IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 02.09.2019

\+ **W.P.(C) 9670/2016 & CM APPL. 38709/2016 (stay)**

THE CHIEF GENERAL MANAGER, (CONTRACTS), M/S NEYVELI LIGNITE CORPORATION LIMITED ..... Petitioner

versus

DRIPLEX WATER ENGINEERING LTD. & ANR ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Anil Nag, Advocate.
For the Respondents : Mr Vikram Nandrajog and Mr Sheetesh Khanna, Advocates for R1.
: Ms Tara Narula, Advocate for R2.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner, M/s Neyveli Lignite Corporation Limited (hereafter 'Neyveli') has filed the present petition impugning an order dated 16.06.2016 passed by The Micro and Small Enterprises Facilitation Council (hereafter 'MSEF Council'). MSEF Council concluded that the parties (Neyveli and respondent no.1) were not interested in amicably resolving their disputes and consequently, by the said order, MSEF Council terminated the conciliation proceedings and referred the matter under Section 18(3) of The Micro, Small and

Medium Enterprises Development Act, 2006 (hereafter 'MSMED Act') for arbitration under the aegis of Delhi International Arbitration Centre.

2. Neyveli contends that the impugned order is without any jurisdiction as respondent no.1 (hereafter 'Driplex') is not a small enterprise and therefore, MSEF Council lacked the jurisdiction to make a reference under Section 18 of the MSMED Act. Neyveli also assails the impugned order on the ground that MSEF Council had failed to consider the preliminary objections raised by it.

3. The relevant facts necessary to address the aforesaid controversy are set out below:-

3.1 Neyveli invited tenders for the work pertaining to Water Treatment Plant and Effluent Treatment Plant in connection with the setting up of 2X250 MW Thermal Power Stations. One of the eligibility conditions specified in the said notice inviting tenders was that the bidder must have a turnover of over ₹11 Crores. Neyveli states that at the time of submitting its bid, Driplex claimed that it had a turnover of ₹20.09 Crores in the year 2001-2002; ₹20.36 Crores in the year 2002-2003; and ₹23.51 Crores in the year 2003-2004.

3.2 Neyveli entered into a contract with Driplex on 25.09.2006 (hereafter 'the Contract') for the work pertaining to water treatment and effluent treatment plant at the said thermal power stations. In terms of the Contract, an amount of about ₹63 Crores was payable to Driplex.

3.3 Neyveli states that Driplex was unable to complete the work within the stipulated period of time. Consequently, Neyveli withheld the performance bank guarantees amounting to ₹6.30 Crores against the total contractual value.

3.4 Aggrieved by the same, Driplex filed an application dated 29.10.2013 with MSEF Council, claiming an amount of ₹34.80 Crores, including interest of an amount of ₹20.15 Crores.

3.5 Neyveli filed its reply to the aforementioned application on 28.12.2015. It, *inter alia*, contended that the MSEF Council lacked the jurisdiction to entertain the reference as Driplex had registered with the Commissioner of Industries on 09.12.2011, which was after the parties had entered into the Contract. Neyveli claimed that Driplex was not a small enterprise because the value of the Contract was ₹63 Crores and in order to qualify as a 'small enterprise' under the MSMED Act, its investment in equipment was required to be more than ₹10 Lakhs but less than ₹2 Crores. According to Neyveli, Driplex could not be classified as a 'small enterprise' as it did not satisfy the criteria as set out in Section 7(1)(b)(ii) of the MSMED Act. Consequently, its reference under Section 18 of the MSMED Act was required to be rejected.

3.6 In its rejoinder dated 19.02.2016, Driplex claimed that it was registered as a 'Small Scale Industrial Unit' with the Department of Industries, Haryana vide a certificate dated 08.05.1981. It also pointed out that although it was registered as a Small Enterprise on

09.12.2011, the Registration Certificate clearly indicated that Driplex was in existence since 27.08.1974. Neyveli countered the said contention by submitting that Driplex had not disclosed that it was registered as a Small Scale Unit with the Department of Industries Haryana on the date of entering into the Contract.

3.7 On 29.02.2016, Neyveli also filed an additional affidavit enclosing therewith the Schedule of Assets of the petitioner for the financial years ending 31.03.2010 and 31.03.2011. Neyveli claimed that the said document established that the Driplex's investment in equipment was more than ₹2 Crores and therefore, it could not be classified as a small enterprise.

3.8 On 16.06.2016, the MSEF Council passed an order – which has been impugned herein – under Sub-section (3) of Section 18 of the MSMED Act, referring the disputes for arbitration under the aegis of the Delhi International Arbitration Centre (DIAC).

Submissions

4. Mr Anil Nag, learned counsel appearing for Neyveli advanced submissions on three fronts. First, he contended that the MSMED Act was enacted in the year 2006, which was after the parties had entered into a contract. He submitted that the MSMED Act created a liability to pay compound interest on the amount payable to a supplier and the imposition of such liability could only be prospective. He contended that the same would not be applicable for contracts entered into prior to the MSMED Act coming into force. Second, he submitted that

Driplex had claimed that it had a turnover of over ₹20 crores and therefore, it did not stand to reason that Driplex's investment in equipment was less than ₹2 crores. He submitted that at the time of filing the Memorandum under Section 8 of the MSMED Act, Driplex was executing several contracts, including the Contract of a value of ₹63 crores awarded by Neyveli. In view of the above, it is not possible to accept that Driplex was a small enterprise. In addition, he also submitted that the schedule to the final accounts for the financial years ending 31.03.2010 and 31.03.2011, indicated that its investment in equipment was ₹2.61 crores, which was beyond the limit as specified under Sub-Section(1)(b)(iii) of Section 7 of the MSMED Act. Lastly, he submitted that MSEF Council had failed to consider the contentions advanced by Neyveli and thus, the impugned order is liable to be set aside.

5. Mr Vikram Nandrajog, learned counsel appearing for Driplex countered the aforesaid submissions. He submitted that the contention that the MSMED Act was not applicable to the Contract was neither raised before MSEF Council nor in the present petition. He contended that the MSMED Act did not create any fresh liability regarding payment of interest, as The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 provided that the buyers were liable to pay compound interest at one-and-half times the prime lending rate, charged by the State Bank of India Limited on any outstanding payment. He also stated that the Contract was subsisting and therefore, the decision of MSEF Council to refer the

disputes to arbitration under the aegis of DIAC, could not be challenged. He relied on the decision of this Court in ***GE T&D India Limited v. Reliable Engineering Projects and Marketing: (2017) 238 DLT 79*** in support of his contention. He also referred to the decision of the Division Bench of the Allahabad High Court in ***Hameed Leather Finishers v. Associated Chemical Industries Kanpur Pvt. Ltd.: (2014) 102 ALR 771***.

Reasons and Conclusion

6. At the outset, it is relevant to note that there is no dispute that Driplex had filed a Memorandum under Section 8 of the MSMED Act and an acknowledgement, in the prescribed form, was issued to Driplex by the Commissioner of Industries, Government of NCT of Delhi. The said Memorandum had also noted that Driplex had commenced providing services on 27.08.1974. Its investment in plant and machinery was noted at ₹86 lakhs. It is relevant to note that Neyveli has not challenged the said Memorandum filed by Driplex in any proceedings.

7. Before MSEF Council Neyveli had, essentially, raised five preliminary objections. First, it had claimed that MSEF Council lacked the jurisdiction to entertain the reference as the Contract (Letter of Award) was issued to Driplex on 29.12.2005 and Driplex had claimed registration as "Small Scale Unit w.e.f. 09.12.2011". Second, that Driplex was not conferred the status of a Small Scale Industry/Enterprise as there is no order of a competent authority in this regard. It was contended that merely filing a Memorandum was not

sufficient for establishing such a claim. Third, that Driplex was not a small enterprise since its turn over was more than ₹11 crores in the year 2005 and it did not stand to reason that its investment in equipment did not exceed ₹2 crores. Neyveli contended that such an enterprise could not handle a contract worth ₹63 crores as awarded to it. Fourth, it was stated that the reference was contrary to the terms of the Contract which required Driplex to, in the first instance, refer the disputes to Neyveli for resolution within a period of thirty days. Neyveli stated that the reference made by Driplex to MSEF Council was contrary to the terms of the Contract. Fifth, it submitted that since Driplex was not a small enterprise, it was required to file a claim before a Civil Court.

8. The contention whether Driplex can still claim benefit under the MSMED Act, notwithstanding that it had filed its Memorandum after entering into the Contract with Neyveli, is squarely covered by the decision of a coordinate Bench of this Court in ***GE T & D India Limited v. Reliable Engineering Projects and Marketing*** (*supra*). In that case, the Court observed that:

> "A unit that is not registered as a supplier does not cease to be one. The registration as a supplier under the MSMED Act makes the availing of the benefit much easier."

9. The Court further held that a supplier, which was already in existence at the time of the commencement of the MSMED Act but had not obtained the registration, could do so even beyond the period of one hundred and eighty days. In that case, the respondent (Reliable

Engineering Projects and Marketing) had obtained a registration on 04.04.2012, but had also specified that its activities had commenced much prior to the said date. It is relevant to note that in that case, the disputes between the parties arose in respect of a purchase order dated 08.09.2009, however, the supplier continued to make supplies even thereafter. In that context, the Court held that the supplier could take recourse to the beneficial provisions of the MSMED Act, even in respect of the first purchase order dated 08.09.2009. This was, notwithstanding, that the Memorandum under Section 8 of the MSMED Act was registered on 04.04.2012. In the present case, Driplex obtained the registration of its Memorandum under Section 8 on 09.12.2011; however, the said registration clearly indicates that Driplex had commenced services on 27.08.1974. Thus, notwithstanding that Driplex had filed the Memorandum under section 8 of the MSMED Act after entering into the Contract with Neyveli it could, nonetheless, seek recourse to the beneficial provisions of the MSMED Act.

10. The contention that the turnover of Driplex exceeded several Crores and therefore, it could not be classified as a small enterprise, is plainly unmerited. Section 7 (1) of the MSMED Act is relevant and is set out below:-

> "**7. Classification of enterprises.—**
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> (1) Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central Government may, for the purposes of this Act, by notification and having regard to

the provisions of sub-sections (4) and (5), classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, association of persons, co-operative society, partnership firm, company or undertaking, by whatever name called,—

(a) in the case of the enterprises 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), as—

(i) a micro enterprise, where the investment in plant and machinery does not exceed twenty-five lakh rupees;

(ii) a small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or

(iii) a medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;

(b) in the case of the enterprises engaged in providing or rendering of services, as—

(i) a micro enterprise, where the investment in equipment does not exceed ten lakh rupees;

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

(iii) a medium enterprise, where the investment in equipment is more than two

> crore rupees but does not exceed five crore rupees.
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> 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.
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> 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. A plain reading of Sub-Clause (ii) of Clause (b) of Sub-Section (1) of Section 7 of the MSMED Act indicates that an enterprise, which is engaged in providing or rendering services, would be classified as a small enterprise if its investment and equipment is more than ₹10 Lakhs but does not exceed ₹2 Crores. It is, thus, seen that the criterion of turnover is wholly irrelevant for the classification of an enterprise. In the present case, Driplex had disclosed its investment and equipment at ₹86 lakhs, which was noted in the acknowledgment issued by the Government of NCT of Delhi. In the additional affidavit filed on behalf of Neyveli, it had relied upon the Schedule of Assets annexed with the final accounts of Driplex and on the strength of the said Schedule of Assets, asserted that the investment of Driplex in equipment as on 31.03.2011 was ₹2.61 crores.

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.

14. The contention that Driplex could not file a reference under Section 18 of the MSMED Act without seeking an amicable resolution under the terms of the Contract, is unpersuasive. Section 24 of the MSMED Act contains a *non-obstante* provision, which expressly provides that the provisions of Section 15 to 23 of the MSMED Act

would have an overriding effect, notwithstanding anything inconsistent in any other law for the time being in force. Therefore, Driplex could not be precluded from making a reference. Thus, the reference made by Driplex could not be rejected on the ground that it had not sought an amicable resolution prior to making such reference.

15. The contention that MSEF Council was required to examine the preliminary objections regarding its jurisdiction to entertain a reference under Section 18 of the Act, is merited. However, this Court does not consider it apposite to remand the matter since the counsel for the parties have advanced contentions with regard to the preliminary objections and invited this Court to consider the same. The said objections have been considered and therefore, little purpose would be served in remanding the matter to the MSEF Council.

16. In view of the above, the contention that MSEF Council did not have the jurisdiction to entertain the reference is unmerited and is, accordingly, rejected.

17. The petition is, accordingly, dismissed. The pending application is also dismissed.

VIBHU BAKHRU, J

SEPTEMBER 02, 2019
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