



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

Date of decision: 24th MAY, 2024

IN THE MATTER OF:

+ **W.P.(C) 4760/2024 & CM APPL. 19484/2024**

ORRIS INFRASTRUCTURE PVT LTD.

..... Petitioner

Through: Mr. Arvind Vashistha, Advocate.

versus

SAANVI INTERIORS INDIA PVT LTD.

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner has approached this Court under Article 226 of the Constitution of India challenging the arbitral award dated 15.03.2023, passed by MSME-Arbitral Tribunal.

2. The facts, in brief, leading to the present Writ Petition are that the Petitioner and the Respondent herein entered into an agreement dated 27.02.2013 for carrying out interior, landscape finishing and plumbing work in its project known as "Orris Gallery Project" (*hereinafter referred to as the Project I*), situated at Sector 89, Gurgaon, Haryana for a sum of Rs. 77,96,789.65/-. It is stated that as per the terms of the Agreement, the work was to be completed within a period of two months, w.e.f. 01.03.2013. It is stated that the Petitioner awarded one more contract of Rs. 10,56,070/- to the Respondent herein for the supply and installation of wooden veneer and mirror glass cladding and, melamine polishing work for its project namely



"Floreal Tower Project" (*hereinafter referred to as the Project II*) situated at Sector 83, Gurgaon, Haryana. It is stated that disputes arose between the parties regarding completion of the projects as the projects were not completed within the stipulated time. It is stated that the Respondent sent a legal notice to the Petitioner for payment of Rs.55,69,201/- with accrued interest @ 18% per annum and also to return the bank guarantee dated 19.03.2013 for a sum of Rs.3,89,840/-. Material on record also indicates that the Respondent filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 before the District Judge, Gurgaon seeking deposit of Rs.55,69,201/- from the Petitioner pending arbitration. It is stated that the said petition has been dismissed by the District Judge, Gurgaon, on the ground that the Respondent had not appointed an Arbitrator even after one year after filing the Section 9 application. It is stated that after dismissal of the said application, the Respondent approached the Micro and Small Enterprise Facilitation Council (*hereinafter referred to as the 'MSE Facilitation Council'*) under Section 18 of the Micro, Small and Medium Enterprise Development (MSMED) Act, 2006. It is stated that the MSEFC referred the matter to a sole arbitrator under the aegis of Delhi International Arbitration Centre (DIAC). It is stated that the Petitioner filed an application under Section 16 of the Arbitration Act before the sole arbitrator stating that the claims raised by the Respondent are barred by limitation and the mandate of arbitration has expired since the proceedings have not been completed within the time stipulated under the MSMED Act. The said application was dismissed by the sole arbitrator and award dated 15.03.2023 has been passed in favour of the Respondent. It is this Order which has been challenged by the Petitioner in the present Writ Petition under Article 226 of



the Constitution of India.

3. It is pertinent to mention here that the Petitioner has also filed an application under Section 34 of the Arbitration Act before the Commercial Courts, Gurgaon, seeking a direction to set aside the award dated 15.03.2023.

4. Before this Court, it is the contention of the Petitioner that the reference to Arbitration under the DIAC is not in accordance with the MSMED Act as the Respondent was not registered as an MSME at the time of entering into an agreement with the Petitioner and, therefore, the Respondent could not have taken the benefit of the MSMED Act. Various other grounds have also been taken by the Petitioner finding fault with the conduct of the arbitration including the fact that the award was not completed within the time stipulated under the MSMED Act and also that the statement of claim is barred by limitation.

5. At this juncture, it is pertinent to mention that the Order referring the matter to the Arbitrator under the MSMED Act by the MSE Facilitation Council has not been challenged. The Petitioner has challenged the award by filing a petition under Section 34 of the Arbitration Act before the competent Court and has also filed the present petition under Article 226 of the Constitution of India.

6. It is settled law that when an award is challenged under Section 34 of the Arbitration Act then a Writ Petition under Article 226 of the Constitution of India is not maintainable (Refer: Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75; Deep Industries Ltd. v. ONGC,



(2020) 15 SCC 706).

7. This Court in Executive Engineer and Others v. Bholasingh Jaiprakash Constrcution Ltd. and Another, **2024 SCC OnLine Del 1080**, has held as under:

"7. It is well settled that Article 226 of the Constitution of India is an extraordinary remedy and cannot be invoked where a party has failed to invoke other remedies available to it under law.

8. MSMED Act was brought in to free Micro, Small and Medium Enterprises from the plethora of laws and regulations which they had to face with their limited awareness and resources. Micro, Small and Medium Industries have emerged as a significant contributor to the economy and is primarily labour intensive. The MSMED Act was brought in to address the concerns of Micro, Small and Medium industries. Chapter V of the MSMED Act deals with delayed payments to the MSMEs. The said Chapter has been brought in to ensure that when goods or services are supplied by the MSMEs, the payments are made to these industries within time and Sections under Chapter V provides for delayed payment at higher rate of interest. The purpose of this chapter is to ensure that the MSMEs are not pushed out of business. It is felt that failure to pay for the amount of goods and services provided by these enterprises was resulting in many of the MSMEs going out of business as they do not have the might to fight with the large scale enterprises. Section 18 of the MSMED Act provides for reference of a dispute to the MSME Facilitation Council. The MSME Facilitation Council on receipt of a reference under Sub-Section 18(1) of the MSMED Act, 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. In the present matter, prior to sending the matter to the Arbitral Tribunal, an effort for conciliation was also made and the matter was referred to the Arbitral Tribunal only after conciliation proceedings have failed. Once the matter is referred to Arbitration and an award is passed, the award can be challenged either by filing an application under Section 34 of the Arbitration Act or by filing an application under Section 19 of the MSMED Act.

9. In the present case, the Petitioner comes within the definition of State under Article 12 of the Constitution of India. The Petitioner knew about the dispute. The Petitioner knew that the matter has been referred to the Arbitral Tribunal. There has been complete inaction on the part of the State to challenge the reference proceedings. In fact, the State chose not to participate in the proceedings. After the award was passed, the State chose not to challenge the same under Section 34 of the Arbitration Act on the same grounds which have been raised in the present Writ Petition. After failing to invoke the procedures under the Arbitration Act, it is now not open for the State to approach this Court by filing a Writ Petition under Article 226 of the Constitution of India. State is not a helpless litigant who is not aware of the law and, therefore, this Court does not find it expedient to interfere with the award under Article 226 of the Constitution of India on the issue of jurisdiction. Article 226 cannot be invoked by a litigant who has failed to avail of the remedies available under law. The State is not a helpless litigant in whose favour, the Court should invoke the extraordinary remedy under Article 226 of the Constitution of India."

8. The said Order has been affirmed by the Division Bench of this Court



in Executive Engineer and Others v. Bholasingh Jaiprakash Construction Ltd. and Another, **2024 SCC OnLine Del 3070**, wherein the Division Bench, while dismissing the appeal, has held as under:

"4. Upon a perusal of the paper book, this Court finds that the arbitral award was passed ex-parte. The appellants chose to not appear before the tribunal or file any application under Section 16 of the Arbitration and Conciliation Act, 1996 ('the Act'). Further, the Appellants have not challenged the award under Section 34 of the Act.

5. In the opinion of this Court, the proper recourse against proceedings under the MSMED Act is to file an application under Section 18(3) of the MSMED Act or Section 16 of the Act and in case an award has been passed, then the proper recourse is to file objections under Section 34 of the Act.

6. Recently, in LPA 91/2024, this Court has refused to interfere with the judgment passed by the learned Single Judge in similar circumstances. This Court, while dismissing the appeal, relied upon the judgment of the Supreme Court in Civil Appeal No. 7491/2023, titled as India Glycols limited v. Micro and Small Enterprises Facilitation Council, Medchal Malkajgiri, wherein it was held that petitions filed under Article 226/227 of the Constitution of India ought not to be entertained in view of Section 18 of the MSMED Act, which provides for recourse to statutory remedy for challenging the Award under Section 34 of the Act. The Supreme Court in the said case has observed that entertaining of petitions under Article 226/227 of the Constitution, in order to obviate compliance with the requirement of pre-deposit under Section 19 of the Act, would defeat the object and purpose of special enactment which has been legislated upon by



Parliament."

9. In view of the above, the writ petition is dismissed, along with pending application(s), if any.

10. It is made clear that this Court has not made any observations on the merits of the case or the award as the proceedings against the same are pending before the Court of competent jurisdiction.

SUBRAMONIUM PRASAD, J

MAY 24, 2024

Rahul