IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30.11.2022	Pronounced on : 25.01.2023

CORAM

THE HON'BLE MR. JUSTICE P.D. AUDIKESAVALU

W.P. No. 29870 of 2022
and
W.M.P. Nos. 29258 and 29260 of 2022

Metalman Auto Pvt. Ltd.,
First Floor, JMK Tower,
44/5, Kapashera, NH-8 (Delhi-Gurgaon Border),
New Delhi – 110 037. ... Petitioner

-vs-

1. Micro and Small Enterprises Facilitation Council,
No. 2, Raja Street,
Coimbatore – 641 001.

2. M/s. Estee Auto Pressings Pvt. Ltd.,
Plot No. 54A, Sipcot, Phase-1,
Zuzuad,
Hosur – 635 126,
Krishnagiri. ... Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records relating to the impugned Order in Reference No. MSEFC/CBER/111/2021, Online Application No. UDYAM-TN-11-0012041/M/00002 dated 25.02.2022 passed by the First Respondent and quash the same as illegal.

For Petitioner	:	Mr. Karthik Sundaram for Ms. Anusha Peri
For Respondents	:	Mr. T.Arunkumar, Additional Government Pleader (for R1) Mr. T.K.Bhaskar (for R2)

O R D E R

Heard Mr. Karthik Sundaram, Learned Counsel appearing for the Petitioner, Mr. T.Arunkumar, Learned Additional Government Pleader appearing for the First Respondent and Mr. T.K.Bhaskar, Learned Counsel for the Second Respondent and perused the materials placed on record, apart from the pleadings of the parties.

2. The Second Respondent made a claim in Case No. MSEFC/ CBER/111/2021 before the First Respondent under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'the MSMED Act' for short), for payment of Rs. 86,89,416/- from the Petitioner towards the value of goods supplied with interest calculated in terms of that Act, in which an order dated 25.02.2022 was passed holding that the Petitioner was

liable to pay the sum of Rs. 86,89,416/- together with compounded interest with monthly rests at three times of the Bank rate notified by the Reserve Bank of India as stipulated in MSMED Act from the invoices dated from 09.12.2020 to 04.05.2021 till the date of realization of dues, which is assailed in this Writ Petition.

3. Learned counsel for the Second Respondent has raised preliminary objections regarding the maintainability of the Writ Petition by contending that if the Petitioner is aggrieved by the impugned order, it has only to resort to filing of an application under Section 34 read with Section 2(4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the A & C Act' for short), to have it set aside as an arbitral award, and that in any event, a Writ Petition to set aside an arbitral award cannot be prosecuted without complying with the requirement of pre-deposit of 75% of the amount involved in terms of Section 19 of the MSMED Act.

4. In response, Learned Counsel for the Petitioner contends that when the First Respondent has not conducted the arbitral procedure as required to be followed under the A & C Act read with MSMED Act, the Petitioner is justified in

invoking the plenary jurisdiction of this Court under Article 226 of the Constitution to impeach it placing reliance on the decision of the Hon'ble Supreme Court of India in ***Jharkhand Urja Vikas Nigam Limited -vs- State of Rajasthan*** (Order dated 15.12.2021 in Civil Appeal No. 2899 of 2021) and the decision of the Division Bench of this Court in ***M/s. Super Steam Boilers Engineers Pvt. Ltd. -vs- Micro, Small Enterprises Facilitation Council, Coimbatore Region*** (Order dated 07.03.2022 in W.A. No. 2655 of 2021) in that regard. It is further submitted that the requirement of pre-deposit of 75% of the amount involved as stipulated in Section 19 of the MSMED Act cannot be made applicable to Writ Petitions under Article 226 of the Constitution as held by this Court in the decision in ***Sri Valli Process -vs- Micro Small Enterprises Facilitation Council*** [(2022) 5 MLJ 489].

5. The pivotal question that arises for consideration in this case is whether a Writ Petition under Article 226 of the Constitution could be entertained to challenge the order passed under Section 18 of the MSMED Act and if so, whether the requirement of pre-deposit of 75% of the amount involved as required under Section 19 of the MSMED Act would not be applicable to such case?

6. At this juncture, it must be noticed that Section 34(2)(v) of the A & C Act provides that an arbitral award may be set aside by the jurisdictional Court on an application made by the aggrieved party when the arbitral procedure is not in accordance with the provisions of that Act. It must, at once, be emphasized that the Hon'ble Supreme Court of India in ***Assistant Collector of Central Excise -vs- Dunlop India Limited*** [(1985) 1 SCC 260] has precisely explained the legal position relating to the exercise of discretionary powers under writ jurisdiction when an alternative remedy exists, in the following words:-

> *"3. Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that*

the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

In ***Nivedita Sharma -vs- Cellular Operators Association of India*** [(2011) 14 SCC 337], adverting to the the previous decisions with regard to the rule of self-restraint when an alternative remedy is available to the aggrieved person, the Hon'ble Supreme Court of India has emphasized that when a statutory forum is created by law for redressal of grievance, a writ petition should not be ordinarily entertained ignoring that statutory dispensation. Further, the law has been restated by the Hon'ble Supreme Court of India in ***Radha Krishan Industries -vs- State of Himachal Pradesh*** [(2021) 6 SCC 771] as extracted below:-

"27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the *aggrieved person.*

27.3. Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition.

However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

Learned Counsel for the Petitioner has not been able to demonstrate from the facts of this case as to how it would fall under any of the exceptional circumstances mentioned therein or that the Petitioner has been impeded from canvassing what is sought to be agitated in this Writ Petition in an application to set aside the arbitral award under Section 34 of the A & C Act, and the affidavit filed in support of the Writ Petition is also bereft of any details in that regard.

7. Coming to the requirement of making pre-deposit of 75% of the amount involved, it would be necessary to refer to Section 19 of the MSMED Act, which reads as follows:-

"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 centre 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 *per cent. 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."

The plain language of the aforesaid provision makes it clear that its compliance is mandatory though the Court has discretion to permit the buyer to remit the amount in installments as it may deem fit as held by the Hon'ble Supreme Court of India in ***Gujarat State Disaster Management Authority -vs- Aska Equipments Limited*** [(2022) 1 SCC 61] in the following words:-

"13. On a plain/fair reading of Section 19 of the MSME Act, 2006, reproduced hereinabove, at the time/before entertaining the application for setting aside the award made under Section 34 of the Arbitration and Conciliation Act, the appellant-applicant has to deposit 75% of the amount in terms of the award as a pre-deposit. The requirement of deposit of 75% of the amount in terms of the award as a pre-deposit is mandatory. However, at the same time,

considering the hardship which may be projected before the appellate court and if the appellate court is satisfied that there shall be undue hardship caused to the appellant-applicant to deposit 75% of the awarded amount as a pre-deposit at a time, the court may allow the pre-deposit to be made in instalments."

The same view has been taken by the Hon'ble Supreme Court of India in the decisions in ***Goodyear India Limited -vs- Norton Intech Rubbers Private Limited*** [(2012) 6 SCC 345] and ***Tirupati Steels -vs- Shubh Industrial Component*** [(2022) 7 SCC 429]. The Division Bench of this Court in ***M/s. Eden Exports Company -vs- Union of India*** [(2013) 1 MLJ 445] has declined to entertain Writ Petitions challenging the orders passed by the Micro and Small Enterprises Facilitation Council when 75% of the amount involved as required under Section 19 of the MSMED Act has not been deposited before the matter is taken up for hearing. Moreover, in the absence of any restriction of the applicability of Section 19 of the MSMED Act only to proceedings under Section 34 of the A & C Act and having due regard to the doctrine of purposive construction to achieve the objects of an enactment, it is not possible to exclude Writ Petitions under Article 226 of the Constitution from the ambit of the phrase 'application to set aside an arbitral award' in that legal provision. The Seven

Judges Bench of the Hon'ble Supreme Court of India in ***Mafatlal Industries Ltd. -vs- Union of India*** [(1997) 5 SCC 536] while explicating that the High Court in exercise of powers under Article 226 of the Constitution of India can neither ignore the law nor it can override it, has observed as follows:-

> *"77. .... So far as the jurisdiction of the High Court under Article 226 — or for that matter, the jurisdiction of this Court under Article 32 — is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."*

Viewed from that perspective, the contrary view expressed by this Court in ***Sri Valli Process -vs- Micro Small Enterprises Facilitation Council*** [(2022) 5 MLJ 489] cited by Learned Counsel for the Petitioner, without any reference to the said principles in the authoritative pronouncements, cannot lend support to exempt the Petitioner from complying from that statutory requirement of pre-deposit in this case.

8. It would assume significance here that there is nothing to infer from the facts reflected in the decision of the Hon'ble Supreme Court of India in ***Jharkhand Urja Vikas Nigam Limited -vs- State of Rajasthan*** (Order dated 15.12.2021 in Civil Appeal No. 2899 of 2021) and the decision of the Division Bench of this Court in ***M/s. Super Steam Boilers Engineers Pvt. Ltd. -vs- Micro, Small Enterprises Facilitation Council, Coimbatore Region*** (Order dated 07.03.2022 in W.A. No. 2655 of 2021) relied by Learned Counsel for the Petitioner that the requirement of pre-deposit of 75% of the amount involved as stipulated in Section 19 of the MSMED Act, had been brought to the notice of the Court in those cases. In this backdrop, it must be recapitulated that the Hon'ble Supreme Court of India in ***Regional Manager -vs- Pawan Kumar Dubey*** [(1976) 3 SCC 334] has highlighted that it is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its *ratio decidendi* and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts. The Constitution Bench of the Hon'ble Supreme Court of India in ***Padma Sundara Rao (Dead) -vs- State of Tamil Nadu*** [(2002) 3 SCC 533] has aptly ruled in this regard as follows:-

"Courts should not place reliance on decisions without discussing as to how the factual situations fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington Vs. British Railways Board (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

9. That apart, it is settled position of law that discretionary relief under Article 226 of the Constitution ought not to be exercised in favour of a person merely because it may be lawful to do so and it would follow as its corollary that it is incumbent upon the Petitioner to establish that prejudice has been caused by the impugned order. It is also relevant to point out here that Sections 15 to 25 of the MSMED Act provides for an expeditious mechanism for recovery of delayed payments to micro and small industries arising out of goods supplied, in which a claim would have to be supported by invoices with proof of delivery. Once such

claim is made by the supplier with that requisite evidence, the burden shifts on the buyer to plead and prove his defences. The First Respondent has given details of the claim made by the Second Respondent specifying 211 invoices with amount due aggregating to Rs. 86,91,857.63 for goods supplied and after deducting Rs. 2,441/- towards payment received, has mentioned the amount of Rs. 86,89,416/- as remaining to be recovered in para 2 of the impugned order. The mandate for granting interest for delayed payment has been stipulated in the MSMED Act itself for which there is no discretion either to reduce or waive the same. It is apparent from a perusal of the Counter dated 06.12.2021 filed by the Petitioner before the First Respondent that the defences raised for non-payment of the amount claimed by the Second Respondent towards goods supplied appear to be illusory, sham and practically moonshine, which cannot be countenanced. If it is the case of the Petitioner that it was not liable for that amount claimed, in view of the aforesaid legal position, it ought to have established the same with relevant proof and examined witnesses before the First Respondent. Having not even taken any efforts to convince that it has evidence to repudiate liability, there is no justification for the Petitioner to find fault with the First Respondent for having arrived at the conclusion based on the materials available on record.

10. In the result, the Writ Petition, which is devoid of merits, is dismissed. Consequently, the connected Miscellaneous Petitions are closed. No costs.

25.01.2023

vjt
Index: Yes/No
NCS: Yes/No
Note: Issue order copy by 27.01.2023.

To

The Chairman,
Micro and Small Enterprises Facilitation Council,
No. 2, Raja Street,
Coimbatore – 641 001.

P.D. AUDIKESAVALU, J.

vjt

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