

(2022) 01 MP CK 0186
In the Madhya Pradesh High Court
Case No : Writ Petition No. 9989 Of 2021

M/S P.M. Projects @ Services Pvt. Ltd	APPELLANT
Vs	
Micro & Small Enterprises Facilitation Council And Another	RESPONDENT

Date of Decision : 18-01-2022

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Micro, Small And Medium Enterprises Development Act, 2006 — Section 8, 9, 18, 19
Arbitration And Conciliation Act, 1996 — Section 37

Citation : (2022) 01 MP CK 0186

Hon'ble Judges : Subodh Abhyankar, J

Bench : Single Bench

Advocate : Tarang Chelawat, Peyush Jain

Final Decision : Allowed

Judgement

Subodh Abhyankar, J

1. This petition has been filed by the petitioner under Articles 226/227 of the Constitution of India, against the order dated 22.9.2020 passed by the respondent No.1/Micro and Small Enterprises Facilitation Council (hereinafter referred to as "the Facilitation Council") through Director/Chairman, Secretariat of Commerce, Vindhyachal Bhawan, Bhopal, whereby the application filed by the petitioner under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as MSME Act) against the respondent no.2 M/s MCL Global Steel Pvt. Ltd. Indore, has been rejected by the Council on the ground that an order dated 06.03.2017 has been passed by the NCLT, Mumbai whereby insolvency proceedings under Sections 8 and 9 of the Insolvency and Bankruptcy Code, 2016 were initiated against the respondent no.2 at the instance of M/s Essar Projects India Ltd and in which it was directed that no suits or continuation of pending suits or proceedings etc. against the respondent no.2 in any court of law, tribunal, arbitration panel or authority was prohibited.

2. In brief, the facts giving rise to the present petition are that the petitioner company is a registered Small Scale Industrial unit engaged in the manufacturing of various industrial equipments, fabrication and erection of steel structure etc. It had provided its services to respondent No.2 and according to the petitioner, a sum of Rs.6,96,521/- was due against the respondent No.2/Company but as the same was not paid, an application under Section 18 of the MSMED Act was preferred by the petitioner before the M.P. Micro and Small Facilitation Council (for short 'the Council') constituted under the MSMED Act.

3. In the aforesaid proceedings, a reply was also filed by the respondent No.2 and vide its letter dated 27.5.2017, it was informed to the Council that the National Company Law Tribunal, Mumbai (hereinafter referred to NCLT, Mumbai) has passed an order on 6.3.2017 admitting the petition filed in the matter of M/s Essar Projects India Ltd. vs. M/s MCL Global Steel Pvt. Ltd., prohibiting any form of institution of a suit or continuation of pending suits or proceedings including execution of any judgment, decree or order against MCL Global Steel Pvt. Ltd. It was also informed that the said order dated 6.3.2017 is challenged by the respondent no.2 before the National Company Law Appellate Tribunal, Delhi (hereinafter referred to NCLAT, Delhi), and vide its order dated 31.5.2017, NCLAT, Delhi has been set aside the order dated 6.3.2017. But the aforesaid fact of setting aside of the order of NCLT, Mumbai was not brought to the notice of the Facilitation Council by the respondent no.2 which led to passing of the order only on the basis of the order passed by the NCLT, Mumbai. Thus, the respondent No.2, deliberately with an intention to frustrate the proceedings under Section 18 of the MSMED Act did not inform this aspect of the matter that the order passed by the NCLT, Mumbai has already been set aside by NCLAT, Delhi which has led to passing of the impugned order by the Council.

5. Shri Chelawat, learned counsel for the petitioner has submitted that the aforesaid order has been passed as the material fact was suppressed by the respondent No.2/Company. It is submitted that on 28.4.2018, it was made to appear by the respondent No.2 to the Facilitation Council that the order passed by the NCLT, Mumbai is pending before the NCLAT, Delhi and hence, the respondent No.1 cannot pass any order under MSMED Act which was a clear suppression of fact.

6. Counsel for the petitioner has further submitted that the impugned order has been passed by the Facilitation Council on 22.9.2020 oblivious of the fact that the order passed by the NCLT, Mumbai dated 6.3.2017 has already been set aside the NCLAT, Delhi on 31.5.2017 itself. Thus, it is submitted that the application filed by the petitioner under Section 18 of the MSMED Act was very much maintainable. Reliance has also been placed upon the decision rendered by the Supreme Court in the case of United India Insurance Co. Ltd. vs. Rajendra Singh reported as (2000) 3 SCC 586.

7. Shri Peyush Jain, learned counsel for the respondents has opposed the prayer and it is submitted that MSMED Act in itself is a complete code and under Section

19 of the Act it provides for the challenge procedure of the order, award etc. passed by the Council under s.18 of the Act which is to be treated as an award passed by an arbitrator under the provisions of Arbitration and Conciliation Act and thereafter, an appeal is also maintainable under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter ' the Arbitration Act'). Thus, it is submitted that in the presence of so many statutory remedies already available to the petitioner, no case for interference is made out at this juncture under Article 226/227 of the Constitution of India. When a query was made to the Council regarding the suppression of the fact, Shri Peyush Jain answered that the respondent No.2 had filed a detailed reply before the Facilitation Council and all the facts are mentioned therein. However, it is admitted that the same is not filed along with the petition.

8. Heard the learned Counsel for the parties and also perused the record.

9. On perusal of the record, it is found that admittedly the Facilitation Council, in its impugned order dated 22.09.2020, has relied upon the decision of the NCLT, Mumbai, Bench Mumbai dated 06.03.2017, holding that the NCLT Mumbai has already passed an order of stay. It is also found that the order passed by NCLAT, Delhi dated 31.05.2017 in an appeal filed by the respondent No. 2 was not brought to the notice of the Council even when the case was fixed before the Council on 28.04.2018. However, in the final order dated 22.09.2020, the Council has also noted that on 25.08.2020, Counsel for the respondent No.2 was absent but instead of waiting for the order of the appeal by the NCLAT, Delhi, the Facilitation Council has proceeded to dispose of the case.

10. In the considered opinion of this Court, the aforesaid findings recorded by the Council that NCLT, Mumbai has already stayed the matter, was passed in a haste, in an arbitrary manner, especially when it was also aware that an appeal has also been preferred against the aforesaid order passed by the NCLT, Mumbai, by the respondent No. 2/company itself before the NCLAT, Delhi.

11. This Court is of the considered opinion that the respondent No. 2 was duty bound to inform this fact to the Council that the appeal has already been allowed and the order of NCLT Mumbai which provided that no further suit or proceeding shall commence against the respondent No. 2, has already been set aside.

12. The Supreme Court, in the case of United India Insurance Company Ltd. (supra) has held as under:-

"4. For a High Court in India to say that it has no power even to consider the contention that the awards secured are the byproducts of stark fraud played on a Tribunal, the plenary power conferred on the High Court by the Constitution may become a mirage and peoples faith in the efficacy of the High Courts would corrode. We would have appreciated if the Tribunal or at least the High Court had considered the plea and found them unsustainable on merits, if they are meritless. But when the Courts pre-empted the Insurance Company by slamming the doors against them, this Court has to step in and salvage the

situation.

11. Thus the Tribunal refused to open the door to the appellant Company as the High Court declined to exercise its writ jurisdiction which is almost plenary for which no statutory constrictions could possibly be imposed. If a party complaining of fraud having been practised on him as well as on the court by another party resulting in a decree, cannot avail himself of the remedy of review or even the writ jurisdiction of the High Court, what else is the alternative remedy for him? Is he to surrender to the product of the fraud and thereby become a conduit to enrich the imposter unjustly? Learned Single Judge who indicated some other alternative remedy did not unfortunately spell out what is the other remedy which the appellant Insurance Company could pursue with.

12. No one can possibly fault the Insurance Company for persistently pursuing the matter up to this court because they are dealing with public money. If they have discovered that such public fund, in a whopping measure, would be knocked off fraudulently through a fake claim, there is full justification for the Insurance Company in approaching the Tribunal itself first. At any rate the High Court ought not have refused to consider their grievances. What is the legal remedy when a party to a judgment or order of court later discovered that it was obtained by fraud?

13. In S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagnnath (dead) by Lrs. & ors. {1994 (1) SCC 1} the two Judges Bench of this Court held:

"Fraud avoids all judicial acts, ecclesiastical or temporal- observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decreed- by the first court or by the highest court-has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

(emphasis supplied)

13. In such circumstances, taking note of the material suppression of facts, this court is of the considered opinion that a case for interference under Art.227 is indeed made out by the petitioner. So far as the availability of alternative remedy as provided under Section 19 of the MSMED Act is concerned, it cannot not be termed as an efficacious statutory remedy in the circumstances as the application under Section

18 of the MSMED Act was filed by the petitioner in respect of non-payment of his claims by the respondent No. 2 and in the challenge proceedings under s.19 of the MSMED Act, the petitioner was not required to pay any amount as provided under Section 19 of the MSMED Act and thus it also not a case where to circumvent the rigour of s.19 of the MSMED Act, the petitioner has filed this petition. Needless to say that the aforesaid proceedings would certainly have

taken sufficiently long time to conclude, and then there is a provision of appeal also under Section 37 of the Arbitration Act before this court with the only result that the case would be remanded back to the Council for adjudication of dispute on merits as there is no order on merits as of now. In such circumstances, the remedy of appeal cannot be said to be an efficacious one.

15. Resultantly, the petition stands allowed and the impugned order dated 22.09.2020 passed by the respondent No.1 is hereby quashed. The matter is remanded back to the respondent No.1, Council with a further direction to decide the lis between the parties in accordance with the law by passing a reasoned and speaking order as expeditiously as possible. The parties are also directed to be present before the respondent No.1 Facilitation Council, Bhopal on 01.02.2022.

Certified copy, as per rules.