Andhra High Court
Cable Corporation Of India ... vs A.P. Micro And Small Enterprises ... on 7 December, 2012

THE HON'BLE SRI JUSTICE L. NARASIMHA REDDY

Writ Petition No.25088 of 2012

07-12-2012

Cable Corporation of India Limited,rep. by its CFO & Company Secretary, Mr. Surendra Khemka

A.P. Micro and Small Enterprises Facilitation Council, Government of Andhra Pradesh,Commissionerate of Industries, A.P., Hyderabad and another

Counsel for the petitioner: Sri C.R. Sridharan

Counsel for respondents : Sri C. Kodandaram, Sr. Counsel

<Gist:

>Head Note:

Citations:
1) (2000) 3 SCC 640
2) (1882) 7 AC 345
3) (2010) 10 SCC 422
4) AIR 1988 SC 1007
5) (2011) 2 SCC 575
6) (2011) 2 SCC 782
7) (2011) 7 SCC 639
8) AIR 1958 SC 86
9) AIR 1969 SC 556
10) AIR 2005 SC 3936
11) (1986) 2 SCC 103
12)(2001) 9 SCC 275
13) AIR 1964 SC 752
14) AIR 1970 SC 209
15) AIR 1970 AP 43

JUDGMENT:

This writ petition is filed challenging the order dated 31-03-2012, passed by the A.P. Micro and Small Enterprises Facilitation Council (for short 'the Council'), 1st respondent herein, in a claim presented before it, by the 2nd respondent, against the petitioner, under Section 6(2) of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (for short 'the

1993 Act').

The petitioner and the 2nd respondent are industrial undertakings. The petitioner placed an order upon the 2nd respondent for supply of "Wire Standing Machine" together with ancillaries, on 22-04-1996. The value of the contract was Rs.2,71,58,872/-. 90% of the amount was paid by the petitioner to the 2nd respondent. Stating that the petitioner did not pay the balance of 10%, being Rs.24,10,980/-, even after the supply of the machinery was completed, the 2nd respondent filed O.S.No.4 of 2002 in the Court of I Additional District Judge, at Sanga Reddy, for recovery of the amount. The petitioner filed a written-statement, opposing the suit. Besides that, it has filed a counter-claim for a sum of Rs.35,12,650/-.

Even while the suit was pending, the 2nd respondent presented a claim before the Council on 30-12-2002, under Section 6(2) of the 1993 Act. It was pleaded that the petitioner is liable to pay a sum of Rs.65,99,230/-, as on the date of presentation of the claim. The claim was numbered as Case No.38/IFC/2002/1635. On receipt of the notice in the said proceedings, the petitioner filed a reply, on 28-01-2003. It was mentioned that the suit filed by the 2nd respondent for recovery of the amount under the contract is pending, and that the claim under 1993 Act is not maintainable. The further plea of the petitioner was that the claim is barred by limitation. It was pleaded that Section 43 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act') is applicable to the proceedings under Section 6 of the 1993 Act, and since Section 43 of the Arbitration Act makes the provision for the Limitation Act applicable to the proceedings under it, the claim presented after 3 years is barred. It was also pleaded that notice contemplated under Section 21 of the Arbitration Act, though mandatory, was not issued. A request was made to give personal hearing.

The claim presented by the 2nd respondent before the Council, in the year 2002, was pending for a decade. During the pendency of the proceedings, the Parliament enacted "Micro, Small and Medium Enterprises Development Act, 2006" (for short 'the 2006 Act'); and the 1993 Act was repealed.

The petitioner states that when the Council was proceeding with the matter, despite its objection, vakalat was filed and a letter dated 21-06-2007 was presented, with a request to issue notices, whenever the proceedings are taken up. It is urged that in the last of the notices, the date of hearing was mentioned as 17-02-2012, and when they appeared on that date, no sitting of the Council took place. It is also stated that when contacted, the officials of the Council informed them that notice of next date of hearing would be issued. The petitioner states that the impugned order was passed without giving them any opportunity of being heard.

The petitioner contends that the very initiation of proceedings by the 2nd respondent before the Council was untenable for two principal reasons, viz., a) O.S.No.4 of 2002 filed by it was very much pending, when the claim was presented before the Council, and that b) the claim was barred by limitation by operation of the provisions of the Limitation Act, and Section 43 of the Arbitration Act. It is also stated that the Council did not observe the basic principles underlying 1993 Act or the 2006 Act, or the Rules made thereunder. According to it, the Council was under obligation to verify as to whether the claim was maintainable at all, before proceeding to decide the matter on merits, and instead, an order, which does not deal with any important aspect; has been passed, fastening huge

financial liability to the petitioner.

The 2nd respondent filed a detailed counter-affidavit and supporting documents. An objection is raised as to the very maintainability of the writ petition. According to it, whether one goes by the provisions of the 1993 Act, or the 2006 Act, the provisions of the Arbitration Act become applicable, and in view of the typical mechanism of adjudication of disputes under that enactment, the writ petition is not maintainable. According to the 2nd respondent, there is no prohibition in law, which disables the petitioner from seeking remedy under the 1993 Act before the Council, even if the suit filed by it was pending. It is stated that whatever may have been the impact of pendency of the suit, vis--vis the filing of the claim, the same ceased to exist, once the suit was dismissed as withdrawn.

Sri C.R. Sridharan, learned counsel for the petitioner submits that the objective underlying the 1993 Act, or the 2006 Act, which replaced it, is only to provide a separate and punitive rate of interest on the amounts payable to an industrial undertaking, which supplied goods, and the enactments did not prohibit the filing of the suits. He submits that once the 2nd respondent has chosen to file a suit, that too, claiming the benefit of special rate of interest under the 1993 Act, there was no basis for it, to file an application under Section 6(2) of the 1993 Act before the Council, even while the suit was pending. He submits that at least when the factum of pendency of the suit was brought to its notice, the Council ought to have rejected the claim, and instead, has permitted the 2nd respondent to pursue both the remedies, in respect of one and the same claim. Learned counsel contends that the subject-matter of the suit was not only the claim made by the 2nd respondent, but also the counter-claim of the petitioner, and as of now, the matter is pending before this Court, in a revision, and in that view of the matter, the impugned order cannot be sustained in law.

Learned counsel submits that the claims that can be presented under Section 6(2) of the 1993 Act is equated to the one, under the Arbitration Act, and unless there existed any express or implied agreement between the parties, providing for reference, there was no occasion for the 2nd respondent to present a claim, which attracted the provisions of the Arbitration Act. Alternatively, learned counsel submits that assuming that there is no impediment for the 2nd respondent in filing the application before the Council, under Section 6(2) of the 1993 Act, it was barred by limitation, since the claim was made in the year 2002, for recovery of an amount, which became due in the year 1998. Learned counsel further submits that the provisions of the Limitation Act are made applicable to the proceedings in arbitration also. He cited fairly large number of precedents, covering the points urged by him.

Sri C. Kodandaram, learned Senior Counsel for the 2nd respondent, on the other hand, submits that once an order is passed by an authority, constituted under the 1993 Act, which has been repealed through 2006 Act, the 2nd respondent is entitled to avail only such of the remedies, as are provided for, under it.

He submits that a specific remedy of appeal is provided for, and the present petition is filed only to avoid or circumvent the condition as to pre-deposit under the relevant provisions of law. He contends that though the 2nd respondent filed a suit, it wanted to avail a quick and effective remedy to recover the amount, and accordingly filed an application under Section 6(2) of the 1993 Act. He

submits that taking recourse to a statutory remedy, even while the suit, in respect of that very claim is pending is not prohibited in law; and at any rate, the suit has since been terminated, the plea as to lack of proper notice, or violation of principles of natural justice is untenable.

According to the learned Senior Counsel, the proceedings instituted under the 1993 Act partake the character of arbitration under the Arbitration Act and the grounds for challenging an order passed by the Council are restricted to those, mentioned under that Act.

The transaction that took place between the petitioner and the 2nd respondent was, in the ordinary course of business. The contract entered into between them provided for the method of supply of goods and making of payment. Even according to the 2nd respondent, 90% of the amount, under the contract, was paid. The petitioner pleads that 10% of the contract amount was withheld, on account of the failure on the part of the 2nd respondent, to satisfy the specifications of supply. The alleged deficiencies on the part of the 2nd respondent are mentioned in detail. According to them, the contract itself provides for such an arrangement.

The law of the land provides for the mechanism of filing of suit, by a citizen, or an agency, to recover any amount due to them. The small-scale industries were facing serious problems of shortage of working capital, on account of the delay, that is involved in recovery of the amount, due to them, in case suits are instituted for recovery. The Small Scale Industries Board analysed the matter, in detail, and expressed the view that a special mechanism needs to be provided to small-scale industries for recovery of the amounts, due to them. The Parliament stepped in and enacted the 1993 Act. The scheme under the Act is contained Sections 3 to 6. They read, "Sec.3: Liability of buyer to make payment.-Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefore on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:

Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed one hundred and twenty days from the day of acceptance or the day of deemed acceptance.

Sec.4: 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 3, 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 interest 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 one- and-a-half time of Prime Lending Rate charged by the State Bank of India.

Explanation.-For the purposes of this section, "Prime Lending Rate" means the Prime Lending Rate of the State Bank of India which is available to the best borrowers of the bank.

Sec.5. Liability of buyer to pay compound interest.-Notwithstanding anything contained in any agreement between a supplier and a buyer or in any law for the time being in force, the buyer shall be liable to pay compound interest (with monthly rests) at the rate mentioned in Section 4 on the amount due to the supplier.

Sec.6 Recovery of amount due.-(1) The amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of Sections 4 and 5, shall be recoverable by the supplier from the buyer by way of a suit or other proceeding under any law for the time being in force. (2) Notwithstanding anything contained in sub-section (1), any party to a dispute may make a reference to the Industry Facilitation Council for acting as an arbitrator or conciliator in respect of the matters referred to in that sub- section and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such dispute as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub-section (1) of Section 7 of that Act".

A perusal of Section 6 discloses that a supplier is entitled to pursue the remedy of a suit or other proceedings under the 1993 Act, for the time being in force. Higher rate of interest is provided both, as a deterrent to the defaulting party and as a compensatory measure for the supplier. Even where the suit is instituted, the benefits provided for under Sections 4 and 5 can be availed. Alternatively, facility is also created to make a reference to the A.P. Industry Facilitation Council, constituted under Section 7B of the 1993 Act. Whenever a reference is made to the Council, the proceedings are governed by the Arbitration Act, as though it is an arbitration or conciliation, in pursuance of an agreement, referred to under Section 7B of the 1993 Act. This Act was repealed by 2006 Act. The mechanism provided for under Section 6 of the 1993 Act is dealt with under Section 18 of the 2006 Act. Though 2006 Act provides for various other aspects, the entitlement of a supplier to recover the amount due to it, with special rate of interest and the mechanism provided for under it, are kept intact.

The 2nd respondent filed O.S.No.4 of 2002 in the Court of I Additional District Judge, Sanga Reddy, on 02-02-2002, for recovery of the amount of Rs.24,10,980/- with interest at 18% per annum from the petitioner. No reference was made to the 1993 Act, and it was an ordinary suit. The petitioner filed a written-statement, on 29-08-2002, denying its liability to pay the amount claimed in the suit and in addition, made a counter-claim for a sum of Rs.35,12,650/-. It has also claimed interest at 18% per annum. The 2nd respondent filed a rejoinder on 13-02-2003, opposing the counter-claim.

Even while the suit was pending, the 2nd respondent filed a claim under Section 6 of the 1993 Act, on 30-12-2002, before the Council. It did not make any mention in the claim petition; of the pendency of the suit. Soon after a notice in the claim petition was received, the petitioner filed a reply dated 28-01-2003. It brought to the notice of the Council that O.S.No.4 of 2002 filed by the 2nd respondent was pending, and it was not open to the 2nd respondent to file a claim under Section 6 of the 1993 Act. Another plea was that the purchase order is, dated 22-04-1996, and the claim made in the year 2002 is barred under the Limitation Act, which is made to such proceedings, by operation of Section 43 of the Arbitration Act. Other contentions were also urged. The curious part of it is that, in the rejoinder filed by the 2nd respondent in O.S.No.4 of 2002 on 13-02-2003, no mention made, of the claim made before the Council. The result is that while it did not inform the Council as to the pendency of O.S.No.4 of 2002, in its claim, it did not mention the pendency of the claim under Section 6(2) of the 1993 Act before the Council; in its rejoinder filed in O.S.No.4 of 2002. It was pursuing both the remedies, at one, and the same time, without informing the other forum.

The law is fairly well-settled in this regard. Whenever a facility is created to a citizen, to avail more remedies than one, he has to choose any one, and not both, at one and the same time. The doctrine of election comes into play and a clear illegality creeps in to both the proceedings, if they are pursued simultaneously.

In BANK OF INDIA v. LEKHIMONI DAS AND OTHERS1, the Hon'ble Supreme Court held, "Para 8: As a general principle where two remedies are available under law one of them should not be taken as operating in derogation of the other. A regular suit will not be barred by a summary and a concurrent remedy being also provided therefore, but if a party has elected to pursue one remedy he is bound by it and cannot on hi failing therein proceed under another provision..."

It may be true that, that was a case where the party has chosen one of the remedies and on failing to get the relief has taken recourse to the other. The doctrine of election prohibits the very institution of proceedings, to avail the remedy, though permissible in law, once proceedings to avail that very remedy are instituted before a different forum.

More than a century ago, the doctrine of election was explained by the House of Lords in SCARF V. JARDINE2, in the following text:

"...[A] party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act ... the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

The relevance of the concept and its importance was recognised through out, and as recently, as in 2010, the Supreme Court has quoted the same with approval, in MUMBAI INTERNATIONAL AIRPORT PRIVATE LIMITED V. GOLDEN CHARIOT AIRPORT3.

By the time the 2nd respondent filed O.S.No.4 of 2002, the 1993 Act was very much in existence, together with the amendment made in the year 1998, providing for reference of the claim under Section 6(2) thereof. However, it has chosen to avail the remedy of suit. In doing so, it manifested its election of the remedy of suit, and descending the one of seeking reference, under Section 6(2) of the 1993 Act. Having done that, it changed the course, by seeking reference under Section 6(2) of the 1993 Act, even while the suit was pending.

The plea urged by the 2nd respondent before the Council was that, O.S.No.4 of 2002 was dismissed as withdrawn. Even that was on 31-12-2003, i.e., long after the proceedings before both the fora advanced to a substantial extent. Further, the very statement about this was not correct. The suit is said to have been dismissed, for want of prosecution, on 31-12-2003. However, the suit is coupled with a counter-claim, made by the petitioner. Even if the 2nd respondent was not interested in proceeding with the suit, the trial Court was under obligation to deal with the counter-claim. It is in

this context, that a revision filed by the petitioner is pending before this Court.

The Council did take note of this, when it was proceeding to decide the claim. The entire discussion undertaken by the Council, on the merits of the case, excluding the introductory paragraphs; reads, "...The learned counsel for the Respondent through their Defence statement dated 28.1.2003 stated that no amount is due for payment to the Claimant and reserves its right to submit a detailed reply to the notice sent by the Council.

Keeping in view the arguments and the statement of the Respondent, the Council made the following observations:

a. The Committee noted that the claimant supplied the material as per the purchase order, which fact has neither been denied nor refused by the Respondent Company in their Statement of Defense.

b. Initially the Claimant had filed a case before the Hon'ble I Additional District Judge, Sangareddy for seeking relief of payment of Rs.24,10,980/- due to be paid by the Respondent, vide O.S.no.4/2002. After filing the Case before the Hon'ble I Additional District Judge, Sangareddy Court, the Claimant learnt that there is speedy remedy available under section 6(2) of the Interest Act 1993 and hence had withdrawn the case from Sanga reddy Court on 31-12-2003. Therefore, as no case was filed in any other courts, the same case was admitted by the Council.

c. When the Sangareddy Court served notices to the Respondent in the above case, the Respondent had filed counter claim of Rs.35,12,650/- which was dismissed for default of the Respondent on 24.3.2004. Against this, the Respondent had filed restoration petition and the same was dismissed on merits by the Hon'ble Court on 4.4.2007. The same counter claim was filed with the Council.

d. The Committee is of the view that having collected the liquidated Damages of Rs.11,55,000/- from the Claimant, the Respondent is liable to pay the amount towards the machinery supplied together with interest under the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 and the Micro and Small Enterprises Development Act, 2006.

It is hereby found that the Respondent is liable to pay the Claim amount as the Machinery supplied was received in good condition, besides being liable to pay the interest thereon.

Upon hearing the Claimant and going through the material placed before Council, the Council hereby pass the following:

ORDER:

The Respondent is DIRECTED to pay as follows:

A. Rs.24,10,980/- (Rupees Twenty Four Lakhs Ten Thousand Nine Hundred and Eighty Only) towards Principal and Rs.41,88,250/- (Rupees Forty One Lakhs Eighty Eight Thousand Two hundred and Fifty Only) towards interest totalling to 65,99,230- (Rupees Sixty Five Lakhs Ninety

Nine Thousand Two Hundred and Thirty Only) up to 30.11.2002.

B. Future interest, at three times of the Bank Rate as notified by the Reserve Bank of India prevailing on the date of this award, compounded with monthly rests, till the date of making final payment.

This order is issued on Saturday, the 31st day of March, Two Thousand Twelve."

The Council comprises of Commissioner of Industries as its Chairman, and three members, representing the A.P. State Financial Corporation, the Federation of A.P. Chamber of Commerce and Industry, and Federation of A.P. State Industries Associations.

The experience shows that, whatever may have been the laudable objective of the Central or State Legislatures in enacting laws, providing for "speedy remedies", excessive tribunalisation has given rise to more problems, than what were supposed to be solved. This appears to be mostly on account of the fact that the persons who are associated with the Tribunals, or most of them are not sensitised about the basic principles of adjudication. For the most part of it an adjudication gets or gains acceptability because the end result is the culmination of the application of not only the substantive provisions, but also the principles of procedure, defined by law. Even if the outcome of case is correct on merits, it suffers a serious dent, if there is any serious lapse as to procedure, on an important aspect. There is no attempt by this Court, to subject the order passed by the Council to the litmus test of general principles. A typical procedure is prescribed for the proceedings before the Council.

The emphasis of the Parliament in enacting the 1993 Act was, to provide a higher and punitive rate of interest. Beyond that, it did not disturb the adjudicatory mechanism. The fact that an amount can be recovered, even with interest, stipulated under Sections 4 and 5 of the 1993 Act; is mentioned in sub-section (1) of Section 6 thereof. The facility created under Section 6(2) was nothing special. If an agreement between two parties contains a clause for arbitration, or if there is no clause, providing for such arbitration, but consensus emerged thereafter, recourse can be certainly had to arbitration. The only requirement is that express or implied agreement for having recourse to arbitration must exist.

In MAJOR (RETD.) INDER SINGH REKHI v. DELHI DEVELOPMENT AUTHORITY4, the Supreme Court observed, "Para-4: Therefore, in order to be entitled to order of reference under S. 20, it is necessary that there should be an arbitration agreement and secondly, difference must arise to which this agreement applied".

The provisions of the Arbitration Act were specifically made applicable to it. That enactment makes the provisions of Limitation Act applicable to the claims presented under it. If the two fictions are taken to their logical conclusion, the Council was under obligation to verify, whether there existed any agreement between the parties to refer the matter to arbitration, and whether the claim presented by the 2nd respondent, before it, was barred by limitation.

Whenever the Council was acting almost as a substitute for the Civil Court, and was dealing with important claims, it was required to bestow its attention to various legal aspects. The relevant portion of the order passed by the Council has already been extracted. There was no mention about the plea of limitation. The legality of the proceedings, on account of pendency of a suit, was dealt with in a casual and perfunctory manner. In fact, one cannot expect a better treatment of the matter in the hands of a Council, which does not comprise of members, who are well versed in the basic tenets of law. It has fastened the liability of crores of rupees on the petitioner, without giving any opportunity to the petitioner, worth its name, and without dealing with the contentions, that were raised in the pleadings. The views expressed by it, can, not at all be supported in law.

The State of Andhra Pradesh framed the A.P. Industry Facilitation Council (Arbitration) Rules 1999 (for short 'the Rules'), in exercise of power under sub-section (3) of Section 7B of the 1993 Act. Rule 9 thereof prescribes the manner in which the Council shall hear and conduct the proceedings. It reads, "Rule 9: Hearings and written proceedings:- (1) On receipt of the statement of defence and if the amount of deposits be paid by the parties, the Council shall send a copy of the statement of defence to the claimant and fix a date for appearance and hearing of the parties and issue notice by registered post in Form 5.

(2) If the respondent fail or omit to send a statement of defence within the time allowed to him, the Council shall proceed to fix a date for the appearance and hearing of the parties and issue notice by registered post in Form 5.

Provided that if the respondent has failed or omitted to pay his share of the deposit, the Council shall call upon the claimant to pay that share also within fifteen days of receipt of the notice;

Provided further that if the claimant has not paid the aforesaid share, the Council may suspend or terminate the proceedings.

(3) At the first hearing, the Council shall not proceed to enter upon the merits of the subject matter in dispute, till it has decided on any challenge to jurisdiction or any challenge to any of its members.

(4) The Council shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether proceedings shall be conducted on the basis of documents and other materials;

Provided that the Council shall hold oral hearings at an appropriate stage of the proceedings, on request by a party, unless the parties have agreed that no oral hearing shall be held.

(5) The parties shall be given sufficient advance notice of any hearing and of any meeting of the Council for the purposes of inspection of documents, goods or other property.

(6) All statements, documents or other information supplied to, or applications made to the Council by one party shall be communicated to the other party, and any expert report or evidentiary document on which the Council may rely in making its decision shall be communicated to the

parties.

(7) Where, without cause,- (a) the claimant fails to communicate his statement of claim in accordance with these rules and section 23(1) of the Arbitration and Conciliation Act, the Council shall terminate the proceedings:

(b) the respondent fails to communicate his statement of defence in accordance with these rules and Section 23(1) of the Arbitration and Conciliation Act, the Council shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant;

(c) a party fails to appear at an oral hearing or to produce documentary evidence, the Council may continue the proceedings and make the arbitral award on the evidence before it.

(8) The Council may, appoint one or more experts in terms of section 26 of the Arbitration and Conciliation Act.

(9) The Council, or a party with the approval of the Council, may apply to Court under section 27 of the Arbitration and Conciliation Act for assistance in taking evidence.

(10) The Council may with the agreement of the parties, at any time during the proceedings, use mediation, conciliation or other procedures to encourage settlement of the dispute under section 30 of the Arbitration and Conciliation Act.

(11) The Council shall conduct its proceedings at such place as the Government may specify in the notification.

(12) The Council, on such terms as it may think fit at any stage for reasonable or sufficient cause, adjourn the hearing from time to time but it shall so conduct the proceedings that the decision is given, as far as possible, within ninety days of the first date of hearing.

(13) At any stage of the proceedings, if the parties jointly apply to the Council that the proceedings be terminated, the Council shall terminate the proceedings".

A perusal of sub-rule (3) of Rule 9 of the Rules discloses that whenever its jurisdiction is challenged, the Council shall not proceed to enter upon the merits, and sub-rule (4) thereof emphasises the same, but in different language.

It has already been mentioned that the petitioner challenged the jurisdiction of the Council, by raising two contentions, viz., that a suit was already instituted by the 2nd respondent, and that it has no jurisdiction to entertain a claim, which is barred by time. The Council could have proceeded to deal with the matter on merits, if only it has passed orders on the question of its jurisdiction. The record does not disclose that any such effort was made.

There is a clear stipulation under the relevant provisions that the proceedings before the Council must be concluded within 90 days. However, the Council took 12 years for disposal of the claim. Even after such a long time, it did not give adequate opportunity to the petitioner, nor did it dealt with important issues, much less the material on record.

Strong objection is raised by the 2nd respondent, as to the very maintainability of the writ petition. It is on the ground that the 1993 Act, under which, the proceedings were instituted, provides for the remedy of appeal under Section 7 thereof, and that similar remedy is provided for under the 2006 Act. Section 7 reads, "Sec.7: Appeal.-No appeal against any decree, award or other order shall be entertained by any court or other authority 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 other order in the manner directed by such court or, as the case may be, such authority".

Reliance is placed upon the judgments of the Supreme Court in TRANSPORT & DOCK WORKERS UNION AND OTHERS v. MUMBAI PORT TRUST AND ANOTHER5; KANAIYALAL LALCHAND SACHDEV AND OTHERS v. STATE OF MAHARASHTRA AND OTHERS6, and STATE OF MADHYA PRADESH v. NARMADA BACHAO ANDOLAN AND ANOTHER7.

Not only in the three judgments, referred above, but also in quite large number of judgments, rendered earlier thereto, the Hon'ble Supreme Court emphasised the need to require the person, who approaches the High Court, under Article 226 of the Constitution of India, to exhaust the other statutory remedies. However, the existence of other statutory remedies was not treated, per se as a prohibition to invoke the writ jurisdiction of the High Court. It is, as a matter of policy, to discourage indiscriminate invocation of the extraordinary jurisdiction of the High Court, that the parties were required to exhaust their other remedies. Here again exceptions were carved out.

For instance, if an administrative or quasi judicial authority has passed an order without jurisdiction or an authority, or, though vested with the jurisdiction, the authority passed the orders, in violation of the principles of natural justice, existence of alternative remedy was not at all treated as a bar, or impediment for the High Court to entertain a writ petition, in which such orders are challenged. Here again, a distinction needs to be maintained between a writ petition, filed for a Writ of Mandamus, on the one hand, and Writ of Certiorari, on the other hand. The Constitutional Bench of the Supreme Court, in STATE OF U.P. v. MOHAMMAD NOOH8 explained the distinction, in detail. It would be, both educative and enlightening, to read few paragraphs of the judgment.

"Para-10: In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol.11, p.130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of

statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.

In the King v. Postmaster General [(1928)1 KB 291], a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has been held that the superior court will readily issue a certiorari in a case where there has been a denial of natural justice before a court of summary jurisdiction. The case of Rex v. Wandsworth [(1942)1 KB 281] is an authority in point. In that case a man had been convicted in a court of summary jurisdiction without giving him an opportunity of being heard. It was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by application to the High Court for an order of certiorari to remove and quash the conviction. At p. 284 Viscount Caldecote, C.J. observed:

"It remains to consider the argument that the remedy of certiorari is not open to the applicant because others were available. It would be ludicrous in such a case as the present for the convicted person to ask for a case to be stated. It would mean asking this Court to consider as a question of law whether Justices were right in convicting a man without hearing his evidence. That is so extravagant an argument as not to merit a moment's consideration. As to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, if in such circumstances as these, he preferred to apply for an order of certiorari to quash his conviction, the court should be debarred from granting his application".

Likewise in Khurshed Modi v. Rent Controller, Bombay [AIR (1947) Bom 46] it was held that the High Court would not refuse to issue a writ of certiorari merely because there was a right of appeal. It was recognized that ordinarily the High Court would require the petitioner to have recourse to his ordinary remedies, but if it found that there had been a breach of fundamental principles of justice, the High Court would certainly not hesitate to issue the writ of certiorari. To the same effect are the following observations of Harries, C.J., in Assistant Collector of Customs v. Soorajmull Nagarmul at p. 470:

"There can, I think, be no doubt that Court can refuse to issue a certiorari if the petitioner has other remedies equally convenient and effective. But it appears to me that there can be cases where the Court can and should issue a certiorari even where such alternative remedies are available. Where a court or tribunal, which is called upon to exercise judicial or quasi-judicial functions discards all rules of natural justice and arrives at a decision contrary to all accepted principles of justice then it appears to me that the court can and must interfere".

It has also been held that a litigant who has lost his right of appeal or has failed to perfect an appeal by no fault of his own may in a proper case obtain a review by certiorari. (See Corpus Juris Secundum, Vol.14 Article 40, p. 189). If, therefore, the existence of other adequate legal remedies is not per se a bar to the issue of a writ of certiorari and if in a proper case it may be the duty of the superior court to issue a writ of certiorari to correct the errors of an inferior court or tribunal called upon to exercise judicable or quasi- judicial functions and not to relegate the petitioner to other legal remedies available to him and I the superior court can in a proper case exercise its jurisdiction

in favour of a petitioner who has allowed the time to appeal to expire or has not perfected his appeal, e.g. by furnishing security required by the statute, should it then be laid down as an inflexible rule of law that the superior court must deny the writ when an inferior court or tribunal by discarding all principles of natural justice and all accepted rules of procedure arrived at a conclusion which shocks the sense of justice and fair play merely because such decision has been upheld by another inferior court or tribunal on appeal or revision?...

Para-11: On the authorities referred to above it appears to us that there may conceivably be cases - and the instant case is in point - where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court's sense of fair play the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned. This would be so all the more if the tribunals holding the original trial and the tribunals hearing the appeal or revision were merely departmental tribunals composed of persons belonging to the departmental hierarchy without adequate legal training and background and whose glaring lapses occasionally come to our notice. The superior court will ordinarily decline to interfere by issuing certiorari and all we say is that in a proper case of the kind mentioned above it has the power to do so and may and should exercise it. We say no more than that".

This was reiterated in BABURAM PRAKASH CHANDRA MAHESHWARI v ANTARIM ZILA PRISHAD NOW ZILA PARISHAD, MUZAFFARNAGAR9, and in many other judgments. The facts of the present case warrant similar approach.

Learned Senior counsel for the 2nd respondent is not able to point out that any different view from the one, taken by the Supreme Court, in MOHAMMAD NOOH'S case (8 supra), was expressed by it, except that the need to exhaust alternative remedies before filing a writ petition, is emphasised.

Recently, in STATE OF H.P AND OTHERS v. GUJARAT AMBUJA CEMENT LIMITED AND ANOTHER10, the Supreme Court observed that mere existence of alternative remedy is not a bar for the High Court to entertain a writ petition and much would depend upon the facts and circumstances of the case. The exceptions to the principle and the judgments, in which they were emphasised, have been referred to, in detail.

In the context of examining the question, as to whether the Council had jurisdiction to entertain the claim, the issue of limitation played a pivotal role. In case a suit is filed for recovery of amount, Limitation Act naturally applies; and even before a written-statement is filed, the Council is under obligation to examine under Section 3 of the Limitation Act, to satisfy itself, as to whether the suit

was not barred by limitation. The Council is also placed under obligation to examine this very aspect. The reason is that Section 43 of the Arbitration Act makes the provisions of the Limitation Act specifically applicable to the claims under it. Sub-section (2) of Section 6 of the 1993 Act provides for a fiction to the effect that a reference made under that Section can be treated as the one, for arbitration under an agreement, as defined under Section 7 of the Arbitration Act. Further, the Rule Making Authority contemplated many circumstances under which, the Council may not have jurisdiction. Obviously for that reason, it placed the Council under obligation to deal with the question of jurisdiction, whenever raised. The petitioner did raise such questions, but the Council, either has bypassed them, or felt it not necessary. Either way, the question of jurisdiction stared at the Council and haunted the proceedings.

An attempt is made by the learned Senior Counsel for the 2nd respondent, to impress upon the Court, that the provisions of Limitation Act do not apply to the matters of this nature and at any rate, raising of plea at this stage is barred. He places reliance upon the judgments of the Supreme Court in THE BOMBAY GAS COMPANY v. GOPAL BHIVA AND OTHERS11; NITYANAND M JOSHI AND ANOTHER v. THE LIFE INSURANCE CORPORATION OF INDIA AND OTHERS12; R.D.K. SITA DEVI v. ANNA RAO13, etc. The subject-matter of those cases were the claims under the Industrial Disputes or other related enactments, to which, the provisions of the Limitation Act were not made applicable at all.

In the instant case, it is a claim for recovery of money, pure and simple, and as a matter of fact, the 2nd respondent has filed a suit for recovery thereof. Therefore, it is too late in the day, to plead that the provisions of the Limitation Act do not apply to the proceedings, instituted for recovery of money.

Assuming that the order challenged in this writ petition does not suffer from any infirmities, that are discussed above, the objection raised by the 2nd respondent fails on another count. Section 7 of the 1993 Act, which provides for the remedy of appeal, has already been extracted. It imposes a condition that appellant must deposit 75% of the amount, in terms of the decree or award, as the case may be.

In the instant case, serious question of jurisdiction was staring at, on account of the fact that the suit filed by the 2nd respondent was very much pending, by the time, it has instituted proceedings before the Council. For all practical purposes, the appellant in such cases, must proceed as though, the judgment against him has become final. This, in a way negates the principle, that an appeal is nothing, but the continuation of a suit.

In M/s FILTERCO AND ANOTHER v. COMMISSIONER OF SALES TAX, MADHYA PRADESH AND ANOTHER14, an assessee of sales tax filed a writ petition, feeling aggrieved by the order, passed by the Commissioner of Sales Tax. He bypassed the remedy provided for under Section 42-B of Madhya Pradesh General Sales Tax Act. The reasons pleaded by the assessee for approaching the High Court was that, Section 38 of that Act requires substantial portion of the tax to be deposited, as a condition precedent for availing the remedy of appeal. The Madhya Pradesh High Court refused to entertain the writ petition. In the appeal, the Hon'ble Supreme Court held, "Para-11: We are of

opinion that the High Court should have examined the merits of the case instead of dismissing the writ petition in limini in the manner it has done. The order passed by the Commissioner of Sales Tax was clearly binding on the assessing authority under Section 42-B(2) and although technically it would have been open to the appellants to urge their contentions before the appellate authority namely, the Appellate Assistant Commissioner, that would be a mere exercise in futility when a superior officer namely, the Commissioner, has already passed a well considered order in the exercise of his statutory jurisdiction under sub-section (1) of Section 42-B of the Act holding that 21 varieties of the compressed woollen felt manufactured by the appellants are not eligible for exemption under Entry 6 of Schedule I of the Act. Further, Section 38(3) of the Act requires that a substantial portion of the tax has to be deposited before an appeal or revision can be filed. In such circumstances we consider that the High Court ought to have considered and pronounced upon the merits of the contentions raised by the parties and the summary dismissal of the writ petition was not justified".

Similarly, in J.M. BAXI & CO., v. COMMISSIONER OF CUSTOMS, NEW KANDLA AND ANOTHER15, the Supreme Court took the view that the High Court ought to have entertained the writ petition, challenging an order passed by the Commissioner of Customs, because the appellant therein was under obligation to make a deposit of substantial amount, as a condition precedent for availing the remedy of appeal.

In the instant case, a more acute situation arises. The claim was in respect of about 24 lakhs. The amount owned by the Council runs into crores. The counter- claim made by the petitioner is still pending.

A plea was raised by the learned counsel for the petitioner, as to the violation of principles of natural justice. It was urged that the petitioner was not put on notice. Though it cannot be said that the principles of natural justice, as such, were violated, procedural irregularity did creep in to the matter, since the Council did not ensure that, parties appear before it, and they are permitted to advance their arguments. For one reason or the other, the case was kept pending for more than a decade, and once an officer, who was interested in clearing the arrears, took up the matters; did not pay the required amount of attention for service of notice and to hear the arguments. For all practical purposes, the order passed by the Council was ex parte in nature. It has just accepted the claim of the 2nd respondent, without undertaking any discussion as to how the claim was proved. Even where an opposite party in a claim, or a defendant, in a suit, remained ex parte, the Tribunal or the Court would not be justified in allowing the claim, or passing a decree straightaway. Discussion must be undertaken, as to how the Tribunal or Court is satisfied about the claim made before it. No such effort was made, in the instant case.

Though the learned counsel for the parties sought to address arguments on the merits of the very claim, this Court is not inclined to deal with the same. The reason is that, the 2nd respondent has to choose, either to pursue the remedy of suit, or the claim, before the Council. Even on the question of jurisdiction, this Court intends to keep the matter open, so that the Council can be required to deal with the same, as required under Rule 9 of the Rules.

Hence, the writ petition is allowed, and the impugned order is set aside, and

a) the matter is remanded to the 1st respondent for fresh consideration and disposal;

b) the 1st respondent shall first decide the question, as to whether the claim presented before it, by the 2nd respondent, on 30-12-2002, was maintainable, on account of pendency of the suit, as on that date; and

c) it shall not proceed with the merits of the matter, unless the question as to maintainability or jurisdiction is decided. If it proceeds to decide the matter on merits, after answering the question, it shall be under obligation to examine the respective pleas of the parties, together with the evidence, that may be adduced by them.

The miscellaneous petition filed in this writ petition shall also stand disposed of. There shall be no order as to costs.

_____ L.NARASIMHA REDDY, J.

Dt: 07-12-2012.