(2024) 05 J&K CK 0027

In the Jammu And Kashmir High Court

Case No : Criminal Miscellaneous Case (M) No. 320, 322 Of 2023

Union Territory Of J&K And Another APPELLANT

Vs

Zain Steel Engineering Works RESPONDENT

Date of Decision : 03-05-2024

Acts Referred:

Constitution Of India, 1950 — Article 226
Jammu And Kashmir Micro Small And Medium Enterprises Facilitation Council Rules, 2017 — Rule10(4)
Micro, Small And Medium Enterprises Development Act, 2006 — Section 7(1), 15, 16, 17, 18, 18(1), 18(2)
Arbitration And Conciliation Act, 1996 — Section 31, 34

Citation : (2024) 05 J&K CK 0027

Hon'ble Judges : Sindhu Sharma, J

Bench : Single Bench

Advocate : Ilyas Nazir Laway, Fayeem Nisar Shah, Azhar Ul Amin

Judgement

Sindhu Sharma, J

1. Petitioners, in these two petitions seek quashing of award Nos. MSEFC-K/18 of 2021 and MSEFC-K/23 of 2021 dated 20.04.2021, passed by Secretary, Micro and Small Enterprises Facilitation Council (MSEFC)Kashmir Division, Srinagarin cases titled 'InnayatullahKhateeb, M/s Zain Steel Engineering Works I/E Barzulla, Sanat Nagar Budgam vs. Executive Engineer Electric Division Special Sub-Division Tangmarg' and 'M/s Indian Steel and Metal Industries vs. Executive Engineer Electric Division Awantipora'and alsoorder dated 13.06.2023, passed by the Court of Additional District Judge (Bank Cases) Srinagar in cases titled 'Zain Steel Engineering Works vs. Chief Engineer M& RE Wing &anr.' and 'M/s Indian Steel and Metal Industries vs. Chief Engineer M& RE Wing &anr.'

2. The relevant facts as stated in the petitions are that M/S Zain Steel Engineering Works filed an application before Micro and Small Enterprises Facilitation Council under the provisions of MSME Act, 2006 regarding the delayed payment to them under the provisions of Section 18(1) of the Delayed

Payment. The respondents claimed to have supplied the goods/services rendered to Assistant Executive Engineer as per their Work order/Agreement 160-61/ SSDT, SSDT/301-4 dated 06.05.2016, 10.11.2018 and that the goods/services rendered by M/s Inayatullah Khateeb to Assistant Executive Engineer and Invoice No. 11, 608 dated 23.05.2016, 12.11.2018 generated and made available by the supplier to the buyer. The petitioner failed to make payment to the supplier within 45 days from the day of acceptance.

3. The Council on 08.07.2020, advised the petitioner to pay the due amount of Rs. 10,96,700/- within 15 days of receipt of notice failing which the case would be registered by MSEFC Srinagar. Thereafter, the petitioner received a communication on 17.08.2020 of reference regarding delayed payment. The reference along with supporting documents were forwarded to the petitioner for authentication and also to furnish details within a period of seven days. Thereafter, the petitioner received an order dated 27.08.2020 from Secretary MSEFC (Joint Director I&C) Kashmir for mutual settlement under conciliation provisions of Micro Small and Medium Enterprise Development Act 2006. The petitioner received another order dated 17.11.2020 from Secretary MSEFC for mutual settlement under conciliation provisions of Section 18(2) of MSME Act. The Secretary MSEFC on 20.04.2021, passed an award of Rs. 10,20,700/-along with compound interest and the Executing Court vide the impugned order has attached all the accounts operated by the petitioner except salary account.

4. M/S Indian Steel and Metal Industries in CM(M) No. 322/2023 also approached the Micro and Small Enterprises Facilitation Council Kashmir regarding recovery of payment for delayed payment of goods supplied/services rendered by virtue of work order SICOP/MM/18-19/480/1375-77 dated 27.10.2018 and SICOP/ MM/18-19/479/1378-80 dated 27.10.2018, and invoice No. SICOP/788 and SICOP/803 dated 27.12.2018 and 31.12.2018 for an amount of Rs. 71,91,902/-.

5. MSEFC vide its communication dated 06.07.2020, on the reference regarding delayed payment directed the petitioners to release the delayed payment in favour of MSME (the supplier) and furnish the details in this regard. The Secretary, MSME passed an order dated 17.11.2020 for mutual settlement under the conciliation proceedings under Section 18(2) of the Act. It is submitted that there was no further communication between the parties till the award on 20.04.2021 was passed by the Secretary, MSEFC for an amount of Rs. 71,91,902/- along with compound interest in favour of the respondent. The petitioners failed to make the payment to the suppliers in both cases within 45 days from the day of acceptance or the day of deemed acceptance as per provisions of Section 15 of The Micro, Small and Medium Enterprises Development Act, 2006.

6. In both the cases, on 20.04.2021, award directing payment of amount along with interest was passed. This was sent for execution to the Court of learned Additional District Judge, Srinagar. The award waspassed in both the cases for Rs. 10,20,700/- and Rs. 71,91,902/- along with compound interest in favour of

the respondents and the Executing Court vide its order dated 13.06.2023, directed attachment of all accounts operated by the petitioners and judgment debtors excluding salary accounts and considering huge pendency of arrears also directed that all official vehicles of the department be attached RTO Srinagar.

7. The petitioners are aggrieved of the impugned award as well as order of the Executing Court in both these petitions on the ground that the same has been passed contrary to the mandate of MSME Act and without hearing the parties to the dispute and, as such, the same is liable to be set aside.

8. Learned counsel for the petitioners submits that the award passed under The Micro, Small and Medium Enterprises Development Act, 2006 does not conform to the requirement of an Award passed under the Act. The Council in terms of Section 18 of the Act was under an obligation to firstconciliate the matter between the parties and in case, the conciliation proceedings did not succeed then the arbitration proceedings between the parties were to be conducted by the council in terms of Arbitration and Conciliation Act, 1996. It is also submitted that the order dated 20.04.2021, which is sought to be executed is not a award in accordance with law, and the Executing Court without considering this fact has erroneously proceeded in the matter and attached the accounts of the respondents vide order dated 13.06.2023, and it being against the principle of law, as such, the award as well as order is required to be set aside.

9. Learned counsel for the respondents have opposed the submissions of learned counsel for the petitioners stating that the writ petitions are not maintainable as there is an alternate efficacious remedy available to the petitioners under Section 34 of theArbitration and Conciliation Act, 1996 to challenge the award passed by the Council. It is further submitted that as per MSME Act, the order passed by the Council is an award and before the award could be challenged, there is a mandatory direction of deposit of 75% of the awarded amount in terms of Rule-10 Sub-Rule-4 of the Jammu & Kashmir Micro Small and Medium Enterprises Facilitation Council Rules, 2017.

10. It is submitted that the petitioners have admitted their liability which is subject matter of the award and payment due to not disputed, there is no requirement of the council to refer the matter for arbitration and for passing an arbitral award. The award has been passed in terms of Section 31 of Arbitration and Conciliation Act and execution of the same was being rightly proceeded by the Executing Court. The only objections raised is with regard to the fact that the order dated 20.04.2021 is not an award, therefore, the same could not have been executed by the Executing Court. The issue at hand is whether the order dated 20.04.2021 is an award and if the same is an award, the same could be executed by the Executing Court.

11. The issue raised in this petition is covered by Chapter-V of MSMED Act, which relates to the delayed payment to Micro and Small Enterprises. Section 15 is regarding liability of buyer to make payment. Section 16 is regarding payment of

interest. Section 17 is regarding recovery of amount due and Section 18 is regarding reference to MSEFC.

Section 18 reads as under: -

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 (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 shall either itself take up the dispute for arbitration or refer it toany 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.

12. Section 18, thus, would be applicable when there is a dispute with regard to payment between the buyer and the supplier. The supplies made by the respondent are not disputed and there is no dispute with regard to the payment to be made to the respondent. Therefore, reference could not have been made by the Council. A reference under Section 18(2) of the Act could only be made by an aggrieved party to the Council when there is dispute with regard to the amount due under Section 17 of the Act. The supply as well as payment due is not disputed, therefore, Section 16 would apply and the amount become payable along with interest as envisaged under Section 16 of the Act.

13. The Council did not proceed as per mandate of Section 15 to 18 of the Act, therefore, all the proceedings are vitiated and since the petitioner proceeded as per the provisions of Chapter V as per Section 15 and 16, therefore, the petition

would invoice the jurisdiction under Article 226 of the Constitution of India. The petition, as such, is maintainable. Since the liability is admitted, payment due to respondent is not disputed, therefore, the petitioners are directed to pay the amount due to the respondents along with interest as envisaged under Section 16 of the Act within a period of six weeks.

14. This Court in Union Territory of J&K and another vs Aibak Electric Industries (CM(M) No. 287/2023),has held as under:-

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.

23. 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.

11. In view of the aforesaid facts and circumstances, the orders passed by the MSEFC is against the provisions of the Act and are not an award, therefore, the same could not have been sent to the Court for execution. The impugned orders are accordingly quashed and petitioners have admitted the liability and are directed to pay the same within a period of six weeks along with interest in terms of the Act.

