IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on	Orders Pronounced on
28.09.2022	7.12.2022

CORAM

THE HONOURABLE MR.T.RAJA, ACTING CHIEF JUSTICE
AND
THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

W.A.No.2079 of 2022
and C.M.P.No.15702 of 2022

The Tamil Nadu Cements Corporation Ltd.
Rep by its Manager (Materials) In Charge,
Aavin Illam, -5th Floor,
No.23 Pasumpon Muthuramalinganar Salai,
Nandanam, Chennai- 600 035 ... Petitioner

Vs.

1 Micro and Small Enterprises
Facilitation Council Rep By its
General Manager, Coimbatore Region,
District Industries Centre/Zonal Office,
No.2 Raja St Coimbatore - 641 049.

2 Unicon Engineers
Rep by Managing Partner P.Ponram,
No.513-A/6, Bharathi Road,
Chinnavedampatty, Coimbatore- 641 049 ... Respondents

Appeal filed under Section 15 of Letters Patent to set aside the Judgment passed in W.P.No.7633 of 2022 dated 13.07.2022 and consequently quash the orders passed by the 1st respondent in Case No.M&SEFC/CBER/11/2016 and order in R.C.No.436/D3/2014 dated 25.10.2016.

For Appellant : Mr.R.Viduthalai,
Senior Counsel for Mr.A.Edwin Prabakar
For Respondents : Mr.Om Prakash
Senior Counsel for Mr.B.Manoharan for R2
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JUDGMENT

D.KRISHNAKUMAR, J.

Challenging the order passed in W.P.No.7633 of 2022 dated 13.07.2022, this Intra Court Appeal has been filed to set aside the said order and consequently quash the orders passed by the 1st respondent in Case No.M&SEFC/CBER/11/2016 and order in R.C.No.436/D3/2014 dated 25.10.2016.

2. **The facts in brief leading to filing of the instant appeal are as follows:**

Pursuant to the tender notice published on 27.1.2010 for Design, Supply, Erection and Commissioning of 2 Nos. of ESP for Clinker coolers at Ariyalur Cement Unit on turnkey basis, the appellant Corporation, after discussions with Unicon Engineers, Coimbatore, the second respondent herein, on 16.4.2010, issued work order to the second respondent company for execution of the aforesaid work and the same was accepted by the respondent Company.

(i) On 16.11.2013, the appellant Corporation sent a letter to the respondent Company requesting to complete all the works before 30.11.2013 and analyse the cause for higher dust emission than the estimated level during unstabilised operation of the Kiln and solve the same.

(ii) The respondent Company has filed an affidavit before **MICRO SMALL AND MEDIUM ENTERPRISES FACILITATION COUNCIL, COIMBATORE (MSEFC),** the first respondent herein claiming an amount of Rs.2,66,80,157/- under various heads. The appellant sent a letter to **MSEFC** citing various issues faced in ESPs supplied and commissioned by the respondent Company and also stated that they had supplied sub-standard spares. On 27.5.2014, the appellant sent a letter to the respondent Company to attend the problem in insulation cladding in the ESP – II. However, the respondent Company refused to rectify the issues stating that they had already filed a claim before **MSEFC** and the warranty period was also already over.

(iii) Hearing was held before MSEFC on 14.10.2014. The respondent Company was directed to produce documentary evidence for the materials theft/missing/damaged items as per the list produced and also directed to set-right all the teething problems. The appellant was also directed to permit the respondent Company to carry out all the rectification works.

(iv) The first respondent Council upon hearing both sides, passed an arbitral award holding that the appellant Corporation is liable to pay the balance retention amount of Rs.39,66,144/- along with interests due to piecemeal releases of the total retention money of Rs.1,17,57,399/- with effect from 31.3.2011 and Rs.1,57,59,537/- along with interest with effect from 17.1.2014 towards additional expenditure incurred by the respondent Company, due to the delay of 3 years in execution of civil works by the appellant, together with compounded interest with monthly rest, at three time of the Bank rate notified by the RBI as stipulated in MSMED Act 2006 from the appointed due dates respectively, to the second respondent Company, till the date of settlement.

(v) On 19.9.2016, the appellant filed a petition under Sec.33 of the Arbitration and Conciliation Act, 1996 to recall/set aside the order/award in Case No.M&SEFC/CBER/11/2016 dated 4.6.2016. By order dated 25.10.2016, the first respondent rejected the recall petition on the ground of delay in filing the recall petition and also on the basis of objection made by the respondent Company.

(vi) Thereafter, the respondent Company has filed Execution petition No.7 of 2017 for claiming an amount of Rs.5,88,88,591.00 with interest as awarded by the first respondent Council vide impugned order in No.M& SEFC/CBER/11/2016 dated 4.6.2016 and the appellant also filed its counter.

(vii) On 4.1.2017, the appellant has filed O.P.No.692 of 2017 challenging the award passed by the first respondent in Case No.M& SEFC/CBER/11/2016 dated 4.6.2016.

(viii) In the meanwhile, the appellant challenged the powers conferred under Sec.16 to 19 of the Micro, Small and Medium Enterprises Development Act, 2006 in W.P.No.29101 of 2017. Along with the Writ petition, the appellant also filed W.M.P.No.31363 to 31366 of 2017 to stay all further proceedings pursuant to the order passed by the first respondent Council in case No.M& SEFC/CBER/11/2016 dated 4.6.2016 and also stay of further proceedings in E.P.No.7 of 2017. All the miscellaneous petitions were dismissed. W.P.No.29101 of 2017 has been transferred to the Hon'ble Supreme Court in the light of challenge to the vires of Sections 16 to 19 of the M.S.M.E.D. Act to be heard along with connected writ petitions transferred by different High Courts. W.P.No.29101 of 2017 is pending before the Hon'ble Supreme Court.

(ix) Pursuant to the transfer of W.P.No.29101 of 2017 to the Hon'ble Supreme Court, the appellant has filed Application No.4846 of 2017 before the Execution Court to declare the award passed by the first respondent Council in case No.M& SEFC/CBER/11/2016 dated 4.6.2016 as illegal, null and void. The Execution Court rejected the Application No.4846 of 2017 as not maintainable.

(x) Challenging the order passed by the Master Court dated 10.10.2017 in A.No.4846 of 2017, the appellant has filed an Application No.7278 of 2017 to set aside the said order and A.No.7279 of 2017 to stay all further proceedings in E.P.No.7 of 2017.

(xi) Thereafter, the appellant also filed O.P.D.No.820 of 2017 under Sec.19 of the MSMED Act, 2006 along with an Application No.956 of 2018 for waiver of 75% pre-deposit that was mandated under Sec.19 of MSMED Act to challenge the award. By order dated 20.7.2018, the said application was disposed of with a direction to the appellant to pay the pre-deposit amount as stipulated under Sec.19 of MSMED Act, within a period of eight weeks.

(xii) Later, this Court by its order dated 22.1.2018 disposed of the A.No.7278 & 7279 of 2017 by remanding the case back to the Master Court.

(xiii) Aggrieved by the order passed by this Court in Application No.7278 & 7279 of 2017 dated 22.1.2018 remanding the case back to the Master Court, the respondent has filed O.S.A.No.157 of 2018.

(xiv) Pursuant to the disposal of O.S.A.No.157 of 2018 by the Division bench setting aside the order passed by the learned Single Judge in A.No.7278 and 7279 of 2017, Master Court issued attachment order dated 25.2.2019 in E.P.No.7 of 2017 on the properties of the appellant.

(xv) Challenging the attachment order, the appellant has filed Application No.1964 of 2019 to stay the operation of the attachment order passed by the Master Court. By order dated 11.3.2019, this Court granted stay subject to deposit of Rs.3,00,00,000/- (Rupees three Crores only) to the credit of E.P.No.7 of 2017. The appellant also deposited Rs.3,00,00,000/- as directed by this Court.

(xvi) Thereafter, O.S.A.No.157 of 2018 was allowed and the appellant was directed to deposit 75% of the decreetal amount. The appellant paid the differential amount of Rs.1,41,66,443/- in O.P.D.No.820 of 2017 as against the 75% of the award amount since the appellant already remitted Rs.3.00 Crores. Hence, a total amount of Rs.4.41 crore was paid by the appellant. After compliance of the order of the Division Bench, Original petition filed by the appellant was numbered as O.P.No.692 of 2019. On 31.7.2019 in Application No.3670 of 2019 filed by the respondent Company in A.No.1964 of 2019 in E.P.No.7 of 2017, this Court permitted the respondent Company to withdraw Rs.1.50 Crores and accordingly, directed the Registry to issue a cheque to the respondent Company for Rs.1.50 Crore. On 3.2.2020 the respondent Company was permitted to withdraw Rs.1.50 crore lying in the credit of E.P.No.7 of 2017 in A.No.360 of 2020 filed by the respondent company. The appellant also filed an Application No.3004 of 2020 to raise additional ground in O.P.No.692 of 2019. While so, the appellant has filed SLP (Civil) Diary No.18423 of 2020 to challenge the award, wherein the Hon"ble Supreme Court directed this Court to dispose of the O.P.No.692 and 1030 of 2019 within a period of six months. Thereafter, O.P.No.692 & 1030 of 2019 filed by the appellant against the impugned award dated 4.6.2016 passed by the first respondent Council was dismissed holding that the application itself filed under Sec.34 of the Act is not maintainable on the ground of limitation. Aggrieved by the same, the appellant has filed O.S.A.No.55 of 2022, however, the same was withdrawn by the appellant on 28.4.2022 after filing the instant writ petition before this Court.

(xvii) The appellant has also filed W.M.P.No.31557 of 2019 in W.P.No.29101 to amend the prayer in the said writ petition as "for issuance of

Writ of Declaration declaring Section 16 to 19 of the Micro, Small and Medium Enterprises Development Act, 2006 as ultravires, unconstitutional, arbitrary and violates Article 14 of the Constitution of India and consequently, set aside the award passed by the first respondent dated 14.6.2016.

3. The Writ Court while dismissing the writ petition in W.P.No.7633 of 2022 has held as under:

> *"31. Thus, the petitioner has approached this Court by way of Writ Petition in W.P.No.29101 of 2017 and thereafter by way of O.P.Nos.692 & 1030 of 2019. After said O.P.Nos.692 & 1030 of 2019 were dismissed by this Court, the petitioner took a chance in O.S.A.No.55 of 2022 which was also dismissed as withdrawn on 28.04.2022. The fact also remains that the petitioner has challenged the vires of Sections 16 to 19 of the Micro, Small and Medium Enterprises Development Act, 2006 in W.P.No.29101 of 2017 which is now pending before the Hon'ble Supreme Court along with the batch of cases.*
>
> *32. Considering the above, I am of the view that the petitioner cannot be given a third opportunity to assail the impugned order dated 04.06.2016 in Case No.M & SEFC / CBER/11 / 2016 and the subsequent order dated 25.10.2016 in R.C.No.436/D3/2014 passed under Section 33 of the Arbitration and Conciliation Act, 1996. The rights of the petitioner, if any, can be confined only to the challenge to the vires of Sections 16 to 19 of the Micro, Small and*

Medium Enterprises Development Act, 2006 in W.P.No.29101 of 2017 which is now pending before the Hon'ble Supreme Court along with the batch of cases. If the petitioner succeeds in the said Writ Petition, the petitioner will be entitled for the relief in the present Writ Petition.

33. This Writ Petition is liable to be dismissed. The rights of the petitioner to recover the amount paid by the petitioner in the course of proceedings before this Court in the E.P. stage and in the O.P. stage, will be subject to the final outcome of the order to be passed by the Hon'ble Supreme Court in W.P.No.29101 of 2017. In case the petitioner succeeds in the said Writ Petition, the amount paid by the petitioner may have to be refunded back to the petitioner by the second respondent.

34. This Writ Petition stands dismissed with the above observations. No cost. Consequently, connected Miscellaneous Petitions are closed."

4. **The grounds raised by the appellant in the present appeal are as follows:**

In the earlier round of litigations, there is no order passed on merits in any of the petitions filed against the order impugned herein. Therefore, the principles of res judicata or estoppel are not attracted in the present case. The learned counsel appearing for the appellant has also submitted that the order impugned in the writ petition is only a conciliation failure order under Part III of the Arbitration and Conciliation Act, 1996, and not an arbitral award under Part I of the Arbitration & Conciliation Act to direct the appellant to pay the respondent the claim amount as if it is an award. With regard to the pendency of writ petition before the Hon'ble Supreme Court, wherein the appellant challenged the vires of certain provisions of Micro, Small and Medium Enterprises Development Act, 2006 (MSMED) Act, 2006, the prayer made therein is totally different to the present writ petition. It is also contended by the learned counsel appearing for the appellant that the first respondent Council has not followed the provisions under Section 18 of Micro, Small and Medium Enterprises Development Act, 2006 and the said ground was not considered by the Writ Court. In support of his contention that the question of Res-Judicata will not apply to the present case, the counsel appearing for the appellant relied on the decision of the Hon'ble Supreme Court in **Krishnan Lal Vs. State of J.K. Reported in 1994(4) SCC 422 and Darrayo and others Vs. State of U.P. Reported in AIR 1961 SC 1457 and decision rendered by the Division Bench of this Court in M/s.Super Steam Boilers Engineers Pvt. Ltd. Vs. The Micro, Small Enterprises Facilitation Council [W.A.No.2655 of 2021 dated 7.3.2022].**

5. We have heard the learned Senior Counsel appearing for the appellant and the learned Senior counsel appearing for the second respondent and perused the materials available on record.

6. All the aforesaid litigations arose out of the award passed by the first respondent Council dated 4.6.2016. The first respondent upon hearing both sides and placing reliance on Sec.15 & 16 of ***MSMED Act 2006*** passed the impugned award dated 4.6.2016 and the consequential impugned order dated 25.10.2016 has been passed by the first respondent Council.

7. The main ground raised in the instant writ appeal by the appellant is that when the impugned order is presumably under Sec.76(b) of the Part III of the Arbitration and Conciliation Act, 1996, for failure of conciliation proceedings, the same would not amount to arbitral award under Chapter VI of the Arbitration and Conciliation Act and therefore, not enforceable.

8. Sec.18(4) of M.S.M.E.D. Act, 2006 makes it clear that notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the Centre 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. Sec.19 of the Act deals with the application for setting aside any decree, award or order made by the Council itself or by any institution or Centre providing alternate dispute resolution services to which a reference is made by

the Council, shall be entertained by the Court, provided the appellant has deposited 75% of the award amount. It is useful to rely upon the earlier order passed by this Court in O.P.No.692 & 1030 of 2019 dated 9.9.2021 filed by the appellant challenging the award passed by the first respondent Council dated 4.6.2016. In the aforesaid O.P., the appellant elaborately argued before this Court and this Court by relying upon various decisions of the Hon'ble Supreme Court as well as this Court, dismissed the O.P. holding that the first respondent Council itself invoked arbitration proceedings, though Council has not followed the procedure contemplated under the Act, that cannot be gone into when the application itself filed under Sec.34 of the Act is not maintainable before this Court. The relevant portion of the aforesaid order reads as follows:

> "9. The matter has been referred to by the first respondent before the Council on a dispute arising out of the outstanding payment payable by the petitioner. The petitioner engaged the first respondent for erection and commissioning of Clinker Cooler at Cement Works in the premises of the petitioner Corporation. The reference was made for the principal amount of Rs.2,66,80,157/- from 1.7.2010 to 25.12.2013. The second respondent Council entertained the reference and conducts conciliation on 14.10.2014, 17.2.2015, 12.2.2016, 4.6.2016 and during the conciliation, the outstanding payment payable by the petitioner is not denied. The only issue raised before the Council is a question with regard to

quality of E.S.P. As the conciliation is not materialised, the matter has been referred to Council and the Council has passed an award which reads as follows:

"the respondent shall be liable to pay the balance retention amount of Rs.39,66,144/- along with interest due to piecemeal releases of the total retention money of Rs.1,17,57,399/- with effect from 31.3.2011 & (2) Rs.1,57,59,537/- along with interests with effect from 17.1.2014 towards additional expenditures incurred by the petitioner due to the delay of 3 years in execution of civil works by the respondent together with compounded interest with monthly rest, at three time of the Bank rate notified by the Reserve Bank of India as stipulated in M.S.M.E.D.Act, 2006 from the appointed due dates respectively as above to the petitioner, till the date of settlement."

....

17. Section 33 of the Act cannot be invoked to set aside the award or to recall of the award, whereas the application filed in the given case is only in the nature of First Appeal before the Council and the same has been rightly rejected by the Council on 25.10.2016.

....

19. Having regard to the above legal position and the provisions of law itself makes it clear that application under Sec.34 of the Act to set aside the award cannot be entertained unless it is filed within a maximum period of 120 days as provided under Sec.34 of the Act.

20. In sofar as the award of the Council, it is the contention of the petitioner counsel that as the conciliation is not fructified, the second respondent Council itself invoked arbitration proceedings, though Council has not followed the procedure contemplated under the Act, that cannot be gone into when the application itself filed under Sec.34 of the Act is not maintainable before this Court on the ground of limitation.

21. Such view of the matter, both the Original petitions are dismissed. Consequently, connected applications are closed."

(Emphasis supplied)

9. In the aforesaid order dated 9.9.2021 passed in O.P.No.692 of 2022 the contentions raised by the appellant have been elaborately discussed and finally rejected the claim of the appellant.

10. Challenging the order dated 9.9.2021 passed in O.P.No.692 of 2022, the appellant has preferred an appeal before this Court in O.S.A.No.55 of 2022 and the same was withdrawn by the appellant on 28.4.2022. It is pertinent to note that this Court while dismissing the O.P.No.692 of 2022 has observed that *the second respondent Council itself invoked arbitration proceedings, though Council has not followed the procedure contemplated under the Act, that cannot be gone into when the application itself filed*

under Sec.34 of the Act is not maintainable before this Court on the ground of limitation. Further, the appellant while challenging the very same award before this Court in the aforesaid O.P. Proceedings, has not questioned the authority of the first respondent Council whereas in the instant writ petition, the appellant challenged the award on the ground that it is a conciliation failure, not an arbitral award under Part 1 of the Arbitration and Conciliation Act. The decisions relied upon by the appellant will not be helpful to the appellant for the reason that facts and circumstances of those cases are entirely different and therefore, same will not apply to the present case.

11. In the meanwhile, the appellant filed a writ petition in W.P.No.29101 of 2017 challenging the provisions under Sec.16 to 19 of the Micro, Small and Medium Enterprises Development Act, 2006. In the writ petition, the appellant also filed W.M.P.No.31363, 31364, 31365 and 31366 of 2017 to stay the operation of the E.P. Proceedings, to stay all further proceedings pursuant to the impugned award, to stay all further proceedings in E.P.No.7 of 2017 and to declare Sec.16 to 19 of the M.S.M.E.D. Act as ultra vires and violates Article 14 and 19 of the Constitution of India. All the miscellaneous petitions are dismissed. Writ petition in W.P.No.29101 of 2017 has been transferred to the Hon'ble Supreme Court to be heard along with the similar Writ petitions transferred by different High Courts.

12. The Writ Court by its order dated 13.07.2022 passed in W.P.No.7633 of 2022 has elaborately discussed the issues involved in the writ petition and rejected the claim of the appellant. Therefore, this Court is of the view that the appellant has already exhausted all the remedies before this Court challenging the award passed by the first respondent Council dated 4.6.2016. In such view of the matter, the contention raised by the appellant that O.P.No.692 of 2022 was dismissed on the ground of limitation and therefore, the appellant has filed the instant writ petition in W.P.No.7633 of 2022 on the ground that the order passed by the first respondent Council dated 4.6.2016 is null and void is unacceptable. Hence, the instant writ appeal filed by the appellant has no legs to stand. Therefore, we are of the view that the appellant has not made out a prima facie case to entertain the appeal and there is no patent error or infirmity to interfere with the order passed by the Writ Court dated 13.07.2022 in W.P.No.7633 of 2022.

Accordingly, the appeal stands dismissed. No cost. Consequently, C.M.P.No.15702 of 2022 is also dismissed.

(T.R. ACJ.) (D.K.K.J.)
7.12.2022

W.A.No.2079 of 2022

T.RAJA, ACJ.
AND
D.KRISHNAKUMAR, J.

vaan

Speaking/Non Speaking order
Index: Yes
vaan

Pre-Delivery Judgment in
W.A.No.2079 of 2022
and C.M.P.No.15702 of 2022

Dated: 7.12.2022