

Court No. - 21**AFR****Case :-** WRIT - C No. - 10525 of 2024**Petitioner :-** Tamilnadu Generation And Distribution Corporation Limited
And 2 Others**Respondent :-** State Of U.P. And 2 Others**Counsel for Petitioner :-** P.K. Upadhyay**Counsel for Respondent :-** C.S.C.,Kartikeya Saran,Prabhav Srivastava**Hon'ble Manoj Kumar Gupta,J.****Hon'ble Kshitij Shailendra,J.**

1. Heard Sri S.T. Raja, learned counsel assisted by Sri P.K. Upadhyay, for the petitioners, Sri Rajiv Gupta, learned Additional Chief Standing Counsel for respondents no.1 and 2 and Sri Kartikeya Saran, learned counsel for respondent no.3.

2. The instant writ petition under Article 226 of the Constitution of India has been filed challenging the order dated 01.01.2024 whereby respondent no.2 (Zonal Micro and Small Enterprises, Facilitation Council (MSEFC), Meerut Zone, Meerut) (for short 'the Facilitation Council') has declared an award of a total sum of Rs.1,49,48,762/- in favour of respondent no.3, in exercise of powers under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short 'the MSME Act, 2006).

3. The case of the petitioners is that respondent no.3, being a registered firm, approached the petitioners pursuant to an e-tender dated 04.01.2021 for supply of 11 KV Vertical Gang Operated Air breaks switch with composite polymer insulator, single square pole transformer structure material with clamp and 11 KV Solid Core type GH fuse sets for HVDS and a contract deed/ purchase order No.146 dated 19.01.2021 came to be executed. The petitioners issued purchase order dated 26.02.2021 asking respondent no.3 to supply the goods and it is alleged that respondent no.3 failed to supply the goods as per the terms and conditions of the supply order. The petitioners, accordingly, issued a letter dated 15.03.2022 to

respondent no.3 with regard to non supply of goods, however, respondent no.3 approached the Facilitation Council by making a reference on 05.04.2022 under Section 18 of the MSME Act, 2006. While the reference was pending, respondent no.3 approached this Court by filing Writ-C No.11981 of 2022 claiming various reliefs. The writ petition was disposed of by a Coordinate Bench of this Court by order dated 19.07.2022 with an observation that the Authority under Section 18 of the MSME Act, 2006 shall decide the reference application in accordance with law within a period of four weeks from the date of receipt of the order. It is in pursuance of the order dated 19.07.2022 passed by this Court that the impugned award has been declared by the Facilitation Council.

4. Respondent no. 3 raised preliminary objection with regard to maintainability of the writ petition on the ground of availability of alternative remedy of filing objections against the impugned award under Section 34 of the Arbitration and Conciliation Act, 1996, read with Section 18(3) of the MSME Act, 2006. Additionally, it is also contended that unless 75% of the amount in terms of impugned award is deposited by the petitioners, the challenge would not be maintainable in view of Section 19 of the MSME Act, 2006. In support of his submission, he places reliance on the judgment of Supreme Court in the case of **M/s India Clycols Limited and another Vs. Micro and Small Enterprises Facilitation Council, Medchal - Malkajgiri and others in Civil Appeal No.7491 of 2023, arising out of SLP (C) No.9899 of 2023, decided on 06.11.2023.**

5. Per contra, learned counsel for the petitioners submitted that the impugned award is ex parte as on the last date of hearing, the video link was not sent to the counsel for the petitioners. According to him, the video link was sent at the head office of the petitioner-

company and to its officers, ignoring the request of the counsel to send video link to him, as arguments were to be advanced by him only. It is urged that since the impugned award has been rendered in violation of principles of natural justice, therefore, availability of alternative remedy of filing objection under Section 34 of the Act of 1996 would not debar the petitioners from invoking the writ jurisdiction. In respect of condition relating to pre-deposit of 75% of the amount, he submits that since the petitioner is a Government company, therefore, the said condition be dispensed with. He even did not accept the suggestion of the Court to deposit the amount as contemplated under Section 19 before advancing arguments on merits and submitted that the case be decided.

6. In order to deal with the submissions advanced, the Court may refer to the provisions of Sections 18 and 19 of the MSME Act, 2006. The same are quoted below:-

"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 centre, 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.

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."

(emphasis supplied)

7. A bare perusal of Section 18(3) of the MSME Act, 2006 would reveal that the provisions of the Arbitration and Conciliation Act, 1996 have been made applicable to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to sub-section (1) of Section 7 of that Act, i.e. the Act of 1996. Thus, remedy of filing objection under Section 34 of the Act of 1996 is available to the petitioner to get the award set aside.

8. Section 19 of the MSME Act, 2006, in unequivocal terms, provides that no application for setting aside the award made by the Council shall be entertained by any court unless the appellant has deposited 75% of the amount in terms of the award or, as the case may be, in the manner directed by such court. Thus, in case the petitioners avail the remedy under Section 34 of the Act of 1996,

they would be required to deposit 75% of the amount in terms of the award before the challenge is entertained.

9. In **M/s India Clycols Limited (supra)**, the Supreme Court held that a person cannot be permitted to bypass the statutory requirement of depositing 75% of the decretal amount by invoking the jurisdiction of the High Court under Articles 226/227 of the Constitution of India. The writ petition was held to be not maintainable for the said reason. The relevant observations made in this regard in paragraphs 10, 12 and 13 of the judgment are reproduced below:-

"10. In terms of Section 19, an application for setting aside an award of the Facilitation Council cannot be entertained by any court unless the appellant has deposited seventy-five per cent of the amount in terms of the award. In view of the provisions of Section 18(4), where the Facilitation Council proceeds to arbitrate upon a dispute, the provisions of the Act of 1996 are to apply to the dispute as if it is in pursuance of an arbitration agreement under sub-section (1) of Section 7 of that Act. Hence, the remedy which is provided under Section 34 of the Act of 1996 would govern an award of the Facilitation Council. However, there is a super added condition which is imposed by Section 19 of MSMED Act, 2006 to the effect that an application for setting aside an award can be entertained only upon the appellant depositing with the Council seventy-five per cent of the amount in terms of the award. Section 19 has been introduced as a measure of security for enterprises for whom a special provision is made in the MSMED Act by Parliament. In view of the provisions of Section 18(4), the appellant had a remedy under Section 34 of the Act of 1996 to challenge the award which it failed to pursue.

12. The appellant failed to avail of the remedy under Section 34. If it were to do so, it would have been required to deposit seventy-five per cent of the decretal amount. This obligation under the statute was sought to be obviated by taking recourse to the jurisdiction under Articles 226/227 of the Constitution. This was clearly impermissible.

13. For the above reasons, we are in agreement with the view of the Division Bench of the High Court that the writ petition which was instituted by the appellant was not maintainable."

(emphasis supplied)

10. Thus, in view of law laid down by Supreme Court in **M/s India Clycols Limited (supra)**, we are of considered opinion that the instant petition, without making pre-deposit as per statutory provision, would not be maintainable. We hold so being fully aware of the legal position that in case of breach of principles of natural justice, alternative remedy is not an absolute bar. We would have entertained the writ petition without relegating the petitioners to the alternative remedy under Section 34 of the Act of 1996, had the petitioners agreed to deposit 75% of the amount in terms of impugned award in this Court. As counsel for the petitioners is not agreeable to comply with the said condition, therefore, we decline to examine the challenge and uphold the preliminary objection of learned counsel for respondent no. 3.

11. The writ petition is, accordingly, **dismissed** as not maintainable, however, without prejudice to the rights of the petitioners to avail such other remedy as may be available to them under the law.

Order Date :- 27.5.2024

AKShukla/-

(Kshitij Shailendra, J.) (Manoj Kumar Gupta, J.)