**(2024) 11 GUJ CK 0002**

**Gujarat High Court**

**Case No:** Special Civil Application No. 15406 of 2024

| | |
|---|---|
| Kendriya Bhandar, Central Government Employees Consumer Cooperative Society Limited | APPELLANT |
| Vs | |
| Vs State Of Gujarat & Ors. | RESPONDENT |

**Date of Decision:** Nov. 18, 2024

**Acts Referred:**

- Micro, Small and Medium Enterprises Development Act, 2006 - Section 15, 16, 18(2), 18(3), 19
- Arbitration And Conciliation Act, 1996 - Section 5, 34, 37
- Constitution of India, 1950 - Articles 226, 227

**Hon'ble Judges:** Aniruddha P. Mayee, J

**Bench:** Single Bench

**Advocate:** Avinash Desai, Pranav Munigela, Kopal Sharraf, Arjun M Joshi, Nidhi Vyas, S N Soparkar, Vatsal S Parikh

**Final Decision:** Dismissed

**Judgement**

Aniruddha P. Mayee, J

1. The present Special Civil Application is filed praying for the following reliefs:-

â€œ12(A) That this Honâ€™ble Court may issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order

or direction, to set aside the Arbitral Award No.17 of 2024 dated 10.06.2024 passed by Respondent No.2, bearing No.MSME-

D/MSEFC/DP-4671/822/2 accepting Respondent No.3â€™s claim against the Petitioner (Annexure A).

(B) Pending the hearing and until the disposal of this petition, this Honâ€™ble Court may stay the operation, implementation and execution

of the Arbitral Award No.17 of 2024 dated 10.06.2024 passed by Respondent No.2, bearing No.MSME-D/MSEFC/DP-4671/822/2

accepting Respondent No.3â€™s claim against the Petitioner (Annexure A).

(C) For ad interim ex parte relief in terms of Paragraph (B) above.â€

2. The brief facts in the present case are that by G.O.RT. No.837 dated 24.12.2018, the Government of Telengana (Agriculture & Cooperation

Department) nominated the petitioner Society as a nodal agency for supply of various items to government institutions in the State of Telengana. That

the primary object of the petitioner was to supply the requisite edible/non-edible commodities exclusively to all the government departments under

Central/State and its agencies/institutions all over the country through its registered manufacturers/ millers/traders/wholesalers with nominal margins.

That the petitioner registers such vendors who propose to supply such commodities as are required by the petitioner. That the petitioner does not

directly undertake supply or delivery of any such goods and primarily acts as a conduit/intermediary between the user department and the registered

vendors with the petitioner. That the respondent No.3 herein is a registered vendor with the petitioner. That the respondent No.4 herein is a dealer in

the present transaction who has supplied the products of the respondent No.3. It is the case of the petitioner that the respondent No.3 entered into a

Memorandum of Understanding [â€œMOUâ€ for short] with the petitioner for supply of agricultural implements for the Farmers Welfare Programme

in the State of Telengana. That the petitioner placed supply orders to the respondent No.3 for certain agricultural implements which were delivered to

the dealer for being sold to the beneficiaries i.e. the farmers in the State of Telengana. That the payment terms in respect of the supply orders was

categorically stated in the MOU. That a total of 11,261 machines were supplied by the respondent No.3 to the dealer i.e. the respondent No.4 through

the petitioner. As per the MOU, once the respondent No.4 made the payment to the petitioner (i.e. the non-subsidy portion), such payment were

forwarded to the respondent No.3 in accordance with the MOU. That the petitioner was in no manner receiving or handling the goods by itself and

was only mediator between the respondent No.3 and the respondent No.4.

3. That the respondent No.3 raised an arbitral claim from the said transaction of supply of goods to the dealer through the petitioner for a total amount

of Rs.101,19,05,250/- out of which, the non-subsidy amount of Rs.60,71,43,150/- was already paid to the respondent No.3 as and when paid by the

dealer i.e. the respondent No.4 to the petitioner. Therefore, the claim of the respondent No.3 before the respondent No.2 Facilitation Council was for

an outstanding amount of Rs.41,86,98,166/- i.e. the subsidy portion. That the conciliation proceedings took place between July and November 2023

under Section 18(2) of the Micro, Small and Medium Enterprises Development Act, 2006 [â€œMSMED Actâ€ for short]. Since the conciliation

proceedings did not fructify, the same came to be terminated and the claim was referred to arbitration under Section 18(3) of the MSMED Act by

order dated 22.12.2023. That thereafter hearings came to be held and the impugned order dated 7.8.2024 came to be passed against the petitioner

directing it to pay Rs.41,86,98,166/- to the respondent No.3 claimant towards principal amount and Rs.29,70,66,757/- towards interest till 31.5.2024. It

was further directed that the petitioner shall pay additional interest to cover the period from 1.6.2024 upto the date of realisation at the same rate as

per Sections 15 and 16 of the MSMED Act. Aggrieved by the award, the petitioner has filed the present Special Civil Application under Articles 226

and 227 of the Constitution of India.

4. Mr. Avinash Desai, learned Senior Counsel appearing for the petitioner submits that the impugned award is completely perverse, grossly violative of

the principles of natural justice and has been passed without application of mind and is, therefore, patently illegal requiring interference of this Court. It

is submitted that the petitioner is a cooperative society and acts solely as a intermediator to facilitate transactions and supply of goods as per the

requirement of Central/State Government employees and employees of subsidiary/autonomous organizations. He submits that the impugned award is

passed in complete violation of the principles of natural justice and is entirely unreasoned and a non-speaking award and is further vitiated by the fraud

played by the respondent No.3 rendering it completely perverse, which the award on the face of it fails to examine and consider. He submits that the

failure of the respondent No.2 Facilitation Council to examine the allegation of fraud and consequently the MOU is a gross failure to exercise its

jurisdiction which goes to the root of the matter and results in absolute miscarriage of justice. He submits that the respondent No.2 Facilitation Council

has entirely failed to look into the documents produced by the respondent No.3 along with its rejoinder which has caused prejudice to the petitioner

herein. He submits that the respondent No.2 Facilitation Council has not even considered that all the supply orders state that the payment terms shall

be as per the MOU. He submits that the MOU was allegedly fabricated and/or its employees were pressurized to sign the same has not been

considered by the respondent No.2 Facilitation Council and thereby virtually accepting the respondent No.3â€™s allegation entirely without any

application of mind. It is submitted that the respondent No.2 Facilitation Council ought to have examined the contents of the MOU, affidavit of the

petitioner so filed and the allegation of fraud being raised and it ought to have directed the parties to lead evidence. However, the same has not been

done resulting into miscarriage of justice. He submits that the respondent No.2 Facilitation Council has incorrectly held that the Section 15 of the

MSMED Act overrides the agreed and fundamental condition of a contract i.e. to make the payment as and when received by the petitioner from the

Government of Telengana. He submits that the payment could not have become due unless the payment is made by the Government of Telengana to

the dealers which the respondent No.2 Facilitation Council has failed to appreciate. He submits that Section 15 of the MSMED Act has been

erroneously applied to override the fundamental condition of the contract rendering it completely perverse, opposed to the principles of public policy

and contrary to law, in addition to being in contravention of the provisions of the Act. He submits that the respondent No.2 Facilitation Council has

incorrectly concluded that the condition of back to back payments was amended by the petitioner itself from time to time, whereas the correspondence

on record unequivocally states that the payments shall be made once released by the Government of Telengana. He submits that therefore the

respondent No.2 Facilitation Council has arrived at an incorrect conclusion which goes to the root of the matter as there was no such amendment to

the agreed conditions. He submits that the respondent No.2 Facilitation Council has further failed to appreciate that the petitioner at the best qualified

as a â€œsupplierâ€ under the MSMED Act as the petitioner acts as a stockist and is in no manner â€œbuyerâ€ as contemplated under the provisions

of the MSMED Act. The said factum has not been considered by the respondent No.2 Facilitation Council. He further submits that there is a criminal

conspiracy and collusion amongst the respondent Nos.3 and 4 as the authorized representative of the respondent No.3 and the Directors of the

respondent No.4 are related to each other and through this mutual understanding and collusion, they have successfully induced the petitioner and other

entities into entering into MOUs with them. He submits that the fraud is also played by the respondent No.3 in denying the execution of the agreement

which forms the base of the contract.

4.1 In support of his contentions, Mr. Avinash Desai, learned Senior Counsel for the petitioner has relied upon the judgment of the Apex Court in case

of Vijeta Construction v. Indus Smelters Ltd. & Anr. - 2021 SCC Online SC 3436 wherein it has been held that â€œthe Facilitation Council has the

jurisdiction to make a thorough inquiry and take evidence once the arbitration proceeding commences as per the provisions of Section 18(3) of the Act

and it has all the power of the arbitrator as available under the provisions of the arbitrationâ€. The learned Senior Counsel for the petitioner has also

relied on another judgment of the Apex Court in case of Jharkhand Urja Vikas Nigam Limited v. State of Rajasthan & Ors. - (2021) 19 SCC 206

wherein it has been held that â€œthe award is nullity if it runs contrary to the provisions of the MSMED Act and also to the various mandatory

provisions of the Arbitration & Conciliation Act. It is not an arbitral award in the eyes of law and when such an award is passed without recourse to

arbitration or in utter disregard to the provisions of Arbitration & Conciliation Act, 1996, Section 34 of the said Act will not applyâ€. The learned

Senior Counsel for the petitioner therefore submits that the present writ petition be allowed and the impugned award be set aside.

5. Per contra, Mr. Saurabh Soparkar, learned Senior Counsel appearing for the respondent No.3 submits that as per the provisions of the MSMED

Act, the respondent No.2 Facilitation Council has initiated the conciliation proceedings. After various meetings, the conciliation proceedings were

declared unsuccessful and therefore, the Facilitation Council initiated arbitration proceedings under Section 18(3) of the MSMED Act. The Facilitation

Council afforded due hearing to the petitioner, opportunity was granted to the petitioner to put forth its case and after giving due hearing to both the

parties, the respondent No.2 Facilitation Council has passed the impugned award. He submits that the impugned award is in conformity with the

provisions of the MSMED Act. He further submits that the impugned award deals with all the contentions raised by the parties. Further, admitted

position is that the petitioner has supplied the goods as required and directed, however, no payment was made by the petitioner for the goods so

supplied. He submits that the respondent No.3 was well within its right to invoke the provisions of MSMED Act to recover its outstanding dues. He

further submits that the present writ petition under Articles 226 and 227 of the Constitution of India is not maintainable. He submits that the statute

provides for remedy under Section 34 of the Arbitration & Conciliation Act, 1996. He submits that the present writ petition has been filed only with a

view to obviate all the requirements of pre-deposit as contemplated under Section 19 of the MSMED Act and entertaining the present writ petition

would defeat the object and purpose of the special enactment. He submits that in view of the alternative efficacious remedy available to the petitioner,

the present writ petition ought not to be entertained as the same is not maintainable and is liable to be dismissed.

5.1 In support of his contentions, Mr. Saurabh Soparkar, learned Senior Counsel for the respondent No.3 has relied upon the judgments of the Apex

Court in case of Nivedita Sharma v. Cellular Operators Association of India & Ors. - (2011) 14 SCC 337, Bhaven Construction Through authorized

Signatory Premjibhai K. Shah v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. & Anr. - 2021 SCC Online SC 8 and M/s. India Glycols

Limited v. Micro and Small Enterprises Facilitation Council, Medchal â€" Malkajgiri â€" 2023 (0) AIJEL-SC 73009 wherein it has been held that

â€œthe remedy available under the statute ought to be availed and the rule of self-imposed restraint in entertaining the writ petition on availability of

alternative remedy has to be implemented unless exceptional circumstance or bad faith has been demonstrated to invoke remedy under Articles 226

and 227 of the Constitution of India.â€ He submits that in the present case, no such exceptional circumstance has been pointed out for exercise of writ

jurisdiction. In the present case, the writ petition is not maintainable and is liable to be dismissed.

6. Heard learned Senior Counsels for the parties and perused the documents on record.

7. In the present case, dealing with the issue of maintainability of the writ petition under Articles 226 and 227 of the Constitution of India as raised by

the learned Senior Counsel for the respondent, the law in this regard is well settled. It is trite law that the High Court will ordinarily not entertain the

petition under Article 226 of the Constitution of India, if an effective remedy is available to the aggrieved person and this rule applies with a greater

rigour in the matters involving recovery of dues. Time and again, it has been held that the High Court must keep in mind that the legislations which are

enacted by the Parliament and State legislature for recovery of dues are code unto itself inasmuch as they not only contain comprehensive procedure

for recovery of the dues, but also envisage constitution of quasi-judicial bodies for redressal of grievance of any person. Such procedures are

mandatory by the statute to ensure quick recovery of the dues. Therefore, in such cases, the insistence should be that of exhausting the remedies

available under the relevant statute before availing the remedy under Articles 226 and 227 of the Constitution of India. When a particular legislation

contains a detailed mechanism for redressal of grievance in respect of the recovery of the dues, the High Court should follow the rules of self-imposed

restraint evolved by the Apex Court to issue any writs or entertain the petition under Article 226 of the Constitution of India as it would amount to

obviating the procedure under the statute. The rule of exhaustion of alternative remedy is a rule of discretion which has to be exercised with greater

caution, care and circumspection.

8. In case of Nivedita Sharma v. Cellular Operators Association of India & Ors. - (2011) 14 SCC 337, the Apex Court has held thus:

â€œ11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue

directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under

Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation L. Chandra Kumar

v. Union of India (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the

Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its

agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to

say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course

ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is

created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

12. In Thansingh Nathmal v. Superintendent of Taxes AIR 1964 SC 1419, this Court adverted to the rule of self-imposed restraint that writ

petition will not be entertained if an effective remedy is available to the aggrieved person and observed:

â€œ7. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and

does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is

open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner

provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery

created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.â€

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa (1983) 2 SCC 433, this court observed:

â€œ11. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the

remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New

Waterworks Co. v. Hawkesford (1859) 6 CBNS 336 : 141 ER 486 in the following passage:

â€™â€¦ There are three classes of cases in which a liability may be established founded upon a statute â€¦â€¦. But there is a third class,

viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for

enforcing it. â€¦. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to

cases of the second class. The form given by the statute must be adopted and adhered to.â€™

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. 1919 AC 368 :

(1918-19) All ER Rep. 61 (HL) and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant

and Co. Ltd 1935 AC 532 and Secy. of State v. Mask and Co. (1939-40) 67 IA 222 : AIR 1940 PC 105. It has also been held to be equally

applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing

the writ petitions in limine.â€

14. In Mafatlal Industries Ltd. v. Union of India (1997) 5 SCC 536, B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench)

observed:

â€œ77. So far as the jurisdiction of the High Court under Article 226 or for that matter, the jurisdiction of this Court under Article 32 is

concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while

exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions

of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.â€

16. It can, thus, be said that this Court has recognised some exceptions to the rule of alternative remedy. However, the proposition laid

down in Thansingh Nathmal v. Superintendent of Taxes (supra) and other similar judgments that the High Court will not entertain a petition

under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the

action complained of has been taken itself contains a mechanism for rederssal of grievance still hold field.â€

8.1 In case of Bhaven Construction Through Authorised Signatory Premjibhai K. Shah v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. &

Anr. - 2021 SCC Online SC 8 it has been held thus:-

â€œ18. It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under

the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear

â€˜bad faithâ€™ shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the

arbitration fair and efficient.

19. In this context we may observe M/s. Deep Industries Limited v. Oil and Natural Gas Corporation Limited, (2019) SCC Online SC 1602,

wherein interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analyzed as under:

â€œ15. Most significant of all is the non-obstante clause contained in Section 5 which states that notwithstanding anything contained in any

other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this

Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory

mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act)

16. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against

orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At

the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section

5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments

allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the

same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed

which are patently lacking in inherent jurisdiction.â€

8.2 In case of M/s. India Glycols Limited v. Micro and Small Enterprises Facilitation Council, Medchal â€" Malkajgiri â€" 2023 (0) AIJEL-SC 73009,

it has been held thus:

â€œ10 In terms of Section 19, an application for setting aside an award of the Facilitation Council cannot be entertained by any court

unless the appellant has deposited seventy-five per cent of the amount in terms of the award. In view of the provisions of Section 18(4),

where the Facilitation Council proceeds to arbitrate upon a dispute, the provisions of the Act of 1996 are to apply to the dispute as if it is in

pursuance of an arbitration agreement under sub-section (1) of Section 7 of that Act. Hence, the remedy which is provided under Section 34

of the Act of 1996 would govern an award of the Facilitation Council. However, there is a super added condition which is imposed by

Section 19 of MSMED Act 2006 to the effect that an application for setting aside an award can be entertained only upon the appellant

depositing with the Council seventy-five per cent of the amount in terms of the award. Section 19 has been introduced as a measure of

security for enterprises for whom a special provision is made in the MSMED Act by Parliament. In view of the provisions of Section 18(4),

the appellant had a remedy under Section 34 of the Act of 1996 to challenge the award which it failed to pursue.

For the above reasons, we affirm the impugned judgment of the High Court of Telangana dated 21 March 2023 by affirming the finding

that the petition which was instituted by the appellant to challenge the award of the Facilitation Council was not maintainable, in view of the

provisions of Section 34 of the Act of 1996.â€

8.3 In case of PHR Invent Educational Society v. UCO Bank & Ors. - (2024) 6 SCC 579, it has been held thus:-

â€œ37. It could thus clearly be seen that the Court has carved out certain exceptions when a petition under Article 226 of the Constitution

could be entertained in spite of availability of an alternative remedy. Some of them are thus:

(i) where the statutory authority has not acted in accordance with the provisions of the enactment in question;

(ii) it has acted in defiance of the fundamental principles of judicial procedure;

(iii) it has resorted to invoke the provisions which are repealed; and

(iv) when an order has been passed in total violation of the principles of natural justice.â€

9. In the present case, the learned Senior Counsel for the petitioner could not make out any case in respect of the exceptions which have been carved

out by the Apex Court (supra) when a petition under Article 226 of the Constitution of India could be entertained inspite of availability of alternative

remedy. None of such exceptions occurred in the present case. The contentions of the learned Senior Counsel for the petitioner with respect to the

fraud being perpetrated are bare allegations which are not supported by any document on record except that there being a relation between the

Directors of the respondent No.3 and the respondent No.4 and a collusion between them. No facts are pleaded to establish such averment in the

present writ petition or from the documents on record. In fact, the petitioner only avers in the petition that the petitioner seeks to reserve liberty to take

appropriate legal recourse of institution of criminal proceedings against the respondent Nos.3 and 4 for criminal conspiracy and collusion. Further

more, the amount so claimed by the respondent No.3 before the respondent No.2 Facilitation Council is not disputed by the petitioner herein. It is

contended that the principles of natural justice have not been followed. However, the learned Senior Counsel for the petitioner could not demonstrate

denial of any opportunity of hearing. It would be pertinent to note that conciliation proceedings came to be initiated between the parties in the present

case and upon being declared unsuccessful, the same were then taken into arbitration proceedings. Three hearings have taken place. Nothing has

been placed on record to show or demonstrate that the petitioner was denied any opportunity of hearing. The contentions raised in the writ petition are

akin to the grounds of challenge to the award which can be gone into by the appropriate Court under Section 34 of the Arbitration & Conciliation Act,

1996. In the considered opinion of this Court, the grounds of challenge raised in the present writ petition constitute a challenge to the award on merits,

which cannot be said to be an exception for not availing the alternative efficacious remedy as prescribed under the statute. Further, as held by the

Apex Court, this Court also cannot overlook the fact that the challenge to the award cannot be entertained as it would obviate provisions of Section 19

of the MSMED Act in respect of pre-deposit of 75% of the decreetal amount without carving out an exception in the present case.

10. Further, in the present case, the award also cannot be said to be in utter disregard to the provisions of Arbitration & Conciliation Act, 1996 as the

main thrust of argument of the learned Senior Counsel for the petitioner is that the petitioner Society was only acting as a mediator/facilitator for the

supply of the goods from the manufacturer to the dealer and could make the payment as claimed only upon receipt of the same from the State

Government as per the terms of the agreement. Such an argument is on the merits of the case and can be taken in a proceeding under Section 34 of

the Arbitration & Conciliation Act, 1996 and cannot be said to be an exceptional circumstance.

11. In view of the aforesaid observations, the present writ petition is accordingly dismissed as not maintainable. The petitioner is relegated to avail the

alternative efficacious remedy as available to it under the MSMED Act.

Needless to say that if such remedy is availed then the competent Court shall deal with the case on its own merits and in accordance with law.

It is made clear that this Court has not gone into the merits of the case and no opinion is expressed thereon.

No order as to costs.