

2013 (5) CTC 25**IN THE HIGH COURT OF MADRAS****K.B.K. Vasuki, J.**

O.P. No.888 of 2010

21.3.2013

Goodyear India Ltd., rep. by its Zonal Manager, A. Baburaj*Petitioner*

Vs.

Nortan Intec Rubber (P) Ltd. and another*Respondents*

Arbitration and Conciliation Act, 1996 (26 of 1996), Section 34(3) — Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006), Section 19 — Petition challenging Award of Facilitation Council — Limitation and Pre-deposit — Whether complied with — Impugned Award received by Petitioner on 15.1.2010 — Instant Petition filed on 29.3.2010, within limitation of three months, however without making mandatory deposit of 75% of Award amount — Application filed by Petitioner for waiving pre-deposit, not supported by 2006 enactment — In spite of several Orders of High Court and Supreme Court granting time to Petitioner to make deposit; pre-deposit of 75% of Award amount made by Petitioner only on 4.6.2012 — Arbitration Petition filed by Petitioner, thus, came to be in order only on 4.6.2012, i.e. much beyond expiry of period of limitation — Petition filed by Petitioner, *held*, hopelessly barred by limitation and not maintainable.

Facts : The Petitioner and First Respondent entered into Agreement for supply of raw materials and consequent supply of finished products. As dispute arose between parties, First Respondent invoked the relevant provisions of MSMED Act, 2006 and referred the dispute to the Facilitation Council, R2 herein. Both parties entered appearance and presented their case. Award was passed directing Petitioner to pay ₹80.11 lakhs as principal amount with prescribed interest. Challenging said award, instant (Original) Petition has been filed by Petitioner.

Held : Even assuming that the argument of the Petitioner is acceptable, here again, the Petitioner failed to comply with the statutory requirement as on the date of filing of the Petition. The Petition was admittedly filed on 29.3.2010 without any pre-deposit of 75% of the admitted amount and 75% of the principal amount was deposited only on 10.11.2010, which is much after the expiry of limitation period i.e. 14.04.2010. The grace period of 30 days from the date of filing the Petition expired on 13.5.2010 as on which date, admittedly no deposit of even admitted portion of the award amount was made. Though the Application was filed for waiving the pre-deposit requirement, it was not supported by any provision of law under MSMED Act. Further, the application for waiving pre-deposit was disposed of on 5.10.2010 granting 6 weeks time for depositing 75% of the entire award amount. Again, the order was complied with only in part. Thus, the Petitioner has not complied with the pre-deposit condition either as on the date of filing of the Petition or

before expiry of period of limitation specified for filing the Petition and even after the expiry of the time specified in the order made in the Waiver Application. In view of the mandatory requirement prescribed under Section 19 of MSMED Act, the Arbitration Petition cannot be treated as maintainable either on 29.3.2010 or on 13.5.2010 without 75% of pre-deposit. If at all the same shall be treated as in order, it was only on 4.6.2012, the date on which pre-deposit of 75% of Award amount stands complied with. The Petition is, as on 4.6.2012, hopelessly barred by limitation and as there is no provision under Arbitration Act to condone the delay beyond 30 days the Arbitration Petition is hit by limitation as laid down by the Hon'ble Supreme Court and our High Court in the judgments cited below: [Para 16]

Thus, the principles laid down in the authorities cited above, are to the effect that under Section 19 of MSMED Act, the constitutional validity of which is already upheld pre-deposit of 75% of the award amount is mandatory for entertaining any Appeal/Petition against the award passed by Conciliation Council. Though the present Arbitration Petition was filed within the time, the mandatory requirement has not been complied with either within the period of limitation or extended period and the Petition is hence barred by limitation. On this score alone, this Original Petition is liable to be dismissed. [Para 22]

Even otherwise, whatever the grounds available to the Petitioner on factual and legal aspects and also against the validity and enforceability of the award, the same can be canvassed only by way of proper Petition under Section 34 of the Act and when the relevant provision of law provides that the Petition shall be entertained only along with pre-deposit of 75% of the amount awarded, the Petition ought to have been filed, after complying with mandatory requirement and on the failure of the Petitioner to do so, the Petition shall be treated as incomplete and improperly filed and shall not be entertained and shall be rejected. In view of the same, there is no challenge against the Arbitral award and the same entitled the awardee to enforce the same and to withdraw the amount deposited by the Petitioner herein. [Para 25]

Arbitration and Conciliation Act, 1996 (26 of 1996), Section 34(3) — Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006), Section 19 — Petition challenging Award of Facilitation Council — Limitation and Pre-deposit — Petition under Section 34 to be filed within 90 days or within further 30 days, from date of Award or date of receipt of same — Said Petition to be mandatorily accompanied with 75% of amount as stipulated in impugned Award.

Section 34(3) of the Arbitration and Conciliation Act prescribes time limit for filing the Petition to set aside the award as three months from the date of receipt of the Arbitral Award and the Proviso to Section 34(3) prescribes further grace period of thirty days for entertaining an Application under Section 34 provided the Applicant satisfy the Court with sufficient cause for not making an Application within a period of three months. As rightly argued by the learned Counsel for the First Respondent, the combined appreciation of Section 34 of the Arbitration and Conciliation Act and Section 19 of the MSMED would undoubtedly go to show that the Petition under Section 34 shall be filed within 90 days or within 30 days thereafter i.e., within 120 days either from the date of the award or from the date of receipt of copy of the award by the Applicant and not thereafter and the Appeal or Petition shall not be entertained, unless the Petitioner deposits 75% of the amount in

terms of the impugned Award and the Petition under Section 34 shall be entertained with deposit of 75% of the amount in terms of the Award. The Apex Court in *Lalta Prasad Khinni Lal* case referred to the Full Bench decision reported in *Lakshmi Rattan Engineering Works Ltd. v. Assistant Commissioner, Sales Tax*, AIR 1968 SC 488, wherein the Supreme Court has observed that the word "entertain" means "admitting to consideration" and the Court shall not proceed to admit to consideration an Appeal, which is not accompanied by satisfactory proof of the payment of the admitted tax, which is the statutory requirement as laid down under law.

[Para 9]

Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006), Section 19 — Award of Facilitation Council — Finality of — Proceedings before Council, when contested and Award passed on merits, Award to be final until same is set aside or modified — Party challenging said Award bound to make pre-deposit of 75% of Award amount (inclusive of principal and interest both) — Party not entitled to split Award for purpose of complying with requirement as contemplated in Section 19.

Whereas, it is repeatedly argued by the learned Senior Counsel for the Petitioner that as the correctness legality and validity of the Arbitration award is being challenged in the O.P., the same would absolve the Petitioner from his liability to comply with the statutory requirement of 75% of the impugned award. It is sought to be argued before this Court on the side of the Petitioner that in the light of the grounds raised against the correctness of the award, the award is to be treated as *non-est* in law, insofar as it relates to award of interest is concerned as such deposit of 75% of principal amount shall be treated as sufficient compliance of the statutory requirement of 75% pre-deposit of the award amount. This Court is, as rightly argued by the learned Counsel for the Respondent, not inclined to accept such contention raised on the side of the Petitioner. The Award having been passed on merits, after contest, unless and until it is modified or set aside, is deemed to be in force and the statutory requirement laid down under Section 19 of MSMED Act shall be only relating to entire Award impugned in the O.P and the Petitioner has no right much less any legal right to split the award into two categories viz., admitted and disputed portion, for the purpose of complying with the statutory requirement for entertaining the Arbitration Petition. As the Award passed is for the principal of ₹80,11,495/- with interest as prescribed under two Acts, the value of the petition, for the purpose of filing the Petition, shall be both principal and interest as awarded and not otherwise.

[Para 15]

CASES REFERRED

Eden Exports Company, rep. by its Partner, Mrs. Faiqua Shameel v. Union of India, 2010 (2) CWC 885	8
K.S.R.T.C. v. Union of India, 2010 (1) KLT 65	8
Lakshmi Rattan Engineering Works Ltd. v. Assistant Commissioner, Sales Tax, AIR 1968 SC 488	9
Lalta Prasad Khinni Lal v. Assistant Commissioner (Judicial), Sales Tax, Kanpur, 1972 (4) SCC 505	9, 17
State of Tamil Nadu v. E.P. Nawab Marakkadai, 1996 (1) CTC 95	21
Union of India v. Popular Constructions Co., 2001 (4) CTC 213 (SC)	20

**S. Silambanan, Senior Counsel for S. Rajeni Ramadass, Advocate for Petitioner.
Sathish Parasaran, Advocate for Respondent No.1.**

O.P. DISMISSED

Prayer : Petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the purported award dated 31.12.2009 passed by the Second Respondent.

JUDGMENT

1. This Original Petition is filed under Section 34 of the Arbitration & Conciliation Act against the award dated 31.10.2010 passed in favour of the First Respondent M/s. Nortan Intec Rubber (P) Ltd. by Second Respondent MSE Facilitation Council and Industries Commissioner and Director of Industries and Commerce (hereinafter shortly referred to as "MSMED").

2. The facts, which are relevant for consideration herein are as follows:

The Petitioner-Company M/s. Goodyear India Ltd and the First Respondent M/s. Nortan Intec Rubber (P) Ltd. entered into Agreements on 14.05.1997 and 01.04.1999 whereby the Petitioner-Company agreed to supply to the First Respondent required quantity of butyl rubber, carbon black, valve components, chemicals for the manufacture and packing of butyl tubes by using the Plant and Machinery belonging to the First Respondent. The First Respondent was entitled to get conversion charges and Excise duty payable thereon against invoices. The Petitioner in terms of the Agreement supplied the materials, but the First Respondent, according to the Petitioner defaulted in supply of finished goods, as such, dispute arose between the parties, which was followed by Memorandum of Understanding dated 04.11.2000. There was renewal of supply of raw materials. Again, according to the Petitioner, there was default in supply of finished goods and the same was again followed by further dispute and misunderstanding and exchange of notices between the two. In the meanwhile Micro, Small and Medium Enterprises Development Act, 2006 (Act 27 of 2006 came into force) (herein after shortly referred to as "MSMED Act". The First Respondent by invoking the relevant provisions of law under Act 27 of 2006 filed a claim for ₹80,31,956/- against the Petitioner herein before the Second Respondent-Council.

3. The Petitioner-Company filed a detailed Counter thereby seriously questioning the applicability of the provisions of Act 27 of 2006 for the claim relating to the period between 1997 to 1999 and by denying the liability and the quantum of liability and prayed for rejection of the claim made by the First Respondent. The parties are permitted to file their Written Objections and also to advance hearings and oral arguments on the hearing dates and last of such hearing date was on 23.11.2009. The Petitioner-Company herein and the First Respondent made the claim before the Second Respondent herein and seriously opposed the maintainability of the claim before the Second Respondent on the ground of non-applicability of

provisions of Act 27 of 2006. The impugned award came to be passed on 31.12.2009 in and under which, the plea of the Petitioner herein as the Respondent therein was rejected and the Respondent-Company was directed to pay the principal amount of ₹80,11,495/- with interest at the rate prescribed in "the interest on delayed payments to small scale and ancillary undertaking Act" from the appointed due dates till the date of coming into force of MSMED Act compounded with monthly rests on the amounts so arrived, at three times of the bank rate and notified by the Reserve Bank of India from the date of coming into effect of the MSMED Act till date of settlement and order of the Council. The award was received by the Petitioner-Company on 15.01.2010. Aggrieved against the award, the present Original Petition came to be filed by the Petitioner on 29.03.2010.

4. The Petitioner-Company has in this Original Petition questioned the claim made by the First Respondent before the 2nd Respondent not only on the following legal grounds viz., (i) limitation (ii) jurisdiction of the council to entertain the claim (iii) non-applicability of provisions of Act 27 of 2006, and (iv) the manner in which the award was passed as if without going into the merits of the claim and without coram but also on merits by denying their liability and quantum of liability not only in respect of principle but also interest and also the rate of interest.

5. Whereas, the First Respondent has seriously opposed the very maintainability of the present Arbitration OP both on the ground of non-compliance of statutory mandatory requirement of pre-deposit of 75% of the award impugned and also defended the correctness of the award on merits.

6. Here is the case, wherein, the award is as stated above for payment of principle amount of ₹80,11,495/- with interest at the rate prescribed in the Act, for the period from appointed date till coming into force of MSMED Act. It may be true that the validity of the award is seriously challenged herein on various grounds, which go to the root of the jurisdiction of the Second Respondent. The Petitioner-Company has seriously contended that the award passed by the 2nd Respondent cannot be treated as legal award in the eye of law, for want of coram and for want of signatures of the members of the Council and hearing and the award is hence incomplete and invalid in nature. However, the grounds so raised are to be agitated, discussed and decided in this OP and until and otherwise the award is varied, reversed or set aside in the manner known to law the same is deemed to be legal and valid for all other practical purposes, particularly for the compliance of the statutory requirement laid down under Section 19 of MSMED Act.

7. Before going into the correctness of the award and claim of the Petitioner on merits, this Court is inclined to first to go into the issue relating to pre-deposit as contemplated under Section 19 of MSMED Act. For better appreciation, Section 19 of MSMED Act is reproduced herein:

"19. Application for setting aside Decree, Award or Order.— No Application for setting aside any Decree, Award or other Order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any Court unless the Appellant (not being a supplier) has deposited with it seventy-five percent. of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such Court."

Provided that pending disposal of the Application to set aside the Decree, Award or Order, the Court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case, subject to such conditions as it deems necessary to impose."

8. Our High Court in a batch of Writ Petitions in W.P. 16908 of 2010, etc. reported in *Eden Exports Company, rep. by its Partner, Mrs. Faiqua Shameel v. Union of India*, 2010 (2) CWC 886, referred to the Division Bench Judgement of Kerala High Court reported in *K.S.R.T.C v. Union of India*, 2010 (1) KLT 65 which upheld the validity of Constitutionality of Section 19 of MSMED Act.

9. Section 34(3) of the Arbitration and Conciliation Act prescribes time limit for filing the Petition to set aside the award as three months from the date of receipt of the Arbitral Award and the Proviso to Section 34(3) prescribes further grace period of thirty days for entertaining an Application under Section 34 provided the Applicant satisfy the Court with sufficient cause for not making an application within a period of three months. As rightly argued by the learned Counsel for the First Respondent, the combined appreciation of Section 34 of the Arbitration and Conciliation Act and Section 19 of the MSMED would undoubtedly go to show that the Petition under Section 34 shall be filed within 90 days or within 30 days thereafter i.e., within 120 days either from the date of the award or from the date of receipt of copy of the award by the Applicant and not thereafter and the Appeal or Petition shall not be entertained, unless the Petitioner deposits 75% of the amount in terms of the impugned award and the Petition under Section 34 shall be entertained with deposit of 75% of the amount in terms of the award. The Apex Court in *Lalla Prasad Khinni Lal Case* referred to the Full Bench decision reported in *Lakshmi Rattan Engineering Works Ltd. v. Assistant Commissioner, Sales Tax*, AIR 1968 SC 488, wherein the Supreme Court has observed that the word "entertain" means "admitting to consideration" and the Court shall not proceed to admit to consideration an Appeal, which is not accompanied by satisfactory proof of the payment of the admitted tax, which is the statutory requirement as laid down under law.

10. In the instant case, admittedly, the Petitioner has not deposited 75% of the award amount within 120 days which is the statutory period prescribed for filing an Appeal including this Petition under Section 34 of the Arbitration Act. Though the Appeal is filed within 30 days from the date of receipt of copy of this award, the same is not filed along with 75% of the

award amount. The perusal of the records relating to this case and the particulars furnished by the First Respondent under the caption 'list of dates and events' would reveal that the Arbitration Award was received by the Petitioner on 15.01.2010 and the limitation period of three months came to end on 14.04.2010 and further grace period of 30 days ended on 13.5.2010. But the present O.P. was filed on 29.03.2010 without mandatory pre-deposit of 75% of the award amount. The O.P.D. No.14214 of 2010 was, hence, returned by the Registry, which compelled the Petitioner to come forward with an Application Appln. D. No.14215 of 2010 on 05.10.2010 and the same was disposed of on 5.10.2010 on the basis of the statement made by learned Senior Counsel appearing for the Petitioner to deposit the amount within six weeks, with further direction issued to the Registry to number the Petition on compliance of pre-deposit of 75% of the award amount. The Petitioner deposited ₹60,08,622/- on 10.11.2010, which is admittedly 75% of only the principal amount of ₹80,11,495/- without including the interest as per the award. The main O.P. was thereafter represented with the delay of 111 days and the delay was condoned by Master on 23.11.2010 and thereafter, the O.P. was numbered as O.P. No.888 of 2010 and O.P. was admitted on 09.12.2010 and stood adjourned to 21.12.2010 at the instance of the First Respondent, who took notice on caveat. The matter was again listed on 24.01.2011 and preliminary objection was seriously raised by the First Respondent regarding maintainability of the O.P., without the deposit of 75% of the award amount and the same was decided as preliminary issue by detailed order dated 07.04.2011. This Court has categorically held that the Petitioner has deposited 75% principal amount and not 75% of the entire award amount consisting of principal and interest in compliance with Section 19 of the Act and unless the Petitioner deposits 75% of the award amount of principal and interest within six weeks from the date of receipt of copy of the order, O.P. will be dismissed. Aggrieved against the same, the Petitioner preferred O.S.A. No.119 of 2011. The Division Bench of this Court concurred with the finding of the learned Single Judge regarding non compliance of pre-deposit of 75% of the award amount, however disposed of the Appeal by granting six more weeks time to the Petitioner to comply with the mandatory requirement. The same was again challenged by the Petitioner in S.L.P. Nos.16919 & 16920 of 2011. The First Respondent herein also filed S.L.P. Nos.31468 & 31469 of 2011 by questioning the maintainability of the O.P. on the ground of limitation for non-deposit of 75% of the award amount.

11. In the meanwhile, the First Respondent/Awardee filed E.P. No.1300 of 2011 for execution of the Award and pending E.P., the Supreme Court by an order dated 12.07.2011 granted further period of 8 weeks to deposit the amount in terms of the order passed in O.S.A. The First Respondent has also filed A. No.3037 of 2011 in O.P. No.888 of 2010 for payment out of ₹60,08,821/- deposited by the Petitioner to the First Respondent and an order

was passed on the same day on 22.07.2011 by directing the Registrar General to invest the amount in fixed deposit, for three months in Indian Bank, High Court Branch. Thereafter, the Hon'ble Supreme Court by another Order dated 02.11.2011 directed the Petitioner to deposit further sum of ₹1 Crore in the Reserve Bank of India and the same was complied with by the Petitioner on 08.11.2011. While doing so, this Court observed that in the absence of deposit of 75% of the amount, O.P. cannot be treated as properly filed. In the same order, liberty was given to the awardee to make an Application before the Master for payment out or to obtain order in E.P. No.1300 of 2011 for executing the award. The Order dated 15.12.2011 further clarified on 21.12.2011 by directing the Master to consider any Application filed by the Awardee for payment of pre-deposit in the light of the Hon'ble Apex Court Order dated 02.11.2011 as referred to above. The Supreme Court has finally disposed of all the four S.L.Ps. filed by the Petitioner as well as the First Respondent herein by common Order dated 15.03.2012 thereby concurred with the view expressed by the learned Single Judge with regard to deposit of 75% of the award amount under Section 19 of the 2006 Act and by extending the time for deposit the amount within the period of 12 weeks. It is further observed by the Supreme Court that in the event of pre-deposit being made, the O.P. will be treated to be in order and may be proceeded with. The Supreme Court has in the same order disposed of the S.L.P. filed by the First Respondent by granting liberty to the First Respondent to take whatever objections that have been taken in the S.L.P. in the O.P. at the time of hearing in the O.P. Thereafter, the Petitioner deposited a sum of ₹2,82,77,540/- on 04.06.2012, pursuant to the order of the Hon'ble Supreme Court. Thus, the total sum deposited by the Petitioner i.e., ₹4,42,86,162/- on 04.06.2012 is towards 75% of the award amount and the pre-deposit condition laid down under Section 19 of MSMED Act is thus to be treated as complied with only on 04.06.2012.

12. In this context another serious dispute arose between the parties is regarding the total amount and 75% of the amount payable towards principal and interest as per the award as on the date of filing of the Petition i.e., on 29.3.2010 and separate Calculation Memos are filed on both sides regarding the principal and interest due as on the date of filing of this Petition i.e., 29.3.2010 and as on the date of deposit of last payment i.e., 4.6.2012 in pursuance of the Order of the Supreme Court. Before going into the Calculation Memo filed by both sides, it is but necessary to reproduce the operative portions of the Award impugned herein, which read as follows:

"In the light of the above findings, we conclude that the Respondents have failed to pay for 52 number Bills with due dates from 22.7.97 till 13.3.98 and 7 Bills with due dates from 25.9.99 till 15.11.99 for a total principal sum of ₹80,11,495/- for goods received by them.

In the foregoing circumstances, the plea of the Respondent fails and the Council directs that the Respondent-Company shall be liable to pay interest from the

appointed due dates respectively as above. The principal amount of ₹80,11,495/- with interest at rate prescribed in the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act, 1993 to till the date of coming into force of the MSMED Act, 2006 and further be liable to pay compound interest with monthly rests to the supplier (Applicant) on that amount at the three times of the Bank rate notified by the Reserve Bank of India from the date of coming into the effect of MSMED Act, 2006, till the date of settlement and orders passed by this Council as above."

13. In the concluding paragraph of the award, the Arbitration Tribunal has stated the total number of bills to be payable as 52 Bills relating to the period from 22.7.97 to 13.3.98 and 7 Bills from 25.9.1999 to 15.11.99. The total principal amount covered under 52 + 7 Bills, according to the Award, is ₹80,11,495/- and the same is also referred to in the second part of the concluding paragraph and the rate of interest awarded is at the rate prescribed "in the interest on delayed payments to Small Scale and Ancillary Industrial Undertaking Act". As far as the rate prescribed in the Interest on delayed payments to Small Scale and Ancillary Industrial Undertaking Act, is concerned, the same was repealed with effect from 2.10.2006 by MSMED Act 27/2006. Thereafter, the interest became payable under Section 16 of MSMED Act. While interest payable as per repealed Act is 1½ times of prime lending rate (PLR), the same is under Section 16 of the new Act 3 times of the rate notified by the Reserve Bank of India. Thus, as far as principal amount is concerned, the same is accepted as ₹80,11,495/- for the purpose of calculation. As far as rate of interest is concerned, the same is calculated at 18% (3 times of 6% as notified by Reserve Bank of India) for the period from 1.10.2006 till the date of Petition *i.e.*, on 29.3.2010 by the Petitioner. Whereas, the Respondent calculated the rate upto the date of last payment *i.e.*, on 4.6.2012. As per such calculation, the total amount payable towards principal and interest as per the award by the Petitioner is ₹5,90,48,215/- as on 29.3.2010 and 75% of the same is ₹4,42,86,161.25. Whereas, as per the Respondent, the total amount payable is ₹6,05,92,156/- and 75% of the same is ₹4,54,44,117/-. For the limited purpose of deciding the issue relating compliance of predeposit of 75% of the Award, this Court is inclined to accept the calculation memo made on the Petitioner's side, as per which, the amount payable towards principal and interest as on 29.3.2010 is ₹5,90,48,215/- and 75% of the same comes to ₹4,42,86,161.25.

14. Next aspect to be considered relating to limitation is whether the Petitioner deposited the pre-deposit amount and whether the O.P. is filed within the time limit prescribed for filing the Petition *i.e.* 90+30 days along with such pre-deposit. The particulars as furnished above would reveal that the total amount of ₹4,42,86,162/- came to be filed only on 4.6.2012. Here is the case, wherein, the Petitioner filed the Arbitration O.P. on 29.3.2010 without complying with mandatory predeposit of 75% of the award amount. At the risk of repetition it is stated herein that the limitation period prescribed under Section 34 of the Arbitration Act *i.e.*, 90+30 days came to

end on 14.4.2010 and O.P. was returned on 20.4.2010 for compliance of statutory requirement of deposit of 75% of the award amount and the Petition was represented along with the Application for waiving pre-deposit of 75% of the award amount and the same was disposed of on 5.10.2010 and the first amount of ₹60,08,622/- towards 75% of the principal amount came to be deposited only 10.11.2010 i.e., much after 90+30 days limitation period for filing Appeal against the Arbitral award expired. Thereafter, the entire 75% of principal and interest as per the award and as per the calculation made by the Petitioner as referred to above, came to be deposited on various dates, only in pursuance of the order of the Supreme Court on 2.11.2011, i.e., ₹1 crore on 8.11.2011 and further sum of ₹2,82,77,540/- on 04.06.2012, thereby total amount ₹4.42.86,162/- came to be deposited by the Petitioner only on 04.06.2012. The Petitioner was given time for complying with pre-deposit of 75% of principal and interest on more than one occasion and further time was granted in O.P. by our High Court as well as in S.L.P. by Hon'ble Supreme Court. In spite of the same, conditional order was not complied with.

15. Whereas, it is repeatedly argued by the learned Senior Counsel for the Petitioner that as the correctness legality and validity of the Arbitration Award is being challenged in the O.P., the same would absolve the Petitioner from his liability to comply with the statutory requirement of 75% of the impugned Award. It is sought to be argued before this Court on the side of the Petitioner that in the light of the grounds raised against the correctness of the Award, the Award is to be treated as *non-est* in law, insofar as it relates to award of interest is concerned as such deposit of 75% of principal amount shall be treated as sufficient compliance of the statutory requirement of 75% pre-deposit of the award amount. This court is, as rightly argued by the learned Counsel for the Respondent, not inclined to accept such contention raised on the side of the Petitioner. The award having been passed on merits, after contest, unless and until it is modified or set aside, is deemed to be in force and the statutory requirement laid down under Section 19 of MSMED Act shall be only relating to entire award impugned in the O.P. and the Petitioner has no right much less any legal right to split the award into two categories viz., admitted and disputed portion, for the purpose of complying with the statutory requirement for entertaining the Arbitration Petition. As the award passed is for the principal of ₹80,11,495/- with interest as prescribed under two Acts, the value of the Petition, for the purpose of filing the Petition, shall be both principal and interest as awarded and not otherwise.

16. Even assuming that the argument of the Petitioner is acceptable, here again, the Petitioner failed to comply with the statutory requirement as on the date of filing of the Petition. The Petition was admittedly filed on 29.3.2010 without any pre-deposit of 75% of the admitted amount and 75% of the principal amount was deposited only on 10.11.2010, which is much after the expiry of limitation period i.e. 14.04.2010. The grace period of 30 days from the date of filing the Petition expired on 13.5.2010 as on which date, admittedly no deposit of even admitted portion of the award amount was

made. Though the Application was filed for waiving the pre-deposit requirement, it was not supported by any provision of law under MSMED Act. Further, the Application for waiving pre-deposit was disposed of on 5.10.2010 granting 6 weeks time for depositing 75% of the entire award amount. Again, the order was complied with only in part. Thus, the Petitioner has not complied with the pre-deposit condition either as on the date of filing of the Petition or before expiry of period of limitation specified for filing the Petition and even after the expiry of the time specified in the order made in the Waiver Application. In view of the mandatory requirement prescribed under Section 19 of MSMED Act, the Arbitration Petition cannot be treated as maintainable either on 29.3.2010 or on 13.5.2010 without 75% of pre-deposit. If at all the same shall be treated as in order, it was only on 4.6.2012, the date on which pre-deposit of 75% of award amount stands complied with. The petition is, as on 4.6.2012, hopelessly barred by limitation and as there is no provision under Arbitration Act to condone the delay beyond 30 days the Arbitration Petition is hit by limitation as laid down by the Hon'ble Supreme Court and our High Court in the judgments cited below:

17. *M/s. Lalta Prasad Khinni Lal v. Assistant Commissioner (Judicial), Sales Tax, Kanpur and another*, 1972 (4) SCC 505, is the case relates to U.P. Sales Tax Act which deals with the Appeal against the Order of Assessment. Under Section 9 of the Act, the Appeal shall be filed within 30 days and the Proviso to this Section says that 'no Appeal against the assessment shall be entertained unless satisfactory proof is adduced of the payment of tax admitted by the Appellant to be due'. Sub-section (6) of Section 9 provides that Section 5 of Indian Limitation Act, 1908 shall apply to Appeals under the Act. The relevant Rule 66(2) says that "the Memorandum of Appeal shall be accompanied by adequate proof of payment of the fee payable and a certified copy of the Order appealed against and the chalan showing deposit in the treasury of the tax admitted by the Appellant to be due or of such instalments thereof as might have become payable" and Rule 66(3) says that "if the Memorandum of Appeal is not in order, it may be rejected or be returned, after necessary endorsement on its back about its presentation and return to the Applicant for correction and representation within the time to be fixed by the Assistant Commissioner (Judicial) or be amended then and there". In the case cited above, one Lalta Prasad Khinni Lal, a Hindu Undivided Family filed an Appeal on 21.10.1965 against the assessment order which resulted in increase of the admitted amount of tax liability. The Appeal was filed, 3 days before the expiry of period of limitation prescribed for filing such Appeal. The admitted tax amount was paid only on 27.5.1966. Therefore, the Assessee filed an Application under Section 5 of Limitation Act praying for condonation of delay, if any, in filing the Appeal. The Memorandum of Appeal was rejected for non-compliance of deposit of admitted tax amount within the period of limitation. The Writ Petition filed under Article 226 of the Constitution of India was also dismissed on the ground that though the

Appeal was filed within the time, there was delay in making the necessary deposit of the admitted tax and the delay could not be condoned. When the same was challenged before the Hon'ble Supreme Court, the Supreme Court has, in view of applicability of Section 5 of Limitation Act to such Appeals, observed that the Appeal became entertainable on 27.5.1966, the date on which, the necessary document showing deposit of the full amount was made, but it only suffered from the defect that it was barred by time on that date and in view of Section 9(6), the assessee could file an Application for extension of time and the rejection of the Application is on the erroneous ground that the Courts below have no jurisdiction to entertain such Application. The Hon'ble Supreme Court has set aside the order of the High Court and remitted the matter for fresh disposal. While doing so, the Hon'ble Supreme Court in Para 5 of the Judgement categorically observed that the Appeal is deemed to have been properly filed on the date on which the amount of admitted tax is paid and if it is beyond the period of 30 days, the Appeal will be barred by time.

18. The important factor to be noted in the case decided by the Supreme Court is that there is no outer limit prescribed for condoning the delay as in the present case. Therefore, Section 9(6) entertains the Application filed under Section 5 of the Limitation Act without any outer limit. Whereas, in the present case, the outer limit fixed beyond the limitation period is only 30 days and not beyond that. If the observation of the Supreme Court is viewed, in the light of specific provisions of law, the present Arbitration Petition should be treated as having been preferred only on 4.6.2012 and in the absence of any Application for condoning the delay and in the absence of any provision for condoning the delay beyond 30 days, the Arbitration Petition shall be treated as barred by limitation as on 4.6.2012, the date on which condition of pre-deposit of 75% stands complied with.

19. It may be true that this Court and the Supreme Court have periodically extended the time, with an observation that in the event of the order for deposit of statutory requirement being complied with, the Arbitration Petition will be entertained. But the Apex Court has in the same order granted liberty to the Respondent to contest all grounds available to them, including that of question of limitation, as such, this Court is, for the discussion held above, compelled to hold that the Petition is barred by limitation.

20. The Supreme Court in the decision reported in *Union of India v. Popular Constructions Co.*, 2001 (4) CTC 213 (SC) : 2001 (8) SCC 470, observed in Para 16 that "...an Application filed beyond the period mentioned in Section 34, sub-section (3) would not be an Application in accordance with that sub-section. Consequently by virtue of Section 34(1), recourse to the Court against an Arbitral Award cannot be made beyond the period prescribed". It is further observed in the same Para 16 that "now the consequence of the time expiring under Section 34 of the 1996 Act is that the Award becomes immediately enforceable without any further act of the Court".

21. The same principle was followed by our High Court in the decision reported in *State of Tamil Nadu v. E.P. Nawab Marakkadai*, 1996 (1) CTC 95, wherein, the case relates to Tamil Nadu General Sales Tax Act. The impugned Assessment Order was passed on 30.12.1988 and was served on Assessee on 1.2.1989. The period of limitation under Section 31 of the Act was 30 days and the Appeal should have been filed on or before 3.3.1989, after paying the admitted tax. The Appeal was filed on 1.3.1989 and the admitted tax was paid only on 30.3.1989. Under the First Proviso to Section 31 of the Act, the Appellate Authority has power to excuse the delay for sufficient reasons only upto 15 days beyond the last date for filing the Appeal. Whereas, there was delay of 28 days in payment of admitted tax. The Appellate Authority refused to condone the delay and dismissed the Petition seeking such condonation. The same was challenged before the Sales Tax Appellate Tribunal. The Tribunal allowed the Appeal and remanded the case before the Appellate Assistant Commissioner holding that there was no delay in filing the Appeal and the payment of the admitted tax beyond the period of limitation was of no consequence. Against which, T.C.509/1995 was filed by the Revenue. The Full Bench of our High Court, after referring to various judgments of the Supreme Court, our High Court and other High Courts arising out of the same issue, arrived at a finding in Para 24 of the judgment that "we were therefore firmly of the opinion that if there was no payment of the admitted tax within the period allowed for condonation of delay in preferring an Appeal, no Appeal could be said to have been filed. It was only when the payment of admitted tax was made that the Appeal could be said to have been filed. We also made it clear that the words "no Appeal should be entertained under this sub-section unless it was accompanied by satisfactory proof of the payment of the tax admitted by the Appellant to be due....." as already stated in Para 14 supra were interpreted to mean that the payment of the admitted tax should be made within the time or the extended time prescribed for filing an Appeal, even though the satisfactory proof might be produced later before the Appeal was taken up for the first time for consideration. Consequently it followed that if the payment of admitted tax was made beyond the period of 30 days prescribed for filing of an Appeal and beyond the period of 15 days in respect of which alone, the Appellate Authority has power to condone the delay then the Appellate Authority has to necessarily reject the Appeal as barred by limitation". The Full Bench of our High Court has accordingly set aside the order of the Tribunal, thereby restoring the order of the Assistant Commissioner holding the respective Appeals as barred by limitation.

22. Thus, the principles laid down in the authorities cited above, are to the effect that under Section 19 of MSMED Act, the Constitutional validity of which is already upheld pre-deposit of 75% of the award amount is mandatory for entertaining any Appeal/Petition against the award passed by Conciliation Council. Though the present Arbitration Petition was filed

within the time, the mandatory requirement has not been complied with either within the period of limitation or extended period and the Petition is hence barred by limitation. On this score alone, this Original Petition is liable to be dismissed.

23. However, for the purpose of complete adjudication, other grounds raised on the side of the Petitioner to be looked into are that the impugned Award was passed without requisite quorum. It is contended by the learned Senior Counsel for the Petitioner that the copy of the award was signed by Chairman and not by other members of the Council Chennai Region and hence is without jurisdiction and is invalid and unenforceable. Whereas, the original minutes and Award was signed by the Chairman and other Members constituting the Committee. It is also sought to be argued on the side of the Petitioner that the issue was permitted to be argued by the Council not on merits, but only on legal grounds. Whereas, the Council passed the award on merits, thereby holding the Petitioner herein liable to make payment with interest without affording any opportunity to the Respondent to argue on merits, the issue relating to quantum of liability of the Petitioner to make any payment to the Respondent.

24. In this regard, the attention of this Court is drawn to the issues (a) to (d) framed for determination of the council *i.e.* in the Award impugned herein (a) jurisdiction (b) limitation (c) Applicability of MSMED Act 2006 to the instant case, and (d) to what effect. The learned Counsel for the Respondent contended that the parties were directed to raise grievance and counter-claim and advanced oral and written arguments on all aspects and the council decided to proceed all the issues under the Award impugned herein and there was no room for raising any grievance as raised herein. In support of such contention, the Respondent also produced the copy of Minutes of Council Meeting held on 23.11.2009. The perusal of the same reveals that as many as 46 cases were taken up on 23.11.2009 in the presence of requisite quorum and orders were passed in 11 cases and amount was fully settled and case was closed in 4 cases and part amount was received in two cases and the minutes was signed by all members attended the Council meeting. The perusal of the minutes reveal that the claim arising out of which is the Arbitration Petition was taken up as Sl. No.18 and both the Petitioner and Respondent-Company appeared for the hearing before the Council and both the parties orally reiterated their written submissions and the hearing was closed and orders were reserved. Further the perusal of the typed set filed on the side of the Petitioner on 26.11.2010 would reveal that the Petitioner herein filed detailed Counter on merits and also filed Written Submissions, but reiterated the arguments only on issues on legal grounds.

25. Even otherwise, whatever the grounds available to the Petitioner on factual and legal aspects, and also against the validity and enforceability of the Award, the same can be canvassed only by 'way of proper Petition' under

Section 34 of the Act and when the relevant provision of law provides that the Petition shall be entertained only along with pre-deposit of 75% of the amount awarded, the Petition ought to have been filed, after complying with mandatory requirement and on the failure of the Petitioner to do so, the petition shall be treated as incomplete and improperly filed and shall not be entertained and shall be rejected. In view of the same, there is no challenge against the Arbitral Award and the same entitled the Awardee to enforce the same and to withdraw the amount deposited by the Petitioner herein.

26. In the result, this Original Petition is dismissed and the amount deposited by the Petitioner to the credit of O.P. No.888 of 2010 with accrued interest less statutory charges in connection with such deposit if any is directed to be paid to the First Respondent and such payment shall be subject to outcome of and subject to adjustment in Execution proceedings initiated for enforcement of award by the First Respondent.

2013 (5) CTC 39

IN THE HIGH COURT OF MADRAS

S. Nagamuthu, J.

C.R.P.(PD) No.3415 of 2012 and M.P. No.1 of 2012

30.4.2013

V.I. Yocoob

.....*Petitioner*

Vs.

Big Mosque, rep. by its Secretary, Mettupalayam-641 301, Coimbatore District

.....*Respondent*

Code of Civil Procedure, 1908 (5 of 1908), Section 151 — Petition to reopen case — Whether necessary — When Suit was posted for judgment, Application filed to reopen case for purpose of filing Application to implead Wakf Board — Application allowed — Order challenged in Revision — There is no need to file Application to reopen case — At any stage, Application can be filed to implead any party — Application filed to implead party already numbered — Direction issued for disposal of Application to implead — C.R.P. dismissed.

Facts : Revision was filed against the Order allowing Application seeking to reopen the case, when the Suit was posted for judgment. Application was filed to reopen so as to enable the Plaintiff to file Application to implead. High Court held that there is no necessity to file Application to reopen and that the Application to implead can be filed at any stage.