BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
12.01.2024	31.01.2024

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
and
THE HONOURABLE MR.JUSTICE C.KUMARAPPAN

C.M.A.(MD)Nos.855 & 856 of 2023
and
C.M.P.(MD)Nos.12155, 12156 & 13169 of 2023

1.The Deputy Chief Engineer,
Gauge Conversion / Southern Railway,
Arasaradi,
Madurai – 625 016.

2.The Chief Engineer (South),
Construction / Southern Railway,
Egmore,
Chennai – 600 008. ... Appellants in both the C.M.As.

vs.

M/s.Savio Industrial and Structural Corporation,
Prop. V.X. Dominic Savio,
96/5, K.N. Colony Post,
Salem – 636 014. ... Respondent in both the C.M.As.

PRAYER in both the C.M.As.:- Civil Miscellaneous Appeals filed under Section 37 of the Arbitration and Conciliation Act, 1996, against the fair and decreetal order dated 30.09.2022, made in Ar.O.P.Nos.189 and 230 of 2021.

For Appellants in both the C.M.As. : Mr.D.Saravanan
Central Govt. Senior Standing Counsel

For Respondent in both the C.M.As.: Mr.J.Anandkumar

COMMON JUDGMENT

DR.G.JAYACHANDRAN, J.
and
C.KUMARAPPAN, J.

These two Civil Miscellaneous Appeals are against the common order dated 30.09.2022, made in Ar.O.P.Nos.189 of 2021 and 230 of 2021.

2. The appellants herein are the Deputy Chief Engineer/Gauge Conversion, Southern Railway, Madurai and the Chief Engineer / South / Construction, Southern Railway, Chennai [hereinafter referred to as "the Railways"]. The respondent M/s.Savio Industrial and Structural Corporation is a proprietary concern, represented by its Proprietor Mr.V.X.Dominic Savio [hereinafter referred to as "the Contractor"].

3. The brief facts leading to the present appeals are as below:-

(i) For the construction of passenger platform shelter, the Railways entered into works contract with the contractor. As per the agreement, dated 02.06.2009, the contract value was Rs.59,88,131/-. The work was scheduled to be completed within a period of six months from the date of issuance of letter of acceptance of the work. The contractor after making a security deposit of Rs.1,82,162/-, took the contract and completed the work within the time stipulated.

(ii) In the course of executing the work, there was some deviation in the design and plan, leading to escalation of the construction cost. On completion of the work, the value of the work done was estimated as Rs.97,73,355.21. The Railways paid Rs.89,31,764/- and the balance amount was withheld. Hence, the contractor being a Small Manufacturing Enterprise, filed a Petition before the Micro and Small Enterprises Facilitation Council, Coimbatore Region [hereinafter referred to as "the MSEFC"], claiming the total outstanding of Rs.10,04,651/- inclusive of security deposit with interest.

(iii) The said Petition in M&SEFC/CBER/15/2015 was allowed, vide Award dated 17.02.2015. The Railways was directed to pay the outstanding of Rs.10,04,651/- with compound interest with monthly rest at three times of Bank rate notified by the Reserve Bank of India till the date of settlement. This Award was passed inconsonance with Sections16 and 17 of the Micro, Small and Medium Enterprises Development Act, 2006 [hereinafter referred to as "the MSMED Act"].

(iv) The Railways, being aggrieved by the Award, filed Ar.O.P.No.80 of 2015 under Section 34 of the Arbitration and Conciliation Act, 1996 before the Principal District Court, Madurai. In the said Ar.O.P., the Railways contended that they are liable to pay only Rs.4,69,557/- without interest. On 30.09.2019, this Ar.O.P. was disposed of, remanding back the matter to MSEFC, for fresh enquiry. The petition was renumbered as MSEFC/CBER/201/2019 and taken up for fresh consideration. After recording that the parties have exhausted the avenue of reconciliation, the MSEFC took up the matter for final disposal. After affording opportunity to the parties, the MSEFC held that pursuant to the deviation in the plan structure, the contractor has satisfactorily completed the work. Both the parties have agreed the final bill of Rs.97,73,355/-. Whereas, only Rs.89,31,764/- has been paid to the contractor. The reason stated by the Railways for deducting 10% of the cost is untenable and therefore, passed the following order:-

> *"Hence, on this day 10th December 2020 this MSEF Council orders that the respondent pays the petitioner his outstanding due of Rs.8,41,591/- together with compound interest with monthly rest at three times of Bank rate notified by the Reserve Bank of India as stipulated vide Sections 16 and 17 of MSMED Act 2006, calculated from the appointed day 31.08.2010 till 13.05.2016 and for Rs.78,068/- with compound interest with monthly rest at three times of Bank rate notified by the Reserve Bank of India as stipulated vide Sections 16 and 17 of MSMED Act, 2006, calculated from 13.05.2016 till the settlement of the amount."*

4. To set aside the award in entirety, passed in MSEFC/CBER/201/2019, the Railways preferred Ar.O.P.No.230 of 2021. Whereas, the interest portion disallowed after 13.05.2016 for the principal amount of Rs.8,41,591/- was challenged by the contractor in Ar.O.P.No.189 of 2021.

5. The learned Principal District Judge, Madurai, allowed Ar.O.P.No. 189 of 2021 filed by the contractor and dismissed Ar.O.P.No.230 of 2021 filed by the Railways, vide common order dated 30.09.2022, in exercise of power under Section 37 of the Arbitration and Conciliation Act, 1996.

6. The operative portion of the common order reads as below:-

"24. In the above facts and circumstances, this court holds that the impugned order is to be set aside in respect of awarding of subsequent interest on the balance amount and in other respects, the same need not be set aside. The petitioner in Ar.O.P.No.189/2021 is entitled to compound interest with monthly rests on Rs.8,41,591/- from the appointed day i.e., from 31.08.2010 till realization and the respondents are not entitled to any relief as sought by them in Ar.O.P.No.230/2021 and the same is liable to be dismissed. The points are answered accordingly.

<u>Ar.O.P.No.189/2021:-</u>

In the result, this petition is allowed and the Arbitral Award dated 10.12.2020 in Case No.MSEFC/CBER/201/2019 passed by MSE Facilitation

Council, Coimbatore Region, is set aside in respect of awarding interest on Rs.8,41,591/- from 31.08.2010 to 13.05.2016 and on Rs.78,068/- from 13.05.2016 till settlement. The petitioner is entitled to compound interest with monthly rests on Rs.8,41,591/- from the appointed day i.e., from 31.08.2010 till realization. No cost.

Ar.O.P.No.230/2021:-

In the result, this petition is dismissed and the Arbitral Award dated 10.12.2020 in Case No.MSEFC/CBER/201/2019 passed by MSE Facilitation Council, Coimbatore Region, is confirmed except in respect of awarding of subsequent interest on the balance amount. No cost."

7. Being aggrieved, two Civil Miscellaneous Appeal (MD)Nos.855 and 856 of 2023 are preferred by the Railways, which are taken up for consideration.

8. The gist of the grounds of appeals as submitted by the learned counsel for the appellants/Railways are as under:-

Earlier, the disputed facts were not properly considered by the MSEFC while passing it's order on 17.02.2015. Hence, Ar.O.P.No.80 of 2015 filed by the

Railways was allowed and the matter was remanded back. The MSEFC, in it's subsequent order, dated 10.12.2020, despite the fact that the contractor failed to seek reference to Mediation and Conciliation, erred in awarding compound interest with monthly rest at three times of Bank rate notified by the Reserve Bank of India upto 27.06.2016. The period of delay in two rounds of litigations is not due to the fault of the Railways. Therefore, the exorbitant interest portion is liable to be set aside.

9. Per contra, the learned counsel for the contractor, who is the respondent in both the appeals, contended that though the work as per the terms of contract completed on 31.08.2010 and the Railways admit that the value of the work is Rs.97,73,355.21, they paid only Rs.89,31,764/- and a sum of Rs.8,41,591/- was withheld for untenable reason. That apart, the claim of the Railways that Rs.7,63,523/- was paid on 27.06.2016 is factually not correct. There is no proof that Rs.7,63,523/- was paid or even tendered on 27.06.2016. The said amount not being towards the full and final settlement, even if it is to be assumed that it was tendered to the contractor, that will not save the Railways from it's liability to pay interest as per MSMED Act.

10. Heard the learned counsels on either side and perused the records.

11. The facts admitted on either side are that the value of the work executed is Rs.97,73,355.21. The work was completed on 31.08.2010. The contractor was paid only Rs.89,31,764/-. Inclusive of security deposit, the Railways due and liable to pay Rs.10,04,651/-. The only fact in dispute is, whether the Railways paid a sum of Rs.7,63,523/- on 27.06.2016. It is to be noted that the alleged date of payment of Rs.7,63,523/- is after the order of the MSEFC in the first round *i.e.,* 17.02.2015. This order was set aside and the matter was remanded back by the learned Principal District Judge, Madurai, in Ar.O.P.No.80 of 2015, vide order dated 30.09.2019. In Ar.O.P.No.80 of 2015, the Railways after suffering the order of payment of Rs.10,04,651/- with compounding interest as per the MSMED Act, had come forward to pay only Rs.4,69,557/- without interest. It is clearly borne on record that the claim of the part payment of Rs.7,63,523/- on 27.06.2016 is incorrect. It was an offer made by the Railways pending litigation, but declined by the contractor.

12. On remand, when the matter was considered afresh by the MSEFC, ensuring all the avenues of reconciliation exhausted, after appreciating the documents, it was held that the revised value for the work executed was Rs.97,73,355.21 and accepted by both the parties in writing. The contractor was only paid Rs.89,31,764/- on 31.08.2010. The outstanding amount of Rs.8,41,591/- remains unpaid.

13. The MSEFC had considered the application of Clause 42.6 of the Agreement, which deals about variation in quantities, resulting in excess of value and had concluded that, though the end use is to provide shelter to passengers, the nature of work done not mere variation in quantity, Cantilevers and butterfly model are different type, the modification in the terms of the design resulting in change in the nature of material used and also the change in the drawing, had resulted in variation of price. Hence, the Railways claiming rebate under Clause 42.6 of the Agreement is not in order. However, taking note of the fact that the Railways after revising it's stand, had communicated to the contractor on 13.05.2016, agreeing to a final value of Rs.96,95,287/-, passed the order, restraining the payment of interest for Rs.8,41,591/- upto 13.05.2016 and interest for Rs.78,068/- from 13.05.2016 till the date of realization.

14. The above reasoning of the MSEFC in respect of interpretation of Clause 42.6 accepted. On appeal under Section 34 of the Arbitration and Conciliation Act, by the learned Principal District Judge, at the same time, for want of proof regarding due payment of Rs.8,41,591/- on 13.05.2016, the restriction of payment of interest only upto 13.05.2016 was set aside. Segregation of the amount payable into two parts is not in order. Hence, the learned Principal District Judge held that,

> *"19. On perusal of records, it is clear that the petitioner has made a reference under the provisions of Micro, Small and Medium Enterprises Development Act, 2006 before the MSE Facilitation Council, Coimbatore Region, to solve the dispute between the petitioner and the respondent. Both side were given opportunities by the said council. The petitioner claim final bill amount as Rs.97,73,355/-. The respondents say that the final bill amount is Rs.96,95,287/-. It is admitted by both that out of final bill, a sum Rs.89,31,764/- was paid on 18.06.2010. The balance as per petitioner is Rs.8,41,591/- and as per*

respondents the balance is Rs.7,63,523/-. From the above facts, it is clear that the respondents have admitted that they have to pay balance amount to the petitioner and the difference in dispute amount is only Rs.78,068/- (Rs.8,41,591/- less Rs.7,63,523/-). There is no dispute that the appointed date is on 31.08.2010. On perusal of Section 16 of the MSME Act, it is clear that when a buyer fails to pay amount due to the supplier, he is liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon at three time of the bank rate notified by the Reserve Bank. Though the respondents contend that the said provision is only applicable to the buyer and the supplier, they have not produced any acceptable material to show that the said provisions is not applicable to the present case as the respondents claim that the petitioner is not a buyer and he is only contractor. The MSME Council has also awarded interest as per that provision of Section 16 of the Act. At the same time, when the Council held that the balance amount to be paid by the respondents is Rs.8,41,591/-, there is no reason assigned for segregating the said amount into two part for payment of interest. On perusal of records, it is clear that as per document No.10, a letter No.W.

148/CN/MDU/DL/Savio dated 13.06.2016 sent by the respondents stating that the final variation statement for the work has been sanctioned by GM/MAS for a value of Rs.96,95,287/-. The respondents admitted that a sum of Rs.89,31,764/- was paid on 18.06.2010. As per document No. 10, full amount was not settled even as on 13.06.2016. In the above facts and circumstances, it is clear that the petitioner is entitled to the compound interest from the appointed date 31.08.2010 till payment of balance amount ordered in impugned order i.e., Rs.8,41,591/-. Therefore, this court holds that in respect of the awarding of subsequent interest on Rs.8,41,591/- by segregating into two parts is not in order and the same is to be set aside and the petitioner is entitled to compound interest with monthly rests on Rs.8,41,591/- from the appointed day i.e., from 31.08.2010 till realization."

15. The learned Principal District Judge has taken note of the plea raised by the Railways that the final bill drawn for Rs.7,63,523/- on 27.06.2016 and the same was intimated to the contractor for his consent. However, the contractor refused to sign the final bill and protracted the settlement due. Hence, he is not entitled for interest after 27.06.2016. The learned Principal District Judge has rejected the said plea. The reason for rejecting the above plea is simple and straight. While the Railways was liable to pay a sum of Rs.8,41,591/- on the date of making petition before MSEFC *i.e.,* on 06.05.2013, the Railways after three years had come forward to pay only Rs.7,63,523/- on 27.06.2016. While the MSMED Act mandates compound interest for delayed payment, thereafter, to pay lesser amount without interest cannot mitigate the Railways from it's liability to pay interest as per Sections 16 and 17 of the MSMED Act.

16. In this case, though through letter, the Railways has agreed to pay Rs.7,63,523/- in the year 2016, this offer has emanated long after initiating the claim petition in the year 2013. Further, this offer has not fructified in depositing the amount in the pending proceedings. A clear breach of mandatory provisions by the Railways, which is non-negotiable, has invited the adverse order from the learned Principal District Judge.

17. The Hon'ble Supreme Court in **Purbanchal Cables and Conductors Pvt. Ltd.** vs. **Assam State Electricity Board and another** reported in **2012 AIR (SC) 3167,** has held that interest for delayed payment to Micro, Small and Medium Enterprises is a substantial law, vesting right of entitlement to a higher rate of interest.

18. It is also profitable to refer the interpretation of MSMED Act by the Hon'ble Supreme Court in **Gujarat State Civil Supplies Corporation Limited** vs. **Mahakali Foods Private Limited (Unit 2) and another** reported in **2022 AIR (SC) 5545**, which give quietus to the grounds raised in the appeals. The relevant portion in the said judgment reads as under:-

> *"23. Having regard to the purpose, intention and objects as also the scheme of the MSMED Act, 2006 and having regard to the unambiguous expressions used in Chapter-V thereof, following salient features emerge:*
>
> *(i) Chapter-V is "party-specific", in as much as the party i.e. the 'Buyer' and the 'Supplier' as defined in Sections 2(d) and 2(n) respectively are covered under the said Chapter.*
>
> *(ii) A specific provision is made fastening a liability on the buyer to make payment of the dues to the supplier in respect of the goods supplied or services rendered to the buyer, as also a liability to pay compound interest at three times of the bank rate notified by the Reserve Bank, if the buyer fails to make payment within the prescribed time limit. The said liability to pay compound interest is irrespective of any agreement between the parties or of any law for the time being in force.*

(iii) A dedicated statutory forum i.e., Micro and Small Enterprises Facilitation Council is provided to enable any party to a dispute with regard to any amount due under Section 17, to make reference to such Council.

(iv) A specific procedure has been prescribed to be followed by the Facilitation Council after the reference is made to it by any party to the dispute.

(v) The Facilitation Council or the centres providing alternative dispute resolution services have been conferred with the jurisdiction to act as an Arbitrator or Conciliator under Section 18(4), notwithstanding anything contained in any law for the time being in force, in a dispute between the supplier located within its jurisdiction.

(vi) The provisions of Arbitration Act, 1996 has been made applicable to the dispute only after the Conciliation initiated under sub-section (2) does not succeed and stands terminated without any settlement between the parties.

(vii) Sub-section (1) and sub-section (4) of Section 18 starting with non obstante clauses have an effect overriding the other laws for the time being in force.

(viii) As per Section 24, the provisions of Sections 15 to 23 have an effect notwithstanding anything

inconsistent therewith contained in any other law for the time being in force."

19. Sections 15, 16 and 17 of the MSMED Act under Chapter V of the MSMED Act deals with liability of buyer to make payment and the rate of interest payable. Section 2(d) of the MSMED Act defines a buyer as "whoever buys any goods or receives any services from a supplier for consideration". Thus, there can be no merits in the submission made by the Railways that Chapter V of the MSMED Act will not apply to the facts of the case in hand. Regarding the rate of interest payable for the delayed payment, Section 16 of the MSMED act is clear and unambiguous. It reads as below:-

> ***"16. Date from which and rate at which interest is payable.****- Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank."*

Thus, it is very clear and certain that the Act mandates the defaulted buyer to pay compound interest with monthly rests from the appointed day. The payment of interest can cease to be payable only from the date of actual payment or in case, the money tendered and refused.

20. From the records, it is obvious that the modification in design and work was carried out at the instruction of the Railways. Though the Railways has agreed the value of the work was Rs.97,73,355.21 and executed letter, marked as Document No.10, dated 13.06.2016, confirming the value of the work as Rs.96,95,287/- referring to Clause 42.6 of the Agreement, wanted to withhold 10% of the value, which is not applicable to the facts of the case. It is also pertinent to note that the Railways never opted to settle the dispute amicably by resorting to Conciliation. The offering of part payment in 2016, admitting liability to the tune of Rs.4,69,557/-, but refused to pay interest for the delayed payment, all goes to show that it was the fault of the Railways not settling the dispute, but prolong the litigation on flimsy ground. Therefore, the contractor cannot be deprived of his right to claim interest towards belated payment as per the Statute.

21. In the course of the argument, it was brought to the notice of this Court that the Railways has deposited a part of the decree amount, but no material was placed to ascertain the date or the amount so deposited and where the money deposited. We clarify that if any amount already deposited in the Court by the Railways pending litigation, and the said amount is already invested in interest bearing deposit, to that extent, i.e., from the date of the said deposit, the contractor will be entitled for the interest accrued if any on the deposit made, but if not invested to earn interest, then, for the said amount so deposited, the Railways is liable to pay 12% simple interest p.a. from the date of deposit till payment. This direction is in terms of the provisions of the Interest Act and the dictum of the Hon'ble Supreme Court in **Snehadeep Structures Private Limited** vs. **Maharashtra Small Scale Industries Development Corporation Limited** reported in **2010 Arb.W.L.J. 376 (SC)** while clarifying the provisions of MSMED Act regarding fixing interest on part payment.

22. In fine, the award passed by the learned Principal District Judge, Madurai, dated 30.09.2022, in Ar.O.P.Nos.189 and 230 of 2021, stands confirmed subject to the observation made in the previous Paragraph. Accordingly, the Civil

Miscellaneous Appeals are dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Index	: Yes / No	**[G.J., J.] [C.K., J.]**
NCC	: Yes / No	**31.01.2024**

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DR.G.JAYACHANDRAN, J.
and
C.KUMARAPPAN, J.

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PRE-DELIVERY COMMON JUDGMENT MADE IN C.M.A.(MD)Nos.855 & 856 of 2023

31.01.2024