IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.08.2023

PRONOUNCED ON : 01.09.2023

CORAM : **JUSTICE N.SESHASAYEE**

W.P.No.9912 of 2020
and W.M.P.Nos.12046, 1048 and 14614 of 2020

L & W Construction Pvt. Ltd.,
A Company incorporated under the
Companies Act, 1956, having its
registered office at
No.801, 8th Floor, Pride Hulkul,
No.116, Lalbagh Road,
Bengaluru - 560 027.
Represented by its Authorized Signatory
Mr.Innasi Remigious ... Petitioner

Vs.

1.Micro Small Enterprises
Facilitation Council, Chennai,
Represented by its Chairman,
Guindy,
Chennai-600 032.

2.iCube Projects
Having its registered office at
No.52/103A, 4th Street,
Abhiramapuram,
Chennai-600 018. … Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the first respondent in Order No.MSEFC/CR/02/2017 dated 11.07.2018, and quash the said order, and consequently, direct the first respondent to consider the petition made by the second respondent, in accordance with Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 and the Tamil Nadu Micro, Small and Medium Enterprises Facilitation Council Rule, 2006.

For Petitioner : Ms.Nalina Mayedowda
Senior Counsel for M/s.Vivrti Law

For Respondents : Mr.Surya Senthil
for M/s.Surana and Surana for R2
R1 - No Appearance

ORDER

The petitioner herein challenges the proceedings of the first respondent dated 11.07.2018 in MSEFC/CR/02/2017.

2.The petitioner introduces the second respondent herein as its subcontractor. On 26.11.2014, it entered into a works contract with the second respondent for the latter to execute some work in some locality in Bangalore. The initial value of the contract was around Rs.16.22 lakhs and after multiple revisions, finally, the value of the contract was fixed at Rs.7.80 Crores.

3.The petitioner would allege that the second respondent did not execute the work as per the time schedule prescribed. Indeed, the petitioner was constrained to remind the second respondent of the delay vide its correspondences dated 02.04.2015, 30.04.2015, 05.05.2015, and lastly on 10.03.2016. With the last mentioned correspondence, the petitioner had settled the bills of the second respondent but with a counter claim for reimbursement of Rs.27,08,852/-.

4.Thereafter, the second respondent would move the first respondent with a claim against the petitioner to the tune of Rs.1,06,63,968/- plus the interest amount of Rs.90,86,956/-. The first respondent took cognizance of the same in MSEFC/CR/02/2017. As per the scheme of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter in short "MSMED Act"), the first respondent tried to resolve the dispute between the parties through conciliation, but it failed. However, the first respondent proceeded to quantify a liability of Rs.83.61 lakhs against the petitioner and fasten the same on it. This is now under challenge.

5. Heard Ms.Nalina Mayedowda, the learned Senior Counsel for the petitioner and Mr.Surya Senthil, the learned counsel appearing for the second respondent.

6. Learned counsel for the petitioner made the following submissions:

(a) The entire contract was executed latest by 10.03.2016, on which date, the petitioner had settled the final bill amount and raised the bill for reimbursement against the second respondent. However, the second respondent registered itself under MSME Act only on 22.04.2016. Therefore, the second respondent is not entitled to invoke MSME Act for the work it undertook to perform prior to its registration under the Act.

(b) While the second respondent has executed some work under a works-contract, it registered itself only as a manufacturer; and

(c) The first respondent has overstepped his bounds of statutory authority when it literally passed an award without resorting to arbitration, when once it concluded that the reconciliation between the parties has failed. Under Rule 11(3) of the Tamil Nadu Micro and Small Enterprises Facilitation Council Rules, 2008, when once conciliation does not lead to a settlement of the dispute, the Council is required to take up the dispute for arbitration under Section 18(3) of the Act, and it is required to issue notice of arbitration to the supplier and buyer form them to appear before it. This notice is mandatory and the same has not been complied with.

Reliance was placed on the ratio in ***Vaishno Enterprises vs. Hamilton Medical AG and another*** [(2022) SCC OnLine SC 355] and an order of this Court in W.P.No.27564 of 2013, dated 19.10.2022.

7. Per contra, the learned counsel for the second respondent made the following submissions:

i. The impugned proceeding, though did not disclose the claim and the reply made by the parties herein in as many words, yet it has all the trappings of an award passed by the MSEF Council. Indeed, the conciliation effort failed on 14.03.2018, on which date, the second respondent filed its claim before the MSFE Council. The petitioner herein too filed its reply on 16.03.2018. And in Paragraph 10, the MSEF Council discusses each of the heads of the second respondent's claim, and only thereafter, it has passed an award of Rs.83.61 Lakhs on 11.07.2018.

ii. Secondly, if it is the case of the petitioner that MSEF Council does not have jurisdiction on the ground alleged by the petitioner, it could have been taken it as a ground of defence before it. Indeed, the petitioner did not even react to this award till the second respondent moved the NCLT with a creditor's petition (This Court is informed that the petition is dismissed).

iii. Turning to the allegation that the second respondent had registered itself under the MSME Act only on 22.04.2016 is concerned, what was actually registered was MSME Udyog Aadhar, and not the registration under the said Act. The difference between registration under the MSME Act and the registration for Udyog Aadhar is well explained in the case of ***Anupam Industries Limited and another vs. West Bengal Micro Small Enterprise Facilitation Council and another*** [(2023) SCC OnLine Cal 956]. The registration under the Udyog Aadhar was introduced by the Central Government only in 2017, and it was further changed to the Udyam Scheme from 01.07.2020. This has little to do with the MSME Act.

8. Rival contentions are carefully weighed. First to the allegation that the respondent has not registered under the MSMED Act. Here, this Court needs to take judicial notice of the fact that the Udyog Adhar was introduced only in 2017, and those units which are registered as MSME, got themselves registered under Udyog Adhar only thereafter. Now, unless the petitioner could establish that the respondent never registered itself as under the MSMED Act any time before, this Court cannot countenance this argument. It should not be forgotten that the petitioner did not seem to have taken any objection to the respondent's status before the MSEF Council.

9.1 Turning to the core issue that an arbitration award has been passed even when conciliation proceedings were taking place is concerned, this Court finds that the petitioner is on much firmer platform. This issue is no more *res integra* either, as this Court had the occasion to deal with identical awards in ***M/s.Raster Images Pvt. Ltd., Vs The Micro Small Enterprises Facilitation Council & Another*** [W.P.No.13059 of 2023 dated 27.04.2023] and ***M/s.VA TECH WABAG Limited Vs The Micro Small Enterprises Facilitation Council, Chennai and another*** [W.P.No.21912 of 2022 dated 08.08.2023]

9.2 In ***Raster Images case***, the learned Single Judge of this Court has relied on the ratio of ***Silpi Industries Vs Kerala State Transport Corporation and Another*** [AIR 2021 SC 5487] and also few other authorities. It is worthwhile to extract the relevant portion of it :

> *7.The Apex Court in* ***Silpi Industries etc., vs. Kerala State Road Transport Corporation and Another*** *reported in* ***2021 SCC Online SC 439*** *has succinctly extracted the procedure to be followed by the Council when a petition is made and the same is extracted hereunder:*
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> > *20. From a reading of Section 18(3) of the 2006 Act it is clear that when the conciliation initiated under sub-section (2) of Section 18 of the said Act is not successful, the Council shall either itself take up the dispute for arbitration or refer to any institution for arbitration. Further Section 18(3) of the said Act also makes it clear that the provisions of 1996 Act are made applicable as if there is an agreement between the parties under sub-section (1) of Section 7 of the 1996 Act. Section 23 of the*

1996 Act deals with the statement of claim and defence. Section 23(2A), which gives a right to respondent to submit a counter claim or plead set-off with regard to claims within the scope of the arbitration agreement, is brought into Statute by Amending Act 3 of 2016. If we look at the Statement of Objects and Reasons of the Amending Act, same is also enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. Clause 11 of the Bill, by which sub-section (2A) was proposed to be inserted, states that sub-section (2A) was intended to give an opportunity to the respondent, in support of his case, to submit counter-claim or a set-off if such counter-claim or set-off falls within the scope of arbitration agreement. When Section 18(3) makes it clear that in the event of failure by the Council under Section 18(2) if proceedings are initiated under Section 18(3) of the 1996 Act, the provisions of 1996 Act are not only made applicable but specific mention is made to the effect as if the arbitration was in pursuance to an arbitration agreement referred to in sub-section (1) of Section 7 of the 1996 Act. When there is a provision for filing counter-claim and set-off which is expressly inserted in Section 23 of the 1996 Act, there is no reason for curtailing the right of the respondent for making counter-claim or set-off in proceedings before the Facilitation Council.

8.The Division Bench of this Court in ***M/s.Super Steam Boilers Engineers Pvt. Ltd, Rep. by its Director Nazeer A. Kazi, Navi Mumbai vs. The Micro, Small Enterprises Facilitation Council Coimbatore Region, Rep. by its Chairperson, Guindy, Chennai 600 032*** *in W.A.No.2655 of 2021 dated 07.03.2022 also had an occasion to deal with the procedure to be followed by the Council when a petition is filed under Section 18 of the MSMED Act and the relevant portions are extracted hereunder:*

> *8. A perusal of the order passed by the Council shows that initially the matter was taken up for conciliation and was deferred from time to time to settle the disputes in the interest of the parties. When the conciliation failed, an order was passed to take up the matter for arbitration invoking Section 18(3) of the Act of 2006. While taking a decision to arbitrate the matter, the procedure required for it has not been followed. The matter was ordered to be posted directly for arguments and for that, to lead evidence by the parties. Without realising that, after the failure of conciliation proceedings, the matter was to be taken up for arbitration as per the procedure.*
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> *9. The Council could have taken up the matter for arbitration or send it for independent arbitration as given under Section 18 of the Act of 2006. If at all the matter is taken up for arbitration, it should have been after calling for the claim and thereupon written statement from the side opposite with counter claim, if any. The procedure*

aforesaid was not followed and in view of the judgment of the Apex Court in the case of Jharkhand Urja Vikas Nigam Limited, it becomes clear that the procedure given under Section 18 of the Act of 2006 is mandatory in nature and when conciliation fails, the Council is empowered either to take up arbitration on its own or to refer it to any institution providing alternative dispute resolution services and the provisions of the Arbitration and Conciliation Act, 1996 to apply therein.

9.In the present case, on carefully going through the orders passed by the 1st respondent, it is seen that the 1st respondent has not followed the procedure under Section 18 of the Act and has dismissed the petition in a hasty manner. The order passed by the 1st respondent suffers from patent illegality. This is not the first occasion where the Court is encountering such illegal orders and it has become a regular feature for the Council to pass such hasty orders in almost all cases where a petition is filed seeking for a claim."

In ***VA TECH WABAG Limited case***, the another learned Judge of this Court relies on the judgment in ***Sri Valli Process Vs Micro, Small Enterprises Facilitation Council*** [2022 SCC OnLine Mad 3537]. The passage relied on by the learned Judge is also relevant for the current purpose and hence, necessary portion is extracted from ***VA TECH WABAG Limited case*** :

" 6. I had an occasion to consider the step by step procedure to be followed under Section 18 by the MSMED Council in Sri Valli Process Vs Mirco, Small Enterprises Facilitation Council reported in 2022 SCC OnLine Mad 3537. The relevant observation in the above said decision reads as follows:-

> *23.The complexion or character of MSMED council changes from one capacity to other while following the step by step procedure contemplated under Section 18 of MSMED Act. While exercising power under Section 18(1) of the Act, MSMED council acts as an ordinary authority to receive respective representations of the parties. On the other hand, while W.P.No.21912 of 2022 acting under Section 18(2) the complexion of the council would change from that of an ordinary authority to that of a conciliator acting under relevant provision of arbitration and conciliation Act. While exercising power under Section 18(3) the complexion of MSMED council changes from that of conciliator to that of an Arbitrator. Therefore, it is incumbent upon the first respondent council to inform the parties by express notice under what capacity, they receive the pleadings of the parties. At least while commencing the arbitration under Section 18(3) of MSMED Act, the first respondent is obliged to record the failure of conciliation proceedings and initiation of an adjudicatory procedure as an Arbitrator. It is obligatory on the part of the first respondent council*

to inform the parties about the change of its face from that of conciliator to that of an Arbitrator, so that the parties will be made to understand that they are participating in an adjudicatory process, which will result in a binding order having impact on their rights. There is nothing available in the impugned order to show that at what point of time, the first respondent council acquired the character of arbitrator from that of conciliator. The parties appeared to have participated in the W.P.No.21912 of 2022 proceedings without knowledge whether they are participating in an ordinary reference stage under Section 18(1) or conciliation stage under Section 18(2)or in an adjudicatory stage under Section 18(3). There is nothing available in the impugned order to show valid constitution of arbitral Tribunal and beginning of adjudicatory process with express notice to the parties. Hence, I hold the impugned order cannot be termed as an award and hence liable to be set aside".

7. Therefore, if the conciliation proceedings is not successful, the 1 st respondent Council is expected to record the failure of the conciliation proceedings and initiate an adjudicated process by way of arbitration. It has been expressly held that it is obligatory on the part of the 1 st respondent Council to inform the parties about the change of its face from the conciliator to arbitrator so that the parties will be made to understand that they are participating in an *adjudicatory process which will result in a binding order having impact on their rights.*

8. A perusal of the impugned order passed by the 1st respondent would suggest the 1st respondent failed to record expressly the failure of the conciliation proceedings and issue an express notice to the parties intimating commencement of arbitration proceedings. There is nothing available on record to say after commencement of arbitral proceedings, a claim statement was made by the 2nd respondent and petitioner was given an opportunity to file a counter as per the provisions of Arbitration Act. Therefore, the 1 st respondent failed to follow the step by step procedure contemplated under Section 18 of MSMED Act, 2006 and consequently, the order impugned in this writ petition cannot be treated as an award passed under Arbitration Act."

10. This apart, when this Court perused the entire 'award' in paragraph No.11, it had directed the petitioner to pay a sum of Rs.83.61 lakhs along with interest, in accordance with Section 16 of the MSMED Act. And, it was scrutinised for the basis for this conclusion, it is seen that the Council had apparently reckoned certain sums said to have been admitted by the petitioner herein. When this Court totalled the sum said to have been admitted by the petitioner, it comes to Rs.60.81 lakhs. The difference of Rs.22.80 lakhs (Rs.83.61 lakhs (-) Rs.60.81 lakhs) is not explained.

11. To conclude, this Court allows this petition, sets aside the impugned proceedings of the first respondent dated 11.07.2018, on the ground that it does not constitute an award within the meaning of MSMED Act, and remands the matter back to the Council for holding a proper arbitration proceedings in terms of the Act. No costs. Consequently, connected miscellaneous petition is closed.

01.09.2023

Anu/ds
Index:Yes/No
Speaking Order:Yes/No
Neutral Citation Case: Yes/No

To:

Micro Small Enterprises
Facilitation Council, Chennai,
Represented by its Chairman,
Guindy,
Chennai-600 032.

N.SESHASAYEE, J.

Anu

Pre delivery order made in
W.P.No.9912 of 2020

01.09.2023