Gujarat High Court
Gujarat High Court
Principal vs Manibhai on 11 October, 2011
Author: Abhilasha Kumari,
Gujarat High Court Case Information System

Print

SCA/2471/2011 34/ 34 JUDGMENT

IN

THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL

CIVIL APPLICATION No. 2471 of 2011

For

Approval and Signature:

HON'BLE

S M T . J U S T I C E A B H I L A S H A K U M A R I
==========

1

Whether

Reporters of Local Papers may be allowed to see the judgment ?

2

To

be referred to the Reporter or not ?

3

Whether

their Lordships wish to see the fair copy of the judgment ?

4

Whether

this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5

Whether

it is to be circulated to the civil judge ?

==========

PRINCIPAL

CHIEF ENGINEER - Petitioner(s)

Versus

MANIBHAI

& BROTHERS (SLEEPER) & 1 - Respondent(s)

========== Appearance :

Mr.Mukesh

Patel for MR RAVI KARNAVAT for Petitioner MR

PARESH M DAVE for Respondent No.1 Mr.Niraj Soni,learned

ASST.GOVERNMENT PLEADER for Respondent No.2

==========

CORAM

:

HON'BLE

SMT. JUSTICE ABHILASHA KUMARI

Date

: 11/10/2011

CAV

JUDGMENT

1. Rule.

Mr. Paresh M.Dave, learned advocate, waives service of notice of Rule, for respondent No.1. Mr.Niraj Soni, learned Assistant Government Pleader, waives service of notice of Rule, for respondent No.2.

2. The

challenge in this petition, preferred under Articles 226 and 227 of the Constitution of India, is to the impugned Award (referred to as an 'Order' by the petitioner) dated 21-08-2010, passed by the State Level Industry Facilitation Council, constituted under Section 21 of the Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act" for short).

3. The

brief factual background of the case, as garnered from the Memorandum of the petition and material on record, is as follows:

3.1 The

petitioner is the Principal Chief Engineer, Western Railway. Respondent No.1 is a Registered Small-scale Manufacturer, who has established a Factory for manufacture of goods, such as Pre-stressed Mono-block Concrete Sleepers, that are being supplied to the Western Railways. The State Level Industries Facilitation Council has been joined as respondent No.2, by order of the Court, dated 15-03-2011. The present dispute centers around Contract CS 160, entered into between the parties, on 20-10-2008. Previous to this contract, respondent No.1 had entered into Contract CS 156 with the Western Railways. The case of the petitioner is that, insofar as CS 156 is concerned, respondent No.1 failed to supply the requisite quantity of Sleepers against the total ordered quantity. A clause in the said contract provides for recovery of Liquidated Damages at 5% of the cost of the stores. The petitioner, therefore, calculated the cost of the unsupplied quantity of sleepers i.e. 1,65,997 at Rs.23,81,57,164.81 and Liquidated Damages at 5%, amounting to Rs.1,19,07,858.00, which has been recovered from the bill of respondent No.1, to be paid under the second Contract, CS 160. According to the petitioner, respondent No.1 has failed to perform his contractual obligations under CS 156, therefore, an amount of Rs. 1,19,07,858.00 has been retained from the sum payable to the said respondent under the said contract, CS 160. Respondent No.1 addressed letter dated 04-05-2009 to the petitioner, stating that the Railways had no legal right to appropriate any amount from the payment of respondent No.1 meant for CS 160, towards the claim for damages pertaining to another contract, when such damages were neither accepted, nor acceptable by the said respondent. As no reply was received from the Railways in this regard, respondent No.1, being a Registered Small-scale Entrepreneur, submitted an application, as per the provisions of Section 18 of the MSMED Act, before the Council on 06/11-06-2009, claiming the outstanding amount of Rs.1,19,07,858/-, with interest. The Council initially resorted to conciliation proceedings. However, when the said proceedings were apparently unsuccessful, it took the dispute for Arbitration to itself, and rendered the impugned Award, dated 21-8-2010.

4. Before

the petition could be heard on merits, Mr.Paresh M.Dave, learned counsel of respondent No.1 raised a preliminary objection regarding the maintainability of the petition, on the ground that the impugned Award made by the Council, being an Arbitral Award, as per the provisions of sub-section (3) of Section 18 of the MSMED Act, could be challenged by the petitioner before the District Court, under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 ("The Arbitration Act" for short). It is contended that as there is an efficacious, alternative statutory remedy, the petition may not be entertained.

4.1 Referring

to the provisions of Section 18 of the MSMED Act, it is submitted by Mr.Paresh Dave, learned advocate for respondent No.1, that the said Section contains a non-obstante clause, which provides that notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under Section 17, make a reference to the Council. It is further submitted that as per the Scheme of Section 18, once a party to a dispute, being a Micro or a Small or a Medium Enterprise, makes such an application, the Council shall either itself take up the dispute for arbitration itself if the conciliation is not

successful and stands terminated without any settlement between the parties, or it may seek the assistance of any Institution, for the purpose of conciliation or arbitration. It is contended by the learned advocate for respondent No.1, that when the dispute has been taken up for arbitration by the Council itself, the provisions of the Arbitration Act would apply, as if the arbitration was in pursuance of an Arbitration Agreement referred to in Section 7(1) thereof. It is urged that, if the petitioner is aggrieved by the Award made by the Council, it would have to make an application for setting aside the same, in accordance with Section 34 of the Arbitration Act, and a petition under Article 226 of the Constitution of India would not be maintainable, and may not be entertained.

4.2 The

learned advocate for respondent No.1 has further submitted that the provisions of Section 19 of the MSMED Act create a statutory obligation for deposit of 75% of the awarded amount, before any application for setting aside the Award is entertained by any Court. The said Section creates a condition of pre-deposit of the stipulated amount before filing an application for setting aside the Award but does not provide for any appellate remedy. An Award made under Section 18(3) of the MSMED Act can be challenged only under Section 34 of the Arbitration Act, and the petitioner may be relegated to take recourse to the statutory remedy.

4.3 To

reinforce the above submissions, the learned advocate for respondent No.1 has referred to the judgment of the Supreme Court in Morgan Securities and Credit Pvt. Ltd. v Modi Rubber Ltd., AIR 2007 Supreme Court 683, by submitting that the Arbitration Act of 1996 is a complete Code in itself, and the provisions of the said Act would apply to the impugned Award.

4.4 A

reference has also been made to the judgment of the Supreme Court in Snehadeep Structures Private Ltd. V. Maharashtra Small Scale Industries Development Corporation Ltd., AIR 2010 Supreme Court 1497 with regard to the

provisions of Section 19 of the MSMED Act.

4.5 The

learned advocate for the respondent No.1 has further submitted that when a Statute provides for the appellate remedy, such a remedy cannot be avoided or bypassed, on the ground that certain statutory conditions imposed for availing the same, are onerous. It is submitted that an appeal is a statutory remedy and not a fundamental right, and merely because the remedy is a conditional one, does not mean that it should be ignored, as has been done by the petitioner, by invoking the writ jurisdiction of this Court.

4.6 In

support of this submission, reliance has been placed upon a judgment of the Kerala High Court in K.S.R.T.C. v. Union of India, W.P.(C) No.10950 of 2009, decided on 01-12-2009, reported in 2010(1)KLT65.

4.7 The

learned advocate for respondent No.1 has referred to the provisions of Section 24 of the MSMED Act and has submitted that the said Section stipulates that Sections 15 to 23 shall have an overriding effect, notwithstanding anything inconsistent contained in any other law for the time being in force.

4.8 It

is further submitted that the MSMED Act is a special Act, therefore, the provisions of the said Act would prevail over any other law. Elaborating further upon this contention, the learned advocate for respondent No.1 has submitted that, as conciliation initiated under sub-section(1) of Section 18 was not successful, the Council, itself, took up the dispute for arbitration, in exercise of jurisdiction vested in it under the provisions of sub-section (3) of Section 18 of the MSMED Act. It is contended that sub-section (3) of Section 18 does not require that a formal order should be passed regarding the failure of conciliation and reference of the dispute to itself, for arbitration, by the Council.

4.9 The

learned advocate for respondent No.1 has further submitted that the parties have appeared before the Council and the submissions made by both sides have been duly considered, as is clear from the impugned Award. The grounds taken by the petitioner, on merits, before this Court can be raised before the Civil Court, under Section 34 of the Arbitration Act.

4.10

It is, therefore, urged that this Court may not entertain the petition, as there is an alternative statutory remedy available to the petitioner.

5. Mr.Mukesh

Patel, learned advocate for Mr.Ravi Karnavat, learned advocate for the petitioner, has submitted that the impugned Award cannot be termed to be an Arbitral Award, as no reference to arbitration was made by the Council under Section 18(3) of the MSMED Act. It is contended that there has to be an order regarding failure of conciliation and a formal reference to arbitration has to be made by the Council. Unless such a reference is made, arbitration proceedings cannot be said to have commenced. It is submitted that as the Council has not made an order regarding failure of conciliation and reference of the matter to arbitration, therefore, the impugned Award cannot be said to be an Arbitral Award and, as such, cannot be challenged under Section 19 of the MSMED Act.

5.1 It

is further contended on behalf of the petitioner that, the petitioner had made an application under Section 8 of the Arbitration Act to the Council, for reference of the matter for Arbitration, but no decision was taken upon the said application. The Council proceeded further without recording that there was a failure of conciliation.

5.2 The

learned advocate for the petitioner has further submitted that there was no "amount due" as per Section 17 of the MSMED Act, to respondent No.1. The petitioner was well within its rights in recovering Liquidated Damages arising from Contract CS 156, from the bill of respondent No.1 under Contract CS 160. It is strenuously urged that in these circumstances, respondent No.1 could not have made an application before the Council under Section 18 of the MSMED Act, as no amount was due to it.

5.3 Adverting

to the provisions of Section 19 of the MSMED Act, the learned advocate for the petitioner has submitted that the words "to which reference is made by the Council" in the said Section mean that there should have been a reference to arbitration, but in the present case, as no such reference has been made, therefore, no application

for setting aside the Award can be made under the provisions Section 19.

5.4 It

is urged that the impugned Award is not an Arbitral Award, and has been passed without jurisdiction, therefore, the challenge to it can be entertained by this Court in exercise of writ jurisdiction under Article 226 of the Constitution of India. It is contended on behalf of the petitioner that there is no alternative remedy available to the petitioner, and the petition before this Court ought to be entertained.

5.5 It

is further urged by the learned advocate for the petitioner that the petitioner has been deprived of an opportunity of making a counter claim, as the matter has not been formally referred for arbitration by the Council.

5.6 It

is further contended by the learned advocate for the petitioner that the impugned Award is not a legal and valid Award, as it is signed by only one Member and not by all the Members of the Council.

5.7 In

support of the above submissions, the learned advocate for the petitioner has placed reliance upon the following judgments:

Hindustan

Petroleum Corporation Ltd. v. M/s.Pinkcity Midway Petroleums, AIR

2003 SC 2881

(2)

M/s. B.H.P. Engineers Pvt. Ltd. v. Director, Industries, U.P.(Facilitation Council), AIR 2009 Allahabad 155.

6. Mr.Niraj

Soni, learned Assistant Government Pleader has produced the original record. The same has been perused by the Court and the learned advocates for the respective parties. It is found therefrom that the original Award has been signed by all the Members of the Council, including the Chairman, though a copy of the Award might have been communicated to the petitioner under the signature of one Member only. The contention of the learned advocate for the petitioner that the Award is illegal, as it has not been signed by all the Members of the Council, is found to have no force.

6.1

The learned Assistant Government Pleader has pointed out to the Court the original record, containing the proceedings signed on 23-7-2010, wherein it has been noted that conciliation has failed. From the said record it appears that the Council was very much aware that conciliation was not successful.

6.2 Apart

from the above, the learned Assistant Government Pleader has submitted that, as is stated in the impugned Award, that notices were issued to the petitioner and respondent No.1 on 22-10-2009, 20-11-2009, 24-12-2009 and 20-5-2010, calling upon them to remain present before the Council on 6-11-2009, 2-12-2009, 6-1-2010 and 31-5-2010. Both parties remained present before the Council during the hearing. It is submitted that the matter was discussed in detail at those hearings, in the presence of both the parties, therefore, the petitioner cannot claim ignorance regarding failure of conciliation and taking up of the dispute by the Council, itself, for arbitration.

6.3 Insofar

as the maintainability of the petition is concerned, the learned Assistant Government Pleader has supported the stand taken by the learned advocate for respondent No.1, by submitting that the petitioner has an alternative statutory remedy under Section 34 of the Arbitration Act, read with Rule 19 of the MSMED Rules, therefore, the petition may not be entertained.

7. In

order to decide whether the petitioner has an alternative statutory remedy and, if so, whether the petition should be entertained in spite of the same, it would be fruitful to advert to the relevant provisions of the MSMED Act.

7.1 Chapter

V of the MSMED Act, is titled "Delayed Payments To Micro And Small Enterprises", and comprises of Sections 15 to 25. Section 15 pertains to the liability of the buyer to make payments to the supplier, for goods or services rendered, where there is no agreement in this regard, before the appointed day. Section 16 relates to the date from which, and rate at which, interest is payable in case a buyer fails to make the payment of the amount to the supplier, as required under Section 15. Section 17 relates to recovery of the "amount due" for any goods supplied or services rendered by the supplier to the buyer and stipulates that the buyer shall be liable to pay the amount, with interest thereon, as provided under Section 16. It reads as under:

"17.

Recovery of amount due.- For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16."

7.2. Section

18 is relevant for the purpose of adjudication of the issues arising in the petition, and is reproduced hereinbelow:

"18. Reference

to Micro and Small Enterprises Facilitation Council.- (1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2)

On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or center, for conducting conciliation and the provisions of sections

65 to 81 of the Arbitration and Conciliation Act,1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3)

Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act,1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

(4) Notwithstanding

anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5)

Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."

7.3. Section

19 provides for making an application for setting aside a decree, award or order, and reads thus:

"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 per cent 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."

7.4 Section

20 provides for the establishment of the Micro and Small Enterprises Facilitation Council, and Section 21 lays down the composition thereof. Section 22 delineates the requirement to specify unpaid amounts with interest in the annual statement of accounts, and Section 23 stipulates, that notwithstanding anything contained in the Income-tax Act, 1961, the amount of interest payable or paid by any buyer, under the provisions of the MSMED Act, shall not be allowed as deduction, for the purpose of computation of income.

7.5 Section

24 reads thus:-

"24.

Overriding effect.- The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

7.6 Section

25 relates to the Scheme of closure of business of Micro, Small and Medium Enterprises, and is not directly relevant.

8. It

is not disputed by the petitioner that it had recovered an amount of Rs.1,19,07,858.00 which, according to it, was due from respondent No.1 under Contract CS 156, from the bill of the said respondent pertaining to Contract CS 160. Having deducted the said amount from the payment due to the petitioner under Contract CS 160, the stand of the petitioner is that no amount was due to respondent No.1 so as to justify the making an application before the Council, under Section 18(1) of the MSMED Act.

9. On

the other hand, the stand of respondent No.1 is that no amount purporting to be towards Liquidated Damages under Contract CS 156, could not have been recovered by the petitioner from the payment due to respondent No.1 under Contract CS 160. As the petitioner did not pay the amount due to respondent No.1, with interest, as provided by Section 17 of the MSMED Act, respondent No.1 has rightly made the application to the Council under Section 18(1) of the MSMED Act.

10. Section

18(1) of the MSMED Act begins with a non -obstante clause and stipulates that any party to a dispute, with regard to any amount due under section 17, may make a reference to the Council. The procedure to be adopted by the Council has also been delineated. Sub-section (2) of Section 18 stipulates that on receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance from any institution or centre providing services of alternate dispute resolution for conciliation.

11. Sub-section

(3) of Section 18 stipulates that when conciliation, initiated under sub-section (2), is unsuccessful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any Institute or Centre, providing for Alternate Dispute Resolution services, for the purpose of arbitration. In that event, the provisions of Arbitration and Conciliation Act, 1996 shall apply to the dispute as, if the arbitration was in pursuance of an agreement referred to in sub-section (1) of Section 7 of the Arbitration Act.

12. In

the present case, after the unsuccessful attempt at conciliation, the Council has taken up the dispute for arbitration by itself, as envisaged by sub-section (3) of Section 18. No doubt, there is no formal order to the effect that conciliation has failed, and no formal order of reference to itself, for arbitration is made. However, if the provisions of sub-section(3) of Section 18 are perused carefully, it is clear from the plain reading thereof that there is no requirement of making a formal order to the effect that conciliation has failed and that the dispute is to be taken up by the Council, itself, for arbitration.

13. It

has been submitted by the learned advocate for the petitioner that the application under Section 8 of the Arbitration Act to refer the matter for arbitration, made by the petitioner, has not been decided by the Council, making the award without jurisdiction. In the considered opinion of this Court, this submission is not acceptable, as the fact that the Council has taken up the matter to itself for arbitration, as empowered by sub-section (3) of Section 18 of the

Act, does imply the failure of conciliation proceedings. Had the conciliation proceedings been successful, the stage of Arbitration would not have come. There is no requirement in Section 18(3) that a formal order regarding failure of conciliation and taking up the matter by the Council for arbitration by itself, is mandatory. Failure to make such an order, which is not expressly required by law, would not render the Award made by the Council without jurisdiction. Nor would such be the result only because the application made by the petitioner under Section 8 of the Arbitration Act remained undecided. The submissions of the learned advocate for the petitioner in this regard, have no legal force.

14. Sub-section

(3) of Section 18 further provides that in the event that the matter is taken up by the Council for arbitration itself, or referred to any Institute or Centre for Alternate Dispute Resolution, the provisions of the Arbitration and Conciliation Act, 1996 would apply. Section 34 of the Arbitration Act falls under Chapter VII which provides for recourse against an Arbitral Award. The said Section reads as below:

"34.

Application for setting aside arbitral award.- (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An

arbitral award may be set aside by the Court only if-

(a)

the party making the application furnishes proof that-

(i)

a party was under some incapacity, or

(ii)

the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii)

the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the

arbtiral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided

that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the

composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b)

the Court finds that-

(i) the

subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii)

the arbitral award is in conflict with the public policy of India.

Explanation.-

Without prejudice to the generality of sub-clause (ii) it is hereby declared,for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An

application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided

that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4)

On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

15. It

is clear from the provisions of Section 34 of the Arbitration Act that the remedy against an Arbitral Award, on the grounds set out in sub-section (2) of Section 34, is before the concerned District Court. As such, there is an alternative statutory remedy provided under sub-section (3) of Section 18 of the MSMED Act, against an Award made by the Council, that has clearly been by-passed by the petitioner. Section 19 of the MSMED Act lays down a condition of deposit of 75% of the amount awarded or decreed, before an application for setting aside such a decree or award is entertained. This provision of law would also be applicable in a case where an Award made under Section 18(3) of the MSMED Act is challenged as per law.

16. A

submission has been made by the learned advocate for the petitioner, to the effect that no amount was due to respondent No.1 under Section 17, therefore an application could not have been made by the said respondent under sub-section (1) of Section 18. This submission is ex-facie untenable, as whether any amount is due or not, is the crux of the dispute for which the application had been made. It may be the stand of the petitioner that no amount is due to the respondent while the stand of respondent No.1 is to the contrary. The stand of the petitioner has not found favour with the Council, as is apparent from the impugned Award. The dispute has not been concluded as there is an alternative statutory remedy available to the petitioner which has not been availed.

17. Reference

has been made by the learned advocate for the petitioner to the provisions of Section 19 of the MSMED Act, by submitting that the said Section provides that a reference be made by the Council, meaning thereby, that a formal reference has to be made regarding initiation of arbitration proceedings, either by itself, or by invoking any other Alternate Dispute Resolution mechanism. This submission is fallacious and not borne out from the plain reading of Section 19. This provision of law clearly lays down that no application for setting aside any decree, award or other order made by the Council itself, or by any institution or centre providing Alternative Dispute Resolution services, to which a reference is made by the Council, shall not be entertained by any Court, unless the appellant has deposited with it seventy-five per cent of the amount in terms of the decree, or award. The word "reference", in this Section pertains to a reference to the Centre for Alternative Dispute Resolution, and not by the Council to itself. The interpretation made by the learned advocate for the petitioner is based on a misreading of Section 19 of the MSMED Act. In the present case, no reference has been made by the Council to an institute or center providing Alternate Dispute Resolution services, therefore, no order referring the matter has been passed.

18. The

learned advocate for the petitioner has referred to the judgment in Hindustan Petroleum Corporation Ltd. v. M/s.Pinkcity Midway Petroleums (Supra) relying upon paragraph 24 thereof. The said judgment arises from a totally different factual context, which is not at all relatable to the dispute between the parties to the present petition. In that case, the Supreme Court directed the trial Court to refer the dispute pending before the Civil Court, to arbitration. In the present case, the Council has already taken up the dispute for arbitration by itself and has passed an Arbitral Award. The principles of law enunciated in the judgment referred to would not be applicable to the facts of the present case.

19. The

learned advocate for the petitioner has further relied upon the judgment in M/s. B.H.P. Engineers Pvt. Ltd. v. Director, Industries U.P.(Facilitation Council)(Supra) wherein it has been held that it is only when, during arbitral proceedings, an issue referable to Section 16(2) & (3) of the Act of 1996 is decided before making of

the Award, that it can be challenged independently by way of appeal under Section 37 of the Act of 1996. In my considered view, the principles of law laid down in this judgment, though apposite to that particular case, are not applicable in the facts and circumstances of the present case.

20. The

Micro, Small and Medium Enterprises Development Act, 2006 is a Special Act, enacted to facilitate the promotion and development and to enhance the competitiveness of, Small and Medium Enterprises. As per Section 24, the provisions of Sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. It, therefore, follows that the provisions of the MSMED Act have an overriding effect over any other provisions of law and shall prevail over the same.

21. A

mechanism has been devised under the MSMED Act, by establishment of a Council under Section 20, and a detailed procedure has been laid down under Section 18, to resolve disputes regarding recovery of any "amount due" for services rendered by the supplier, to the buyer. It is this procedure and mechanism that has been invoked by respondent No.1 under the provisions of Section 18(1) of the MSMED Act, and an Arbitral Award has been made by the Council under sub-section (3) of Section 18. The recourse against the Arbitral Award made by the Council is by following the provisions of the Arbitration Act, by way of Section 34 thereof, read with Section 19 of the MSMED Act, which envisages the deposit of seventy-five percent of the amount of Award before any application for setting it aside can be entertained by any Court. As such, there is a clear-cut alternative statutory remedy available to the petitioner, which has been circumvented by invoking the jurisdiction of this Court under Article 226 of the Constitution of India.

22. The

submissions advanced by the learned advocate for the petitioner fail to have any legal force in convincing this Court that it should entertain the petition in spite of the availability of an alternative remedy. No exceptional circumstances or contingencies exist in the present case, so as to persuade this Court to deviate from the self-imposed restriction of exercising its writ jurisdiction despite the availability of an alternative statutory remedy.

23. At

this stage, it may be pertinent to examine the extraordinary circumstances that may not operate as a bar, in given circumstances in exercise of jurisdiction under Article 226 of the Constitution of India. In this regard, the observations of the Supreme Court in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai

- (1998) 8 SCC 1

are relevant, and are reproduced hereinbelow:

"The

power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. The High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by the Supreme Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural

justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

(Paras

14 and 15)

Therefore,

the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

(Para

20)

Hence,

the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show-cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the "Tribunal"

(Para

21)

24. As

has been discussed in detail hereinabove, this Court does not find that the Arbitral Award has been passed without jurisdiction by the Council, or that the principles of natural justice have been violated while passing the same. No fundamental right of the petitioner has been violated, nor have the vires of any provision of law been challenged. None of the grounds laid down by the Supreme Court for entertaining a petition in spite of the availability of an alternative remedy, exist in the present case, so as to persuade this Court to entertain it.

25. The

learned advocates for the parties have made lengthy arguments which touch upon the merits of the case. The same are not being dealt with by this Court as all contentions can be raised before the appropriate forum by the parties. As the petitioner has an alternative remedy, as provided under sub-section (3) of Section 18, read with Section 19 of the MSMED Act, this Court does not consider it appropriate to exercise its writ jurisdiction by entertaining the petition. However, it is clarified that no observations made by this Court be taken as an expression of opinion on the merits of the matter.

26. For

the aforestated reasons, the petition is rejected. Rule is discharged. There shall be no orders as to costs.

(Smt.Abhilasha Kumari,J)

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Mr.Ravi

Karnavat, learned advocate for the petitioner, has prayed for stay of this Judgment. For reasons stated in the judgment, this request is not found worthy of acceptance.

(Smt.Abhilasha Kumari,J)

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