

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 22ND DAY OF MARCH 2017

THE HON'BLE DR. JUSTICE S.VIMALA

A.No.1511 of 2017

in

O.P.D.No.6821 of 2017

In the matter of the
Arbitration & Conciliation
Act, 1996

And

In the matter of M/s.Unicon
Engineers and Karmic Energy
Private Limited

Ved Prakash(Authorized Representative)
M/s.Karmic Enerty Private Limited
851, Ground Floor, Udyog Vihar Phase-V
Gurgaon, Haryana-122016

...Applicant/Petitioner

Versus

P.Ponram,Managing Partner,
M/s.Unicon Engineers
513-A/6, Bharathi Road,
Chinnavedampatty,
Coimbatore-641049

...Respondent/Respondent

Application praying that this Hon'ble Court be pleased
towaive the requirement to deposit of 75% of the award
amount, for setting aside the ex-parte impugned award dated
05.08.2016 passed in Case No.M&SEFC/CBER/26/2016 by the
Micro and Small Enterprises Facilitation Council, Coimbatore
Region.

This Application coming on this day before this court for hearing the court made the following order:

"Whether the provision providing for, dispute resolution mechanism under Section 18 of the MSMED Act, through Micro and Small Enterprises Facilitation Council would override the dispute resolution mechanism, as provided under the Arbitration and Conciliation Act, 1996, / Arbitration Clause under the contract; out of two, which enactment is special; when each of the enactment is special with reference to the context, i.e., when the method under MSMED Act is special with reference to the nature of the dispute and when the Arbitration under the Arbitration and Conciliation Act is special with reference to the methodology of the dispute resolution, which shall be preferred over which, and if so, under what circumstances ?"

"Whether pre-deposit of 75% of the award amount is the pre-requisite for entertaining any application for setting aside any award, decree or other orders made by the Micro and Small Enterprises Facilitation Council ?"

"Whether that pre-requisite can be waived, when the benefit of waiver is claimed, but not by the supplier?"

These are the issues raised in this Application.

2. The Main Petition has been filed by the appellant /

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the respondent before the MSE Facilitation Council, seeking

to set-aside the exparte impugned award, dated 05.08.2016, passed in Case No.M&SEFC/CBER/26/2016 by the Micro and Small Enterprises Facilitation Council, Coimbatore Region.

3. Pending disposal of the petition, Application No.1511 of 2017 has been filed, seeking stay of the award and also to waive the requirement, under Section 19 of the MSMED Act, 2006, of the deposit of 75% of the award amount.

Brief facts:-

4. The appellant is engaged in the promotion of the renewable energy project, proposing to produce power with biomass based on Rice Straw. The project was financed by the State Bank of India, where all disbursements have to be based on approval by the State Bank of India also, as per the orders / terms, based on which project was appraised. Excise Exemption Certificate had to be issued by the Ministry of New and Renewable Energy, Government of India, New Delhi.

4.1. The respondent is engaged in the line of activity of manufacturing of ESP components and he agreed to supply the same to the appellant herein. As per the terms and conditions, the appellant has to make payment to the respondent / company i.e., 20% advance against site mobilization, 70% against erection and 10% after commissioning and commencement of operation.

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4.2. It is alleged that the respondent supplied goods

to the extent of Rs.1,13,12,554/-. But the appellant has paid only a sum of Rs.1,01,27,475/- and the balance is payable. Additional expenses to the extent of Rs.21,21,900/- is also due.

4.3. It is alleged that the appellant's project has been badly affected on account of incomplete supplies, incomplete erection and commissioning on the part of the respondent and the project has to be held up for over one-and-half years.

4.4. It is the further case of the appellant that the respondent undertook to do designing, engineering, erecting, testing commissioning and supply of three field elector static preceptors with its auxiliaries, and that subsequently the respondent did not adhere to the terms and conditions of the contract dated 12.06.2013 and did not complete the orders placed by the appellant and failed in carrying out the erection of ESP and ASH.

4.5. Suffice to point out that reference has already been made to MSE Facilitation Council and the Council has directed the appellant to pay the principal sum of Rs.34,56,479/- along with the compoundable interest with monthly rest.

5. Now the point that arises for consideration is, whether the appellant is bound to deposit 75% of the amount awarded as a pre-condition to maintain this Application, as

contemplated under Section 19 of the said Act.

6. The learned counsel for the appellant would submit that the award itself is patently illegal and the requirement of deposit of 75% of the award amount must be waived, having regard to the nature of the agreement, conduct of the respondent and the illegality in the award.

6.1. The specific contention is that, when the award itself could not have been made by the Council, in the light of the agreement providing for appointment of the Arbitrator for resolution of disputes, the award passed is illegal.

6.2. In order to appreciate this contention, it is necessary to look into the provisions relating to nature of jurisdiction conferred upon the Micro and Small Enterprises Facilitation Council.

6.3. Section 19, dealing with deposit of 75% of the award amount, reads as under:-

"Section 19 - Application for setting aside decree, award or order:

No application for setting aside any decree, award or other order made either by the Council itself or by any institution or center providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court ***unless the appellant (not being a supplier) has deposited with it seventy-five percent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:***

Provided that pending disposal of the application

to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose."

6.4. The establishment and composition of the Council, along with the nature of powers and functioning, are highlighted in Sections 20 and 21, which reads thus:-

"Section 20 - Establishment of Micro and Small Enterprises Facilitation Council.

The State Government shall, by notification, establish one or more Micro and Small Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification.

Section 21 - Composition of Micro and Small Enterprises Facilitation Council.

(1) The Micro and Small Enterprise Facilitation Council shall consist of not less than three but not more than five members to be appointed from among the following categories, namely:--

(i) Director of Industries, by whatever name called, or any other officer not below the rank of such Director, in the Department of the State Government having administrative control of the small scale industries or, as the case may be, micro, small and medium enterprises; and

(ii) one or more office-bearers or

representatives of associations of micro or small industry or enterprises in the State; and

(iii) one or more representatives of banks and financial institutions lending to micro or small enterprises; or

(iv) one or more persons having special knowledge in the field of industry, finance, law, trade or commerce.

(2) The person appointed under clause (i) of sub-section (1) shall be the Chairperson of the Micro and Small Enterprises Facilitation Council.

(3) The composition of the Micro and Small Enterprises Facilitation Council, the manner of filling vacancies of its members and the procedure to be followed in the discharge of their functions by the members shall be such as may be prescribed by the State Government.

Section 18 - Reference to Micro and Small Enterprises Facilitation Council.

(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or center providing alternate dispute resolution services by making a reference to such an institution or center, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and

Conciliation Act, 1996(26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or center providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996(26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the center providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."

6.5. It is also relevant to point out that, Section 24 gives the overriding effect to the provisions of Sections 15 to 23, which reads as under:-

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"24. Overriding effect.- The provisions of

Sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

6.6. The object and the scheme of the Act have been highlighted by the decision of this Court reported in **MANU/TN/3670/2015 (Prime Technologies and others v. Hamsa Watch Glass Pvt. Ltd.,)** whereupon it has been held that the object of the Act and its scheme clearly indicate that the thrust thereof is to promote facilitation between the parties, rather than force adjudication upon them.

6.7. It is necessary to consider the object of the Act, along with Section 15, which casts an obligation on the buyer to pay compound interest on delayed payment.

6.8. The object of the Act is to provide with a single legal framework, by which, the concerns of the entire small and medium enterprise sectors are addressed as is done in most developed and developing countries (in India too).

6.9. Section 15 of the Act casts an obligation on the buyer to pay compound interest on delayed payments.

7. Having seen the object of the Act, the necessity to preserve the Micro, Small and Medium scale industries, the method of protecting the interest of investor, the composition of Council and the nature of jurisdiction to be exercised by the Council, the next to be considered is, when

the Arbitration and Conciliation Act, 1996, is a special enactment, which is special to the mode of resolution of dispute, giving preference to party autonomy and when the MSMED Act is special Act, providing special mode of dispute resolution through specially qualified persons providing specific mode of enforcing payment, which method is preferable.

8. At this juncture, it is appropriate to consider the case of **Edukanti Kistamma (Dead) through LRs. v. S.Venkatareddy (dead) through Lrs.** (2010 (1) SCC 756), where the Supreme Court explained that a special statute would be preferred over a general one where it is beneficial. It was explained that the purport and object of the Act must be given its full effect by applying the principles of "purposive construction." The question whether the dispute resolution mechanism under Section 18 of the MSMED Act overrides the arbitration clause under the contract has to be answered in the affirmative. As was explained in **Waman Shrinivas Kini v. Ratilal Bhagwandas & Co.** (A.I.R. 1959 S.C. 689) an agreement contrary to a statutory provision that prohibits it would be unenforceable.

8.1. Thus, it is clear that, out of two enactments, the provisions of the MSMED Act would prevail especially when it has a overriding provision under Section 24 where it has been clearly said that Sections 15 to 23 shall have the

overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, the contention that the award passed by the Council is patently illegal, has to be rejected and it is rejected accordingly.

9. The next issue to be decided is, whether the deposit of 75% of the award amount is mandatory or directory.

9.1. This issue has already been answered by the Hon'ble Supreme Court, in the case of **Snehadeep Structures Private Limited v. Maharashtra Small Scale Industries Development Corporation Limited** [MANU/SC/0030/2010](#) explained the reasons for the introduction of the pre-deposit and the purpose sought to be achieved out of that requirement. The relevant observation reads as under:-

"47. The requirement of pre-deposit of interest is introduced as a disincentive to prevent dilatory tactics employed by the buyers against whom the small-scale industry might have procured an award, just as in cases of a decree or order. Presumably, the legislative intent behind Section 7 was to target buyers, who, only with the end of pushing off the ultimate event of payment to the small-scale industry undertaking, institute challenges against the award/decreed/order passed against them. Such buyers cannot be allowed to challenge arbitral awards indiscriminately, especially when the section requires pre-deposit of 75% interest even when appeal is preferred against an award, as distinguished from an order or decree."

9.2. Therefore, it is clear that the deposit of 75% is mandatory except for the supplier. The appellant is not the supplier, but the person benefited from the supplies made by the supplier. Therefore, the contention that the appellant is not liable to deposit 75% of the award cannot be accepted and this contention is rejected.

10. Then the next issue is, whether, in terms of the provisions of Section 19 of the MSMED Act, the Court can set any reasonable terms for the deposit to be made.

10.1. Considering the nature of the business and the amount involved, this Court directs that 75% of the amount awarded by the Felicitation Council, in favour of the respondent should be deposited by the appellant in this Court, in three equal instalments, with each instalment being deposited, fortnightly, starting from 01.04.2017. The amount, as and when deposited by the appellant, shall be kept by the Registry in a interest yielding fixed deposit, initially for a period of six months and kept renewed during the pendency of the petition. The hearing of the main petition will be subject to compliance with the above direction.

11. With the above terms, the Application stands disposed of.

sd/.S.V.J

22.03.2017

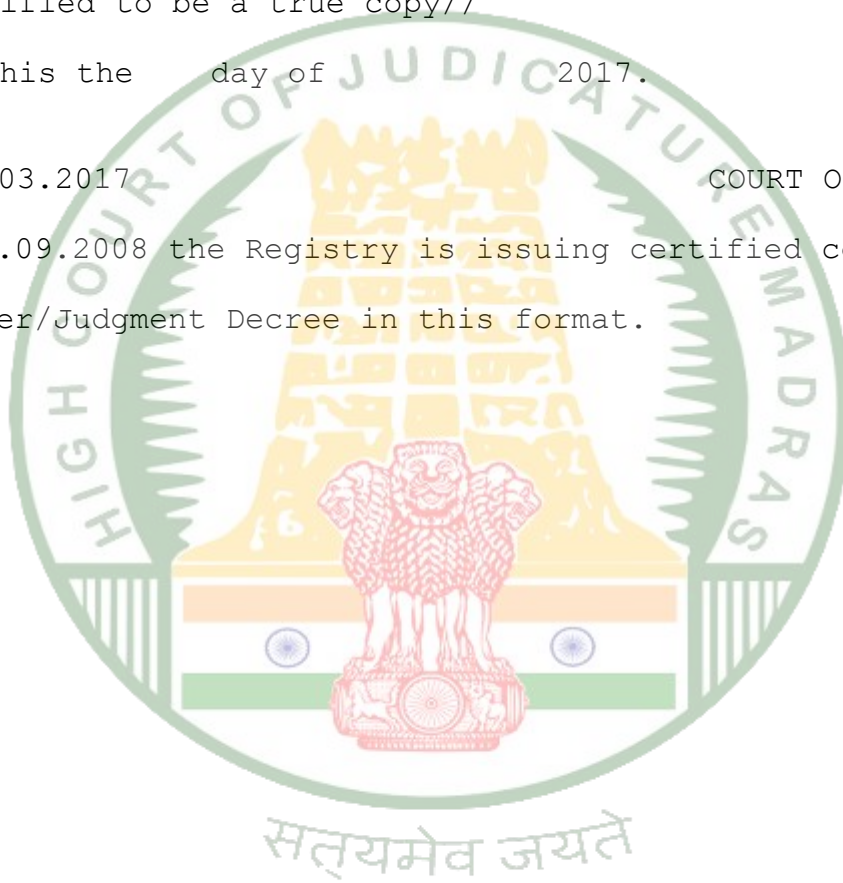
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Dated this the day of JUDICATURE 2017.

R.s/23.03.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.



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