.06.2018 for undertaking construction in a multi-storeyed residential complex, viz., "Srivalli Pravas" at Kaja, Guntur District. However, the said contract could not be executed. As the petitioner had already stationed sizeable plant and machinery at the site, a further agreement, termed as a Memorandum of Understanding, was entered between the petitioner and the 3rd respondent on 20.05.2020. As per this Memorandum of Understanding, the 3rd respondent had agreed to pay a sum of Rs.253 lakhs + GST to the petitioner as consideration for the plant and machinery handed over to the 3rd respondent.

3. The 3rd respondent did not make the payment due to the petitioner. Therefore, the petitioner approached the 2nd respondentFacilitation Council, under the provisions of the Act for recovery of its dues. This application was rejected by the 2nd respondent in the meeting held on 22.06.2021 and the said decision was communicated to the petitioner by letter bearing Reference No.21C/IFC 2021/427 dated 23.09.2021. The endorsement in the said letter is as follows:

"As per the Udyam registration certificate, the permissible activity for the petitioner is construction of building. The petitioner made claim for not honouring the MOU, where payment is to be made for the Plant & Machinery sold. As the activity is neither manufacturing nor servicing and only trading activity. It is beyond the scope of the Council. Hence the application is not admissible for adjudication under MSMED Act, 2006."

4. The petitioner, being aggrieved by the said rejection of its claim, has approached this Court by way of the present writ petition. It is the contention of the petitioner that the petitioner has already been recognised as an Enterprise falling within the ambit of the Act and the claim was made was for recovery of consideration, payable on account of sale of plant and machinery, which are goods.

5. Sri S. Ram Babu, learned counsel for the petitioner, submits that the endorsement of 23.09.2021 requires to be set aside and seeks a direction from this Court to the 2nd respondent to consider the application of the petitioner bearing No.UDYAM-AP-06-0004450/S/00001, dated 06.02.2021. He contends that once the petitioner has been recognised as an Enterprise falling within the ambit of the Act, the petitioner would be entitled for the benefit of the Act and the 2nd respondent would have to consider any claim made by the petitioner for recovery of money due on account of sale of goods or supply of services.

6. In the present case, the petitioner is seeking recovery of money payable on account of the sale of goods, viz., plant and machinery of the petitioner. He further contends that the view taken by the 2nd respondent that sale of plant and machinery is a trading activity and would not fall within the ambit of the provisions of the Act, is clearly incorrect. He submits that this issue had been considered by a learned Single Judge of the Hon"ble High Court of Bombay in the case of **Shah & Parikh, Engineers & Contractors vs. Urmi Trenchless Technology Pvt. Ltd., and Ors**.[1]

7. The 3rd respondent has filed a counter affidavit raising various disputes regarding the liability of the 3rd respondent to make any payment. The 3rd respondent would also submit that the relief sought by the petitioner cannot be granted, as there is an effective alternative remedy available under the agreement dated 14.06.2018. The 3rd respondent contends that Clause-38 of the said agreement provides for reference of all disputes to arbitration and any claim of the petitioner would have to be decided by an arbitrator appointed under the provisions of the Agreement dated 14.06.2018.

8. Sri G. Elisha, learned counsel representing Sri Ashok Returi, learned counsel appearing for the 3rd respondent, would submit that in view of Clause-38 of the Agreement dated 14.06.2018, the claimant cannot approach the 3rd respondent for any claim, and any resolution of disputes between the petitioner and the 3rd respondent would have to be carried out only by way of arbitration. He would further submit that the view taken by the 2nd respondent does not require any interference as the said view is correct. He would submit that the sale of plant and machinery is not a manufacturing activity or supply of services and as such does not fall within the ambit of the provisions allowing such claims to be filed under the Act.

Consideration of the Court:

9. This Court, at the outset, would place on record that this Court is not going into the merits or demerits of the respective claims of claimant and the 3rd respondent. The same would have to be adjudicated upon by the authority, which would be competent to adjudicate on such claims.

10. The issue in the present writ petition revolves around the interpretation of the provisions of the Act. The Act had been enacted for facilitating the permission, development and enhancing competitiveness of Micro, Small and Medium Enterprises and for matters connected therewith and incidental thereto.

11. The scheme of the Act is as follows:

The Act would apply to Micro, Small and Medium Organisations, which answer the definition of “Enterprise” contained in Section 2(e), which is as follows:

Section 2(e): “enterprise” means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 or engaged in providing or rendering of any service or services.”

12. Any organisation answering this description would be categorised as a Micro, Small or Medium Enterprise, depending upon the quantum of investment made in the enterprise. Any enterprise, which seeks the benefit of this Act, would have to file a Memorandum of the enterprise before such authority, as may be specified by the State Government or Central Government. Once the said Memorandum is registered with the said authority, the enterprise would be entitled to the benefits of the Act.

[1] 2019 SCC OnLine Bom 340

13. Any enterprise, which has not been paid its dues, on account of supply of goods or services to any buyer, would be entitled to approach, under Section 18 of the Act, the Micro and Small Enterprises Facilitation Council for recovery of its dues along with interest specified in Section 17 of the Act. When any application is made under Section 18 of the Act, the Facilitation Council shall either itself conduct conciliation or seek assistance of any institution or centre to carry out such conciliation. In the event of the conciliation not being successful, the Council can either take up the dispute for arbitration or refer it to any institution or centre for such arbitration and the provisions of Arbitration and Conciliation Act, 1996 shall then apply to the dispute as if the arbitration was in pursuance of the arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act.

14. In the present case, the 3rd respondent contends that, in view of the arbitration clause in Clause-38 of the agreement dated 14.06.2018, the matter should be referred to an arbitrator mentioned in the said clause and the same cannot be referred to the 2nd respondent under the provisions of the Act. The provisions of Clause-38 and the provisions of Section 18 of the Act require the dispute between the petitioner and the 3rd respondent should be referred to arbitration. The only question is whether the arbitrator is to be appointed under the terms of the agreement dated 14.06.2018 or in accordance with the provisions of Section 18 of the Act.

15. Section 18 of the Act reads as follows:

Section 18 – (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 shall apply to such a dispute as if the conciliation was initiated under Part III of the 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 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 the 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.

16. Section 7 of the Arbitration and Conciliation Act, 1996 requires an arbitral agreement in writing to be available before any dispute can be referred to arbitration. In the present case such an arbitral agreement is available in Clause-38 of the agreement dated 14.06.2018. However, Section 18 (3) of the Act provides that the arbitration conducted by the Facilitation Council shall be treated as arbitration, as if the said dispute was referred under an arbitration agreement referred to in subsection (1) of Section 7 of the Arbitration and Conciliation Act, 1996. Further, Section 18(4), which starts with a non-obstante clause states that the Facilitation Council shall have jurisdiction to act as

arbitrator in any dispute between a supplier located with its jurisdiction and buyer located anywhere in India.

17. A conjoint reading of these provision would make it amply clear that a reference to the Facilitation Council for conciliation and subsequent arbitration if required, is not barred on account of the presence of an arbitration agreement providing for a different method of constituting an Arbitral Tribunal. In the circumstances, the contention that Clause-38 of the Agreement dated 14.06.2018 would bar reference of the dispute to the Facilitation Council, has to be rejected.

18. I am fortified by the judgment of the Hon"ble Supreme Court in **Secur Industries Limited vs. M/s. Godrej and Boyce Mfg. Co. Ltd., and Anr.**,[1], which had dealt with Section 6 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, which has now been replaced by the present Act.

19. The 2nd respondent-Council had taken, the view that even though the petitioner was registered under the Act, the dispute cannot be taken up by the 2nd respondent on the ground that the transaction of sale of plant and machinery, is a trading activity. This view is assailed by the petitioner on the basis of a judgment of a learned Single Judge of the Hon"ble High Court at Bombay.

20. In **Shah & Parikh, Engineers & Contractors vs. Urmi Trenchless Technology Pvt. Ltd., and Ors**., the learned Single Judge while dealing with a similar issue, at paragraph-22 had held as follows:

"22. As regards the other defence is concerned, defendant no. 1 is admittedly a small enterprise registered under the MSME Act. The registration certificate is annexed at Exhibit "1" to the affidavit in support of notice of motion (L) no. 2266 of 2018 filed by defendant no. 1 under Section 8 of the Arbitration Act. The Registration Certificate is for "horizontal boring", which is nothing but drilling activity. Plaintiff in the course of arguments did not dispute that defendant no. 1 was registered under the MSME Act, but merely sought to contend that the work forming the subject matter of the contract between the parties was not the same activity for which defendant no. 1 had been registered. However, as stated above, this is misconceived as "horizontal boring" is in fact a drilling activity. Further, there is nothing in the MSME Act which provides that the registration for a particular activity will render an enterprise liable not to be regarded as a micro, small or medium enterprise for any other activity. Once registered, the status of the enterprise is that of a registered enterprise under the MSME Act and all the provisions of the MSME Act has to apply with full force

21. I am in respectful agreement with the said principle enunciated by the learned Single Judge of the Hon"ble High Court of Bombay.

22. In that view of the matter, the writ petition is allowed directing the 2nd respondent to consider the claim of the petitioner in accordance with law and after proper notice and adequate opportunity being afforded to both the petitioner and the 3rd respondent. There shall be no order as to costs.

As a sequel, pending miscellaneous petitions, if any, shall stand closed.

[1] AIR 2004 SC 1766