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W.P.No.10688 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.10.2024

CORAM

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

W.P.No.10688 of 2024

and

W.M.P.No.11778 & 11779 of 2024

The Tamil Nadu Medical
Services Corporation Limited,
417, Pantheon Road,
Egmore, Chennai – 600 008.
Rep. by its Managing Director.

.... Petitioner

Vs

1.Uttar Pradesh State Micro and
Small Enterprises Facilitation Council,
Sarvodaya Nagar,
G.T.Road, Kanpur,
Uttar Pradesh – 205 005.
Rep. by its Chairman.

2. M/s.Atul Generators Pvt. Ltd.,
Rep. by its Director,
Nunhai, Agra – 282 006.

.... Respondents

Prayer:- Writ Petition filed under Article 226 of Constitution of India for the issuance of Writ of Certiorari to call for the order passed by the first respondent in claim petition No.26/2012 dated 28.11.2016 and quash the same.



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For Petitioner : Mr.R.Ramanlal
Additional Advocate General-II
Assisted by Mr.Habeeb Rahman
Government Advocate

For R1 : No appearance

For R2 : Mr.Sathish Parasran
Senior Counsel

ORDER

This Writ Petition has been filed challenging the award dated 30.10.2023 in claim petition No.26 of 2012 on the file of the first respondent.

2. The petitioner is a Nodal Agency for procurement and distribution of drugs, surgical and suture items for about 11,000 Government Medical Institutions all over Tamil Nadu. It procures and supplies the equipment and goods to the Government hospitals as and when instructed by the Government or by the Directorates of Health and Family Welfare Department. In order to procure drugs, medicines, surgical and sutures, the tenders would be floated as and when the requirement for the equipment arises. Accordingly, in the year 2009, the petitioner floated an open tender for supply, installation and



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commissioning of 130 Nos of 5 KVA diesel generator set (DG set) to various Primary Health Centres in the State of Tamil Nadu in which the second respondent become the lowest bidder and the work order was placed for a total value of Rs.2,05,39,740/- with a delivery period of 90 days. If the supplier failed to deliver the goods within a period of 90 days from the date of signing of agreement, liquidated damages will be levied at 0.5% of the value of the delayed goods or unperformed services of each week of delay or part thereof until actual delivery or performance up to a maximum deduction of 10% of the contract price. Further, 10% advance amount was payable within 30 days from the date of signing of contract agreement and against submission of bank guarantee for equivalent amount.

3. According to the petitioner, there was a delay in supply and installation of the DG sets and the second respondent levied liquidated charges at Rs.18,76,249/-. In this regard, there was dispute between the petitioner and the second respondent. Therefore, the second respondent filed a claim petition before the first respondent in Claim Petition No.26 of 2012. The first respondent, being the Facilitation



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Council for the purpose of conciliation between parties, informed the petitioner. The petitioner submitted a reply and the conciliation was failed. Therefore, the first respondent acted as Arbitrator and passed Award, thereby directed the petitioner to pay a sum of Rs.1,31,75,204.86 as principal and interest till the date of the award and thereafter compound interest with monthly rest in accordance to the Act till the entire amount with interest is paid by the petitioner.

4. The learned Additional Advocate General appearing for the petitioner would submit that it was an ex-parte award. The petitioner was not served with any notice with regard to the arbitration proceedings. During conciliation process, the petitioner submitted his reply and requested further time. However, without considering the same, the first respondent recorded the failure of conciliation and acted as Arbitrator. Thereafter, the petitioner was not served with any notice, without giving any opportunity of hearing and without following any of the procedure as contemplated under the Arbitration and Conciliation Act (hereinafter referred to as A & C Act), the first respondent passed an award. The said award was not communicated to the petitioner and only



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after filling of the execution petition, the petitioner came to know about the award passed by the first respondent. Immediately, the petitioner challenged the award under Section 34 of the A & C Act with a delay. Unfortunately, the condone delay petition was dismissed. Therefore, the petitioner has no other option than to approach this Court challenging the award on various other grounds. The first respondent, being the facilitation council, cannot act as an Arbitrator to pass an award. The petitioner was not given an opportunity and no procedure as contemplated under the Arbitration and Conciliation Act was followed by the first respondent before passing an award. They simply recorded the claim petition and allowed the entire claim without even recording any evidence and marking any documents.

5. In fact, the petitioner, while filing the petition under Section 34 of the Arbitration and Conciliation Act, deposited 75% of the award amount to the tune of Rs.98,81,403/-. That apart, the first respondent has no jurisdiction to entertain any claim petition under the Micro, Small and Medium Enterprises Development Act, 2006, (hereinafter referred to as “MSMED Act”). As per the tender condition



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with regard to dispute, Clause No.15 (4) of Special Conditions of Contract, the arbitration proceedings shall be held at Chennai, India and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English. The first respondent has no jurisdiction and even then the second respondent made claim before the first respondent. That apart, the first respondent communicated all the communications in Hindi. Therefore, the petitioner does not know the language of Hindi and could not able to present before the first respondent in the claim proceedings. The first respondent passed an award in the conciliation stage deriving power for conciliation proceedings from the provision under Section 18(2) of MSMED Act.

6. Accordingly, with regard to conciliation proceedings, Sections 65 to 81 of the A & C Act apply to the conciliation process. The award was passed under Section 76 Part-III of the A & C Act. Further, as per Section 80 of the A & C Act, the Conciliator is restrained from acting as Conciliator and Arbitrator for the same dispute. In support of his contention he relied upon the Judgment of the Hon'ble



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Single Judge of this Court reported in **2016 1 CTC 403** in the case of ***M/s.Ramesh Conductors Pvt.Ltd Vs. M & SME Council***, in which, this Court held as follows :

27. *A perusal of the order of the first respondent reveals that the Council had not conducted any conciliation proceedings either by itself or as stated in sub-section 2 of Section 18 applying the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996.*

28. *The provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, deals with, submissions of statements to conciliator, conciliator not bound by certain enactments, Role of conciliator, Administrative assistance, communication between conciliator and parties, disclosure of information, cooperation of parties with conciliator, suggestions by parties for settlement of dispute, settlement agreement, status and effect of settlement agreement, confidentiality, termination of conciliation proceedings, resort to arbitral or judicial proceedings, costs, deposits, role of conciliator in other proceedings and admissibility of evidence in other proceedings respectively.*

31. *A plain reading of sub-section 3 of Section 18 shows that if the conciliation proceedings is*



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not successful and stands terminated without any settlement between the parties, then the counsel either itself take up the dispute for arbitration or reffer it to any institution or centre arbitration.

36. The provisions of Sections 7 to 34 deals with, arbitration agreement, power to refer parties to arbitration where there is an arbitration agreement, interim measures etc. by Court, number of arbitrators, appointment of arbitrators, grounds of challenge, challenge procedure, failure or impossibility to act, termination of mandate and substitution of arbitrator, competence of arbitral Tribunal to rule on its jurisdiction, interim measures ordered by arbitral Tribunal, equal treatment of parties, determination of rules of procedure, place of arbitration, commencement of arbitral proceedings, language, statements of claim and defence, hearings and written proceedings, default of a party, expert appointed by arbitral Tribunal, Court assistance in taking evidence, rules applicable to substance of dispute, decision making by panel of arbitrators, settlement, form and contents of arbitral award, termination of proceedings, correction and interpretation of award ; additional award and application for setting aside arbitral award, respectively.



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37. *A scrutiny of the order passed by the first respondent would reveal that no provisions of the above sections of the Arbitration and Conciliation Act, 1996 have been applied for conducting the arbitration, even though the sub-section 3 of Section 18 has specifically stated that the provisions of the Arbitration and Conciliation Act, shall be applied for conducting the arbitration.*

7. Further, he relied upon the Judgment of the Hon'ble Supreme Court of India, reported in **2021 SCC Online SC 1257** in the case of ***Jharkhand Urja Vikas Nigam Limited Vs. State of Rajasthan and others***, in which the Hon'ble Supreme Court of India has held as follows :

“11. 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



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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.”

8. He also relied upon the Judgment of the Hon'ble Division Bench of this Court in ***W.A.No.2655 of 2021*** in the case of ***M/s.Super Steam Boilers Engineers Pvt. Ltd., Vs. The Micro, Small Enterprises Facilitation Council, Coimbatore Region, Rep. by its Chairperson, Office of Industries Commissioner and Director of Industries and Commerce, Guindy, Chennai – 600 032***, in which, the Hon'ble Division Bench of this Court held as follows :

“8. A perusal of the order passed by the Council shows that initially the matter was taken up for conciliation and was deferred from time to time to settle the disputes in the interest of the parties. When the conciliation failed, an order was passed to take up the matter for arbitration invoking Section 18(3) of the Act of 2006. While taking a decision to arbitrate the matter, the procedure required for it has not been followed. The



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matter was ordered to be posted directly for arguments and for that, to lead evidence by the parties. Without realising that, after the failure of conciliation proceedings, the matter was to be taken up for arbitration as per the procedure.

*9. The Council could have taken up the matter for arbitration or send it for independent arbitration as given under Section 18 of the Act of 2006. It at all the matter is taken up for arbitration, it should have been after calling for the claim and thereupon written statement from the side opposite with counter claim, if any. The procedure aforesaid was not followed and in view of the judgment of the Apex Court in the case of **Jharkhand Urja Vikas Nigam Limited**, it becomes clear that the procedure given under Section 18 of the Act of 2006 is mandatory in nature and when conciliation fails, the Council is empowered either to take up arbitration on its own or to refer it to any institution providing alternative dispute resolution services and the provisions of the Arbitration and Conciliation Act, 1996 to apply therein.”*

Therefore, he prayed that the award itself cannot be sustained and is liable to be quashed.



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9. Per contra, the second respondent filed a counter and Mr.Sathish Prasaran, learned Senior Counsel appearing for the second respondent submitted that the second respondent filed a claim petition before the first respondent under Section 18 of MSMED Act. On receipt of such claim petition, the first respondent had sent a communication dated 05.02.2014, thereby called upon the petitioner to submit its reply. In fact, even before that communication, the petitioner was served with notices on 10.04.2013, 10.09.2013 and 15.10.2013, thereby informed about the claim petition filed by the second respondent under Section 18 of the MSMED Act on 20.05.2014 and directed both the parties to attend up coming meeting along with all the documents. The first respondent , in the said order dated 20.05.2014, stating that on behalf of the respondent, one Parashuram appeared and informed that due to the staff being tied up in the counting of votes for the General Lok Sabha Elections 2014. The concerned officer is unable to attend the meeting and undertaking to appear in the next meeting. However, in the next meeting, the respondent failed to appear and as such, the first respondent, by an order dated 15.07.2014, directed the parties, viz., the petitioner as well as the second respondent, to present in the next meeting with



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complete details for mutual settlement by discussion. After repeated demands, the petitioner submitted his written statement. However, there was no settlement through conciliation. Therefore, the first respondent has jurisdiction to entertain the claim petition and examine whether it is legally sustainable or not, by acting as an Arbitrator.

10. Finally, by an order dated 27.09.2016, if he has not appeared, the order will be passed by invoking the provision under Section 25(c) of the A & C Act. In fact, on the objections raised by the petitioner with regard to jurisdiction, the first respondent passed an order dated 30.08.2016 and stated that the provisions under Section 18A of MSMED Act provides that 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, can make a reference to the Micro and Small Enterprises Facilitation Council. For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under Section 16. It provides buyer fails to make payment of the amount to the supplier, as required under Section 15, the buyer shall be liable to pay compound



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interest. It shows that the suppliers can claim from the buyer any amount due against supplies. The liquidated damages has been deducted from the amount of bills of supply viz., buyer has not made full payment of bills and the amount deducted is balance amount of bills. Therefore, the party can file the petition under the MSMED Act for recovery of balance amount.

11. Therefore, the first respondent has jurisdiction to entertain the claim and examine whether deduction is legally sustainable for which council can examine the contract. Even otherwise under Section 24 of the MSMED Act, the provisions under Sections 15 to 23 shall have effect notwithstanding anything inconsistent contained in any other law. Hence, the first respondent has jurisdiction and it will not be effected by jurisdiction of the Civil Court. Further, after the award passed by the first respondent, the same was duly served on the petitioner by speed post on 28.08.2017 and the same was received on 31.08.2017. If any grievance over the award, it can be challenged under Section 34 of the A & C Act within a period of three months from the date of receipt of the award, i.e., the petitioner ought to have filed a petition under Section



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34 of the A & C Act on or before 30.12.2017. However, the petitioner did not prefer any application under Section 34 of the A & C Act challenging the award passed by the first respondent. Therefore, the second respondent, in order to execute the award passed by the first respondent, filed an execution petition in E.P.No.121 of 2019 before this Court. On receipt of the notice from the said execution proceedings, the petitioner once again asked the first respondent to provide a copy of the award. The said request was also considered by the first respondent and served with a copy of the award through e-mail on 15.01.2020.

12. Thereafter, the petitioner filed a petition under Section 34 of the A & C Act with a delay in Arbitration Miscellaneous Case No.274 of 2023 before the Commercial Court, Kanpur Nagar. It was dismissed, by an order dated 30.10.2023, not only on the ground that the petitioner failed to provide satisfactory reasons for condone the delay and also on merits. Therefore, the petitioner approached this Court by way of this writ petition on the ground that the first respondent has no jurisdiction and failed to follow the procedure as contemplated under MSMED Act and A & C Act. In this regard, the learned Senior Counsel



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relied upon the Judgment of the Hon'ble Supreme Court of India reported in **1977 (2) SCC 806** in the case of ***State of U.P. Vs. Nawab Hussain***, in which, the Hon'ble Supreme Court of India held that it therefore serves not only a public but also a private purpose by obstructing the reopening the matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. This is the general principle of res judicata.

13. He also relied upon the Judgment of the Hon'ble Supreme Court of India reported in **(2023) 6 SCC 401** in the case of ***Gujarat State Civil Supplies Corpn. Ltd Vs. Mahakali Foods (P) Ltd***, in which, the Hon'ble Supreme Court of India has held as follows :

“47. The aforesaid legal position also dispels the arguments advanced on behalf of the counsel for the buyers that the Facilitation Council having acted as a



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Conciliator under Section 18(2) of the MSMED Act, 2006 itself cannot take up the dispute for arbitration and act as an arbitrator. Though it is true that Section 80 of the Arbitration act, 1996 contains a bar that the Conciliator shall not act as an arbitrator in any arbitral proceedings in respect of a dispute that is subject of conciliation proceedings, the said bar stands superseded by the provisions contained in Section 18 read with Section 24 of the MSMED Act 2006. As held earlier, the provisions contained in Chapter V of the MSMED Act 2006 have an effect overriding the provisions of the Arbitration Act, 1996. The provisions of the Arbitration Act, 1996 would apply to the proceedings conducted by the Facilitation Council only after the process of conciliation initiated by the Council under Section 18(2) fails and the Council either itself takes up the dispute for arbitration or refers to it to any institute or centre for such arbitration as contemplated under Section 18(3) of the MSMED Act, 2006.

48. When the Facilitation Council or the institution or the centre acts as an arbitrator, it shall have all powers to decide the disputes referred to it as if such arbitration was in pursuance of the arbitration agreement referred to it as in sub-section (1) of Section 7 of the Arbitration Act, 1996 and then all the trappings of



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the Arbitration Act, 1996 would apply to such arbitration. It is needless to say that such Facilitation Council/institution/centre acting as an Arbitral Tribunal would also be competent to rule on its own jurisdiction like any other Arbitral Tribunal appointed under the arbitration Act, 1996 would have as contemplated in Section 16 thereof.”

14. Thus, it is clear that though Section 18 of the Arbitration Act, 1996, contains a bar that the Conciliator shall not act as an Arbitrator in any arbitral proceedings in respect of a dispute that in subject of conciliation proceedings, the said bar stands superseded by the provisions contained in Section 18 read with Section 24 of the MSMED Act, 2006. It has an effect overriding the provisions of the Arbitration Act, 1996. The provision of the Arbitration Act, 1996 would apply to the proceedings conducted by the Facilitation Council only after the process of conciliation initiated by the Council under Section 18(2) fails and the Council either itself takes up the dispute for arbitration or refers to it any institute or centre for such arbitration as contemplated under Section 18(3) of the MSMED Act, 2006. Therefore, the first respondent



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can act very well as Conciliator as well as an Arbitrator under the MSMED Act. Hence, the Judgments cited by the learned Additional Advocate General are not applicable to the case on hand. It is relevant to extract the provision under Section 18 of the MSMED Act, 2006.

“18(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.

(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) Whether 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



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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.”

15. Thus, it is clear that if the conciliation was initiated under Section 18(2) of MSMED Act is not successful and stands terminated and the first respondent can very well take up the dispute for arbitration. A perusal of the records reveals that the first respondent initiated the conciliation proceedings as contemplated under Section 18(2) of the MSMED Act, which failed. Therefore, the first respondent



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rightly acted as an Arbitrator and proceeded with the claim submitted by the second respondent.

16. In view of the above, this Court finds no infirmity or illegality in the claim petition as well as the award passed by the first respondent. Therefore, the writ petition is devoid of merits and is liable to be dismissed. Accordingly, this writ petition stands dismissed. Consequently, connected miscellaneous petitions are closed. No costs.

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Internet : Yes

Index : Yes/No

Speaking order/Non-speaking order

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