

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 6TH DAY OF AUGUST 2019

BEFORE

THE HON'BLE MR. JUSTICE ALOK ARADHE

WRIT PETITION NOS.30700-701 OF 2018 (GM-RES)

BETWEEN:

1. UNION OF INDIA
MINISTRY OF DEFENCE (ARMY),
SOUTH BLOCK,
NEW DELHI - 110 001,
REP BY ITS SECRETARY
2. THE DIRECTORATE GENERAL
OF ORDINANCE SERVICE
MASTER GENERAL OF ORDNANCE BRANCH,
INTEGRATED HEAD QUARTERS
OF MINISTRY OF DEFENCE (ARMY),
ROOM NO. 95, B HUTMET,
DALHOUSIE ROAD, DHQ POST,
NEW DELHI - 110 001,
REP BY LT. COL SK PUNIA,
OIC AA!IC, ARMY AVIATION LIAISON CELL
(AIRCRAFT DIVISION)

... PETITIONERS

(BY SRI.UNNIKRISHNAN M, ADVOCATE)

AND:

1. INDUSTRIAL ENGINEERING INSTRUMENTS
A PARTNERSHIP FIRM AT PLOT 203,
12TH MAIN ROAD, 3RD PHASE,
PEENYA INDUSTRIAL AREA,
PEENYA, BENGALURU - 560 058,

REP BY ITS PARTNER,
MR. CHETHAN PARAMESHWARAI AH

2. THE KARNATAKA MICRO &
SMALL ENTERPRISES
FACILITATION COUNCIL,
KHANIJA BHAVAN,
RACE COURSE ROAD,
BENGALURU - 560 001,

... RESPONDENTS

(BY SMT. SAHANA B.V., ADVOCATE FOR R1;
R2 SERVED AND UNREPRESENTED)

THESE WRIT PETITIONS ARE FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH ANNEXURE-A I.E., THE ORDER PASSED BY THE KARNATAKA MICRO & SMALL ENTERPRISES FACILITATION COUNCIL, BANGALORE IN CASE NO.39/2016, DATED 06.02.2018.

THESE WRIT PETITIONS COMING ON FOR ORDERS, THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

Sri. Unnikrishnan M., learned counsel for the petitioners.

Smt. Sahana B.V., learned counsel for respondent

No.1.

These petitions are admitted for hearing. With the consent of learned counsel for the parties, the same are heard finally.

2. In these petitions under Articles 226 and 227 of the Constitution of India, the petitioners *inter alia* seek a writ of certiorari for quashment of the order passed by the Karnataka Micro & Small Enterprises Facilitation Council, Bengaluru.

3. The facts giving rise to filing of these writ petitions, which lie under narrow compass are stated hereafter:

Respondent No.1 claims to be a Supplier as defined under Section 2(n) of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as '*the 2006 Act*' for short) and is engaged in manufacture of electronic test and measuring instruments, PC/microprocessors based automated test equipment and systems, transducers and sensors, and

technical/engineering laboratory equipment. As per the supply order dated 10.01.2012, respondent No.1 was required to supply 1793 sets of Leak Tester Sets to petitioner No.2. Petitioner No.2 has not disputed the status of respondent No.1 as a supplier. The dispute arose between the parties on account of delay in supply of Leak Tester Sets by respondent No.1 to respondent No.2. Thereafter, the same was referred by respondent No.1 to respondent No.2 i.e., the Karnataka Micro & Small Enterprises Facilitation Council, Bengaluru vide application dated 24.01.2017 under Section 17 of the 2006 Act for recovery of the amount of Rs.13.45 Crores. Respondent No.2, thereupon initiated conciliation proceedings. Petitioner No.2 appeared before respondent No.2 and participated in the proceedings and did not question the jurisdiction of respondent No.2. Thereupon, respondent No.2 by an order dated 06.02.2018 held that the conciliation had failed and that the question of justifiability of the liquidated damages ought to be decided by way of arbitration and referred the parties to

arbitration before a Sole Arbitrator under the auspices of the Bangalore Arbitration Centre. The petitioners appeared before the Arbitrator in a arbitration proceedings on 16.07.2018. The petitioners after entering appearance in the proceedings before the Arbitrator, have approached this Court seeking the relief as stated supra.

4. Learned counsel for the petitioners submitted that the concluded contract between the parties contains an Arbitration Clause. It is further submitted that the 2006 Act in no way prohibits appointment of an Arbitrator and refer the dispute to the Arbitrator. While inviting the attention of this Court to Section 3(f) of the 2006 Act, it is submitted that the Board shall be made in respect of supply of goods. However, in the instant case, the claim has been made for liquidated damages and therefore, the aforesaid claim is not maintainable before the Arbitrator. It is also urged that taking cognizance of the proceedings by the Arbitrator under the 2006 Act,

shall have the effect only in case of inconsistency. In support of the submissions, learned counsel for the petitioners has placed reliance on decision of Bombay High Court in **'STEEL AUTHORITY OF INDIA LIMITED VS. MICRO, SMALL ENTERPRISES FACILITATION COUNCIL, THROUGH JOINT DIRECTOR OF INDUSTRIES', LAWS(BOM) 2010 8 247**, decision of High Court of Patna in **'RELIANCE COMMUNICATIONS LIMITED VS. THE STATE OF BIHAR AND ORS.'**, **LAWS (PAT) 2018 6 148**, decision of Orissa High Court in **'M/S SHRI MAHAVIR FERRO ALLOYS PRIVATE LIMITED VS. M/S. PASSARY MINERALS LIMITED', ARBP NO.39/2017**, decisions of Supreme Court in **'INDIAN OIL CORPORATION LIMITED AND OTHERS VS. RAJA TRANSPORT PRIVATE LIMITED', (2009) 8 SUPREME COURT CASES 520**, **'KARNAIL SINGH VS. STATE OF HARYANA', (2009) 8 SUPREME COURT CASES 539**, **'ACE PIPELINE CONTRACTS (P) LIMITED VS. BHARAT PETROLEUM CORPORATION LIMITED'**,

(2007) 5 SUPREME COURT CASES 304 and a decision of a Bench of this Court in '**M/S. CROMPTON GREAVES LIMITED VS. M/S ANNAPURNA ELECTRONICS AND OTHERS**', **IN W.P.NO.12465/2010, DATED 20.08.2013.**

5. On the other hand, learned counsel for respondent No.1 submits that the petitioners have entered appearance before the Arbitrator on 16.07.2018 and under the provisions of the 2006 Act, the matter has been correctly referred to the Arbitrator. It is further submitted that any reference to Arbitration under the 2006 Act shall be deemed to be referred under the provisions of the Arbitration and Conciliation Act, 1996. It is further submitted that the claim of the petitioners is in respect of the delay in supply of the goods and the same is cognizable under the provisions of the 2006 Act. It is also urged that the Arbitration Clause is hit by Section 12 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as '*the 1996 Act*' for short) as

the dispute was referred after amendment of Section 12 of the Act had come into force. In support of the aforesaid submission, learned counsel for respondent No.1 has referred to decisions of Supreme Court in **'SECUR INDUSTRIES LIMITED VS. GODREJ & BOYCE MFG. CO. LTD. AND ANOTHER', (2004) 3 SUPREME COURT CASES 447, 'SNEHADEEP STRUCTURES PRIVATE LIMITED VS. MAHARASHTRA SMALL SCALE INDUSTRIES DEVELOPMENT CORPORATION LIMITED', (2010) 3 SUPREME COURT CASES 34, M/S. PAPER & BOARD CONVERTORS VS. UTTAR PRADESH STATE MICRO & SMALL ENTERPRISES AND OTHERS', 2014 SCC ONLINE ALL 5825, decisions of High Court of Delhi in 'GE T&D INDIA LIMITED VS. RELIABLE ENGINEERING PROJECTS AND MARKETING', 2017 SCC ONLINE DEL 6978, 'BHARAT HEAVY ELECTRICALS LIMITED VS. THE MICRO AND SMALL ENTERPRISES FACILITATIONS CENTRE AND ANOTHER', 2017 SCC ONLINE DEL 10604, decision**

of Bombay High Court in '**SHAH & PARIKH VS. URMI TRENCHLESS TECHNOLOGY PRIVATE LIMITED AND ANOTHER**', 2019 SCC ONLINE BOM 340, decision of High Court of Calcutta '**NATIONAL PROJECTS CONTRUCTION CORPORATION LIMITED AND ANOTHER VS. WEST BENGAL STATE MICRO SMALL ENTERPRISES FACILITATION COUNCIL AND ORS.**', G.A NO.304 OF 2017 IN W.P.NO.294/2016 DATED 16.02.2017; decision of High Court of Allahabad in '**BHARAT HEAVY ELECTRICALS LIMITED VS. STATE OF UTTAR PRADESH AND ORS**', IN W.P (C) NO.11535/2014, DATED 24.04.2014;

6. I have considered the submissions made by learned counsel on both the sides and have perused the record. Sections 17, 18 & 24 of the 2006 Act 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.

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 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.

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. From close scrutiny of aforesaid provisions, it is evident that Section 18(1) confers a power on a party to a dispute with regard to any amount due under Section 17 to make a reference to Micro and Small Enterprises Facilitation Council. Section 18(3) of the Act contemplates that in case, conciliation is not successful, the Council would take up the dispute for arbitration or refer it to any institution or arbitration. Section 18(4) of the Act mandates that notwithstanding anything

contained in any other law for the time being in force the institution or center identified by the Council shall have jurisdiction to act as an Arbitrator or Conciliator. Thus, the 2006 Act provides for a statutory arbitration.

8. Section 2(4) of the Arbitration and Conciliation Act, 1996 stipulates that provisions of first part of the 1996 Act will apply to a statutory arbitration as if there was an arbitration agreement between the parties. However, the first part of the Act 1996 will not apply in case there is conflict between provisions of the Act which enforces statutory arbitration and the provision of the Act, 1996. In view of Section 18(4) and Section 24 of the 2006 Act read with Section 2(4) of the 1996 Act, the arbitration clause contained in the agreement between the parties, stand superseded by the right conferred by the statute viz., the 2006 Act. It is trite law that right under a statute would be on a higher pedestal than the right provided under an arbitration agreement.

9. The petitioners have participated in the proceedings initiated under the 2006 Act and when the conciliation was failed and the matter was referred to the arbitration and after having entered appearance before the arbitrator, have approached this court. The proceedings have been entertained under Section 18 of the 2006 Act in pursuance of the provisions of the Act and therefore, at this stage, the grievance of the petitioners cannot be entertained as it is trite law that when the statute provides a mode of doing a particular thing in a particular way, that thing has to be done in that way alone and all other modes of performance in any other manner are prohibited. In support of aforesaid submissions, reliance has been placed on decisions of Supreme Court in '**T.P.SENKUMAR VS. UNION OF INDIA**', (2017) 6 SCC 801, '**STATE OF JHARKHAND & ORS. VS. AMBAY CEMENTS & ANR.**', (2005) 1 SCC 368 and '**NSOFT (INDIA) SERVICE PRIVATE LIMITED VS. BESCO LTD. & ORS.**', MANU/KA/0272/2008.

10. For yet another reason, no relief can be granted to the petitioners as if the Arbitration agreement is given effect to the appointment of arbitrator, would be in contravention of Section 12(5) of the Arbitration and Conciliation Act, 1996 as the arbitration proceedings have commenced after 23.10.2015 i.e., when the amendment in the 1996 Act was already incorporated.

11. The decision relied upon by the learned counsel for the petitioners in the case of **STEEL AUTHORITY INDIA LIMITED** supra has no application to the fact situation of the case as in the aforesaid case, the petitioners had not participated in the proceedings initiated under the 2006 Act. Similarly, the decision relied upon by the petitioners in the case of **INDIAN OIL CORPORATION LTD.,** supra does not apply in the fact situation of the case as in the aforesaid decision, the Supreme Court was dealing with a situation prior to incorporation of amendment in the Arbitration and Conciliation Act, 1996.

12. In view of the preceding analysis, I do not find any ground to interfere in exercise of powers under Articles 226 & 227 of the Constitution of India. Needless to state that the petitioners shall have liberty to take recourse to such remedy as may be provided to them in law.

With the aforesaid liberty, the petitions are disposed of.

**Sd/-
JUDGE**

Mds/SS