



W.P. (MD) No. 26527 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 02.03.2023

WEB COPY

CORAM

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

W.P. (MD) No. 26527 of 2022

and

W.M.P. (MD) No. 20712 of 2022

Kalpataru Power Transmission Limited,
Represented by its
Authorized Signatory Mr. Harbinder Gulati
Madurai Chettikulam,
NH 785, Chettikulam,
Madurai – 625020.
(Cause-title amended by order dated
28.02.2023 in W.M.P. (MD) No.2356 of 2023)

... Petitioner

-VS-

1. Thiru. N. Athimuthan (Proprietor),
M/s. Aathees Hard Flooring,
26/2, LDC Road, Chinnachokkikulam,
Madurai – 625 002.
2. The Micro Small Enterprise Facilitation Council,
Madurai Region, District Industries Centre,
AlagarKoil Road,
Madurai – 625 002.

... Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records pertaining to the proceedings initiated in O.P.55/MSEFC/Madurai/2021 by the 2nd respondent which culminated into an order dated 26.07.2022 in case No. MSEFC/MDU/55/2021 passed by the 2nd Respondent and quash the same.



WEB COPY



W.P. (MD) No. 26527 of 2022

For Petitioner : Mr. M.Vallinayagam
Senior Counsel for M/s. A.Sivaji

For Respondents : Mr. S.Meenakshisundaram,
Senior Counsel for
Mr. M.Thirunavukarasu (for R1)

Mr. V.J.Kumaravel
Central Government Senior Panel Counsel
(for R2)

ORDER

Heard Mr. M.Vallinayagam, Learned Senior Counsel appearing for the Petitioner, Mr. S.Meenakshisundaram, Learned Senior Counsel appearing for the First Respondent and Mr. V.J.Kumaravel, Learned Counsel for the Second Respondent and perused the materials placed on record, apart from the pleadings of the parties.

2. The First Respondent made a claim in Case No. MSEFC/MDU/55/2021 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. 99,74,825/- from the Petitioner towards the amount due for the works carried out with calculation in terms of the Act, in which an order dated 26.07.2022 was passed holding that the Petitioner was liable to pay



the sum of Rs. 99,74,825/- 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 for the invoices during the period from 23.10.2020 to 02.08.2021 till the date of realization of dues, which is assailed in this Writ Petition.

3. Learned Senior Counsel for the First 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 Senior Counsel for the Petitioner contends that when the Second 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) 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.

5. The primordial 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], advertent 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 Senior 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 clear language of the aforesaid provision makes its compliance 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



W.P. (MD) No. 26527 of 2022

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 any 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, it would not be possible to entertain the Writ Petition in the absence of the Petitioner complying with the 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) relied by Learned Senior 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. Learned Senior Counsel for the Petitioner by relying on the decision of the Hon'ble Supreme Court of India in ***Silpi Industries etc., -vs- Kerala State Road Transport Corporation*** (Order dated 29.06.2021 in Civil Appeal Nos. 1570-1578 of 2021) contends that the UDYAM Registration Certificate dated 15.10.2020 has been obtained from the First Respondent only for 'manufacturing' activities, which cannot be applied for the 'works contract' performed by the First Respondent. In this regard, it is satisfactorily explained by Learned Senior Counsel for the First Respondent that in the column relating to National Industry Classification Code in the said UDYAM Registration Certificate, it has been mentioned as 'specialized construction activities', that has been treated as 'manufacturing' in terms of clause 6 of the Notification dated 26.06.2020 issued by the Government of India in the exercise of powers conferred by the relevant statutory provisions of the MSMED Act, and the invoices for the works contract are for the period from 23.10.2020 to 02.08.2021, which are apparently after such registration entitling the Petitioner to invoke the remedy provided under Section 18 of the MSMED Act.

10. It is asserted by Learned Senior Counsel for the Petitioner that before commencement of arbitration, there was no termination of the conciliation proceedings in the manner provided under Section 76 of the A & C Act, which



would vitiate the impugned order. At this juncture, it must be noticed that the conciliation proceedings had taken place before the impugned order was passed as reflected from paras 5 to 7 thereof, which is extracted below:-

“5. During the 3rd Hearing on 15 03.2022 through Video Conference, the Petitioner was present and represented by Thiru N. Athimuthan and the Respondent was present and represented by Thiru Narasimman Counter and Rejoinder are filed by the Respondent and the Petitioner respectively. The Respondent stated that bills submitted and work given did not match. The Council instructed both the parties to appear before the General Manager. District Industries Centre, Madurai for joint sitting on 22.03.2022 at 11:00 AM for conciliation and adjourned the case for next hearing.

6. During the 4th Hearing on 29.04.2022 through Video Conference, the Petitioner was present and represented by Thiru N Athimuthan and the Respondent was present and represented by Thiru Narasimman. The Respondent submitted that the Petitioner did not complete work on time and



therefore they had to engage a third party to complete the work Respondent prayed for time to reconcile with the Petitioner and arrive at a settlement. The Petitioner submitted that any reconciliation has failed with the Respondent Hence, the Council instructed the Respondent to file a Counter and adjourned the case to the next hearing.

7. During the 5th Hearing on 13.06.2022 through Video Conference, the Petitioner was present and represented by Thiru. Athimuthan and the Respondent was present and represented by Counsel Thiru P.J. Sri Ganesh. The Respondent contended that the Petitioner had abandoned work and therefore they had to engage a third party to complete the work at the risk and cost of the Petitioner and raised a counter claim of Rs 61,70,741/- The Petitioner stated that Running Account bills were raised and reconciled and thereafter raised the final bill. Further, no dues certificate was also given by the Respondent. The Council directed the Petitioner and the Respondent to appear before the General Manager, District



Industries Centre, Madurai and the Council members Vice President, TANSTIA, Madurai, President, Tamil Nadu Chamber of Commerce, Madurai in the joint sitting proposed to be held on 27.06.2022 at 11.00 AM for conciliation of the issues related to the pending dues and adjourned the case to the next hearing.

As per the instruction of the Council, the joint sitting was held on 27.06.2022. Both the Petitioner Thiru. N.Athimuthan and the Respondent Counsel Thiru. P.J.Sri Ganesh did not agree to amicable settlement. Conciliation failed and hence closed and the case is posted for arbitration proceeding.”

On a bare reading of the said paras of the impugned order, it is beyond any cavil that the Petitioner and the First Respondent could not arrive at any amicable settlement on the dispute between them during the conciliation proceedings. Learned Senior Counsel appearing for the Petitioner has also reiterated before this Court that there is no possibility of any conciliation on the dispute between the parties even at this advanced stage of the matter. In that scenario, the only possible inference that can be drawn is that the parties themselves have terminated



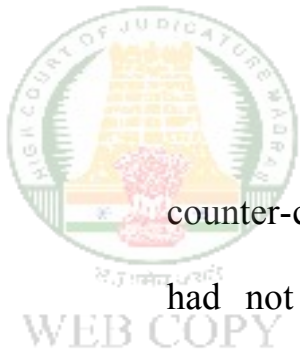
the conciliation proceedings and that no useful purpose would be served to take any further efforts for conciliation between them. Section 76 of the A & C Act merely illustrates certain situations where conciliation proceedings would get terminated, but it cannot be construed as if there cannot be termination of conciliation proceedings in any other manner. As such, it is not possible to accept that the conduct of the arbitration proceedings has taken place without prior termination of the conciliation proceedings so as to nullify the impugned order in this case.

11. 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 and services extended, 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 Second



Respondent has given details of the claim made by the First Respondent specifying 33 invoices with amount due aggregating to Rs. 6,23,40,488/- for goods supplied and services extended and after deducting Rs. 5,23,65,665/- towards payments received, has mentioned the amount of Rs. 99,74,824/- as remaining to be recovered in para 8 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. After discussing the controversy involved, the Second Respondent has given cogent reasons for arriving at the conclusion in rejecting the contentions of the Petitioner and granting the relief claimed by the First Respondent.

12. Learned Senior Counsel for the Petitioner lastly made a fervent plea that the Second Respondent has failed to examine the counter-claim made by the Petitioner which would invalidate the impugned order. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in ***Silpi Industries etc., -vs- Kerala State Road Transport Corporation*** (Order dated 29.06.2021 in Civil Appeal Nos. 1570-1578 of 2021) where the right to make a counter-claim in proceedings under Section 18 of the MSMED Act has been taken cognizance. In view of the said binding decision, the Petitioner is certainly entitled to make a



W.P. (MD) No. 26527 of 2022

counter-claim, but at the same time, it is pertinent to notice here that the Petitioner had not produced any supporting documents along with his counter-claim belatedly made on 30.05.2022 after the conciliation proceedings had already commenced on 31.01.2022. The conciliation proceedings had ended on 13.06.2022 and the matter had been posted for conducting arbitration on next hearing on 26.07.2022, when the Petitioner was expected to be prepared to lead evidence in support of the counter-claim on the said date. Though Learned Senior Counsel for the Petitioner accuses that the arbitration proceedings have been hurriedly completed in a single hearing, there is nothing to show that Petitioner had been denied any opportunity by the Second Respondent to prove its counter-claim in the arbitration. If the Petitioner had not been prudent enough to prove its counter-claim then, no fault could be found on the Second Respondent for the same. In any event, as already observed, the Petitioner could raise such contention in a proceeding to set aside the arbitral award under Section 34 of the A & C Act, which the Petitioner has failed to avail without any acceptable justification.



W.P. (MD) No. 26527 of 2022

In the result, the Writ Petition, which is devoid of merits, is dismissed.

Consequently, the connected Miscellaneous Petition is closed. No costs.

02.03.2023

SJ

Index: Yes/No

NCC: Yes/No

Note: Issue order copy by 19.04.2023.

To

1. The Micro Small Enterprise Facilitation Council,
Madurai Region, District Industries Centre,
AlagarKoil Road,
Madurai – 625 002.



WEB COPY



W.P. (MD) No. 26527 of 2022

P.D. AUDIKESAVALU, J.

vjt/sj

W.P. (MD) No. 26527 of 2022

02.03.2023