

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.12.2015

CORAM

THE HON'BLE Mr. JUSTICE **M.M.SUNDRESH**

W.P.No.34006 of 2014
& M.P.Nos.1/14 and 1 of 2015

1. Concast Steel & Power Ltd.
Rep. by Manager (Legal) A.N.Bhattacharya
21 Hemanta Basu Sarani Centre Point Suite
No.511 & 512 5th Floor Kolkata-700001.

... Petitioner

Vs

1. Micro and Small Enterprises
Facilitation Council, Guindy,
Chennai-32.
2. Samay Project Services Pvt. Ltd.,
1218 17th Street, West End Colony,
Mogappair, Chennai-50.

... Respondents

Petition filed under Article 226 of The Constitution of India praying to issue a writ of Certiorari calling for the records of the 1st Respondent in its order dated 10/10/2014 in O.P. No. MSEFC/CR/ 34/2014 quash the same.

For Petitioner : Mr.S.R.Rajagopal

For Respondents-2 : Mr.J.Sivanandaraj

ORDER

This writ petition has been filed by the petitioner challenging the award passed in O.P. No. MSEFC/CR/34/2014, dated 10.10.2014 by which the petitioner was asked to pay a sum of Rs.2,85,456,823/- with compounding interest. The second respondent company incorporated under the Companies Act, 1956, which is engaged in the business of executing works contract in the field of supply of piping, fittings, valves and appurtenances. The petitioner has placed two purchase orders dated 15.09.2011 & 12.11.2011, for supply of piping and appurtenances for the captive power plant project with the second respondent. Though 95% of the materials were supplied by the second respondent, the petitioner has not made the required payment. Thus, the second respondent preferred a case against the petitioner, before the first respondent Council.

2. The first respondent Council took the matter for adjudication. The petitioner was put on notice to come with all relevant records. The petitioner appeared before the first respondent for enquiry through counsel and the meeting held on 25.09.2014 was adjourned directing the petitioner to come

with the technical person. On the subsequent meeting held on 10.10.2014, the petitioner once again represented only by the counsel but stated that the Council may pass final orders. Accordingly, orders have been passed placing reliance upon Section 15 & 16 of the MSMED Act. Challenging the same, the present writ petition has been filed.

3. Learned counsel for the petitioner submitted that Section 18 of the Arbitration and Conciliation Act, 1996 is mandatory. The Council before proceeding to decide the matter on merits ought to have adopted conciliation, when the petitioner did raise the issue of jurisdiction before the Council, as the purchase order specifically speaks about jurisdiction of the Kolkatta Court alone.

4. In support of his contentions, learned counsel placed reliance upon the following judgments:

(i) Lloyd Insulations (India) Ltd. V. State of West Bengal & Others. reported in 2014 SCC Online Cal 20072.

(ii) Godrej Foods Ltd. vs. Panchamy Exporters Pvt. Ltd. & 2 Others reported in 2014 SCC Online Ker. 13695

(iii) Godrej Foods Ltd., vs. Panchamy Exporters Pvt. Ltd. & 2 Others (Division Bench)

(iv) Asiatic Rubro Complex vs. Kerala Micro & Small Enterprises Facilitation Council.

5. Per contra, learned counsel for the second respondent submitted that such facts are not in dispute and the first respondent had already passed appropriate orders and therefore, no interference is required. The petitioner has approached this Court bypassing the remedy available under Micro, Small and Medium Enterprises Development Act, 2006. The very same issue has been considered by a Division Bench of this Court in **Eden Exports Company vs. Union of India and Others** reported in [2013 (1) MLJ 445].

6. Admittedly, the petitioner has not sought for conciliation. On the contrary, the petitioner's counsel has made a request to the first respondent to pass orders on merits. Thus, it is not open to the petitioner to contend that there has to be a prior conciliation under Section 18 of the Arbitration and Conciliation Act, before proceeding to decide the matter on merits. Even otherwise, the said issue ought to have been raised before the authority under Section 34 of the said Act.

7. The remedy before this Court is discretionary in nature. When there is available alternative remedy, the same cannot be bypassed, in order to escape from the rigour of making the payment, which is the condition precedent. The decisions relied upon by the learned counsel for the petitioner are not

applicable to the case on hand. The question of alternative remedy under Section 34 of the Arbitration and Conciliation Act has not been considered in the said cases. Furthermore, in the case on hand, it is the petitioner who did not express any opinion before the Conciliation. On the contrary, the petitioner has sought for adjudication on merit.

8. In so far as the jurisdictional issue, the available alternative remedy under the Arbitration and Conciliation Act, 1996, is concerned, I had taken note of the decision rendered in 2013 (1) MLJ 445, cited supra wherein, in paragraph 24 it has been held as follows:

"In all these writ petitions filed by various companies challenging the award/order passed by the Arbitrators/Facilitation Council, the question to be gone into is whether such writ petitions could be maintained before this Court. If one carefully goes through the provisions of the MSMED Act under Chapter V, in particular Section 18, it could be seen that the said Act is in consonance with the Arbitration and Conciliation Act, 1996. Moreover, the award/order passed by the Arbitration/Facilitation Council is similar and identical to that of the award passed under Section 31 of the Arbitration and Conciliation Act. Section 5, which is contained in Part I of the Arbitration Act, defines the extent of judicial intervention in arbitration proceedings. It says that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in that Part. The Hon'ble Supreme Court in P.Anand Gajapathi Raju v.P.V.G.Raju MANU/SC/0281/2000 : (2000) 4 SCC 539, has held that the judicial

intervention in arbitration proceedings should be minimal. Keeping in view the object of the MSMED Act, we have no hesitation in adopting Section 5 of the Arbitration and Conciliation Act, 1996, which prohibits interference of the judicial authority, to the awards passed under the MSMED Act. Apart from the reason stated above, these writ petitions were filed without complying with the provisions contained in Section 19 of the MSMED Act, which contemplates pre-deposit of 75% of the decree amount. The petitioners cannot overtake Section 19 and invoke Article 226 of the Constitution before this Court. As we have held that pre-deposit of 75% is mandatory, we see no reason to entertain the present writ petitions. Moreover, once the petitioners have submitted themselves to the jurisdiction of the Council and when the decision of the Council went against them, they cannot turn round and state that the Council has no jurisdiction or the conciliators cannot sit as arbitrators or the pre-deposit of 75% is against the provisions of law. As rightly pointed out by the learned single Judge, it is always open to the petitioners to move the appropriate civil Court for relief or to invoke arbitration clause, if provided in the agreement. Hence, we are not inclined to entertain the present writ petitions filed challenging various awards/orders passed by the Facilitation Council and they are liable to be dismissed."

10. In yet another case where an award has been passed, the Division Bench of this Court in the recent pronouncement on 25.11.2015 in Prime Technologies & Others vs. M/s. Hamsa Watch Glass P. Ltd., in paragraph-5 has held as follows:

" A reading of the aforesaid judgment shows that the

parties approached the court to interdict the Arbitration proceedings as the procedure prescribed had not been followed. In the present case, we are faced with a situation where the award had already been delivered. Thus, the principle that a party should not be made to go through the ordeal of arbitration without endeavouring conciliation really would not apply because the arbitration process is also over. We may also note that the consequences of the conciliation not being successful arise in sub-section(3) of Section 18, where the arbitration proceedings would commence. Be that as it may, the most important factor in the present case is that neither are we considering a situation where the parties are trying to interdict the arbitration proceedings without going in for conciliation nor are we dealing with the objections to an award. The appellant in his wisdom, failed to file any objection under Section 19 of the said Act."

11. Therefore, in the light of the above said pronouncement, this Court is of the view that the remedy of the petitioner lies elsewhere while invoking Section 34 of the Arbitration and Conciliation Act, 1996.

12. Coming to the other issue of jurisdiction, as rightly submitted by the learned counsel for the petitioner under Section 18(iv) of the Micro, Small and Medium Enterprises Development Act, 2006, a dispute can be raised by the supplier before the Arbitrator even before the operation of his business, as having jurisdiction. Admittedly, the second respondent being the supplier to first respondent certainly does have the jurisdiction. Further more, as held by the apex court in **Interglobe Aviation Ltd. vs. N.Satchidanand**

reported in **2011(7) SCC 463**, the deficiency of service would not vitiate the proceeding initiated and concluded by the first respondent under Section 18(ii) of the Micro, Small and Medium Enterprises Development Act, 2006. Thus, merely because the petitioner may have some difficulty in complying with the mandatory requirement of invoking the provisions of Section 34 of the Arbitration and Conciliation Act, 1996, the jurisdiction of this Court under Article 226 of the Constitution of India is not meant to be invoked.

13. Accordingly, this writ petition stands dismissed giving liberty to the petitioner to work out the remedy in accordance with law, taking note of the discussions made above. Consequently, connected miscellaneous petitions are closed.

14.12.2015

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M.M.SUNDRESH, J.

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