IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.01.2024

CORAM

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

W.P. No. 36067 of 2023
and
W.M.P. Nos. 36031 and 36032 of 2023

M/s. Vee Kay Logistics,
Represented by its Partner,
Mr. Mathew J.,
New No. 24/3, Sri Vinayagar Sarang Garden Street,
George Town,
Chennai – 600 001. … Petitioner

-vs-

1. The Micro and Small Enterprises Facilitation Council,
Chennai Region,
A 30, Thiru. Vi. Ka. Industrial Estate,
Guindy,
Chennai – 600 032.

2. M/s. Eco Care Pest Control Services,
New No. 62, 4th North Beach Road,
Chennai – 600 001. ...
Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India, 1950, praying to issue a Writ of Certiorari, calling for the records of the impugned order dated 23.03.2023 in MSEFC/CR/232/2022 passed by the First Respondent and quash the same.

For Petitioner : Mr. G.Derrick Sam

For Respondents : Mr. B.Vijay,
Additional Government Pleader (for R1)

O R D E R

Heard Mr. G.Derrick Sam, Learned Counsel for the Petitioner and Mr. B.Vijay, Learned Additional Government Pleader, who takes notice for the First Respondent, and perused the materials placed on record, apart from the pleadings of the parties.

2. Having regard to the nature of order proposed to be passed in the Writ Petition, which would not cause any prejudice to the Second Respondent, notice to it is dispensed with.

3. The Second Respondent had made a claim in Case No. MSEFC/CR/232/2022 before the First Respondent under Section 18(1) of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'the MSMED Act' for short), claiming payment of Rs. 15,49,234/- from the Petitioner towards remaining amount due for services rendered with interest calculated in terms of that Act, in which an order dated 23.03.2023 was passed holding that the Petitioner was liable to pay the principal amount of

Rs. 15,49,234/- together with compounded interest with monthly rests at three times of the Bank rate notified by the Reserve Bank of India as stipulated in Sections 15 and 16 of the MSMED Act from the appointed due dates respectively till payment, which is assailed in this Writ Petition.

4. At the outset, queries were raised by the Court to Learned Counsel for the Petitioner as to the maintainability of the Writ Petition 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.

5. In response, it is contended by Learned Counsel for the Petitioner that the mandatory provisions of the A & C Act had not been followed as the Petitioner had not been opportunity to effectively defend his case by filing his documents for which it had sought adjournment by e-mail dated 21.03.2023 from the First Respondent. In this context, 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.”

In such circumstances, the Petitioner has not 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, which the Petitioner has failed to avail without any acceptable justification.

6. 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 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]. 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."*

The Hon'ble Supreme Court of India in ***India Glycols Limited -vs- Micro and Small Enterprises Facilitation Council, Medchal-Malkajgiri*** (Order dated 06.11.2023 in Civil Appeal No. 7491 of 2023) has held that when the remedy is available under Section 34 of the A & C Act to impeach the order passed under Section 18 of the MSMED Act by depositing 75% of the amount due, the said obligation under the statute could not be obviated by taking recourse to the jurisdiction under Articles 226 or 227 of the Constitution.

7. 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 First Respondent has given details of the claim made by the Second Respondent specifying the invoices with amount due aggregating to Rs. 15,49,234/- for goods supplied and services extended and has mentioned the amount of Rs. 15,49,234/- as remaining to be recovered in the impugned order. The amount of liability of the Second Respondent to the Petitioner in the transaction has been discussed by the First Respondent in the impugned order as extracted below:-

> *"8. The Council has gone through the invoices and other relevant documents including GSTR-1 documents. Respondent denied liability and contended that the claim of the Petitioner is*

inflated. Respondent in their counter statement has contended that according to the unwritten agreement between the buyer and supplier of fumigation services rendered to the clients, a sum of Rs. 250/- per import container, during the period between 2018 to 2021, and thereafter upto 2021-2022 a sum of Rs. 500/- per import container, are the only mutually agreed rates for the supply of fumigation services. It is further stated therein that whatever balance amount claimed in the Petitioner's bills shall become payable to the buyer of the services, by the supplier of the services. Also, it is stated in the counter that the modus operandi of the disbursal of excess amount to the buyer of the services claimed in the Petitioner's bills were liable to be set off against amounts claimed vide their subsequent bills raised on the buyer of services. It is the contention of the Respondent that such excess amount claimed by the supplier of services is adjusted by issuing credit notes reflected in the ledger of Petitioner for the year 2021-2022. It is pertinent to note that admittedly there is no written agreement for supporting the contentions of the Respondent. The invoice *number 16373/15-16 dated 18.02.2016, 16230/16-17 dated 04.01.2017 and invoice number ECC/6910/21-22 dated 21.07.2021 are submitted by the Respondent in support of their contentions. It is ascertained that invoice no. 16373/15-16 and no. 16230/16-17 do not pertain to fumigation and is raised towards document charges. Invoice No. ECC/6910/21-22 pertain to fumigation and also is part of the claim of the Petitioner. No evidence is adduced by the Respondent to establish their contentions. Credit notes have been already adjusted by the Petitioner and the balance amount is claimed in this petition. Further, the Petitioner has referred to a report dated 27.06.2022 with respect to investigation on the complaint filed by the Respondent regarding non usage of Methyl Bromide for import shipment by the Petitioner. The report which is signed by RCMPIC, DD, states that fumigation has been done by the Petitioner as per prescribed standards. It is ascertained that work has been duly completed by the Petitioner. The claim of the Petitioner is established by way of documents. Based on the detailed and critical examination of the claims made by the*

Petitioner along with available materials on record and on merits of the case, the Council has come to the considered conclusion that the Respondent is liable to pay the Petitioner the principal amount of Rs. 15,49,234/- along with the compound interest with monthly rests at three times the Bank rate notified by the RBI in accordance with Sections 15 & 16 of the MSMED Act, 2006."

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 adverting to the factual matrix of the controversy involved, the First Respondent has given cogent reasons for arriving at the conclusion in rejecting the contentions of the Petitioner and granting the relief claimed by the Second Respondent. 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.

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

05.01.2024

Index: Yes/No
NCC: Yes/No

Note: Issue order copy by 24.05.2024.

vjt

To

1. The Chairman,
   Micro and Small Enterprises Facilitation Council,
   Chennai Region,
   A 30, Thiru. Vi. Ka. Industrial Estate,
   Guindy,
   Chennai – 600 032.

Copy to

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P.D. AUDIKESAVALU, J.

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