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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.09.2024

CORAM

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

W.P. Nos.10408 and 10415 of 2024
and W.M.P. Nos.11403 and 11410 of 2024

M/s.Siemens Industry Software (India) Pvt. Ltd,
Represented by its Authorised signatory
Mr.Amit Sehgal,
Tower D, 16th Floor, Global Business Park,
MG Road, Gurgaon-122 002. ... Petitioner in both W.Ps.

Vs.

1.Micro and Small Enterprises Facilitation Council,
Represented by its Secretary/ Regional Joint Director,
of Industries and Commerce,
Guindy, Chennai-600 032.

2.M/s.MTAB Technology Center Private Ltd.,
Represented by its Director,
Ms.Sashi Sairaman, No.133, Developed Plots,
Electrical and Electronic Industrial Estates,
Perungudi, Chennai-600 096. ... Respondents in both W.Ps.

3.M/s.National Institute of Technology,
Warangal, Telangana-506 004. ...3rd Respondent in W.P.10408 of 2024

4.M/s.Vishvesvaraya National Institute of Technology,
Nagpur, Maharastra -440 010. ...3rd Respondent in W.P.10415 of 2024

PRAYER in W.P.No.10408 of 2024:- Writ Petition is filed under Article 226 of Constitution of India, praying to issue a Writ of Certiorarified

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Mandamus calling for the records of the impugned order dated 23.11.2023 vide MSEFC/CR/251/2022 passed by the first Respondent (received on 20.03.2024) and quash the same and consequently direct the first Respondent to refer the petitioner and the second Respondent to Arbitration in a recognised Arbitral Institution while following the provision of Section 18(3) of the MSMED Act.

PRAYER in W.P.No.10415 of 2024:- Writ Petition is filed under Article 226 of Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for the records of the impugned order dated 23.11.2023 vide MSEFC/CR/253/2022 passed by the first Respondent (received on 20.03.2024) and quash the same and consequently direct the first Respondent to refer the petitioner and the second Respondent to Arbitration in a recognised Arbitral Institution while following the provision of Section 18(3) of the MSMED Act.

For Petitioner in both W.Ps.	:	Mr.C.Mohan for Mr.T.C.Gopalakrishnan
For Respondents in both W.Ps.	:	Mr.Naveen Kumar Government Advocate (for R1) Mr.Arun C.Mohan (for R2) Mr.J.Madangopal Rao Senior Panel Counsel (for R3)

COMMON ORDER

These writ petitions have been filed challenging the order passed by the first Respondent dated 23.11.2023 thereby directing the petitioner to pay

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the principal amount with compound interest as claimed by the second Respondent. In both the writ petitions, the petitioner is one and the same and as such this Court disposes these writ petitions by a common order.

2. The petitioner is provider of Product Lifecycle Management (PLM) software which allows companies to manage entire lifecycle of the product efficiently and cost effectively from ideation, design and manufacture, through service and disposal. While being so, the petitioner and the second Respondent had entered into a reseller agreement dated 21.08.2018 whereby the second Respondent had become a non-exclusive seller of certain designated products of the petitioner. Thereafter, the 3rd Respondent invited for a competent bidding tender dated 01.10.2019 and 23.12.2019 respectively, in which the petitioner and the second respondent were successful bidders and accordingly the Tripartite agreement was entered between the petitioner and the Respondents 2 and 3 dated 13.02.2020 and 12.12.2019 respectively for setting up of a centre of excellence at the premises of the 3rd Respondent. As per the tripartite agreement, opening of an Escrow account to be operated jointly between the petitioner and

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Respondents 2 and 3 was required to deposit money in the Escrow account in accordance with the terms of the tripartite agreement. The Escrow agreement was entered between the petitioner and the second Respondent with the Bank on 04.01.2022. Accordingly, the 3rd Respondent agreed to pay a sum of Rs.20,23,64,885/-plus taxes and Rs.22,93,89,271/- plus taxes into the Escrow account respectively upon completion of the schedule of work as contemplated under clause 4(a) of the tripartite agreement.

3. While being so, the second Respondent had failed to complete the obligations under clauses 7(a), 7(b) and 7(f) of the tripartite agreement, thus causing huge delay in setting up the centre for excellence, which had also resulted in tarnishing the brand of the petitioner and a consequential loss of business. The second Respondent had failed its mandate as per clauses 7(d) and 7(e) of the tripartite agreement and caused a notice dated 08.03.2022 thereby directed the petitioner to pay a sum of Rs.5,48,19,714/- and Rs.8,20,70,422/-. It was denied by the petitioner stating that it had never stopped and delayed the transfer of funds from Escrow account. However, the second Respondent had terminated the tripartite agreement. Therefore,

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the second Respondent had preferred a claim before the first Respondent under Section 18(1) of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "MSMED Act") for a sum of Rs.5,84,37,282/- and Rs.5,95,86,516/- by two claim petitions. Thereafter, the first Respondent referred the issue for conciliation and the same had failed. Therefore, the first Respondent had taken up the case for arbitration proceedings. The petitioner filed counter for the petitions filed under Section 18(1) of the MSMED Act. Thereafter, the first Respondent passed an award dated 23.11.2023.

4. The learned counsel for the petitioner would submit that as per the tripartite agreement, it is very much the work contract i.e., an agreement for supply of goods and services. Therefore, the work contract would not attract the provisions under the MSMED Act. Though, the first Respondent had taken up the case for arbitration proceedings without following any of the procedure as contemplated under the Arbitration and Conciliation Act, 1996, and passed award as per Section 18(3) of the MSMED Act. The arbitration proceedings envisaged the parties to file pleadings, let in evidence and

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examination of witnesses was that the parties would have to establish about their claim as well as counter claim, if any. The first Respondent without following the procedure in accordance with Section 18(3) of the MSMED Act passed an award. Therefore, these writ petitions are very much maintainable. The order passed by the first Respondent cannot be considered as an award as per the Arbitration and Conciliation Act, 1996 and as such there is no question of challenging the award under Section 34 of the Arbitration and Conciliation Act, 1996. In support of his contentions, he read upon several judgments of this Court and the Hon'ble Supreme Court.

5. Per contra, the learned counsel for the second Respondent filed counter and the submissions made by the learned counsels for the Respondents revealed that the writ petitions are not maintainable and it has to be challenged only under Section 34 of the Arbitration and Conciliation Act, 1996, in the manner known to law. Since the first Respondent passed an award under Section 18(3) of the MSMED Act, a notice given by a party such as the second Respondent invoking jurisdiction of the first Respondent under Section 18 of the MSMED Act can be considered to be a deemed

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notice under arbitration under Section 21 of the Arbitration and Conciliation Act, 1996. Apart from the notice dated 06.07.2022 another notice was also issued to the petitioner by the first Respondent dated 15.11.2023 thereby informing the next date of hearing of arbitration as 23.11.2023 and sought for the petitioner to file any documents in support of their stand in advance. Therefore, the first Respondent duly followed the procedure as contemplated under Section 18(3) of the MSMED Act. Therefore, the writ petitions are not at all maintainable and the petitioner ought to have challenged the award under Section 31 of the Arbitration and Conciliation Act, 1996. In order to avoid the deposit of 75% of the award amount, the petitioner approached this Court by way of writ petitions under Article 226 of the Constitution of India.

6. Admittedly, there was dispute between the petitioner and the second Respondent related to their business transactions. Though, the learned counsel for the petitioner raised a ground that the work contract would not attract the provisions of MSMED Act, he mainly projected on the ground of non-compliance of the provisions under Section 18(2) of the Act while passing an award. It is relevant to extract the provisions under Section

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18(3) of the MSMED Act:

> *"18. .....*
> *(3) Where the conciliation initiated under sub-section(2) is not successful and stands terminated without any settlement between the parties, the Council shall either take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section(1) of section 7 of that Act."*

7. It is thus clear that the first Respondent ought to have followed the provisions of the Arbitration and Conciliation Act, 1996, if not followed, the procedure as contemplated under Section 18(3) of the MSMED Act, the award deserves to be set aside. Further, on receipt of the reference under Section 18(1) of the MSME Act by any one of the parties, the first Respondent shall conduct conciliation itself or seek assistance of any institution or centre to provide alternative resolution services. If the conciliation resorted to under Section 18(2) of the Act is not successful and terminated without any settlement then the first Respondent shall either take up the dispute for arbitration or refer the dispute to any institution for such arbitration. Failure to enter into any settlement before the conciliation, the

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first Respondent has rightly taken his case under the Arbitration and Conciliation Act, 1996. Thereafter, the first Respondent ought to have followed the procedure contemplated under Section 18(3) of the MSMED Act.

8. Perusal of the order passed by the first Respondent would show that conciliation proceedings had been conducted. However, no provisions of the Arbitration and Conciliation Act have been applied for conducting the arbitration by the first Respondent.

9. On perusal of the records, it is seen that the second Respondent had filed a petition simply claiming the claim amount without enclosing any document to substantiate the said claim. That apart, it was not in the form of claim statements. For the said petition, the petitioner filed counter denying the allegations in the petition. There is no whisper of marking any documents and evidence to substantiate the claim of the second Respondent. Further, the parties appeared to have participated in the proceedings without participating in the original reference under Sections 18(1) and 18(2) or

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adjudication under Section 18(3) of the MSMED Act. There is nothing available in the order passed by the first Respondent to show valid constitution of arbitral Tribunal and beginning of adjudicatory process with express notice to the parties. Therefore, the order passed by the first Respondent cannot be termed as an award passed under Section 18(3) of the MSMED Act and the same is evident as contemplated in Section 18(3) of the MSMED Act.

10. When it has been shown that these writ petitions can be very well maintained, it is not necessary for the petitioner to challenge the same under Section 19 of MSMED Act by depositing 70% of the amount ordered by the first Respondent.

11. In view of the above, the order passed by the first Respondent dated is set aside and liable to be quashed in both the writ petitions. Accordingly, the impugned order dated 23.11.2023 is hereby quashed. The matter is remanded back to the first Respondent to conduct arbitration proceedings by itself or through a centre for alternative dispute resolution in

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accordance with the provisions of Section 18(3) of the MSMED Act read with the provisions of the Arbitration and Conciliation Act, 1996 and pass order within a period of 3 months from the date of receipt of a copy of this order.

12. Accordingly, these writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

05.09.2024

Index:Yes/No
Speaking Order: Yes/No
Neutral Citation: Yes/No
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G.K.ILANTHIRAIYAN, J.

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To:
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of Industries and Commerce,
Guindy, Chennai-600 032.

2.The Director,
M/s.MTAB Technology Center Private Ltd.,
No.133, Developed Plots,
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