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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **LPA 91/2024 and CM APPL. 6199/2024, CM APPL. 6200/2024 & CM APPL. 6201/2024**

STATE TRADING CORPORATION OF INDIA LTD
..... Appellant

Through: Mr. Sanjeev Puri, Sr. Advocate with
Ms. Pragya Puri, Advocate.

versus

MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL DELHI AND ANR. ..... Respondent

Through:

% Date of Decision: 8th February, 2024

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ : (ORAL)

CM APPL. 6200-01/2024 (for exemption)

1. Allowed, subject to all just exceptions.

2. Accordingly, the applications stand disposed of

LPA 91/2024 and CM APPL. 6199/2024

3. This Letters Patent Appeal has been filed challenging the impugned order dated 15th January, 2024, passed in W.P.(C) 4227/2023, whereby the learned Single Judge declined to interfere with the Award dated 1st December, 2012, passed by the Delhi Arbitration Centre in ARB. CASE ID:

DL/10/M/SWC/00035 of 2022 ('the Award'), holding that when a dispute resolution mechanism is provided under the Act, the Court in exercise of jurisdiction under Articles 226/227 of the Constitution of India should not entertain the petitions only because of condition of pre-deposit.

4. Bereft of unnecessary details, the writ petition was filed by the Appellant herein challenging the Award dated 1st December, 2012, whereby the learned Arbitrator awarded a sum of ₹ 7,21,10,729/- to the Respondent No. 2 along with pendente lite and future interest as per the Micro, Small and Medium Enterprises Development Act, 2006 ('MSMED Act') and litigation costs of ₹ 50,000/-. The Appellant contends that the Award is non-est in law and deserves to be set aside on ground of lack of inherent jurisdiction.

5. The Appellant contends that since, at the time of execution of contract and/or at the time of concluding of supplies thereunder i.e., in the year 1991, the Respondent No.2 was not registered under the MSMED Act, which itself was enacted in the year 2006 and therefore, the said Act is not applicable to the transactions/contracts entered into before enactment of said Act.

6. Learned senior counsel for the Appellant states that though the Appellant herein has the remedy of filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act of 1996') challenging the Award, however, it is not an efficacious remedy in the facts of this case. He states that the Appellant will have to make a pre deposit of 75% of the awarded amount as per Section 19 of the MSMED Act. He states that, in fact, the objections by way of a petition under Section 34 of the Act of 1996

stands filed, however, the Appellant is not pursuing the same due to condition of pre-deposit.

6.1. He states that in similar facts, learned Single Judge of this Court in ***Malani Construction Company v. Delhi International Arbitration Centre and Ors.***[1] had entertained a petition filed under Article 227 of the Constitution challenging the reference to arbitration made by Micro & Small Enterprises Facilitation Council ('MSEFC'). He states that the writ petition was entertained and the reference to arbitration made by MSEFC was set aside.

7. This Court has considered the submissions of the Appellant and perused the record.

8. We are of the considered opinion that the writ petition filed by the Appellant under Articles 226/227 of the Constitution for setting aside the Award was not maintainable and the learned Single Judge has rightly dismissed the writ petition.

9. The issue of non-maintainability of the petitions filed under Article 226/227 of Constitution with respect to proceedings arising out of proceedings under Act of 1996 is no longer res integra. Undoubtedly, the Supreme Court in ***Deep Industries Ltd. v. ONGC***[2] has observed that the power of the High Court under Article 226/227 has remained unaffected by the said Act of 1996; however, in the said judgment, the Supreme Court has further held that the High Court should be extremely circumspect in

[1] 2023 SCC OnLine Del 1665
[2] (2020) 15 SCC 706 (Para 17)

interfering with the arbitral proceedings in exercise of the said jurisdiction. In fact, the Constitution Bench of the Supreme Court [seven Judges Bench] in ***SBP & Co. v. Patel Engg. Ltd.***,[3] has expressly disapproved the practice of the High Courts in entertaining writ petitions under Articles 226/227 of the Constitution against the orders passed in the arbitral proceedings.

10. Similarly, with respect to the issue of non-maintainability of writ petition challenging an award passed in pursuance to arbitral proceedings initiated under MSMED Act, the Supreme Court in its recent decision dated 6th November, 2023, passed in Civil Appeal No. 7491/2023, titled as '***M/s India Glycols limited and Anr. v. Micro and Small Enterprises Facilitation Council, Medchal – Malkajgiri and Ors.***', has unequivocally held that petitions filed under Article 226/227 of Constitution of India ought not to be entertained in view of Section 18 of the MSMED Act, which provides for a recourse to statutory remedy for challenging the Award under Section 34 of the Act of 1996. The Supreme Court has observed that entertaining of petitions under Article 226/227 of Constitution, in order to obviate compliance with the requirement of pre-deposit under Section 19, would defeat the object and purpose of special enactment which has been legislated upon by Parliament. The relevant extracts of the said judgment read as under:

> *"3 On 28 October 2021, the Facilitation Council decreed the claim in the principal sum of Rs 40,29,862 on which interest with monthly rests at three times the bank rate prevailing as on the date of the award was granted under Section 16 from the appointed day till final payment.*

[3] (2005) 8 SCC 618

4 ***The award of the Facilitation Council was challenged in a petition under Articles 226/227 of the Constitution***. *By a judgment and order dated 14 September 2022, a Single Judge of the High Court of Telangana allowed the writ petition and set aside the award on the ground that the claim was barred by limitation.*

xxxx xxxx xxxx xxxx

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***.

14 Mr Parag P Tripathi, senior counsel appearing on behalf of the appellant sought to urge that the view of the Facilitation Council to the effect that the provisions of the Limitation Act 1963 have no application, which has been affirmed by the Division Bench in the impugned judgment, suffers from a perversity, and hence a petition under Article 226 of the Constitution ought to have been entertained. ***We cannot accept this submission for the simple reason that Section 18 of the MSMED Act 2006 provides for recourse to a statutory remedy for challenging an award under the Act of 1996. However, recourse to the remedy is subject to the discipline of complying with the provisions of Section 19. The entertaining of a petition under Articles 226/227 of the Constitution, in order to obviate compliance with the requirement of pre-deposit under Section 19, would defeat the object and purpose of the special enactment which has been legislated upon by Parliament***.

15 For the above reasons, we affirm the decision of the Division Bench by holding that it was justified in coming to the conclusion that the petition under Articles 226/227 of the Constitution instituted by the appellant was not maintainable. Hence, it was unnecessary for the High Court, having come to the conclusion that the petition was not maintainable, to enter upon the merits of the controversy which arose before the Facilitation Council.

…

> *17* ***For the above reasons, we affirm the impugned judgment of the High Court of Telangana dated 21 March 2023 by affirming the finding that the petition which was instituted by the appellant to challenge the award of the Facilitation Council was not maintainable, in view of the provisions of Section 34 of the Act of 1996****."*

(Emphasis supplied)

11. Further, the Constitutional Bench of Supreme Court in ***SBP & Co.*** (supra), while considering the issue of interference with an order passed by an arbitral tribunal under Articles 226/227 of the Constitution laid down as follows:

> *"45.* ***It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach.*** *Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement.* ***We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible****.*
>
> ***46.*** ***The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal****. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless,*

of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage."

(Emphasis supplied)

12. With respect to the objection taken by the Appellant to the effect that the MSEFC does not have inherent jurisdiction to make a reference to arbitration under the provisions of MSMED Act and therefore a writ petition would be maintainable, is also misconceived. In similar facts, the Supreme Court in ***Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods (P) Ltd.***[4] has categorically held that such an issue of lack of inherent jurisdiction can be decided by the Arbitral Tribunal appointed under the said Act, which by virtue of Section 18(3) of MSMED Act is competent to rule on its own jurisdiction as also the other issues in view of Section 16 of the Act of 1996. The sequitur is that, the decision of the Arbitral Tribunal on the issue of jurisdiction would be amendable to challenge under Section 34 of the Act of 1996.

13. In light of the aforesaid judgments of the Supreme Court and more specifically the judgment ***M/s India Glycols Ltd. v. MSEFC, Medchal-Malkajgiri*** (supra) we are of the considered opinion that the judgment of the learned Single Judge of this Court in ***Malani Construction Company*** (supra) holding that a writ petition under Article 227 of the Constitution can be maintained, is not the correct view. .

14. The Appellant has already taken recourse to the proceedings under Section 34 of the Act of 1996 and has raised the objection of lack of

[4] (2023) 6 SCC 401 (Para 48 to 52.6)

jurisidiction of the Arbitrator in the said petition. The contention of the Appellant that the obligation to comply with the condition of pre-deposit under Section 19 of the MSMED Act is onerous, is without any merit. The mandatory nature of Section 19 of the MSMED Act has been pronounced upon by the Supreme Court in ***Gujarat State Disaster Management Authority v. Aska Equipments Ltd.***[5] and the same cannot be circumvented by the Petitioner by filing the present petition. The Petitioner admittedly has sufficient annual income of ₹. 62 crores and hardship, if any, in making the deposit is an issue which can be raised before the competent Court in terms of the observations made by the Supreme Court in ***Tirupati Steels v. Shubh Industrial Component and Anr.***[6].

15. In view of the aforesaid observation, the present appeal is without any merit and is accordingly, dismissed along with pending applications.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

FEBRUARY 8, 2024/rhc/msh

Click here to check corrigendum, if any

[5] (2022) 1 SCC 61
[6] (2022) 7 SCC 429