



IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 13<sup>th</sup> DAY OF SEPTEMBER 2012

BEFORE

THE HON'BLE MR. JUSTICE AJIT J. GUNJAL

WRIT PETITION NOs.22370-371/2010, C/W.  
22374-375/2010, 22377-378/2010,  
40138, 40140 & 40141/2011 (GM-Res)

**IN W.P.NO.s.22370-371/2010**

BETWEEN:

1. The Karnataka Power Transmission Corporation Limited,  
Kaveri Bhavan, Bangalore-560009.  
Rep. by its Director (Administration & H.R.), KPTCL, Shivayogi C Kalsad.
2. The Chief Engineer,  
Electricity, Tendering and Procurement, Karnataka Power Transmission Corporation Ltd.,  
Kaveri Bhavan,  
Bangalore-560009.  
A.J. Hosamani.

...PETITIONERS

(By Sri Naganand, Senior Counsel for  
Just Law, Adv.)

AND:

1. Union of India  
Ministry of Micro Small And Medium Enterprises, represented by its  
Secretary, Udyog Bhavan, New Delhi.

2. M/S Amit Conductors,  
A proprietary concern of Shri. R.K.  
Tater having office at Tater Palace,  
Krishna Mandi Road, Bhanvkhari Bijai  
Nagar, Ajmer, Rajasthan-305624.  
Rep. by its Proprietor, Shri. Rajendra  
Tater.
3. The Government of Karnataka,  
Rep. by its Principal Secretary,  
Ministry of Power/Energy,  
M.S. Building, Bangalore-560001.
4. Rajasthan Micro and Small Enterprises,  
Facilitation Council,  
Office of the Commissioner of Industries,  
Udyog Bhawan, Tilak Marg,  
C-Scheme,  
Jaipur-302 005. ...RESPONDENTS

(By Sri T.A. Ramachandraiah, CGC for R1,  
Sri. M.A. Humayan, Adv. for R3,  
Sri. K.Krishna, AGA for R3)

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These writ petitions are filed under Articles 226 and 227 of the Constitution of India with a prayer to declare that section 19 of the Micro Small and Medium enterprises development Act of 2006 is ultra vires article 14 of the Constitution of India marked as Annexure-A.

**In W.P.Nos.22374-375/2010**

BETWEEN:

1. The Karnataka Power Transmission  
Corporation Limited,  
Kaveri Bhavan, Bangalore-560 009.  
Rep. by its Director  
(Administration & H.R.),  
KPTCL, Shivayogi C Kalsad.

2. The Chief Engineer, Electricity,  
Tendering and Procurement,  
Karnataka Power Transmission  
Corporation Ltd., Kaveri Bhavan,  
Bangalore-560 009.  
A.J. Hosamani.

...PETITIONERS

(By Sri. Naganand, Senior Counsel for  
M/s.Just Law, Advs.)

AND:

1. Union of India  
Ministry of Micro Small  
And Medium Enterprises,  
represented by its Secretary,  
Udyog Bhavan, New Delhi.
2. M/s. Shubham Cables,  
A partnership firm  
Having its office at  
3 Kumhar Mohalla,  
Bijai Nagar, Ajmer,  
Rajasthan-305 624.  
Rep. by its Proprietor.
3. The Government of Karnataka,  
Rep. by its Principal Secretary,  
Ministry of Power/Energy,  
M.S. Building, Bangalore-560 001.
4. Rajasthan Micro and  
Small Enterprises,  
Facilitation Council,  
Office of the Commissioner  
of Industries,  
Udyog Bhawan, Tilak Marg,  
C-Scheme, Jaipur-302 005.

...RESPONDENTS

(By Sri. T.A. Ramachandraiah, CGC for R1,  
Sri. K.Krishna, AGA for R3)

These writ petitions are filed under Articles 226 and 227 of the Constitution of India with a prayer to declare that section 19 of the Micro Small and Medium enterprises development Act of 2006 is ultra vires article 14 of the Constitution of India marked as Annexure-A.

**In W.P.Nos.22377-378/2010**

BETWEEN:

1. The Karnataka Power Transmission Corporation Limited,  
Kaveri Bhavan, Bangalore-560 009.  
Rep. by its Director  
(Administration & H.R.),  
KPTCL, Shivayogi C.Kalsad.
2. The Chief Engineer,  
Electricity, Tendering and  
Procurement, Karnataka Power  
Transmission Corporation Ltd.,  
Kaveri Bhavan, Bangalore-560 009.  
A.J. Hosamani. ...PETITIONERS

(By Sri Naganand, Senior Counsel for  
M/s.Just Law, Adv.)

AND:

1. Union of India  
Ministry of Micro Small  
And Medium Enterprises,  
Represented by its  
Secretary, Udyog Bhavan,  
New Delhi-110 011.
2. M/s. S.L.Jain Conductors Pvt. Ltd.,  
A private limited company,  
Registered under the Indian  
Companies Act 1956,  
Having its office at No.3,

Kumar Street, Bijai Nagar,  
Ajmer, Rajasthan-305624.  
Represented by its Manager,  
Tara Chand Jain.

3. The Government of Karnataka,  
Rep. by its Principal Secretary,  
Ministry of Power/Energy,  
M.S. Building, Bangalore-560 001.

4. Rajasthan Micro and Small  
Enterprises, Facilitation Council,  
Office of the Commissioner  
of Industries, Udyog Bhawan,  
Tilak Marg, C-Scheme,  
Jaipur-302 005.

...RESPONDENTS

(By Sri. T.A.Ramachandraiah, CGC for R1,  
Sri. M.A.Humayan, Adv. for R2,  
Sri. K.Krishna, AGA for R3)

.....

These writ petitions are filed under Articles 226  
and 227 of the Constitution of India with a prayer to  
declare that section 19 of the Micro Small and Medium  
enterprises development Act of 2006 is ultra vires article  
14 of the Constitution of India marked as Annexure-A.

**In W.P.No.40138/2011**

BETWEEN:

M/s. Amit Conductors,  
Having its office at  
"TATER PALACE",  
Krishanji Nandi Road,  
Bajai Nagar, Ajmer-305 624,  
Rajasthan, By its proprietor  
Rajendra Kumar Tater.

...PETITIONER

(By Sri. M.A.Humayan, Adv.)

AND:

1. Government of Karnataka,  
By its Principle secretary,  
Ministry of Power/Energy,  
M.S.Building,  
Bangalore-560 001.
2. The Karnataka Power Transmission  
Corporation Limited,  
By its Managing Director,  
Cauvery Bhavan,  
Bangalore-560 009.
3. The Chief Engineer,  
Electricity, Tendering and  
Procurement, KPTCL,  
Cauvery Bhavan,  
Bangalore-560 009. ...RESPONDENTS

(By Sri. Naganand, Sr. Counsel for  
M/s.Just Law, Adv. for R2 & R3,  
Sri. K.Krishna, AGA for R1)

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This writ petition is filed under Articles 226 and 227 of the Constitution of India with a prayer to quash the Annex-E dated 28.1.11 on I.A.No.2 passed in Execution Petition 2271/2010 on the file of City Civil Judge CCH 18.

**In W.P.No.40140/2011**

BETWEEN:

M/s. S.L.Jain Conductors (p) Ltd.,  
Having it's Office at B-2,  
Mahavirnagar, Bijai nagar,

Ajmer -305624, Rajasthan,  
By its Director Sri. M.L.Jain.

...PETITIONER

(By Sri M.A.Humayan, Adv.)

AND:

1. Government of Karnataka,  
By its Principle secretary,  
Ministry of Power/Energy,  
M.S.Building,  
Bangalore-560 001.
2. The Karnataka Power Transmission  
Corporation Limited,  
by its Managing Director,  
Cauvery Bhavan,  
Bangalore-560 009.
3. The Chief Engineer,  
Electricity, Tendering and  
Procurement, KPTCL,  
Cauvery Bhavan,  
Bangalore-560 009.

...RESPONDENTS

(By Sri. Naganand, Sr. Counsel for  
M/s.Just Law, Adv. for R2 & R3,  
Sri. K.Krishna, AGA for R1.)

....

This writ petition is filed under Articles 226 and 227 of the Constitution of India with a prayer to quash the Annex-E dated 28.1.11 passed in Exe. Pet. 2273/2010 on the file of City Civil Judge CCH 18.

**In W.P.No.40141/2011**

BETWEEN:

M/s. Shubham Cables,  
Partnership firm, having its

Office at B-2, Mahavirnagar,  
Bijai Nagar,  
Ajmer –305624, Rajasthan,  
By its Partner Sri. Tarachand Jain. ...PETITIONER

(By Sri. M.A.Humayan, Adv.)

AND:

1. Government of Karnataka,  
By its Principle secretary,  
Ministry of Power/Energy,  
M.S.Building,  
Bangalore-560 001.
2. The Karnataka Power Transmission  
Corporation Limited,  
by its Managing Director,  
Cauvery Bhavan,  
Bangalore-560 009.
3. The Chief Engineer,  
Electricity, Tendering and  
Procurement, KPTCL,  
Cauvery Bhavan,  
Bangalore-560 009. ...RESPONDENTS

(By Sri.Naganand, Sr. Counsel for  
M/s.Just Law, Adv. for R2 & R3,  
Sri.K.Krishna, AGA for R1.)

....

This writ petition is filed under Articles 226 and 227 of the Constitution of India with a prayer to quash the Annex-E, dated 28.1.11 passed in Exe.Pet. 2272/2010 on the file of City Civil Judge CCH 18.

These writ petitions having been heard and reserved, coming on for *pronouncement of orders*, this day, the Court made the following:



## ORDER

All these six writ petitions are disposed of by this common order.

2. The parties will be referred to with reference to their ranking before the Facilitation Council.

3. Three applications were filed under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short 'Micro Act'). Respondent No.2 therein i.e., the Karnataka Power Transmission Corporation Limited (for short hereinafter referred to as 'KPTCL') had invited tenders for supply of Weasel and Rabbit ACSR conductors of different quantity and varieties. The applicants had submitted their bid for the said tender and offered to supply conductors to the respondent. The applicants had submitted their letter of offer on 01.05.2001 and had offered to supply 1000 kw of weasel conductors and 4000kw rabbit at the price indicated in the said offer. Suffice it to note that the said offer was accepted and the petitioners had supplied the said material. However

it appears certain dispute arose with respect to the payment of the amount due to the applicants. Hence, in the circumstances, an application was filed by the applicants under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (Micro Act). On consideration of the material, awards have been passed for various sums in the three applications. The said award for recovery of amount was put to execution in the Executing Court at Jaipur. Since the respondent – KPTCL are having their office in Bangalore, the said decree was transferred to Bangalore for execution. Hence, execution proceedings were initiated. In the said execution proceedings, an application is moved by the applicants seeking attachment of the Bank account of respondent No.2. Initially, the said application was granted. But, however respondent No.2 entered appearance and filed its objections and also for recalling of the said attachment order. The Executing Court has recalled the order of attachment in all the three execution petitions. The said recalling order has given rise to the three petitions i.e., WP.Nos. 40138/2011,

40140/2011 and 40141/2011 filed by applicants. The applicants are essentially questioning the order passed by the Executing Court on the premise that there was no justification to recall the order of attachment, inasmuch as according to them the proceedings as sought to be projected under Section 34 of the Arbitration and Conciliation Act were not at all initiated.

4. The respondent No.2 aggrieved by the award passed by the Facilitation Council are before the City Civil Court under Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act). Indeed, the Registry of the City Civil Court had raised an objection regarding maintainability of the proceedings, inasmuch as under Section 19 of the Micro Act the respondent No.2 is required to deposit 75% of the award amount. It is submitted by the learned counsel for the applicants that the matter is being adjourned on the ground that the writ petition is pending in this Court questioning the vires of Section 19 of the Act. The respondent No.2 has questioned the vires of Section 19 in remaining three writ petitions i.e., WP.Nos.22377/10 and other

connected matters. The relief which is sought for by them is a declaration that Section 19 of the Act is ultra vires of Article 14 of the Constitution of India or in the alternate to read down the said provision to mean that the Court will have the discretion to vary the conditions regarding the amount to be deposited.

5. I have heard Mr. Nagananda, learned Senior Counsel appearing for respondent No.2, Mr. Humayun, learned counsel for the applicants and Mr. Ramachandraiah, learned counsel for Union of India.

6. Mr. Nagananda, learned Senior Counsel submits that having regard to the decision rendered by the Apex Court in the case of MARDIA CHEMICALS LIMITED vs. UNION OF INDIA reported in AIR 2004 SC 2371, the pre deposit condition to the extent of 75% as contemplated under Section 19 of the Micro Act is onerous. He submits that the said remedy cannot be an illusory remedy. Hence, he submits that it is ultra vires of Article 14 of the Constitution of India. In the alternate he submits that the said provision is required

to be read down to impose such conditions which are germane or necessary in the circumstances of the case. Insofar as the order passed by the Executing Court, he submits that having regard to the provisions of Sections 34 and 36 of the Arbitration and Conciliation Act, 1996, once the arbitration suit is filed the award becomes unexecutable. Hence, justifies the order of the Executing Court.

7. Mr. Humayun, learned counsel for the applicants submits that the proceedings under Section 34 of the Arbitration Act itself is not maintainable, inasmuch as the respondent No.2 has not complied with the provisions of Section 19 of the Micro Act. He further submits that once the proceedings are not maintainable under Section 34 of the Arbitration Act, the question of invoking the provisions of Section 36 regarding enforceability of the award does not arise. Hence, in the circumstances the order of the Executing Court warrants interference.

8. Mr. Ramachandraiah, learned Counsel for respondent No.1 submits that Section 19 of Micro Act cannot be said to be onerous, inasmuch as identical provisions are to be found in various tax statutes. Hence, the said condition is not onerous and cannot be struck down as ultra virus of Article 14 of the Constitution.

9. Mr. Nagananda, learned Senior Counsel submits that having regard to the provisions of Section 18(2) and 18(3) of the Micro Act, the proceedings under Section 34 of the Arbitration Act are maintainable.

10. I have given my anxious consideration to the submissions made by the learned counsel appearing for the parties. Before examining the order passed by the Executing Court, it is necessary to examine whether the proceedings as initiated under Section 34 of the Arbitration Act is maintainable and attract the provisions of Section 19 of the Micro Act.

11. The respondents had invited tenders for supply of weasel and rabbit ACSR Conductors of

different quantity and varieties. The applicants had submitted their letter of offer dated 01.05.2001 and had offered to supply 10000 KM of Weasel Conductors and 4000 KM of Rabbit Conductors at the prices indicated in the said offer. The respondents, through their letter dated 21.11.2001, placed an order with the applicants for supply of 1750 kms. of Weasel ACSR Conductors at Ex-works price of Rs.9490.96 per kilometer at computed F.O.R.T. Rs.11529.70 Per Km. and subject to the other terms and conditions mentioned therein.. Suffice it to note that the goods, which were supplied by the applicants, at no point of time were rejected. After accepting the purchase order, the petitioner commenced the delivery of goods well within time and it was expected from the respondents to make payment for the goods delivered to the respondents immediately. But however, from the beginning, the payment was delayed. It is further stated that first payment was made only on 08.04.2002 and thus there was a delay in paying the price of the goods from the first month of delivery itself. It is the case of the applicants that the respondents did

not make the payment and that a huge amount was outstanding and the entire financial planning of the petitioner suffered and the business of the petitioner was severely affected. The Bankers of the petitioner cancelled the overdraft facility due to non-receipt of payment for more than 90 days and the applicants were finding it difficult to even pay the salaries of the employees and electricity bills for running the factory.

12. The petitioner claims to be Small Scale Industry, which is governed by the provisions of The Micro, Small and Medium Enterprises Development Act, 2006 which came into force from 16.06.2006 pursuant to which the earlier Act i.e., The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 was repealed. It is the case of the petitioners that the said new enactment had an overriding effect. In these circumstances, the applicants filed a writ petition before this Court seeking to direct the Government of Karnataka to establish one or more Industry Facilitation Council for State as no Facilitation Council was constituted by the Government.



In these circumstances, the petitioner was compelled to invoke the provisions of Section 18 of the Micro Act and make an application before the Rajasthan Micro Small Enterprises Facilitation Council for recovery of the outstanding amount dues.

13. Indeed we are not really concerned for the present as to the reasons given by the Council for granting the relief of the petitioners. Suffice it to note that aggrieved by the order passed by the Council, the respondents initiated arbitration suit under Section 34 of the Arbitration Act. Incidentally, it is to be noticed that the proceedings, which were initiated under Section 34 of the Arbitration Act were not numbered after the arbitration suits were presented. The Registry of the City Civil Court at Bangalore raised a preliminary objection inasmuch as the respondents had not complied with the statutory provisions of Section 19 of the Micro Act inasmuch as respondent No.2 was required to deposit 75% of the award amount. In these circumstances, the respondents are before this Court

questioning the vires of Section 19 of the Act by way of connected writ petitions.

14. It is to be noticed that the proceedings before the City Civil Court were being adjourned from time to time to hear on maintainability. Thus, no orders were passed on the application, which is filed under Section 34 of the Arbitration Act. Undoubtedly, Section 34 of the Arbitration Act is referable to an award, which is passed under Arbitration and Conciliation Act, 1996. Section 34 of the Arbitration Act would deal with an application for setting-aside the arbitral award. Sub-Section(1) of Section 34 refers to having recourse to a Court against an arbitral award and which is to be made only by an application for setting aside such award in accordance with Sub-Section (2) & (3) of Section 34 of the Act. The award, which is to be questioned under Section 34 of the Arbitration Act would emanate from the award passed by the Arbitrator under the Arbitration Act or, who is appointed under Section 11 of the Act.

15. In the case on hand, it is to be noticed that the proceedings were initiated by the applicants under the Micro Small and Medium Enterprises Act, 2006. Chapter V of the said enactment is referable to delayed payments to Micro and Small Enterprises. Section 16 of the Act is with reference to the date from which and rate at which the interest is payable. Section 17 of the Act is with reference to recovery of amount due. Where the outstanding amount is due, an application is required to be made under Section 18 of the Act, which has been done by the applicants. Sub-Section (1) starts with a non-obstante clause inasmuch as 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 of the Act make a reference to the Micro and Small Enterprises Facilitation Council. On receipt of such 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 centre, for conducting conciliation. The provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply to such dispute.

16. A compendious reading of provisions of Section 18 of the Micro Act clearly discloses that it is independent of the Arbitration Act. Apparently, when a dispute has arisen with reference to the amount payable or amount due under Section 17 of the Micro Act, a reference application is required to be made. The Council in its wisdom shall either itself conduct conciliation in the matter it could do so or seek the assistance of any Institution for conducting the conciliation. The provisions of Sections 65 to 81 of the Arbitration Act are made applicable.

17. Sections 65 to 81 of the Arbitration Act is with reference to the conduct of the proceedings. Section 65 of the Arbitration Act is referable to submission of statements to Conciliator and under Section 66 of the Arbitration Act, the Conciliator is not bound by certain enactments including the Code of Civil Procedure and

the Indian Evidence Act. Section 67 would refer to the Role of the Conciliator and so on and so forth. A reading of the provisions of the Arbitration Act with reference to Sections 65 to 81, does not in any way indicate that the Arbitration Act is applicable to the Micro Act. What is made applicable is only the conduct of proceedings. That is the procedural aspects. That by itself, it cannot be said that Sections 34 and 35 of the Arbitration Act are made applicable and the award passed by the Facilitator under the Micro Act is amenable to the jurisdiction of the Arbitration Act. Apparently, by implication, the provisions of Sections 34 and 36 of the Arbitration are excluded. It is not the case of the respondent No.2 that the provisions of the Arbitration Act were invoked and the proceedings were conducted under the Arbitration Act. Indeed Sections 65 to 81 of the Arbitration Act are applicable to such disputes as if the conciliation was initiated under Chapter III of the Arbitration Act. Chapter III of the Arbitration Act is with reference to the Composition of Arbitral Tribunal. It takes into its fold number of

Arbitrators, appointment of Arbitrators, grounds for challenge, challenge procedure and failure or impossibility to act, Termination of mandate and substitution of the arbitrator.

18. Indeed I am of the view that the proceedings, which are initiated under the Micro Act are independent of the proceedings under the Arbitration Act. Hence, I am of the view that the question of Arbitration Act being made applicable to the proceedings so as to invoke the provisions of Sections 34 and 36 of the Arbitration Act does not arise.

19. Sub-Sections (3) and (5) of Section 18 of the Micro Act are not at all applicable inasmuch as the said provisions would be made applicable to, in a situation where the conciliation or facilitation, which is initiated under Section 18(1) & (2) is not at all possible and stand terminated without any settlement between the parties. In these circumstances, only, the Facilitation Council shall take it upon itself the dispute for arbitration or refer it to any Institutional Centre providing alternate

dispute resolution services for such service and the proceedings of the Arbitration Act shall then apply as if it was arbitration agreement referred to in Sub-Section (1) of Section 7 of the Arbitration Act. I am of the view that before reaching the stage of Sub-Section (3), the Facilitation Council had acted and had determined the amount due to the applicants. Hence, the question of referring to the provisions of Arbitration Act, in the circumstances does not arise.

20. In the case on hand, it is to be noticed that at no point of time the applicants had invoked the provisions of the Arbitration Act. It is an application, which is made under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 which would necessarily mean that the entire enquiry or the dispute is required to be resolved having regard to the provisions of the said enactment. Any person, who is aggrieved by the order or the award passed by the Council or by any institution or centre provided, alternate dispute resolution service to which reference is made by the Council shall be entertained by the Court.

A perusal of Section 19 of the Micro Act clearly discloses that if at all a person is aggrieved by the award, which is passed under Section 18 of the Act, he is required to make an application under Section 19 of the Act. Section 19 further contemplates that the applicant or the appellant is required to deposit 75% of the amount in terms of the decree, award or as the case may be and on such deposit the Court can order that such percentage of the deposit shall be paid to the supplier as it considers reasonable subject to said conditions as it deems necessary to impose.

21. A compendious reading of the provisions of both Acts indicates that the application under Section 34 of the Arbitration Act filed by the respondent itself was not maintainable. Indeed the application ought to have been under Section 19 of the Micro Act. It is also to be noticed that even the respondents have proceeded on the footing that the proceedings, which was initiated before the City Civil Court by way of an arbitration suit were required to be dealt as one under Section 19 of the Micro Act. This fact is further strengthened by the writ



petitions filed by the respondents questioning the vires of Section 19 of the Act or at least impose such conditions, which are reasonable and which are not onerous. Hence, the respondents cannot be heard to say that they are not required to comply with the provisions of Section 19 of the Act.

22. It is also to be noticed that the applicants had sued out execution in the Jaipur Court and the said awards were transferred to be executed at Bangalore Court. In these circumstances, the respondents sued out execution proceedings. In Execution proceedings, they did make an application for attachment of the Bank accounts of respondent No.2, which was initially granted. But however, the respondents entered appearance and made an application in the Execution Proceedings indicating that they have initiated proceedings under Section 34 of the Arbitration Act and having regard to the decision rendered by the Apex Court, the question of Executing the award in the circumstances does not arise. The Executing Court has accepted the contention of the respondent and has

recalled the order of attachment, which has given rise to another three writ petitions, which was referred to above, filed by the applicants.

23. It is to be noticed that undoubtedly as has been ruled by the Apex Court in the case of **National Aluminium Company Limited V/s. Pressteel & Fabrications (P) Ltd., and another** reported in **(2004)1 SCC 540**, once an award is questioned under Section 34 of the Arbitration Act, the award become unexecutable. Having regard to the decision rendered by the Apex Court and also the Arbitration suit pending before the VI Additional City Civil Court at Bangalore, the Executing Court was of the view that the award was not enforceable as per Section 36 of the Arbitration Act. Hence, accepted the application of the respondent No.2 and the order of attachment in respect of the Bank accounts was recalled. I am of the view, as observed, the proceedings, which were initiated by the 2<sup>nd</sup> respondent, were not under Section 34 of the Arbitration Act. Hence, the question of the award being un-executable in the circumstances does not arise.

What governs the present proceedings is the Micro, Small and Medium Enterprises Development Act, 2006 and not the Arbitration Act.

24. This takes us to the vires of Section 19 of the Act. Mr.Naganand, learned Senior counsel appearing for the respondent submits that having regard to the decision rendered by the Apex Court in *Mardia Chemical's case*, the appeal or the remedy should not be illusory. He submitted that the condition imposed under Section 19 of the Micro Act is onerous.

25. Indeed provisions of the Securitization Act fell for consideration before the Apex Court in the case of ***Mardia Chemicals Ltd., etc. etc. V/s. Union of India and other etc. etc.*** reported in **AIR 2004 SC 2371**. The condition of pre-deposit under the Act was held to be illusory on the grounds that : -

- (i) It is imposed while approaching the adjudicating authority for the first instance, not in appeal;

- (ii) There is no determination of the amount due as yet;
- (iii) The secured assets or its management with transferable interest is already taken over and under control of the secured creditor;
- (iv) no special reason for double security in respect of an amount yet to be determined and settled
- (v) 75% of the amount claimed by no means would be a meagre amount;
- (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand.

The Apex Court has further observed that such conditions are not only onerous and oppressive but also unreasonable and arbitrary. Therefore, sub-section (2) of Section 17 of the Securitization Act was found to be unreasonable, arbitrary and violative of Article 14 of the Constitution.

26. The observations made by the Apex Court in *Mardia Chemical's case* are with reference to a situation, where there is no adjudication of the amount payable and that the secured assets or its management with transferred interest are already taken over under the control of the secured creditor. The Apex Court has observed that there is no determination of the amount due as yet. In those circumstances, the Apex Court was of the view that the said condition regarding pre-deposit of 75% without any prior determination by competent authority is unreasonable, arbitrary and violative of Article 14 of the Constitution.

27. In the case on hand, it is not so. There is already adjudication of the quantum by the Competent Authority, which is designated under the Act, which is the Facilitation Council. The Facilitation Council had issued notice to the respondents and an enquiry was conducted and an award is passed. The provisions of Arbitration Act so far as it relates to holding of an enquiry have been followed. Thus, there is an adjudication of quantum. Thus, it is not a case where

without an adjudication, the amount is determined. In fact it is a full-fledged trial and on an enquiry the amount is determined. Thus, I am of the view that the provisions relating to deposit of 75% of the amount cannot be said to be unreasonable, arbitrary and violative of Article 14 of the Constitution. It is not a case where the property or the asset of respondent No.2 is taken over without adjudication which would make it difficult or impossible for them to comply with the provisions of Section 19 of the Act.

28. Identical questions with reference to the conditions regarding deposit, before the appeal or the proceedings could be entertained, fell for consideration before the Apex Court in various decisions, including the tax statutes. This Court while dealing with the scope of Section 105 of the Co-operative Societies Act was of the view that the condition regarding deposit of 25% of the award amount cannot be said to be onerous, more so, having regard to the identical provisions which are referred to in a tax statute. Indeed Section 17 of the Securitization Act was also dealt extensively in the

decision of this Court in case of **Nirmala P.Kini V/s. State of Karnataka and others** in W.P.No.25784/2010 decided on 28<sup>th</sup> February 2010.

29. The Apex Court in the case of **Seth Nand Lal and another V/s. State of Haryana and others** reported in **1980(Supp.) SCC 574**, with reference to the appeal has observed thus:

*“It is well settled by several decisions of this Court that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendered the right almost illusory.*

*It is clear that the cash deposit or bank guarantee is not by way of any exaction but in the nature of securing mesne profits from the person who is ultimately found to be in unlawful possession of the land.”*

30. The Apex Court in the case of **The Anant Mills Co. Ltd., etc. etc. V/s. The State of Gujarat**

reported in **AIR 1975 SC 1234** with reference to cash deposit has observed thus:

*“There is a presumption of the constitutional validity of a statutory provision. In case any party assails the validity of any provision on the ground that it is violative of Article 14 of the Constitution, it is for that party to make the necessary averments and adduce material to show discrimination violative of Article 14.”*

31. In the present petitions, no such averments are made by the petitioners to substantiate that as to how the retention of this condition is onerous or violative of Article 14 of the Constitution of India.

32. The Apex Court in the case of **Vijay Prakash D.Mehta and Jawahar D.Mehta V/s. Collector of Customs (Preventive), Bombay** reported in **AIR 1988 SC 2010**, while dealing with an identical matter regarding refusal to entertain an appeal unless specified amount is deposited, was of the view that refusal to entertain an appeal without deposit, does not amount to



whittling down the right to appeal. The Apex Court has observed thus:

*“Right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant.”*

*It is not the law that adjudication by itself following the rules of natural justice would be violative of any right – constitutional or statutory without any right of appeal, as such. If the Statute gives a right to appeal upon certain conditions, it is upon fulfillment of these conditions that the right becomes vested and exercisable to the appellant.”*

33. The Apex Court in the case of **Raj Kumar Shivhare V/s. Assistant Director, Directorate of Enforcement and Another** reported in **AIR 2010 SC 2239** while conferring such right has observed thus:

*“A right of appeal, it is well settled, is a creature of Statute. It is never an inherent right, like that of filing a suit. While conferring such right Statute may impose restrictions,*

like limitation or pre-deposit of penalty or it may limit the area of appeal to questions of law or sometime to substantial questions of law. Whenever such limitations are imposed, they are to be strictly followed.”

34. I am of the view that having regard to the law laid down by the Apex Court with reference to the pre-deposit in different contexts and different statutes, it cannot be said that the conditions regarding pre-deposit of 75% of the amount in terms of the decree or award is illusory or oppressive and arbitrary.

35. Having said so, I am of the view that the order passed by the Executing Court in the petitions filed by the applicants is liable to be interfered. Insofar as the petitions filed by respondent No.2 are concerned, they are liable to be dismissed directing them to comply with the statutory provisions of Section 19 of the Micro Act.

36. Hence, the following order is passed:

(a) W.P. Nos.40138/2011, 40140/2011 and 40141/2011 are **allowed**.

(b) The impugned order therein passed by the  
Executing Court is set-aside.

(c) The Writ petitions filed by the respondent No.2  
in W.Ps. 22370-71/2010, 22374-75/2010 and  
22377-378/2010 stand **dismissed**.

SD/-  
JUDGE

SPS/-