IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

121

CWP-9580-2023 (O&M).
Reserved on: 04.05.2023
Date of Decision: 07.07.2023.

Avnish Chowdhary Prop. M/s Sukh Sadan Hospital, Dalhousie Road, Pathankot and another

...Petitioners

Versus

District Level MSME Facilitation Council, Jalandhar and others

…Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

*****

Present: Mr. Karan S. Gill, Advocate for the petitioner.

VINOD S. BHARDWAJ. J.

Challenge in the present petition is to the Award dated 29.06.2022 passed by the District Level MSME Facilitation Council on the ground that the same is invalid, without jurisdiction and is unsustainable in the eyes of law, apart from being in violation of the Notification dated 13.11.2017 issued by the Government of Punjab, Department of Industries and Commerce.

Briefly summarized, the facts of the case are that the petitioner who is the resident of Dalhousie Road, Pathankot and is a doctor by profession, is running a hospital under the name and style of

M/s Sukh Sadan Hospital. It is averred that private respondents No.2 and 3 who are manufacturers and suppliers of Effluent-cum-Sewage Treatment Plant (ETP-cum-STP) had agreed to supply, install and commission an ETP-cum-STP of the capacity of 25 KLD to petitioner No.2 for an agreed sum of Rs.3,60,000/-. The mode of payment required 40% as an advance while 50% against proforma invoice on pro rata basis and completion of civil work, while 10% was payable after completion. The equipment and system carried a warranty against manufacturing defects for a period of 15 months from the date of supply or 12 months from the date of commissioning, whichever is earlier. It was also undertaken that the project would be made operational within a period of 02 months. The petitioners claimed to have made payment of Rs.65,000/- as advance on 29.03.2017, Rs.2,00,000/- on 26.04.2017 and 28.05.2017, aggregating to Rs.2,65,000/-. However, despite the agreement amongst the parties, the private respondents No.2 and 3 allegedly failed to supply the agreed plant and machinery and other components, resulting in failure to make the ETP-cum-STP plant operational even after the period of 08 months. It is further averred that the private respondents overcharged the petitioners to the extent of Rs.92,600/- as the actual price of the said ETP-cum-STP plant was merely Rs.1,72,400/- and even then it was not only sub-standard and technically faulty but was also not as per the required specifications and remained non-operational. The defects were also not remedied or rectified by the respondents. The petitioners flagged the said issues in their Email dated 09.06.2017 calling upon the respondents to lift the sub-standard plant and machinery supplied to them followed by the reminder. The private respondents instead demanded the payment from the petitioners.

A civil suit for declaration with consequential relief of mandatory injunction was thereafter filed by the petitioners before the Court of Civil Judge (Jr. Divn.), Pathankot on 16.12.2017 bearing No. CS/893/2017 titled as "Avnish Kumar Vs. Jalvayu Parivartan and Others" which is stated to be fixed for 01.05.2023.

A detailed written statement in the civil proceedings had also been filed by the private respondents and no objection was raised qua the jurisdiction of the Civil Courts, at Pathankot or that MSME Act had ousted the jurisdiction of the Civil Courts.

During the pendency of the above said civil suit, a complaint under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006(hereinafter referred to as the MSMED Act')was filed on 14.02.2018 without disclosing the factum of pendency of civil suit and notwithstanding that the respondents had submitted themselves to the jurisdiction of Civil Court at Pathankot. Parallel proceedings for recovery of principal amount of Rs.2,16,779/- along with interest were initiated. It is averred that the claim of the private respondents had been allowed by the District Level MSME Facilitation Council without appreciating the material facts and other evidence available on record vide the impugned award dated 29.06.2022 and in violation of the notification issued by the Government of Punjab dated 13.11.2017 as Chairman has not been the signatory to the Award. Hence, the present petition.

It is argued that the Government of Punjab that in exercise of its powers under Chapter V, Section 21 (3) of the MSMED Act, has set up the District Level Micro and Small Enterprises Facilitation Councils in different Districts vide Notification dated 13.11.2017. As per the above said Notification, the Deputy Commissioners of the Notified Districts were to exercise the powers of the Director, Industries and Commerce and also to act as the Chairman of the MSME Facilitation Councils in their respective Districts. It is averred that the District Level MSME Facilitation Council, has passed the Award in haste notwithstanding that the said MSME Facilitation Council had not been properly constituted. The quoram of the MSME Facilitation Council comprises of the D.C. as the Chairperson, General Manager of the District Industries Centre as Member Secretary; two persons from the Association of the MSME as members; Director MSME, Department of Industries of the concerned District as member; and Lead District Bank Manager of the concerned District as member. However, the Deputy Commissioner did not preside over the proceedings of the Facilitation Council in the present case and is also not a signatory to the Award. No reasons have also been given about the exclusion of the members from the proceedings of the Council and as to why the composition of the Facilitation Council was not proper. Thus, the Award in question would be a nullity and would be vitiated on account of being passed by Council not constituted in accordance with the notification.

Learned counsel appearing on behalf of the petitioners has also vehemently argued that the private respondents invoked the jurisdiction of the MSMED Act, 2006 notwithstanding that the said dispute was already pending before the Civil Court and notwithstanding the same Award had been passed by the Facilitation Council. It is further argued that Section 18 (5) of the MSMED Act, provides for a time period of 90 days for deciding the reference and as the said period had already come to an end when the Award was passed, such Award is unconstitutional and unsustainable in the eyes of law.

On being confronted, learned counsel appearing on behalf of the petitioners fairly concedes that even though there is a remedy of appeal provided under Section 19 of the MSMED Act, 2006, however, the said remedy mandates a pre-deposit and that the same is onerous and tantamount to taking away their right to challenge.

I have heard the learned counsel appearing on behalf of the petitioners and have gone through the documents appended along with the present petition with his able assistance.

The aspects that emerge from a perusal of the same are that the petitioners had entered into an agreement with the private respondents for setting up an ETP-cum-STP plant. They are duly registered as a Micro Enterprises Category under the Government of Punjab vide Udyog Aadhaar Memorandum No.PB10D00004948 issued by Ministry of Micro, Small and Medium Enterprises, Government of India. The respondents claim that ETP-cum-STP had been duly installed and made operational to the satisfaction of the petitioners herein even though such claim is disputed by the petitioners herein. It is averred by the respondents that the petitioners failed to make the balance payment despite satisfactory execution of the work and demand for the balance payment.

It is also not in dispute that a civil suit had been filed by the petitioners which is pending before the Civil Court in which a written statement had been filed on behalf of the respondents on 18.05.2018. The private respondents however filed their claim No.860 of 2018 before the District Level MSME Facilitation Council, Jalandhar, wherein the petitioners herein were also duly represented. An application under Section 10 of the Code of Civil Procedure to stay the proceedings in the application under Section 18 before the District Level MSME Facilitation Council was also filed, which was, however, declined. Thereafter, the written statement had to be filed by the petitioners herein in the proceedings before the Council.

An adjudication by way of arbitration under Section 18 (3) of the MSMED Act, 2006, was undertaken after the parties stated that there is no scope of conciliation under Section 18 (2) in the matter. The District Level MSME Facilitation Council duly considered the objections raised by the petitioners as about the previous institution of Civil Suit No.893 of 2017 and rejected the said argument by referring to various judgments and to hold that claim in question could be duly considered by the District Level MSME Facilitation Council itself and that it was under no obligation to abdicate its authority merely because a civil suit was filed by the petitioners herein. It specifically relied upon Section 18 (4) and Section 24 of the MSMED Act to support itself to return a finding that the Facilitation Council, Jalandhar had jurisdiction to consider the claim raised by the private respondents herein.

Thereafter, the claim was considered on merits and all contentions of the petitioners were noticed. The Award was eventually passed by the Facilitation Council directing that the amount of Rs.4,77,691/- calculated along with interest till 31.05.2022 be paid. The said Award had been signed by four members of the Facilitation Council. The Deputy Commissioner-cum-Chairman was, however, not signatory to the same.

Even though the petitioner contends that composition of the Facilitation Council was not in accordance with the Notification dated 13.11.2017 issued by the Government of Punjab as per which the Deputy Commissioners of the specified District were to exercise the powers of Director Industries and Commerce and were to be the Chairman of the Facilitation in their respective Districts, however, he has not made reference to any rules or proceedings laid down by the Department of Industries and Commerce or to procedure followed by the District Level MSME Facilitation Council for expeditious disposal of the cases. In the absence of reference to the regulations of Department of Industries and Commerce specifying the mode of making/passing of an Award by the Facilitation Council and/or the procedure to be followed by the District Level MSME Facilitation Council, it cannot be assumed that an Award having been passed by the Facilitation Council would be vitiated merely on account of absence of any member or Chairman of the Facilitation Council. There is no such mandate in the MSMED Act, 2006, that the

Facilitation Council would be incompetent to pass any Award in the absence of its Chairman. It is undisputed that four members of the Facilitation Council are signatory to the Award. There is also no mandate that Award of the Facilitation Council has to be an unanimous Award. In the absence of any prohibition imposed in the Statute and/or rules and regulations notified/framed therein, the award which is signed by four out of five members of the Facilitation Council cannot be per se held to be illegal or to be in conflict with law.

The Government of Punjab had notified the Punjab Medium and Small Enterprises Facilitation Council Rules, 2021 on 20.09.2021. Rule 9 of the same fixed the quorum of 03 members and Rule 10 provides that decision can be taken by a majority of members. The relevant Rules are extracted as under:-

> *"**9. Meetings of the Council and Quorum**: -*
> *(1) The meeting of the Council shall be ordinarily held after giving seven days notice. However, an urgent meeting can be called at such short notice as the Chairperson may consider.*
> *(2) The notices/communication for the meeting shall be sent/given to the petitioner and through registered post or SMS or email.*
> *(3) The Council shall hold regular meetings, at least twice a month.*
> *(4) The presence of three members of Council shall form a quorum.*
> ***10. Decisions of the Council**:-*
> *(1) Any decision of the Council shall be made by a majority of its members present at the meeting of the Council.*

(2) Every reference made under section 18 to the Council shall be decided within a period of ninety days from the date of making such a reference.

(3) The Secretariat office shall upload the proceedings of every meeting of the Council on the web portal created for the purpose.

(4) 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, the other order, as the case may be, in the manner directed by such court."

The Rules of 2021 thus do not stipulate either a unanimous award or mandatory presence of the Chairman. The quorum being three and the award having been signed by 04 members out of 05, the same is in compliance of the Rules and cannot be termed as a nullity.

In so far as reference to Section 18 (5) of the MSMED Act, 2006 is concerned, even though the said provision provides a period of 90 days for passing of an Award, however, I fail to be in agreement with the petitioners that the aforesaid period is mandatory and that the Facilitation Council shall have no jurisdiction to pass an Award after the expiry of the above said period. The expression "**shall**" used in Section 18 (5) of the MSMED Act, even though couched as mandatory, is only directory in its nature. It expresses desire of the Legislature for an expeditious adjudication of the reference brought before the Facilitation

Council and does not prescribe any fatal consequences for non-adherence to the said time schedule. Such an argument of vitiating the Award solely on the ground of being passed after a period of 90 days thus does not stem from meaningful and purposive interpretation of the Statutory Scheme under the provisions of the MSMED Act, 2006. The above said view is also supported by the judgment of the Hon'ble Delhi High Court in the matter of ***Indian Highways Management Company Limited Vs. Mukesh and Associates reported as 2021 SCC Online Del. 2868***.

The petitioners have also failed to refer to any provision as per which the jurisdiction of the Facilitation Council constituted under the MSMED Act, 2006 would be barred merely on account of pendency of a civil suit. In so far as reference to Section 10 of the Code of Civil Procedure and the objection on the strength thereof is concerned, the same has been already dealt with by the Facilitation Council and the argument has been rejected. I would refrain myself from commenting on merits of such argument and/or the contention raised by the petitioners for the reason that the petitioners have an efficacious alternative remedy to prefer an appeal under the MSMED Act, 2006. The condition of mandatory pre-deposit has already been affirmed by the Hon'ble Supreme Court. Besides, the said provision is not a subject matter of challenge in the present petition as well. As a matter of fact, even though the learned counsel for the petitioners concedes that there is a remedy of appeal under the MSMED Act, 2006, however, in paragraph No.22 of the instant petition, the declaration made by the counsel is that the petitioners have no other remedy except to approach this Court. Such a declaration is undisputedly wrong and misleading. Once the remedy of appeal has been prescribed under the Statute, a person is required to ordinarily take recourse to the statutory remedies. The Hon'ble Supreme Court in the matter of ***M/s Radha Krishan Industries Vs State of Himachal Pradesh & Ors. Civil Appeal No 1155 of 2021 (Arising out of SLP(C) No 1688 of 2021) decided on 20.04.2021*** has held as under:-

> *"27 The principles of law which emerge are that :*
>
> *(i) 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;*
>
> *(ii) 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;*
>
> *(iii) 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;*
>
> *(iv) 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;*
>
> *(v) 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; and

(vi) 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."

It has also been held by the Hon'ble Supreme Court in the matter of ***South Indian Bank Limited and others Vs. Naveden Mathew Philip and another reported as 2023 SCC Online SC 435*** as under:-

"It is thus evident approaching a writ Court is not a substitute to the procedure provided in law. The remedy has to be ordinarily availed as per Statute. No such circumstances exist as would make out a case for direct interference by the High Court in a writ petition. The issues raised are questions of fact and merit of claim which can be duly appreciated by the Appellate Forums as well."

In view of the foregoing reasons and considering that the petitioner has an alternative efficacious remedy and there are no pressing circumstances which render such alternative remedy as a nullity, I find no reason to exercise jurisdiction under Article 226 of the Constitution of India.

The present petition is accordingly dismissed in *limine*.

The dismissal of the present petition, however, shall not operate as a Bar for the petitioners from raising challenge to the award as per law and before the competent Forum.

July 07.07.2023. **(VINOD S. BHARDWAJ)**
raj arora **JUDGE**

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No