IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.09.2024

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

W.P.No.24325 of 2024
and W.M.P.Nos.26571 & 26572 of 2024

M/s. Statue of Unity Area Development and
Tourism Governance Authority,
Administrative Building, Ekta Nagar,
Kevadia, Narmada District,
Gujarat – 393 151.
Rep. by its Authorized Signatory,
Rakesh Kumar Narayanlal Raval ...Petitioner

-Vs-

1. Micro and Small Exterprise
Facilitation Council,
Chennai Region,
Industries Commissioner and
Director of Industries and Commerce,
Guindy, Chennai,
Tamil Nadu – 600 032.

2. Tri Electric Private Limited,
Plot No.D-5, SIPCOT, Industrial Complex,
Gummidipoondi, Thiruvallur – 601 201,
Rep by Parthasarathi Krishnaswami. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records relating to the order in Reference No.MSEFC/CR/376/2022, Online Application

No.UDYAM-TN-24-0021740/M/00003 dated 12.05.2023 passed by the first respondent and quash the same as illegal.

For Petitioner	: Ms.Deepika Murali
For Respondents	
For R1	: Mr.N.Naveen Kumar Government Advocate
For R2	: Mr. K.P.Sanjeev Kumar For Ms.N.Madhusruthi

ORDER

This writ petition has been filed challenging the award passed by the first respondent dated 12.05.2023, thereby directed the petitioner to pay principal amount of Rs.91,53,610/- with compound interest with monthly rests, at three times the bank rate, as stipulated under Sections 15 and 16 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "MSMED Act")

2. The petitioner floated a tender dated 21.08.2021 in relation to the supply, installation and comprehensive maintenance of battery-operated vehicle (Electric carts – 25 Nos.) at Kevadia, Gujarat. As per the tender condition, a pre-bid meeting was scheduled on 25.08.2021, to provide bidders with information regarding request for proposal and the

project requirements and to provide each bidder with an opportunity to seek clarification. Subsequently, a corrigendum tender was issued on 27.08.2021, clarifying the procedural and financial terms and conditions and the eligibility criteria of the tender. The second respondent submitted lowest bid for a total price of Rs.2,17,74,970/- and after further negotiations, by the letter of acceptance dated 29.09.2021, the second respondent was awarded the tender for the reduced price at the rate of Rs.2,17,50,000/-. Thereafter, the second respondent was called upon to submit the performance bank guarantee/security deposit for an amount equal to 5% of the order value prescribed in the letter of acceptance. Further it stipulated inter alia the payment terms, delivery schedule, consignee, invoice information, penalty and liquidate damages, warranty, taxes, training, force majeure clause, arbitration clause and other functional requirements of the electric vehicles.

3. While being so, on 25.07.2022, the petitioner received an intimation with regard to application dated 25.07.2022 from Samadhaan Micro and Small Enterprises Facilitation Council, Trichy, thereby informed that the second respondent filed an application under Section 18(1) of the MSMED Act, for delayed payment against the petitioner for

recovery of Rs.91,53,610/- along with compound interest with monthly rests as stipulated under Sections 15 & 16 of the MSMED Act. The petitioner filed counter denying all the allegations made in the application. After three adjournments, conciliation proceeding were filed and ordered for arbitration proceedings to be conducted by the first respondent. Accordingly, the first respondent issued arbitration notice as contemplated under Section 18(3) of the MSMED Act, on 08.05.2023. Thereafter, the petitioner sought for time to engage his counsel in the arbitration proceedings. On 12.05.2023, the first respondent passed an award under MSMED Act, thereby directed the petitioner to pay the principal amount of Rs.91,53,610/- along with compound interest with monthly rests at three times the bank rate. Aggrieved by the same, the petitioner filed the present writ petition.

4. The learned counsel appearing for the petitioner submitted that the award passed by the first respondent cannot be sustained and it cannot be treated as an award. Therefore, the petitioner need not to file application under Section 34 of the Arbitration and Conciliation Act, and also under Section 18(4) of the MSMED Act. The filed respondent failed to follow the mandatory provisions as contemplated under Section 18 of

the MSMED Act and it is clear violation of principles of natural justice. No claim statement was filed and no deposition was made by the second respondent. The petitioner was not given an opportunity of cross-examining the second respondent and on the documents relied upon by the second respondent, the impugned order has been passed. Therefore, the award passed by the first respondent cannot be treated as an award and the petitioner need not to challenge the award as contemplated under Section 18(4) of the MSMED Act and Section 34 of the Arbitration and Conciliation Act.

5. The second respondent filed counter and the learned counsel appearing for the second respondent submitted that the writ petition is not maintainable since the statutory alternative remedy is available as against the award passed by first respondent under the MSMED Act. If the petitioner invoked the provision under Section 19 of the MSMED Act or Section 34 of the Arbitration and Conciliation Act, the petitioner has to pay deposit 75% of the award amount. In order to evade the said deposit, the petitioner in short cut method filed the present writ petition. Therefore, the writ petitioner itself is not maintainable. Further the claim statement of the second respondent has been filed and the same has been

relied upon by the first respondent and passed detailed order.

5.1. In support of his contention, he relied upon the judgment reported in ***2023 SCC OnLine SC 1852*** in the case of ***India Glycols Limited and anr Vs. Micro and Small Enterprises Facilitation Council and ors.,*** in which the Hon'ble Supreme Court of India held that under Section 19 of the MSMED Act, an application for setting aside an award of the Facilitation Council cannot be entertained by any Court unless the appellant has deposited seventy-five percent of the amount in terms of the award. Further in view of the provisions under Section 18(4) of the MSMED Act, where the Facilitation Council proceeds to arbitrate upon a dispute, the provisions of the Act of 1996 are to apply to the dispute as if it is in pursuance of an arbitration agreement under sub-section(1) of Section 7 of the Act. Therefore, the only remedy is available under Section 34 of the Arbitration and Conciliation Act. However, there is a supper added condition which is imposed by Section 19 of the MSMED Act, to the effect that an application for setting aside an award can be entertained only upon the appellate depositing with the Council seventy-five percent of the amount in terms of the award.

6. Heard the learned counsel appearing on either side and perused the materials placed before this Court.

7. It is relevant to extract the provision under Section 18 of the MSMED Act, as follows :-

> *"18. Reference to Micro and Small Enterprises Facilitation Council:- (1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.*
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> *(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.*
>
> *(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 itself 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.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."

Thus it is clear that the conciliation and arbitration proceedings cannot be clubbed in terms of the statutory mandate under Sections 18(2) and 18(3) of the MAMED Act.

8. In this regard, the Hon'ble Supreme Court of India in the judgment reported in ***(2021) 19 SCC 206*** in the case of ***Jharkhand Urja Vikas Nigam Limited Vs. State of Rajasthan & ors.,*** held that the proceedings for conciliation and arbitration cannot be clubbed together. It is relevant to extract the relevant portion of the above judgment as follows :-

> *"14. From a reading of Section 18(2) and 18(3) of the MSMED Act it is clear that the Council is obliged to conduct conciliation for which the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 would apply, as if the conciliation was initiated under Part III of the said Act. Under Section 18(3), when conciliation fails and stands terminated, the dispute between the parties can be resolved by arbitration. The Council is empowered either to take up arbitration on its own or to refer the arbitration proceedings to any institution as specified in the said Section. It is open to the Council to arbitrate and pass an award, after following the procedure under the relevant provisions of the Arbitration and Conciliation Act, 1996, particularly Sections 20, 23, 24, 25.*
>
> *15. There is a fundamental difference between*

> *conciliation and arbitration. In conciliation the conciliator assists the parties to arrive at an amicable settlement, in an impartial and independent manner. In arbitration, the Arbitral Tribunal/ arbitrator adjudicates the disputes between the parties. The claim has to be proved before the arbitrator, if necessary, by adducing evidence, even though the rules of the Civil Procedure Code or the Indian Evidence Act may not apply. Unless otherwise agreed, oral hearings are to be held.*
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> *16. If the appellant had not submitted its reply at the conciliation stage, and failed to appear, the Facilitation Council could, at best, have recorded the failure of conciliation and proceeded to initiate arbitration proceedings in accordance with the relevant provisions of the Arbitration and Conciliation Act, 1996, to adjudicate the dispute and make an award. Proceedings for conciliation and arbitration cannot be clubbed."*

In the case on hand, on the date in which the conciliation proceeding was filed, the first respondent became Arbitrator and initiated arbitration proceeding. On the same day, i.e., on 12.05.2023, after closing the conciliation proceedings, passed an award under the MSMED Act, in UDYAM-TN-24-0021740/M/00003 and in MSEFC/CR/376/2022.

9. That apart, when the first respondent invoked the proceedings under Section 18(3) of the MSMED Act and acted as Arbitrator, it should be taken up the dispute as an Arbitrator and the provisions of the Arbitration and Conciliation Act shall be applied in every procedure to be followed by the first respondent. On perusal of the records, the first respondent failed to follow the mandatory statutory provisions envisaged under the Arbitration and Conciliation Act. The first respondent did not even conduct any proceedings such as recording deposition, marking of documents from the second respondent. The petitioner was not given an opportunity of cross-examining the second respondent objecting the documents which were annexed in support of his claim.

10. Therefore, the award passed by the first respondent does not amount to an award passed under Section MSMED Act and the writ petition is very much maintainable under Article 226 of the Constitution of India. On receipt of the reference under Section 18(1) of the MSMED

Act, by any one of the parties, the first respondent shall conduct conciliation itself or seek assistance of any institution or center to provide alternative resource person. Thereafter, the Arbitrator ought to have followed the procedure as contemplated under Section 18(3) of the MSMED Act. The records also shown that the first respondent did not record any deposition and failed to mark any documents to prove the claim. Therefore, the award passed by the first respondent cannot be treated as award passed under Section 18(3) of the MSMED Act.

11. In view of the above discussions, the award passed by the first respondent cannot be sustained and liable to be quashed. Accordingly, the award passed by the first respondent dated 12.05.2023, is hereby quashed, and the matter is remanded back to the first respondent to conduct arbitration proceedings by itself or through a center for alternative dispute resolution in accordance with the provisions under Section 18(3) of the MSMED Act r/w. the provisions of the Arbitration and Conciliation Act, and pass order within a period of twelve weeks from the date of receipt of a copy of this order.

12. With the above directions, the Writ Petition stands allowed. Consequently, connected miscellaneous petitions are closed. There shall be no orders as to costs.

30.09.2024

Index : Yes/No
Speaking/Non Speaking order
Neutral Citation : Yes/No

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