

HIGH COURT OF MADHYA PRADESH : JABALPUR

W.P. No.22577/2018

M/s Fives Stein India Project Pvt. Ltd., Kolkata

-Versus-

State of M.P. and others

Single Bench: Hon'ble Shri Justice Vijay Kumar Shukla

Shri Sabyasachi Chowdhary, Advocate Shri V.V.V. Sastry, Shri Tridib Bose and Shri Ritwik Parashar, Advocates for the petitioner.

Shri Vishal Dhagat, Govt. Advocate and Shri Pranay Choubey, Panel Lawyer for the respondents/State.

Shri Rohit Jain, Advocate for the respondent No.3.

<i>Whether approved for reporting ?</i>	Yes.
<i>Law laid down</i>	<p>1. The expression "shall" is not conclusive to determine the provision as directory or mandatory. The Court is required to ascertain the real intention of the Legislature which will include the examination, nature and design of the statute and the consequences.</p> <p>2. In all cases, failure to perform a duty within the time limit, does not render the action a nullity. Where a provision lays down a period within which the public body should perform any function, the provision is merely directory and not mandatory.</p> <p>3. Alternative remedy is not an absolute bar to entertain a writ petition under Article 226 of the Constitution of India, but where a statutory forum and remedy is created by law for redressal of grievances, a writ petition should not ordinarily be entertained.</p>
<i>Significant paragraph Nos.</i>	14, 15, 17 and 18.

ORDER
(Jabalpur, dt. 02-11-2018)

In the instant petition filed under Article 226 of the Constitution of India the petitioner, a company registered under the provisions of the Companies Act, 1956 has challenged the order/award dated 26-11-2014 passed by the Micro and Small Enterprises Facilitation Council [hereinafter referred to as 'the Council'] and notice dated 03-4-2018.

2. Learned counsel appearing on behalf of the petitioner today, produced an authority letter given by Shri Akshay Sapre, Advocate, who has filed the present writ petition stating that because of his ailment, he is unable to attend hearing of the case and he has authorized the advocates, whose names have been mentioned hereinabove, to appear on his authority.

3. Learned counsel appearing for the petitioner, in a nutshell, have raised six points to entertain the present writ petition, despite availability of an efficacious and alternative remedy under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 [for brevity "the Act 2006"]. The *first* point raised is that the award has not been passed within the statutory mandatory period of 90 days from the date of

commencement of the reference and, therefore, the impugned order/award is a nullity lacking jurisdiction. *Secondly*, that the Rule 5 of the M.P. Micro and Small Enterprises Facilitation Rules, 2006 [hereinafter referred to as 'the Rules 2006'] does not and cannot have any application, as the Rule 5 of the Rules 2006 cannot have any application beyond the territory of the State of Madhya Pradesh. *Third*, since there was no termination of purported conciliation proceedings in terms of the provisions of Section 76 of the Arbitration and Conciliation Act, 1996 [for short 'the Act'], assumption of jurisdiction by the respondent-authority as an arbitral Tribunal and the action of the respondent-authority thereon, suffers from inherent lack of jurisdiction, therefore, the order dated 26-11-2014 is a nullity and cannot have the bearing of an arbitral award. *Fourth*, objection of the petitioner before the respondent No.2 was not decided and the Council proceeded. *Fifth*, there was delay on the part of the respondent No.3 to initiate execution of the impugned award/order. *Sixth*, execution of the impugned award of a private party cannot be made by way of public demand.

4. To bolster their submissions on the aforesaid points, learned counsel appearing for the petitioner has referred the judgments of the Apex Court rendered in the cases of **State of Uttar Pradesh vs. Singhara Singh and others, AIR 1964 SC 358;**

Balasinor Nagrik Co-operative Bank Limited vs. Babubhai Shankerlal Pandya and others, AIR 1987 SC 849 = (1987) 1 SCC 606; Agriculture Finance Co. Ltd. vs. Micro and Small Enterprises Facilitation Council, 2013 SCC OnLine Cal 22786: (2013) 5 CHN 375 [W.P. No.18318(W) of 2012, decided on 12-6-2013. Further, a judgment passed by the Bombay High Court in the case of **Gujarat State Petronet Ltd. vs. Micro and Small Enterprises Facilitation Council, 2018 SCC OnLine Bom 2039 [W.P. No.5459/2015, decided on 6-8-2018]** was also placed reliance upon.

5. The respondent No.3 has filed a short return raising preliminary objections regarding maintainability of the writ petition. He has raised the objection that the petition suffers from delay and laches, as the award was passed on 26-11-2014 and the present writ petition has been is filed only when the demand notice is issued for recovery. The other objection is regarding suppression of the fact that the petitioner has filed an application under Section 9 of the Act before the City Civil Court at Calcutta before filing of the writ petition, but the said fact has not been disclosed in column (2) of the writ petition. A declaration has been made that no proceeding on the same subject-matter has been previously instituted. Thus, the petition suffers from suppression material facts and is liable to be

dismissed. It is also contended that after the proceedings were closed by the respondent No.2 – Council, the petitioner appeared and participated in the proceedings and, therefore, he has waived his right to challenge the aforesaid proceedings.

6. In addition to the aforesaid submissions and the objections, counsel for the respondents vehemently argued regarding availability of an alternative efficacious remedy of filing an appeal under Section 19 of the Act 2006. The writ petition has been filed in order to circumvent the requirement of deposit of 75% in terms of Section 90 of the Act and, therefore, the present petition cannot be entertained, as the petitioner has not deposited 75% of the demand notice. It was also argued that in case the petitioner wishes to get the matter adjudicated in the writ petition, the petitioner has to deposit 75% of the demand. In support of his contention he referred to the order dated 18-6-2018 passed by a Co-ordinate Bench of this Court in the case of **M/s Rajasthan State Ganganagar Sugar Mills v/s M/s S.N.M. Enterprises, Kheriya in W.P. No.11683/2018.**

7. The learned counsel for the respondents also addressed this Court on the points raised by the petitioner. As regards the argument advanced by the counsel for the petitioner that since the award dated 26-11-2014 is a nullity, therefore the same can be

challenged in the writ petition, the counsel for the respondents submitted that the said contention can be raised under the provisions of Section 19 of the Act 2006, and unless the condition of the pre-deposit is complied with by the petitioner, the same cannot be appreciated. In regard to first point of non-compliance of the provisions of Section 18 of the Act 2006 it is submitted that the petitioner could have raised the aforesaid point along with objections at the relevant point of time. Since the same was not raised, therefore, he waived his rights to raise the said issue. In regard to the contention that the objection of the petitioner was not decided, it is submitted that the petitioner did not agitate the aforesaid non-decision of the objection before the appropriate forum. Even in the application filed under Section 9 of the Act before the District Court, Kolkata no stay was granted, and now the same relief is being sought for before this Court, suppressing the aforesaid material facts, therefore, the same do not deserve consideration. In regard to non-observance of the provision of Section 76 of the Act it is submitted that Section 24 of the Act 2006 overrides all other statutory provisions. It is further stated that the aforesaid point was also not raised at the relevant time and the same can be agitated only after compliance of the statutory pre-deposit in terms of Section 19 of the Act 2006. With respect to the point raised by the counsel for the petitioner regarding delay in execution of the

award, it is stated that the respondents had already written to the Council for execution and there was no delay and he had taken all steps therefor.

8. To substantiate his contention, learned counsel for the respondent placed reliance upon the judgment passed by the Karnataka High Court in the case of **M/s Crompton Greaves Ltd. vs. M/s Annapurna Electronics and others [W.P. No.12465/2010, decided on 20-8-2013]** which has also been affirmed by the Supreme Court. In regard to the submissions of the counsel for the petitioner that the District Magistrate has no jurisdiction under Rule 5 of the MSME Rules of M.P., as it cannot extend outside the territorial jurisdiction of Madhya Pradesh, he relied on the judgment passed by the Apex Court reported in the case of **Power Machines India Limited vs. State of Madhya Pradesh and others, (2017) 7 SCC 323.**

9. In regard to the first submission of the counsel for the petitioner that the award in question is a nullity in view of the provisions of Act 2006 as the award has not been passed within the stipulated period of 90 days from the date of commencement of the reference. Mere use of word “shall” under Section 18 of the Act

2006 would not make the aforesaid period as mandatory and would not render the decision/award as a nullity.

10. The mere fact that the statute uses the expression “shall” is not conclusive of the fact that as to whether the provision is directory or mandatory. In the cases of **Hari Vishnu Kamath vs. Ahmad Ishaque, AIR 1955 SC 233; Banwarilal Agarwalla vs. State of Bihar, AIR 1961 SC 849; Collector of Monghyr vs. Keshav Prasad Geonkar, AIR 1962 SC 1694; and Municipal Corporation of Greater Bombay vs. The B.R.S.T. Workers Union, (1973) 3 SCC 546**, it is ruled that the Court is required to ascertain the real intention of the Legislature which will include the examination, nature and design of the statute, the consequences which would follow from construing it one way or the other and whether the object of the legislation would be defeated or furthered by a particular construction.

11. The time limit to do an act falls broadly in two categories - when an obligation is cast on a party or a litigant to take an action within the time prescribed, such cases will be like the cases to file statement of defence under the CPC.

12. In the case of **Salem Advocate Bar Association, T.N. vs. Union of India, (2005) 4 SCC 344**, the Supreme Court held that keeping in view the provisions of the CPC introduced by way of amendment in the year 1999, the use of the word “shall” in the Order VIII Rule 1 of the CPC by itself is not conclusive to determine whether the provision is mandatory or directory.

13. In the case of **Dr. J.J. Merchant and others vs. Shrinath Chaturvedi, (2002) 6 SCC 635** and **New India Assurance Company Limited Vs. Hilli Multipurpose Cold Storage Private Limited, (2015) 16 SCC 22** it is held that there is a legislative mandate that written statement of defence is to be filed within 30 days. In case of **M/s Crest Steel and Power Private Limited and others vs. Punjab National Bank and others PNB [M.P. No.2271/2018, decided on 10-5-2018]** a Division Bench of this Court held that the filing of written statement by the borrower was held to be mandatory within the stipulated period provided under the provision of the Recovery of Debts and Bankruptcy Act, 1993.

14. Another set of cases is where the time-limit is not for the party to perform but for a public Authority to conclude the proceedings. Where a provision of law lays down a period within

which the public body should perform any function, that provision is merely directory and not mandatory. In this regard reference may be made to the decisions rendered in the cases of **Dr. Ram Singh Saini Vs. Dr. H.N. Bhargava, (1975) 4 SCC 676** and **Karnal Improvement Trust, Karnal vs. Parkash Wanti and another, (1995) 5 SCC 159.**

15. Since there is no consequence provided in the statute that in case of not passing of the award within the period prescribed or even the extended period, the proceedings will stand abated. Therefore, the contention of the counsel for the petitioner that since the award has not been passed within the stipulated period is nullity, cannot be accepted.

16. The other contention that Rule 5 of the Rules 2006 does not and cannot have application beyond the territory of the State of Madhya Pradesh. In the case of **Power Machine India Ltd. vs. (supra)** the Apex Court has considered the validity of Rule 5 of the M.P. Rules 2006 wherein it was contended that the said rule is *ultravires*, arbitrary and violative of Article 14 of the Constitution of India and is repugnant to the provision of the Arbitration and Conciliation Act 1996 and the provisions contained in Section 18 of the 2006 Act. It was also contended that it is beyond the rule

making powers conferred under Sections 21 and 30 of the Act 2006. The contention was raised that once provisions of the Code of Civil Procedure [for brevity 'the CPC'] had been made applicable, recovery could have been initiated only under Order 21 of the CPC, which provides adequate safeguard to the judgement-debtor. The Apex Court considered the provision of the Act 2006 which has been enacted for benefit of micro, small and medium enterprises. The object of the Act 2006 is to provide facilities of promotion and development and enhance competitiveness of micro, small and medium enterprises and the matter connected therewith and incidental thereto. The Rule 5 of the Rules 2006 has been framed in exercise of powers conferred by the State Government to frame rule under Section 30 of the Act 2006 which enables the State Government to make rules. The rule has been held to be *intra-vires*.

17. In view of the aforesaid enunciation of law, the contentions of the learned counsel for the petitioner that the award in the present case is a nullity, cannot be accepted. In regard to the submission that recovery under Rule 5 of the Rules 2006 cannot have any application beyond the territory of the State of M.P. and therefore, the same is without jurisdiction. The said contention sans merit.

18. The contention of the learned counsel for the respondent No.3 that the petitioner has suppressed the fact of filing an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the City Civil Court at Calcutta and, therefore, the petition is liable to be dismissed on the said ground cannot be accepted. In para 5.8 of the petition, the said fact is stated. Merely because the same is not mentioned in column No.2 of the petition, it cannot be held that there was any intentional omission or suppression to mislead the Court.

19. Learned counsel appearing for the petitioner referred various decisions to contend that availability of an alternative efficacious remedy under Section 19 of the Act 2006 is not an absolute bar to entertain the writ petition under Article 226 of the Constitution of India. There cannot be any dispute to the aforesaid proposition of law settled by the Apex Court in numerous judgments that availability of alternative, efficacious and statutory remedy is no bar to exercise powers under Article 226 of the Constitution of India by this Court. However, in cases where an alternative efficacious statutory remedy is provided and the statutory provision itself requires an appeal to be filed along with pre-deposit of certain percentage of the amount. Submission of the learned counsel for the for the petitioner that in all such cases a writ petition can be

entertained where the award/order is without jurisdiction or a nullity, cannot be accepted as a rule, as doing so would render the statutory provision of law otiose and migratory. The powers of this Court can and may be exercised in exceptional circumstances and facts.

20. The law relating to an alternative efficacious remedy, can be summarised as follows:

(i) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: **Nivedita Sharma vs. Cellular Operators Assn. Of India**, (2011) 14 SCC 337).

(ii) In **CIT vs. Chhabil Dass Agrawal**, (2014) 1 SCC 603, this Court held that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

(iii). In **Cicily Kallarackal vs. Vehicle Factory**, (2012) 8 SCC 524, this Court issued a direction of caution that it will not be a proper exercise of the jurisdiction by the High Court to entertain a writ petition against such orders against which statutory appeal lies before this Court.”

21. Since the present writ petition deserves to be dismissed on the ground of availability of alternative and efficacious remedy, therefore, the other contentions raised by the counsel appearing for the parties are not considered. However, the petitioner will be at liberty to avail the alternative remedy in accordance with law.

22. *Ex-consequenti*, the **writ petition stands dismissed**. No order as to costs.

(Vijay Kumar Shukla)
Judge

ac.