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IN THE HIGH COURT OF KARNATAKA AT BANGALORE**DATED THIS THE 20TH DAY OF AUGUST, 2013****BEFORE****THE HON'BLE MR. JUSTICE A S BOPANNA****WRIT PETITION NO.12465/2010 (GM-RES)****Between:**

M/S Crompton Greaves Ltd.
a company registered under the
provisions of the
Companies Act, 1956 and having
its registered office at: CG House
Dr. Annie Besant Road
Worli, Mumbai-400030,

And also its location at
10A, Jigani Industrial Area
Anekal Taluk
Bangalore Rural District
Bangalore – 562 106
Rep. by its Manager
Corporate Legal
Shri Banlumlal W. Phira

... Petitioner

(By Sri Uday Holla, Sr. Counsel &
Sri L.A. Rubens, Adv. for
M/S Holla and Holla)

And:

1. M/S Annapurna Electronics
No.1/4, B1, NGEF Guest House
Near ESI Hospital Road
Krishnaiahna Palya
Bangalore-560038
2. The Karnataka Industries
Facilitation Council
Khanija Bhavana, High Grounds

Bangalore-560 001
 By Its Chairman/
 The Commissioner for
 Industrial Development and
 Director of Industries Commerce
 Bangalore

3. President, Karnataka Small Scale Industries Association (KASSIA)
 No.2/106, 17th Cross
 Magadi Chord Road
 Vijayanagar, Bangalore-560040
4. The General Manager, SLBC
 Syndicate Bank
 Regional Office No. 69
 9th Main, III Block
 Jayanagar, Bangalore-560011
5. The Executive Director(Finance)
 Karnataka State Financial Corporation
 Recovery-II, Head Office
 KSFC Bhavan
 No.1/1, Thimmaiah Road
 Bangalore-560052

... Respondents

(By Sri M.G.S. Kamal, Adv. for
 M/s. Kamal & Bhanu for R1
 R2-5 is not necessary at present)

This writ petition is filed under Articles 226 and 227 of the Constitution of India, praying to quash the order dt.1.4.10, passed in Arbitration Suit No.44/08 by the Court of VI Addl. City Civil Judge Bangalore City [CCH-11] Vide Ann-M & grant such other & further reliefs as are just.

This Writ Petition is having been reserved for orders, coming on for pronouncement this day, the Court pronounced the following:

ORDER

The petitioner is before this Court assailing the order dated 01.04.2010 in Arbitration Suit No.44/2008, passed by the VI Addl. City Civil Judge, Bangalore City. The said order is impugned at Annexure-M to the petition.

2. The facts in brief which has lead to the impugned order is that the petitioner and first respondent had entered into an agreement dated 01.04.2004 relating to providing infrastructure and personnel to enable the petitioner to execute the work order dated 29.04.2002 awarded by M/s Bharath Sanchar Nigam Ltd. The details of difference or dispute between the parties relating to its terms need not be adverted to, but the fact remains that due to certain dispute the first respondent claiming to be a 'Supplier' as defined under Section 2(f) of The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 ('IDPSSAIU Act' for short) approached the Karnataka Industrial Facilitation

Council ('KIFC' for short) under Section 6(2) of the said Act. During the pendency of the proceedings, the said Act was repealed with effect from 02.10.2006 and The Micro, Small and Medium Enterprises Development Act, 2006 ('MSMED Act' for short) was enacted to replace the same. The Conciliation and Arbitration proceedings continued under the new Act. The same culminated in the award dated 14.07.2008.

3. The petitioner herein claiming to be aggrieved by the said award has invoked the remedy under Section 34 of the Arbitration and Conciliation Act, 1996 ('A & C Act' for short) which should be in terms of Section 19 of the MSMED Act. In the pending proceedings, the first respondent has filed an application under Section 19 of the MSMED Act praying that the suit be rejected since 75% of the arbitral award amount has not been deposited. Alternatively, it was sought that the petitioner herein be directed to deposit the amount. The application was objected to by the petitioner herein. The Court below after considering the

rival contentions in detail has by its order dated 01.04.2010 arrived at its conclusion to allow the application and permit the petitioner herein to deposit 75% of the award amount. It is against the said order, the petitioner herein is before this Court.

4. Heard Sri Udaya Holla, learned senior counsel appearing along with Sri L.A.Rubens, learned counsel for the petitioner and Sri M.G.S. Kamal, learned counsel for the first respondent and perused the petition papers.

5. Though elaborate arguments are addressed and several precedents are cited, the limited scope of consideration available in a writ proceedings against an interlocutory order passed by the Court below is to be kept in view, more particularly when the contentions with regard to the validity or otherwise of the award is yet to be decided by the Court below. Hence, the relevant aspects and decisions are adverted to come to a conclusion only on the limited aspect touching upon the issue raised in opposing the application and to find out whether there is any perversity committed by the Court

below or if the order is so unreasonable so as to call for interference. To that extent, the legal contentions are adverted to.

6. At the outset, from the decision in the case of ***Snehadeep Structures Private Limited -vs- Maharashtra Small Scale Industries Development Corporation (2010(3) SCC 34)*** and in the case of ***Goodyear India Limited -vs- Norton Intech Rubbers Private Limited and Another (2012(6) SCC 345)*** as also the final order dated 21.03.2013 passed by the Hon'ble Supreme Court in the same case relied on by the learned counsel for the first respondent, it is clear that the legal position enunciated is that the application for setting aside the decree, award or order as provided under Section 34 of the A & C Act is in terms of the Petition/Suit under Section 19 of MSMED Act. In such event, the pre-deposit of 75% of the award amount is a mandatory requirement and the Court has no discretion to reduce or waive the amount. To that extent of the legal position, there appears to be no

dispute raised by the petitioner, but the contention is that the award dated 14.07.2008 passed by the KIFC is without jurisdiction and contrary to procedure and is therefore nullity. In that regard, it is contended that when the award is nullity, the pre-deposit need not be made.

7. The learned senior counsel while canvassing this contention on behalf of the petitioner would contend that the first respondent does not answer the definition of "Supplier" as contained in Section 2(n) of the MSMED Act since they have failed to establish that they have filed the memorandum as required under Sub-Section (1) of Section 8 to that Act. It is contended that though discretion is available under Section 8, if the Micro, Small or Medium Enterprise was to take benefit of the Act, the petitioner was required to file the memorandum within one hundred and eighty days from the commencement of the MSMED Act as the word employed is 'shall'. It is contended that when the jurisdiction of the Civil Court is excluded by a provision,

it has to be strictly construed. In that direction, the decisions in the case of ***Mandvi Co-operative Bank Ltd. Vs. Nimish B. Thakore (2010 (3) SCC 83)*** wherein it is held that in the guise of interpretation, it is not permissible for the Court to make additions in the law and read it as something that is just not there; the case of ***Abdul Waheed Khan Vs. Bhawani & Ors (AIR 1966 SC 1718)*** wherein it is held that under Section 9 of CPC, a Civil Court can entertain a suit of a civil nature except a suit of which its cognizance is expressly or impliedly barred and it is for the party who seeks to oust the jurisdiction of the Civil Court to establish his contention and that a statute ousting the jurisdiction of a Civil Court must be strictly construed; the case of ***Darbari Lal & Others -vs- Smt. Dharam Wati (AIR 1957 All 541-FB)*** wherein it is held that when the word 'means' is employed, it shows that the definition is a hard and fast definition and that no other meaning can be assigned to the word or the expression defined than is put down in the definition; the case of ***Feroze N. Dotivala Vs. P.M.Wadhwani & Others (2003 (1) SCC***

433) wherein it is held that generally when the definition of the word begins with 'means', it is indicative of the fact that the meaning of the word has been restricted, that is to say, it would not mean anything else but what has been indicated in the definition itself, are relied upon.

8. Learned counsel for the first respondent at the outset would contend that the said contentions raised by the petitioner is a matter which the Court below will consider while deciding the suit on its merits and this has been correctly appreciated by the Court below while passing the order impugned herein. In the guise of challenging the said order, the petitioner is making an attempt to challenge the award itself. The procedure cannot be circumvented or bye-passed and in that regard, reliance is placed on the decisions of the Hon'ble Supreme Court in the case of **Delhi Administration Vs. Gurdip Singh Uban & Others (AIR 2000 SC 3737)** and in the case of **Ram Chandra Singh Vs. Savitri Devi & Ors (AIR 2004 SC 4096)**. Further, it is

contended that in the instant case, the first respondent answers the definition of 'Supplier' as provided under IDPSSAIU Act cannot be disputed. The proceedings were initiated under the said Act on 27.12.2005 and the petitioner appeared on 16.02.2006, but did not dispute and five hearings were held before the Act was repealed and the proceedings were continued under the new Act. On 11.03.2008, an interim award was passed holding the first respondent as the 'Supplier'. The same was not challenged, but the proceedings continued and the final award was passed on 14.07.2008. Even otherwise, Section 32(2) of MSMED Act has saved all earlier proceedings.

9. Learned senior counsel, in reply would contend that Section 32 (2) of MSMED Act is specific that actions should correspond to provisions of the new Act and as such, the saving would not be as provided in the Section 6 of the General Clauses Act. In that regard, the decisions in the case of ***Kalawati Devi Harlalka Vs. The Commissioner Income Tax (AIR 1968 SC 162)*** is

relied. Further, the decisions in the case of ***M/s. Maruti Udyog Ltd. Vs. Ram Lal & Ors (AIR 2005 SC 851)*** and in the case of ***Imagic Creative (P) Ltd. Vs. Commissioner of Commercial Taxes & Others (2008 (2) SCC 614)*** are relied to contend that there is no role for 'sympathy' while interpreting the provisions and binding precedents cannot be ignored and that legal fiction should be applied only to the extent for which it was enacted. Though it must be given its full effect, it should not be applied beyond a point which was not contemplated by the legislature or which would lead to an anomaly or absurdity.

10. In the light of the rival contentions and the legal position assimilated from the decisions cited, it would be necessary to notice the relevant provisions from the said two enactments on which the contentions rest.

11. The first respondent had approached the KIFC invoking the provisions of IDPSSAIU Act as provided under Section 6 (2) of that Act, claiming to be a

‘Supplier’ as defined therein. Section 2 (f) of that Act defines the ‘Supplier’ to mean an ancillary industrial undertaking or a small scale industrial undertaking holding a permanent registration certificate issued by the Directorate of Industries of a State. There is no further requirement to take benefit of the provisions of the Act. The fact that the first respondent held a certificate issued by the Directorate of Industries and Commerce cannot be in dispute as it is produced before KIFC and referred to by the Court below by taking notice of the same in the Arbitrator’s file at Volume II. On the said Act being repealed and the MSMED Act was enacted, the term ‘Supplier’ defined in Section 2 (n) required the small enterprise to file a memorandum with the authority referred to in Sub-section (1) of Section 8 of that Act as an additional compliance. The main part of Sub-section (1) of Section 8 states the requirement to be complied by any person who intends to establish the type of enterprise mentioned therein, at his discretion, shall file the memorandum. By the proviso to that section, the requirement has been

stipulated in respect of an enterprise which had been established before the commencement of MSMED Act. In such event, the memorandum shall be filed within one hundred and eighty days from the commencement of the Act, if the person at his discretion intends to take benefit of the provision of this Act. The requirement of the proviso would undoubtedly apply to the first respondent if the benefit of MSMED Act was to be taken in a fresh case of seeking reference to the Arbitration proceedings claiming to be a “Supplier” under that Act. In the background of the rival contentions, the question would be as to whether the requirement is to be complied by a person who answered the definition of “Supplier” under the Repealed Act by complying the requirement therein and proceedings were pending under that Act when the new Act came into force?

12. In order to consider the above noticed aspect of the matter, it would be necessary to refer to Section 32 of the MSMED Act which reads as hereunder:

“32. Repeal of Act.- (1) *The Interest on Delayed Payments to Small Scale and Ancillary*

Industrial Undertakings Act, 1993 (32 of 1993) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Act so repealed under sub-section (1) shall be deemed to have been done or taken under the corresponding provisions of this Act.”

Though the learned senior counsel was emphatic that the legal fiction created by the said provision is not as wide as Section 6 of the General Clauses Act to cover all proceedings and relied on the decision in the case of **Kalawati Devi** (supra), the issue that arose therein was the enactment of the Income Tax Act, 1961 and vide Section 297, the Act of 1922 was repealed and vide Sub-section 2(a) to (m), the effect of repeal and savings had been clearly specified. Further, in the decision of **IMAGIC CREATIVE (P) Ltd.**, (supra), it is held that the legal fiction should be given its full effect to that extent contemplated by legislature. In that light, if the scheme of the Repealed Act and the object of the new Act herein is taken into consideration, it is enacted to aid the small enterprise and the new Act makes it wider in application. The liability of the ‘Buyer’ and the date

from which the interest is payable and the manner of recovery of amount are contained in Section 3, 4 and 6(2) of the Repealed Act, which is also provided under Section 15, 16, 17 and 18 of the MSMED Act except that Industry Facilitation Council in the Repealed Act is designated as Micro and Small Enterprises Facilitation Council.

13. In this backdrop, it is seen that the first respondent had invoked the provisions of the Repealed Act by answering all the requirements and compliances therein and the proceedings had commenced under that Act on 27.12.2005 as is evident from the writ papers. If this is in perspective and sub-Section (2) of Section 32 of MSMED Act is closely considered, the same makes it very clear that “anything done or any action taken” under the Repealed Act are deemed to have been done or taken under the corresponding provisions of the MSMED Act. Therefore, it is clear in law that reference sought and commenced under the Repealed Act seeking recovery of the amount in the manner provided therein,

is an action taken under the Repealed Act. When the person seeking reference thereunder had answered the definition of 'Supplier' as on the date of commencement of the proceedings under the Repealed Act, such person will be entitled for continuation of the same under the corresponding provisions of the MSMED Act even without complying any additional requirements under the MSMED Act as the compliance of those requirements would be relevant for a proceeding to be commenced for the first time under the MSMED Act. Hence, in the instant facts also since the proceedings for recovery had commenced on 27.12.2005 and the MSMED Act has come into force on 16.06.2006, the proceedings had rightly been continued and concluded as per law. Hence, the contention that the proceedings were without jurisdiction and the Award is a nullity on that ground cannot be accepted.

14. Learned senior counsel no doubt sought to contend that the KIFC itself had understood that the claim was to be under the new Act as recorded in para

22.16 of the Award. In my view, that in itself cannot alter the legal position. Further, on facts, the observation in para 39.1 of the Award would disclose that the KIFC had also taken note of the clarifications issued on 07.02.2008 with regard to that aspect of the matter and even otherwise, what was done earlier was re-submission and not compliance under the new Act. That apart, an interim award dated 11.03.2008 was also passed considering these aspects and the first respondent was held to be a "Supplier". In any event, I have already considered the legal position on that aspect of the matter as answered supra.

15. The next contention of the learned senior counsel for the petitioner to term the Award passed as 'nullity' is that Section 18(3) of MSMED Act provides for termination of conciliation before the dispute is referred to Arbitration. The termination should be in any one of the modes as specified under Section 76 of the A & C Act, which according to the learned senior counsel has not been done. Thus, the award being contrary to the

mandatory provisions is ultra vires the provisions of the Act, is invalid and a 'nullity' in law. On this ground and on the ground that the proceedings were without jurisdiction, it was contended that the pre-deposit as contemplated under Section 19 of MSMED Act need not be complied. The learned senior counsel in that context relied on the decisions in the case of ***Adbullamiyan Abdulrehman -vs- Government of Bombay (AIR (29) Bombay 257-FB)***; in the case of ***Bajranglal Shivachandrai Ruia -vs- Shashikant N. Ruia and Others (2004(5) SCC 272)***; in the case of ***Bhalchandra Ramchandra Vaidya -vs- State of Gujarat (AIR 1964 Guj 1-FB)***; in the case of ***Rungta Sons (P) Ltd and Another -vs- Collector of Customs and Others (1986(23) ELT 14-Cal)***; in the case of ***Kiran Singh and Others -vs- Chaman Paswan and Others (AIR 1954 SC 340)***; in the case of ***M/s Dodha House -vs- S.K. Maingi (AIR 2006 SC 730)***; in the case of ***Chief Engineer, Hydel Project & Others -vs- Ravinder Nath and Others (2008(2) SCC 350)*** wherein the cumulative effect of the decisions is that an order

passed without jurisdiction is a nullity and that such order which is a nullity will not give rise to any right nor would it impose any obligation. As such, it is contended that it is held therein that the provision regarding pre-deposit at the time of filing appeal will not apply.

16. The learned counsel for the first respondent would refer to the relevant portion of the Award to point out that Conciliation was terminated and thereafter Arbitration proceedings were taken up and it is not correct to contend that they were simultaneously concluded as urged by the learned senior counsel by merely relying on the concluding portion.

17. To consider this aspect of the matter, reference to para 42.5 of the Award relied on by the learned senior counsel would at first blush indicate as if the position is as contended by the learned senior counsel since it reads as hereunder:

“42.5 Exercising the powers vested with the IFC under Sec 76 (b) and Sec 32 (2) (c) of the Arbitration & Conciliation Act 1996, the

conciliation and arbitration proceedings stand terminated.”

But, a detailed perusal of the Award at para 27.O and 28.O would read as hereunder:

“27.0 *The IFC has given sufficient opportunity to the respondent to put forth their arguments orally as well as in writing in the interest of natural justice.*

28.0 *The IFC felt that it has made sufficient efforts at conciliation between the concerned parties. It has found that the respondent is non responsive, and the IFC admitted that conciliation efforts of the IFC are not bearing fruits. Since, the parties have not made any progress, the IFC decided to take on arbitration as provided for under the provisions of the MSMED Act 2006.”*

18. In that light, if the provision contained in Section 76 of the A & C Act is perused, the termination of conciliation proceedings in the instant case would be in terms of sub-section (b), which provides for written declaration of the Conciliator. Though it further provides that it is after consultation with the parties, the observation indicates that the petitioner herein was

non-responsive which was an act of unwillingness to proceed with conciliation. Further, sub-section (3) of Section 18 of MSMED Act provides that if Conciliation is not successful and terminated, the Council shall either itself take up the dispute for arbitration or refer as provided thereunder. In the instant case, it is seen that after the conciliation proceedings on 23.08.2007 and the termination thereof vide para 28.O, the Council had itself taken up Arbitration in terms of Section 18(3) of MSMED Act and the first hearing was held on 14.12.2007 as recorded in para 29.O. The Manager-Legal of the petitioner has appeared on that date and has participated in the proceedings and on considering the rival contentions thereafter on the subsequent dates, it has concluded on 14.07.2008 on passing the Award. There was no protest on behalf of the petitioner at that stage for taking up Arbitration proceedings. Merely because it has been recorded in a sequential manner and a consolidated observation is made in para 42.5 instead of separately recording the Arbitration proceedings, by no stretch of imagination can it be

accepted that the conciliation proceedings had not been terminated before the Arbitration proceedings were commenced. This aspect has also been appropriately considered by the Court below in para 56 of its order. Hence, I am unable to persuade myself to accept the contention of the learned senior counsel for the petitioner that the Award passed therein is a 'nullity'.

19. In such circumstance, when for the reasons indicated supra, I have arrived at the conclusion that the KIFC has not usurped the jurisdiction which was not vested in it and since I have also concluded that the Award is not a 'nullity', the decisions relied on by the learned senior counsel referred to supra to seek avoidance of pre-deposit of the amount as provided under Section 19 of MSMED Act also are of no assistance in the instant case though there can be no cavil with the position of law enunciated therein.

20. The other contentions urged by the learned senior counsel that the procedure followed offends the judicial procedure and principles of natural justice as

the person hearing has not passed the Award, by relying on the decision in the case of ***Gullapalli Nageswara Rao and Others –vs- APSRTC and Another (AIR 1959 SC 308)*** and also the contention that excepted matters and issues which did not form part of arbitration agreement were decided, by relying on the decisions in the case of ***M/s Prabartak Commercial Corporation Limited –vs- The Chief Administrator Dandakaranya Project and Another (AIR 1991 SC 957)*** and in the case of ***Delhi Development Authority –vs- R. S. Sharma and Co., New Delhi (JT 2008 (9) SC 362)***, in my opinion the same does not arise for consideration in the scope of this writ petition. The said contentions are open to be urged before the Court below, if it arises for consideration within the scope of Section 19 of MSMED Act read with Section 34 of the A & C Act.

21. For all the reasons aforesaid and for the reasons stated by the Court below in the order impugned herein, I find no error or perversity in the

impugned order dated 01.04.2010 so as to call for interference in the instant petition.

22. In the result, the following;

ORDER

- (i) The petition is W.P.No.12465/2010 (GM-RES) stands dismissed with no order as to costs.
- (ii) The petitioner is however granted four weeks time from this date to deposit the amount before the Court below in terms of Section 19 of MSMED Act.

**Sd/-
JUDGE**

akc/bms