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

% *Date of Decision: 18.07.2022*

\+ **FAO (COMM) 117/2021**

BHARAT HEAVY ELECTRICALS LIMITED (BHEL) ..... Appellant

Through: Mr Ashim Vachher and Mr Vaibhav Dabas, Advocates.

versus

BHATIA ENGINEERING COMPANY ..... Respondent

Through: Dr Amit George, Mr Swaroop George, Mr P. Harold, Mr Amol Acharya, Mr Rayadurgam Bharat and Mr Arkaneil Bhaumik, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. ***(ORAL)***

CM No. 34754/2021

1. This is an application filed by the appellant seeking condonation of delay in filing the present appeal.

2. Dr Amit George, learned counsel appearing for the respondent, fairly states that in view of the orders passed by the Supreme Court in ***Suo Motu Writ Petition (Civil) No.3/2020: Re: Cognizance for Extension of Limitation***, the limitation stands condoned and he is not opposing the present application.

3. In view of the above, the application is allowed.

4. Issue notice.

5. The learned counsel appearing for the respondent accepts notice.

6. The appellant has filed the present appeal impugning an order dated 16.12.2019 (hereafter '**the impugned order**') passed by the learned Commercial Court in ***Arb. No. 21058/2016*** captioned "***M/s Bhatia Engineering Company v. M/s BHEL India***".

7. By the impugned order, the learned Commercial Court has allowed the respondent's application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') and set aside the arbitral award dated 29.06.2016 (hereafter '**the impugned award**') rendered by an Arbitral Tribunal comprising of a Sole Arbitrator (hereafter '**the Arbitral Tribunal**').

8. The dispute between the parties relates to payment of three items supplied by the respondent to the appellant. The appellant had placed Purchase Orders upon the respondent for supply of three totally different independent items - Y Strainers, Duplex Strainers and Conical Strainers for its Bhilai Project by a Purchase Order No. PW:PE:MM-PG-II:BHL:P-380/06 dated 20.03.2007 for Duplex Strainers and Conical Strainers and Purchase Order No. PW:PE:MM-PG-II.BHL:P-381/06 dated 13.03.2007 for Y Strainers in March 2007.

9. The respondent had raised invoices for supply of the said items. The appellant had made certain payments against the said invoices;

however, the same were not for the entire amount. In addition, the respondent claimed that the payments were delayed. The respondent claimed that it had followed up with the appellant for release of the balance payments; however, the appellant had failed and neglected to clear the same.

10. In the aforesaid context, the respondent made a reference to the Micro and Small Enterprise Facilitation Council (hereafter '**the MSEFC**') for resolution of the disputes under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereafter '**the MSMED Act**') on 05.06.2013. The dispute was not resolved by conciliation. In terms of Section 18(3) of the MSMED Act, the MSEFC referred the parties to arbitration under the aegis of the Delhi International Arbitration and Conciliation Centre. Before the Arbitral Tribunal, the respondent claimed the balance unpaid amount, which according to it remained unpaid, along with interest at the rate of 27% per annum compounded monthly. The respondent claimed that it is entitled to such interest in terms of Sections 15 and 16 of the MSMED Act.

11. The Arbitral Tribunal found that the appellant had unjustifiably withheld the amount due to the respondent and awarded a sum of ₹1,60,000/-, in favour of the respondent. The Arbitral Tribunal further awarded interest at the rate of 12% per annum from 07.10.2009 till the date of payment, in the event the amount awarded was not paid within a period of ninety days from the date of the award.

12. The respondent had assailed the impugned award to the limited

extent that the Arbitral Tribunal had not allowed the respondent's claim for interest, in terms of Section 16 of the MSMED Act. It is the respondent's case that in terms of Section 16 of the MSMED Act, it was entitled to interest at the rate of 27% per annum. Although the Arbitral Tribunal had accepted that the respondent was a 'Micro Enterprise' within the meaning of Section 2(h) of the MSMED Act, it had not allowed the respondent's claim for interest at 27% per annum but had limited it to simple interest at the rate of 12%. Aggrieved by the decision of the Arbitral Tribunal to confine the interest, the respondent had filed an application under Section 34 of the A&C Act to set aside the impugned award to the said extent.

13. The learned Commercial Court had accepted the aforesaid challenge. The court found that the impugned award was rendered by the Arbitral Tribunal in regard of the positions of the MSMED Act and the respondent's entitlement to interest there under. Accordingly, it had set aside the impugned award.

14. Mr Vachher, learned counsel appearing for the appellant, assailed the impugned order, essentially, on two fronts. First, he submits that the learned Commercial Court has erred in not appreciating that the respondent was not a Micro Enterprise at the material time and therefore, was not entitled to interest in terms of Section 16 of the MSMED Act.

15. Second, he states that the learned Commercial Court has set aside the impugned award instead of remanding the matter; and therefore, the disputes do not survive.

16. He submits that the dispute between the parties relates to an agreement dated 14.09.2006. The respondent was not registered under the MSMED Act at the material time; it was registered as a Micro Enterprise under the MSMED Act subsequently by a memorandum dated 15.01.2007. He referred to the decision of the Supreme Court in ***Silpi Industries etc. v. Kerala State Road Transport Corporation and Anr***.: ***2021 SCC OnLine SC 439*** and, on the strength of the said decision, submitted that since the respondent was not registered under the MSMED Act at the time when the parties had entered into the agreement (that is, on 14.09.2006), the MSMED Act was inapplicable.

17. This Court finds the aforesaid contention unpersuasive.

18. First of all, the Arbitral Tribunal had rejected the appellant's contention that the MSMED Act was not applicable. It is apparent that the appellant had accepted the finding that the respondent, being a Micro Enterprise, was entitled to the benefit under the MSMED Act. The arbitral proceedings, which culminated in the impugned award, had commenced by virtue of a reference under the MSMED Act. The MSEFC had referred the disputes between the parties to the Delhi International Arbitration Centre, in terms of Section 18(3) of the MSMED Act. The appellant had not challenged the jurisdiction of the Council to make the reference. It did raise objections regarding the applicability of the MSMED Act before the Arbitral Tribunal but did not prevail. The appellant did not challenge the impugned award.

19. Secondly, the appellant had placed the purchase orders after the respondent was duly registered as a Micro Enterprise under the

MSMED Act. The supplies were made thereafter. Thus, it difficult to accept that the appellant is not entitled to the benefit of the MSMED Act. The decision in the case of ***Silpi Industries etc. v. Kerala State Road Transport Corporation and Anr.*** (*supra*) does not assist the appellant. The respondent was registered under the MSMED Act from 15.01.2007 and its claims are in respect of the invoices that were raised after the respondent was registered under the MSMED Act. The contract between the parties was thus, performed by the respondent as a duly registered Micro Enterprise. The respondent was, thus, a Supplier within the meaning of Section 2(n) of the MSMED Act at the time of performance of the contract.

20. In ***Silpi Industries etc. v. Kerala State Road Transport Corporation and Anr.*** (*supra*), the Supreme Court had found that registration under the MSMED Act, at the time performance of the contract, was material. While distinguishing the judgment of this Court in ***GE T&D India Ltd. v. Reliable Engineering Projects and Marketing: 2017 SCC OnLine 6978***, the Supreme Court had held as under:

> "26. Though the appellant claims the benefit of provisions under MSMED Act, on the ground that the appellant was also supplying as on the date of making the claim, as provided under Section 8 of the MSMED Act, but same is not based on any acceptable material. The appellant, in support of its case placed reliance on a judgment of the Delhi High Court in the case of *GE T&D India Ltd. v. Reliable Engineering Projects and Marketing*[5], 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. v. Assam State Electricity Board*[6] has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act. There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of appellant as the unit under MSMED Act, 2006. By taking recourse to filing memorandum under sub-section (1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which appellant entered into contract with the respondent. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of MSMED Act 2006, by submitting a memorandum to obtain registration

subsequent to entering into the contract and supply of goods and services…."

21. Thirdly, it was necessary for the Arbitral Tribunal to consider the question whether the respondent was entitled to interest in terms of Sections 15 and 16 of the MSMED Act. The respondent had founded its claim on the said statutory provisions. The Arbitral Tribunal had rejected the appellant's contention that the MSMED Act was inapplicable. Having held that the MSMED Act was applicable, it was incumbent upon the Arbitral Tribunal to indicate its reasons for denying the benefit under Sections 15 and 16 of the MSMED Act to the respondent. However, a plain reading of the impugned award indicates no reason for not accepting the respondent's claim.

22. Sections 15 and 16 of the MSMED Act are relevant and set out below:-

> "15. **Liability of buyer to make payment. –** Where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:
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> Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.
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> 16. **Date from which and rate at which interest is payable. –** Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or

> in any law for the time being in force, be liable to pay compound interest with monthly *rests* to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank."

23. In view of the above, this Court finds no infirmity with the decision of the learned Commercial Court in holding that the Arbitral Tribunal had not considered the mandatory provisions of the MSMED Act, insofar as the award of interest is concerned.

24. Insofar as the appellant's contention that the learned Commercial Court ought to have remanded the matter to the Arbitral Tribunal is concerned, the same is unmerited. The question whether the court can remand the matter to an arbitral tribunal under Section 34 of the A&C Act is no longer *res integra.* In ***Puri Construction Pvt. Ltd. &Ors. v. Larsen & Toubro Ltd. & Anr.: 2015 SCC OnLine Del 9126***, a Division Bench of this Court had noted the different views expressed by various courts and following the decision of the Supreme Court in ***McDermott International Inc. v. Burn Standard Co. Ltd.: (2006) 11 SCC 181***, it held that the same was impermissible. The Supreme Court has, in a recent decision in ***NHAI v. Hakeem & Anr.: (2021) 9 SCC 1***, referred to the decision in ***Puri Construction Pvt. Ltd. &Ors. v. Larsen & Toubro Ltd. & Anr.*** (*supra*) as instructive and affirmed the said view. In terms of Section 34 of the A&C Act, a person has a right to apply for setting aside an arbitral award on certain specified grounds. The scope of limited right, and corresponding limited power, does not permit that the matter be

remanded to the arbitrator except in terms of Section 34(4) of the A&C Act, to remedy a curable defect. Section 34(4) of the A&C Act enables the court to adjourn the proceedings to enable an arbitral tribunal to resume the proceedings to cure a curable defect. However, it is well settled that an order under Section 34(4) of the A&C Act cannot be passed except on an application moved by the concerned party [See: ***Kinnari Mullick and Anr. v. Ghanshyam Das Damani: (2018) 11 SCC 328***].

25. In this case, the failure to consider the respondent's case is not a curable defect. However, even if it is assumed that such a defect could be cured, none of the parties had filed an application under Section 34(4) of the A&C Act. Thus, the contention that the learned Commercial Court has erred in not remanding the matter to the Arbitral Tribunal, cannot be accepted.

26. The appeal is unmerited and, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JULY 18, 2022
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