

**THE HONOURABLE SMT JUSTICE T.MADHAVI DEVI**

**W.P.No. 1603 of 2023**

**ORDER:**

In this writ petition, the petitioner is seeking a writ of Certiorari calling for records leading upto the order passed by the official respondent No.3, dated 27.10.2022 vide Case No.193/IC/Mdl-Mlg/2020, as being illegal, arbitrary and nonest in law as it is contrary to the provisions of Micro, Small and Medium Enterprises Development (MSMED) Act, 2006 and the Telangana Micro, Small Enterprises Facilitation Rules, 2014 and consequently to set aside the same and to pass such other order or orders.

2. Brief facts leading to the filing of the present writ petition are that the writ petitioner and unofficial respondent No.4 had an arrangement for supply of products for 4X270 MW project at Manuguru, Telangana. The unofficial respondent No.4 alleging that it did not receive certain amounts from the petitioner and claiming to be a registered entity under the provisions of Micro, Small and Medium Enterprises Development Act, 2006 (MSME Act), has filed an application before the official respondent No.3 under Section 18(1) of MSME

Act vide Case No.192/IFC/Mdl-Mlg/2020, seeking recourse against the petitioner company under the MSME Act for the alleged claim amount under Purchase order No.1655132, dated 13.08.2015. Consequent thereto, the dispute was taken up for Conciliation, wherein the official respondent No.3 acted as a Conciliator as per the powers granted under Section 30 read with Section 21(3) of the MSME Act and rule 6(xiii) of the Telangana Micro, Small Enterprises Facilitation Rules, 2017. It is submitted that the petitioner's company as well as unofficial respondent filed their respective responses/statements before the official respondent No.3, but the conciliation proceedings failed.

3. Thereafter, the respondent No.3 issued a notice dated 15.06.2022 to the petitioner's company stating that the authorized representative of the company should be present to attend the council meeting at 02.30 p.m., on 29.06.2022, as the matter was being taken up for arbitration. It is submitted that the authorized representative of the petitioner's company appeared on the said date and orally raised objections that no notice regarding the appointment of the arbitrator or suggesting an arbitrator, was given to the petitioner company. It was also

alleged by the learned counsel for petitioner company that due process has not been followed for taking up the matter for arbitration. It is submitted that the council had stated that it would take appropriate steps to carry out the necessary processes, however, there was no notice or any further development in the matter until the petitioner received an order wherein the conciliation proceedings are referred to as arbitration proceedings and that an award was passed on 27.10.2022. It is submitted that no communication was made to the petitioner's company informing about the initiation and furtherance of arbitration proceedings, despite the objections raised by the authorized representative of the petitioner's company on 29.06.2022. Therefore, alleging non-compliance of the procedure for arbitration proceedings, the present writ petition has been filed.

4. Learned counsel for the petitioner submitted that under the MSME Act, a dispute can be referred for conciliation or arbitration within a prescribed period and since the claim pertains to the year 2015, the unofficial respondent could not have made reference in the year 2022 and the respondent No.3 ought not to have entertained the same. He further submitted

that on account of failure of conciliation, the respondents ought to have intimated about the failure of conciliation proceedings and only thereafter, should have initiated proceedings for arbitration and the procedure prescribed under the Arbitration and Conciliation Act ought to have been followed. It is further submitted that the respondent No.3, without giving any opportunity of hearing to the petitioner, has passed the Arbitral award and therefore, it is in violation of the principles of natural justice and hence, the Writ of Certiorari should be issued.

5. Learned counsel for the petitioner has relied upon the following decisions in support of his contentions:

**(i) Srirasthu Shopping Mall Vs. Micro and Small Enterprises and Others<sup>1</sup>;**

**(ii) Alvittas Electricals Private Limited Vs. Micro Small Enterprises Facilitation Council and Others<sup>2</sup>;**

6. Learned counsel for the respondent, however submitted that the writ petition is not maintainable as the petitioner is challenging the Arbitral Award before this Court, without availing the alternative remedy of filing an appeal

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<sup>1</sup> W.P.No. 38797 of 2022, dt.18.01.2023

<sup>2</sup> W.P.No. 5733 of 2022, dt.14.03.2022

against the Arbitral Award under the MSME Act. He submitted that the petitioner has to approach the Appellate Authority by making payment of 50% of the Arbitral Award, but to avoid the same, the present writ present is filed and therefore, the writ petition has to be dismissed. He also referred to Section 18(3) of MSMED Act which provides that where the conciliation proceedings failed, the council on its own, shall either take up the dispute for arbitration or may on his own, refer it to any other institution providing such arbitration facilities. It is submitted that, in this case, since the conciliation proceedings have failed, the conciliation officer has himself taken up the arbitration proceedings and has accordingly issued notice to the petitioner and thereafter, proceeded with the matter and therefore, there was no case for interference and prayed for dismissal of the writ petition. He also placed reliance upon the following judgments in support of his contentions that where the alternative remedy of appeal is available, the writ jurisdiction cannot be invoked.

**(1) M/s.Anupam Industries Limited Vs. State of Orissa and Others<sup>3</sup>;**

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<sup>3</sup> W.A.No.836 of 2021, dt.10.12.2021  
HC of Orissa at Cuttack

**(2) M/s.Anupam Industries Limited Vs. State of Odisha and Others<sup>4</sup>;**

**(3) Romantic Garments Vs. P.Vellaichamy and Others<sup>5</sup>;**

**(4) Orient Cement Limited Vs. Unicon Engineers<sup>6</sup>;**

**(5) The Executive Engineer Vs. The Telangana State Micro and Small Enterprises<sup>7</sup>.**

7. Having regard to the rival contentions and the material on record, this Court finds that the issue in this writ petition is whether the respondent authority has followed the due procedure under the Arbitration and Conciliation Act before passing the impugned arbitral award dated 27.10.2022 and whether this Writ Petition is maintainable due to the alternative remedy available under Section 19 of the Act. As seen from the impugned order, the Conciliation proceedings were initiated by issuing a notice on 28.01.2021 calling for statement of defense in Form-2 and enclosures to be submitted in Form-3 along with claim application in Form-I and documents submitted by the claimant. It is noticed that the council meeting was held on

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<sup>4</sup> W.P.(C) No.20234 of 2020, HC of Orissa at Cuttack

<sup>5</sup> 2020 SCC OnLine Mad 25463

<sup>6</sup> 2019 SCC OnLine TS 2497

<sup>7</sup> W.P.No.40760 of 2016

26.02.2021, wherein the counsel of both sides attended and the respondent's counsel requested time for submitting his defence statement. Thereafter, the council meeting was held on 28.08.2021 wherein both the claimant as well as respondents attended the meeting and the respondent submitted his defense statement and a copy of the same was communicated to the claimant. Council then required the respondent to submit documentary evidence to prove that the respondent company incurred loss for non supply of goods by claimant company in time and hence enforced LD. The case was posted for next hearing under Arbitration treating the conciliation proceedings as failed. The conciliator himself became the arbitrator. It is noticed that thereafter, claimant vide his letter dated 18.10.2021 submitted a rejoinder to the defence statement. Subsequently, through mail dated 28.05.2022, claimant informed the council that the respondent had not attended the meeting and also that they have not received any counter statements to the replies for statement of defence against claimant sent through post. Thereafter, the case was placed in the council meeting held on 25.03.2022, wherein the claimant was present and the counsel for the respondent also attended

and requested for adjournment as the concerned officers dealing with the issue are busy with financial year closing work. Therefore, the council asked both the claimant and the respondent to submit detailed written arguments along with supportive documents before 13.04.2022. It is submitted that case was placed in the council meeting held on 29.06.2022, wherein both the claimant and the respondent attended the meeting. After hearing both the parties and observing that the counsel for the respondent failed to produce any evidences for the losses incurred due to delay in supply of the goods by the claimant and also that the respondent had put on hold for one year and one month period and as such claiming of LD is not justified and the council asked claimant to furnish details in the given format certified by CA and the council decided to issue award for payment of principle (LD amount) without interest. After going through the documentary evidences i.e., claimant statement, defence statement as well as the replies given by the claimant, the council opined that the claimant company's claim for payment of principle amount of Rs.30,49,071/- which was deducted under LD is justified without interest as the cause of delay and LD cannot be totally attributed to either respondent



or claimant and the respondent is liable for payment of principle amount.

8. In this whole process, it is to be examined if the procedure prescribed under the Arbitration and Conciliation Act i.e., MSME Act, has been followed. On filing of an application under Section 18 and under sub-clause (2) thereof and on receipt of a reference under sub-section (1) thereof, 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 shall apply to such a dispute as if the conciliation was initiated under Part-III of that Act. The sub-section (3) thereof provides that 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 it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 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. Sub-section (4) thereof provides that 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. Therefore, the Arbitration and Conciliation proceeding have to be conducted in accordance with the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996.

9. Sections 65 to 76 of the Arbitration and Conciliation Act refer to the Conciliation proceedings. Under Section 65, the conciliator upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue and Section 75 provides that the conciliator and the parties shall keep confidential all information relating to the conciliation proceedings and the confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary

for the purposes of implementation and enforcement of such a settlement. Section 76 provides for Termination of conciliation proceedings by prescribing a procedure thereunder. For the ready reference, Section 76 is re-produced hereunder:

*The conciliation proceedings shall be terminated—*

*(a) by the signing of the settlement agreement by the parties, on the date of the agreement; or*

*(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or*

*(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or*

*(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.*

Therefore, the first and foremost step should be taken for termination of conciliation proceedings is to declare the same as terminated in writing either by the conciliator himself or by any of the parties to the proceedings.

10. Section 77 of the Arbitration and Conciliation Act provides that the parties shall not initiate, during the

conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

11. Section 80 also provides that unless otherwise agreed by the parties —

*(a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;*

*(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.*

12. Section 81 also provides that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings —

*(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;*

*(b) admissions made by the other party in the course of the conciliation proceedings;*

*(c) proposals made by the conciliator;*

*(d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.*

13. Thus, the conciliation proceedings are confidential and any material or information expressed during the said proceeding cannot be relied upon subsequently in the arbitral or judicial proceedings.

14. The arbitration proceedings are governed by the provisions of Sections 18 to 33 of the Arbitration and Conciliation Act, 1996. Under this Act, the procedure prescribed for arbitration proceedings *vis-a-vis* the conciliation proceedings is different. Therefore, the conciliation proceedings cannot be automatically converted into arbitral proceedings without first declaring that the conciliation proceedings have failed and hence terminated. Therefore, this Court is of the opinion that after the failure of the conciliation proceedings in the case before this Court, the Conciliator ought to have passed a written declaration of termination of conciliation proceedings and ought to have intimated the same to the parties and only thereafter, initiated the arbitral proceedings. The conciliator could not have become the member of the arbitral tribunal as he was privy to

the confidential information submitted by both the parties in confidence and he ought to have referred the matter to another arbitrator.

15. The Madras High Court in the case of **Alvittas Electricals Private Limited Vs. Micro Small Enterprises Facilitation Council and Others**<sup>8</sup> had an occasion to deal with the case under Section 18 of the MSMED Act and has observed that in the said case council had not conducted any conciliation proceedings either by itself or as stated in the sub-section (2) of the Section 18 applying the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act of 1996 and therefore, the inevitable conclusion is that no conciliation proceedings was conducted by the council and the order was passed by the first respondent in total violation of sub-section (2) of Section 18 of the MSMED Act. It was further observed that a plain reading of sub-section (3) of Section 18 shows that if the conciliation proceedings are not successful and stands terminated without any settlement between the parties, then the council can either by itself take up the dispute for arbitration or refer it to any institution or centre for arbitration and the provisions of the

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<sup>8</sup> MANU/TN/1740/2022

Arbitration and Conciliation Act, 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.

16. In the case of **Srirasthu Shopping Mall vs. Micro and Small Enterprises and Others**<sup>9</sup>, the Co-ordinate bench of this Court has held that where there is no mention that respondent therein had followed the procedure laid down under Sections 65 to 81 of the MSME Act and particularly, Section 76, there is a violation of the mandatory procedure laid under both the Acts, 2006 and Act, 1996.

17. From the communication received from the Chairman of MSMED to the Government Pleader, this Court finds that after conducting the conciliation meetings on 26.02.2021, 28.08.2021 and 25.03.2022, the respondent No.3 had come to the conclusion that the conciliation proceedings failed and therefore, conducted the arbitration conciliation on 25.03.2022 and 29.06.2022. Thus, it is clear that the declaration under Section 76 has not been given by the conciliator before referring the matter for arbitration under the Arbitration and Conciliation Act.

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<sup>9</sup> MANUI/TL/0157/2023

18. Further, when the arbitration proceedings are to be initiated, the arbitrator has to be appointed under Section 11 of the Arbitration and Conciliation act, 1996 and the Court should examine whether the agreement provides for an arbitration between the parties in case of a dispute between them. There must be strict compliance with the agreement procedure by parties and institutions nominated in the agreement procedure. Therefore, the appointment of an arbitrator has to be with the concurrence and agreement of both the parties and where the parties to the arbitration agreement failed to comply with the provisions of Sub-Section (6) of 11 of the Act, only the Court can appoint an arbitrator as held by the Hon'ble Supreme Court in the case of **Rajasthan Small Industries Corporation Limited Vs. Ganesh Containers Movers Syndicate**<sup>10</sup>. Further, the Hon'ble Supreme Court, in the case of **Union of India Vs. Pradeep Vinod Construction Company**<sup>11</sup>, as observed that when agreement specifically provides for appointment of named arbitrators, appointment should be in terms of agreement, unless there are exceptional reasons for departing from agreement procedure for appointment of an arbitrator, as per

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<sup>10</sup> (2019) 3 SCC 282

<sup>11</sup> (2020) 2 SCC 464



settled principles and only in the cases where an independence and impartiality of the arbitrator appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate in the given circumstances, after assigning cogent reasons in appropriate cases, may resort to an alternative arrangement to give effect to the appointment of independent arbitrator under Section 11(6) of the Act. In the case on hand, none of this procedure has been followed, but the conciliator as himself assumed the role of arbitrator and without declaring the conciliation proceedings as failed, as taken the material furnished during the conciliation proceedings as defence statement of the respondent and has passed arbitral award. This is in clear violation of the provisions of Arbitration and Conciliation Act and also in violation of principles of natural justice. As the Hon'ble Supreme Court, in a number of cases, has held that where there is violation of principles of natural justice or where the fundamental rights have been violated or when the statutory provisions have not been followed, then the

writ petition under Section 226 of the Constitution of India is maintainable irrespective of whether there is no alternative remedy against the order passed.

19. The judgments on which the petitioner has placed reliance upon, supports the case of the petitioner. The judgments relied upon by the learned counsel for the respondents are distinguishable on facts. In the said cases, there was no challenge to the procedure adopted by the arbitrator and the parties therein had appeared before the arbitrator and had participated therein and therefore, it was observed that there was no violation of principles of natural justice. The facts before this case are therefore distinguishable and the said judgments are not applicable.

20. In view of the same, this Court is of the opinion that the arbitral award dated 27.10.2022 is not sustainable and the same is accordingly set aside and the respondent is directed to re-initiate the proceedings under the Arbitration Act after passing the order under Section 76 of the Arbitration and Conciliation Act.

21. Accordingly, this writ petition is allowed. There shall be no order as to costs.

22. Miscellaneous petitions, if any, pending in this writ petition, shall stand closed.

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**JUSTICE T.MADHAVI DEVI**

**Date: 12.02.2024**  
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