



**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

**DATED THIS THE 30<sup>TH</sup> DAY OF JANUARY, 2024**

**BEFORE**

**THE HON'BLE MR JUSTICE M.NAGAPRASANNA**

**R**

**WRIT PETITION NO. 5509 OF 2023 (GM-RES)**

**BETWEEN:**

M/S. NORTHROOF VENTURES PRIVATE LIMITED  
(EARLIER KNOWN AS M/S. NITESH HOUSING  
DEVELOPERS PVT. LTD.)  
A COMPANY INCORPORATED UNDER THE PROVISIONS OF  
THE COMPANIES ACT, 1956  
HAVING ITS REGISTERED OFFICE AT:  
110, B WING, ANDREWS BUILDING  
LEVEL 1, M.G.ROAD  
BENGALURU – 560 001  
REP. BY ITS AUTHORISED SIGNATORY  
MR. PRADEEP K. P.,  
SPECIAL OFFICER LEGAL

...PETITIONER

(BY SRI. VIKRAM UNNI RAJAGOPAL, ADVOCATE)

**AND:**

1. M/S. XYNC STRUCTURAL SOLUTIONS PVT. LTD.,  
A COMPANY INCORPORATED UNDER THE PROVISIONS OF  
THE COMPANIES ACT, 1956  
HAVING ITS REGISTERED OFFICE AT:  
NO.17-201 UNIT, 2<sup>ND</sup> FLOOR  
SAI ANJALI BUILDING  
CHINNASWAMY MUDLIYAR ROAD  
TASKER TOWN, SHIVAJINAGAR  
BENGALURU – 560 051  
EARLIER AT NO.134, MBC CHAMBERS  
401, 4<sup>TH</sup> FLOOR, INFANTRY ROAD  
BENGALURU – 560 001.  
REP. BY ITS DIRECTOR AND  
AUTHORISED SIGNATORY  
MR. NAYEEM UR RAHMAN





2. HON'BLE MR. KHAN LIYAKHAT ALI KHAN  
SOLE ARBITRATOR  
ARBITRATION AND CONCILIATION CENTRE, BENGALURU  
(DOMESTIC AND INTERNATIONAL)  
'KHANIJA BHAVAN', NO.49, 3<sup>RD</sup> FLOOR  
EAST WING, RACE COURSE ROAD  
BENGALURU – 560 001.

...RESPONDENTS

(BY SRI. AKASH R. RAO, ADV. FOR R1;  
NOTICE TO R-2 IS DISPENSED WITH V/O. DATED 24.03.2023)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE ORDERS DTD 07/01/2023 (ANNEXURE-M) AND 22/02/2023 (ANNEXURE-N) PASSED BY R-2 IN AC.NO.222/2022 AND QUASH CONSEQUENTLY ALL FURTHER PROCEEDINGS IN AC.NO.222/2022.

THIS WRIT PETITION, COMING ON FOR ORDERS, THIS DAY, THE COURT MADE THE FOLLOWING:

### **ORDER**

The petitioner is before this Court calling in question orders dated 07.01.2023 and 22.02.2023 passed by the second respondent – Arbitrator rejecting the application filed by the petitioner to decide the issue of jurisdiction tacit at the outset.

2. Heard the learned counsel Sri.Vikram Unni Rajagopal, appearing for the petitioner and the learned counsel Sri.Akash R. Rao, appearing for respondent No.1.

3. The petitioner claims to be a company incorporated under the provisions of the Companies Act, 1956. The first



respondent and the petitioner enter into a contract, pursuant to which, the petitioner issued a work order to the first respondent for painting and scaffolding on 10.05.2018. An invoice of Rs.6,04,870/- is also raised on 22.05.2018 for payment of the said amount. Therefore, the issuance of the work order and execution of work begins on 10.05.2018 and the invoice for such work is raised on 22.05.2018. After the aforesaid events, the first respondent registers itself to be a Micro Enterprise under the Micro, Small And Medium Enterprises Development Act, 2006 (for short 'the MSME Act'). Long thereafter, with regard to certain payment, dispute arose between the petitioner and the first respondent. The first respondent then files an application before the Micro and Small Enterprises Facilitation Council (for short 'the Council') claiming a sum of Rs.8,38,731/-. During the pendency of the proceedings before the Council, the first respondent gets the certificate of registration as Micro Enterprise under the Act on 16.07.2021. The Council initiates conciliation proceedings under Section 18 of the Act and when the dispute did not get resolved, recorded failure of conciliation and referred the matter to Arbitration in terms of its order dated 03.02.2022.



4. The first respondent files a arbitration petition in A.C.No.222/2022, by then, claiming a sum of Rs.19,08,538/-. The petitioner files its objections before the arbitral Tribunal to the claim petition on 25.11.2022. Long thereafter, on 07.01.2023, the petitioner files an application under Order 14 Rule 2(2) read with Section 151 of the CPC, to try the issue of jurisdiction as a preliminary issue. No order is passed on the said application. Arbitration proceedings were posted for proceedings on the issue already framed. It is then, the petitioner knocks at the doors of this Court in the subject petition.

5. Learned counsel appearing for the petitioner would contend that the Arbitral Tribunal has no jurisdiction to entertain the petition, as it is referred to, by the Council. When Council itself had no jurisdiction to entertain the petition, as the registration of the first respondent as a Micro Enterprise takes place long after the execution of work was over and invoice had been raised, between the two. Learned counsel would submit that only because the registration had taken place after all the transactions between the two were over, the Council had no



jurisdiction to consider the dispute between the two. It was open for the first respondent to approach any competent Court of law agitating his grievance. He would place reliance upon the following judgments of the Apex Court:

- i) ***Vaishno enterprises vs. Hamilton Medical AG and Another***<sup>1</sup>
- ii) ***M/S. Nitesh Estates Ltd., vs. Micro and Small Enterprises Facilitation Council of Haryana & Ors.***<sup>2</sup>

6. Learned counsel appearing for the first respondent would submit that the petitioner at no point in time had raised any objection with regard to the Council having no jurisdiction in the matter. He has acquiesced his rights by continuing the proceeding and at the fag end of the proceeding before the Arbitral Tribunal, has knocked at the doors of this Court and would seek dismissal of the petition.

7. Insofar as the judgments relied on by the learned counsel for the petitioner, the learned counsel for respondent No.1 would refute the same on the score that those were cases

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<sup>1</sup> 2022 SCC Online SC 355

<sup>2</sup> 2022 SCC Online SC 1198



where on issuance of a notice itself were under challenge by those petitioners. The petitioner having accepted the order of the Council and the proceedings before the arbitral Tribunal having gone on for a long time, cannot now turn around and contend that the proceedings are without jurisdiction.

8. I have given my anxious consideration to the contentions of respective learned counsel and have perused the material on record.

9. The only issue that falls for consideration is, ***whether the Micro and Small Enterprises Facilitation Council had the jurisdiction to entertain the application/petition of the first respondent; conciliate on it and refer the matter to the Arbitral Tribunal?***

10. The afore-narrated facts are not in dispute, they in fact, lie in a narrow compass. The petitioner and the first respondent enter into an agreement for certain work to be done by the first respondent. The work order was issued on 10.05.2018. The invoice to the work order was raised on



22.05.2018. The first respondent had not even submitted an application seeking registration of his firm as a Micro, Small or Medium Enterprise, when the aforesaid transactions took place. For consideration of a Unit as MSME, registration under the Act is imperative. Section 8 of the Act reads as follows:

**"Section 8. Memorandum of micro, small and medium enterprises.**

*(1) Any person who intends to establish,--*

*(a) a micro or small enterprise, may, at his discretion; or*

*(b) a medium enterprise engaged in providing or rendering of services may, at his discretion; or*

***(c) a medium enterprise 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), shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):***

*Provided that any person who, before the commencement of this Act, established--*

*(a) a small scale industry and obtained a registration certificate, may, at his discretion; and*

*(b) an industry 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), having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in pursuance of the notification of*



*the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O.477(E), dated the 25<sup>th</sup> July, 1991 filed an Industrial Entrepreneur's Memorandum,*

*shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.*

*(2) The form of the memorandum, the procedure of its filing and other matters incidental thereto shall be such as may be notified by the Central Government after obtaining the recommendations of the Advisory Committee in this behalf.*

*(3) The authority with which the memorandum shall be filed by a medium enterprise shall be such as may be specified by notification, by the Central Government.*

*(4) The State Government shall, by notification, specify the authority with which a micro or small enterprise may file the memorandum.*

*(5) The authorities specified under sub-sections (3) and (4) shall follow, for the purposes of this section, the procedure notified by the Central Government under sub-section (2)."*

Section 8 of the Act mandates that any person who intends to establish or has established, to come within the ambit of the Act should file a memorandum of micro, small or as the case may be, or a medium enterprise in the form prescribed under the Act. After the submission of the application, the acceptance thereto, would be notified by the Central Government after obtaining recommendations of the Advisory Committee.



Therefore, two factors emerge from Section 8 of the Act, one, an application to be made by any person intending to establish such an enterprise and another, on acceptance of such an application, the unit / establishment would become an Micro, Small or Medium Enterprise. Registration process is also found under the statute itself. Two dates are germane to be noticed to consider the issue in the *lis*.

11. The first respondent files an application under Section 8 of the Act before the competent authority on 30.06.2018. This is accepted and a certificate of registration is issued on 16.07.2021. Between the two dates, the petitioner had preferred an application before the Council seeking jurisdiction of the Council to entertain the dispute between the two *i.e.*, the petitioner and the first respondent. Long thereafter, the Council renders a failure of conciliation report and refers the matter to Arbitration. The proceedings go on before the arbitral Tribunal and the petitioner realizing that the Council having no jurisdiction files an application under Order XIV Rule 2(2) of the C.P.C., to decide the jurisdiction as an preliminary



issue. The application is not answered but the concerned Court frames the following issues:

**"ISSUES**

1. *Whether the Claimant proves that the respondent has placed the order as claimed by the claimant and claimant carried out the work from 11.5.2018 till 22.5.2018 and the cost was Rs.6,04,870/-?*
2. *Whether the Claimant is entitled for the interest as claimed in the claim petition?*
3. *Whether the Claimant is entitled for claim sought for?*
4. ***Whether the proceedings are not maintainable as pleaded by the respondent in the objections placed before the Tribunal?***
5. ***Whether the respondent proves that the Tribunal has no jurisdiction to entertain the claim petition as pleaded in their objections filed?***
6. *Whether the respondent proves that the claim made by the claimant is not within time as per the Limitation Act?*
7. *Whether the claimant is entitled for a sum of Rs.7.5 lakhs towards hardship caused to the claimant due to delay in payment?*
8. *Whether the claimant is entitled for costs as claimed?*
9. *Whether the respondent proves that claimant has failed to carry out the work as per the specifications mentioned in the terms of work order?*



10. *What order or award?"*

*(Emphasis added)*

Issue Nos.4 and 5 deal with maintainability of the proceedings before the arbitral Tribunal. The petitioner at that juncture knocks at the doors of this Court. The *lis* therefore, would boil down to an issue of jurisdiction of the Council to have entertained the application / petition under Section 18 of the Act.

12. The afore-quoted dates are not in dispute. The transactions between the two were over on raising of the invoice on 22.05.2018, till that date the first respondent was not a Micro, Small or Medium Enterprise, as no application was even filed seeking registration as a Micro, Small or Medium Enterprise. The application is filed on 30.06.2018, it is considered and registration certificate is issued on 16.07.2021, declaring the first respondent to be a Micro Enterprise. Since all the transactions between the parties was long over before the submission of the application, in the considered view of this Court, the Council would not get jurisdiction to entertain the application.



13. An issue of jurisdiction would always cut at the root of the matter, as the answer to the question of jurisdiction is always a '**yes**' or a '**no**' and can never be a '**may be**'. Therefore, if the first respondent was not even registered as a Micro, Small or Medium Enterprise, on the dates between which the transactions taken place, the Council did not have jurisdiction to adjudicate upon the dispute between the two. Therefore, the application before the Council, and the Council entertaining the application, are all acts without jurisdiction. If the Council did not have jurisdiction to conciliate, it could not have referred the matter to the arbitral Tribunal. Since the reference is made by the Council, to the arbitral Tribunal, which by itself had no jurisdiction, the proceedings before the arbitral Tribunal on such incompetent reference would be a nullity in law.

14. It now becomes apposite to refer to the judgments of the Apex Court in the cases of ***Vaishno Enterprises (supra)***, wherein it has held as follows:

***"15.....Therefore, the supplier has to be a micro or small enterprise registered as MSME, registered with any of the authority mentioned in sub-***



***section (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."***

and in the case of ***M/s. Nitesh Estates Ltd.,(supra)***, the Apex

Court has held as follows:

***"4. Having heard learned counsel appearing on behalf of the respective parties, the question which is posed for consideration of this Court is whether the proceedings initiated by respondent no.2 under MSME Act would be maintainable and/or permissible as at the time of entering into the brokerage agreement, respondent no.2 was not registered as micro enterprise. The issue involved is squarely covered against the respondents in view of the decision of this Court in Silpi Industries Etc. Vs. Kerala State Road Transport Corporation and Another 2021 SCC Online SC 439 as well as the subsequent decision of this Court in Vaishno Enterprises Vs. Hamilton Medical AGA and Another 2022 SCC Online SC 355, taking the view that for initiation of proceedings under the MSME Act, the registration of the complainant/application as micro***



*enterprise shall be must. The subsequent registration of respondent no.2 with retrospective effect from 10 years back will not be of any assistance and/or help to respondent no.2.*

***5. In view of the above, the impugned judgment and order passed by the High Court is unsustainable and the same is hereby quashed and set aside. Consequently, the notices issued by the Council and the notice issued by the Arbitrator, appointed by the Council, are hereby quashed and set aside. However, it will be open for respondent no.2 to take recourse to law, may be to revive the proceedings before NCLT, if permissible under the law and as and when such proceedings are initiated, the same be considered in accordance with law and on its own merits."***

In the light of the afore-quoted unequivocal facts and the judgments rendered by Apex Court (*supra*), it becomes as clear as ***noonday*** that the Council did not have jurisdiction to entertain the application.

15. Learned counsel appearing for the first respondent would strenuously contend that the petitioner did not object to the conciliation proceedings, before the Council and never pointed to the fact that the Council did not have jurisdiction. It is for the first time, the petitioner files an application at the fag end of the proceedings, before the arbitral Tribunal. It is his submission that he has consented to the jurisdiction of the Council and the arbitral Tribunal and therefore is estopped from



challenging it. These submissions of the learned counsel for respondent No.1 is noted only to be rejected, as they are fundamentally flawed. It is trite that no amount of consent of the parties can confer jurisdiction on any *fora*. Therefore, merely because the petitioner has not objected to it, would not mean it would clothe jurisdiction upon the Council, which under the statute did not have one. Therefore, the very proceedings instituted before the Council and the Council referring the matter to the arbitral Tribunal and the second respondent conducting arbitration proceedings, are all acts *dehors* jurisdiction. Therefore, reserving liberty to the first respondent to agitate its claim, before any appropriate *fora*, the petition deserves to succeed.

16. For the aforesaid reasons, the following:

**ORDER**

- i) The writ petition is allowed;
- ii) The orders dated 07.01.2023 and 22.02.2023 passed by No.2 in A.C.No.222/2022, stand quashed.



- iii) Quashment of these proceedings will not come in the way of the first respondent agitating his rights before any appropriate *fora*, in accordance with law.

**Sd/-  
JUDGE**

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List No.: 1 Sl No.: 6