HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

CM (M) No. 287/2023

Reserved on 02.12.2023
Pronounced on 14.12.2023

Union Territory of J&K And anr. ...Petitioner(s)

Through:- Mr. Faheem Nisar Shah, GA.
Mr. Illiyas Nazir Laway, GA.

V/s

Aibak Electric Industries ...Respondent(s)

Through:- Mr. Azhar-ul-Amin, Advocate with
Mr. Mubashir Masood, Advocate and
Mr. Bilal Ahmad Bhat, Advocate.

HIGH COURT JAMMU & KASHMIR

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. Union Territory of Jammu and Kashmir through Chief Engineer, M&RE Wing, Srinagar, alongwith Executive Engineer Electric Division Baramulla have filed this petition under Article 227 of the Constitution of India for seeking quashment of an award dated 20-04-2021 passed by the Secretary, Micro and Small Enterprises Facilitation Council, Kashmir Division, Srinagar, in case titled Aibak Electrical Industries v. Chief Engineer, M&RE Wing, Srinagar, as also an order dated 13-06-2023 passed

by the court of learned Additional District Judge (Bank Cases) Srinagar ['the executing Court'].

2. Briefly stated the facts projected by the petitioners in this petition are that on 11-06-2020 the respondent filed an application under the Micro Small and Medium Enterprises Development Act, 2006 ['MSMED Act, 2006'] regarding delayed payments before the Secretary, Micro and Small Enterprises Facilitation Council, Kashmir Division, Srinagar ['the Council']. On receipt of reference the Secretary of the Council vide its communication dated 14-07-2020 called upon the petitioner No.2 to furnish the details in respect of the reference received, within a period of seven days with regard to; (i) date of completion of supply order; (ii) payment made, if any; and (iii) pending payments as on date. This was followed by another communication of the Secretary of the Council dated 17-08-2020 calling upon the petitioner No.2 to pay an amount of Rs. 35,14,992/- to the respondent within 15 days from receipt of notice, intimating further to the petitioner No.2 that, in case of failure, the case shall be registered by the Council. It seems that the aforesaid notices issued by the Secretary to the Council were not responded to by the petitioners and the requisite payment demanded by the respondent was not released. The Secretary of the Council invoked the provisions of Section 18(2) of the MSMED Act, 2006 and called upon both the parties to appear before it for mutual settlement or not. It is, however, not clear from the pleadings as to whether the parties attended the settlement meeting fixed by the Council. It is, however, the grievance of the petitioners that they suddenly received an award dated 20-04-2021 passed by the Secretary of the

Council, holding the respondent entitled to a payment of Rs, 35,41,992/- alongwith compound interest at the rate of 12.75 % Per annum with effect from 14-02-2019 till the payment was made to the respondent through J&K SICOP.

3. When the award dated 20-04-2021 was not complied with by the petitioners, the respondent filed an execution petition before the executing Court in which the executing Court, vide order impugned dated 13-06-2023, attached all accounts operated by the petitioner No.2, excluding the salary account, as also all the official vehicles belonging to the petitioner-department. The award, as well as the order passed by the executing Court referred to above, are subject matter of challenge in this petition.

4. The award has been challenged by the petitioners *inter alia* on the ground that the Council has not followed the mandate of Section 18 of the Act of 2006 in its right perspective. It is submitted that no conciliation proceedings in terms of sub-Section 2 of Section 18 were ever conducted nor was the dispute between the parties amicably settled in such proceedings. It is thus argued that in the absence of failure of conciliation proceedings, it was not available to the Council to initiate the arbitral proceedings. To put it more clearly, the learned counsel for the petitioners argued that the award, which has been put to execution before the executing Court, is neither on account of any amicable settlement made during the conciliation proceedings conducted under sub Section (2) of Section 18 nor the same can be termed as an award passed by the Arbitral Tribunal under Section 18(3) of the Act of 2006. It is thus argued that the impugned award, which has

been put to execution by the respondent, is nullity in the eye of law, and, therefore, cannot be enforced.

5. The Chief Engineer, who appeared in person before this Court, fairly submitted that the payment due to the respondent is not in dispute and is required to be paid. He, however, disputes the award insofar as it grants the compound interest at the rate of 12.75% per annum in favour of the respondent. As a matter of fact, before the executing Court also, the petitioners have taken this fair stand.

6. *Per contra*, the case of the respondent is that, pursuant to reference filed by the respondent under Section 18 of the Act, the petitioners were served and were directed to make the payment. The direction to make the payment was made by the Council for the reason that the petitioners had fairly admitted the supply of goods made by the respondent. It is thus argued on behalf of the respondent that, once the supplies made by the respondent to the petitioners are admitted and the payment due to the respondent is not disputed by the petitioners, there was hardly any need for the Council to refer the matter to arbitration for passing an arbitral award under Section 18(3). Learned counsel for the respondent would submit that the case of the respondent falls within the purview of Sub Section 2 of Section 18 and, therefore, an award in terms of Section 31 of the Arbitration and Conciliation Act, 1996, which has been rightly put to execution by the respondent before the executing Court.

7. Having heard learned counsel for the parties and perused the material on record, it is seen that the Parliament in the year 2006 enacted the Micro,

Small and Medium Enterprises Development Act, 2006, with a view to providing and facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto. Apart from other objectives and reasons for enactment, the Act seeks to make provisions for ensuring timely and smooth flow of credit to Small and Medium Enterprises to minimise the incidence of sickness among and enhancing the competitiveness of such enterprises in accordance with the guidelines and instructions of the Reserve Bank of India and to make further improvements in the interest on delayed payments to Small and ancillary industries under the Small Scale and Ancillary Industrial Undertakings Act, 1993 and making that enactment a part of proposed legislation and to repeal that enactment. Chapter V of the 2006 Act deals with delayed payments to Micro and Small Enterprises. Section 15 deals with liability of the buyer to make payment and the same for facility of reference is reproduced hereunder:-

HIGH COURT
JAMMU & KASHMIR

> " **15. Liability of buyer to make payment**:- Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day
>
> Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance."

8. Similarly Sections 16 and 17 provides the rate at which the interest is payable and the date from which it becomes payable on the delayed payment. Sections 16 and 17 read thus:-

> "**16**. **Date from which and rate at which interest is payable**:- Where any buyer fails to make payment of the amount to the supplier, as required under Section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed date, or as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.
>
> **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."

HIGH COURT OF JAMMU & KASHMIR

9. Section 18 is at the heart of controversy raised in this petition and, therefore, is set out 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 anyamount 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 Section 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 hall 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 (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."

10. From reading of scheme of Section 15 to 18, it clearly transpires that where supplies are made by any micro and small enterprise to any buyer, the

payment thereof shall be made by the buyer on or before the date agreed upon between him and the supplier in writing. However, where there is no such agreement entered into between the buyer and the supplier, the payment shall be made by the buyer before the appointed day. The term 'appointed day' is defined in Clause (b) of Section 2 of the MSMED Act, 2006. The proviso appended to Section 15 further lays down that the period agreed upon between the buyer and supplier in writing shall not, in any case, exceed 45 days from the date of acceptance or the date of deemed acceptance. From reading of Section 16 it becomes abundantly clear that in case the buyer fails to make the payment to the supplier, as required under Section 15, the buyer shall become liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank. This condition of payment of compound interest on failure of the buyer to make the payment on the date it becomes due, is statutory in character and overrides any stipulation in the agreement made between the buyer and the supplier. It also overrides any such stipulation with regard to interest made in any law for the time being in force. To put it succinctly, the payment of compound interest under Section 16 is statutory in nature and in supersession of any contrary stipulation contained in any agreement between the buyer and the supplier or any contrary stipulation contained in any law for the time being in force. So far as Section 18 is concerned, it would come into play only

when there is dispute with regard to the payment between the buyer and the supplier.

11. In the instant case, I am surprised to find that when the supplies made by the respondent to the petitioners were not disputed and the payment due to the respondent was also not in dispute, where was the occasion for the respondent to seek a reference before the Council under Section 18 of the Act of 2006. From plain reading of Sub Section (2) of Section 18 it clearly transpires that reference can be made by the aggrieved party to the Council only where there is a dispute with regard to any amount due under Section 17 of the Act. Ordinarily, in the present case the petitioners should have acted fairly and in the true spirit of the MSMED Act, 2006 and made payment to the respondent along with statutory interest envisaged under Section 16. However, the failure on the part of the petitioners to carry out the mandate of Section 15 and 16 did provide a cause of action to the respondent to directly approach this Court by invoking its extraordinary writ jurisdiction under Article 226 of the Constitution of India.

HIGH COURT
JAMMU & KASHMIR

12. I reiterate that Section 18 of the MSMED Act, 2006 is invokable only when there is dispute with regard to any payment due under Section 17. In the instant case the payment due to the respondent is not disputed. It is also not disputed that the payment has not been made to the respondent by the petitioners within the period stipulated under Section 15. That being the admitted position, Section 16 was to operate automatically and the amount would become payable with compound interest as envisaged under Section 16.

13. In the instant case, the Council has miserably failed to carry out the mandate of Sections 15 to 18 of the MSMED Act, 2006, and, therefore, all proceedings taken by the Council are vitiated. However, for the reason that amount due to the respondent (supplier) is not disputed nor it is in dispute that payment to the supplier (respondent) has not been made so far, this Court is of the firm view that the petitioners cannot be permitted to hide behind technicalities and avoid its contractual as well as statutory liability. It is reiterated that in the instant case, invocation of Section 18 was totally uncalled for and the liability to make payment was statutorily incurred. Therefore, the initiation of proceeding by Council under Section 18 erroneously should not impact the outcome. Despite not being satisfied with the manner in which the Council has acted, the Court is inclined to uphold the liability which the petitioners have incurred and are under a statutory obligation to discharge. It is for this reason only the petition filed by the petitioners is liable to be dismissed and the petitioners are required to be directed to make payment to the respondent alongwith interest envisaged under Section 16 without any further delay.

HIGH COURT
JAMMU & KASHMIR

14. Since the respondent has gone through the process under Section 18 and, therefore, it would be necessary to clarify as to how Section 18 operates and how should the Council proceed in the matter. This may put the things in proper perspective and provide clear guidelines to the Council to be followed in case of reference of a dispute made by the supplier with regard to any amount due from the buyer under Section 17 of the MSMED Act, 2006.

15. I have already reproduced Sections 15 to 18 of the MSMED Act, 2006 hereinabove, which clearly and systematically lay down a scheme for resolution of dispute between the buyer and supplier (who happens to be Micro and Small Enterprises) in respect of any amount due for any goods supplied or services rendered by the supplier to the buyer. The term 'supplier' is defined under Section 2 and would mean, ' a Micro or Small Enterprise' and would include a National Small Industries Corporation, Small Industries Industrial Corporation of a State or a Union Territory and any Company, co-operative society, trust or a body by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises. Therefore, a *sine qua non* for invoking Chapter V of the Act of 2006, is the liability of the buyer to make payment to the supplier as defined under Section 2 (n) of the Act of 2006.

HIGH COURT JAMMU & KASHMIR

16. As is evident from reading of Section 15, when there is no dispute with regard to quality and quantity of the goods supplied and services rendered by the supplier to the buyer, the buyer has to make the admitted payment thereof on or before the day agreed upon between the two and such agreed period should not be exceeding 45 days from the date of acceptance or deemed acceptance of the goods or the services, as the case may be. It is only where the buyer fails to make the payment of the admitted amount to the supplier as stipulated under Section 15, the buyer shall become liable to pay compound interest in terms of Section 16, notwithstanding anything

contrary contained in the agreement between the buyer and the supplier or any law for the time being in force. The payment of compound interest envisaged under Section 16 is statutory in nature and overrides anything contrary contained either in the agreement between the buyer and supplier or any law for the time being in force.

17. If the principal amount alongwith the interest in terms of Section 16 is not paid, such amount shall become payable from the buyer in terms of Section 17 of the Act of 2006. It is only where there is dispute with regard to any amount due under Section 17, the matter shall be referred by the aggrieved party to the Council. Under sub-section (2) of Section 18, the council, on receipt of reference aforesaid, shall conduct the conciliation in the matter either itself or seek the assistance of any institution or centre providing Alternative Dispute Resolution Services. The conciliation shall be conducted in terms of Section 65 to 81 of the Arbitration and Conciliation Act, 1996 [“the Act of 1996”]. In terms of Section 65 of the Act of 1996, the Council or the Conciliator to whom the Conciliation is referred to by the Council, shall call upon each party to the dispute to submit a brief written statement describing the general nature of the dispute and the points at issue and shall exchange the same with each other. In terms of Section 67 of the Act of 1996, the Conciliator shall assist the parties in an independent and impartial manner with a view to persuade them to reach an amicable settlement of the dispute. The Conciliator shall, in the proceedings, be guided by principles of objectivity, fairness and justice, having regard to rights and obligations of the parties, the usages of the trade concerned and

the circumstances surrounding the dispute including any previous business practices between the parties.

18. In terms of Section 73 of the Arbitration and Conciliation Act, 1996, when it appears to the Conciliator that there exists element of a settlement which may be acceptable to both the partiers, he shall formulate the terms of a possible settlement and may submit the same to the parties for their observations. This process can be repeated after receiving the observations from the parties and re-framing the terms for possible settlement in the light of such observations. However, where the parties reach on a settlement of the dispute, they may draw up and sign a written agreement, or request the Conciliator to draw up or assist the parties in drawing the settlement agreement. It is only when the parties sign a written settlement agreement, it shall be final and binding on both the parties and shall have status of arbitral award. .

HIGH COURT JAMMU & KASHMIR

19. By following the steps indicated from Sections 65 to 74, the conciliation proceedings may result into an amicable settlement to be reduced in writing in the form of settlement agreement between the parties. This settlement agreement shall have the status and effect as if it is an Arbitral Award under Section 30 and would be enforceable under Section 36 of the Act of 1996.

20. Sub-section (3) of Section 18 of the Act of 2006 further provides that where the conciliation proceedings initiated under sub-section (2) fail and stand terminated without any settlement between the parties, the Council is empowered to move ahead to have the matter/dispute sorted out through the

medium of Arbitration. Again, the Council, which may have conducted conciliation, can itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services. The provisions of Arbitration and Conciliation Act, 1996 shall then apply to the dispute as if these proceedings are in pursuance of the arbitration agreement referred to in Sub-Section (1) of Section 7 of the Act of 1996. The reference made under sub-section (3) has to be decided by the Arbitrator within a period of 90 days of making such reference and there is no provision for extension.

21. In terms of Section 19 of MSMED Act, 2006, any decree, award or any order made by the Council can be set aside by the Court under Section 34 of the Act of 1996 provided the party seeking setting aside of the award/order (not being a supplier), has deposited with the Court 75% of the amount in terms of the impugned decree, award or order.

HIGH COURT JAMMU & KASHMIR

22. As already clarified by this Court hereinabove, the MSMED Act of 2006, as is apparent from reading of Section 18 and 19 thereof, has overriding effect on the similar and contrary provisions provided in any other Act or legislation. Section 19 though provides for filing the application for setting aside a decree or order by resort to Section 34 of the Arbitration and Conciliation Act, 1996, but in the matter of suppliers, who are Micro and Small Enterprises, the provisions of Section 34 of the Act of 1996 are required to be read and applied subject to the provisions of Section 19. A harmonious reading of Section 34 of the Act of 1996 and Section 19 of the Act of 2006 would lead us to a conclusion that while a decree, award or

order of the Arbitrator conducting arbitration, can be called in question on the grounds set out in Section 34, but no such application for setting aside a decree, award or order shall be entertained unless the applicant, not being a supplier, has deposited with the Court 75% of the amount in terms of such decree, award or order, as the case may be.

23. I have ventured to read, interpret and elaborate the provisions of Sections 15 to 19 of the MSMED Act, 2006 only with a view to making it easy for the Council and other authorities under the Act of 2006 to follow law in its correct perspective.

24. In the instant case, the entire procedure laid down in these Sections has been thrown to wind. There is neither proper conciliation conducted by the Council nor any settlement agreement duly signed by the parties has been drawn so as to give it a status of award, enforceable under Section 36 of the Act of 1996. The Council has not recorded failure of conciliation nor has it referred the matter for arbitration. Probably, the Council did not think it proper to adhere to the procedure being influenced by the fact that at no point of time the petitioners had denied the payment due to the respondent. Resultantly, there is no valid arbitral award which could be put to execution before civil court or could be challenged by the petitioners under Section 19 of MSMED Act of 2006 read with Section 34 of the Act of 1996. However, for the reasons given above, I uphold the liability of the petitioners to make payment to the respondent.

25. In the premises, this Court, while holding the impugned orders bad in law and liable to be quashed, direct the petitioners to make the payment of

entire amount i.e., principal as well as compound interest to the respondent within a period of two months from today. Resultantly, the proceedings before the executing court shall terminate.

26. Petition is, accordingly, disposed of in the terms as above.

27. This Court would also call upon the Council concerned to follow law as enumerated in Chapter V of the MSMED Act, 2006 in the manner explained above so that the proceedings conducted by it have semblance of legal proceedings. And in such a situation the party concerned, in particular, the supplier of goods or services, who are Micro and Small Enterprises, are in a position to enforce the orders of the Council and obtain their due amounts hassle free and without unnecessary waste of time.

HIGH COURT
JAMMU & KASHMIR

(**Sanjeev Kumar)**
Judge

Srinagar.
14.12.2023
Anil Raina, Addl. Reg/Secy

Whether the order is speaking : Yes
Whether the order is reportable: Yes