

# Ironbell Infra Pvt Ltd vs Antara Purukul Senior Living Ltd on 28 March, 2024

**Author: Prathiba M. Singh**

**Bench: Prathiba M. Singh**

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IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 335/2024

IRONBELL INFRA PVT LTD

ANTARA PURUKUL SENIOR LIVING LTD

CORAM:

JUSTICE PRATHIBA M. SINGH

ORDER

% 28.03.2024

1. This hearing has been done through hybrid mode.

2. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter, 'the Act') seeking appointment of a Sole Arbitrator. A purchase order was issued by the Respondent to the Petitioner on 26th October, 2015 for supply of pre-fabricated doors, door shutters, wooden glass panel doors, vision panels and fixed windows etc., and pursuant to the said purchase order, a work order dated 26th October, 2015 was also placed.

3. The case of the Petitioner is that the dispute arose due to delays which took place in the performance of contract, but finally work has been executed by the Petitioner. The Respondent has withheld certain payments This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 02/04/2024 at 21:38:05 which then got referred by the Petitioner to the Micro and Small Enterprises Facilitation Council (hereinafter, 'MSEFC'). The MSEFC had vide order dated 13th December, 2019 referred the matter to the Delhi International Arbitration Centre (hereinafter, 'DIAC'). There was some issue in respect of deposit of fee to the DIAC leading to a writ petition being filed by the Petitioner being Writ Petition Civil 13078/2022 Ironbell Infra Private Limited And Anr. v. Micro And Small Enterprises Facilitation Council And Anr., where the Petitioner sought reference to a ld. Sole Arbitrator on an ad

hoc basis. The said order reads as under:-

"2. Learned Counsel appearing for the Parties submit that they have no objection if the matter can be referred to a sole arbitrator on an ad-hoc basis in terms of the reference made under the Micro, Small and Medium Enterprises Development Act, 2006. The statement is taken on record.

3. It is open for the Respondents to raise objections regarding the maintainability of arbitration in line with the Judgment passed by the Apex Court in Silpi Industries and Ors. vs. Kerala State Road Transport Corporation and Ors, AIR 2021 SC 5487 and Gujarat State Civil Supplies Corporation Ltd. and Ors vs. Mahakali Foods Pvt. Ltd., AIR 2022 SC 5545.

4. In view of the above, the writ petition is disposed of, along with pending application(s), if any."

4. Pursuant to the said order, the Petitioner issued notice dated 29th December, 2023 under Section 21 of the Act invoking arbitration in terms of Art. 18 of the Purchase Order and Art. 32 of the Work Order and they suggested three Arbitrators.

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5. Vide reply dated 30th January, 2024, the Respondent suggested three other Arbitrators and did not accede to the names suggested by the Petitioner.

6. At this stage there are two issues that arise in the opinion of this Court, firstly, whether the MSME Act would be applicable and whether an ad hoc Arbitrator can be appointed.

7. The first issue is as to whether Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter, 'MSME Act') applies or not. The same is settled in view of the decision of the Id. Supreme Court in Silpi Industries and Ors. vs. Kerala State Road Transport Corporation and Ors, (AIR 2021 SC 5487) and Gujarat State Civil Supplies Corporation Ltd. and Ors vs. Mahakali Foods Pvt. Ltd., (AIR 2022 SC 5545). The relevant paragraphs of the said judgements are extracted hereinbelow:

"M/s Shilpi Industries vs. Kerala State Road Transport Corporation, (AIR 2021 SC 5487) "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 , 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 This is a digitally signed order.

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Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods Pvt. Ltd. (unit 2) & Anr. (AIR 2022 SC 5545) "33. Following the above-stated ratio, it is held that a party who was not the "supplier" as per Section 2 (n) of the MSMED Act, 2006 on the date of entering into the contract, could not seek any benefit as a supplier under the

MSMED Act, 2006. A party cannot become a micro or small enterprise or a supplier to claim the benefit under the MSMED Act, 2006 by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods or rendering services. If any registration, is obtained subsequently, the same would have the effect prospectively and would apply for the supply of goods and rendering services subsequent to the registration. The same cannot operate retrospectively. However, such issue being jurisdictional issue, if raised could also be decided by the Facilitation Council/Institute/Centre acting as an arbitral tribunal under the MSMED Act, 2006.

34. The upshot of the above is that:

(i) Chapter-V of the MSMED Act, 2006 would override the provisions of the Arbitration Act, 1996.

(ii) No party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council, though an independent arbitration agreement exists between the parties.

(iii) The Facilitation Council, which had initiated the Conciliation proceedings under Section 18(2) of the MSMED Act, 2006 would be entitled to act as an arbitrator despite the bar contained in Section 80 of the Arbitration Act.

(iv) The proceedings before the Facilitation This is a digitally signed order.

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(v) The Facilitation Council/institute/centre acting as an arbitral tribunal by virtue of Section 18(3) of the MSMED Act, 2006 would be competent to rule on its own jurisdiction as also the other issues in view of Section 16 of the Arbitration Act, 1996.

(vi) A party who was not the 'supplier' as per the definition contained in Section 2(n) of the MSMED Act, 2006 on the date of entering into contract cannot seek any benefit as the 'supplier' under the MSMED Act, 2006. If any registration is obtained subsequently the same would have an effect prospectively and would apply to the supply of goods and rendering services subsequent to the registration."

8. The Petitioner was, admittedly, registered as MSME on 21st July, 2021 by which date, the work under the contract was already executed. Thus, clearly, the MSME Act would not be applicable.

9. Secondly, both the parties are willing for an ad hoc Arbitrator to be appointed. It is accordingly deemed appropriate to appoint Justice V.K. Jain - Retd (M: 9650116555) as Sole Arbitrator to adjudicate the dispute between the parties.

10. Id. Counsel for the Petitioner raises an issue in respect of the Bill of Quantity ('BOQ') which is attached at page 49 of the petition. The question as to whether this BOQ is valid or not would be adjudicated by the Id. Arbitrator, though the purchase order and the work order are both not disputed. All the contentions of the parties are left open.

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11. The Id. Arbitrator is free to fix the venue and the fee as long as the same within the upper limit specified in the Fourth Schedule of the Act, as amended by the DIAC Rules.

12. The petition is disposed of with all pending applications, if any.

PRATHIBA M. SINGH, J.

MARCH 28, 2024 mr/bh This is a digitally signed order.

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