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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (Art. 227) No.699 of 2015

Order reserved on: 18-10-2016

Order delivered on: 25-11-2016

M/s. I.C.S.A. (India Limited), Through Managing Director, I.C.S.A. (India Limited), R/o Plot No.12, Software Units Lay Out, Cyberabad, Hyderabad - 500 081, presently through executive namely N. Venkata Chalam, S/o Satyanarayana Murthy, aged about 36 years, Executive of ICSA (India) Limited, Plot No.12, Software Units Layout, Cyberabad, Hyderabad (Telangana State).

(Non-applicant)

---- Petitioner

Versus

M/s. Swastik Wires, Through Kirti Jain, Managing Director, Industrial Area Bhanpuri, Post Birgaon, Tahsil and District Raipur (C.G.)

(Applicant)

---- Respondent

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For Petitioner: Mr. Raghavendra Pradhan and Mr. Shikhar Sharma, Advocates.
For Respondent: Mr. B.P. Sharma and Mr. Raza Ali, Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. The Micro and Small Enterprises Facilitation Council constituted under Section 20 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short 'the Act of 2006') arbitrated the arbitrable dispute between the parties and delivered an award on 12-3-2014 granting Rs.80,02,528/- in favour of the respondent herein and against the petitioner herein/defendant.

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2. Feeling aggrieved against the award passed by the Facilitation Council, the petitioner defendant filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act of 1996') before the District Court, Raipur, but the petitioner defendant did not deposit the mandatory deposit under Section 19 of the Act of 2006, therefore the learned District Judge on 14-7-2015 directed for deposit of 75% of the award amount and further directed that till the amount is deposited, the proceedings shall remain in abeyance and that order has attained finality as it has not been sought to be challenged by the petitioner till it is denied. Execution was levied by the respondent herein. The petitioner herein filed two applications, one under Order 7 Rule 11 read with Section 151 of the CPC stating inter alia that since the petitioner Company has been declared sick industry, no execution is maintainable. Second application was filed under Section 151 of the CPC that since the application under Section 34 of the Act of 1996 for setting aside the award is pending consideration, therefore, by virtue of Section 36 of the Act of 1996, execution of the award shall remain suspended automatically. The learned District Judge by its impugned order rejected both the applications feeling aggrieved against which this writ petition under Article 227 of the Constitution of India has been filed by the petitioner.

3. Mr. Raghavendra Pradhan, learned counsel appearing for the

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petitioner, would submit as under: -

1. The learned District Judge has committed legal error in not properly appreciating the fact that once an application under Section 34 of the Act of 1996 is filed, by virtue of Section 36 of the Act of 1996, proceeding for execution shall stand automatically suspended.
2. The petitioner Company is a sick industry and by virtue of the provisions contained in Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short 'the SIC Act'), execution proceedings cannot proceed against a sick industry / petitioner as held by the Supreme Court in the matter of **LML Ltd. v. Union of India and others**[1].

4. Mr. B.P. Sharma, learned counsel appearing on behalf of the respondent decree holder, would submit as under: -

1. The provisions of Section 36 of the Act of 1996 would not be applicable in the instant case, as the Act of 2006 has overriding effect over the provisions contained in Section 34 of the Act of 1996. Therefore, the execution would continue as it has an overriding effect over the provisions of the Act of 1996 as well as the SIC Act and Section 19 of the Act of 2006 is mandatory.
2. In alternative, Mr. B.P. Sharma submits that unless 75% mandatory deposit is made, the application under Section

1 (2014) 13 SCC 375

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34 of the Act of 1996 filed by the petitioner herein is not maintainable and therefore, unless application under Section 34 of the Act of 1996 is duly constituted by mandatory deposit as required under Section 19 of the Act of 2006, the provisions of Section 36 of the Act of 1996 are not attracted and the order of the District Judge suspending the proceeding of Section 34 of the Act of 1996 for non-compliance of Section 19 of the Act of 2006 has not been challenged and same has become final and as such, the writ petition has no merit and deserves to be dismissed.

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5. I have heard learned counsel for the parties and cautiously analysed the submissions made therein and also gone through the records with utmost circumspection extensively.

6. After hearing learned counsel for the parties, following two questions arise for consideration: -

   1) Whether mere filing of execution under Section 34 of the Act of 1996 for setting aside the award passed under the Act of 2006, the execution filed under Section 36 of the Act of 1996 would stand suspended or Section 19 of the Act of 2006 would prevail over the Act of 1996 and 75% of the deposit under Section 19 of the Act of 2006 is mandatory to make an application under Section 34 of the Act of 1996 maintainable?

   2) Whether in view of the objection filed under Section

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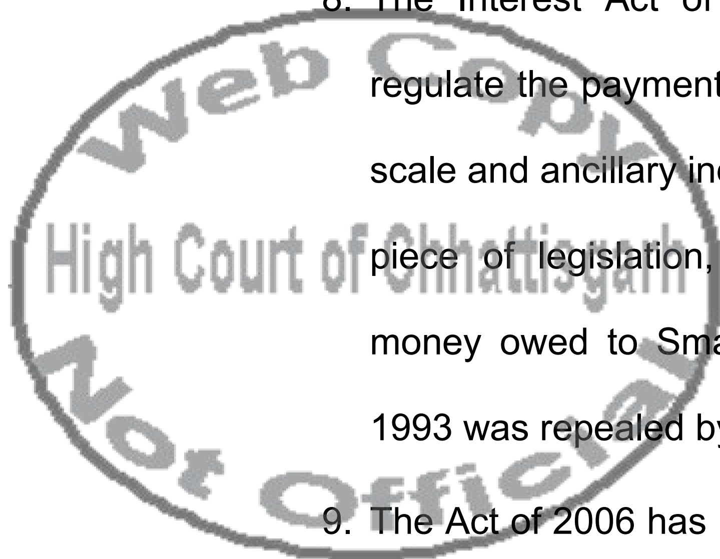
22(3) of the SIC Act by the petitioner, the executing court has no jurisdiction to execute the award?

Re. Question No.1

7. In order to consider the plea raised at the Bar, it would be appropriate to consider the provisions contained in the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (for short 'the Interest Act of 1993') which was repealed by Section 32 of the Act of 2006.



8. The Interest Act of 1993 was enacted to provide for and regulate the payment of interest on delayed payments to small scale and ancillary industrial undertakings as it was a beneficial piece of legislation, tended to expedite timely payment of money owed to Small Scale Industries. The Interest Act of 1993 was repealed by the Act of 2006.

9. The Act of 2006 has been enacted to provide for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto. It is a central enactment which came into force on 2-10-2006. The Act of 2006 is intended to provide single legal framework to small and medium enterprises' sector by intending to make further improvements to the Interest Act of 1993 and to ensure timely and smooth flow of credit to small and medium enterprises as well as minimising the incidence of sickness among them.

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10. Chapter V of the Act of 2006 provides for the consequences and remedies for delayed payments to Micro and Small Enterprises. Section 15 of the said Act provides for the liability of the buyer to make payment to the supplier within the stipulated period. Section 16 enables the supplier to claim compound interest from the buyer on delayed payment notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force. Section 17 provides for recovery of amount due for any goods supplied or services rendered by the supplier along with interest thereon as provided under Section 16. Section 18 enables the party to the dispute with regard to any amount due under Section 17 to approach the Council in reference, the Council upon such reference shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services, upon conciliation initiated not being successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration. The Arbitration and Conciliation Act, 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 the Act of 2006. Sub-section (4) of Section 18 of the Act of 2006 confers

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jurisdiction on the Council, notwithstanding anything contained in any other law for the time being in force 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. Section 19 provides for moving an application for setting aside decree, award or order which reads as follows: -

> "**19. Application for setting aside decree, award or order**.—No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:
>
> Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose."

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11. A careful perusal of the aforesaid provision would clearly state that no application for setting aside any decree or award or order made by the Council constituted under Section 20 of the Act of 2006 shall be entertained by any court unless the

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appellant therein has deposited 75% of the amount in terms of the decree or award, as the case may be, or the other order in the manner indicated by the High Court. Thus, the requirement of depositing 75% of the amount is mandatory to entertain the application for setting aside the award. Proviso to Section 19 empowers the court to pass appropriate order with respect to disbursement of the amount to the supplier on the condition as it considers reasonable under the circumstances of the case. Therefore, deposit of 75% of the amount is mandatory and court has the discretion to indicate the manner of depositing 75% of the amount and it can be in installments, if required.

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12. The Supreme Court in the matter of **Snehadeep Structures Private Limited v. Maharashtra Small-Scale Industries Development Corporation Limited**[2] while dealing with the Interest Act of 1993 also considered Section 19 of the Act of 2006 and held in paragraph 58 that Section 19 of the Act requires the deposit to be made before an application under Section 34 of the Arbitration is filed. Similarly, the Supreme Court in the matter of **Goodyear India Limited v. Norton Intech Rubbers Private Limited and another**[3] has relied upon **Snehadeep Structures Private Limited** (supra) and has held that court has no discretion to either waive or reduce the amount of 75% of award as a predeposit for filing of

2 (2010) 3 SCC 34
3 (2012) 6 SCC 345

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application/appeal, however, court has direction to allow predeposit to be made in installments, if required, while considering the phrase “in the manner directed by such court” employed in Section 19 of the Act of 2006.

13. Thus, the condition of predeposit of 75% while filing an application for setting aside an award is mandatory in nature and only the manner of deposit can be directed by the court hearing the application for setting aside the award passed by the Facilitation Council constituted under Section 20 of the Act of 2006.

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14. At this stage, it would be appropriate to notice Section 24 of the Act of 2006 which provides as under: -

> “**24. Overriding effect.**—The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

15. Section 24 of the Act of 2006 is a *non obstante* clause. According to "Principles of Statutory Interpretation", 12th Edition 2010, a clause beginning with 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force', is sometimes appended to a section in the beginning, with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision or Act mentioned in the *non obstante* clause. It is equivalent to saying that in spite of the provision or Act mentioned in the *non*

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obstante clause, the enactment following it will have its full operation or that the provisions embraced in the *non obstante* clause will not be an impediment for the operation of the enactment. Thus, a *non obstante* clause may be used as legislative device to modify the ambit of the provision or law mentioned in the *non obstante* clause or to override it in specified circumstances.

16. Way back, in the matter of **Union of India and another v. G.M. Kokil and others**[4], the Supreme Court has considered the nature and effect of *non obstante* clause by holding it as a legislative device and observed as under: -

> "A non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions."

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17. Similar is the proposition laid down in the matter of **State of Bihar and others v. Bihar Rajya M.S.E.S.K.K. Mahasangh and others**[5] in which the Supreme Court has held in paragraphs 45 to 47 as under: -

> "45. A *non obstante* clause is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision in the same or other Act mentioned in the *non obstante* clause. It is

4 1984 (Supp) SCC 196
5 (2005) 9 SCC 129

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equivalent to saying that in spite of the provisions of the Act mentioned in the *non obstante* clause, the provision following it will have its full operation or the provisions embraced in the *non obstante* clause will not be an impediment for the operation of the enactment or the provision in which the *non obstante* clause occurs. (See Principles of Statutory Interpretation, 9th Edn., by Justice G.P. Singh -- Chapter V, Synopsis IV at pp. 318 and 319.)

46. When two or more laws or provisions operate in the same field and each contains a *non obstante* clause stating that its provision will override those of any other provisions or law, stimulating and intricate problems of interpretation arise. In resolving such problems of interpretation, no settled principles can be applied except to refer to the object and purpose of each of the two provisions, containing a *non obstante* clause. Two provisions in same Act, each containing a *non obstante* clause, require a harmonious interpretation of the two seemingly conflicting provisions in the same Act. In this difficult exercise, there are involved proper considerations of giving effect to the object and purpose of two provisions and the language employed in each. (See for relevant discussion in para 20 in Sarwan Singh v. Kasturi Lal[6].)

47. Normally the use of a phrase by the legislature in a statutory provision like "notwithstanding anything to the contrary contained in this Act" is equivalent to saying that the Act shall be no impediment to the measure (see Law

6 (1977) 1 SCC 750

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> Lexicon words "notwithstanding anything in this Act to the contrary"). Use of such expression is another way of saying that the provision in which the *non obstante* clause occurs usually would prevail over other provisions in the Act. Thus, *non obstante* clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all obstructions which might arise out of the provisions of any other law in the way of the operation of the principal enacting provision to which the *non obstante* clause is attached. (See Bipathumma v. Mariam Bibi[7], Mys LJ at p. 165.)"

18. Recently, in the matter of **JIK Industries Ltd. v. Amarlal V. Jumani**[8] it has been held by the Supreme Court that the insertion of a non obstante clause is a well-known legislative device and in olden times it had the effect of non obstante aliquo statuto in contrarium (notwithstanding any statute to the contrary). Under the Stuart reign in England the Judges then sitting in Westminster Hall accepted that the statutes were overridden by the process but this device of judicial surrender did not last long. Under the scheme of the modern legislation, non obstante clause has a contextual and limited application. The impact of a "non obstante clause" on the Act concerned must be kept measured by the legislative policy and it has to be limited to the extent it is intended by Parliament and not

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7 (1966) 1 Mys LJ 162
8 (2012) 3 SCC 255

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beyond that.

19. Nature and effect of non obstante clause as held in **G.M. Kokil's** case (supra) has been followed with approval by the Supreme Court very recently in the matters of **State (NCT of Delhi) v. Sanjay**[9] and **Laxmi Devi v. State of Bihar**[10].

20. The Act of 2006 is a Special Act and as per the provisions of Section 24 of the said Act, the provisions of Sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, Section 18/19 of the Act of 2006 would have overriding effect on any other law for the time being in force including the Act of 1996 and therefore if there is any dispute between the parties governed by the Act of 2006, the said dispute is to be resolved only through the procedure as provided under Section 18 of the Act of 2006.

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21. Thus, by virtue of Section 24 of the Act of 2006, it is quite vivid that the Act of 2006 does not provide for any mechanism for enforcement of the award. Therefore, the award has to be enforced under the provisions of the Act of 1996 as mandated by Section 18 of the Act of 2006.

22. Section 36 of the Act of 1996 provides that the award enforceable upon expiry of time provided for making an application to set aside arbitral award under Section 34 or upon such application having been made, it has been refused,

9 (2014) 9 SCC 772
10 (2015) 10 SCC 241

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the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court.

23. The Allahabad High Court in the matter of **U.P. Rajya Karmchari Kalyan Nigam v. District Judge, Kanpur Nagar and others**[11] while considering Section 7 of the Interest Act of 1993, which also provides for the mandatory deposit of 75% of amount awarded, it has been held that the provisions of Section 34 of the Act of 1996 would have to be read along with the provisions of Section 7 of the Interest Act of 1993. Therefore, the requirement of mandatory deposit of 75% of the amount awarded is a condition precedent for entertaining the application for setting aside the award under the Act of 1996.

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24. A Division Bench of the M.P. High Court in the matter of **R.S. Avtar Singh and Co. v. Vindyachal Air Products Pvt. Ltd. and another**[12] has also held that deposit of 75% in the manner directed by the Court is mandatory requirement for entertaining an application for setting aside the award.

25. Similarly, the Supreme Court in the matter of **Snehadeep Structures Private Limited** (supra) has clearly held that deposit of 75% of the award amount in terms of Section 7 of the Interest Act of 1993 is the condition precedent for hearing an application under Section 34 of the Act of 1996 and further held that the word "appeal" appearing in Section 7 of the Interest Act of 1993 is referring to application filed under

11 AIR 2013 Allahabad 77
12 2009(3) M.P.L.J. 392

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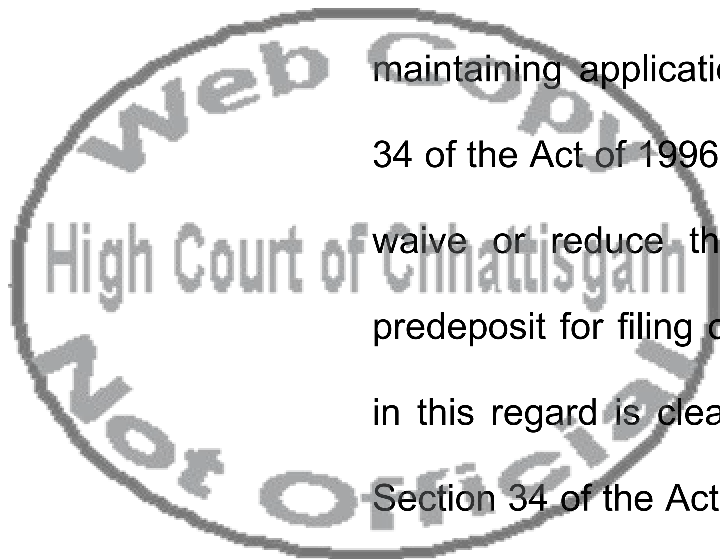
Section 34 of the Act of 1996 and the word "award" includes the arbitral award. It was also held that the Interest Act of 1993 governing small scale industries is a special enactment in order to protect the industries and would have overriding effect.

26. As noticed herein-above, in **Goodyear India Limited** (supra), Their Lordships of the Supreme Court have relied upon **Snehadeep Structures Private Limited** (supra) and did not approve the order of the High Court and held that predeposit of 75% under the Act of 1996 is the condition precedent for maintaining application to set aside the award under Section 34 of the Act of 1996, only the Court has no discretion to either waive or reduce the amount of 75% of the award as a predeposit for filing of application or appeal. Thus, legal view in this regard is clearly crystallised that the application under Section 34 of the Act of 1996 would be maintainable for setting aside the award passed by the Micro and Small Enterprises Facilitation Council constituted under Section 20 of the Act of 2006 but while filing an application, the appellant has to deposit 75% of the amount in terms of the award in the manner indicated by such court and as such, the application under Section 34 of the Act of 1996 challenging the award passed by the Facilitation Council has to be read along with Section 19 of the Act of 2006 and in order to make the application under Section 34 of the Act of 1996 maintainable and duly constituted, a mandatory deposit of 75% of awarded amount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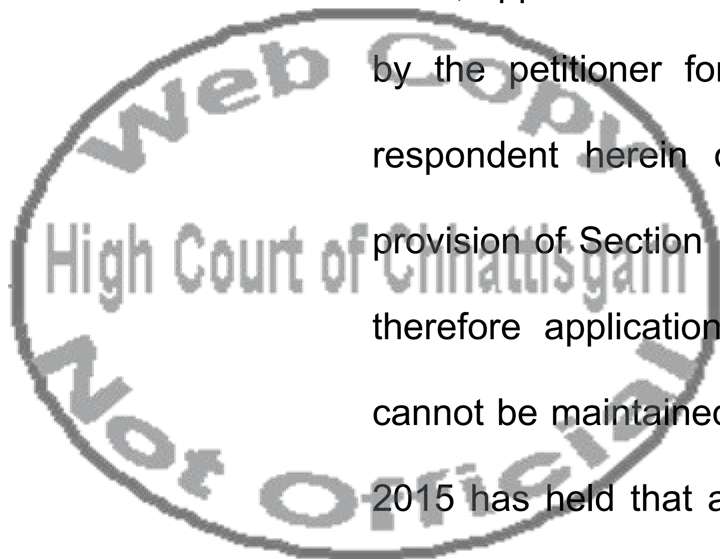
has to be made in the manner directed by the court trying that application.

27. In light of the principles laid down by Their Lordships of the Supreme Court and legal analysis made herein-above, if the facts of the instant case are examined, it is quite vivid that in the present case, the award was passed by the Facilitation Council on 12-3-2014, the respondent herein filed application for execution of award on 21-8-2014 and thereafter on 19-2-2015, application under Section 34 of the Act of 1996 was filed by the petitioner for setting aside the award in which the respondent herein objected that compliance of mandatory provision of Section 19 of the Act of 2006 has not been made therefore application under Section 34 of the Act of 1996 cannot be maintained. The trial Court by its order dated 14-7-2015 has held that application of the petitioner under Section of the Act of 1996 is not entertainable as the mandatory deposit (75% of the award as mandated under Section 19 of the Act of 2006) has not been made. That order has attained finality and that has not been challenged by the petitioner herein. The objection raised before the trial Court was that in view of the pendency of application, award passed by the Facilitation Council cannot be executed. As held herein-above, application for setting aside the award passed by the Facilitation Council, filed under Section 34 of the Act of 1996 has to be read along with Section 19 of the Act of 2006 and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unless while filing such application, 75% of the award amount is predeposited, the application for setting aside the award filed under Section 34 of the Act of 1996 would not be entertainable and maintainable. The trial Court has already held that the petitioner's application under Section 34 of the Act of 1996 is not maintainable for want of prerequisite deposit under Section 19 of the Act of 2006 as such, the award is clearly executable, as the petitioner's application under Section 34 of the Act of 1996 is not duly constituted and not liable to be entertained, and rightly held so by the trial Court and the petitioner's application has rightly been rejected by the trial Court.

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Re. Question No.2

28. This would bring me to the next objection raised by the petitioner that the petitioner industry has been declared as a sick industry under the provisions of the SIC Act. Therefore, by virtue of the provisions contained in Section 22(3) of the SIC Act, the award is not executable and the execution proceeding deserves to be dropped. The award of the Facilitation Council being an award deemed to have been made under the Act of 1996, is executable under Section 36 of the said Act.

29. The Supreme Court in the matter of **Jay Engineering Works Ltd. v. Industry Facilitation Council and another**[13] has held that once the awarded amount is included in the scheme

13 (2006) 8 SCC 677

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approved by the Board, Section 22 of the SIC Act would apply.

30. Very recently, in the matter of **Ghanshyam Sarda v. Shiv Shankar Trading Company and others**[14], the Supreme Court has held that the SIC Act is a self-contained code and has conferred upon BIFR complete supervisory control over a sick industrial company to adopt such methodology as provided in Chapter III for detecting, reviving or winding up such sick company. The authority to determine the existence and extent of sickness of such company and to adopt methodology for its revival are, in the exclusive domain of BIFR and by virtue of Section 26 there is an express exclusion of the jurisdiction of the civil court in that behalf. The Supreme Court further held as under in paragraph 30: -

> "30. As laid down by this Court the Act is a complete code in itself. The Act gives complete supervisory control to BIFR over the affairs of a sick industrial company from the stage of registration of reference and questions concerning status of sickness of such company are in the exclusive domain of BIFR. Any submission or assertion by anyone including the company that by certain developments the company has revived itself and/or that its net worth since the stage of registration having become positive no such scheme for revival needs to be undertaken, must be and can only be dealt with by BIFR. Any such assertion or claim has to be made before BIFR and only upon the satisfaction of BIFR that a sick

14 (2015) 1 SCC 298

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> company is no longer sick, that such company could be said to have ceased to be amenable to its supervisory control under the Act. The aspects of revival of such company being completely within its exclusive domain, it is BIFR alone, which can determine the issue whether such company now stands revived or not. The jurisdiction of the civil court in respect of these matters stands completely excluded."

31. In light of the principles laid down herein-above, if the facts of the present case are examined, it is quite vivid that the petitioner has simply said that the petitioner industry is a sick industry, it has not been demonstrated that whether the awarded amount has been included in the scheme approved by the BIFR. Section 26 of the SIC Act bars the jurisdiction of the civil court, as held by the Supreme Court in **Ghanshyam Sarda** (supra).

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32. Therefore, the petitioner's plea in regard to applicability of the SIC Act is not complete in itself, rather halfhearted, it has neither been established that the awarded amount has been included in the scheme approved by the BIFR nor it has been shown how the civil court has jurisdiction in view of Section 26 of the SIC Act and the judgment rendered by the Supreme Court in **Ghanshyam Sarda** (supra).

33. As a fallout and consequence of aforesaid discussion, I hold that the learned executing court is absolutely justified in rejecting the objections raised by the petitioner herein in

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execution and no error of jurisdiction has been committed while rejecting those objections raised by way of applications. This Court is of the considered opinion that this writ petition under Article 227 of the Constitution of India has no merit and deserves to be and is accordingly, dismissed leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (Art. 227) No.699 of 2015

M/s. I.C.S.A. (India Limited)

Versus

M/s. Swastik Wires

HEAD NOTE

Requirement of depositing 75% of award amount under Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006, is mandatory in nature.

सूक्ष्म, लघु और मध्यम उद्यम विकास अधिनियम, 2006 की धारा 19 के अंतर्गत अवार्ड राशि का 75% जमा करने की आवश्यकता आज्ञापक प्रकृति की है।

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