

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :14.02.2020

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.6454 & 12062 of 2017
and
WMP.Nos.6962 &12920 of 2017

W.P.No.6454 of 2017

The Superintending Engineer,
General Construction,
TANTRANSCO Ltd.,
Tatabad, Coimbatore - 641 012.Petitioner

-vs-

1. Micro Small Enterprises Facilitation Council and
Director of Industries and Commerce,
Represented by its Chairman,
Sidco Corporate Building, Guindy,
Chennai - 600 032.
2. M/s. Transmetal (India),
42, Post Office Street,
2nd Floor, Chennai - 600 001. Respondents

PRAYER : Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, calling for the records of the first respondent culminating the order O.P.No.MSEFC/CR/23/2013 and O.P.NO.MSEFC/CR/37/2013 dated 18.10.2016 quash the same and direct the first respondent to refer the claim of the second respondent to Arbitration in accordance with the provisions of Section 18(3) of the MSMED Act.

W.P.No.12062 of 2017

The Chief Engineer,
Materials Management,
Tamil Nadu Generation and Distribution Corporation Ltd.,
144, Anna Salai, Chennai - 600 002. .. Petitioner

Vs.

1. Micro Small Enterprises Facilitation Council and
Director of Industries and Commerce,

Represented by its Chairman,
Sidco Corporate Building, Guindy,
Chennai - 600 032.

2. M/s. Transmetal (India),
42, Post Office Street,
2nd Floor, Chennai - 600 001.

... Respondents

PRAYER : Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, calling for the records of the first respondent in respect of the order passed in O.P.No.MSEFC/CR/06/2013 dated 27.12.2016, quash the same and direct the first respondent to refer the claim of the second respondent to Arbitration in accordance with the provisions of Section 18(3) of the MSMED Act.

For Petitioner : Mr.P.H. Aravind Pandian
[in both W.Ps.] Additional Advocate General
for Mr.V.Anil Kumar

For Respondents: Mr.C.T.Prabhakar
[in both W.Ps.] assisted by Ms.A.Ayesha Parveen

COMMON ORDER

Heard Mr.P.H.Aravind Pandian, learned Additional Advocate General for Mr.V.Anilkumar, learned counsel for the petitioner and Mr.C.T.Prabhakar, learned counsel assisted by Ms.A.Ayesha Parveen, learned counsel for respondents.

2. With the consent of learned counsel on either side, this writ petition itself is taken up for final disposal.

3. These writ petitions have been filed by the Superintending Engineer, General Construction, TANTRANSO Ltd., Tatabad, Coimbatore and the Chief Engineer, Materials Management, TANGEDCO, Chennai, respectively challenging the orders passed by the 1st respondent, the Facilitation Council. The 2nd respondent was the petitioner before the Facilitation Council and a reference was made based on a claim made by the 2nd respondent claiming payment of Rs.89,41,733/- & 21,40,782/- in W.P.No.6454 of 2017 and Rs.35,50,619/- and 38,48,888/- in W.P.No.12062 of 2017.

4. The 2nd respondent claimed that they have not received the payment in spite of goods having been accepted by the petitioner. The Facilitation Council has passed the impugned orders holding that the petitioner is liable to pay the principal with interest amount of Rs.12,50,000/- and 20,00,000/- respectively.

5. Aggrieved by the same the petitioners have filed these writ petitions. At the time when the writ petitions were entertained an order of interim stay was granted on 16.03.2017 and 01.06.2017 respectively subject to the condition that the petitioner has to deposit a sum of Rs.1,00,000/- in W.P.No.6454 of 2017 and Rs.2,00,000/- in W.P.No.12062 of 2017. The petitioner is stated to have complied with the said condition.

6. The legal issue to be considered in the instant case is whether the writ petitions are maintainable, challenging the awards passed by the Facilitation Council exercising powers under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'MSMED Act').

7. The MSMED Act was enacted to provide for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto. For the purpose of this case, it would suffice to refer to chapter V of the MSMED Act, which deals with Delayed Payment to Micro and Small Enterprises. The 2nd respondent, filed claim petitions stating that payments are due from the petitioner. Section 18 of the MSMED Act deals with the Reference to the Facilitation Council. Sub-Section(1) of Section 18 provides that notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount under Section 17, make a reference to the Facilitation Council. Sub-Section(2) of Section 18 provides for the procedure to be followed by the Council upon a reference being made under Section 18(1). Sub-Section (2) of Section 18 provides for conciliation proceedings for which the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 would apply. Sub-Section(3) of Section 18 deals with the subject where the conciliation initiated under Sub-Section(2) of Section 18 is not successful. The case of the 2nd respondent is that upon reference being made the Facilitation Council scrupulously followed the procedure under Sub-Section(2) of Section 18 and having found that the conciliation was not successful, proceeded to decide the matter by exercising its power under Sub-Section(3) of the Section 18 and the impugned order came to be passed.

8. As seen from the statement of objects and reasons of the MSMED Act, the legislators thought fit to have a single framework for small and medium enterprises. Therefore, Section 18 of the MSMED Act was enacted. Section 19 provides for an application for setting aside the decree, award or an order passed by the Facilitation Council. A party proposing to avail the remedy under Section 19 is required to mandatorily deposit 75% of the award amount for an application to be entertained.

Proviso to Section 19 provides 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. Thus, the MSMED Act, a special enactment enacted for a specific purpose provides for a remedy to the medium and small enterprises, clearly lays down procedure in cases where there is a delayed payment to micro, small and medium enterprises.

9. In cases, where there is a delayed payment to micro and small enterprises and an award is passed any person aggrieved by a decree, award or order passed by the Facilitation Council under Sub-Section(3) of Section 18 can apply to the Court to set aside the order subject to the condition that 75% of the award amount is pre-deposited. In the considered view of this Court, the petitioner cannot bypass such remedy by filing a writ petition.

10. It is argued by the learned Additional Advocate General that when the impugned order is patently illegal and has ignored the provisions of the MSMED Act, writ petition is maintainable.

11. The learned Additional Advocate General referred to the recent decision in the case of Director General of Police Vs. M/s. A.R. Polymers Pvt. Ltd. [O.P.No. 505 of 2019 dated 16.10.2019], wherein the Court has elaborately considered all issues and found that there was no proper notice of the Conciliation or the Arbitration and apart from that also held that the Facilitation Council could not have acted both as a Conciliator and Arbitrator under the provisions of Section 80 of the Arbitration and Conciliation Act, 1996. With regard to the compliance of the requirement under Section 19 is concerned, the Court took note of the directions in the said case, considering the amount to be paid directed deposit of the amount in two instalments, if the main O.P. itself is not disposed of within a period of 90 days.

12. In the considered view of this Court, the merits of the award passed by the Facilitation Council cannot be adjudicated in a writ petition, as they pertain to disputed questions of fact that apart the petitioner has a effective remedy under the Act, which is special enactment and therefore, the special procedure cannot be bypassed. That apart, the petitioner is entitled to exercise the remedy available under Section 19 of Act, subject to mandatory pre-deposit of 75% of the award amount. This condition has not been complied with by the petitioner. That apart, there is also a period of limitation

within which the application under Section 34 of the Arbitration and Conciliation Act, 1996 has to be filed and the question would be whether assuming on the date, when this writ petition was filed i.e., 15.03.2017, the petitioner had filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996, whether, it was within the period of limitation stipulated under the Arbitration act. This also needs to be examined. With regard to the pre-deposit of 75% of the award amount, this being mandatory cannot be dispensed with. At this juncture, it may be of relevance to refer to Section 30 of the Workmen Compensation Act, 1923, Sub-Section(1) of Section 30 of the Workmen Compensation Act, 1923 provides for an appeal to the High Court from the orders of the Commissioner exercising powers under the said Act, when substantial question of law arises for consideration. The third proviso to Section 30(1) provides that no appeal by an employer under Clause (a) of Section 30(1) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against. This condition cannot be bypassed by an employer, when he files such an appeal. Therefore, this special enactment provide for a special procedure and this is so because of the object for which the law was enacted.

13. The learned Additional Advocate General referred to the decision in the case of Ramesh Conductors Private Ltd & Ors. Vs. M & SE Facilitation Council and Ors. [W.P.Nos.18282 to 18287 of 2015 dated 24.11.2015] and submitted that the writ petition was held to be maintainable and the Court has examined the correctness of the decision under Section 18 of the Act and allowed the writ petition. On a careful reading of the order, it is seen that there is no finding as to the maintainability of a writ petition against an Award. In the light of the fact that specific provision of the Section 19 was never raised by TANTRANSCO, who is the petitioner in these writ petitions, the Court has not decided the same as to whether an petition under Article 226 of the Constitution of India is maintainable, when such a special remedy has been provided under the MSMED Act. Therefore, the decision does not support the case of the petitioner.

14. For all the above reasons, the writ petitions are dismissed and they are held to be not maintainable. It is open to the petitioner to challenge the order passed by the Facilitation Council by filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996, if so advised.

15. In the event, a petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, the period between ***13.02.2017 & 13.04.2017**, when the writ petitions were filed

respectively, till the receipt of the certified copy of this order shall be excluded while computing the limitation for the petition under Section 34 of the Arbitration and Conciliation Act, 1996.

16. In the light of the above order, the petitioner will be permitted to withdraw the amount, which has been deposited to the credit of these writ petitions pursuant to order dated 16.03.2017 & 01.06.2017 respectively.

With the above observations, the writ petitions are dismissed. No costs. Connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//
*Amended as per order of
this Court dated 12.03.2021
-s/d-
Assistant Registrar(CSIII)
dt 30/03/2021

//True Copy//

Sub Assistant Registrar

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To

1. Micro Small Enterprises Facilitation Council and
Director of Industries and Commerce,
Represented by its Chairman,
Sidco Corporate Building, Guindy,
Chennai - 600 032.

Amended order to be
substituted For the order
already despatched on
04.06.2020

- 2.The Section Officer, ER Section, High Court, Madras.

+1cc to Mr.V.Anil Kumar, Advocate, S.R.No. 12276
+2cc to Mr.C.T.Prabakar, Advocate, S.R.No.12741
+1 CC to Mr.V.Anil Kumar, Advocate sr 12277 (31/07/2020)
+2ccs to Mr.V.Anil Kumar, Advocate, S.R.No. **16009**
+1cc to Mr.C.T.Prabakar, Advocate, S.R.No.**15967**

W.P.Nos.6454 & 12062 of 2017
and WMP.Nos.6962 &12920 of 2017

KS(CO)
GN(20/03/2020)
A.SK(31.03.2021)