



W.A.No.677 of 2023

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.11.2023

CORAM

THE HON'BLE MR.SANJAY V.GANGAPURWALA, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

W.A.No.677 of 2023

Bharat Heavy Electricals Limited
Power Sector Western Region
Rep. by its General Manager and Head
Sanjeev Kumar Agarwal
No.345, Kingsway, Nagpur 440 001.

.. Appellant

Vs.

1. The Chairman
Micro Small Enterprises Facilitation Council
Rep. by its Regional Joint Director of
Industries and Commerce
Thiru-vi-ka Industrial Estate
Guindy, Chennai 600 032.

2. ICS Engineering Limited
Rep. by its Director
No.144, Shaila Villa, Thomas Street
Ganapathy Nagar, Alapakkam
Porur, Chennai 600 116
Also at No.3A, 3rd Floor, Pushkar
Soundarya Enclave, Block No.H65
East Avenue Road, Periyar Nagar
Korattur, Chennai 600 080.



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3. The Hon'ble Presiding Arbitrator
Madras High Court Arbitration Centre
High Court, Parry's Corner
George Town, Chennai 600 108.

.. Respondents

Prayer: Appeal filed under Clause 15 of the Letters Patent against the order dated 03.01.2023 made in W.P.No.6216 of 2021.

For the Appellant : Mr.K.Harishankar

For the Respondents : Mr.R.Rajesh
for Respondent-2

Not ready in Notice
for Respondent-1

JUDGMENT

(Delivered by the Hon'ble Chief Justice)

We have heard Mr.K.Harishankar, learned counsel for the appellant and Mr.R.Rajesh, learned counsel for the second respondent.

2. It appears that a contract was entered into between the appellant and the second respondent. According to the appellant, the contract was in the nature of works contract. The second



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respondent disputes the same before this Court. There appears to be some dispute between the parties. The second respondent approached the Micro Small Enterprises Facilitation Council under the provisions of Micro, Small and Medium Enterprises Development Act, 2006. On or about 09.06.2017, MSE Facilitation Council passed an order that "the conciliation did not succeed as the matter involves intricate engineering issues of contract management. Arbitration by a professional body is needed. Accordingly, both sides agreed for nomination of the Madras High Court Nomination Centre for the arbitration process to resolve the issue. The Facilitation Council ordered accordingly."

3. It appears that thereafter, the arbitration proceedings commenced. The first hearing before the Arbitrator was held on 21.12.2020. The appellant, thereafter, filed a writ petition bearing No.6216 of 2021 on 05.03.2021 on the ground that the provisions of the Act of 2006 could not have been invoked as the contract between the parties is in the nature of works contract.



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4. The learned Single Judge disposed of the writ petition under the impugned order observing that the matter has been referred to arbitration with the consent of the parties; further, the contract governing the parties also provides for such reference to arbitration; the second respondent has also already invoked the arbitration clause by issuing notice in the year 2013 and the appellant has also participated in the said arbitration proceedings; and now, the appellant cannot challenge the impugned order at this belated stage and that too, when the arbitration proceeding is in the final stage. Aggrieved thereby, the present appeal.

5. Learned counsel for the appellant strenuously contends that it is not a case that the appellant consented for the appointment of the Arbitrator. It was also not conclusively held that the conciliation has failed. In fact, the appellant had appeared before the Council and sought dates. However, the appellant was not given an opportunity and the matter was referred to arbitration.

6. Learned counsel further submits that mere consent for



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appointment of an Arbitrator would not denude the right of the appellant to agitate about the lack of inherent jurisdiction. Reference is made to the judgment of the Apex Court in the case of ***Hindustan Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd. [(2019) 17 SCC 82]***.

7. Learned counsel further submits that the MSME Act does not apply to the works contract. The said aspect has not been considered. To substantiate his contention that the MSME Act does not apply to the works contract, learned counsel relies upon the judgments of the Gujarat High Court in the cases of ***Surya International v. Union of India [Manu/GJ/1943/2017]*** and ***Samvit Buildcare Private Limited v. Ministry of Civil Aviation [Manu/GJ/0990/2018]***.

8. According to learned counsel for the appellant, if the proceedings are inherently without jurisdiction, the appellant can invoke the writ jurisdiction of this Court under Article 226 of the Constitution of India, at any stage of the proceedings. Learned



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counsel also refers to the judgment in the case of **Hindustan Zinc** (supra).

9. Per contra, learned counsel for the second respondent submits that it is with the consent of the parties, proceedings are referred to for arbitration. Now, the appellant cannot turn around and agitate otherwise. It is contended by the learned counsel that the appellant cannot approbate and reprobate.

10. According to learned counsel for the second respondent, the appellant has also filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 before the Arbitrator. The said application has been rejected by the Arbitrator. Learned counsel relies upon the judgment of the Apex Court in the case of **Bhaven Construction v. Executive Engineer, Sardar Sarovar Nigam Ltd. [(2022) 1 SCC 75]** and submits that the ruling of Arbitrator under Section 16 of the Act of 1996 cannot be challenged under Articles 226 and 227 of the Constitution before the High Court.



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11. Learned counsel for the second respondent also relies upon the judgment of the Apex Court in ***Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods (P) Ltd. [(2023) 6 SCC 401]*** to submit that the Facilitation Council/Institute/Centre acting as an Arbitrator/Arbitral Tribunal would have jurisdiction to rule over on its own jurisdiction as per Section 16 of the Act of 1996. It is further submitted that the dispute exists between the parties regarding the nature of the contract and the same also cannot be gone into in a writ jurisdiction. The second respondent does not admit that the contract in question is a works contract.

12. We have considered the submissions canvassed by learned counsel for the parties.

13. The appellant filed a writ petition before this Court in March 2021. The appellant could not get relief from this Court. Thereafter, on 17.06.2021, filed an application under Section 16 of the Act of 1996 challenging the jurisdiction of the Arbitrator. The



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Arbitrator ruled upon his jurisdiction rejecting the application filed by the appellant under Section 16. The appellant invited the ruling on the jurisdiction of the Arbitrator from the Arbitrator by referring to Section 16 of the Act of 1996. Sub-section (6) of Section 16 of the Act of 1996 provides that a party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34. In an application under Section 34 of the Act of 1996, the appellant has a remedy to raise the dispute with regard to the jurisdiction of the Arbitrator. The appellant is not remediless.

14. As the appellant had already resorted to remedy under Section 16 of the Act and invited an order on the said application, simultaneously maintaining the writ petition, which was filed earlier, would not be appropriate. The appellant invoked the jurisdiction of this Court and did not get any interim orders from this Court and thereafter, ventured to file an application under Section 16 of the Act of 1996. After the rejection of an application under Section 16 of the Act, again prosecuting the writ petition would not be



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appropriate and would be against the propriety. The appellant has a remedy, if an award is passed against it, to challenge under Section 34 of the Act. In the said proceedings, the appellant can also raise the objection with regard to the order under Section 16 of the Act, as may be permissible.

15. In the light of the aforesaid and as the arbitration proceeding is in the final stage, we are not inclined to interfere with the order of the learned Single Judge. The writ appeal, as such, is dismissed. There will be no order as to costs. Consequently, C.M.P.No.6763 of 2023 is also dismissed.

(S.V.G., CJ.)

(D.B.C., J.)

17.11.2023

Index : Yes/No

Neutral Citation : Yes/No

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