# Research notes on
# Micro, Small and Medium Enterprises (MSME) Judgments

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**Allahabad High Court**

(BEFORE ARUN TANDON, J.)

M/s. B.H.P. Engineers Pvt. Ltd.

*Versus*

Director, Industries, U.P. (Facilitation Council), Kanpur & Ors.

Civil Misc. Writ Petition No. 23264 of 2009

Decided on May 19, 2009



**ORDER**

**1.** Heard Sri Navin Sinha, learned Senior Advocate assisted by Sri Syed Ali Murtaza, learned counsel for the petitioner, Sri. P.N. Saxena, learned Senior Advocate assisted by Sri Uma Nath Pandey, learned counsel for, respondent No. 3, and learned Standing Counsel for the State respondents.

**2.** Petitioner before this Court is a private small scale industrial unit covered under the provisions of the Micro, Small, and Medium Enterprises Development Act, 2006 (hereinafter referred to as the 'Act, 2006'). Petitioner is engaged in manufacturers of engineering equipments and is stated to have entered into a contract with respondent No. 3, M/s. Jay Pee Enterprises for execution of the certain work contract. There exists a dispute between the petitioner and respondent No. 3 qua nature of the work performed under the aforesaid contract. As a consequence thereto, there is a dispute with regard to payment of money in terms of the contract between the parties. Respondent No. 3, who claims itself to be an Enterprise covered by the provisions of Act, 2006, filed a claim petition before the Industries Facilitation Council, U.P. at Kanpur (for short 'Council'), which was numbered as Claim Petition No. 09 of 2004, claiming a sum of Rs. 9,99,548/- with interest at the rate of 15%, under the provisions of Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act, 1993 (hereinafter referred to as the 'Act, 1993'). Claim petition was contested by the petitioners and they pleaded a counter claim for sum of Rs. 61,90,000/-. Matter was heard and before orders could be passed, Act, 1993 was repealed and substituted by the provisions of Act, 2006 (Micro, Small and Medium Enterprises Development Act, 2006). Despite the enforcement of the Act, 2006, the Council constituted under Act, 1993 proceeded to make an award in the matter dated 19th June, 2007. Petitioner not being satisfied filed writ petition No. 55675 of 2007 before this Court. The writ petition was allowed vide judgement and order dated 19th November, 2007 and the award made by the Council dated 19th June, 2007 was set aside with following observations:

> "Counsel for the parties agree that in such a situation the award may be set aside and the matter may be directed to be heard afresh by respondent No. 2. U.P. State Micro and Small Enterprises Facilitation Council, Kanpur which may consider

all the objections of the petitioner, including his objection regarding jurisdiction of respondent No. 2 and the counter claim filed by the petitioner. Parties would be permitted to raise all contentions and objections available to them under the law before the respondent No. 2.

In view of the aforesaid position, this writ petition is allowed. The award dated 19-6-2007 passed by the respondent. No. 2 is set aside. The respondent No. 2 shall try to decide the case expeditiously and if possible within a period of four rnonths from the date a certified copy of this order is filed before it by either of the parties."

**3.** The matter was thereafter heard by the Council constituted under Act, 2006 and an award has been made on 4th December,



2008 in favour of respondent No. 3, wherein a total sum of Rs. 16,81,860/- (principal amount Rs. 8,46,387/- plus interest Rs. 8,35,473/-) till the date of award along with future Interest in accordance with the Act on the principal amount till the entire amount with interest is liquidated. A sum of Rs. 15,000/- has also been provided as the cost of the case. It is against this award that the present writ petition has been filed.

**4.** Learned counsel for the parties agree that the writ petition may be decided finally at this stage of the proceedings without calling for any further affidavits, in view of the fact that only legal issues have been raised in the present writ petition and no factual controversy is to be examined. Accordingly with the consent of the parties the matter has been heard today by the Court.

**5.** The award of the Council dated 4th December, 2008 is being questioned before this Court basically on the ground that under the impugned award it has been recorded that the counter claim set up by the petitioner cannot be examined in view of the fact that the arbitration as referred was conferred to the subject matter of recovery of the amount due to the respondent No. 3 i.e. M/s. J.P. Enterprises covered by the provisions of Act, 2006 and no other issue except claim of such Enterprises can be examined by the Arbitrators.

**6.** A specific issue No. 6 was framed by the Council in respect of the counter claim set up by the petitioner and it has been answered under the impugned award as follows:

"6. Whether the council has jurisdiction to entertain and decide the counter claim set up by the respondent?

The respondent has claimed Rs. 61,90,000/- by way of counter claim and has also given the particulars & details of the above amount. Micro, Small and Medium Enterprises Development Act 2006 empowers the council to consider and decide the references made under Section 18 of Act 27/2006 which is evident from chapter V of the said Act, section 17 specifically deals with recovery of amount due to the Micro, Small and Medium Enterprises only. In this reference it is relevant to mention that the Council has been made under the provisions of the Act 27/2006 for the particular purposes and object and only to facilitate the SSI units. What disputes can be settled by the Council is well defined in the Act itself as mentioned earlier. As argued by the Petitioner council has no jurisdiction to hear the counter claim, counter claim is adjudicated by civil court or other arbitration as per agreement, this council has only jurisdiction to hear and adjudicate the matter regarding payments to the supplies which were made to the buyer as per Section 17 of the Micro, Small and Medium Enterprises Development Act 2006 and not to

decide all the dispute between the parties and also stated that no debit notes ever raised by the respondent and on the contrary to it respondent has acknowledged their liability to pay petitioner a sum of Rs. 2,54,259.90 instead of due payment of Rs. 9,60,648 along with interest. The above argument has certainly force under the provisions of the Act. The Council has very limited jurisdiction and the Act never empower the Council to consider and decide the counterclaim of buyer. Hence the council holds that counter claim set up by the respondent is liable to be rejected."

**7.** Learned counsel for the petitioner submits that non-consideration of the counter claim of the petitioner is based on misreading of the provision of Act, 2006, read with the Arbitration and Conciliation Act, 1996, which provides for, set of, being claimed (counter claim) in arbitral proceedings. It is, therefore, submitted that the impugned award is patently illegal.

**8.** On behalf of the respondents, a preliminary objection has been raised on the ground that the petitioner has two alternative remedies (a) by making an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act, 1996') for setting aside the abitral award and (b) by way of appeal under Section 37 of Act, 1996 against the order deciding the issue No. 6, which virtually amounts to an order of the Arbitral Tribunal, holding that the counter claim is outside the scope of the dispute and therefore the order is referable to Section 16(3) of Act, 1996 which is appealable under Section 37(2) of Act, 1996.

**9.** In the alternative, it is contended that since the arbitral proceedings are under the Act of 2006, the scope of of arbitration is limited to the dispute, which has been referred as per Section 18 of Act, 2006 and no other issue beyond the said reference can be examined by the Arbitrator/The authority of the Council is limited to the adjudication



of the reference made under Section 18 of Act, 2006. It is therefore, contended that the award made by the Arbitral Council holding that it has no jurisdiction/authority to entertain the counter claim, is based on true and correct reading of Section 18 of Act, 2006.

**10.** I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present writ petition.

**11.** Preliminary issue with regard to the efficacious statutory alternative remedies being available to the petitioner, may be examined first.

**12.** For appreciating the aforesaid controversy raised between the parties, it is worthwhile to reproduce to Section 18 of Act, 2006 and Sections 16, 34 and 37 of Act, 1996, which read as follows:

ACT. 2006

"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 subsection (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 conduction 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 lip the dispute for arbitration or refer it to any 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.

Act. 1996

34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains, decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing, such agreement, was not in accordance with this Part; or

(b) the Court finds that—



(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation, — Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under subsection (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

37. Appealable orders.—(1) An appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) granting or refusing to grant any measure under Section 9;

(b) setting aside or refusing to set aside an arbitral award under Section 34,

(2) An appeal shall also lie to a court from an order of the arbitral tribunal—

(a) accepting the plea referred to in subsection (2) or sub-section (3) of Section 16: or

(b) granting or refusing to grant an interim measure under Section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall effect or take away any right to appeal to the Supreme Court."

**13.** A bare reading of the aforesaid Section 18 of Act, 2006 would demonstrate that if the Conciliation between the parties under Section 18(2) of Act, 2006 fails, the dispute has to be settled between the parties by way of arbitration under Section 18 (3) of Act, 2006 by the Council or by way of reference to any institution or centre providing due service for such arbitration and in that circumstances, the provisions of Arbitration and Conciliation Act, 1996 would become applicable. Section 18(3) of Act, 2006 further clarifies that the dispute so referred has to be adjudicated, as if the Arbitration was in pursuance to an arbitration agreement referred to in sub-section (1) of Section 7 of the Act of 1996.

**14.** For ready reference Section 7(1) of Act, 2006 reads as follows:

7. Arbitration agreement.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

....."

**15.** The logical consequence of simple reading of Section 18(3) of Act, 2006, in the opinion of the Court is that once the conciliation fails and matter is referred for arbitration, then such proceedings of the arbitration shall be treated to have commenced, as if an arbitration agreement exists between the parties in terms of Section 7(1) of Act, 1996. In respect of arbitration agreement referable to Section 7 (1) of Act, 1996, all the provisions of Act, 1996 including the procedure prescribed under Act, 1996 will be become applicable as a whole.

**16.** It has not been disputed before this Court by the learned counsel for the parties that in arbitral proceedings, based on arbitration agreement referable to Section 7(1) of Act, 2006, counter claim is permissible to be set up by the defendants for opposing the claim.

**17.** It is in this legal ground that the issue of efficacious statutory alternative remedies being available to the petitioner may be now considered by this Court for which reference may be had to Section 16 of Act, 1996, which reads as follows:

"16. Competence of arbitral tribunal to



rule on its jurisdiction.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because, that he has appointed, or participated in the appointment of, an arbitrator,

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."

**18.** A bare reading of Section 16(2)(3) and (5) of Act, 1996 would establish that the arbitrator is required to examine the plea of a matter being outside his jurisdiction and to decide the same before proceeding to make the award. When such order is passed before the award is made, an appeal under Section 37(2) of Act, 1996 has been provided. But in case where the award is made simultaneously while adjudicating upon the issue of a particular matter being outside the scope of the arbitral proceedings, or when the appeal is not filed against the order and final award is made, then the remedy made available to the person aggrieved is under Section 16(6) i.e. by way of an application for setting aside the award as per Section 34 of Act, 1996.

**19.** What follows from the aforesaid Section is that if, an issue with regard to the matter being within or outside the dispute of arbitral proceedings is decided before making of the award by the Arbitrator, then such order to that extent can be challenged under Section 37(2) by way of Appeal by the person aggrieved. But in case the arbitral proceedings are continued even after the issue decided and or the award is made subsequently or simultaneously then the remedy available to the person aggrieved in respect of the aforesaid issue also would be by challenging the award as a whole under Section 34 of Act, 1996. In that circumstance appeal against part of the award, whereunder particular issue with regard to the jurisdiction of the arbitrator to

examine a particular issue, cannot be independently challenged under Section 37 of Act, 1996. Inasmuch as what is contemplated by Section 16(6) is that once is made, all issues decided therein can be challenged by making an application under Section 34 of Act, 1996 as a whole. Therefore, I am of the considered opinion that it is only when during arbitral proceedings, an issue referable to Section 16(2) & (3) of Act, 1996 is decided before making of the award that it can be challenged independently by way of appeal under Section 37 of Act, 1996.

**20.** In the facts of the present case, it is an admitted position that the award has been made simultaneously, while deciding the issue, qua the counter claim being outside the scope of the arbitral proceedings. Therefore, in the opinion of the Court, no remedy under Section 37 of Act, 1996 is available in the facts of the case.

**21.** The other remedy of making an application under Section 34 of Act, 1996 for setting aside the award need be examined now. It is no doubt true that the Hon'ble Supreme Court has held that if the order of the arbitral council is patently illegal, it will be in violation of public policy and can, therefore, be challenged under Section 34 of Act, 1996. (*Reference Oil Natural Gas Corporation Ltd.* v. *SAW Pipes Ltd.*, reported in (2003) 5 SCC 705 : AIR 2003 SC 2629 and *Mcdermott International Inc.* v. *Burn Standard Co. Ltd.* reported in (2006) 11 SCC 181 : (2006 AIR SCW 3276). Therefore, it can be said that a remedy under the provisions of Act, by way of an application under Section 34 for setting aside the award is available. However,



in the facts of the present case the Court is of the considered opinion that the bar of alternative remedy may not be invoked and this Court may not insist upon the petitioner to exhaust the alternative remedy for the following reasons:

> On an earlier occasion, while deciding the Civil Misc. Writ Petition No. 55675 of 2007 in respect of the same dispute, this Court had provided under its judgment and order dated 19th November, 2007 that counter claim set up by the petitioner be also examined by the Arbitral Council. Despite the aforesaid the Arbitral Council has refused to examine the plea of counter claim set up by the petitioner for the reasons, which have been recorded while deciding issue No. 6 as-quoted above. The Court has to examine as to whether in the facts of the present case under the provisions of Act, 2006 consideration of the counter claim in arbitral proceedings initiated under Section 18(3) will be outside the scope of arbitral proceedings or not. This being purely a legal issue based on interpretation of the provisions of Act, 2006, read with Act, 1996, shall effect large number of similar arbitral proceedings, which are initiated under Section 18 of Act, 2006. A pronouncement on the issue by this Court would be in the interest of justice. Therefore, this Court feels that in this case, the issue of counter claim being within the scope of arbitral proceedings before the Arbitral Council under Section 18 of Act, 2006 need to be settled by this Court instead of insisting upon the petitioner to approach the Authority under Section 34 of Act, 1996. Such legal issues need to be settled by the Hon'ble High Court of the State at the earliest possible instead of permitting it to be agitated before authorities below and thereafter being re-examined by this Court, inasmuch as it is in the interest of the parties that the litigation be shortened.

**22.** In view of the aforesaid, I proceed to examine the issue on merits and I hold that exhaustion of statutory remedy in the facts of the present case may not be insisted upon.

**23.** This Court now proceeds to examine the issue on merit. As already noticed

herein above, from the simple reading of Section 18(3) of Act, 2006, it is apparently clear that arbitral proceedings commence after conciliation has failed, and it is to be treated as they are in pursuance to an arbitration agreement between the parties as per subsection (1) of Section 7 of the Act, 1996. Provisions of Act, 1996 will therefore, apply as a whole including the provisions for counter claim. What logically follows is that arbitral proceeding in respect of a dispute, referred to in sub-section (3) of Section 18 by virtue of Section 7(1) of the Act, 1996 would be tried and decided as if a reference made under the provisions of Act, 1996. Since the counter claim can be pleaded by respondent in an arbitral proceedings under Act, 1996, it follows that in arbitral proceedings made under Section 18 of Act, 2006, such counter claim can also be set up before the Arbitral Council by the respondent.

**24.** In view of the aforesaid, the finding recorded in respect of issue No. 6 by the Arbitral Council impugned in the present writ petition cannot be legally sustained as it is based on non-consideration of the specific language of Section 18(3) of Act, 2006 read with Section 7(1) of Act, 1996. As a consequence thereto the award challenged in the present writ petition dated 4th December, 2008 also cannot be legally sustained. The award dated 4th December, 2008 is hereby quashed and the matter is remanded to the Arbitral Council for decision afresh after considering the counter claim set up by the petitioner.

**25.** It is made clear that this Court has not examined the merits of the counter claim set up the petitioner in any manner and it is for the Arbitral Council to examine the same on merits having due regard to the objections, which may be raised in respect thereto by the claimant.

**26.** Proceedings before the Arbitral Council, after remand may be completed in light of the observations made above, at the earliest possible, preferably, within four months from the date a certified copy of this order is filed before it.

**27.** The writ petition is allowed subject to the observations made above.

**28.** Petition allowed.

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**2010 SCC OnLine Bom 2208 : AIR 2012 Bom 178 : (2012) 6 AIR Bom R 670**

**In the High Court of Bombay at Nagpur**

(BEFORE S.A. BOBDE AND MRIDULA BHATKAR, JJ.)

M/s. Steel Authority of India Ltd. and Anr.

*Versus*

Micro, Small Enterprise Facilitation Council, through Joint Director of Industries, Nagpur Region, Nagpur

Writ Petition No. 2145 of 2010

Decided on August 27, 2010

The Judgment of the Court was delivered by

**S.A. BOBDE, J.**:— Rule. Rule returnable forthwith. Heard finally by consent of the parties.

**2.** This is a petition by M/s. Steel Authority of India, questioning the jurisdiction of respondent No. 1 the Micro, Small Enterprises Facilitation Council (hereinafter referred to as "the Council") in entertaining a reference under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "the Act"), in disputes, which have arisen between the petitioners as a buyer of goods from respondent No. 2 M/s. Vidarbha Ceramics Pvt. Ltd, as seller. Respondent No. 2 M/s. Vidarbha Ceramics Pvt. Ltd. (hereinafter referred to as "the Supplier") has supplied certain goods to the petitioners (hereinafter referred to as "the Buyers") under a contract for supply of Fire Clay Refractory Coke-Oven. According to the petitioners, the materials supplied by the supplier were defective and the supplier was, therefore, asked to replace the material. The supplier, apparently, admitted the defects in the material vide communications dated 1.1.2007, 25.1.2007 and 10.2.2007. The supplier, thereafter, issued a notice to the petitioners and invoked clause 22 of the agreement between them and proposed to appoint Justice C.P. Sen (Retired) as Arbitrator to settle the dispute through arbitration. However, in pursuance to clause 23 of the general conditions of contract, the petitioners exercised, its powers and appointed one Mr. S.K. Gulati as an Arbitrator for resolving the disputes between the parties. The Arbitrator issued no



dees to the parties on 09.3.2009 asking them to submit their claim within 21 days. However, on 26.3.2009, the supplier instead of filing the claim submission before the Arbitrator, objected to the arbitration by stating that the matter be either referred to Justice C.P. Sen (Retired) or it should go before the Micro, Small Enterprise Facilitation Council (hereinafter referred to as "the Council") established under the Act. The petitioners declined to enter into another mode of settlement of dispute before the Council since it had already appointed an Arbitrator. On 17.4.2009, the supplier went ahead and filed a reference before the respondent No. 1 Council under Section 18 of the Act. The petitioners filed an objection before the Council contending that the matter cannot be entertained by it in view of the Arbitration and Conciliation Act, 1996.

**3.** In this background, respondent No. 1 Council having decided to proceed with the matter, the petitioners have invoked jurisdiction of this Court for a Writ of Prohibition

restraining the Council from entertaining the reference.

**4.** Mr. K.H. Deshpande, the learned counsel for the petitioners, submitted that the reference under S. 18 of the Act is not tenable in the present case before the Council since there is an arbitration agreement between the parties, which has already been invoked by the petitioners and in fact even by respondent supplier, who has mainly disputed the choice of the Arbitrator. According to the learned Senior Advocate, a reference may be entertained by the Council only where an arbitration agreement does not exist between the parties. He further submitted that there is no inconsistency between the existence of an independent arbitration agreement and the arbitration which the Council is bound to undertake under the Act. In the submission of the learned counsel for the petitioners, the arbitration agreement between the parties could have been ignored only if the Arbitration in pursuant thereof was inconsistent with the provisions of the Act, which has an overriding effect over any law and not in a case such as the present one where there is no inconsistency between the arbitration agreement between the parties and the arbitration is liable to be held in pursuance thereof on one hand and the Arbitration, which may be conducted by the Council under the provisions of S. 18 of the Act, since the arbitration to be conducted by the Council is also required to be conducted under the provisions of the Arbitration and Conciliation Act, 1996. In short, the contention on behalf of the petitioners is that no inconsistency can arise if the arbitration is conducted under the arbitration agreement and the arbitration is conducted by the Council under Section 18 of the Act since both must be conducted under the Arbitration and Conciliation Act, 1996.

**5.** It is further submitted that the scheme under the Act namely Sections 16, 17 and 18 provide only for recovery of a sum allegedly due to the seller, therefore, a party such as a buyer i.e the petitioners are not entitled to invoke that remedy. Hence, according to the learned counsel for the petitioners, the arbitration agreement between the parties, which allows for an adjudication of the claims and counter claims of both the parties, if any, under the provision of the Arbitration and Conciliation Act, 1996 is the only proper remedy.

**6.** It is, therefore, necessary to look into the provisions of the Act. The Act is 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 identical thereto. The Act has enacted special provisions for preventing delayed payments to such enterprises and a special procedure for recovery of the amount due to a supplier is also laid down. Chapter V of the Act contains the special provisions. Section 15 of the Act provides that a buyer is liable to make payment of goods purchased from a micro or small enterprise on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day, which is the 16th day from the day of acceptance or deemed day of acceptance of the goods. Section 16 of the Act provides that notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, the buyer shall be liable to pay compound interest with monthly rents to the supplier on the amount due from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank. Section 17 provides that the buyer shall be liable to pay entire amount i.e., price of goods with interest as contemplated by Section 16. Section 18 provides for



mechanism for reference i.e. reference of the dispute by any of the parties to the Micro

and Small Enterprises Facilitation Council. And section 19 provides for an application for setting aside a decree, award or other order made by Council or by institution or Centre, which acts as an Arbitrator. However, it is not necessary to deal with other provisions of Chapter V since they do not have direct bearing on this matter, except Section 24. Section 24 of the Act provides for an overriding effect of Sections 15 to 23 notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

**7.** Sections 17, 18, 19 and 24 of the Act read as follows:—

17. Recovery of amount due:— For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under Section 16.

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 subsection (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 condition 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 to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 19% (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in subsection (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.

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 within 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.

(20) .....

(21) .....

(22) .....

(23) .....

(24) Overriding effect:— The provisions of Secs. 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

**8.** Mr. Deshpande, the learned counsel for the petitioners, submitted that where there is an independent arbitration agreement in existence between the parties, the Council has no jurisdiction under Section 18 of the Act either to conduct conciliation or to enter upon the reference for the purposes of arbitration. According to Mr. Deshpande, Section 24 of the Act, which provides for an overriding effect of the provisions of the Act including Section 18, which provides for reference to a Council is of no effect in a case where there is an arbitration agreement capable of being given full effect to under the provisions of the Arbitration and Conciliation Act, 1996. Since such an agreement serves the same purpose as that of arbitration, which might be entered upon under Section 18 of the Act by the Council. According to the learned



counsel for the petitioners, a buyer like the petitioners, have no remedy under the Act and are not entitled to invoke the provisions of Section 18 of the Act at all either for conciliation or for arbitration since an amount can be claimed under Section 18 of the Act only in respect of an amount due under Section 17, which in turn can only be an amount payable by the buyer for service provided or goods provided by the supplier.

**9.** As against this, Mrs. Dangre, the learned Additional Government Pleader for respondent No. 1, submitted that though Section 17 of the Act makes a provision for recovery of the amount due from the buyer alone at the instance of the supplier, Section 18 clearly contemplates that any party to the dispute may; with regard to any amount due under Section 17; make reference to the Council in view of the expressed provisions of Section 18(1) supra. According to the learned Addl. Government Pleader, the purport of the Act is to provide for a special procedure for micro, small and medium enterprises to recover the amount and the Act has, therefore, set up a Facilitation Council, which is required to deal with the dispute, which has arisen between a buyer and a micro and small enterprise, initially by conciliation and later if conciliation fails, by arbitration.

**10.** Mr. Dhole, the learned counsel for respondent No. 2, submitted that the arbitration agreement between the parties cannot be given effect to in view of the Forum provided by Section 18, which has been given an overriding effect by Section 24 of the Act.

**11.** Having considered the matter, we find that Section 18(1) of the Act, in terms allows any party to a dispute relating to the amount due under Section 17 i.e. an amount due and payable by buyer to seller; to approach the facilitation Council. It is rightly contended by Mrs. Dangre, the learned Addl. Government Pleader, that there can be variety of disputes between the parties such as about the date of acceptance of the goods or the deemed day of acceptance, about schedule of supplies etc. because of which a buyer may have a strong objection to the bills raised by the supplier in which case a buyer must be considered eligible to approach the Council. We find that Section 18(1) clearly allows any party to a dispute namely a buyer and a supplier to make reference to the Council. However, the question is; what would be the next step after such a reference is made, when an arbitration agreement exists between the parties or not. We find that there is no provision in the Act, which negates or renders an arbitration agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the provisions of

Sections 15 to 23 including section 18, which provides for forum for resolution of the dispute under the Act would not have the effect of negating an arbitration agreement since that section overrides only such things that are inconsistent with Sections 15 to 23 including Section 18 notwithstanding anything contained in any other law for the time being in force. Section 18(3) of the Act in terms provides that where conciliation before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution and that the provisions of the Arbitration and Conciliation Act, 1996 shall thus apply to the disputes as an arbitration in pursuance of arbitration agreement referred to in Section 7(1) of the Arbitration and Conciliation Act, 1996. This procedure for arbitration and conciliation is precisely the procedure under which all arbitration agreements are dealt with. We, thus find that it cannot be said that because Section 18 provides for a forum of arbitration an independent arbitration agreement entered into between the parties will cease to have effect. There is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996.

**12.** At this stage, it is necessary to deal with another contention raised on behalf of the Council by Mrs. Dangre, the learned Addl. Government Pleader. According to the learned Addl. Government Pleader, the procedure of conciliation contemplated by Section 18(2) of the Act is a procedure, which has been specially enacted for the purposes providing a Forum for conciliation which itself is capable of settling a dispute between the micro, small and medium enterprises and any other party. We find that the arbitration agreement in question, like most arbitration



agreements, does not contain a specific provision for conciliation and, therefore, it would be necessary for the parties to submit to the conciliation process under Section 18(2) of the Act notwithstanding the existence of an arbitration agreement. Undoubtedly, the Council may either itself conduct the conciliation in accordance with the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 or as provided by Section 18(2) of the Act refer it to any institute or centre provided for alternate dispute resolution.

**13.** At one stage, it was also submitted at the bar that the procedure contemplated by Section 18 of the Act for resolution of dispute is not compulsory either for the seller or the buyer and the parties are free to adopt any course including the civil suit. We, however, find that it is not possible for the parties whether a buyer or seller to invoke jurisdiction of a Civil Court by filing Civil Suit in respect of its claim particularly since the requirement of conciliation is mandatory and the buyer or seller must approach the Council where there is a dispute with regard to any amount due under Section 17 of the Act.

**14.** In the circumstances, we hold that respondent No. 1 Council is not entitled to proceed under the provisions of Section 18(3) of the Act in view of independent arbitration agreement dated 23.9.2005 between the parties. The petitioners and respondent No. 2 shall, however, participate in the conciliation, which shall be conducted by respondent No. 1 Council under the provisions of Section 18(1) and (2) of the Act. Respondent No. 1 Council shall complete the process of conciliation within a period of two weeks from the date the parties appear before it. The parties are directed

to appear before respondent No. 1 Council on 25.10.2010. Rule made absolute in the above terms. No order as to costs.

**15. *Order accordingly.***

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7269 OF 2011
WITH
CIVIL APPLICATION NO. 1855 OF 2011
IN
WRIT PETITION NO. 7269 OF 2011

S. I. Group India Limited & Anr. ..Petitioners

versus

Micro and Small Enterprises Facilitation Council, Konkan Region, Thane & Ors. ..Respondents

Mr. V. R. Dhond – Sr. Advocate with Ms. Farzana Behramkamdin i/b. M/s. FZB & Associates for Petitioners.
Mrs. M. P. Thakur - Assistant Government Pleader for Respondent Nos. 1 and 3.
Mr. K. R. Belosey for Respondent No. 2.

CORAM : S. A. BOBDE AND
SMT. V. K. TAHILRAMANI, JJ.

DATE : NOVEMBER 23, 2011

P.C. (In Chamber) :

Called for speaking to the minutes of the order dated 16.11.2011. The last sentence in paragraph 2 of the order beginning with "We direct and ending with as an Arbitrator", is hereby deleted, instead the following is inserted:

"We direct that a Member of the Council who has acted as a Conciliator and who is a party to the order dated 28.7.2011 shall not act as an Arbitrator."

Order stands corrected accordingly.

(S. A. BOBDE, J.)

(SMT. V. K. TAHILRAMANI, J.)

**2011 SCC OnLine P&H 16956 : ILR (2013) 1 P&H 709 : (2013) 5 RCR (Civil) 150**

**Punjab and Haryana High Court**

(BEFORE K. KANNAN, J.)

Welspun Corp. Ltd. ... Petitioner;

*Versus*

Micro and Small, Medium Enterprises Facilitation Council, Punjab and others ... Respondents.

CWP No. 23016 of 2011

Decided on December 13, 2011

**Constitution of India, 1950-226 — Arbitration & Conciliation Act, 1996 Section 11 — Micro, Small and Medium Enterprises Development Act, 2006-18, 24 — Dispute arising out of an agreement between buyer and seller — conciliation under Act of 2006 failed — Petitioner issued notice to seller seeking arbitration as contemplated in agreement under the Arbitration Act, 1996 — Seller sought the Council to act as arbitrator by invoking Section 18(3) of 2006 Act — Council rejected plea of petitioner to refer matter to arbitration under 1996 Act — challenge thereto — held — Section 24 of the 2006 Act, provides for overriding effect of the Act thus it has precedence over 1996 Act — Legislation must prevail over individual volition of parties if Statue does not save terms of contract by express provision — where the Council has constituted itself as an Arbitrator then, it has done an act allowing for appointment of an Arbitrator and setting the arbitral process in motion — Consequently, a need for appointment of an Arbitrator under Section 11 of the Act, 1996 does not arise — Recourse only under 2006 Act — writ petition dismissed.**

*Held* :

That there is an express provision under Section 24, which spells out an overriding effect of the Act. If there was no conflict or likely to be a conflict, it will be even futile to introduce such a provision. To the extent to which Section 18 contains a particular procedure for an arbitration and the same Act also provides a particular method of setting aside an award passed by an Arbitrator, surely, the said provisions must have precedence over what is contained in the 1996 enactment. If the statute does not save the sanctity of specific terms of contracts by making express provision that

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shall be subject to any contract to the contrary, it must be so read that the legislation must prevail over the individual volition of parties.

(Para 5)

*Further held* :

That in terms of the agreement between the parties, the parties shall be at liberty to have an arbitration done under the Act, 1996. It does not exclude a construction that whenever there is an arbitration clause, the Council does not have a power to act as an Arbitrator. Such an interpretation would render nugatory the first portion of Section 18(3) that allows it to proceed to arbitrate.

(Para 6)

*Further held* :

That in a case, where the Council has constituted itself as an Arbitrator then, it has done an act allowing for appointment of an Arbitrator and setting the arbitral process in motion. Consequently, a need for appointment of an Arbitrator under Section 11 of the Act, 1996 does not arise.

(Para 8)

**2. Constitution of India, 1950-226 — Micro, Small and Medium Enterprises Development Act, 2006 — S. 17.**

*Held* :

That I would not, therefore, find that Section 17 does not fetter a buyer to plead that he is not liable to pay the money and that there is some entitlement, which he has against the seller himself. The Act, 2006 would, therefore, make possible a reference to include even a right, which a buyer claims against the seller.

(Para 4)

Puneet Bali, Advocate and Amit Parashar, Advocate, for the petitioner.

The Judgment of the Court was delivered by

**K. KANNAN, J. (Oral)**:— All the 5 writ petitions challenge the order passed by the Chairman, Industrial Facilitation Council before which the 3rd respondent-Mithila Malleables Pvt. Ltd. had sought initially for conciliation for the



dispute arising out of a claim towards cost of equipments for supplies effected to the petitioner. On an attempt of the Council to proceed with conciliation, in spite of the petitioner raising an objection and expressing his unwillingness to participate, the petitioner had earlier approached this Court through CWP Nos. 13107 to 13112 of 2011. This Court had observed that the parties could not be compelled for conciliation and if he was not willing to have the benefit of such conciliation, he was entitled to seek reference for arbitration. When the proceedings went back to the Council, the petitioner had by that time issued a notice to the seller seeking for arbitration in the manner contemplated by the agreement between parties. The agreement provided for a reference to arbitral Tribunal in case of disputes between themselves through the procedure established under the Arbitration and Conciliation Act, 1996 (for short, 'the Act, 1996'). The 3rd respondent-seller did not respond to the notice and instead sought the Council itself to act as an Arbitrator by invoking Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 (for short, 'the Act, 2006').

**(2)** The Council rejected the plea of the petitioner that the agreement provided for a reference to arbitration under the Act, 1996 and that the dispute shall not be adjudicated before the Council. According to the petitioner Section 18(3) of the Act, 2006 must be read harmoniously with the Arbitration Act, 1996 and it shall give place to the latter Act The Council rejected the plea of the petitioner and proceeded to hold that the Act, 2006 was a special central enactment that provided for a mechanism realization of amount for goods supplied by a seller to a buyer, both of which were industries to which the provisions of the Act, 2006 had admittedly applied, the provisions of the Act, 1996, which was a general enactment has to be read down to give a full play for the applicability of the Act, 2006. The Council, while proceeding to pass the impugned order, had observed that for consideration of the dispute relating to the entitlement or otherwise of the 3rd respondent-company to secure the value for the goods supplied, the parties were to appear before the Council at the next hearing, which would be communicated separately. This order was passed on 15.11.2011 and that is in challenge in all the above writ petitions.

**(3)** There is no denying the fact that the petitioner and the 3rd respondent fulfill the respective capacity as buyer and seller in the manner contemplated by the Act, 2006. There is also no denying the fact that the

3rd respondent claims that he has supplied goods for which the payments had not been made in full by the petitioner, while the petitioner has serious issues about some breach of the terms of the contract and denies the alleged claim to entitlement by the 3rd respondent. The petitioner has on the other hand counter claims for the loss, which the petitioner was alleged to have suffered by the conduct of the 3rd respondent by breach of some of the essential terms of contract of supply.

**(4)** Learned counsel appearing for the petitioner would mount several objections on the validity of the order. Firstly, he would contend that the Act, 2006, which contemplates a resolution of a dispute under Section 18 through a reference, is in the context of a recovery of amount provided under Section 17 of the Act, 2006.

> "*Recovery of amount due. — For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16.*"

Learned counsel would read to this provision to mean that it contemplates a buyer's liability to pay the amount with interest as provided under Section 16 and to that extent it excludes any possibility of any counter claim by the buyer against the seller. I would reject this objection right away, for, a liability to pay is invariably a reckoning of the mutual rights of the parties and when Section 17 contemplates a buyer's liability to pay, the assessment cannot and ought not to exclude the liability of the seller to pay, if any. This issue was dealt within a slightly different context in the proceedings under the Recovery of Debts Due to Banks & Financial Institution Act, 1993, which originally did not contain a provision for making a set-off by a debtor. It came after the decision of Hon'ble the Supreme Court in "*United Bank of India* v. *Abhjit Tea Co. (P) Ltd.*"[(1)], that allowed for a plea for counter claim/set-off to be entertained that the law itself was amended explicitly by amending Section 19(6) of the 1993 Act to make explicit what the law even otherwise made possible. I would not, therefore, find that Section 17 does not fetter a buyer to plead that he is not liable to pay the money and that there is some entitlement, which he has against the seller himself. The Act, 2006 would, therefore, make possible a reference to include even a right, which a buyer claims against the seller.



**(5)** Learned counsel would contend that the reading of Section 18 of the Act, 2006 makes it clear that insofar as it makes provision for conciliation, the provisions of Sections 65 to 81 of the Act, 1996 as applicable, it should be so read that even the provision under Section 80 of the Act, 1996 that bars a Conciliator for acting as an Arbitrator must be applied. According to the learned counsel, Section 18(2) itself allows for a full applicability of Sections 65 to 81 and therefore, the non-obstante clause in Section 18(1) ought not to be used to eclipse Section 80 itself. In my view, this is not a correct reading of Section 18. The Act, 2006 itself contains provisions, which are at once consistent with the Act, 1996. It must be remembered that the Act, 2006 is also an Act of Parliament and it is a special enactment meant for a particular class of persons only namely the Micro, Small and Medium Enterprises and for facilitating the promotion, development and enhancing their *inter se* competitiveness. The Act insofar as it contains a specific provision for conciliation and arbitration is alive to the issue that it could come into conflict with some of the provisions of the Act,

1996. There could also be certain other conflicts relating to recovery modes provided under other Central enactments. Consequently, there is an express provision under Section 24, which spells out an overriding effect of the Act. If there was no conflict or likely to be a conflict, it will be even futile to introduce such a provision. We must read into every section of an enactment of Parliament, a wisdom, which the Courts are bound to apply as having been exercised by the Legislature.

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

To the extent to which Section 18 contains a particular procedure for an arbitration and the same Act also provides a particular method of setting aside an award passed by an Arbitrator, surely, the said provisions must have precedence over what is contained in the 1996 enactment.

> *"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 to it any 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.*
>
> *(emphasis supplied)*
>
> *(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."*

Section 18(3) provides that where a conciliation initiated under Section 18(2) is not successful and stands terminated without any settlement between parties, the Council shall itself take up the dispute for arbitration. Therefore, when there is an express provision under Section 18(3) providing for conciliator to act as an Arbitrator, it will be untenable to contend that Section 18 will still apply. There strive application to Section 18(3) is sought to be made by the counsel by contending that this clause will apply only in cases

where there is no agreement between the parties for an arbitration in their own contract. According to the learned counsel, since the contract specifies that the parties shall be at liberty to seek for an arbitration under the Act, 1996, the said contract must prevail. If the statute does not save the sanctity of specific terms of contracts by making express provision that it shall be subject to any contract to the contrary, it must be so read that the legislation must prevail over the individual volition of parties.

**(6)** In this case, if there was a contract between the parties to have an arbitration made under the Act, 1996 and the Conciliator had proposed to terminate its conciliatory postures, it was competent for it to treat itself as an Arbitrator and proceed the arbitral process in the manner contemplated under Section 18(3). I cannot read Section 18(3) in the manner canvassed by the learned counsel that Section 18(3) will apply only if there is no contract between the parties for a reference to arbitration under the Act, 1996. On the contrary, the latter part of Section 18(3) that the provisions of the Act, 1996 would apply to a dispute as if the arbitration was in pursuance of an arbitration agreement shall be read in such a way that it is applicable only to a situation where the Council deems fit to refer to any institution for an alternate dispute resolution services for such an arbitration. Section 18(3) provides for two procedures: (i) on termination of conciliation, it can either take up the arbitration itself or (ii) refer the matter to arbitration as though there is an arbitral agreement between the parties. It is possible for a Council to make a reference to arbitration even in the absence of an arbitration agreement. If there is an arbitration agreement between the parties, it only means that the power is still available when the Council, without invoking its own powers. It can simply observe that in terms of the agreement between the parties, the parties shall be at liberty to have an arbitration done under the Act, 1996. It does not exclude a construction that whenever there is an arbitration clause, the Council does not have a power to act as an Arbitrator. Such an interpretation would render nugatory the first portion of Section 18 (3) that allows it to proceed to arbitrate. I would, therefore, uphold the specific reasoning, which the impugned order makes in stating that:

> *"If Section 18 of the Act, 2006 provides for a mode of resolution of a dispute wherein this Council is to adjudicate acting as an arbitrator in terms of the Act, 1996, it would not be*



*open for any party to oust the said jurisdiction of this Council which has been vested in terms of Section 18(3) of the Act, 2006 merely by creating a mutual agreement. The Agreement cannot over ride the provisions of the Act, 2006 in view of the aforesaid fact."*

**(7)** The learned counsel states, to a specific query as to why the petitioner has a problem for obtaining an adjudication through the Council as an Arbitrator, would contend that the contract between the parties contemplates appointment of an Arbitrator by each party and a provision for appointment of an Umpire, but that remedy will be lost if the Council itself has to act as an Arbitrator where his own individual volition comes to nought. The counsel would further contend that there are other stringent provisions of the Act, 2006, such as requirement of having to deposit 75% of the amount determined by the Arbitrator through an award for an application

under Section 19, which an application under Section 34 of the Act, 1996 does not enjoin. This points out to the inconsistency in provisions between the Act, 2006 and the Act, 1996 but the Act, 2006 still obtains primacy of its application through the overriding effect, which we had stated above. If an arbitration made under Section 18 proceeds to an award directing the payment between the parties, the manner of setting aside the award cannot happen under Section 34 of the Act, 1996 but it has to be still only in the manner contained under Section 19 of the Act, 2006. Inevitably, it has to be so and if an express provision in a statute would contain a non-obstante clause and overriding effect of the Act, a full play to the same Act must be given and it shall become possible to apply the Act, 1996 only to such matters of procedures as the Act, 2006 itself does not provide for. For instance, the Act, 2006 contains no procedure for conducting arbitral process; the Act, 2006 does not contain provisions for challenging the Arbitrator's impartiality; the Act, 2006 does not still contain any provision for enforcement of process where an award was obtained in a foreign jurisdiction. The above are merely illustrative and not exhaustive. But in respect of provisions relating to appointment of Arbitrator or commencement of arbitral process, the binding nature of arbitral award and the manner of redressal of a person not satisfied with the award would perforce have to conform to the provisions of section contained in Sections



18 and 19 of the Act, 2006. I would, therefore, find that if the Council found that the Act, 2006 empowers it to act as an Arbitrator, I would not find any error in the said order.

**(8)** The learned counsel would also point out to me that in the order passed by this Court earlier in CWP No. 13111 of 2011, it had been found that if there is a refusal to refer the matter to the arbitration, the petitioner was entitled to have the remedy under the Act, 1996 in terms of Section 11 but the manner in which the Council has provided to treat itself as an Arbitrator amounted to violation of the directions contained in the order. The Council has also dealt with this objection in the order itself and in my view correctly. This clause could have obtained relevance where the arbitral dispute had not been referred to arbitration. As per the procedure under Section 18 (3), the reference could have been either by the Council acting itself as an Arbitrator or it could have made a reference to an Arbitrator constituted under the Act, 1996. If he had omitted to do either one of them, it should have been possible for the petitioner to apply under Section 11 of the Act, 1996. Admittedly, till date a resort to Section 11 had not been made. This has also been referred to in the impugned order. In a case, where the Council has constituted itself as an Arbitrator then, it has done an act allowing for appointment of an Arbitrator and setting the arbitral process in motion. Consequently, a need for appointment of an Arbitrator under Section 11 of the Act, 1996 does not arise.

**(9)** There are at least 25 central enactments, which contain provisions for statutory arbitrations. The provisions that are frequently invoked are statutory arbitration provided under the Telegraph Act and amongst the State enactments, the State Co-operative Societies Act. The reference to statutory arbitration and the primacy that it obtains over contractual reference to independent modes of resolution of disputes had come before Hon'ble the Supreme Court in several cases. In *Registrar, Co-operative Society* v. *Krishan Kumar Singhania*[(2)], the Supreme Court dealt with a conflict between the statutory arbitration contained under the West Bengal Co-operative Societies Act and the Arbitration and Conciliation Act, 1996 and provided for a primacy

of application of the State Act. In *Punjab State Electricity Board* v. *Guru Nanak Cold Storage*[3], the

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Supreme Court was considering the effect of some of the provisions of the Electricity Act and a provision for an arbitration outside the scope of the Act, 1996. These are merely to state that the issue is not *res integra*. The conflicts have existed and the Courts have never found it essential at all times to give the Act, 1996 a primacy. In this case, the Act, 2006 which is an Act of the Parliament and will hold itself field for determining the rights of parties for thedisputes that they have arisen between a supplier and a buyer. The arbitral proceedings before the Council have not made much head way except that through the impugned order, it is clear that the Council has decided to accept the termination of conciliation proceedings and it has stated that the case was being adjourned and the parties will be informed the future date of hearing. The petitioner shall have his recourse only under the Act, 2006 and with reference to the procedures for which the Act, 2006 does not make provision for conducting the arbitral process, he shall be entitled to resort to the Act, 1996 to the extent to which it is applicable.

**(10)** In the light of the above reasoning, the writ petitions challenging the impugned order ought to fail and accordingly dismissed.

**J. Thakur**

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(1) (2000) 7 SCC 357.

(2) (1995) 6 SCC 482.

(3) (1996) 5 SCC 411.

**W.A. Nos. 2461, 2475, 2042, 2199 of 2010, 368, 456, 462 to 464, 694, 695, 1113, 1281, 1282 of 2011**

**Eden Exports Company v. Union of India**

**2012 SCC OnLine Mad 4570 : (2013) 1 Mad LJ 445 : (2013) 1 CWC 378**

(BEFORE DHARMA RAO AND M. VENUGOPAL, JJ.)

M/s. Eden Exports Company Rep. by its Partner Mrs. Faiqua Shameel ..... Appellant

*v.*

1. Union of India, Rep. by its Secretary, Ministry of Micro, Small and Medium Enterprises, Udyog Bhavan, New Delhi 110 011.
2. State of Tamil Nadu, Rep. by its Secretary, Department of Industries and Commerce, Chepauk, Chennai 600 005.
3. Director, Ministry of Micro, Small and Medium Enterprises, Room 254, Udyog Bhawan, Rafi Marg, New Delhi 110 011.
4. Regional Joint Director of Industries and Commercial (i/c)/Zonal Officer, MSE Facilitation Council, Thiru. Vi. Ka Industrial Estate, Guindy, Chennai 600 032.
5. M/s. Falcon Prints Pvt. Ltd., No. 68 (Old No. 268), Royapettah High Road, Chennai 600 014 ..... Respondents

For Appellant in WA. 2461/2010, WP. No. 11234/2011: Mr. Zaffarullah Khan

For Appellant in WA. Nos. 368 & 456 of 2011: Mr. K.S.V. Prasad

For Appellant in WA. NOs. 1281 & 1282 of 2011 and WP. Nos. 27319 & 27888/2010: Mr. Perumbalavil Radhakrishnan

For Appellant in WA. Nos. 2042/2010 1113/2011 & WP. No. 24506/2010: Mr. Jayesh Dolia for M/s. Aiyar & Dolia

For Petitioner in WP. No. 4397/2009: Mr. M. Raghunandham M/s. for T.S. Gopalan & Co.

For Petitioner in WP. No. 7805/2011: Mr. T. Saikrishnan for M/s. K.S. Natarajan

For Appellant in WA. Nos. 694 & 695/2011: Mr. P.S. Raman for M/s. Puspha Menon

For Petitioner in WP. No. 15733/2011: Mr. Muthukumarasamy Senior Counsel for M/s. A. Jenasenan

For Petitioner in WP. No. 28168/2010 & Appellant in WA. No. 2199/2010: Mr. T. Mohan

For Petitioner in WP. No. 39/2011: Mr. S. Viswanathan

For Petitioner in WP. 15065/2011: Mr. A. Narayanan

For Appellant in WAs. 462 to 464/11: Mr. G. Vasudevan

For Appellant in WA. 2475/2011: Mr. J. Sivanandaraaj

For Union of India: Mr. M. Ravindran Addl. Solicitor General of India for Mr. K. Mohanamurali

For the State: Mr. A. Navaneethakrishnan Advocate General Assisted by Mr. S.T.S. Moorthy Mrs. M.E. Raniselvam Mr. R. Bala Ramesh

For R2 in WP. No. 11234/2011: Mr. A.S. Rajkumar Vadivel

For R2 in WA. 456/2011: Mr. D. Krishnakumar

For R3 in WPs. 27319 & 27888/10 R5 in WA. Nos. 1281 amp; 1282/2011 and R2 in

WPs. 4397/09 & 39/2011: Mr. N. Viswanathan

For R2 in WPs. 2042 & 24506/10 R5 in WA. No. 1113/11: Mr. G. Rajasekaran (Party in Person)

For R2 in WP. 15733/11: Mr. Venkatachalapathy Senior Counsel for Mr. M. Sriram

For R2 in WA. 2199/10 amp; WP. 28168/2010 & 15065/2011: Mr. C. Saravanan

For R1 in W.A. Nos. 462 to 464/2011: Mr. N. Ramakrishnan for M/s. Waraon & Sairams

For R3 in WP. 2475/10: Mr. G.S. Rajasekaran Party-in-person

W.A. Nos. 2461, 2475, 2042, 2199 of 2010, 368, 456, 462 to 464, 694, 695, 1113, 1281, 1282 of 2011

And

W.P. Nos. 27319, 27888, 28168 of 2010, 4397 of 2009, 39, 7805, 11234, 15065, 24506, 15733 of 2011

Decided on November 20, 2012

COMMON JUDGMENT

ELIPE DHARMA RAO, J.

All the writ appeals arise out of the common order passed by the learned single Judge in WP. No. 16908 of 2009 & etc. batch, dated 20.08.2010. Most of the writ petitions were filed challenging various provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (Central Act 27 of 2006) as unconstitutional. Some writ petitions were filed challenging the orders passed by the Facilitation Council and the notices issued by the said Council. Since the issues involved in all these matters are intrinsically interconnected, they were heard together and disposed of by this common judgment.

2. In most of all these writ appeals and the writ petitions, some of the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (Central Act 27 of 2006) (in short "MSMED Act") are challenged as unconstitutional and ultra vires of the Constitution of India. The learned single Judge under the impugned order dated 20.08.2010, held that the provisions under challenge cannot be said to be unconstitutional and ultra vires and dismissed the writ petitions, giving rise to the present writ appeals.

3. We have heard the learned counsel appearing for all the parties at length and have gone through various records furnished at the time of hearing of these appeals and the decisions rendered by the Hon'ble Supreme Court, this Court and various other High Courts.

4. Learned Senior Counsel appearing on behalf of the appellants and the counsel appearing in the connected writ appeals and the writ petitions have more or less reiterated the contentions raised before the learned single Judge. Their challenge encircles Chapter V of the MSMED Act.

5. In order to appreciate their contentions, it would be profitable to note down, first, the Statements and Objects for enacting the MSMED Act. This Act has been enacted for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises. From the Statement of Objects and Reasons for enacting the Act, it is seen that many Expert Groups or Committees appointed by the Government from time to time as well as the small scale industry sector itself have emphasised the need for a comprehensive Central enactment to provide an

appropriate legal framework for the sector to facilitate its growth and development. And also considering the growing need and to extend policy support for the small enterprises so that they can grow into medium ones, adopt better and higher levels of technology and achieve higher productivity to remain competitive in a fast globalisation area, the Union Government thought it fit to enact the MSMED Act. Through the above Bill they also sought to make further improvements in the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act, 1993 and to repeal that enactment.

6. Section 2(e) defines "enterprise" an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951) or engaged in providing or rendering of any service or services.

7. According to Section 2(g) "medium enterprise" means an enterprise classified as such under sub-clause (iii) of clause (a) or sub-clause (iii) of clause (b) of sub-section (1) of section 7. "micro enterprise" is defined under Section 2(h). As per Section 7, if the enterprise engaged in the manufacture or production of goods pertaining to any industry and where the investment in plant and machinery is more than five crores but does not exceed ten crore rupees, it is called as medium enterprise. If the enterprise is service oriented and the investment is more than two crores but does not exceed five crore rupees, it is known as medium enterprise. In the case of micro enterprise, if it is engaged in production, the investment should not exceed twenty-five lakh rupees. In the case of service oriented, the investment in equipment should not exceed ten lakhs.

8. Section 3 deals with the formation and constitution of National Board for Micro, Small and Medium enterprises. The officials at various levels from all fields have been appointed as Members and in other capacities. Section 7(2) empowers the Central Government to constitute an Advisory Committee consisting of officials from the Central and State Governments and a representative each from the associations of micro, small and medium enterprises. Such Committee would examine the matters referred to by the National Board and shall advise the Central and the State Governments for promotion of the enterprises. Section 8 deals with the registration of the micro, small and medium enterprises.

9. The controversy in all these cases relate to Chapter V of the MSMED Act, viz., Sections 15 to 24. Though the learned counsel appearing for the appellants have attacked Sections 15 to 24, after the impugned order, they are very much particular in respect of Sections 18 to 21. However, with light intensity, in order to formally strike the impugned order, they have made their contentions with respect to Sections 15 to 17 also.

10. Sections 15 to 24 being relevant to decide the issue involved, are extracted hereunder:-

"15. Liability of buyer to make payment.—Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:

Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

16. Date from which and rate at which interest is payable.—Where any buyer fails to make payment of the amount to the supplier, as required under Section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from time the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

17. Recovery of amount due.—For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under Section 16.

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 to any 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 disputes 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.

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.

20. Establishment of Micro and Small Enterprises Facilitation Council.—The State Government shall, by notification, establish one or more Micro and Small Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification.

21. Composition of Micro and Small Enterprises Facilitation Council.—(1) The Micro and Small Enterprise Facilitation Council shall consist of not less than three but not more than five members to be appointed from amongst the following categories, namely:—

(i) Director of Industries, by whatever name called, or any other officer not below the rank of such Director, in the Department of the State Government having administrative control of the small scale industries or, as the case may be, micro, small and medium enterprises; and

(ii) one or more office-bearers or representatives of associations of micro or small industry or enterprises in the State; and

(iii) one or more representatives of banks and financial institutions lending to micro or small enterprises; or

(iv) one or more persons having special knowledge in the field of industry, finance, law, trade or commerce.

(2) The person appointed under clause (i) of sub-section (1) shall be the Chairperson of the Micro and Small Enterprises Facilitation Council.

(3) The composition of the Micro and Small Enterprises Facilitation Council, the manner of filling vacancies of its members and the procedure to be followed in the discharge of their functions by the members shall be such as may be prescribed by the State Government.

22. Requirement to specify unpaid amount with interest in the annual statement of accounts.—Where any buyer is required to get his annual accounts audited under any law for the time being in force, such buyer shall furnish the following additional information in his annual statement of accounts, namely:—

(i) the principal amount and the interest due thereon (to be shown separately) remaining unpaid to any supplier as at the end of each accounting year;

(ii) the amount of interest paid by the buyer in terms of Section 16, along with the amount of the payment made to the supplier beyond the appointed day during each accounting year;

(iii) the amount of interest due and payable for the period of delay in making payment (which have been paid but beyond the appointed day during the year) but without adding the interest specified under this Act;

(iv) the amount of interest accrued and remaining unpaid at the end of each accounting year; and

(v) the amount of further interest remaining due and payable even in the succeeding years, until such date when the interest dues as above are actually paid to the small enterprise, for the purpose of disallowance as a deductible expenditure under Section 23.

23. Interest not to be allowed as deduction from income.—Notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), the amount of interest payable or paid by any buyer, under or in accordance with the provisions of this Act, shall not, for the purposes of computation of income under the Income-tax Act, 1961, be allowed as deduction.

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."

11. Section 15 is attacked by contending that this clause interferes with the right of the buyers, who utilise the goods or services rendered by the suppliers, by compelling them to enter into agreement with the suppliers, which is in violation of Article 19(1)(g) of the Constitution. In other words, according to the appellants/petitioners, this clause curtails the freedom to enter into contract and against the commercial parlance prevailing in the country. Sections 16 and 17 seek to specify the date from which and the rate at which interests will be payable by the buyer to the supplier in case of the former failing to make payments of the amount to the supplier. According to the appellants and the writ petitioners, these clauses are in violation of Article 14 of the Constitution of India and against the provisions contained in the Civil Procedure Code and the related Acts. Section 19, according to the appellants, which stipulates pre-deposit of 75% before challenging a decree, award or other orders made by the Facilitation Council, is unwarranted and against the decisions of the Supreme Court. In support of their contentions, learned counsel have placed reliance upon various decisions of the Hon'ble Supreme Court, this Court and other High Courts and we have given our anxious consideration to the arguments advanced and the judgments relied on on either side

12. Admittedly, MSMED Act had repealed the earlier Interest on Delayed Payment Act, 1993 as the provisions of the old Act have been suitably incorporated in the new Act. Section 15 of the MSMED Act is similar to Section 3 of the old Act viz., the Interest on Delayed Payment Act, 1993. However, the difference in the period agreed upon between the supplier and the buyer was reduced from 120 days to 45 days. So far as Section 16 is concerned, the rate of interest on delayed payment has been increased from one and half time of prime lending rate charged by the State Bank of India to three times of the Bank rate notified by the Reserve Bank. Section 17 of the MSMED Act, which substitutes Section 6 of the old Act, mandates the buyer to pay the amount with interest as provided under Section 16 to the supplier for the goods supplied or services rendered by them; whereas Section 6 of the old Act made the amount recoverable by the supplier by way of a suit or other proceeding.

13. From the above comparison, it is apparent that there is only change in respect of time limit in making payment by the buyer and increase in the rate of interest payable on the principal amount, in case it fell due after the time limit prescribed in the agreement entered between them. The appellants and the writ petitioners, though strenuously contended that rate of interest and the time limit of 45 days fixed is arbitrary, they are not very much concerned with these contentions in view of the decisions of the Apex Court referred to by the learned single Judge in the impugned order.

14. The learned single Judge, for rejecting the aforesaid contention, has sought help from the decision of the Supreme Court in Civil Appeal No. 5597 of 2002 in *A.P. Transco* v. *Bala Conductors (P) Ltd.*, dated 23.9.2003. The matter came up before the Supreme Court by way of appeal from the common order of the Andhra Pradesh High

Court in C.A. Nos. 5599, 5606 of 2002, etc., batch at the instigation of the A.P. Transco challenging the MSMED Act. The MSMED Act was challenged on two grounds, namely, (i) that the Act was outside the legislative competence of Parliament and (ii) that the Act was otherwise violative of Article 14 of the Constitution of India since it operated in discriminatory manner. The contention relating to legislative competence was fairly conceded by the appellant therein by stating that the legislative competence of the Parliament cannot be questioned not only in view of Entry 33 of List-III but also because of the residuary Entry 97 in List-I of the Seventh Schedule to the Constitution. The second contention was also rejected by the Hon'ble Supreme Court by observing the Industries (Development and Regulation) Act has already created the class by specifying the particular industries in the First Schedule to that Act, the control of which is expedient in the public interest to be under/by the Union of India. The Hon'ble Supreme Court was of the further view that the discrimination if any, would operate against other industries and not against the buyer as all of them are similarly situated.

15. In view of the aforesaid decision of the Supreme Court on the point, we do not find any reason to entertain the contention of the learned Counsel for the appellants on this score. Moreover, the reasons stated by the learned single Judge for upholding Section 17 of the MSMED Act to the effect that a person who commits default and suffers an order or award or decree from the Facilitation Council alone is bound to pay such interest and such order, if found erroneous, can be corrected by judicial review, cannot be brushed aside.

16. Coming to the challenge in respect of 75% pre-deposit contemplated under Section 19 of the MSMED Act, we have no hesitation in confirming the conclusion arrived at by the learned single Judge in this regard, in view of the decisions of the Supreme Court and this Court. The Hon'ble Supreme Court in *Snehadeep Structures Private Limited* v. *Maharashtra Small Scale Industries Development Corporation Limited* (2010) 3 SCC 34 has categorically held that the introduction of pre-deposit clause is a disincentive to prevent dilatory tactics employed by the buyers against whom the small-scale industry might have procured an award. The aforesaid decision has been followed by the Kerala High Court in (2010) 1 KLT 65 (*K.S.R.T.C.* v. *UNION OF INDIA*) and this Court in 2011-3-L.W. 626 (M/s. Goodyear India Limited, Rep. by its *Zonal Manager* v. *Nortan Intech Rubbers (P) Ltd.*,). Therefore, the appellants/writ petitioners no more cannot contend that the condition of pre-deposit imposed in Section 19 of the MSMED Act is arbitrary.

17. Learned Senior Counsel appearing for the appellants, though not much concerned with regard to the aforesaid provisions, are very much concerned about Sections 18 and 21. In one voice they have contended that Section 18 invokes Section 7(1) of the Arbitration Act and it is contrary to Section 80 of the said Act. Mr. P.S. Raman, learned Senior Counsel appearing for the appellants in W.A. Nos. 694 and 695 of 2011 has specifically contended that the Arbitration and Conciliation Act could be invoked only when there is an agreement in writing between the parties. According to him, as per the MSMED Act, the suppliers could invoke the provisions of the Arbitration Act in the absence of a written agreement and therefore it has to be struck down.

18. For the sake of easy reference, we extract hereunder Section 7 of the Arbitration and Conciliation Act, 1996:

"7. Arbitration agreement.

(1) In this Part,' arbitration agreement' means an agreement by the parties to submit

to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

19. From the reading of the above Section, it is no doubt true that this Section stipulates that an Arbitration agreement should be in writing. But, we should not forget the wordings of Section 18 of the MSMED Act which provides a party to the dispute with regard to the amount due under Section 17, to make a reference to the Micro and Small Enterprises Facilitation Council. Sub-section (2) enables such Council to conduct conciliation by itself or seeking assistance of any institution or centre providing alternate dispute resolution services by making a reference to such institution or centre. It has also been made mandatory that Sections 65 to 81 of the Arbitration and Conciliation Act 1996 are applicable to such a dispute as if the conciliation was initiated under Part III of that Act. In case such conciliation is not successful, sub-section (3) provides for further arbitration by the council itself or to any other institution providing alternate dispute resolution services for such arbitration. The contention of the appellants in this context is three folded; (1) without any written agreement, the provisions of the Arbitration and Conciliation Act could not be invoked; (2) the Micro and Small Enterprises Facilitation Council, which was empowered to conciliate between the parties, should not be allowed to further arbitrate in the matter; and (3) the Members of the Council who conciliate as per sub-section (2) of Section 17 would also be the Members in the arbitration proceedings provided under sub-section (3) and, therefore, such arbitration would be of no use and such provision being contrary to Section 80 of the Arbitration and Conciliation Act, it is required to be struck down as illegal and unconstitutional.

20. But, the Legislature in its wisdom, was very careful in drafting Section 18 MSMED Act, providing solace to the parties, even where there is no Arbitration clause in writing, and requiring the Council to take up the dispute for itself for arbitration or refer to any other institution for that purpose. Taking into consideration the object for which the said Act has been introduced by the Legislature, it cannot be said that there is any Legal conflict between the provisions of Arbitration and Conciliation Act and that of the MSMED Act as the intention of the Legislature is very clear from the wordings of the said Section to bring the disputes into the fold of arbitration, even where there is no written agreement to that effect.

21. Section 80 of the Arbitration and Conciliation Act, 1996, being relevant, is

extracted hereunder:-

"80. Role of conciliator in other proceedings. - Unless otherwise agreed by the parties, -

(a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings."

22. A cursory reading of the aforesaid provision makes it clear that a conciliator could not act as an arbitrator. It is no doubt true that Sections 18(2), 18(3) and 18(4) have given dual role for the Facilitation Council to act both as Conciliators and Arbitrators. According to the learned counsel for the appellants, the Facilitation Council should not be allowed to act both as Conciliators and Arbitrators. This contention, though prima facie appears to be attractive, it is liable to be rejected on a closer scrutiny. Though the learned counsel would vehemently contend that the Conciliators could not act as Arbitrators, they could not place their hands on any of the decisions of upper forums of law in support of their contentions. As rightly pointed out by the learned single Judge, Section 18(2) of MSMED Act has borrowed the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act for the purpose of conducting conciliation and, therefore, Section 80 could not be a bar for the Facilitation Council to conciliate and thereafter arbitrate on the matter. Further the decision of the Supreme Court in (1986) 4 SCC 537 (*Institute of Chartered Accountants of India* v. *L.K. Ratna*), on this line has to be borne in mind. One should not forget that the decision of the Facilitation Council is not final and it is always subject to review under Article 226 of the Constitution of India and, therefore, the appellants are not left helpless.

23. An allied contention was raised with respect to bias in passing the award by the arbitrator, if he happened to be the conciliator also. In order to ascertain the factual position, we have gone through the minutes of the various meetings held by the Council with respect to Conciliation as well as the Arbitration. From the materials produced by the Facilitation Council, it is seen that the conciliators who had conciliated on the matter had not sat as the Members/Arbitrators during arbitration. However, at this stage, a duty has been cast upon this Court to take judicial notice that the Members who participate in the Conciliation shall not sit in the Arbitration proceedings and the Facilitation Council has to amend/formulate its own rules in this regard at the earliest in order to avoid these complications.

24. Coming to the question of formation of Facilitation Council, we are in full agreement with the conclusion arrived at by the learned single Judge. The contention of the learned counsel for the appellants/petitioners that the members preside over the Facilitation Council should have legal background and a Judicial Member has to preside over the Facilitation Council cannot be accepted. When the Facilitation Council is not a Tribunal constituted in exercise of power granted under Articles 323-A and 323-B of the Constitution, the appellants cannot be heard to contend that a Judicial Member has to preside over the Council or the members should have legal background. However, we cannot fully brush aside the aforesaid contention of the learned counsel for the appellant. Considering the issues involved in all these matters, in order to avoid the Companies/Corporation in approaching the Court in large numbers, in future, we observe that while appointing the Members for the Council, the Government may bear in mind this aspect and appoint the Members having judicial background.

25. Coming to the writ petitions, in W.P. Nos. 27319, 27888 of 2010, 39, 7805,

11234, 15065, 15733, of 2011, the concerned writ petitioner has challenged the award passed by the Facilitation Council, dated 20.9.2010, 20.9.2010, 29.7.2010, 31.7.2010, 7.1.2011, 29.4.2011, 29.03.2011 respectively. The appellant in WA. No. 2199 of 2010, who had challenged the vires of the Act, has also filed a separate writ petition W.P. No. 28168 of 2010, challenging the award dated 29.7.2010, passed by the Council, by reiterating the contentions raised in the writ appeal. W.P. No. 4397 of 2009, though filed in 2009 challenging the award passed by the Council, dated 22.10.2008, has not got admitted so far. However, for one reason or the other it was not tied along with the batch of the writ petitions heard by the learned single Judge.

26. In all these writ petitions filed by various companies challenging the award/order passed by the Arbitrators/Facilitation Council, the question to be gone into is whether such writ petitions could be maintained before this Court. If one carefully goes through the provisions of the MSMED Act under Chapter V, in particular Section 18, it could be seen that the said Act is in consonance with the Arbitration and Conciliation Act, 1996. Moreover, the award/order passed by the Arbitrators/Facilitation Council is similar and identical to that of the award passed under Section 31 of the Arbitration and Conciliation Act. Section 5, which is contained in Part I of the Arbitration Act, defines the extent of judicial intervention in arbitration proceedings. It says that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in that Part. The Hon'ble Supreme Court in (2000) 4 SCC 539 (*P. Anand Gajapathi Raju* v. *P.V.G. Raju*), has held that the judicial intervention in arbitration proceedings should be minimal. Keeping in view the object of the MSMED Act, we have no hesitation in adopting Section 5 of the Arbitration and Conciliation Act, 1996, which prohibits interference of the judicial authority, to the awards passed under the MSMED Act.

27. Apart from the reason stated above, these writ petitions were filed without complying with the provisions contained in Section 19 of the MSMED Act, which contemplates pre-deposit of 75% of the decree amount. The petitioners cannot overtake Section 19 and invoke Article 226 of the Constitution before this Court. As we have held that pre-deposit of 75% is mandatory, we see no reason to entertain the present writ petitions. Moreover, once the petitioners have submitted themselves to the jurisdiction of the Council and when the decision of the Council went against them, they cannot turn round and state that the Council has no jurisdiction or the conciliators cannot sit as arbitrators or the pre-deposit of 75% is against the provisions of law. As rightly pointed out by the learned single Judge it is always open to the petitioners to move the appropriate civil court for relief or to invoke arbitration clause, if provided in the agreement. Hence, we are not inclined to entertain the present writ petitions filed challenging various awards/orders passed by the Facilitation Council and they are liable to be dismissed.

For the reasons stated above, subject to the observations made, all the writ appeals and the writ petitions stand dismissed. There shall be no order as to costs. Interim order, if any, shall stand vacated. Consequently, the connected Miscellaneous Petitions are closed.

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**Writ - C No. - 11535 of 2014**

**Bharat Heavy Electricals Limited v. State of U.P.**

**2014 SCC OnLine All 2895 : (2014) 104 ALR 156 : (2014) 4 All LJ 52**

(BEFORE D.Y. CHANDRACHUD, C.J. AND DILIP GUPTA, J.)

M/s. Bharat Heavy Electricals Limited ..... Petitioner

*v.*

State of U.P. & 2 Others ..... Respondents

Counsel for Petitioner:- Kashif Zaidi

Counsel for Respondent:- C.S.C.

Writ - C No. - 11535 of 2014

Decided on February 24, 2014

**Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, Chief Justice**

**Hon'ble Dilip Gupta, J.**

The third respondent filed a claim petition before the Uttar Pradesh State Micro and Small Enterprises Facilitation Council on 19 November 2012. The grievance of the third respondent is that it supplied goods amounting to Rs. 6.87 lacs during the period from 27 September 2010 to 23 April 2012 to the Petitioner in spite of which payment has not been made. In pursuance of the aforesaid claim petition, a notice was issued by the Council, which is impleaded as the second respondent, to the petitioner on 3 December 2012. On 7 January 2013, the petitioner filed an objection under Section 8 of the Arbitration and Conciliation Act, 1996 stating that there is an arbitration agreement between the parties and submitted that the dispute be referred to arbitration in terms of the arbitration agreement. On 27 May 2013, the petitioner was asked to appear before the Member of the Facilitation Council at Lucknow for conciliation. Thereafter, further proceedings have taken place and on 30 December 2013, an order has been passed observing that the conciliation has not been successful. On 17 January 2014, a notice was issued to the petitioner to file its reply failing which it has been stated that action would be taken in terms of the provisions of the Micro, Small and Medium Enterprises Development Act, 2006.

2. The petitioner has filed this proceeding seeking the intervention of this Court and prays for a certiorari quashing all the proceedings before the Uttar Pradesh State Micro and Small Enterprises Facilitation Council and a direction to the Council to decide the objection filed under Section 8 of the Arbitration and Conciliation Act, 1996.

3. The petitioner has relied upon the arbitration agreement which is contained in the contract between the parties, which is in the following terms:

**"23. ARBITRATION:**

In all cases of disputes emanating from and in reference to this Purchase Order the matter shall be referred to the arbitration of the sole arbitration of the Executive Director/GM of BHEL, Bhopal or any other person (including an employee of BHEL, even though he had to deal with the matter relating to this P.O. in any manner) nominated by the said Executive Director/GM to act as sole arbitrator. The arbitration

shall be under 'THE ARBITRATION and CONCILIATION ACT of 1996' and the rules there under. The arbitrator may from time to time with the consent of the parties enlarge the time for making and publishing the award."

4. Parliament enacted the Micro, Small and Medium Enterprises Development Act, 2006 for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith. Section 7 provides for the classification of enterprises as micro enterprises, small enterprises and medium enterprises respectively. Under the said Act, the State Government is required to establish Micro and Small Enterprises Facilitation Councils. Section 15 provides that where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day. The proviso, however, stipulates that in no case would the period agreed upon between the supplier and the buyer in writing exceed forty-five days from the date of acceptance or the deemed date of acceptance. 'Appointed day' has been defined in Section 2(b) to mean the day following immediately after the expiry of the period of fifteen days from the day of acceptance or the day of deemed acceptance of any goods or any service by a buyer from a supplier. Section 18 empowers a reference of disputes being made to the Council by any of the parties to the dispute. Section 18 is in the following terms:

"**18.** (*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 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 to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of 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 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."

5. Section 18 empowers the Council, upon receipt of a reference, to conduct a conciliation in terms of the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996. Where the conciliation is not successful and is terminated without a settlement between the parties, the Council is empowered to itself take up

the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services. Sub-section (4) of Section 18 begins with a non obstante clause which operates notwithstanding anything contained in any other law for the time being in force. Under sub-section (4), the Council or as the case may be, the centre providing alternative dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

6. The Act thus provides for a statutory remedy of an arbitration in sub-section (4) to Section 18 notwithstanding anything to the contrary contained in any other law for the time being in force.

7. In the present case, the Council is seized of the reference on a claim petition filed by the second respondent.

8. In this view of the matter, the relief of certiorari for quashing all the proceedings before the Council is manifestly misconceived. The proceedings had been entertained by the Council in pursuance of the provisions of the Act. Though there may be an arbitration agreement between the parties, the provisions of Section 18(4) specifically contain a non obstante clause empowering the Facilitation Council to act as an Arbitrator. Moreover, section 24 of the Act states that sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

9. The petitioner has appeared before the Council and we see no reason to interdict the proceedings before the Council at this stage. Once the conciliation is unsuccessful, the Council will necessarily have to act in pursuance of the provisions of Section 18. Hence, no case for interference is made out.

10. The petition is, accordingly, dismissed. There shall be order as to costs.

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**Writ - C No. - 24343 of 2014**

**Paper & Board Convertors v. U.P. State Micro & Small Enterprises**

**2014 SCC OnLine All 5825 : (2014) 140 AIC (Sum 31) 15 : (2014) 105 ALR 50 : (2014) 6 All LJ 89**

(BEFORE D.Y. CHANDRACHUD, C.J. AND DILIP GUPTA, J.)

M/s. Paper & Board Convertors Thru' Partner Rajeev Agrawal ..... Petitioner

*v.*

U.P. State Micro & Small Enterprises & 2 Others ..... Respondents

Counsel for Petitioner:- Swapnil Kumar

Counsel for respondents:- A.S.G.I.

Writ - C No. - 24343 of 2014

Decided on April 29, 2014

**Industry, Trade, Development and Business Laws — Micro, Small and Medium Enterprises Development Act, 2006 — S. 18 — Challenge against the order of the facilitation council relegating the petitioner to adjudicate the dispute by the sole arbitrator so designated by the respondents — The respondents appointed a sole arbitrator after the petitioner had invoked the intervention of the Facilitation Council — Setting aside the order of the facilitation council — Once the jurisdiction of the Facilitation Council has been validly invoked, the Council has exclusive jurisdiction to enter upon conciliation in the first instance and after conciliation has ended in failure, to refer the parties to arbitration — The Facilitation Council had only one of the two courses of action open to it: either to conduct an arbitration itself or to refer the parties to a centre or institution providing alternate dispute resolution services stipulated in sub section (3) of S. 18**

**Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, Chief Justice**

**Hon'ble Dilip Gupta, J.**

The petitioner is a partnership firm which is registered under the provisions of the Indian Partnership Act, 1932 and is also registered as a small scale industry. The petitioner is engaged in the business of processing, manufacture and conversion of various kinds of papers and paper products. The petitioner is registered with the National Small Industries Corporation as a supplier of paper products to government departments in accordance with the rate contracts which are issued from time to time by the second respondents.

During 2005, 2008 and 2009, rate contracts were awarded to the petitioner for the supply of paper products which the petitioner claims to have supplied to designated consignees. According to the petitioner, goods were supplied but payments were not made.

On 3 June 2011, the petitioner served an Advocate's notice on the second respondent for the payment of its outstanding dues failing which, it was stated that it would be constrained to initiate proceedings under the Micro, Small and Medium Enterprises Development Act, 2006 (2006 Act). On 3 October 2011, the petitioner filed a claim before the Micro and Small Enterprises Facilitation Council of the State of Uttar Pradesh at Kanpur claiming an award of an amount of Rs. 1.03 crore together with interest and expenses.

An objection was filed on behalf of the respondents on 4 May 2012 *inter alia* contending that the dispute was first required to be decided by an arbitrator and it

was only when the liability to make payment was established that the Facilitation Council at Kanpur could exercise the jurisdiction. The respondents stated that in pursuance of the request which was made by the petitioner, an arbitrator had been appointed on 5 October 2011. On 28 December 2012, the respondents filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 on the ground that the sole arbitrator had been appointed by the respondents in pursuance of the request made by the petitioner.

Upon receipt of the reference, the Facilitation Council conducted conciliation proceedings. The Facilitation Council recorded a failure of conciliation on 30 December 2013. Thereafter, by an order dated 13 February 2014, the Facilitation Council upheld the contention of the respondents and directed that the petitioner should place its version before the sole arbitrator in terms of the rate contract agreement.

The submission which has been urged on behalf of the petitioner is that once the petitioner had invoked the provisions of the 2006 Act, the Facilitation Council was conferred with the exclusive jurisdiction under Section 18 to enter upon the dispute and to initially conduct the conciliation proceedings. Moreover, once the conciliation ended in a failure, the Council was, under Section 18(3) either required to take up the dispute for arbitration itself or to refer it to any institution or centre providing alternate dispute resolution services. The submission is that though the petitioner had invoked arbitration initially, the provisions of the 2006 Act were invoked on 3 October 2011. Thereafter, the proceedings had to be governed by that Act which contains a *non-obstante* clause in sub-section (4) of Section 18 and hence, it was not open to the respondents to seek a reference to the sole arbitrator whom the respondents had designated on 5 October 2011 after the petitioner had moved the Facilitation Council.

On the other hand, it has been urged on behalf of the respondents by the learned Assistant Solicitor General of India that it was at the behest and the request of the petitioner that the respondents had appointed an arbitrator on 5 October 2011. The respondents having acceded to the request for arbitration in terms of the arbitration agreement between the parties, the Facilitation Council was not in error in referring the parties to arbitration by the sole arbitrator appointed by the respondents on 5 October 2011.

The 2006 Act makes special provisions for facilitating the promotion and development and enhancing the competitiveness of Micro, Small and Medium Enterprises. The Statement of Objects and Reasons appended to the Bill which was introduced in Parliament contains the following rationale for the enactment of law.

"***Statement of Objects and Reasons.--*** Small scale industry is at present defined by notification under section 11-B of the Industries (Development and Regulation) Act, 1951. Section 29-B of the Act provides for notifying reservation of items for exclusive manufacture in the small scale industry sector. Except for these two provisions, there exists no legal framework for this dynamic and vibrant sector of the country's economy. Many Expert Groups or Companies appointed by the Government from time to time as well as the small scale industry sector itself have emphasised the need for a comprehensive Central enactment to provide an appropriate legal framework for the sector to facilitate its growth and development. Emergence of a large services sector assisting the small scale industry in the last two decades also warrants a composite view of the sector, encompassing both industrial units and related service entities. The world over, the emphasis has now been shifted from "industries" to "enterprises". Added to this, a growing need is being felt to extend policy support for the small enterprises so that they are enable to grow into medium ones, adopt better and higher levels of technology and achieve higher productivity to remain competitive in a fast globalisation area. Thus, as in most developed and many developing countries, it is necessary, that in India too, the concerns of the entire small

and medium enterprises sector are addressed and the sector is provided with a single legal framework. As of now, the medium industry or enterprise is not even defined in any law.

2. In view of the above-mentioned circumstances, the Bill aims at facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises and seeks to--

(a) provide for statutory definitions of "small enterprise" and "medium enterprise";

(b) provide for the establishment of a National Board for Micro, Small and Medium Enterprises, a high-level forum consisting of stakeholders for participative review of and making recommendations on the policies and programmes for the development of small and medium enterprises;

(c) provide for classification of micro, small and medium enterprises on the basis of investment in plant and machinery, or equipment and establishment of an Advisory Committee to recommend on the related matter;

(d) empower the Central Government to notify programmes, guidelines or instructions for facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises;

(e) make provisions for ensuring timely and smooth flow of credit to small and medium enterprises to minimise the incidence of sickness among and enhancing the competitiveness of such enterprises, in accordance with the guidelines or instructions of the Reserve Bank of India;

(f) empower the Central and State Governments to notify preference policies in respect of procurement of goods and services, produced and provided by small enterprises, by the Ministries, departments and public sector enterprises;

(g) empowering the Central Government to create a Fund or Funds for facilitating promotion and development and enhancing the competitiveness of small enterprises and medium enterprises;

(h) make further improvements in the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act, 1993 and making that enactment a part of the proposed legislation and to repeal that enactment.

3. The Bill seeks to achieve the above objects."

Chapter V of the Act contains special provisions in regard to delayed payments to Micro and Small Enterprises. Section 15 provides that where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment on or before the date agreed upon between him and the supplier in writing or, where there is no agreement, before the appointed day. The proviso stipulates that, in any case, the period agreed upon between the supplier and the buyer shall not exceed forty-five days from the day of acceptance or the day of deemed acceptance. Section 16 provides for the payment of interest by the buyer at three times of the Bank rate notified by the Reserve Bank upon a failure of the buyer to make payment, as required under section 15, notwithstanding anything contained in any agreement or in any law for the time being in force.

Section 18 of the Act is to the following effect:

"**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 to any 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 disputes as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of the 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."

Certain salient aspects of Section 18 would merit emphasis. Subsection (1) of Section 18 provides for a reference to the Micro and Small Enterprises Facilitation Council notwithstanding anything contained in any other law for the time being in force, by any party to a dispute, with regard to any amount due under Section 17. Consequently, what Section 18(1) does, is to stipulate a statutory reference to the Facilitation Council for the resolution of disputes. Under sub-section (2), on receipt of a reference, the Council shall either conduct a conciliation in the matter itself or seek assistance of any institution or centre providing alternate dispute resolution services. Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 are to apply to such a dispute. Sub-section (3) provides for the consequences if the conciliation is not successful. Once the conciliation proceeding is terminated without any settlement, the Council has one of two courses of action open. The Council may either itself take up the dispute for arbitration or refer the dispute to an institution or centre providing alternate dispute resolution services for such arbitration. Thereupon the provisions of the Arbitration and Conciliation Act, 1996 apply as if the arbitration was in Act. accordance with the provisions of Section 7(1) of the Act of 1996. Subsection (3) of Section 18, therefore, contains a statutory reference to arbitration. This is not dependent on the existence of an arbitration agreement in the contract between the parties.

Under sub-section (4) of Section 18, this position is made abundantly clear because it stipulates that notwithstanding anything contained in any other law for the time being in force, the 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 a supplier located within its jurisdiction and a buyer located anywhere in India.

The petitioner invoked the provisions of the 2006 Act by filing a reference to the Facilitation Council on 3 October 2011. There was undoubtedly a dispute between the petitioner and the respondents in regard to the claim of the petitioner arising out of non payment of its bills. The respondents appointed a sole arbitrator on 5 October 2011 after the petitioner had invoked the intervention of the Facilitation Council on 3 October 2011 under Section 18 of the 2006 Act. Once the jurisdiction of the Facilitation Council has been validly invoked, the Council has exclusive jurisdiction to enter upon conciliation in the first instance and after conciliation has ended in failure, to refer the parties to arbitration. The Facilitation Council could either have conducted the arbitration itself or could have referred the parties to a centre or institution providing alternate dispute resolution services. The Facilitation Council was clearly in

error in entertaining the objection filed by the respondents and referring the petitioner to the sole arbitrator so designated by the respondents.

The *non-obstane* provision contained in sub-section (1) of Section 18 and again in sub-section (4) of Section 18 operates to ensure that it is a Facilitation Council which has jurisdiction to act as an arbitrator or Conciliator in a dispute between a supplier located within its jurisdiction and a buyer located anywhere in India. The Facilitation Council had only one of the two courses of action open to it: either to conduct an arbitration itself or to refer the parties to a centre or institution providing alternate dispute resolution services stipulated in sub-section (3) of Section 18.

In this view of the matter, the impugned order of the Facilitation Council directing the parties to a reference before the sole arbitrator appointed by the respondents was manifestly illegal. We would, accordingly, have to allow the petition and set aside the impugned order dated 13 February 2014. We order accordingly.

As a consequence, we restore the proceedings back to the first respondent. The first respondent shall now act in accordance with the provisions of sub-section (3) of Section 18 and either conduct the arbitration itself or refer the arbitral proceedings to any institution or centre providing alternate dispute resolution services. The first respondent shall pass necessary orders in consequence of this direction within a period of one month from the receipt of a certified copy of this order.

By way of abundant caution, we make it clear that we have expressed no opinion on the merits or the tenability of the claim of the petitioner in respect whereof we keep all the rights and contention of the respondents open, to be urged before the arbitral forum.

The petition is, accordingly, allowed. There shall be no order as to costs.

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**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH**

**CWP No.277 of 2015**
**Date of Decision.09.01.2015**

The Chief Administrative Officer, COFMOW .....Petitioner

Versus

The Micro & Small Enterprises Facilitation Council of Haryana and others .....Respondents

Present: Mr. Sanjay Kumar Chhetry, Advocate for
Mr. Debabrata Borah, Advocate
for the petitioner.

**CORAM:HON'BLE MR. JUSTICE K. KANNAN**

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

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**K. KANNAN J. (ORAL)**

1. The order impugned is a reference by the Chairman HMSEFC-cum-Director of Industries and Commerce under the Provisions of the Micro Small and Medium Enterprises Development Act, 2006. If any dispute arises under a contract at the instance of any enterprise to which the provision of 2006 Act is applicable, Section 18 contemplates that the matter would be decided either by the Council itself or may make a reference to an institution or centre for conducting conciliation and the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act would apply. Clause (3) contemplates a situation of where the conciliation is not successful and stands terminated, the Council may itself take up the dispute for arbitration and refer to it as an institution or centre providing for alternative dispute resolution services for such arbitration.

2. The grievance is that the Council could not have directed an arbitration to be carried out by an arbitrator appointed by it without reference to the provision under clause 3 that contemplates to such reference only on the failure of the Council to resolve the dispute by itself under clause (2). I have seen through the order and when the Director makes a reference on behalf of the Council to an Arbitrator, It must be taken that it was not possible to conciliate and resolve the dispute itself and therefore, the reference was made. It would make no difference that the reference is made to an institution or centre which will provide for alternative dispute resolution services or a direct reference to the arbitrator itself. There can be really no prejudice at all for the petitioner, for, there is no issue of bias. The provisions of Arbitration Act are sufficient to make possible for any party who is not satisfied with the Arbitrator to take such an issue before him and invite a decision thereon which is still capable of being assailed in higher forums in the manner contemplated under the Arbitration and Conciliation Act.

3. The counsel says that there is an independent arbitration agreement under the contract and that must allow for the parties to choose the arbitrator in the manner contemplated under the contract. It must be taken only as an additional method of appointment of an arbitrator and cannot exclude the application of the provisions of this Act. This is so in view of the ***non obstante*** clause that is set forth under Section 18 which begins with these expressions "notwithstanding anything contained in any other law for the time being in force". A contract that provides for appointment of an arbitrator must be seen as

a contract as recognized by law and that provision will stand eclipsed by the *non obstante* clause that Section 18 provides for.

4. I find no substantial prejudice for the petitioner to approach this Court for any remedy under Article 226 of the Constitution. The writ petition is dismissed.

**(K. KANNAN)**
**JUDGE**

**January 09, 2015**
Pankaj*

**Arbitration Petition No. 990 of 2014**

**Bharat Sanchar Nigam Ltd. v. Maharashtra Micro and Small Scale Enterprises Facilitation Council**

**2015 SCC OnLine Bom 4145 : (2015) 3 AIR Bom R 659 : AIR 2015 (NOC 955) 358**

(BEFORE S.J. KATHAWALLA, J.)

Bharat Sanchar Nigam Ltd. ..... Petitioner

*v.*

The Maharashtra Micro and Small Scale Enterprises Facilitation Council & Additional Commissioner (Revenue) & Ors. ..... Respondents

Mr. Gautam Ankhad, instructed by M/s. Shukla & Associates, for BSNL.

Mr. Suresh Dhole for the Respondent No. 2

Arbitration Petition No. 990 of 2014
Along With
Notice of Motion (L) No. 1923 of 2014
Decided on March 31, 2015

**ORDER:**

1. BSNL - Bharat Sanchar Nigam Ltd. (BSNL) is a Company duly incorporated under Section 617 of the Companies Act 1956, and is registered as a Central Public Sector Enterprise providing telecom services in India, except Mumbai and Delhi. Respondent No. 1 - The Maharashtra Micro and Small Scale Enterprises Facilitation Council & Additional Commissioner (Revenue), is a statutory functionary established under the Micro, Small Medium Enterprises Development Act, 2006 ("the Council"). The Respondent No. 2-M/s. People Infocom Pvt. Ltd. ("PIPL") is a Company incorporated under the Companies Act, 1956. BSNL has entered into Agreements with PIPL for providing add on services to the customers of BSNL, details of which are set out hereinafter.

2. The present Petition is filed by BSNL under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 ("the Act").

3. The facts which have led to the filing of the present Petition are as under:

3.1 On 9th November, 2004, BSNL entered into an Agreement with PIPL whereunder PIPL agreed to provide SMS based Value Added Service to Cellular Mobile Subscribers of BSNL. This Agreement was non-exclusive and on revenue sharing basis. The said Agreement dated 9th November 2004 was renewed from time to time, i.e. on 2nd December 2005, 4th December 2006, 6th November 2007, 6th November 2008, 13th January 2009 and 23rd April 2010. Clause 11 of the Agreement dated 9th November 2004 provided that the disputes between the Parties shall be resolved by arbitration through a sole arbitrator appointed by the Chief Managing Director of BSNL.

3.2 Another Agreement dated 23rd November 2004 was also executed by and between BSNL and PIPL whereunder PIPL agreed to provide MMS/GPRS based value added services to the subscribers of BSNL. The Agreement dated 23rd November 2004 was

renewed from time to time by renewal letters dated 24th November 2006, 23rd November, 2007, 1st March 2008, 16th April 2008 and 22nd August, 2008. This Agreement too provided that the disputes between the Parties would be resolved by arbitration through a sole arbitrator appointed by the Chief Managing Director of BSNL. The Agreements dated 9th November 2004 and 23rd November 2004 along with the renewal agreements/letters shall hereinafter be referred to as "the said Agreements".

3.3 Since the year 2004, PIPL submitted its monthly bills for services provided by it to BSNL for payment. BSNL scrutinized PIPL's bills and made payment of the bills in accordance with the said Agreements. Amounts which were not admissible were deducted and balance amounts as admissible were paid to PIPL from time to time. PIPL disputed the short payments and raised a claim of about Rs. 2.57 crores since the year 2005 in respect of the said Agreements. According to BSNL, on 12th December 2008, there was a conciliation meeting held between BSNL and PIPL with regard to short payment and Call Detailed Records (CDR's) were exchanged.

3.4 PIPL through its Advocates' letter dated 6th April 2009 invoked the arbitration clause contained in the said Agreements. On 10th February 2010, PIPL withdrew the letter/notice dated 6th April, 2009 invoking arbitration and clearly recorded that "... *please note that the letter/notice dated 6th April 2009 hereby stands withdrawn/revoked/cancelled without any liability to you. Our clients however, state that the withdrawal of the notice/letter dated 6th April, 2009 is without prejudice to any of their rights that they may have under the said Agreements."*

3.5 Post the withdrawal of the arbitration notice, BSNL and PIPL exchanged correspondence between the period 4th February 2011 and 14th March 2012, whereunder PIPL sought payment of its dues from BSNL and BSNL denied and disputed the claim of PIPL.

3.6 On 28th May 2012, PIPL forwarded its Application [under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act")], to the Council seeking the following relief:

*"This Facilitation Council/appropriate authority be pleased to allow this application and direct BSNL to pay a sum of Rs. 2,98,07,510 (Two Crores Ninety eight lacs Seven thousand five hundred ten) towards the outstanding invoices along with interest of 225,73,308 (Two crores Twenty Five Lacs Seventy Three Thousand Three Hundred and Eight) calculated @ 18% p.a. till 31st March 2012 in accordance with MSMED Act. We request that further interest be allowed till actual payment and realization of the amount.*

3.7 In paragraph 4(c) and Paragraph 6 of the said Application, PIPL stated as follows:

*"4(c): In April 2009 in order to get the things resolved, we issued a notice, through our Advocate to BSNL, to invoke Arbitration ("Notice"). The notice was not replied for a very long time, it is only when the time for renewing the Agreements arrived the BSNL Officials communicated that if we intend to renew the Agreements we will have to withdraw the Notice and the outstanding amounts would be cleared simultaneously. In the interest of long term relationship and with the assurance given by BSNL for clearing our dues, we withdrew the said notice vide our Advocates letter dated 10th February 2010. However, the payments have still not cleared....."*

*"6. Arbitrator and Conciliator:- In the present connection, if we once again initiate the Arbitration proceedings with BSNL, we apprehend and doubt the transparency and fairness with which BSNL would handle the dispute and we believe that a fair trial would not be carried as the matter would come up before the sole Arbitrator being the Chairman and Managing Director of BSNL. It is therefore requested to the Divisional Commissioner to act as Arbitrator & Conciliator in connection with this application."*

3.8 The Council by its notice/letter dated 11th July 2012, informed BSNL that PIPL has filed a Petition before the Council, being Petition No. 11 of 2012 praying for the recovery of the amount due i.e. Rs. 5,23,80,819 (Principal Rs. 2,98,07,510 + interest Rs. 2,25,73,309) and called upon BSNL to file its reply within 15 days from the date of receipt of the said notice/letter.

3.9 BSNL by its letter dated 14th September 2012, addressed to the Member Secretary of the Council recorded that it has received the Notice dated 11th July 2012 from the Council, calling for conciliation in respect of the purported disputes raised by PIPL and inviting BSNL for conciliation under Section 62 of the Act. BSNL, in its said letter further recorded that all the accounts between BSNL and PIPL have been settled and therefore the invitation for conciliation proceedings is rejected and the conciliation proceedings stands terminated. BSNL also recorded that if PIPL is of the view that any further amount is recoverable from BSNL, it would be open for PIPL to apply to the Chief Managing Director of BSNL for appointment of an Arbitrator under the said Agreements.

3.10 The Council by its letter dated 23rd October 2012 addressed to BSNL as well as PIPL informed them that the hearing of the Council is scheduled on 3rd November, 2012 between 11 a.m. and 2 p.m., and that the parties should attend the Meeting on time. In the Minutes of the Meeting held on 3rd November, 2012, the Council recorded that the representatives of both the Parties were present, and after hearing the representatives of the Parties, the Council has ordered that the Parties should try and arrive at an amicable settlement qua the balance outstanding claimed by PIPL from BSNL within a period of one month from the date of the order.

3.11 On 22nd January 2013, the Advocates for BSNL addressed a letter to the Member Secretary of the Council forwarding BSNL's affidavit in reply dated 16th January 2013 to the Council and recording that BSNL is once again rejecting the invitation for conciliation and therefore the conciliation proceedings stand terminated. In the said affidavit BSNL reiterated its stand as recorded in its Advocates letter dated 22nd January 2013 and further recorded that in the Meeting held on 3rd November 2012, BSNL had categorically submitted that they are not submitting to the jurisdiction of the Council and therefore the conciliation proceedings stood terminated. However the Council had not recorded the said submission made on behalf of BSNL in the Minutes of the Meeting held on 3rd November 2012.

3.12 In June 2013, PIPL filed an Application before the Council under Section 18(3) of the MSMED Act, inter alia recording that the conciliation proceedings between the Parties have failed and praying that the dispute now be referred to arbitration. Paragraph 8 of the said Application is reproduced hereunder:

*"8. The Petitioner submits that with reference to Clause No. 11 of the Agreements, as has been referred to by the Respondent, the same does not supersede the provisions of the Medium Enterprises Development Act, 2006 and the Hon'ble Council has*

*jurisdiction to adjudge the current dispute and the provision of Medium Enterprises Development Act, 2006 shall prevail. Further the Petitioner has an apprehension that if Chairman and Managing Director of the Respondent Company is appointed as a sole arbitrator then the matter would not be to be decided in a impartial manner and undue advantage would be given to the Respondent. Hence in the circumstances all the disputes need to be referred and settled by referring them to arbitration in accordance with the provisions of the Micro, Small and Medium Enterprises Development Act, 2006."*

3.13 On 21st October 2013, pursuant to the arbitration clause contained in the said Agreements, the Chairman and Managing Director of BSNL appointed Mr. Chandra Prakash as the sole arbitrator to determine the disputes between PIPL and BSNL. The Learned Sole Arbitrator on 29th October 2013, issued directions to the Parties to file their claims and counter claims. PIPL by its letter dated 15th November 2013, addressed to the learned Arbitrator Mr. Chandra Prakash informed him about the proceedings pending before the Council. PIPL, in its said letter also pointed out to the learned Arbitrator that since the arbitration proceedings have already been initiated by PIPL and the notice of the same is already sent to BSNL, it is unfair on the part of BSNL to invoke the arbitration for the same cause of action before a different forum. The Learned Arbitrator was therefore requested to keep the matter in abeyance until the application filed before the Council was decided.

3.14 On 21st December 2013, a hearing was held before the Council which was attended by the representatives of the Parties along with their Advocates. From the Minutes of the Meeting held on 21st December 2013 (page 115 of the Petition), it appears that the Advocate for BSNL submitted before the Council that the disputes between the Parties should be referred to the Arbitrator already appointed by BSNL. Thereupon the Chairman of the Council pointed out that since there were 3 to 4 similar cases with the Council, the matter will be heard after examining and studying the various decisions of the High Court and adjourned the hearing to 18th January 2014. The hearing held on 18th January, 2014, before the Council was attended to by the representatives of BSNL and PIPL. From the Minutes of the Meeting/hearing held on 18th January 2014 (Page 116 of the Petition) it appears that BSNL raised the issue of jurisdiction of the Council and in support of its contention that the Council has no jurisdiction to proceed with the hearing of the disputes, submitted a copy of the judgment passed by this Court in the case of *Faridabad Meta Udyog Pvt. Ltd.* v. *Mr. Anurag Deepak, Sole Arbitrator*. Thereupon the Council fixed the matter for further hearing on 1st February, 2014.

3.15 On 1st February 2014, both the Parties appeared before the Council and made submissions on the issue of jurisdiction, before it.

3.16 According to BSNL, the Council by its letter/notice dated 14th February 2014, informed BSNL that the next hearing before the Council is fixed on 15th February 2014. In the said letter/notice it was stated that the Minutes of the Meeting held on 1st February 2014, were enclosed therewith. Since no such Minutes were enclosed, the Advocate for BSNL contacted the Council and requested for a copy of the same. However, the Advocates for BSNL were informed that the same will be provided on the date of hearing i.e. on 15th February, 2014.

3.17 According to BSNL, a copy of the Minutes of the Meeting held on 1st February

2014 were handed over to them at the Meeting held on 15th February 2014. Upon perusal of the said Minutes it was observed that certain incorrect statements were recorded in the said Minutes which were pointed out to the Council. According to BSNL on 15th February 2014, it was categorically brought to the notice of the Council that (i) the arbitration proceedings before the learned Sole Arbitrator Mr. Chandra Prakash had already commenced, and that parallel proceedings cannot be commenced on the same subject matter; (ii) admittedly the cause of action and the subject matter of the dispute is even prior to the provisions of MSMED Act, 2006 coming into force and the said Act cannot be given retrospective effect; (iii) the Council will not have jurisdiction to try and entertain the present dispute and (iv) there was no speaking order passed by the Council as to why the settled rule of law laid down in various judgments on the subject matter were not applicable.

3.18 From the Minutes of the Meeting held before the Council on 15th February 2014, it becomes clear that the representative of BSNL informed the Council that the Council had no jurisdiction to hold the arbitration as recorded in the Minutes of the Meeting held on 1st February 2014. The Council therefore gave time to BSNL to approach the appropriate forum before 15th April, 2014.

3.19 BSNL thereafter filed the present Petition under Sections 14 and 15 of the Act seeking termination of the mandate of the Council and a direction to PIPL to appear before the Ld. Arbitrator Mr. Chandra Prakash, who is appointed in accordance with the arbitration agreement.

4. The Learned Advocate appearing for BSNL has taken me through the various provisions of the MSMED Act. The Learned Counsel has strongly relied on the decision of the Division Bench of this Court in Writ Petition No. 2145 of 2010 in the case of *Steel Authority of India Ltd.* v. *Micro, Small Enterprises Facilitation Council, through Joint Director of Industries, Nagpur Region, Nagpur*[1]. In that case a writ petition was filed by M/s. Steel Authority of India, questioning the jurisdiction of the Council in entertaining a reference under Section 18 of the MSMED Act in disputes which had arisen between the parties thereto. Paragraphs 2, 3, 11, 12, 13 and 14 of the said Judgment are reproduced hereunder:

*"2. This is a petition by M/s. Steel Authority of India, questioning the jurisdiction of Respondent No. 1-the Micro, Small Enterprises Facilitation Council (hereinafter referred to as "the Council") in entertaining a reference under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "the Act"), in disputes, which have arisen between the petitioners as a buyer of goods from Respondent No. 2 - M/s. Vidarbha Ceramics Pvt. Ltd, as seller.*

3. Respondent No. 2-M/s. Vidarbha Ceramics Pvt. Ltd. (hereinafter referred to as "the Supplier") has supplied certain goods to the petitioners (hereinafter referred to as "the Buyers") under a contract for supply of Fire Clay Refractory Coke-Oven. According to the Petitioners, the materials supplied by the supplier were defective and the supplier was, therefore, asked to replace the material.

*The supplier, apparently, admitted the defects in the material vide communications dated 01.01.2007, 25.01.2007 and 10.02.2007. The supplier, thereafter, issued a notice to the petitioners and invoked clause 22 of the agreement between them and proposed to appoint Justice C.P. Sen (Retired) as Arbitrator to settle the dispute through arbitration. However, in pursuance to clause 23 of the general conditions of contract, the Petitioners exercised, its powers and appointed one Mr. S.K. Gulati as an*

*Arbitrator for resolving the disputes between the parties. The Arbitrator issued notices to the parties on 09.03.2009 asking them to submit their claim within 21 days. However, on 26.03.2009, the supplier instead of filing the claim submission before the Arbitrator, objected to the arbitration by stating that the matter be either referred to Justice C.P. Sen (Retired) or it should go before the Micro, Small Enterprise Facilitation Council (hereinafter referred to as "the Council") established under the Act. The petitioners declined to enter into another mode of settlement of dispute before the Council since it had already appointed an Arbitrator. On 17.04.2009, the supplier went ahead and filed a reference before the respondent no. 1-Council under Section 18 of the Act. The petitioners filed an objection before the Council contending that the matter cannot be entertained by it in view of the Arbitration and Conciliation Act, 1996.*

*11. Having considered the matter, we find that Section 18(1) of the Act, in terms allows any party to a dispute relating to the amount due under Section 17 i.e. an amount due and payable by buyer to seller; to approach the facilitation Council. It is rightly contended by Mrs. Dangre, the learned Addl. Government Pleader, that there can be variety of disputes between the parties such as about the date of acceptance of the goods or the deemed day of acceptance, about schedule of supplies etc. because of which a buyer may have a strong objection to the bills raised by the supplier in which case a buyer must be considered eligible to approach the Council. We find that Section 18(1) clearly allows any party to a dispute namely a buyer and a supplier to make reference to the Council. However, the question is; what would be the next step after such a reference is made, when an arbitration agreement exists between the parties or not. We find that there is no provision in the Act, which negates or renders an arbitration agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the provisions of Section 15 to 23-including section 18, which provides for forum for resolution of the dispute under the Act-would not have the effect of negating an arbitration agreement since that section overrides only such things that are inconsistent with Section 15 to 23 including Section 18 notwithstanding anything contained in any other law for the time being in force. Section 18(3) of the Act in terms provides that where conciliation before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution and that the provisions of the Arbitration and Conciliation Act, 1996 shall thus apply to the disputes as an arbitration in pursuance of arbitration agreement referred to in Section 7(1) of the Arbitration and Conciliation Act, 1996. This procedure for arbitration and conciliation is precisely the procedure under which all arbitration agreements are dealt with. We, thus find that it cannot be said that because Section 18 provides for a forum of arbitration an independent arbitration agreement entered into between the parties will cease to have effect. There is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996.*

*12. At this stage, it is necessary to deal with another contention raised on behalf of the Council by Mrs. Dangre, the learned Addl. Government Pleader. According to the learned Addl. Government Pleader, the procedure of conciliation contemplated by Section 18(2) of the Act is a procedure, which has been specially enacted for the purposes providing a Forum for conciliation which itself is capable of settling a dispute between the micro, small and medium enterprises and any other party. We find that*

*the arbitration agreement in question, like most arbitration agreements, does not contain a specific provision for conciliation and, therefore, it would be necessary for the parties to submit to the conciliation process under Section 18(2) of the Act notwithstanding the existence of an arbitration agreement. Undoubtedly, the Council may either itself conduct the conciliation in accordance with the provisions of Section 65 to 81 of the Arbitration and Conciliation Act, 1996 or as provided by Section 18(2) of the Act refer it to any institute or centre provided for alternate dispute resolution.*

*13. At one stage, it was also submitted at the bar that the procedure contemplated by Section 18 of the Act for resolution of dispute is not compulsory either for the seller or the buyer and the parties are free to adopt any course including the civil suit. We, however, find that it is not possible for the parties-whether a buyer or seller-to invoke jurisdiction of a Civil Court by filing Civil Suit in respect of its claim particularly since the requirement of conciliation is mandatory and the buyer or seller must approach the Council where there is a dispute with regard to any amount due under Section 17 of the Act.*

*14. In the circumstances, we hold that respondent no. 1-Council is not entitled to proceed under the provisions of Section 18(3) of the Act in view of independent arbitration agreement dated 23.09.2005 between the parties. The petitioners and respondent no. 2 shall, however, participate in the conciliation, which shall be conducted by respondent no. 1-Council under the provisions of Section 18(1) and (2) of the Act. Respondent no. 1-Council shall complete the process of conciliation within a period of two weeks from the date the parties appear before it. The parties are directed to appear before respondent no. 1-Council on 25.10.2010."*

5. The Learned Advocate appearing for BSNL has submitted that though a Special Leave Petition (SLP) is preferred from the above decision of the Division Bench of this Court and the same has been admitted, there is no stay operating against the said order and therefore the ratio laid down in the said decision holds the field.

6. The learned Advocate appearing for BSNL also relied on the following Judgments passed by the learned Single Judge of this Court in:

(i) *Hindustan Sires Ltd.* v. *R. Suresh*[2],

(ii) *Faridabad Metal Udyog Pvt Ltd.* v. *Mr. Anurag Deepak*[3] and

(iii) *Supreme Cylinders Ltd.* v. *R. Suresh*[4] and has submitted that the learned Single Judge has in his said Judgments followed the decision of the Division Bench in *Steel Authority of India Ltd.* (supra) and has accordingly decided the arbitration petitions filed under Section 14 of the Act.

7. The Learned Advocate appearing for BSNL has next submitted that the claims raised by PIPL also pertain to the period much prior to the MSMED Act, 2006 coming into force as well as to BSNL's registration. The said Act cannot be said to have retrospective operation. In view thereof the Council would have no jurisdiction whatsoever to adjudicate on the present disputes. It is also submitted on behalf of BSNL that the apprehension of bias expressed by PIPL before the Council is unwarranted, and that the claim by PIPL is also barred by the law of limitation. It is also submitted that the arbitration proceedings in connection with the said Agreements between the Parties have already commenced before the learned Sole Arbitrator.

8. It is therefore submitted on behalf of BSNL that the reliefs sought in the above Petition be granted.

9. The Learned Advocate appearing for PIPL has inter alia made the following submissions:

(i) That the purported order dated 1st February 2014 is not an order passed in conciliation proceedings but an order passed under Section 18 of MSMED Act, 2006;

(ii) That the question raised in the present Arbitration Petition can be raised only under writ jurisdiction;

(iii) That the MSMED Act, 2006, is a special enactment and will prevail over the Arbitration & Conciliation Act, 1996;

(iv) That the provisions of Arbitration under the MSMED Act will prevail over the contractual arbitration agreement and thus appointment of a sole arbitrator as per the Arbitration Agreement is not valid;

(v) That the Judgment of this Court passed in *SAIL* v. *Micro, Small Enterprise Facilitation Council* (supra) is challenged before the Hon'ble Supreme Court of India and the Hon'ble Supreme Court of India was pleased to grant leave; and

(v) That the Arbitration Petition is not maintainable and liable to be dismissed.

10. In support of its submissions, the Learned Advocate appearing for PIPL has relied on the following decisions:

(i) *Eden Exports Co.* v. *Union of India*[5]

(ii) *Lanco Infratech Ltd.* v. *Micro and Small Enterprises Facilitation Council*[6]

(iii) *Principal Chief engineer* v. *Manibhai*[7]

(iv) *Union of India* v. *Delhi High Court Bar Association*[8]

(v) *Maharashtra State Electricity Board* v. *Maharashtra Conductors Association (SSI)*[9];

(vi) *Maharashtra Conductor Association (SSI)* v. *Maharashtra State Electricity Board*[10]

(vii) *Sanket Steel Industries* v. *The Presiding Officer, Micro and Small Enterprises Facilitation Council*[11]

(viii) *Purbanchal Cables & Conductors Pvt. Ltd.* v. *Assam State Elec. Board*[12]

(ix) *Secur Industries Ltd.* v. *Godrej & Boyce Mfg.Co. Ltd.*[13]

(x) *Lalitkumar* v. *Sanghavi (Dead through LRS Neeta Lalit Kumar Sanghavi* v. *Dharamdas V. Sanghavi*[14]

(xi) *Kirloskar Brothers Ltd.* v. *Fusion Controls*[15]

(xii) *Modern Industries* v. *Steel Authority of India Ltd.*[16]

(xiii) *Reliance Industries Ltd.* v. *Union of India*[17];and

(xiv) *S. Govinda Menon* v. *Union of India*[18]

It is submitted on behalf of PIPL that the above Petition be therefore dismissed.

11. I have considered the pleadings filed by the Parties, the submissions made by their Advocates and the case-law cited by them.

12. PIPL admittedly approached the Council to resolve the disputes between BSNL and PIPL by filing an Application dated 28th May, 2012. The said Application was made by PIPL under Section 18 of the MSMED Act. Section 18 of the MSMED Act is reproduced hereunder:

"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 condition 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 to it any 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 subsection (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"

From the above Section it is clear that upon receipt of a reference by the Council, the Council may either itself attempt to bring about conciliation between the Parties in the matter, or seek the assistance of an institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre for conducting conciliation under the provisions of Sections 65 to 81 of the Act, and 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 to any institution or centre providing alternate dispute resolution services for such arbitration, and the provisions of 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.

13. The Council upon receipt of the said Application dated 28th May 2012 from PIPL, by its letter dated 11th July 2012 informed BSNL that the said reference has been filed before it by PIPL and that BSNL should file its reply to the same within 15 days from the date of receipt of the notice. BSNL by its letter dated 14th September 2012, rejected the invitation for conciliation proceedings and informed the Council that the conciliation proceedings stand forthwith terminated. The Council fixed a meeting on 3rd November 2012 which was attended by the representatives of BSNL as well as PIPL. On that day the Council gave 4 weeks time to the Parties to attempt an amicable settlement of their disputes. BSNL once again by its letter dated 22nd January 2013, informed the Council that it is rejecting the invitation for conciliation and also forwarded its Affidavit-in-Reply dated 16th January 2013, to the Council inter alia recording that BSNL had on 3rd November 2012 informed the Council that BSNL is not submitting to the jurisdiction of the Council, which fact was not recorded in the Minutes of the Meeting held on 3rd November 2012.

14. PIPL filed an application in June 2013 before the Council inter alia stating that the conciliation proceedings had failed and requested the Council to take up the dispute for arbitration under Section 18(3) of the MSMED Act.

15. Thereafter the Chairman and Managing Director of BSNL by his letter dated 21st October 2013 appointed Shri Chandra Prakash as an Arbitrator to decide the disputes between the Parties pursuant to the said Agreements executed by and between BSNL and PIPL. The Learned Arbitrator by his letter addressed to BSNL and PIPL issued certain directions to the Parties to file their claims/counter-claims before him. However, PIPL by its letter dated 15th November 2013, addressed to the learned Arbitrator recorded that since the arbitration proceedings were already initiated by PIPL and a notice to this effect was already sent to BSNL, it was unfair on the part of BSNL to invoke arbitration for the same cause of action before a different forum and requested the Arbitrator to keep the matter in abeyance until the application filed before the Council was decided. The Sole Arbitrator appointed by BSNL thereafter did not pursue the matter any further. Instead the representatives of BSNL and PIPL pursuant to the meeting fixed by the Council appeared before the Council on 21st December 2013 and the representative of BSNL submitted before the Council that the arbitration proceedings should be placed before the Arbitrator appointed by them. The meeting was adjourned to 18th January 2014 since the Chairman of the Council wanted to examine and study the case law on the subject.

16. On 18th January 2014, the Council recorded that the representative of BSNL raised the issue of jurisdiction qua the Council and submitted a copy of the Judgment passed by this Court in the case of *Faridabad Meta Udyog Pvt. Ltd.* v. *Mr. Anurag Deepak, Sole Arbitrator*. This Judgment was obviously cited by BSNL in support of its submission that the Council has no jurisdiction to proceed with the Arbitration and not in support of the argument that the Council had no jurisdiction to hold the conciliation proceedings. The Council decided to hear the matter on 1st February 2014. From the Minutes of the Meeting held on 1st February 2014 (Page 120 of the Petition) it appears that arguments were once again advanced by the Advocates for the Parties with regard to the jurisdiction of the Council to proceed with the Arbitration, and the Council accepted the argument advanced by the Advocate for PIPL and came to the conclusion that the conciliation proceedings have come to an end and the arbitration proceedings

will start before the Council, and that the Council itself will work as the Arbitral Tribunal. Since BSNL insisted that the Council had no jurisdiction to proceed with the arbitration proceedings, the Council having already decided that the conciliation proceedings had concluded, and the Council would now proceed with the arbitration proceedings, in the meeting held on 15th February 2014 gave an opportunity to BSNL to raise their grievance before the appropriate forum.

17. BSNL thereafter filed the above Petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996, inter alia seeking the following reliefs:-

*"(a) The Hon'ble Court be pleased to terminate the mandate of Respondent No. 1 and direct PIPL to appear before the Ld. Arbitrator Mr. Chandra Prakash who is appointed in accordance with the arbitration agreement;*

*(b) The Hon'ble Court be pleased to quash and set aside the order dated 1st February 2014 passed by Respondent No. 1."*

18. Sections 14, 15 and 16 of the Act read thus:

*"14.* ***Failure or impossibility to act.-****(1) The mandate of an arbitrator shall terminate if-*

*(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and*

*(b) he withdraws from his office or the parties agree to the termination of his mandate*

*(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.*

*(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agreed to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this Section or sub-section (3) of Section 12.*

15. ***Termination of mandate and substitution of arbitrator.-***

*(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate-*

*(a) where he withdraws from office for any reason; or*

*(b) by or pursuant to agreement of the parties.*

*(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.*

*(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.*

*(4) Unless otherwise agreed by the parties an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid*

*solely because there has been a change in the composition of the arbitral tribunal.*

*16.* ***Competence of arbitral tribunal to rule on its jurisdiction.-*** *(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose.-*

*(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and*

*(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

*(2) a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.*

*(3) a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*

*(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.*

*(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.*

*(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.*

19. Section 14 of the Act is applicable only if an arbitrator, is made to act as an arbitrator under a mandate, and that mandate comes to an end making it impossible to act as an arbitrator, on the grounds set out in the said Section. Section 15 of the Act also provides for termination of the mandate of an arbitrator and the consequent substitution. Section 16 of the Act provides that where a plea is raised that an Arbitral Tribunal does not have jurisdiction, the Arbitral Tribunal shall decide such plea, and where the Arbitral Tribunal takes a decision rejecting the plea, the Arbitral Tribunal shall continue with the arbitral proceeding and make an arbitral award. A party aggrieved by the award is at liberty to make an application for setting aside the same under Section 34 of the Act.

20. In the present case, BSNL has throughout contended that the Council has no mandate to proceed with the arbitration proceedings, and has challenged the jurisdiction of the Arbitral Tribunal (Council) on that ground. The Council has, after hearing the Parties, decided that it has jurisdiction to proceed with the arbitration between the Parties. BSNL is no doubt aggrieved by this decision of the Council. However, BSNL cannot approach this Court with a prayer that the mandate of the Council (Arbitrator) stands terminated. The Arbitral Tribunal having rejected the plea of BSNL and having decided that it has jurisdiction to proceed with the arbitration is entitled in law to continue with the arbitral proceedings and make an arbitral award under sub-clause (5) of Section 16 of the Act, and BSNL if aggrieved may challenge the final award as provided in sub-clause (6) of Section 16 of the Act. The Judgment of the Division Bench of this Court in *Steel Authority of India Ltd.* v. *Micro, Small Enterprises Facilitation Council, through Joint Director of Industries, Nagpur Region,*

*Nagpur* (supra) holding that in the facts of that case the Council did not have the jurisdiction to proceed with the arbitration is a decision given in a Writ Petition filed by M/s. Steel Authority of India challenging the jurisdiction of the Council. A similar relief cannot be sought by BSNL by way of a Petition filed under Sections 14 and 15 of the Act.

20. The argument advanced on behalf of BSNL that the learned Single Judge has in *Hindustan Sires Ltd.* v. *R. Suresh, Sole Arbitrator, Faridabad Metal Udyog Pvt Ltd.* v. *Mr. Anurag Deepak* (supra) and *Supreme Cylinders Ltd.* v. *R. Suresh* (supra) followed the view of the Division Bench of this Court in a petition under Section 14 of the Act also renders no assistance to BSNL. In that case the petition under Section 14 of the Act was filed by the supplier contending that the mandate of the arbitrator appointed under the Agreement executed between the parties had come to an end, inter alia on the ground of inordinate delay on the part of the learned arbitrator to conclude the arbitration proceedings and therefore prayed that the matter be referred to the Council. It is in this context that the learned Single Judge of this Court referred to the decision in *Steel Authority of India Ltd.* (supra) and held that the arbitrator appointed as per the agreement between the parties can proceed with the arbitration proceedings irrespective of Section 18 of the MSMED Act and that the mandate of the arbitrator has not come to an end even on the ground that the arbitration proceedings were delayed, because the application under Section 14 of the Act was made by the Petitioner in that matter after all the pleadings between the parties were filed before the learned arbitrator and he had fixed the matter for final hearing.

21. For the aforestated reasons in my view the above Petition is not maintainable under Section 14 and/or 15 of the Arbitration and Conciliation Act, 1996, and the same is rejected. It is therefore not necessary for me to consider the other submissions advanced on behalf of BSNL pertaining to the retrospective applicability of the MSMED Act and the claim of PIPL being time barred. In view thereof, the above Petition is dismissed with a clarification that the dismissal of the Petition shall not preclude BSNL from pursuing any other remedy available to them in law.

**22.** PIPL has filed the above Notice of Motion alleging that the Officers of BSNL and its Advocate have committed contempt of court and that they be suitably punished for the same. It is submitted on behalf of PIPL, that after PIPL filed an Application before the Council seeking intervention of the Council under Section 18 of the MSMED Act, the Council issued a notice to BSNL on 11th July 2012, informing them about the filing of the said Application by PIPL and asking BSNL to appear before the Council and submit its defence statement. It is submitted on behalf of PIPL that the Officers of the BSNL and its Advocate have disobeyed the mandate of the MSMED Act and by its letter/affidavit dated 14th September 2012, have rejected the invitation for conciliation proceedings by inter alia stating that, "*We….. hereby reject the invitation for conciliation proceedings…….*". It is submitted that this amounts not only to disobedience but also disregard towards the Council which is a statutory body. In support of this contention, the learned Advocate appearing for PIPL has relied on the decisions in the case of (i) *Heema Ravishankar* v. *K.R. Ravishankar*[19] and (ii) *M.Y. Shareef* v. *Hon'ble Judges of the Nagpur High Court*[20].

23. BSNL has in response submitted that there is no contempt whatsoever committed by the Officers of the BSNL or the Advocate for BSNL as alleged. It is submitted that the said letter merely uses the language/terms used under Section 62(3) of the Arbitration and Conciliation Act, 1996. It is submitted that the case-law relied upon by PIPL in support of its contention that the Officers of the BSNL and its Advocate have

committed contempt would not be applicable to the facts of the present case.

24. After considering the submissions advanced by the Learned Advocates appearing for the Parties, I am of the view that there is no contempt committed by the Officers of the BSNL and/or the Advocate for BSNL as alleged by PIPL. Section 62(3) of the Act of 1996 reads as under:

*"62. **Commencement of conciliation proceedings.-** (1) The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.*

*(2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.*

***(3) If the other party rejects the invitation, there will be no conciliation proceedings.***

*(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly."*

25. BSNL has, in its letter addressed to the Council in response to its invitation for conciliation, inter alia responded as under:

*"(2) .... All amounts have already been settled with the PETITIONER and we hereby reject the invitation for conciliation proceedings as more particularly contemplated under Section 62*

*(3) of the Arbitration and Conciliation Act, 1996 and hence the conciliation proceedings shall hereby stands terminated forthwith."*

It is therefore clear that by the said letter BSNL has merely used the terms which are used under Section 62(3) of the Act of 1996. In fact, admittedly BSNL has despite rejecting the invitation for conciliation, throughout attended all the hearings before the Council, and has also advanced their submissions. The question therefore of the Officers of BSNL or the Advocate for BSNL having committed contempt as alleged by PIPL, does not arise and the said Notice of Motion is dismissed with costs.

26. After the Order is pronounced, the Learned Advocate appearing for BSNL has prayed that the Council be directed not to proceed with the arbitration proceedings for a period of four weeks from the date of this Order. The said prayer is granted. In view thereof, the Council shall not proceed with the arbitration proceedings upto 28th April, 2015.

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[1] 2012 (6) AIR Bom R 670

[2] *Order dated 4th April 2013 in Arbitration Petition No. 56 of 2013*

[3] 2013 (7) Bom CR 631

[4] Judgment dated 30th April 2013, passed in Arbitration Petition No. 52 of 2013.

[5] Madras High Court Judgment dated 20th Nov. 2012 in W.P. No. 2461 of 2010;

[6] Bombay High Court Judgment dated 24th October 2013 in Civil W.P. No. 6636 of 2013;

[7] Gujarat High Court Judgment dated 11th April 2012 in Letters Patent Appeal No. 1997 of 2011;

[8] (2002) 4 SCC 275

[9] Bombay High Court order dated 30th August 2004 in Arbitration Petition (O.S.) No. 328 of 2004

[10] 2008 (4) AIR Bom. R. 236

[11] Bombay High Court (Nagpur) Judgment dated 7th January, 2014 in WP No. 3414 of 2012.

[12] (2012) 7 SCC 462

[13] (2004) 3 SCC 447

[14] (2014) 7 SCC 255

[15] Unreported order of Bombay High Court dated 6th August, 2014 in Arb. Petition (A.S.) No. 48 of 2013

[16] 2010 (3) ALL MR 464

[17] (2014) 7 SCC 603

[18] AIR 1967 SC 1274

[19] 2004 Cri. L.J. 1205

[20] AIR 1955 SC 19

**AA No. 2 of 2015**

**State of M.P. v. Anivet Health Care**

**2016 SCC OnLine MP 4875**

**In the High Court of Madhya Pradesh**

(BEFORE PRAKASH SHRIVASTAVA, J.)

The State of Madhya Pradesh ..... Petitioner

*v.*

M/s. Anivet Health Care ..... Respondent

Shri Yogesh Mittal learned counsel for appellant in AA No. 2/15 and respondent in AA No. 4/15.

Shri Pankaj Sohani learned counsel for appellant in AA No. 4/15 and respondent in AA No. 2/15.

AA No. 2 of 2015 & AA No. 4 of 2015

Decided on February 2, 2016

**PRAKASH SHRIVASTAVA, J.**:— These appeals have been filed under Section 37 of Arbitration and Conciliation Act, 1996 (for short Act, 1996) challenging the order dated 18/11/2014 passed by Additional District Judge Shajapur rejecting the objection of both the parties filed under Section 34(2) of Act, 1996, against the award dated 12/8/13 passed by MP Micro, Small and Medium Enterprises Facilitation Council (for short Facilitation Council). The arbitration appeal No. 4/15 is at the instance of M/s. Anivet Health Care whereas arbitration appeal No. 2/15 is at the instance of State.

**2.** In brief, the proposal of M/s. Anivet Health Care was accepted by the State for the year 2008-09 for supply of kit to the beneficiaries of the cattle and imparting three days training. Accordingly the orders in this regard were issued in favour of M/s. Anivet Health Care. The allegation of M/s. Anivet Health Care is that though the kits were supplied and training was imparted but the requisite bill amount was not paid, hence M/s. Anivet Health Care had preferred reference under Section 18 of MP Micro, Small and Medium Enterprises Development Act, 2006 (Act of 2006) before the Facilitation Council constituted under the Act. The arbitration proceedings were taken up by the Council and the award dated 12/8/13 was passed in favour of M/s. Anivet Health Care. Both the parties had filed their objections under Section 34 of Arbitration and Conciliation Act and by the impugned order dated 18/11/2014 the objections have been rejected.

**3.** Shri Yogesh Mittal learned counsel for State submits that Facilitation Council at Bhopal had no jurisdiction to pass the award since the parties had agreed for jurisdiction of Shajapur Court. Opposing the appeal of other side he has submitted that the interest amount has rightly been awarded.

**4.** Shri P. Sohani learned counsel for appellant in AA No. 4/15 submits that the Facilitation Council had the jurisdiction to pass the award. Pressing his appeal he has submitted that the interest amount has not been properly awarded.

**5.** Having heard the learned counsel for parties and on perusal of the record it is noticed that undisputedly M/s. Anivet Health Care is an undertaking covered by the Act of 2006. Section 17 of Act makes the buyer liable to pay the amount for supply of goods or services rendered by the supplier. Section 18 provides for a reference to Facilitation Council in case any dispute arises with regard to the amount due under Section 17 and powers have been conferred to the Facilitation Council to settle the

dispute in terms of the Act of 1996. Sub-section 4 of Section 18 provides that Facilitation Council has jurisdiction to act as an arbitrator or conciliator in a dispute between the supplier located within its jurisdiction and a buyer located anwhere in India. In the present case both the buyer as well as the supplier are located within the jurisdiction of the Facilitation council at Bhopal. The notification dated 10/1/2007 has been issued by the State Government in terms of Section 20 of Act of 2006 establishing the Facilitation council at Bhopal which in terms of the said notification has the jurisdiction over the entire State of Madhya Pradesh. The arbitration in the present case is statutory arbitration in accordance with the provisions of Act of 2006. Considering the aforesaid circumstances, no error has been committed by the learned Additional District Judge while passing the order under Section 34 of Act 1996 and rejecting the objection about jurisdiction by noting that Facilitation Council also has jurisdiction at Shajapur. That apart the arbitration being statutory in nature in terms of the provisions of Act of 2006 by agreement the parties cannot insist for place of arbitration at Shajapur whereas the Facilitation Council in terms of provisions of Act is constituted at Bhopal. Hence it has rightly been observed by the Additional District Judge that at the most for further proceeding arising out of the award, Shajapur court can have the jurisdiction but for that reason the award passed by the Facilitation Council cannot be held to be without jurisdiction.

**6.** Counsel for State has placed reliance upon judgment of the Supreme court in the matter of *A.B.C. Laminart Pvt. Ltd.* v. *A.P. Agencies, Salem* reported in (1989) 2 SCC 163 but the said judgment is distinguishable on its own fact since it does not deal with the situation where statutory body having jurisdiction over the area had decided the dispute. He has also placed reliance upon the judgment of the Supreme court in the matter of *Harmony Innovation Shipping Ltd.* v. *Gupta Coal India Ltd.* reported in 2015 AIR SCW 1755 but that was a case where in the agreement itself the stipulation was contained that the contract is to be governed and construed according to English law with intended effect of having seat of arbitration at London, hence the jurisdiction of the Court in India was found to be impliedly excluded but the present case stands on different footings.

**7.** For the reasons noted above Arbitration Appeal No. 2/15 filed by the State is found to be devoid of any merit.

**8.** So far as the Arbitration Appeal No. 4/15 is concerned, the Facilitation Council has awarded interest w.e.f. the date on expiry of 45 days from the date of presentation of the bills. The bills were produced on 30/3/10 and the interest has been awarded w.e.f. 15/5/10. In terms of Section 15 of Act where the supplier supplies any good or render services and no date is agreed for payment then the payment is required to be made before the appointed day. In terms of Section 16 if the buyer fails to make payment as per Section 15 he becomes liable to pay the interest from the appointed day in case if no date is agreed. Section 2(b) defines the appointed day to mean the day following immediately after the expiry of the period of fifteen days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier. The explanation defines the day of acceptance to mean the day of actual delivery of goods or the rendering of services. The explanation further deals with the eventuality where objection is made in writing by buyer regarding acceptance and explains the day of deemed acceptance. Section 15 & 16 as also the definition clause 2(b) are reproduced below for ready reference:

> **15. Liability of buyer to make payment**.-Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day.
>
> Provided that in no case the period agreed upon between the supplier and the

buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

**16. Date from which and rate at which interest is payable.**-Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from time the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank."

2(b) "appointed day" means the day following immediately after the expiry of the period of fifteen days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier."

**9.** In the present case the aforesaid provisions have not been considered by the learned ADJ while rejecting the objection relating to date from which interest is payable. Hence part of the order of ADJ in respect of effective date for the purpose of grant of interest determined as 15/5/2010 is hereby set aside and matter is remanded back to the learned ADJ with direction to examine the issue relating to the date from which the appellant is entitled for interest.

**10.** In view of the aforesaid analysis Arbitration Appeal No. 2/15 is dismissed and Arbitration Appeal No. 4/15 is partly allowed to the extent indicated above. The signed order be placed in the record of AA No. 4/15 and copy whereof be placed in the record of connected appeal.

**11.** Parties are directed to appear before the learned ADJ for this limited purpose on **4/4/2016**.

**12.** Let the original record be sent back immediately. C.C. As per rules.

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SETTING ASIDE OF AWARD OF MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL : LIMITATION

*(R. D. Dhanuka, J.)*

RAVINDRANATH GE MEDICATE ASSOCIATE PVT. LTD., CHENNAI *Appellant.*

vs.

CLEAN COATS PVT. LTD., AMBERNATH *Respondent.*

**Arbitration and Conciliation Act (26 of 1996), S. 34(3), Micro, Small and Medium Enterprises Development Act (27 of 2006), SS. 19, 18(2), (3) and Limitation Act (36 of 1963), S. 5 —** *Application for setting aside award by Facilitation Council — Arbitral proceedings under provisions of Micro, Small and Medium Enterprises Development Act, 2006 are governed by provisions of Arbitration and Conciliation Act, 1996 — No separate provision for limitation in filing an application for challenging award rendered by Council under provisions of 2006 Act — Limitation would be governed by section 34(3) of 1996 Act — Appellant not required to deposit 75% of awarded amount along with application filed under section 34 — Such amount of deposit could be made when said application was ultimately entertained.*

Section 19 of Micro, Small and Medium Enterprises Development Act, 2006 does not provide for any period of limitation in filing the application under section 34 of the Arbitration and Conciliation Act, 1996. The said provision does not indicate that if the amount of 75% of the awarded sum is not deposited along with the application under section 34 of the Arbitration and Conciliation Act, 1996, the limitation in filing such application under section 34 of the Arbitration and Conciliation Act, 1996 would not stop. Since the arbitral proceedings under the provisions of Micro, Small and Medium Enterprises Development Act, 2006 are also governed by the provisions of the Arbitration and Conciliation Act, 1996, limitation for filing an application under section 34 of the Arbitration and Conciliation Act, 1996 would be governed by section 34(3) of the Arbitration and Conciliation Act, 1996. Limitation in this case had stopped when the appellant had filed the arbitration application under section 34 of the Arbitration and Conciliation Act, 1996 before the Principal District Judge, Thane, which was admittedly filed within a period of three months from the date of service of the signed copy of the award. The Court has to consider the plea of limitation raised, if any, in filing and application under section 34 of the Arbitration and Conciliation Act, 1996 by applying the provisions of section 34(3) of the Arbitration and Conciliation Act, 1996 which Act is self-contained which is applicable in all respects even to the arbitration proceedings commenced under the provisions of the said Micro, Small and Medium Enterprises Development Act, 2006 in view of section 18(3) thereof. There is no separate provision for limitation in filing an application for challenging the award rendered by the Micro and Small Enterprises Facilitation Council under the provisions of the said Micro, Small and Medium Enterprises Development Act, 2006. The appellant was not required to deposit 75% of the awarded sum along with the application

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Arbitration Appeal (St.) No. 18470 of 2016 with Civil Appln. (St.) No. 18471 of 2016 decided on 20-7-2016. (Bombay)

R.F. 4

filed under section 34 of the Arbitration and Conciliation Act, 1996 before the Principal District Judge and such amount of deposit could be made when the said application was ultimately entertained by the Principal District Judge. The impugned order passed by the Principal District Judge refusing to entertain the arbitration application though the applicant had agreed to deposit 75% of the awarded sum and had filed an application for seeking permission to deposit the said amount on the ground that the said amount of 75% of the awarded sum not having deposited along with the arbitration application was not maintainable or in any event was barred by law of limitation is totally contrary to the law laid down by the Supreme Court and High Court and is also contrary to sections 18 and 19 of the Micro, Small and Medium Enterprises Development Act, 2006 and is set aside. 2013(3) Mh.L.J. 24 and (2012) 6 SCC 345, Rel. (Paras 37, 38, 40 and 43)

For appellant : *G. R. Joshi, Senior Advocate along with Raj Panchnatia along with Ayush Agarwala along with Anindya Basarkod along with Nishant Prasad* instructed by *M/s Khaitan and Co.*

For respondent : *Ashwin Ankhad along with Ms. Nishita Mohanty* instructed by *M/s Ashwin Ankhad and Associates*

***List of cases referred :***

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| 1. | *Lakshmi Rattan Engineering Works vs. Assistant Commissioner, Sales Tax, Kanpur and anr., AIR 1968 SC 488* | (Paras 10, 13, 39) |
| 2. | *Hindustan Commercial Bank Ltd. vs. Punnu Sahu (Dead) through legal representatives, (1971) 3 SCC 124* | (Paras 11, 13, 39) |
| 3. | *E-Square Leisure Pvt. Ltd., Pune vs. K. K. Dani Consultants and Engineers Pvt. Ltd., Pune, 2013(3) Mh.L.J. 24* | (Paras 12, 26, 33, 40) |
| 4. | *Goodyear India Limited vs. Norton Intech Rubbers Private Limited and anr., (2012) 6 SCC 345 = 2013(5) CTC 25* | (Paras 13, 22, 24, 26, 29, 31, 32, 35, 41, 42) |
| 5. | *Mazgaon Dock Ltd. vs. Micro and Small Industries Facilitation Council and ors., Writ Petition No. 10551 of 2011 decided on 5-10-2012* | (Para 14) |
| 6. | *Snehadeep Structures Private Limited vs. Maharashtra Small-Scale Industries Development Corporation Limited, 2010(4) Mh.L.J. (S.C.) 201 = (2010) 3 SCC 34* | (Paras 15, 20, 24, 31, 32) |
| 7. | *K.S.R.T.C. vs. Union of India, Writ Petition (C) No. 10950 of 2009 decided on 1-12-2009* | (Paras 21, 30, 41) |
| 8. | *M/s. Amartara Pvt. Ltd. vs. M/s. Clean Coats Pvt. Ltd., Arbitration Petition No. 1559 of 2015 decided on 15-4-2016* | (Para 25) |

**JUDGMENT :—** By this appeal filed under section 37 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act"), the appellant has impugned the order dated 13th June, 2016 passed by the learned Principal District Judge, Thane allowing the application filed by the respondent herein raising a preliminary objection on the maintainability of the application filed by the appellant herein under section 34 of the Arbitration Act and holding that the said arbitration application was not maintainable. Learned Principal District Judge rejected the arbitration application filed by the appellant praying for setting

aside the impugned award dated 17th March, 2015. Some of the relevant facts for the purpose of deciding this appeal are as under :—

**2.** The appellant had issued a work order dated 9th January, 2008 to the respondent for Epoxy flooring, coving, hygiene PU wall coating and other specialty coating at its hospital in Chennai. The total value of the work order was ₹ 1,09,55,852/-. The dispute arose between the parties. The respondent herein made an application before the Micro and Small Enterprises Facilitation Council, Konkan Region, Thane (Reference Petition No. 19 of 2013) inter alia praying for an amount of ₹ 21,17,361/- against the appellant herein. The appellant herein filed an application before the said council appointed under the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (for short "the said MSMED Act") challenging its jurisdiction and also raised various objections regarding the claims of the respondent on merits. The said council made an award on 17th March, 2015 directing the appellant to pay the principal amount of ₹ 10,31,915/- to the respondent and interest thereon as per the provisions of section 16 of the said MSMED Act.

**3.** The appellant herein filed a Civil Miscellaneous Application No. 236 of 2015 before the learned Principal District Judge, Thane under section 34 of the Arbitration Act or thereby impugning the said award dated 17th March, 2015 rendered by the said council.

**4.** On 1st August, 2015, the council issued a certificate transferring the execution proceedings qua the award to the Principal District Judge, Chennai. On 9th December, 2015, the respondent herein filed a proceeding challenging the maintainability of the said Civil Miscellaneous Application filed by the appellant inter alia on the ground that the appellant herein had failed to deposit 75% of the amount awarded to the respondent with the learned Principal District Judge along with the said application under section 34 in terms of section 19 of the said MSMED Act.

**5.** On 5th March, 2016, the appellant herein filed an application before the learned Principal District Judge, Thane inter alia praying for permission to deposit 75% of the amount awarded to the respondent by the said council vide demand drafts in the Court of the learned Principal Judge, Thane. On 2nd April, 2016, the appellant filed another application with a request to permit the appellant to deposit 75% of the amount awarded to the respondent under the said award with the Nazir Office which section is responsible for collecting the Court deposits. The said applications filed by the appellant were resisted by the respondent before the learned Principal District Judge, Thane.

**6.** On 13th June, 2016, the learned Principal District Judge, Thane allowed the said application dated 9th December, 2015 filed by the respondent raising a preliminary objection to the maintainability of the said civil miscellaneous application filed by the appellant under section 34 of the Arbitration Act and held that since the appellant herein had failed to deposit 75% of the amount awarded to the respondent by the council in the said award prior to filing of the said civil miscellaneous application, the said civil miscellaneous application was not maintainable. Learned Principal District Judge also held that the appellant had not deposited 75% of the amount awarded at the time of filing of the application

on 17th June, 2015 and also had not deposited the said amount even within 120 days i.e. three months plus 30 days as per section 34(3) of the Arbitration Act and proviso to section 19 of the said MSMED Act. The appellant not having made compliance of the provision of section 19 of the said MSMED Act regarding deposit of the awarded amount while filing an application under section 34 of the Arbitration Act, the said application was not maintainable.

**7.** Mr. Joshi, learned senior counsel appearing for the appellant invited my attention to the order passed by the learned Principal District Judge, Thane allowing the application filed by the respondent thereby raising a preliminary objection on the maintainability of the application filed under section 34 of the Arbitration Act. He submits that there was no dispute that the appellant herein had already filed the said civil miscellaneous application (236 of 2015) in the Court of learned Principal District Judge, Thane within a period of three months from the date of service of the signed copy of the award from the council.

**8.** Learned senior counsel for the appellant placed reliance on the proviso to section 19 of the said MSMED Act and would submit that under the said proviso, for making an application for setting aside any decree, award or other order made by the council, the appellant was not required to deposit 75% of the awarded amount before the learned arbitrator in terms of the decree, award or other order along with the application under section 34 of the Arbitration Act. He submits that if 75% of the awarded amount is not deposited, the application for setting aside the award cannot be entertained by any Court. He submits that admittedly the appellant had made an application for seeking permission to deposit the said 75% of the awarded sum by demand drafts. It is submitted by the learned senior counsel that the learned Principal District Judge has erroneously interpreted section 19 of the said MSMED Act. He submits that the term "entertain" mentioned in section 19 of the said MSMED Act clearly indicates that the said stage would arise only at the time of hearing of the said application under section 34 of the Arbitration Act filed by an aggrieved party and not at the time when such application was filed by an aggrieved party.

**9.** It is submitted that proviso to section 19 of the said MSMED Act clearly indicates that the Court has been given a discretionary power to order such percentage of the amount to be deposited as it considers reasonable under the circumstances of each case during the pendency of the application to set aside decree, award or order. He submits that such discretion given to the Court itself indicates that the said discretion could be exercised by the Court only when the application for setting aside the award was entertained or heard by the said Court.

**10.** Learned senior counsel for the appellant placed reliance on the judgment of the Supreme Court in the case of *Lakshmi Rattan Engineering Works vs. Assistant Commissioner, Sales Tax, Kanpur and anr.*, reported in *AIR 1968 SC 488* and in particular paragraph 12 and would submit that the term "entertain" has been interpreted by the Supreme Court and it is held that the term "entertain" would mean the first occasion on which the Court takes up the matter for consideration. It may be at the admission stage or if by the rules of that tribunal, the appeals are automatically admitted, it will be at the time of hearing of the appeal. It is held that on the first occasion, when the Court takes up the

matter for consideration, a satisfactory proof must be presented that the tax was paid within the period by limitation available for the appeal.

**11.** Learned senior counsel for the appellant placed reliance on the judgment of the Supreme Court in the case of *Hindustan Commercial Bank Ltd. vs. Punnu Sahu (Dead) through legal representatives,* reported in *1971 (3) SCC 124.* Supreme Court has interpreted the term "entertain" and has held that the term "entertain" would mean "adjudicate upon" or "proceed to consider on merits."

**12.** Learned senior counsel for the appellant placed reliance on the judgment of this Court in the case of *E-Square Leisure Pvt. Ltd., Pune vs. K. K. Dani Consultants and Engineers Pvt. Ltd., Pune,* reported in *2013(3) Mh.L.J. 24* and in particular paragraph 17 interpreting section 19 of the said MSMED Act. He submits that this Court has held that under section 19 of the said MSMED Act, there is a bar from entertaining the petition under section 34 of the Arbitration Act for non-deposit of 75%, but there is no bar from filing an application under section 34 of the Arbitration Act. The stage of entertaining the petition would arise only after it is filed before the District Court. It is held that such objection of non-deposit of 75% could have been entertained by the learned District Judge only if he would have allowed the application for condonation of delay in filing section 34 application.

**13.** Learned senior counsel for the appellant placed reliance on the judgment of the Supreme Court in the case of *Goodyear India Limited vs. Norton Intech Rubbers Private Limited and anr.,* reported in *(2012) 6 SCC 345* and in particular paragraphs 11 and 12 and would submit that the Supreme Court in the said judgment after interpreting section 19 of the said MSMED Act has granted extension of time for pre-deposit by the petitioner and had ordered that if such deposit was made, the appeal shall be treated to be in order and thereafter, the same may be proceeded with. He submits that it is thus clear that even if 75% of the awarded sum is deposited within the extended time granted by the Court, the application filed for challenging the arbitral award would be treated to be in order and has to be proceeded with on merits. He submits that the impugned order passed by the learned Principal District Judge is totally contrary to the judgments of the Supreme Court in the cases of *Goodyear India Limited* (supra), *Lakshmi Rattan Engineering Works* (supra), *Hindustan Commercial Bank Ltd.* (supra) and the judgment of this Court in the case of *E-Square Leisure Pvt. Ltd., Pune* (supra) squarely apply to the facts of this case.

**14.** Learned senior counsel for the appellant placed reliance on an unreported order of this Court delivered on 5th October, 2012 in the case of *Mazgaon Dock Ltd. vs. Micro and Small Industries Facilitation Council and ors.,* in Writ Petition No. 10551 of 2011 in which the Division Bench of this Court had accepted the assurance of the petitioner to deposit 75% of the ordered amount within the time prescribed and upon such assurance given by the petitioner therein this Court had granted stay of operation of the impugned order passed by the council till next date.

**15.** Learned senior counsel for the appellant fairly invited my attention to the judgment of the Supreme Court in the case of *Snehadeep Structures Private*

*Limited vs. Maharashtra Small-Scale Industries Development Corporation Limited,* reported in *2010(4) Mh.L.J. (S.C.) 201 = (2010) 3 SCC 34* and more particularly paragraphs 12, 13, 42 and 59 thereof. He submits that issue before the Supreme Court in the said judgment was whether the expression "appeal" appearing in section 7 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 includes an application to set aside the arbitral award filed under section 34 of the Arbitration Act. He submits that observation made by the Supreme Court in the said judgment that proviso to section 19 which requires the deposit to be made before an application under section 34 of the Arbitration Act is filed, is not a ratio, but such observation was made in the context of the issue raised before the Supreme Court. He submits that the said judgment of the Supreme Court in the case of *Snehadeep Structures Private Limited* (supra) is clearly distinguishable.

**16.** Mr. Ankhad, learned counsel for the respondent on the other hand invited my attention to various paragraphs of the impugned order passed by the learned Principal District Judge, Thane and would submit that the learned Judge has rightly interpreted the provisions of the said MSMED Act and has rightly held that since the appellant had not deposited 75% of the awarded amount along with the Civil Miscellaneous Application filed under section 34 of the Arbitration Act before the learned Principal District Judge, Thane, the said application was not maintainable and was even otherwise barred by law of limitation.

**17.** Learned counsel led emphasis on the words as deposited with it 75% of the amount in terms of the decree, award or the case may be. He submits that the words 'with it' would itself indicate that 75% of the awarded amount has to be deposited along with such application for setting aside any decree, award or other order made by the council or by any institution. He submits that the deposit of 75% of the awarded amount along with such application filed under section 34 of the Arbitration Act is mandatory and non compliance thereof would make an application itself not maintainable. He also placed reliance on section 18(4) of the said MSMED Act and would submit that the Central Government has constituted the Micro and Small Enterprises Facilitation Council for the purpose of providing an alternate dispute resolution services who would have acted as an arbitrator or conciliator in a dispute between the supplier and a buyer.

**18.** It is submitted that the said MSMED Act is a social welfare legislation and is enacted for the purpose of protecting the interest and rights of a small enterprises. He also placed reliance on section 24 of the said MSMED Act and would submit that the provisions of sections 15 to 23 including section 19 shall have overriding effect over the provisions contained in any other law which would include the provisions of the Arbitration and Conciliation Act, 1996.

**19.** It is submitted by the learned counsel that the learned District Judge was right in dismissing the application filed by the appellant filed under section 34 of the Arbitration Act also on the ground of limitation. He submits that since the applicant was required to deposit 75% of the awarded sum along with the application under section 34 with the Council, filing of such application without such deposit itself was defective and thus limitation would not stop upon filing of such application without deposit.

**20.** Learned counsel for the respondent placed reliance on the judgment of Supreme Court in case of *Snehadeep Structures Private Limited vs. Maharashtra Small Scale Industries Development Corporation Limited* in Civil Appeal No. 10 of 2010 decided on 5th January, 2010 and more particularly paragraphs 42 and 55. He submits that the Supreme Court has interpreted section 19 of the said MSMED Act and has held that deposit of 75% of the awarded amount is mandatory and has to be made along with an application filed under section 34 for challenging an award or for filing the appeal. He submits that the said judgment is binding on this Court.

**21.** Learned counsel for the respondent placed reliance on the judgment of Kerala High Court in case of *K.S.R.T.C. vs. Union of India* decided on 1st December, 2009 in Writ Petition (C) No. 10950 of 2009 and would submit that the constitutional validity of section 19 of the said MSMED Act has been upheld by the Kerala High Court in the said judgment, holding that the said provision did not violate Article 14 of the Constitution. He submits that in this case the appellant had made an application for deposit after one year of the filing of the application under section 34 of the Arbitration Act and not within the period of three months and 30 days. He submits that the application under section 34 itself having become time barred in view of the non deposit of the 75% of the awarded amount, application for seeking permission for deposit filed after one year was thus not maintainable.

**22.** Learned counsel for the respondent placed reliance on the judgment of Supreme Court in case of *Goodyear India Limited vs. Norton Intech Rubbers (P) Ltd. and another,* decided on *15th March, 2012 in S.L.A.(Civil) Nos. 16919-16920 of 2011* and in particular paragraphs 11 to 13 and would submit that the said judgment would assist the case of the respondent. Reliance is also placed on judgment of Madras High Court in case of *Goodyear India Ltd. vs. Nortan Intec Rubber (P) Ltd. and another, 2013(5) CTC 25* and more particularly paragraphs 9, 11 and 16. He submits that the Madras High Court has taken a view that the pre-deposit of the 75% of the awarded sum was to be made along with application under section 34 of the Arbitration Act and if no such deposit was made along with such application, the petition could not be entertained by the Court in view of the bar under section 19.

**23.** Mr. Joshi, learned senior counsel in rejoinder submits that the words 'with it' mentioned in section 19 has to be construed as a deposit of 75% of the awarded sum with Court and not with an application under section 34. Learned senior counsel led emphasis on the words 'entertain' and 'the other orders in any manner directed by such Court'. He submits that the discretion given to the Court to pass an order for deposit under section 19 itself would indicate that such discretion can be exercised only when such application filed under section 34 is heard by the concerned Court.

**24.** Learned senior counsel submits that the Supreme Court in case of *Goodyear India Limited* (supra) has already dealt with this issue and has held that the expression 'in the manner directed by such Court' would indicate the discretion given to the Court to allow the pre-deposit to be made, if felt necessary in installment. He submits that the Supreme Court had also extended the time for

pre-deposit to the petitioner in that matter and had made it clear that if such deposit was made within the extended period, the appeal shall be treated to be in order and to be proceeded with. He submits that the said judgment of the Supreme Court was after interpreting its earlier judgment in case of *Snehadeep Structures Private Limited* (supra).

**25.** Learned senior counsel also placed reliance on the order passed by this Court on 15th April, 2016 in Arbitration Petition No. 1559 of 2015 in case of *M/s. Amartara Pvt. Ltd. vs. M/s. Clean Coats Pvt. Ltd.* and would submit that this Court in the said judgment had also granted time to deposit the amount of 75% of the awarded sum.

**26.** Learned senior counsel for the appellant distinguished the judgment of Madras High Court in case of *Goodyear India Limited* (supra) and would submit that the said judgment of Madras High Court is contrary to the view taken by the Supreme Court in case of *Goodyear India Limited* (supra) and contrary to the judgment of this Court in case of *E. Square Leisure Pvt. Ltd., Pune* (supra).

***Reasons and Conclusions :—***

**27.** There is no dispute that the appellant herein had not deposited any amount along with the application filed under section 34 while challenging the impugned award before the learned Principal District Judge, Thane. There is no dispute that the appellant had subsequently made an application for permission to deposit 75% of the awarded sum by the demand draft. The said application filed by the appellant was opposed by the respondent on the ground that the appellant not having deposited 75% of the awarded sum along with the application filed under section 34, the said application itself was not maintainable or in any event was barred by law of limitation.

**28.** The learned Principal District Judge in the impugned order has accepted the objections raised by the respondent herein and has held that the application filed by the appellant under section 34 was not maintainable on the ground of non-compliance of mandatory deposit of 75% of the awarded sum along with the said application. The learned Principal District Judge has also considered the said application filed under section 34 as barred by law of limitation.

**29.** Supreme Court in case of *Goodyear India Limited* (supra) has interpreted section 19 of the said MSMED Act. It has been held by the Supreme Court in the said judgment that the expression 'in the manner directed by such Court' would indicate that the discretion is given to the Court to allow the pre-deposit to be made and if felt necessary, in instalments. The Supreme Court extended the time for pre-deposit to be made by the petitioner therein by a further period of 12 weeks and made it clear that if such deposit was made, the appeal shall be treated to be in order and thereafter the same may be proceeded with.

**30.** In the said judgment, the Supreme Court has also dealt with the judgment of Kerala High Court in case of *K.S.R.T.C. vs. Union of India* (supra) relied upon by the learned counsel for the respondent upholding the constitutional validity of section 19 of the MSMED Act and also the order passed by the Supreme Court arising out of the said judgment. The Supreme Court in the said Special leave petition arising out of the said judgment of Kerala High Court

while dismissing the said special leave petition had granted extension to make the pre-deposit in those cases by a period of 10 weeks.

**31.** The Supreme Court also adverted to its earlier judgment in case of *Snehadeep Structures Private Limited* (supra) which is strongly relied upon by the learned counsel for the respondent and has clarified that while considering the question as to whether an application under section 34 of the Arbitration and Conciliation Act, 1996 could be treated to be an appeal, a question incidentally arose as to whether if the same was to be treated as an appeal, it be necessary to comply with the provisions of section 19 of the MSMED Act. In that context, the Supreme Court held that the provisions of section 19 no doubt require pre-deposit to be made before an application under section 34 of the Arbitration Act was filed but they were not inclined to read that provisions into the provisions in question. The Supreme Court held that the facts of the said case were different from the facts before the Supreme Court in case of *Goodyear India Limited* (supra) and it would be difficult to import the ratio of the decision in case of *Snehadeep Structures Private Limited* (supra) into the facts of the case in Goodyear India Limited (supra).

**32.** A perusal of the judgment of Supreme Court in case of *Snehadeep Structures Private Limited* (supra) relied upon by the learned counsel for the respondent also indicates that even in the said judgment, the Supreme Court directed the party to make a deposit of 75% of the amount awarded by the learned arbitrator in Court where the application for setting aside the award was pending decision within the period of three months from the date of the said order. The Supreme Court also clarified that in the event, such deposit was made, the Court shall decide the application for setting aside the award filed under section 34 of the Arbitration Act as expeditiously as possible preferably within six months from the date of deposit with the Court. A perusal of the said judgment clearly indicates that whether amount of 75% of the awarded sum shall be deposited along with the application under section 34 or not was not an issue before the Supreme Court in the said judgment in case of *Snehadeep Structures Private Limited* (supra). Supreme Court in case of *Goodyear India Limited* (supra) has clarified this issue.

**33.** This Court in case of *E. Square Leisure Pvt. Ltd., Pune* (supra) has already interpreted the expression 'entertain' and has held that the said expression does not indicate that the deposit of 75% was required to be made at the stage of filing an application under section 34 but would indicate that the application would not be entertained at the time of hearing. In my view the judgment of this Court in case of *E. Square Leisure Pvt. Ltd., Pune* (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment.

**34.** Insofar as the submission of the learned counsel for the respondent that the term "with it" would itself indicate that 75% of the awarded sum has to be deposited along with an application filed under section 34 of the Arbitration and Conciliation Act, 1996 is concerned, in my view the term "with it" has to be read with the term "entertain by any Court". A conjoint reading of both the term clearly indicates that the amount of 75% of the awarded sum has to be deposited

with the Court and not with an application filed under section 34 of the Arbitration and Conciliation Act, 1996 for the reason that in the later part of section 19, it is made clear that the Court has been given discretion to direct the applicant to deposit such amount and in such manner as the Court may deem fit.

**35.** The Supreme Court in case of *Goodyear India Limited* (supra) has held that the Court is empowered to grant even instalments to the applicant for depositing 75% of the amount awarded by the learned arbitrator while entertaining the application under section 34 of the Arbitration and Conciliation Act, 1996. In my view, Mr. Joshi, learned senior counsel for the appellant is right in his submission that the term "with it" has to be construed as the amount of deposit with the Court and not with the application filed under section 34 of the Arbitration and Conciliation Act, 1996 otherwise the term "shall be entertained by any Court" and the term "however the order in any manner directed by such Court" will become redundant and otiose.

**36.** Insofar as the issue of limitation raised by the counsel for the respondent that since the appellant has not deposited 75% of the awarded sum along with the arbitration application under section 34 of the Arbitration and Conciliation Act, 1996, limitation had not stopped and thus the said application under section 34 of the Arbitration and Conciliation Act, 1996 had become time barred is concerned, reliance placed on section 24 of the MSMED Act, 2006 is misplaced. Section 18(3) of the MSMED Act, 2006 clearly indicates that once the conciliation initiated under section 18(2) is not successful and stands terminated without any settlement between the parties, the dispute has to be resolved by arbitration and for such dispute resolution, the provisions of the Arbitration and Conciliation Act, 1996 shall apply to such disputes as if the arbitration was pursuant to the arbitration agreement referred to in section 7(1) of the Arbitration and Conciliation Act, 1996.

**37.** In my view, section 19 of the MSMED Act, 2006 does not provide for any period of limitation in filing the application under section 34 of the Arbitration and Conciliation Act, 1996. The said provision does not indicate that if the amount of 75% of the awarded sum is not deposited along with the application under section 34 of the Arbitration and Conciliation Act, 1996, the limitation in filing such application under section 34 of the Arbitration and Conciliation Act, 1996 would not stop.

**38.** In my view, since the arbitral proceedings under the provisions of MSMED Act, 2006 are also governed by the provisions of the Arbitration and Conciliation Act, 1996, limitation for filing an application under section 34 of the Arbitration and Conciliation Act, 1996 would be governed by section 34(3) of the Arbitration and Conciliation Act, 1996. Limitation in this case had stopped when the appellant had filed the arbitration application under section 34 of the Arbitration and Conciliation Act, 1996 before the Principal District Judge, Thane, which was admittedly filed within a period of three months from the date of service of the signed copy of the award. In my view, the Court has to consider the plea of limitation raised, if any, in filing an application under section 34 of the Arbitration and Conciliation Act, 1996 by applying the provisions of section 34(3) of the Arbitration and Conciliation Act, 1996 which Act is self-contained

which is applicable in all respects even to the arbitration proceedings commenced under the provisions of the said MSMED Act, 2006 in view of section 18(3) thereof. There is no separate provision for limitation in filing an application for challenging the award rendered by the Micro and Small Enterprises Facilitation Council under the provisions of the said MSMED Act, 2006. Reliance thus placed by the learned counsel for the respondent under section 23 of the MSMED Act, 2006 is totally misplaced.

**39.** The Supreme Court in case of *Laxmi Ratan Engineering Works Ltd.* (supra) and in case of *Hindustan Commercial Bank Ltd.* (supra) has interpreted the term "entertain" and has held that the term "entertain" would mean first occasion on which the Court takes up the matter for consideration which may be at the admission stage or if by rules of that tribunal, the appeals are automatically admitted, it will be at the time of hearing of the appeal. It is held that on the first occasion, when the Court takes up the matter for consideration, satisfactory proof must be presented that tax was paid within the period of limitation available for the appeal.

**40.** In my view, the appellant was thus not required to deposit 75% of the awarded sum along with the application filed under section 34 of the Arbitration and Conciliation Act, 1996 before the learned Principal District Judge, Thane and such amount of deposit could be made when the said application was ultimately entertained by the learned Principal District Judge, Thane, who could even consider grant of instalments of the said amount and also the mode and manner in which the said amount could be deposited. In my view, the judgment of this Court in case of *E. Square Leisure Pvt. Ltd., Pune* (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgments.

**41.** Insofar as the judgment of the kerala High Court in case of *K.S.R.T.C.* (supra) relied upon by the learned counsel for the respondent is concerned, Kerala High Court had upheld the validity of section 19 of the MSMED Act, 2006. The Supreme Court in case of *Goodyear India Limited* (supra) has also dealt with the judgment of Kerala High Court in case of *K.S.R.T.C.* (supra) relied upon by the learned counsel for the respondent and the order passed by the Supreme Court arising out of the said judgment of the Kerala High Court and has held that the Supreme Court in the Special Leave Petition arising out of the said judgment of the Kerala High Court had granted extension to the applicant to make pre-deposit in those cases by a period of 10 weeks. In my view, the judgment of the Kerala High Court relied upon by the learned counsel for the respondent thus would not assist the case of the respondent. In my view, in view of the judgment of the Supreme Court in case of *Goodyear India Limited* (supra), the judgment of the Kerala High Court in case of *K.S.R.T.C.* (supra) would not apply to the facts of this case.

**42.** Insofar as the judgment of the Madras High Court in case of *Goodyear India Limited vs. Norton Intec Rubbers Private Limited and anr.* (supra) is concerned, a perusal of the said judgment indicates that there was no issue of limitation in the said judgment delivered by the Madras High Court. With great respect to the said judgment of the Madras High Court, in my view, in view of the judgment of the Supreme Court in case of *Goodyear India Limited* (supra),

the said judgment of the Madras High Court in case of *Goodyear India Limited* (supra) would not assist the case of the respondent.

**43.** In my view, the impugned order passed by the learned Principal District Judge, Thane refusing to entertain the arbitration application though the applicant had agreed to deposit 75% of the awarded sum and had filed an application for seeking permission to deposit the said amount on the ground that the said amount of 75% of the awarded sum not having deposited along with the arbitration application was not maintainable or in any event was barred by law of limitation is totally contrary to the law laid down by the Supreme Court and this Court in the judgments referred to aforesaid and is also contrary to sections 18 and 19 of the MSMED Act, 2006 and thus deserves to be set aside.

**44.** I therefore, pass the following order :—

a) Arbitration Appeal (Stamp) No. 18470 of 2016 filed by the appellant is allowed. The impugned order passed by the learned Principal District Judge, Thane on 13th June, 2016 allowing the application Exhibit-11 filed by the respondent raising a preliminary objection on the maintainability of the arbitration application under section 34 of the Arbitration and Conciliation Act, 1996 is set aside. The application (Exhibit 11) filed by the respondent is dismissed. The impugned order dismissing the original application being Civil Misc. Application No. 236 of 2015 filed by the appellant is set aside. The Civil Misc. Application No. 236 of 2015 is restored to file.

b) The appellant is granted two weeks time to deposit 75% of the awarded sum in the Court of Principal District Judge, Thane in Civil Misc. Application No. 236 of 2015. If the amount of 75% of the awarded sum is deposited by the appellant within the time prescribed, the said application shall be treated in order and shall heard and disposed off by the learned Principal District Judge, Thane on its own merits expeditiously.

c) In view of disposal of the appeal, civil application does not survive and is accordingly disposed of.

d) There shall be no order as to costs.

*Appeal allowed.*

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TEMPORARY INJUNCTION : GRANT OF

*(Nutan D. Sardessai, J.)*

VIJAY A PALEKAR *Appellant.*

vs.

STATE OF GOA and others *Respondents.*

**State Financial Corporations Act (63 of 1951), S. 29, Civil Procedure Code, O. 39, RR. 1, 2 and Transfer of Property Act, S. 105** — *Temporary injunction — Grant of — Respondent No. 3 mortgaged suit property with*

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Appeal from Order No. 66 of 2015 decided on 5-8-2016. (Panaji-Goa)

**2016 SCC OnLine Mad 4912 : (2016) 3 LW 711 : (2016) 4 CTC 225 : AIR 2016 Mad 139**

**In the High Court of Madras**

(BEFORE SANJAY KISHAN KAUL, C.J. AND R. MAHADEVAN, J.)

M/s. Refex Energy Limited, by its Managing Director/Authorised Signatory Anil Jain, Mumbai 400012 ... Petitioner;

*Versus*

Union of India, by its Secretary (Legislative), Ministry of Law and Justice, Government of India, 4th Floor, A-Wing, Shastri Bhavan, New Delhi 110001 & another ... Respondents.

Prayer:— This writ petition is filed under Article 226 of the constitution of India, to issue a Writ of Declaration, declaring section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, as ultravires Article 14 of the constitution of India.

WP. No. 17785 of 2016, WMP. No. 15469 of 2016

Decided on June 2, 2016

**Micro, Small and Medium Enterprises Development Act (2006), section 18, validity, upheld**

**Constitution of India, Article 226, writ of Declaration, grant of, Article 14, provision ultra vires, when, scope, Entry 52, List I, Entry 33, List III, 7th schedule**

**held: validity of section 18 upheld — subject matter falls within Entry 52 of List I of VII Schedule — contention that right to approach the court is taken away — provisions mandate that a reference to arbitration is possible only after failure of the conciliation proceedings**

**Para 16**

**Reference is not because of the agreement between the parties but by operation of law, waiver clause would not take away right of 2nd respondent to invoke provisions of the MSMED Act, 2006, as their constitution as an "Enterprise" under the act has not been disputed**

**Para 27**

This writ petition is filed by the petitioner company to issue a Writ of Declaration, declaring section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 as ultravires Article 14 of the constitution of India.

Para 1

In the present case, the Union has, after considerate opinion to pave way for development and smooth functioning of the industries in the Small Scale Sector, has enacted the MSMED Act, by repealing the existing "The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993". It is clear that Entry 24 is subject to the provisions of Entries in 7 and 52 of List I, which enable the Union of India to cover industries, which the parliament by law in public interest feels necessary to do so.

Para 11

In the present case, the subject matter clearly falls within Entry 52 of List I of VII Schedule in view of the fact that the parliament had thought it expedient in the circumstances to bring in such an enactment and therefore, the ground raised by the petitioner regarding the legislative competency is hereby rejected. The next contention of the petitioner is that the section 18 is arbitrary and hence, infringes Article 14 of the constitution as the right to approach the court is taken away. This is factually incorrect, section 19 of the act provides for the remedy to the person aggrieved by the award or decree to approach the court. Hence, the said contention is also rejected.

Paras 16, 22

The provisions lucidly mandate that a reference to arbitration is possible only after the failure of

the conciliation proceedings. In the present case, though the petitioner has contended that there was no conciliation, his affidavit proves otherwise.

Para 25

Page: 712

The next contention, put forth by the petitioner, is that having entered into a settlement agreement, the 2nd respondent has waived its right to arbitration and therefore, the reference to the facilitation council under section 18 is itself bad in law. This court is not in agreement with the above contention for the simple reason that the reference is not because of the agreement between the parties but by the operation of law, i.e the provisions of the MSMED Act. Also, as per section 24 of the act, the provisions of sections 15 to 23 shall have an overriding effect on any other law inconsistent with the above provisions. Therefore, even if there has been a waiver clause, the same would not take away the right of the 2nd respondent to invoke the provisions of the MSMED Act, 2006, as their constitution as an "Enterprise" under the act has not been disputed.

Para 27

(1970) 3 SCC 323 (*Shri Ramtanu Co-operative Housing Society Ltd* v. *State of Maharashtra*);

AIR 1971 Madras 245 (*T.P Sundaram Lingam* v. *State of Madras*);

(2008) 7 SCC 454 (*United India Insurance Co. Ltd* v. *Ajay Sinha*);

WA. No. 2461 of 2011 (*Eden Exports Company* v. *Union of India*) (—Reported in 2013 Writ L.R. 1); and

AIR 1971 Madras 245 (*T.P Sundaram Lingam* v. *State of Madras*); — **Referred to**.

**Writ petition dismissed**

For petitioner: Mr. Srinath Sridevan
For respondents: Mr. V.P. Sengottuvel-R1

**ORDER**

This writ petition is filed by the petitioner company to issue a Writ of Declaration, declaring section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (herein after referred to as the MSMED Act), as ultravires Article 14 of the constitution of India.

**2.** The case of the petitioner, in a nutshell, is that the petitioner company placed three work orders, viz. (1) REL/COMET/PO-04/11-12, dated 03.06.2011, (2) REL/Vituza/P0-03/11-12, dated 16.06.2011 and (3) REL/Vituza/P0-09/11-12, dated 28.07.2011, with the 2nd respondent for the supply of Galvanized Steel Structures/Solar Module Mounting Structures. Subsequently, since the 2nd respondent made a further demand, without making any correlative supplies, certain disputes arose between them. After conciliation, by the settlement agreement dated 20.03.2012, the same was settled by themselves with a condition that the 2nd respondent shall not claim any further amount other than Rs. 80,00,000/-. For the amount payable to the 2nd respondent under the said settlement agreement, the 2nd respondent has to execute certain rectificatory service and on its failure, the petitioner withheld the said payment. The further case of the petitioner is that after a lapse of 3 years from the date of the said settlement agreement, the 2nd respondent filed a claim petition under section 18 of the MSMED Act, 2006, before the MSME Facilitation Council, claiming a sum of Rs. 1,86,00,000/- along with interest thereon under section 16 of the MSMED Act. It is the further case of the petitioner that the facilitation council, despite the objections from the petitioner, referred the matter to arbitration

and appointed Justice Shri S.S. Dahiya as the arbitrator to decide the claim petition. During the pendency of the arbitration proceedings, questioning the validity of section 18 of the MSMED Act, 2006 and raising the issue of legislative competence, this writ petition has been filed, with the prayer as stated above.

**3.** The learned counsel for the petitioner, in support of his contention that section 18 of the MSMED Act is ultra vires, has submitted as follows:—

a. A party cannot be forced to participate in the arbitration proceedings at the instance of the other party making the reference



under section 18 of the MSMED Act. Section 18 contemplates initiation of unilateral arbitration proceedings, which is contrary to the spirit of alternate dispute resolution system, as without the consent of both the parties, the dispute cannot be referred to arbitration. Only payment as per the invoices by Micro, Medium and Small Scale industries would attract the provisions of sections 16, 17 and 18 of the MSMED Act.

b. The parliament has no power to legislate in respect of Micro, Small and Medium Scale industries as it is a subject falling within the scope of Entry 24 of List II of Schedule VII of the constitution and only the states will have the power to enact.

c. Section 18 deprives the petitioner of its right to approach the courts for redressal of their grievances.

d. The dispute raised would not fall within the ambit of sections 16, 17 and 18 of the MSMED Act, 2006.

e. Since a conciliation under Section 18(2) is a pre-requisite for the MSME facilitation council, in the absence of such conciliation between the parties, within the meaning of section 18(2) of the Act, the MSME Facilitation Council has no jurisdiction to entertain the claim of the 2nd respondent and therefore, the reference of the dispute to arbitration is bad in law.

f. The 2nd respondent, having waived its right to invoke the arbitration clause in view of the settlement agreement and having consented to the courts within the territory of Chennai and contracted itself out of the statute, is not entitled to make any reference under section 18 of the MSMED Act and further, the 2nd respondent has also initiated proceedings under section 138 of the Negotiable Instruments Act against the petitioner.

**4.** The learned counsel for the petitioner has, in support of his contentions, relied upon the following judgements:—

(a) (1970) 3 SCC 323 (*Shri Ramtanu Co-operative Housing Society Ltd* v. *State of Maharashtra*).

(b) AIR 1971 Madras 245 (*T.P Sundaram Lingam* v. *State of Madras*).

(c) (2008) 7 SCC 454 (*United India Insurance Co. Ltd* v. *Ajay Sinha*).

**5.** The learned counsel for the petitioner also submitted that the other provisions of the MSMED Act, except section 18, were tested before this court and upheld by the division bench of this court, in a batch of writ petitions in WA. No. 2461 of 2011 (*Eden Exports Company* v. *Union of India*) (— Reported in 2013 Writ L.R. 1), by order dated 20.11.2012. Under the circumstances and grounds, the learned counsel for the petitioner prayed for the declaration against section 18 as sought for in this writ petition.

**6.** Per contra, the learned counsel appearing for the 1st respondent contended that the grounds mostly raised by the petitioner are factual in nature and have to be tested

before the Arbitrator. The learned counsel also contended that the parliament has the power to legislate as the enactment was made in public interest to cover a class of industries exercising its power under the Entry 52 of List I of VII Schedule of the constitution.

**7.** This court heard the learned counsel on either side and perused the materials placed on record, including the relevant provisions of law.

**8.** The bone of contention of the learned counsel for the petitioner is that the union legislature is incompetent to enact laws with respect to any "industries", as they fall, exclusively, within the domain of Entry 24 of List II of the Union List and not under Entry 52 of the List I of the VII Schedule of the constitution and only the states are competent.

**9.** Entry 52 of List I reads as follows:—



"52. industries, the control of which by the Union is declared by parliament by law to be expedient in the public interest."

**10.** Entry 24 of List II reads as follows:—

"24. industries, subject to the provisions of entries 7 and 52 of List I."

**11.** It is clear that Entry 24 is subject to the provisions of Entries in 7 and 52 of List I, which enable the Union of India to cover industries, which the parliament by law in public interest feels necessary to do so. In the present case, the Union has, after considerate opinion to pave way for development and smooth functioning of the industries in the Small Scale Sector, has enacted the MSMED Act, by repealing the existing "The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act. 1993". The statement of objects and reasons for enacting the act clearly spells out the public interest to bring in a unified legal frame work for the small scale industries, so that the obstacles in the path to growth may be minimised and to facilitate the growth of such industries into medium and so on.

**12.** Section 2(e) of the MSMED Act defines "Enterprise" as "an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the industries (Development and Regulation) Act, 1951 (65 of 1951) or engaged in providing or rendering of any service or services". The definition is wide enough to cover not only the industries in the manufacturing or production sector, but also the industries engaged in the service providing sector, section 7 provides for classification of enterprises. First Schedule of the act provides for the types of industries covered under the act.

**13.** In the decision relied upon by the learned counsel for the petitioner reported in AIR 1971 Madras 245 (*T.P Sundaram Lingam* v. *State of Madras*), the Division Bench has held as follows:—

"7. Entry 24 of List II is "industries" subject to the provisions of Entries 7 and 52. Entry 52 of List I covers industries, the control of which by the Union is declared by parliament by law to be expedient in the public interest, trade and commerce within the State subject to the provisions of Entry 33 of List III is in Entry 26 of List II. Entry 33 of List III relates to trade and commerce, in, and the production, supply and distribution of—

a. The products of any industry, where the control of such industry by the Union

is declared by parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

b. Foodstuffs, including edible oil-seeds and oils; and certain other articles. The interrelation to these articles in obvious. All industries fall within Entry 24 of List II. The State Legislature is exclusively competent to make laws in respect of industries. But, inasmuch as the entry in subject to Entry 52 of List I, where parliament by law declares that it is expedient in the public interest for the Union to control any specified industry, the parliament will have the entire power to make any law in respect of such control led industry, and correspondingly the State Legislature under Entry 24 will cease to have competence to make laws in respect of the controlled industry".

**14.** In this context, it is also relevant to quote Entry 33 of List III of the VII Schedule, as under:—

"33. Trade and commerce in, and the production, supply and distribution of,—

a) the products of any industry where the control of such industry by the Union is declared by parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

b) foodstuffs, including edible oilseeds and oils;

c) cattle fodder, including oil cakes and other concentrates;



d) raw cotton, whether ginned or unginned, and cotton seed; and

e) raw jute."

The entry confers on the parliament, a right similar to Entry 52 of List I, to enact over the production and supply of any of the products of any of the Industry, which the parliament in public interest may feel expedient.

**15.** In fact, the scheme of the constitution is scientific and facilitates equitable distribution of legislative powers between the parliament and the state legislatures. Firstly, regarding the matters contained in List I i.e. the Union List to the Seventh Schedule, the parliament alone is empowered to legislate and the state legislatures have no authority to make any law in respect of the Entries contained in the List I. Secondly, in so far as the Concurrent List is concerned, both the parliament and the state legislatures are entitled to legislate in regard to any of the entries appearing therein, but that is subject to the condition laid down by Article 254(1) of the constitution, wherein if the law on the subject has been enacted by the parliament prior to any enactment on the same subject by the state, the law of the parliament shall prevail. Thirdly, in so far as the matters in List II i.e. the state list are concerned, the state legislatures alone are competent to legislate on them and only under certain conditions the parliament can do so.

**16.** In the present case, the subject matter clearly falls within Entry 52 of List I of VII Schedule in view of the fact that the parliament had thought it expedient in the circumstances to bring in such an enactment and therefore, the ground raised by the petitioner regarding the legislative competency is hereby rejected.

**17.** Further, upon consideration of the decision of the Division Bench of this court rendered in WA. No. 2461/2011 (— reported in 2013 Writ L.R. 1 (batch) cited supra, it is clear that the validity of the MSME Development Act, including the section 18 was also considered and upheld in the following paragraphs:—

"12. The learned single Judge, for rejecting the aforesaid contention, has sought help from the decision of the Supreme Court in Civil Appeal No. 5597 of 2002 in *A.P. Transco* v. *Bala Conductors (P) Ltd.*, dated 23.9.2003. The matter came up before the Supreme Court by way of appeal from the common order of the Andhra Pradesh High court in C.A. Nos. 5599, 5606 of 2002, etc., batch at the instigation of the A.P. Transco challenging the MSMED Act. The MSMED Act was challenged on two grounds, namely, (i) that the Act was outside the legislative competence of parliament and (ii) that the Act was otherwise violative of Article 14 of the constitution of India since it operated in discriminatory manner. The contention relating to legislative competence was fairly conceded by the appellant therein by stating that the legislative competence of the parliament cannot be questioned not only in view' of Entry 33 of List-III but also because of the residuary Entry 97 in List -I of the Seventh Schedule to the constitution. The second contention was also rejected by the Hon'ble Supreme Court by observing that the industries (Development and Regulation) Act has already created the class by specifying the particular industries in the First Schedule to that Act, the control of which is expedient in the public interest to be under/by the Union of India. The Hon'ble Supreme Court was of the further view that the discrimination if any, would operate against other industries and not against the buyer as all of them are similarly situated.

13. In view of the aforesaid decision of the Supreme Court on the point, we do not find any reason to entertain the contention of the learned Counsel for the appellants on this score. Moreover, the reasons stated by the learned single Judge for upholding section 17 of the MSMED Act to the effect that a person who commits default and suffers an order or award or decree from the Facilitation Council alone is



bound to pay such interest and such order, if found erroneous, can be corrected by judicial review, cannot be brushed aside.

15. Learned Senior Counsel appearing for the appellants, though not much concerned with regard to the aforesaid provisions, are very much concerned about sections 18 and 21. In one voice they have contended that section 18 invokes section 7(1) of the Arbitration Act and it is contrary to section 80 of the said Act. Mr. P.S. Raman, learned Senior Counsel appearing for the appellants in W.A. Nos. 694 and 695 of 2011 has specifically contended that the Arbitration and Conciliation Act could be invoked only when there is an agreement in writing between the parties. According to him, as per the MSMED Act, the suppliers could invoke the provisions of the Arbitration Act in the absence of a written agreement and therefore it has to be struck down.

16. For the sake of easy reference, we extract hereunder section 7 of the Arbitration and Conciliation Act, 1996:—

"7. Arbitration agreement:—

(1) In this Part,' arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

17. From the reading of the above section, it is no doubt true that this section stipulates that an Arbitration agreement should be in writing. But, we should not forget the wordings of section 18 of the MSMED Act which provides a party to the dispute with regard to the amount due under section 17, to make a reference to the Micro and Small Enterprises Facilitation Council. Sub-section (2) enables such Council to conduct conciliation by itself or seeking assistance of any institution or centre providing alternate dispute resolution services by making a reference to such institution or centre. It has also been made mandatory that sections 65 to 81 of the Arbitration and Conciliation Act, 1996 are applicable to such a dispute as if the conciliation was initiated under Part III of that Act. In case such conciliation is not successful, sub-section (3) provides for further arbitration by the council itself or to any other institution providing alternate dispute resolution services for such arbitration. The contention of the appellants in this context is three folded; (1) without any written agreement, the provisions of the Arbitration and Conciliation Act could not be invoked; (2) the Micro and Small Enterprises Facilitation Council, which was empowered to conciliate between the parties, should not be allowed to further arbitrate in the matter; and (3) the Members of the Council who conciliate as per sub-section (2) of section 17 would also be the Members in the arbitration proceedings provided under sub-section (3) and, therefore, such arbitration would be of no use and such provision being contrary to section 80 of the Arbitration and Conciliation Act, it is required to be struck down as illegal and unconstitutional.

18. But, the Legislature in its wisdom, was very' careful in drafting section 18 MSMED Act, providing solace to the parties, even where there is no Arbitration clause in writing, and requiring the Council to take up the dispute for itself for arbitration or refer to any other institution for that purpose. Taking into consideration the object for which the said Act has been introduced by the Legislature, it cannot be said that there is any Legal conflict between the provisions of Arbitration and Conciliation Act and that of the MSMED Act as the intention of the Legislature is very clear from the wordings of the said



section to bring the disputes into the fold of arbitration, even where there is no written agreement to that effect.

19. Section 80 of the Arbitration and Conciliation Act, 1996, being relevant, is extracted hereunder

"80. Role of conciliator in other proceedings.-Unless otherwise agreed by the parties,- (a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings."

20. A cursory reading of the aforesaid provision makes it clear that a conciliator

could not act as an arbitrator. It is no doubt true that sections 18(2), 18(3) and 18 (4) have given dual role for the Facilitation Council to act both as Conciliators and Arbitrators. According to the learned counsel for the appellants, the Facilitation Council should not be allowed to act both as Conciliators and Arbitrators. This contention, though prima facie appears to be attractive, it is liable to be rejected on a closer scrutiny. Though the learned counsel would vehemently contend that the Conciliators could not act as Arbitrators, they could not place their hands on any of the decisions of upper forums of law in support of their contentions. As rightly pointed out by the learned single Judge, section 18(2) of MSMED Act has borrowed the provisions of sections 65 to 81 of the Arbitration and Conciliation Act for the purpose of conducting conciliation and, therefore, section 80 could not be a bar for the Facilitation Council to conciliate and thereafter arbitrate on the matter. Further the decision of the Supreme Court in (1986) 4 SCC 537 (*Institute of Chartered Accountants of India* v. *L.K. Ratna*), on this line has to be borne in mind. One should not forget that the decision of the Facilitation Council is not final and it is always subject to review under Article 226 of the constitution of India and, therefore, the appellants are not left helpless."

**18.** Therefore, this court finds that no different or additional ground has been raised by the petitioner warranting deviation from the earlier judgements on the point and hereby upholds the validity of the provision.

**19.** The judgements relied upon by the learned counsel for the petitioner are not applicable to the present facts of the case. The facts of the case and the scope and purpose of the provision under challenge is different. In the first case, the Honourable Supreme Court had to consider the right of the State of Maharashtra to legislate under Entry 24 of List II and the right of the Union to legislate under Entry 42 of List I. Also, the scope and object of the challenged Maharashtra Act before the Apex court was different from the MSMED Act, 2006 as it was for the development of industries within the State of Maharashtra alone. Whereas, the present act deals with Small and Medium Scale industries, throughout the country.

**20.** The second judgement mainly deals with the definition of "Industry" and "Manufacture" and does not lay down that the states alone will have absolute right to legislate. In fact, the judgement clarifies that Entry 24 of List II is subject to the reservation of the parliament to enact laws under Entry 7 and 52 of List I, which has been exercised by the parliament in the present case. As stated above, the provisions of the MSMED Act, would be applicable not only to an enterprise engaged in the manufacturing or production activities, but also to service industries.

**21.** The third Judgement deals with the scope of reference to Lok Adalat under the Legal Services Authorities Act, which is different from the statutory alternate remedy provided under the MSMED Act for resolution of disputes.

**22.** The next contention of the petitioner is that the section 18 is arbitrary and hence, infringes Article 14 of the constitution as the right to approach the court is taken away. This is factually incorrect, section 19 of the act provides for the remedy to the person aggrieved by the award or decree to



approach the court. Hence, the said contention is also rejected.

**23.** The next contention raised by the petitioner is that the facilitation council did not conduct any conciliation and therefore, the reference is bad in law. It was contended that only after conciliation and upon failure, there could be reference.

**24.** For the sake of clarity, the section 18 is extracted below:—

Section 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 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 to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of 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 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.

**25.** The provisions lucidly mandate that a reference to arbitration is possible only after the failure of the conciliation proceedings. In the present case, though the petitioner has contended that there was no conciliation, his affidavit proves otherwise. Paragraphs 6 to 9 of the affidavit of the petitioner reads as under:—

"6. Thereafter, after a lapse of more than 3 years from the signing of the settlement agreement, the 2nd respondent filed a claim petition under section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, before the Micro and Small Enterprises Facilitation Council (hereinafter referred to as "MSME Facilitation Council"), claiming a principal amount of Rs. 1,86,00,000/- (Rupees One Crore Eighty Six Lakhs only) along with interest thereon under section 16 of the Act.

7. However, MSME Facilitation Council, without application of mind as to whether the said claim petition was maintainable or whether they had the necessary jurisdiction to her the same, in a routine manner issued a notice dated 11.06.2015 to the petitioner Company for appearance before it on 07.07.2015.

8. I submit that the petitioner, under protest, duly appeared before MSME Facilitation Council on 07.07.2015 and raised certain preliminary objections to the reference/claim petition filed by the 2nd respondent. Thus, the matter was argued before the MSME Facilitation Council by me and the petitioner was asked to submit his written arguments, which were duly filed.

9. However, to my shock and surprise, I straight away received a copy of the letter issued by MSME Facilitation Council stating that the dispute was referred to arbitration and that Retired Justice S.S. Dahiyahad been appointed as an arbitrator to decide the claim petition on 06.10.2015."

**26.** It is, therefore, clear that the petitioner has participated in the conciliation proceedings. Since the petitioner has raised objections, there was no possibility for

settlement and the matter has been referred



to Justice Shri S.S. Dahiya under Chapter V in accordance with law and therefore, the contention of the learned counsel for the petitioner is hereby rejected.

**27.** The next contention, put forth by the petitioner, is that having entered into a settlement agreement, the 2nd respondent has waived its right to arbitration and therefore, the reference to the facilitation council under section 18 is itself bad in law. This court is not in agreement with the above contention for the simple reason that the reference is not because of the agreement between the parties but by the operation of law, i.e the provisions of the MSMED Act. Also, as per section 24 of the act, the provisions of sections 15 to 23 shall have an overriding effect on any other law inconsistent with the above provisions. Therefore, even if there has been a waiver clause, the same would not take away the right of the 2nd respondent to invoke the provisions of the MSMED Act, 2006, as their constitution as an "Enterprise" under the act has not been disputed.

**28.** The other grounds raised by the petitioner have to be decided only by the arbitrator. Any findings by this court could prejudice the interest of either of the parties, section 18(5) mandates that the proceedings shall be concluded within 90 days of reference. The first notice was issued by the arbitrator in October 2015. Already, considerable time had elapsed. Hence, there will be a direction to the arbitrator to decide the dispute, at the earliest, preferably within a period of two months.

**29.** In the result, this writ petition fails and is hereby dismissed, with the above direction. No costs. Consequently, the connected WMF is closed.

**VCJ**

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**16.** It is to be noted that Chapter 11 of MMC Act contains special provisions relating to public street. An analysis of the provisions under this chapter makes it clear that all the public streets within Brihan Mumbai vests in Corporation and are under the control of the Commissioner. The provisions under the MMC Act makes it clear that it is the primary duty of the Corporation to maintain and widen the public streets. In the instant case the shops allotted to the petitioners are abutting the subway over which the pedestrians have right of passage. It cannot be ignored that over the last decade the volume of pedestrians has grown manifold resulting in congestion of the subway and hardship and inconvenience to the pedestrians. There is also no controversy over the fact that it is the statutory obligation of the Corporation to safeguard the rights of the pedestri ans for free and unhindered passage with reasonable measure of safety and security. Nevertheless, such statutory obligation has to be discharged in accordance with statutory provisions.

**17.** In this regard it is pertinent to note that Chapter 5-A of the Bombay Municipal Corporation Act confers powers on the Municipal Commissioner to evict persons from the Corporation premises. Clause (b) of sub-section (1) of section 105-B enables the Commissioner to evict a person in unauthorised possession of Corporation premises where as clause (c) enables the Commissioner to recover possession of the corporation premises if required by the corporation in the public interest. Sub-section (2) of 105-B prescribes the procedure expected to be followed for exercising such power.

**18.** In the instant case the Corporation has sought to evict the petitioners, who are in possession of the premises for a period of over 10 years, without taking recourse to the remedy available under the statute and without following due process of law. The action of the Corporation, a statutory body, is not in consonance with the procedure prescribed by the statute. The action of the Corporation being arbitrary, in violation of principles of natural justice and contrary to the statutory provisions, the petitioners were justified in invoking the writ jurisdiction of this Court.

**19.** Under the circumstances and in view of discussion supra the petitions are allowed. The impugned notices are quashed and set aside. We, however, make it clear that this order shall not preclude the Corporation from evicting the petitioners from the subject premises by following due process of law.

*Petitions allowed.*

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AWARD : VALIDITY OF

*(S. C. Gupte, J.)*

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LTD. and others *Petitioners.*

vs.

DELTRON ELECTRONICS *Respondent.*

**(a) Arbitration and Conciliation Act (26 of 1996), S. 31(1) and (2) —** *Award made by Arbitral Tribunal — Validity of award — Signatures of*

Arb. Petition (L) No. 2464 of 2015 with Notice of Motion (L) Nos. 3696 of 2015, 15 and 14 of 2016 decided on 15-11-2016. (Bombay)

*arbitrators — If award is not signed by all members of Arbitral Tribunal, reason for omitted signatures must be stated which must be adequate and germane for fulfilment of requirement of law — Where no justifiable reason is given, award will not be valid award.*

No doubt, under the scheme of the Arbitration and Conciliation Act, 1996, the award within the meaning of the Act is really an award of the majority of the Arbitral Tribunal and the award of any dissenting minority is no award. That still does not dispense with the requirement of participation of all Arbitrators in the reference and in the deliberations for making of the award. Sub-section (2) of section 31 of the Act, requires that if the award is not signed by all members of the arbitral tribunal, the reason for omitted signature/s must be stated. What this means is that not just that the reason must be stated mechanically and as a mater of form, but that such reason must be adequate and germane for fulfilment of the requirement of the law that though the arbitrator/s whose signature/s is/are omitted actually participated in the hearings and deliberations for making of the award, his/their signature/s is/are justifiably not appended to the award. The justifiable reason may be absence or unavailability of the arbitrator/s at the time of signing (which is merely a ministerial act) or his/their refusal on the ground of any dissention or disagreement with the majority or the like. Such adequate and germane reason is clearly absent in the present case. In the premises, the impugned award cannot be termed as a valid award in the eyes of law. The want of signature of the Chairman of the Arbitral Tribunal/Council cannot be attributed simply to any administrative exigency or ministerial lapse or difficulty or even his having taken a dissenting view. It rather goes to the root of the award and undermines its validity. (Para 6)

**(b) Micro, Small and Medium Enterprises Development Act (27 of 2006), S. 18(3), Arbitration and Conciliation Act (26 of 1996), SS. 43, 7(1) and Limitation Act (36 of 1963), Preamble —** *Arbitrations under Act of 2006 — Provisions of Limitation Act fully apply.*

By virtue of the provisions of section 18 of the Small Enterprises Act, all provisions of the Arbitration and Conciliation Act, 1996 are made applicable to any arbitration carried out by the Council or its designate under section 18(3) of the Small Enterprises Act as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of the Arbitration and Conciliation Act, 1996. There is no exception made in respect of section 43 of the Arbitration and Conciliation Act, 1996. Accordingly, the provisions of the Limitation Act apply to arbitrations under section 18(3) of the Small Enterprises Act, just as they would apply to arbitrations arising out of an arbitration agreement entered into between the parties under sub-section (1) of section 7 of the Arbitration and Conciliation Act, 1996. (Para 13)

For petitioners : *Gaurav Joshi, Senior Advocate along with Ms. Neeta Jain, Nirav Shah and Anuj Jaiswal* instructed by *Little and Co.*

For respondent : *Suresh Dhole along with Pushpa Shinde*

***List of cases referred :***

1. *Ram Narain Ram vs. Pati Ram, AIR 1916 Pat. 156* (Para 5)
2. *Abu Hamid Zahir Ala vs. Golam Sarwar, AIR 1918 Cal. 865* (Para 5)

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| 3. | *Appayya vs. Venkataswami, AIR 1919 Mad. 877* | (Para 5) |
| 4. | *Tara Prasad Singh vs. Raja Singh, AIR 1935 ALL 90* | (Para 5) |
| 5. | *Raghubir Pandey vs. Kaulesar Pandey, AIR 1945 Pat. 140* | (Para 5) |
| 6. | *Y. L. Paul vs. G. C. Joseph, AIR 1948 Mad. 512* | (Para 5) |
| 7. | *Johara Bibi vs. Mohammad Sadak Thambi Marakayar, AIR 1951 Mad. 997* | (Para 5) |
| 8. | *Deo Narain Singh vs. Siabar Singh, AIR 1952 Pat. 461* | (Para 5) |
| 9. | *Welspun Corp. Ltd. vs. Micro and Small, Medium Enterprises Facilitation Council, Punjab and others, CPW No. 23016 of 2011 (O and M) decided on 13-12-2011* | (Para 9) |
| 10. | *M/s Eden Exports Company vs. Union of India, W. A. Nos. 2461 of 2010 decided on 20-11-2012* | (Para 9) |
| 11. | *Assam State Electricity Board vs. Shanti Conductors Pvt. Ltd. decided on 5-3-2002* | (Para 13) |
| 12. | *Savitra Khandu Beradi vs. Nagar Agricultural Sale and Purchase Co-operative Society, AIR 1957 Bom. 1957* | (Para 13) |
| 13. | *Central Coal Fields Ltd. vs. S. K. Dutta, Miscellaneous Appeal (S. J.) No. 258 of 1997 (R) decided on 19-5-2010* | (Para 13) |

**JUDGMENT :—** This Arbitration Petition challenges an award passed by the Micro and Small Enterprises Facilitation Council, Konkan Division, Thane under section 18(3) of Micro, Small and Medium Enterprises Development Act, 2006 ("Small Enterprises Act"). By consent, the petition is admitted and taken up for final hearing forthwith.

**2.** The short facts of the case may be stated as follows :

**2.1** The petitioners are successors of erstwhile Maharashtra State Electricity Board (MSEB) and are distributors of electricity in their area of operation in Maharashtra. The respondent is a small scale enterprise duly registered with the District Industries Centre, Thane and is governed by the Small Enterprises Act.

**2.2** The petitioners had floated a tender for distribution of transformers. Pursuant to it, the respondent submitted its offer. The offer was accepted by the petitioners and a letter of award was issued to the respondent. Pursuant to the letter of award, the petitioners placed ten purchase orders on the respondent. The contract between the parties stipulated payment of 100% value of the contract by account payee cheque within 60 days from the date of receipt of the entire quantity as per the monthly delivery schedule. The purchase orders pertain to the period between 1 August, 1994 to 10 October, 2000. Through this period the respondent supplied the materials against the purchase orders under various invoices. The petitioners accepted the materials and paid the bills submitted by the respondent from time to time in respect of the same.

**2.3** By its letter dated 9 June, 2004, the respondent for the first time raised its claim for interest on delayed payments on the various contracts of purchase represented by the purchase orders. An aggregate sum of ₹ 83,54,695/- was claimed in respect of such interest. The petitioners refused to pay these delayed payment charges.

**2.4** In the premises, on 21 September, 2005, the respondent filed a reference before the Industries Facilitation Council Bench, Thane under the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 ("Interest on Delayed Payments Act"). The council, by its letter dated 24 January, 2006, served a copy of the reference on the petitioners directing them to file their reply to the reference.

**2.5** During the pendency of the reference, on 16 June, 2016, the Interest on Delayed Payments Act was repealed by the Small Enterprises Act which made appropriate provisions for Small Scale and Ancillary Industrial Undertakings. The Council was redesignated as Micro and Small Scale Enterprises Facilitation Council ("Council"). Section 32 of the Small Enterprises Act which provided for repeal of the former Act inter alia contained a clause to the effect that anything done or any action taken under the repealed Act shall be deemed to have been done or taken under the corresponding provisions of the Small Enterprises Act.

**2.6** By its notice dated 30 November, 2012, under section 18 read with section 17 of the Act, the Council called upon the petitioners to file their submissions/say on the reference petition filed by the respondent.

**2.7** By its letter dated 24 December, 2013, the respondent called upon the petitioners to hold a conciliation meeting in terms of section 18 of the Act. The petitioners did not comply with this requisition.

**2.8** On 18 January, 2014, in the premises, the respondent through its Advocate informed the Council that the parties had failed to arrive at any amicable settlement and required the Council to place the matter for arbitration under the provisions of section 18(3) of the Small Enterprises Act.

**2.9** The Council, by its order dated 30 January, 2014, terminated the conciliation proceedings and took up the matter for arbitration under section 18(3) of the Small Enterprises Act.

**2.10** By its award dated 31 January, 2015, the Council awarded the respondent's claim for interest on delayed payment together with further interest. The impugned award is not signed by chairperson of the Council/Arbitral Tribunal. The remark to be found on the award states that he was "transferred". It appears that some other members of the Council/Arbitral Tribunal have also signed the award on different dates other than 31 January, 2015.

**2.11** The impugned award was received by the petitioners on 18 May, 2015.

**2.12** Whilst the petitioners were contemplating steps to challenge the award, the petitioners received a letter dated 24 August, 2015 from the Council proposing a rehearing of the reference petition. The letter mentioned that due to technical and administrative reasons, the award was not signed by the Chairman of the Council and the matter was required to be reviewed as per the discussions of the Council held on 11 August, 2015. The rehearing was fixed on 4 September, 2015.

**2.13** On 31 August, 2015, the respondent filed an application challenging the decision taken by the Arbitral Tribunal/Council for rehearing of the matter. No meeting was called by the Arbitral Tribunal/Council for hearing of that

application. The rehearing of the reference petition was, however, adjourned to 5 September, 2015. It appears that no effective rehearing took place on either the scheduled date or the adjourned date.

**2.14** It appears that on 29 September, 2015, the Council transferred the award as a decree in Execution Petition No. 1 of 2005 to this Court. On 26 October, 2015, the petitioners received Minutes of Meeting purportedly held on 5 September, 2015 stating that the matter did not require any rehearing, as the award purportedly passed under sections 31(1) and (2) of the Arbitration and Conciliation Act, 1996 was signed by the majority of the members of the Arbitral Tribunal/Council and that it was accordingly valid. A copy of the transfer decree was received by the petitioner on 28 October, 2015.

**2.15** The petitioners challenged the award by way of the present Arbitration Petition lodged in December, 2015. The petition has been amended on 18 January, 2016 by incorporating further averments, grounds and reliefs.

**3.** As submitted by learned Counsel for the petitioners, the challenge to the award is mainly on three grounds. Firstly, it is submitted that the award is not signed by the chairperson of the Council, who sat as one of the Arbitrators; there is no material to show that he actually participated in the deliberations of the Arbitral Tribunal/Council for making of the award or agreed with or even considered its findings; and that in the premises, the award cannot be termed as a valid Arbitral award. Secondly, it is submitted that the Council having acted as a conciliator in the reference made to it, cannot act as an arbitral tribunal by virtue of section 80 of the Arbitration and Conciliation Act, 1996. Thirdly, it is submitted that the claim is clearly barred by the Law of Limitation and ought to have been rejected by the Arbitral Tribunal/Council.

**4.** Learned Counsel for the respondent, in the first place, raised an objection to the maintainability of the petition on the ground that the petition itself is filed beyond the period of limitation. At the outset, it is pertinent to note that the limitation of three months and the further period of 30 days for filing of an application for setting aside an award within the meaning of section 34(3) of the Arbitration and Conciliation Act, 1996, begins on the date a party making the application receives a signed copy of the arbitral award from the arbitral tribunal. Admittedly the signed copy of the award in the present case was received by the petitioners on 18 May, 2015. The period of limitation thus originally began with effect from that date. Admittedly before the expiry of this period, the petitioners received a communication from the Arbitral Tribunal/Council (letter dated 21 August, 2015), communicating the Arbitral Tribunal/Council's decision to review the reference petition, and communicating the date of rehearing of the reference petition as 4 September, 2015. The petitioners could not have, in the premises, applied for setting aside of the award within the period of limitation. The Arbitral Tribunal/Council was entitled to correct any mistake in the award or interprete the award under section 33 of the Arbitration and Conciliation Act 1996. Even the Court under sub-section (4) of section 34, on an application for setting aside the award under sub-section (1) of section 34 was empowered to adjourn the proceedings in order to give the Arbitral Tribunal/Council an

opportunity to resume the arbitral proceedings. On these facts and the law as it stands, there is a clear communication by the Arbitral Tribunal/Council that the award served on the petitioners was not a final award and that the Arbitral Tribunal/Council had proposed to rehear the matter. There is no question, in the premises, of the petitioners approaching this Court for setting aside the award between the date of receipt of the communication and expiry of the period of limitation originally available in respect of the award. The Arbitral Tribunal/Council in fact fixed a date of hearing of the reference, i.e. on 4 September, 2015, which was later rescheduled to 5 September, 2015. In its meeting (between the members of the Arbitral Tribunal/Council) held on 5 September, 2015, the Arbitral Tribunal/Council decided that the award passed in the matter and communicated to the petitioners earlier, was valid and there was no question of rehearing the matter. Accordingly, by its Minutes of Meeting dated 5 September, 2015 (received by the petitioners on 26 October, 2015), the Arbitral Tribunal/Council decided to withdraw the notice of rehearing of the petition. The communication of the minutes along with the notice of withdrawal of hearing, as mentioned above, was received by the petitioners on 26 October, 2016. Effectively, therefore, the final award on the reference petition can be said to have been communicated by the Arbitral Tribunal/Council to the petitioners on 26 October, 2015. The present petition, which is filed in December, 2015, is, accordingly, clearly within time.

**5.** Coming now to the first ground of challenge to the impugned award raised by the petitioners, sub-section (1) of section 31 of the Arbitration and Conciliation Act, 1996 requires the Arbitral Award to be made in writing and signed by the members of the Arbitral Tribunal. Sub-section (2) of section 31 provides that for the purpose of sub-section (1), signatures of majority of members of the Arbitral Tribunal shall be sufficient so long as the reason for any omitted signature is stated. As held by a number of our High Courts, an award signed by a majority of the Arbitrators is valid, **provided** all Arbitrators were present through the proceedings and took part in all deliberations, including the deliberations for preparation of the award. [See the cases of *Ram Narain Ram vs. Pati Ram, AIR 1916 Pat. 156, Abu Hamid Zahir Ala vs. Golam Sarwar, AIR 1918 Cal. 865, Appayya vs. Venkataswami, AIR 1919 Mad. 877, Tara Prasad Singh vs. Raja Singh, AIR 1935 ALL 90, Raghubir Pandey vs. Kaulesar Pandey, AIR 1945 Pat. 140, Y. L. Paul vs. G. C. Joseph, AIR 1948 Mad. 512, Johara Bibi vs. Mohammad Sadak Thambi Marakayar, AIR 1951 Mad. 997, Deo Narain Singh vs. Siabar Singh, AIR 1952 Pat. 461.*]

**6.** If one has regard to the impugned award in the present case, what transpires, in the first place, is that there is nothing in the award or the subsequent orders of the Arbitral Tribunal/Council to indicate that the Chairman of the Arbitral Tribunal/Council was available and actually participated in the deliberations of the Council for making of the award. The award itself is dated 31 January, 2015. It, however, appears from the award that atleast two members of the Arbitral Tribunal/Council, who have appended their signatures to the Award, have signed the same after 31 January, 2016. On the other hand, the Minutes of

Meeting dated 5 September, 2015 take a position that the award was passed on 8 May, 2015 (it was served on the petitioners on 18 May, 2015). The award itself indicates that the matter was closed for order/award on 31 January, 2015. It is hardly likely, in the premises, that the award was actually made on 31 January, 2015. In any event, as the subsequent communication indicates, it is the stand of the Arbitral Tribunal/Council itself that the award was passed on 8 May, 2015. It is not borne out by the record as to when the Chairman of the Arbitral Tribunal/Council was transferred. There is absolutely nothing either in the award or in the communication, as mentioned above, to indicate that after the matter was closed for order/award, the Chairman of the Arbitration Tribunal/Council participated in the deliberations or assented or even applied his mind to the impugned award. No doubt, under the scheme of the Arbitration and Conciliation Act, 1996, the award within the meaning of the Act is really an award of the majority of the Arbitral Tribunal and the award of any dissenting minority is no award. That still does not dispense with the requirement of participation of all Arbitrators in the reference and in the deliberations for making of the award. Sub-section (2) of section 31 of the Arbitration and Conciliation Act, 1996 requires that if the award is not signed by all members of the arbitral tribunal, the reason for omitted signature/s must be stated. As we have noted the law on the point, what this means is that not just that the reason must be stated mechanically and as a matter of form, but that such reason must be adequate and germane for fulfillment of the requirement of the law that though the arbitrator/s whose signature/s is/are omitted actually participated in the hearings and deliberations for making of the award, his/their signature/s is/are justifiably not appended to the award. The justifiable reason may be absence or unavailability of the arbitrator/s at the time of signing (which is merely a ministerial act) or his/their refusal on the ground of any dissention or disagreement with the majority or the like. As I have noted above, such adequate and germane reason is clearly absent in the present case. In the premises, the impugned award cannot be termed as a valid award in the eyes of law. The want of signature of the Chairman of the Arbitral Tribunal/Council cannot be attributed simply to any administrative exigency or ministerial lapse or difficulty or even his having taken a dissenting view. It rather goes to the root of the award and undermines its validity.

**7.** Insofar as the objection concerning the Council itself having entered upon the reference, committing thereby a breach of section 80 of the Arbitration and Conciliation Act, 1996, is concerned, it is pertinent to note that what section 80 prohibits is the Conciliator himself acting as an Arbitrator in the absence of an agreement between the parties permitting him to do so. It is submitted across the bar by learned Counsel for the petitioners that the Council in the present case first acted as a Conciliator and having so acted, in the admitted absence of a contrary agreement between the parties, it could not have itself entered upon the reference. On the other hand, it is submitted by learned Counsel for the respondent that the scheme of the Small Enterprises Act, under section 18 thereof, permits the Council whenever a reference is made to it under sub-section (1) of section 18 to either itself conduct conciliation in the matter or refer the same to any institution

or centre for conducting such conciliation. If such conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, sub-section (3) empowers the Council to either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration. It is submitted that to the extent section 18 makes a contrary stipulation, it overrides the provisions of the Arbitration and Conciliation Act, 1996. It is submitted that provisions of section 18 open with a non-obstante clause and accordingly its provisions operate in precedence over any other law for the time being in force.

**8.** There are two questions involved in this objection. The first is whether the Council itself did act as a Conciliator and would, therefore, be subject to the restrictions of section 80 of the Arbitration and Conciliation Act, 1996. The second, if the answer to the first question is in the affirmative, is whether section 18 of the Small Enterprises Act overrides section 80 of the Arbitration and Conciliation Act, 1996 or, in other words, whether the Council having undertaken conciliation under sub-section (2) of section 18, is empowered to itself take up the dispute for arbitration under sub-section (3) of section 18 notwithstanding the provisions of section 80 of the Arbitration and Conciliation Act, 1996.

**9.** On the factual aspect, namely, whether or not the Council itself acted as a Conciliator in the matter, there is nothing on record to indicate that the Council did so. The only communication, which is on record, is a letter addressed by the respondent to the petitioners on 24 December, 2013 requesting the latter for date and time of a conciliation meeting. Admittedly, no such conciliation meeting was actually fixed between the parties. Since the petitioners failed to respond, the respondent intimated failure of conciliation. In the premises, there is nothing to show that the Council itself undertook any conciliation within the meaning of sub-section (2) of section 18. Accordingly, there is no question of applying the embargo contained in section 80 to the Council entering upon the reference for arbitration. In the premises, the second question, namely, the overriding effect of section 18 of the Small Enterprises Act over section 80 of the Arbitration and Conciliation Act, 1996, does not arise in the present case. The cases of *Welspun Corp. Ltd. vs. Micro and Small, Medium Enterprises Facilitation Council, Punjab and others, CPW No. 23016 of 2011 (O and M)* and connected cases, decided on 13-12-2011 and *M/s Eden Exports Company vs. Union of India, W. A. Nos. 2461 of 2010 and other connected cases, decided on 20 November, 2012,* which deal with this legal question, need not, therefore, be considered.

**10.** As for the issue of limitation, it is contended by learned Counsel for the respondent that the provisions of the Limitation Act do not apply to any arbitration before the Council or the authority designated by it. It is submitted that the Small Enterprises Act is a special statute making provisions for arbitration; and to a statutory arbitration thereunder through the Council or its designate, the provisions of Limitation Act do not apply.

**11.** Before we go into this aspect, it is pertinent to note that the objections on the ground of limitation were raised before the Arbitral Tribunal/Council in

the reference. These objections were disposed of in a cavaliar fashion by the Arbitral Tribunal/Council in terms of the following observations :

> "The issue of limitation is dealt in the enactment itself that the buyer has to mention the due amount payable to the supplier till it is paid finally to the supplier. The responsibility is fastened upon the buyer to pay interest upon the delayed payment as per the provision of the Act of 1993 and improved Act of 2006. Thus, all the issues raised by the respondents are addressed by this Council."

**12.** It is pertinent to note that sub-section (3) of section 18 of the Small Enterprises Act itself provides that the Arbitration and Conciliation Act, 1996 shall apply to any dispute submitted to the arbitration of the Council or its designate as if such arbitration was in pursuance of an arbitration agreement referred in sub-section (1) of section 7 of that Act. This provision would obviously include section 43 of the Arbitration and Conciliation Act 1996, which makes the provisions of Limitation Act applicable to any arbitration conducted in pursuance of an arbitration agreement under section 7(1) of that Act. Accordingly, the provisions of the Limitation Act fully apply to all arbitrations under the Small Enterprises Act.

**13.** Learned Counsel for the respondent relied on several judgments to support his contention that the Limitation Act does not apply to arbitrations conducted under sub-section (3) of section 18 of the Small Enterprises Act. None of these judgments supports the respondent. The case of *Assam State Electricity Board vs. Shanti Conductors Pvt. Ltd.,* Gauhati High Court, *decided on 5 March, 2002,* relied on by learned Counsel for the respondent, deals with the overriding effect of the Interest on Delayed Payments Act. The Full Bench of Gauhati High Court in that case held that the provisions of that Act create a statutory liability against the buyer to pay interest under that Act on delayed payments and simultaneously vests a right in the supplier to recover such interest according to the provisions of sections 4 and 5 of that Act. Even if one concedes that a similar statutory liability against the buyer and corresponding right in the supplier are provided under the Small Enterprises Act, there is nothing to show that the provisions of Limitation Act would not apply to any claim for enforcement of such right or liability. The case of *Assam State Electricity Board* does not deal with the question with which we are concerned in the present case, namely, whether or not the Limitation Act applies to any adjudication of liability owed by buyer to the supplier through the statutory arbitration under section 18(3) of the Small Enterprises Act. The judgment in the case of *Savitra Khandu Beradi vs. Nagar Agricultural Sale and Purchase Co-operative Society, AIR 1957 Bom. 1957,* concerns itself with the applicability to statutory arbitrations of section 37 of the Arbitration Act, 1940, which made the Limitation Act applicable to arbitrations generally. It is pertinent to note that section 46 of the Arbitration Act, 1940 particularly provided for exclusion of applicability of section 37 to statutory arbitrations. The statutory arbitration, with which the Court was concerned in the case of *Savitra Khandu* was under the Bombay Co-operative Societies Act. That Act had no particular provision for applicability of the Arbitration Act, 1940 and particularly, section 37 thereof to statutory arbitrations carried out under that Act.

Such applicability was provided for under section 46 of the Arbitration Act, 1940, which in terms excluded the applicability of section 37 of the Arbitration Act, 1940. On the other hand, by virtue of the provisions of section 18 of the Small Enterprises Act, all provisions of the Arbitration and Conciliation Act, 1996 are made applicable to any arbitration carried out by the Council or its designate under section 18(3) of the Small Enterprises Act as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of the Arbitration and Conciliation Act, 1996. There is no exception made in respect of section 43 of the Arbitration and Conciliation Act, 1996. Accordingly, the provisions of the Limitation Act apply to arbitrations under section 18(3) of the Small Enterprises Act, just as they would apply to arbitrations arising out of an arbitration agreement entered into between the parties under sub-section (1) of section 7 of the Arbitration and Conciliation Act, 1996. The case of *Savitra Khandu* (supra), thus, has no application to the facts of the present case. The case of *Central Coal Fields Ltd. vs. S. K. Dutta, Miscellaneous Appeal (S. J.) No. 258 of 1997 (R) decided on 19 May, 2010* decided by Jharkhand High Court also relies on the decision of our Court in *Savitra Khandu* (supra), which has been explained above.

**14.** It is not the respondent's case that even if the Limitation Act were to apply, the claims are within time. In any event, it was for the Arbitral Tribunal/ Council to go into each claim and see if it was within time. The Arbitral Tribunal/Council did not do so, for the reason that, according to it, under the Small Enterprises Act, the buyer has a claim so long as the amount is not finally paid by the supplier. The liability to pay interest arises under section 16 of the Small Enterprises Act "notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force". The enforcement of such liability, is, however, through the mechanism of section 18 of the Small Enterprises Act, first by conciliation under sub-section (2) and then, arbitration under sub-section (3) thereof. As we have noted above, the provisions of Limitation Act apply to such arbitrations.

**15.** In the premises, the impugned award of the Arbitral Tribunal/Council cannot be sustained.

**16.** The Arbitration Petition is, accordingly, allowed and the impugned award dated 31 January, 2015 passed by the Micro and Small Enterprises Facilitation Council, Konkan Division, Thane, is set aside.

**17.** In view of the disposal of the Arbitration Petition, the Notices of Motion do not survive and the same are disposed of.

**18.** In the circumstances of the case, there shall be no order as to costs.

**19.** The amount deposited in Court by the petitioners in pursuance of an order passed by this Court earlier shall be refunded by the Office of the Prothonotary to the petitioners. The Office to number the petition forthwith.

*Petition allowed.*

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20. A victim of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weight. In the instant case, after careful consideration of the materials on record, the trial court and the High Court have found that a prima facie case for taking cognizance against the respondents is made out. Section 3(1)(xi) of the SC/ST Act which deals with assaults or use of force to any woman belonging to a Scheduled Caste or Scheduled Tribe with the intent to dishonour or outrage her modesty is an aggravated form of the offence. The only difference between Section 3(1)(xi) and Section 354 is essentially the caste or the tribe to which the victim belongs. If she belongs to a Scheduled Caste or Scheduled Tribe, Section 3(1)(xi) applies. The other difference is that in Section 3(1)(xi) dishonour of such victim is also made an offence.

21. In view of the above discussion and in the light of the specific averments in the complaint made by the complainant, we are of the considered opinion that Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code and the High Court has committed grave error in granting anticipatory bail to the respondents. Accordingly, the order dated 03.12.2014, passed by the High Court, is set aside.

22. The appeal is allowed. The respondents are granted four weeks' time from today to surrender before the appropriate court and seek for regular bail. However, it is made clear that the present conclusion is confined only to the disposal of this petition and the trial court is free to decide the case on merits.

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[Citation : 2017(3) RLW 1846 (Raj.)]

***(Rajasthan High Court)***
***Jaipur Bench***

HON'BLE MOHAMMAD RAFIQ, J.

**State of Rajasthan & Ors.**
*Versus*
**M/s. Sigma Engineering**

S.B. Civil Writ Petition No. 4641 of 2016, decided on 30.01.2017

**Arbitration and Conciliation Act, 1996, Sec. 34 read with National Highways Act, 1956, Sec. 3G(6) — Setting aside of award — Maintainability of writ petition — Jurisdiction lies with District Court — Held — When alternative remedy u/Sec. 34 of the Act of 1996 is available, writ petition not maintainable. (Para 8)**

**Writ petition dismissed.**

**माध्यस्थ एवं सुलह अधिनियम, 1996, धारा 34 सपठित राष्ट्रीय राजमार्ग अधिनियम, 1956, धारा 3G(6) – अधिनिर्णय अपास्त करना – रिट याचिका की पोषणीयता। – अधिकारिता जिला न्यायालय के पास है – अभिनिर्धारित – जब 1996 के अधिनियम की धारा 34 के तहत वैकल्पिक उपचार उपलब्ध हो तो, रिट याचिका पोषणीय नहीं होगी। (पद संख्या 8)**

**रिट याचिका खारिज की।**

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**Case Law Referred** **(Para No.)**

Smt. Susheelamma & Ors. vs. The Dy. Commissioner-Cum-Arbitrator, Chitradurga Distt. & Ors. (W.P.No.44398/2012, decided on 26.4.2013) 9

**Advocates Appeared**

J.M. Saxena, AAG., *for Petitioners;*
Ashutosh Bhatia, *for Respondent*

Hon'ble RAFIQ, J.—This writ petition seeks to challenge the award dated 10.09.2015 passed by the Micro and Small Enterprises Facilitation Council at Odisha, Cuttak (for short 'the Facilitation Council') in claim application filed by the respondent, M/s. Sigma Engineering Private Limited, whereby the petitioners have been directed to pay an amount of Rs. 37,15,000/- towards principal and Rs. 69,20,659/- towards interest.

2. Facts of the case are that a tender was floated by State of Rajasthan for construction of vertical lift steel gates of Suk li-Selwara Dam Project in Sirohi District, Rajasthan. The respondent being successful bidder/tenderer, was issued work order for a sum of Rs. 4,71,35,000/- in the year 2005. As per the petitioners, in spite of receiving amount of Rs. 4,64,75,000/- out of the total amount, respondent-firm did not complete the work within the stipulated time frame. Even though the work was completed with inordinate delay, there were certain defects in the construction which were to be rectified/corrected. Despite several reminders by the petitioners, the aforesaid defects were not rectified/corrected by the respondent, owing to which the petitioners had to get the said work done through another contractor incurring extra expenditure. On account of all these facts, dispute arose between the parties.

3. Mr. J.M. Saxena, learned Additional Advocate General submitted that Clause 23 of the agreement executed between the parties provided for reference of any such dispute to the Standing Committee for settlement and if the decision of the Standing Committee was not acceptable, the aggrieved party was free to approach concerned civil court, as per Clause 51 of the agreement, having jurisdiction over the place where the agreement was executed. The respondent, instead of raising the dispute before the Standing Committee or approaching any civil court in the State of Rajasthan, approached the Facilitation Council. Despite objection raised by the petitioners about jurisdiction of the Facilitation Council, the said Council vide impugned award dated 10.09.2015, has required the petitioners to pay the respondent a sum of Rs. 37,15,000/- towards principal amount and Rs. 69,20,659/- towards interest.

4. Learned Addl. Advocate General argued that the impugned award passed by the Facilitation Council is wholly without jurisdiction and the same, being illegal, is unenforceable against the petitioners. The Facilitation Council ought not to have entertained the claim of the respondent, who was having alternative efficacious remedy of reference of the dispute to the Standing Committee under Clause 23 of the agreement executed between the parties.

5. Mr. Ashutosh Bhatia, learned counsel referred to Section 18(1) of the Micro, Small and Medium Enterprises Development Act, 2006(for short 'the Act of 2006'), which provides that 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. It is argued that the impugned award passed by the Facilitation Council falls in the scope of Section 18(3) of the Act of 2006 which inter alia provides that where the conciliation initiated under sub-section (2) of Section 18 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 to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996(for short 'the Act 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 the Act of 1996. Learned counsel submitted that objection with regard to jurisdiction of the Facilitation Council is devoid of any merit because sub-section (4) of Section 18 of the Act of 2006 inter alia provides that notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council 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. Learned counsel invited attention of the Court towards Section 24 of the Act of 2006 which provides that the provisions of Sections 15 to 23 of the Act of 2006 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. In that view of the matter, submission of learned counsel for the respondent is that stipulation contained in the agreement executed between the parties would not oust the jurisdiction of the Facilitation Council because provisions contained in Section 15 to 23 of the Act of 2006 have been overriding effect over any other law for the time being in force. Learned counsel argued that once an award has been passed by the Facilitation Council, the provisions of the Arbitration and Conciliation Act, 1996 would apply which also include Section 34(2) whereunder the petitioners can file objections before the competent civil court.

6. I have given my anxious consideration to rival submissions and carefully perused the material on record.

7. Analysis of the provisions of Micro, Small and Medium Enterprises Development Act, 2006 show that the Facilitation Council has been set up to redress the grievances of the Micro and Small Enterprises. The respondent being a Small Enterprise is covered by the provisions of the Act of 2006. Chapter V of the Act of 2006 deals with delayed payments to Micro and Small Enterprises. Section 15 of the Act of 2006 requires that where any supplier, supplies any goods, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day, provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance. Section 16 of the Act of 2006 further provides that where any buyer fails to make payment of the amount to the supplier, as required under Sec. 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that

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amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank. Section 17 of the Act of 2006 provides that for any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under Section 16.

8. It is significant to note that provisions of the Act of 2006 have been given overriding effect by repeated emphasis of the Legislation. Sec. 18(1) of the Act of 2006 begins with non-obstente clause which provides that 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. Sub-section (2) of the Section 18 of the Act of 2006 further provides that 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 section 65 to 81 of the Act of 1996 shall apply to such a dispute as if the conciliation was initiated under Part III of that Act. Sub-section (3) of the Section 18 provides that 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 to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996(for short 'the Act 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 the Act of 1996. Sub-Section (4) of Section 18 of the Act of 2006 further provides that 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. Section 18(4) thus makes it clear that jurisdiction has been conferred to Facilitation Council at the place where the supplier is located which is evident from the wordings of sub-section (4) of the Section 18 that "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." (emphasis supplied) That would mean that jurisdiction has been conferred on Facilitation Council of the place where the supplier is located, regardless of location of buyer. Moreso, provisions of the Act of 2006 contained in Section 15 to Section 23 have been given overriding effect also under Section 24 of the Act of 2006 which provides that "the provisions of Secs.15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force." Once the award passed by the Facilitation Council is deemed to be an award under the provisions of the Act of 1996, it goes without saying that provisions

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of the Act of 1996, which otherwise applies to such an award for the period subsequent to passing of the award, would also be attracted including Sec. 34 whereunder the remedy has been provided to the person aggrieved to file objections against the award before the competent civil court. This Court, therefore, does not deem it appropriate to entertain the dispute on merits.

9. Somewhat similar scheme has been provided under the National Highways Act, 1956 wherein sub-sec. (6) of Sec. 3-G provides that subject to the provisions of this Act (National Highways Act, 1956), provisions of the Arbitration and Conciliation Act, 1996 shall apply to arbitration under the National Highways Act, 1956. In this context, award passed by an arbitrator under National Highways Act, 1956 was challenged before the Kamataka High Court in Smt. Susheelamma & Others vs. The Deputy Commissioner-Cum-Arbitrator, Chitradurga District & Others (W.P.No.44398/2012 (LA-RES) decided on 26.04.2013) seeking issuance of writ of mandamus to the Competent Authority (Land Acquisition), National Highway Authority of India to enhance the compensation on par with the amount determined and awarded in another case. The Karnataka High Court held that if the petitioners therein are aggrieved by the award passed by the Arbitrator, they have to avail the alternative remedy provided as per sub-sec. (6) of Sec. 3G of the National Highways Act, 1956 read with Section 34 of the Arbitrator & Conciliation Act, 1996 by initiating the proceedings before the jurisdictional District Judge. When special provisions are made providing special remedy for an aggrieved person to redress his grievance against the award passed by the Arbitrator, the High Court will not interfere in the matter exercising writ jurisdiction, that too by issuing a writ of mandamus as sought for enhancement of compensation. Scope of the remedy provided under Section 34 of the Act may be limited, but that does not mean that the petitioners do not have any remedy at all against the determination made by the Arbitrator. Therefore, they have to avail the remedy under Section 34 of the Arbitration and Conciliation Act, 1996.

10. In view of above, present writ petition cannot be held to be maintainable, as the petitioners have alternative efficacious remedy of filing objections under Section 34 of the Act of 1996 against the award. With that liberty to the petitioners, writ petition is dismissed as not maintainable.

Stay application also stands dismissed.

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[Citation : 2017(3) RLW 1850 (Raj.)]

***(Rajasthan High Court)***

HON'BLE P.K. LOHRA, J.

**Samri Gram Seva Sahkari Samiti**

*Versus*

**State of Rajasthan & Ors.**

S.B. Civil Writ Petition No.2837 of 2016 with 436 other connected matters, decided on 03.06.2016

**Rajasthan Cooperative Societies Act, 2001, Secs. 30-B, 51, 125 — Authority of PACS to carry on banking activities — Registrar issued directions not**

**O.M.P. (COMM) 76/2016**

**GE T&D India Limited v. Reliable Engineering Projects and Marketing**

**2017 SCC OnLine Del 6978 : (2017) 238 DLT 79**

**In the High Court of Delhi at New Delhi**

(BEFORE S. MURALIDHAR, J.)

GE T&D India Limited ..... Petitioner

Mr. Tejas Karia, Mr. Surjendu Sankar Das and Mr. Siddharth Kochhar, Advocates

*v.*

Reliable Engineering Projects and Marketing ..... Respondent

Dr. Amit George, Advocate/Amicus Curiae.

O.M.P. (COMM) 76/2016

Decided on February 15, 2017, [Reserved on: January 17, 2017]

The Judgment of the Court was delivered by

**S. MURALIDHAR, J.**

**IA No. 4177/2016 (Seeking waiver of deposit)**

**1.** GE T&D India Limited [earlier known as Alstom T & D India Limited (hereafter 'Alstom')] has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging an Award dated 22nd November, 2015 passed by the Facilitation Council, Facilitation Cell, Kanpur ('hereinafter 'FC') in the disputes between Alstom and the Respondent, Reliable Engineering Projects and Marketing ('REPM').

**2.** It is pointed out at the outset by the Petitioner that the impugned Award comprises of two awards passed by the FC, one pursuant to the order dated 29th June, 2015 (Award Part-I) and the other pursuant to the order dated 13th August, 2015 (Award Part-II).

***Background facts***

**3.** REPM is a sole proprietorship concern of which Mr. Vijendra Kumar Verma is the Sole Proprietor. It has its office in Ghaziabad, Uttar Pradesh. The Government of India awarded the work of the installation of the Jhajjhar Power Plant to Aravali Power Company Pvt. Ltd. ('Aravali'), a joint venture of NTPC Ltd., Haryana Power Generation Company Ltd. and Indraprastha Power Generation Company Ltd. Aravali by a contract dated 15th January, 2008 awarded Alstom a turnkey project for erection and commissioning of Power Transformer Package for Indira Gandhi Super Thermal Power Project (IGSTPP), Jhajjhar in the Aravalli Super Thermal Power Project.

**4.** On 6th January, 2009, REPM sent a letter to Alstom along with a brief introduction of the Respondent seeking its enlisting as an approved sub-contractor for the Principal Project. Alstom is stated to have engaged REPM for the receipt, unloading, storage, handling at site, installation, in plant transportation at site, insurance, installation testing and commissioning, including carrying out guarantee tests for the complete power package for IGSTPP ('hereafter referred to as 'Works').

**5.** REPM submitted a quotation for the Works to Alstom on 2nd June, 2009. In response thereto, on 23rd July, 2009, Alstom issued a Letter of Intent to REPM. On 8th September, 2009, Alstom issued a purchase order ('PO') bearing reference no. PTI/T-6748/48-52/SEC-II ('First PO') for a sum of Rs. 1.2 crores. According to the terms and conditions of the First PO, the completion period was 24 months from the date of site

mobilisation. However, Alstom was not to pay the overrun charges. The other terms and conditions were contained in Annexure-B to the PO. Admittedly, the said conditions did not incorporate any clause for referral of disputes between the parties arising out of the First PO to arbitration.

**6.** Alstom states that due to a change in its SAP system, the First PO was re-issued against the balance/remaining works by a Second PO dated 27th November, 2012. REPM states that it never received the Second PO. What is significant about the Second PO is that it contains an arbitration clause (Clause 25) which reads as under:

> "All or any of the disputes/differences arising between the parties with respect to the Contract shall be referred to arbitration by a sole arbitrator mutually agreed by the parties. The arbitration shall be conducted as per the Arbitration and Conciliation Act 1996, as may be amended from time to time. The venue of the arbitration shall be Delhi and the courts in Delhi shall have exclusive jurisdiction."

**7.** A meeting took place between the parties on 1st May, 2013 for sorting out the issues concerning the aforementioned PO. The Minutes of the Meeting ('MoM') dated 1st May, 2013, a copy of which has been placed on record, states in para 6 that "claim for overrun charges shall be submitted jointly by REPM and Alstom to NTPC after completion of the work." Annexure-1 to the said MoM listed out the documents required to be submitted by REPM. According to Alstom, the additional works of the value of Rs. 3,30,000 were agreed upon thereafter. The Second PO was amended to incorporate the said additional works on 31st May, 2013 wherein Line Item No. 20 was added. According to Alstom, on 4th June, 2013, the Second PO was further amended to delete certain Line Items and a single Line was added for the same value.

**8.** A second meeting took place between the parties on 28th December, 2013. The said MoM has also been placed on record. This recorded the history of the transaction and enclosed a reconciliation statement as Annexure-1.

**9.** In the meanwhile, REPM applied for registration as a 'Supplier' under the Micro, Small and Medium Enterprises Development Act, 2006 ('MSMED Act'). The said registration was granted on 4th April, 2012 but the date of commencement of the activity was indicated therein as 1st February, 2009.

**10.** REPM approached the FC on 19th February, 2015 setting out the entire background of the case and laying a claim against Alstom for the balance amounts due under the First PO for a sum of Rs. 5,81,08,100 inclusive of interest up to 31st January, 2015.

***Proceedings before the FC***

**11.** The FC passed an order on the said claim on 20th February, 2015 registering it as Claim Petition No. 5 of 2015 and issuing notice to Alstom. On 25th March, 2005, Alstom wrote to the FC seeking two weeks' time to file a reply. An order was passed by the FC on 10th April, 2015 directing that Alstom should submit its written statement within two weeks. On 20th April, 2015, Alstom wrote to the FC seeking a further opportunity for appropriate representation before the FC and requesting that the matter should be taken up for conciliation under Section 18 of MSMED Act.

**12.** In its order dated 11th May, 2015, the FC noted that no conciliation proposal has yet been brought by Alstom. In the circumstances, it directed Alstom to invite REPM for conciliation. A detailed reply was sent by Alstom on 6th June, 2015 which was deliberated upon by the FC. An order was passed by the FC on 29th June, 2015 in which it was *inter alia* noted as under:

> "When the above project was delayed, opposite no. 1 ordered petitioner for 'Digging work', besides above works, during delayed period. Opposite party agreed

to pay Rs. 26,29,375/- to opposite party in written in the meeting of M.O.M. which was held on date 01.05.2013, but till now, no payment has been made."

**13.** The FC also noted that Alstom had not abided by the settlement arrived at between the parties on 28th December, 2013. The FC proceeded to make an Award requiring Alstom to pay REPM Rs. 26,29,375/- for the 'excess digging work'.

**14.** This led to Alstom to make another representation on 1st July, 2015 to the FC requesting it for providing an opportunity of being heard. This was responded to by REPM by its letter dated 14th July, 2015. Another submission was presented by Alstom before the FC on 25th August, 2015 placing on record certain documents. The impugned Award was thereafter passed on 22nd November, 2015 requiring Alstom to pay to REPM Rs. 2,24,23,454/- towards interest.

**15.** The findings as far as Issue No. 1 were that the FC was competent to act as an Arbitral Tribunal (AT) notwithstanding the arbitration clause in the contract between the parties. It was noted that Alstom had till then not invoked the arbitration clause.

**16.** Issue No. 2 was regarding the liability of Alstom to pay REPM Rs. 1,38,52,500/-. The FC noted that Annexure-2 and Annexure-3 (i.e., the MoMs dated 1st May, 2013 and 28th December, 2013 respectively) were the backbone of the dispute and that a representative of Alstom was present at the meeting on 28th December, 2013 when the MoMs were executed. In that view of the matter, the said claim was allowed.

**17.** Issue No. 3 concerned the payment of interest and the FC held that Alstom was liable to pay interest under Section 16 of the MSMED Act.

***Proceedings in this Court***

**18.** When the present petition was filed by Alstom, it was accompanied by an application being IA No. 4177/2016 seeking waiver of the deposit as required in terms of Section 19 of the MSMED Act, which reads as under:

> "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."

**19.** It is pointed out that in terms of orders dated 29th June, 2015 and 13th August, 2015, Alstom was required to pay REPM Rs. 4,08,56,470/-. In terms of Section 19 of the MSMED Act, if Alstom sought to challenge the Awards, then such challenge would not be entertained by the courts until Alstom deposited 75% of the awarded amount. It is pointed out that REPM had obtained registration as 'supplier' under the MSMED Act only on 4th April, 2012. The PO was issued in favour of REPM way back on 8th September, 2009. Therefore, REPM could not take advantage of the provisions of the said Act. It is contended that the MSMED Act does not apply at all. Further, it is submitted that the FC could not proceed with the matter in view of the arbitration clause between the parties in the contract.

**20.** On hearing the petition on 1st April, 2016, notice was issued in IA No. 4177/2016 filed under Section 19 of the MSMED Act seeking exemption which was

accepted on behalf of the Respondent. At the hearing on 18th April 2016, the Court directed the Respondent to seek adjournment in Execution Case Nos. 58 and 61/2016 filed before the District Court, Kanpur, U.P. That interim order has continued since then.

**21.** On 1st December, 2016, the Court condoned the delay in filing of the petition in IA No. 12113/2016. On the same date, the Court allowed the change in the cause title of the Petitioner to 'GE T&D India Limited'. On that date, the Court further noted that the Respondent, Mr. Vijender Kumar Verma, who was appearing in person required the assistance of a lawyer. Accordingly, Dr. Amit George, Advocate was requested to appear as *amicus curiae* on the side of the Respondent and assist Mr. Verma in presenting the case before the Court.

**22.** The Court has heard detailed arguments of Mr. Tejas Karia, counsel appearing for the Petitioner and Dr. Amit George, *amicus curiae*, for REPM. Both the parties have also filed their respective notes of written arguments.

**23.** The arguments centred around the applicability of the MSMED Act since that in turn would decide the fate of the IA No. 4177/2016 filed by the Petitioner seeking waiver of the deposit. This judgment, therefore, is confined to the issue of applicability of the MSMED Act.

***Submissions on behalf of the Respondent***

**24.** The submissions of Mr. Tejas Karia, learned counsel appearing for the Petitioner, were as under:

(i) Under Section 15 of the MSMED Act, the requirement that the buyer should make payment by the appointed date was only 'where any supplier, supplies any goods or renders any services to any buyer...". Further, under Section 17 of the MSMED Act, the liability of the buyer was attracted when the goods were supplied or services were rendered by the supplier. Reference could be made to the FC under Section 18 only with regard to any amount under Section 17.

(ii) The definition of 'supplier' under Section 2 (n) is "a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of Section 8..." Under Section 2(n)(iii), the definition includes any company, cooperative society, trust or body.

(iii) Under Section 8(i), there are two situations under which a person seeks registration as a supplier. Under Section 8(i), it could be a person who intends to establish a micro or small enterprise who has, prior to establishing such enterprise, filed the memorandum with the authority specified by the Central or State Government. The second situation is contemplated by the proviso to Section 8(i) which applies to a person who has already established a small scale industry prior to the commencement of the MSMED Act. Such a person is required to file the memorandum within 180 days from the date of commencement.

(iv) REPM commenced its activities prior to the MSMED Act coming into force and did not file memorandum till much later. Therefore, on the date of performance of the contract of supply, REPM was not a 'supplier' within the meaning of Section 2(n) of the Act and, therefore, could not take advantage of the provisions of Section 17 read with Section 18 of the MSMED Act. In other words, the registration was not retrospective.

(v) Extensive reliance was placed on the decision dated 24th July, 2015 of the Madhya Pradesh High Court in Writ Petition No. 19319/2014 [*Frick India Ltd.* v. *Madhya Pradesh Micro and Small Enterprises Facilitation Council*] where, in similar circumstances, it was held that the aspect of registration under the MSMED Act did not act retrospectively. Where the contract was performed prior

to coming into force of such registration, then an entity on the basis of subsequent registration could not have availed the benefit of the MSMED Act.

(vi) Reliance was also placed on the decision of the Bombay High Court in *Faridabad Metal Udyog Pvt. Ltd.* v. *Anurag Deepak* 2013 SCC OnLine Bom 1789; *Hindustan Wires Limited* v. *R. Suresh* 2013 SCC OnLine Bom 547; *Steel Authority of India Ltd.* v. *The Micro, Small Enterprises Facilitation Council through Joint Director* [Writ Petition No. 2145/2010].

(vii) The First PO dated 8th September, 2009 did not contain the arbitration clause but the subsequent PO dated 27th November, 2012 did contain such a clause and, therefore, was in fact in continuation of the earlier PO. The said arbitration clause would govern the parties and, therefore, resort to the MSMED Act was legal for that purpose. The Act was a Special Act and took precedence over the MSMED Act. Reliance was placed on the decision of Bombay High Court in *Girnar Traders* v. *State Of Maharashtra* (2011) 3 SCC 1 to urge that in light of the Act, the claim had to be made only before the Arbitrator appointed under the agreement as it was to take precedence over the remedy under the MSMED Act.

***Submissions on behalf of the Respondent***

**25.** Countering the above submissions, Dr. Amit George, *amicus curiae*, appearing on behalf of the Respondent referred to Section 1(2) of the MSMED Act which makes it explicit that it came into force on the date appointed by the Central Government for that purpose i.e., 2nd October, 2006. The MSMED Act was in fact in continuation of the earlier Act i.e., The Interest on Delayed Payments under Small Scale and Ancillary Industrial Undertakings Act, 1993 ('1993 Act') which was repealed by Section 32(1) of the MSMED Act. In any event, both the POs in the present case were issued subsequent to the coming into force of the MSMED Act.

**26.** Dr. George submitted that the Court did not have discretion to waive the 75% deposit under Section 19 of the MSMED Act. He submitted that in *Goodyear India Ltd.* v. *Norton Intech Rubbers Pvt. Ltd.* (2012) 6 SCC 345, the Supreme Court was categorical in this regard. He also placed reliance on the decision of *Purbanchai Cables & Conductors Pvt. Ltd.* v. *Assam State Electricity Board* (2012) 7 SCC 462. Dr. George submitted that under Section 15 of the MSMED Act, the focus was on supply of goods and rendering of services and as long as a person satisfied these two requirements, he was recognized as a 'supplier' for the purposes of the MSMED Act. According to Dr. George, it was never in doubt even from that point of view of the Petitioner that the First PO dated 8th September, 2009 which was in the process of being executed did not contain an arbitration clause and the supply pursuant thereto was continued even under the Second PO which made an explicit reference to the First PO. Dr. George also pointed out that as part of Alstom's representation to the FC on 25th August, 2015, it had in fact enclosed a copy of machine generated PO dated 24th November, 2009 which in paragraph 8 appended in the General Conditions of Contract ('GCC'). Clause 8 of this GCC stated that all disputes and differences arising out of the contract would be referred to an arbitrator in Calcutta failing which it would be referred to Indian Chambers of Commerce, Calcutta whose decision would be final. He pointed out that this machine generated PO was obviously an embarrassment to Alstom since it required arbitration to take place in Calcutta. He pointed out that Alstom made a reference even in this PO to the First PO dated 8th September, 2009. Likewise, the minutes of the meeting dated 28th December, 2013 also referred explicitly to the First PO dated 8th September, 2009.

**27.** Dr. George relied upon the decision in *Asiatic Rubro Complex* v. *Kerala Micro & Small Enterprises Facilitation Council* ILR 2008 (2) Kerala 281; *Bharat Heavy Electricals Ltd.* v. *State of Uttar Pradesh* 2014 (4) AWC 3543; *Paper & Board*

*Convertors, Agra* v. *Uttar Pradesh State Micro & Small Enterprises Facilitation Council, Kanpur* 2014 (5) AWC 4844; *Principal Chief Engineer* v. *Manibhai & Brothers (Sleeper)* AIR 2016 Gujarat 151; *Central Electricity Supply Utility of Odisha* v. *Union of India*. [W.P. (C) No. 1213/2016 decided on 23rd March, 2016) and *Welspun Corp. Ltd.* v. *The Micro & Small, Medium Enterprises Facilitation Council, Punjab* (2012) 166 PLR 195 to urge that Section 18 of the MSMED Act would have an overriding effect. He also placed reliance on the decision in *Waman Shriniwas Kini* v. *Ratiial Bhagwandas & Co.* AIR 1959 SC 689 to urge that a statute would override the contract. Relying on the decision in *Life Insurance Corporation of India* v. *D.J. Bahadur* (1981) 1 SCC 315, he submitted that being a special statute it is the MSMED Act which should apply. In this context he also relied upon the decisions in *Snehadeep Structures Pvt. Ltd.* v. *Maharashtra Small Scale Industries Development Corporation Ltd.* (2010) 3 SCC 34 and *Edukanti Kistamma (Dead) through LRs.* v. *S. Venkatareddy (dead) through LRs* (2010) 1 SCC 756.

**28.** Dr. George also referred to Section 24 of the MSMED Act which underscores its overriding effect. According to him, there was nothing inconsistent in the MSMED Act with any other law. On the other hand, there were two advantages of the MSMED Act; one was that there would be a three-member AT. The second was that the arbitration could be expected to be completed within 90 days. Under Section 18(3) of the MSMED Act, the FC could even *suo moto* refer the dispute to arbitration and even the Act would have applied to such arbitration.

***Analysis and Reasons***

**29.** Before commencing the discussion on the above submissions, it is necessary to note the objects and reasons behind the MSMED Act. The Statement of Objects and Reasons highlights two broad objects; one was to have a comprehensive central enactment to provide an appropriate legal framework for facilitating the growth and development of the small scale industries sector ('SSI'). There was also a growing need felt to extend policy support for the small enterprises so that they were enabled to grow medium-level achieving higher productivity. The idea was to provide a single legal framework.

**30.** The second object is that not only does the MSMED Act deal exclusively with the activities of the SSI units but it also provides for a mechanism for expeditious adjudication of the claims that such units may have. This would even be in relation to a dispute involving a non-MSMED supplier. The relevant provisions of the MSMED Act which require to be discussed are Sections 15, 17 and 18 which read as under:

> **"15. Liability of buyer to make payment.**
>
> Where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefore on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day: Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.
>
> 17. **Recovery of amount due.**
>
> For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16.
>
> 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 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 to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of 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 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."

**31.** There is no doubt that the above provisions apply only to the services rendered and goods supplied by a 'supplier as 'defined under Section 2(n) of the Act. The focus under Section 15 of the MSMED Act is on the actual act of providing services and supplying goods. If a small scale industry or micro or small enterprise undertakes the above tasks, then the buyer is bound under Section 15 of the MSMED Act to make payment by the appointed date which cannot exceed 45 days from the date of acceptance or deemed acceptance in terms of the proviso thereof.

**32.** A unit that is not registered as a supplier does not cease to be one. The registration as a supplier under the MSMED Act makes the availing of the benefit much easier. Section 8(1) of the MSMED Act which requires the filing of a memorandum by such unit reads as under:

"8. **Memorandum of micro, small and medium enterprises.**- 1. Any person who intends to establish,

a. a micro or small enterprise, may, at his discretion, or
b. a medium enterprise engaged in providing or rendering of services may, at his discretion; or
c. a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951,

Shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):

Provided that any person who, before the commencement of this Act, established

a. a small scale industry and obtained a registration certificate, may, at his discretion; and
b. an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951, having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O. 477(E) dated the 25th July, 1991 filed an Industrial Entrepreneur's Memorandum,

Shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act."

**33.** Section 8 of the MSMED Act envisages two possible situations; one is where a unit which has not yet come into existence, and the second is where the unit is in existence. Where a unit is yet to be established, Section 8(1) requires filing of the memorandum in the manner specified by the State or the Central Government, as the case may be. Where a unit has already been established prior to the commencement of the MSMED Act, then the proviso applies and the memorandum has to be applied within 180 days from the date of commencement.

**34.** It, however, does not mean that a third category i.e., a unit that is established after the commencement of the Act cannot seek registration as a supplier. That could never have been the intention of the legislature as is evident from the Statement of Objects and Reasons of the MSMED Act.

**35.** The case on hand falls in the third category where a supplier is already in existence at the time of commencement of the Act but has not obtained any registration till then. It is registered as a supplier beyond 180 days from the date of the commencement of the Act i.e., after 180 days from 2nd October, 2006. Clearly, such a unit can also seek registration as a supplier. That is precisely what has happened in the present case. The certificate issued to the REPM is dated 4th April, 2012, but importantly, it notifies that the date of commencement of the activities as 1st February, 2009.

**36.** The question that next arises is whether having been registered on 4th April, 2012, can REPM take advantage of the MSMED Act? For this purpose, it is necessary to refer to Section 18 which requires REPM to be a 'supplier' as on the date of making such reference. Clearly, that condition stood satisfied. Secondly, even according to the Petitioner, the supplies made by REPM pursuant to the PO dated 8th September, 2009 continued even under the Section PO dated 27th November, 2012. From the point of view of the Petitioner, it is seeking to rely on the Second PO having been validly issued. The supplies made by REPM to Alstom in terms of the PO dated 8th September, 2009 continued even after REPM's registration as supplier as is evident from the two MoMs dated 1st May, 2013 and 28th December, 2013. The result is that REPM can seek the application of the beneficial provisions of MSMED Act as far as its claims against Alstom arising from the said First PO are concerned.

**37.** Now to a discussion of the decisions cited by both parties. In the first place, the Court finds merit in the contention of REPM that the MSMED Act should be construed to be a special statute. In *Life Insurance Corporation of India* v. *D.J. Bahadur* (supra), the two statutes that the Supreme Court was considering were the Industrial Disputes Act, 1947 ('ID Act') and the Life Insurance Corporation Act ('LIC Act'). While the ID Act exclusively provided for resolution of disputes, the LIC Act was a general one not specific to the service conditions of the employees of the LIC. This explains the following observation of the Supreme Court that even if both statutes were to be construed as special enactments, it is the ID Act which should be given preference since that was specific to the dispute on hand:

"53. What are we confronted with in the present case, so that I may determine as between the two enactments which is the special? The only subject which has led to this litigation and which is the bone of contention between the parties is *an industrial dispute between the Corporation and its workmen qua workmen*. If we refuse to be obfuscated by legal abracadabra and see plainly what is so obvious, the conclusion that flows, in the wake of the study I have made, is that vis-a-vis 'industrial disputes' at the termination of the settlement as between the workmen and the Corporation the ID Act is a special legislation and the LIC Act a general

legislation. Likewise, when compensation on nationalisation is the question, the LIC Act is the special statute. An application of the generalia maxim as expounded by English textbooks and decisions leaves us in no doubt that the ID Act being special law, prevails over the LIC Act which is but general law."

**38.** In the present case, therefore, the Court is satisfied that the MSMED Act to the extent it provides for a special forum for adjudication of the disputes involving a 'supplier' registered thereunder, overrides the Act i.e., the Arbitration and Conciliation Act 1996. The following observations in *Snehadeep Structures Pvt. Ltd.* v. *Maharashtra Small Scale Industries Development Corporation Ltd.* (supra) which dealt with the statute of 1993 preceding the MSMED Act equally applies to the MSMED Act:

"47. The requirement of pre-deposit of interest is introduced as a disincentive to prevent dilatory tactics employed by the buyers against whom the small-scale industry might have procured an award, just as in cases of a decree or order. Presumably, the legislative intent behind Section 7 was to target buyers, who, only with the end of pushing off the ultimate event of payment to the small-scale industry undertaking, institute challenges against the award/decree/order passed against them. Such buyers cannot be allowed to challenge arbitral awards indiscriminately, especially when the section requires predeposit of 75% interest even when appeal is preferred against an award, as distinguished from an order or decree."

**39.** Likewise, in *Edukanti Kistamma (Dead) through LRs.* v. *S. Venkatareddy (dead) through LRs* (supra), the Supreme Court explained that a special statute would be preferred over a general one where it is beneficial. It was explained that the purport and object of the Act must be given its full effect by applying the principles of "purposive construction." The question whether the dispute resolution mechanism under Section 18 of the MSMED Act overrides the arbitration clause under the contract has to be answered in the affirmative. As was explained in *Waman Shriniwas Kini* v. *Ratilal Bhagwandas & Co.* (supra) an agreement contrary to a statutory provision that prohibits it would be unenforceable.

**40.** While it is true that a Division Bench (DB) of the Bombay High Court in *Steel Authority of India Ltd.* v. *The Micro, Small Enterprises Facilitation Council through Joint Director* (supra) has observed that the MSMED Act would not be retrospective, the DB in that case was dealing with a case where the supply had been completed much earlier and not where it continued after registration of the supplier under the MSMED Act. Likewise, the decisions in *Frick India Ltd.* v. *Madhya Pradesh Micro and Small Enterprises Facilitation Council* (supra) and *Faridabad Metal Udyog Pvt. Ltd.* v. *Anurag Deepak* (supra) are distinguishable on facts. To reiterate, here, the supply has continued beyond the registration of the supplier. Therefore, the benefit of the MSMED Act cannot be denied to such supplier.

**41.** The decisions in *Goodyear India Ltd.* v. *Norton Intech Rubbers Pvt. Ltd.* (supra); *Asiatic Rubro Complex* v. *Kerala Micro & Small Enterprises Facilitation Council* (supra); *Bharat Heavy Electricals Ltd.* v. *State of Uttar Pradesh* (supra); *Principal Chief Engineer* v. *Manibhai & Brothers* (supra); *Weispun Corp. Ltd.* v. *The Micro & Small, Medium Enterprises Facilitation Council, Punjab* (supra) support the case of the *REPM* in relation to the applicability of the MSMED Act to the transactions in question.

**42.** For the above reasons, the Court negates the plea of the Petitioner that the MSMED Act does not apply. Consequently, the question of the Petitioner seeking a waiver of the requirement of depositing 75% of the amount in terms of Section 19 of the MSMED Act does not arise. As explained by the Supreme Court in *Goodyear India Ltd.* v. *Norton Intech Rubbers Pvt. Ltd.* (supra), there is no discretion in the Court to reduce the amount of pre-deposit.

**43.** The question that now arises is whether, in terms of the provisions of Section

19 of the MSMED Act, the Court can set any reasonable terms for the deposit to be made? Considering the amount involved, the Court directs that 75% of the amount awarded by the FC in favour of the Respondent should be deposited by the Petitioner in this Court, in four equal instalments with each instalment being deposited before the 10th of every succeeding month hereafter. The amount as and when deposited by the Petitioner shall be kept by the Registry in a fixed deposit initially for a period of six months and kept renewed during the pendency of the petition. The hearing of the main petition will be subject to compliance with the above direction.

**44.** The application is disposed of in the above terms.

**45.** The Court records its appreciation of the excellent assistance it received from Dr. Amit George, who appeared at the Court's request as *amicus curiae* on behalf of the Respondent and Mr. Tejas Karia, learned counsel for the Petitioner.

**OMP (Comm.) 76/2016**

**46.** List for further hearing on 17th July 2017.

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**W.P.(C) 10886/2016**

**Bharat Heavy Electricals Limited v. Micro and Small Enterprises Facilitations Centre**

**2017 SCC OnLine Del 10604**

**In the High Court of Delhi at New Delhi**

(BEFORE VIBHU BAKHRU, J.)

W.P.(C) 10886/2016 and CM No. 42638/2016

Bharat Heavy Electricals Limited ..... Petitioner

*v.*

The Micro and Small Enterprises Facilitations Centre & Anr. ..... Respondents

And

W.P.(C) 10901/2016 and CM No. 42707/2016

Bharat Heavy Electricals Limited ..... Petitioner

*v.*

The Micro and Small Enterprises Facilitations Centre & Anr. ..... Respondents

W.P.(C) 10886/2016, CM No. 42638/2016, W.P.(C) 10901/2016 and CM No. 42707/2016

Decided on September 18, 2017

Advocates who appeared in this case:

For the Petitioner: Mr. Ashim Vachher, Mr. P. Piyush and Mr. Vaibhav Dabas. For the Respondent: Mr. Siddharth Dutta for R-1.

Mr. Vikram Nandrajog and Mr. S. Khanna for R-2.

The Judgment of the Court was delivered by

**VIBHU BAKHRU, J.**:— Bharat Heavy Electricals Limited (hereafter 'the BHEL') has filed these petitions, challenging two separate orders (hereafter 'the impugned orders'), both dated 16.06.2016, passed by the respondent no. 1, The Micro and Small Enterprises Facilitations Centre (hereafter 'the MSEFC'). By the impugned orders, MSEFC had recorded its conclusion that resolution of disputes between BHEL and respondent no. 2 (hereafter 'DRIPLEX'), by conciliation, was not possible; it had, accordingly, decided to terminate the conciliation proceedings and refer the disputes to Delhi International Arbitration Centre (hereafter 'DIAC') for initiating arbitration proceedings.

**2.** The parties involved and the controversy raised in these petitions is common and, therefore, both the petitions were taken up and heard together.

**3.** The principal question involved in the present petitions is whether MSEFC could- in terms of Section 18(3) of The Micro, Small and Medium Enterprises Development Act, 2006 (hereafter 'the Act') - refer the disputes for arbitration under the aegis of DIAC, considering that the disputing parties had also entered into an arbitration agreement. The General Conditions of Contracts (hereafter 'GCC'), included as a part of the agreements (purchase orders) entered into between the parties, contains an arbitration clause in terms of which the disputes are to be referred to an arbitrator appointed by BHEL. It is BHEL's contention that MSEFC does not have the jurisdiction to override the arbitration agreement and refer the disputes to DIAC. According to BHEL, once MSEFC had concluded that the disputes could not be resolved through

conciliation, it could refer the parties to resolve their disputes by arbitration in terms of their agreement but it could not supplant the arbitration agreement. The respondents, both MSEFC and DRIPLEX, dispute the same. According to the respondents, in terms of Section 18(3) of the Act, if the conciliation proceedings initiated is not successful, MSEFC is enjoined to adjudicate the disputes or refer the disputes for arbitration to any institution or centre providing alternate disputes resolution services. The respondents claim that the provisions of Section 18(3) would override the arbitration agreement between the disputing parties.

**4.** Briefly stated, the relevant facts necessary to address the controversy areasunder:—

4.1. BHEL had entered into a contract for setting up a Thermal Power Plant in Syria on a turnkey basis. BHEL in turn has placed purchase order dated 26.03.2013 for supply of DM Plant (subject matter of ***W.P. (C) 10901/2016***) and purchase order dated 20.12.2016 for supply of Condensate Polishing System and other items (subject matter of ***W.P. (C) 10886/2016***), on DRIPLEX.

4.2. BHEL's claims that on 11.06.2012, it was forced to suspend all operations relating to the thermal plant in question, including exports to Syria from India, due to Civil unrest and the advisory issued by the Indian Embassy at Damascus. Accordingly, BHEL informed all the concerned suppliers, including DRIPLEX, that the project had been put on hold. According to BHEL, it is, thus, not required to make payments under the agreements (purchase orders). DRIPLEX claims to the contrary; according to DRIPLEX, it is entitled to the consideration payable for supply of DM Plant and Condensate Polishing Unit delivered to BHEL.

4.3. Since BHEL declined to pay the consideration for the supplies, on June 2015, DRIPLEX filed separate applications under Section 18 of the Act, with MSEFC, enclosing therewith a statement of their claims in respect of the respective purchase orders. In respect of the purchase order dated 26.03.2013, DRIPLEX claimed a sum of Rs. 2,22,00,000/- along with interest and, in respect of the purchase order dated 20.12.2011, DRIPLEX claimed a sum for Rs. 6,08,59,300/- along with interest.

4.4. Pursuant to the above applications, MSEFC issued a notice to BHEL on 02.11.2015 and called upon BHEL to appear before MSEFC on 23.11.2015. BHEL was also called upon to file a reply to the claims filed by DRIPLEX. In response to the aforesaid notices, BHEL filed its replies to the respective claims preferred by DRIPLEX, *inter alia*, disputing the liability to pay the amount claimed on account of *force majure* conditions. BHEL claimed that the *force majeure* clause as contained in the Special Conditions of Contract was applicable and, thus, BHEL was not obliged to make any payments to DRIPLEX. DRIPLEX filed rejoinders countering the contentions advanced by BHEL.

4.5. It appears that certain proceedings were undertaken by MSEFC for reconciliation of the disputes but since MSEFC found that the same was not possible, MSEFC passed the impugned orders referring the disputes to arbitration under the aegis of DIAC.

*Submissions*

**5.** Mr. Ashim Vachher, learned counsel appearing for BHEL contended that there was no dispute that MSEFC would have the jurisdiction to undertake the conciliation proceedings in terms of Section 18(3) of the Act. However, the parties could not be referred to arbitration contrary to the arbitration agreement entered into between them. He submitted that Section 18(3) of the Act only provided for the disputes to be resolved by arbitration failing the conciliation proceedings, however, the said arbitration was to be conducted in terms of the agreement between the parties. He canvassed that there was no conflict between the arbitration agreement and the

provisions of Section 18(3) of the Act and, the same must be read in an harmonious manner. He relied on the decision of the Bombay High Court in the case of *Steel Authority of India* v. *The Micro, Small Enterprise Facilitation Council*: AIR 2012 Bom 178 and drew the attention of the Court to paragraph 11 of the said judgment, wherein the Court had observed that *"we find that there is no provision in the Act, which negates or renders the arbitration agreement entered between the parties ineffective"*.

**6.** Mr. Siddharth Dutta, learned counsel appearing for MSEFC countered the aforesaid submissions and relied on the decision of the Punjab & Haryana High Court in *Welspun Corp. Ltd.* v. *The Micro and Small, Medium Enterprises Facilitation Council, Punjab*: CWP No. 23016/2011 decided on 13.12.2011, whereby the single Judge of the Punjab and Haryana High Court had taken a view contrary to that of the Bombay High Court in *Steel Authority of India* v. *The Micro, Small Enterprise Facilitation Council* (supra). He also relied on the decision of the Madras High Court in *Refex Energy Limited* v. *Union of India*: AIR 2016 Mad 139.

**7.** Mr. Vikram Nandrajog, learned counsel appearing for DRIPLEX supported the contentions advanced on behalf of MSEFC. He further contended that there was a clear conflict between the provisions of Section 18(3) of the Act and the arbitration agreement between BHEL and DRIPLEX (Clause 30 of the GCC) and, therefore, the provisions of the Act would necessarily prevail. He relied on the decision of the Division Bench of Allahabad High Court in *BHEL* v. *State of U.P.*: W.P. (C) 11535/2014 decided on 24.02.2014; the decision of the Punjab and Haryana High Court in *The Chief Administrator Officer, COFMOW* v. *MSEFC of Haryana*: CWP 277/2015 decided on 09.01.2015; the decision of the Calcutta High Court in *NPCC Limited* v. *West Bengal State MSEFC*: GA No. 304/2017 W.P. 294/2016 decided on 16.02.2017; and the decision of a coordinate bench of this Court in *GE T&D India Ltd.* v. *Reliable Engineering Projects and Marketing*: OMP (Comm.) No. 76/2016 decided on 15.02.2017, in support of his aforesaid contention. He also referred to the decisions of the Supreme Court in *Fair Air Engineers Pvt. Ltd.* v. *N.K. Modi*: (1996) 6 SCC 385 and *National Seeds Corporation Ltd.* v. *M. Madhusudhan Reddy*: (2012) 2 SCC 506 and on the strength of the said decisions contended that the Act being a Special Act would override the provisions of Arbitration and Conciliation Act, 1996 (hereafter the A&C Act').

**8.** Mr. Nandrajog also contended that BHEL, in its reply filed before MSEFC, had notraised any objectionasto jurisdiction of MSEFC and, therefore, was estopped from raising such objections at this stage. He referred to paragraph 3 of the replies filed on behalf of BHEL wherein BHEL had reserved its rights to urge further grounds in case the matter was referred to arbitration under the Act.

***Reasons and Conclusion***

**9.** At the outset, it is relevant to observe that the Act was enacted with the object of facilitating the promotion, development and enhancing the competitiveness of small and medium enterprises. Chapter V of the said Act (funiculus of sections 15 to 24) contains provisions to address the issue of delayed payment to Micro and Small Enterprises. Section 15 of the Act mandates that where any supplier supplies any goods or renders any services to any buyer, the buyer would make the payment for the same on or before the date agreed, which in any case could not exceed 45 days from the date of acceptance/deemed acceptance. Section 16 of the Act provides for payment of interest. Section 17 of the Act mandates that the buyer would be liable to pay the amount for the goods supplied or services rendered along with interest as provided under Section 16 of the Act.

**10.** Section 18(1) of the Act contains a non obstante clause and enables any party to a dispute to make a reference to the Micro and Small Enterprises Facilitation Council

(MSEFC). Section 18 of the Act is relevant and is set out below:—

> **"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 to it any 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 subsection (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 anArbitratoror 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."

**11.** Section 19 of the Act, *inter alia*, provides that no application for setting aside any 3 decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution would be entertained, unless the appellant (not being a supplier) has deposited 75% of the amount in terms of the decree or award in the manner as directed by the Court. Section 19 of the Act is set out below:—

> "**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 percent 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."

**12.** Section 20 and 21 of the Act provides for establishment and composition of Micro and Small Enterprises Facilitation Council. Section 22 mandates that a buyer would furnish certain additional information in his annual accounts. Section 23 of the Act expressly provides that the amount of interest payable or paid by any buyer would not be allowed any deduction for the purposes of computing the income charitable to tax under the Income Tax Act, 1961.

**13.** Section 24 of the Act is a non-obstante provision and reads as under:—

> "**24 Overriding effect**-The provision of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the

time being in force."

**14.** A plain reading of Section 18(2) of the Act indicates that on receipt of a reference under Section 18(1) of the Act, the Council [MSEFC] would either conduct conciliation in the matter or seek assistance of any institution or centre providing alternate dispute resolution services. It also expressly provides that Section 65 to 81 of the A&C Act would apply to such a dispute as it applies to conciliation initiated under the Part III of the A&C Act.

**15.** It is clear from the provisions of Section 18(2) of the Act that the legislative intention is to incorporate by reference the provisions of Section 65 to 81 of the A&C Act to the conciliation proceedings conducted by MSEFC.

**16.** Section 18(3) of the Act expressly provides that in the event the conciliation initiated under Section 18(2) of the Act does not fructify into any settlement, MSEFC would take up the disputes or refer the same to any institution or centre providing alternate dispute resolution services for such arbitration.

**17.** It is at once clear that the provision of Section 18(3) of the Act do not leave any scope for a non-institutional arbitration. In terms of Section 18(3) of the Act, it is necessary that the arbitration be conducted under aegis of an institution-either by MSEFC or under the aegis of any *"Institution or Centre providing alternate dispute resolution services for such arbitration".*

**18.** At this stage, it would be relevant to refer to clause 29 and 30 of the GCC. The relevant extracts of which are quoted below:—

"29.0 **SETTLEMENTOF DISPUTES**

29.1 Except as otherwise specifically provided in the Order/Contract, all disputes concerning questions of the facts arising under the Order/Contract, shall be decided by purchaser, subject to written appeal by the Seller/Contractor to the purchaser, whose decision shall be final.

29.2 Any disputes or differences shall be to the extent possible settled amicably between the parties hereto, failing which the disputed issues shall be settled through arbitration.

29.3 The Seller/contractor shall continue to perform the Order/Contract, pending settlement of dispute(s).

30.0 **ARBITRATION**

30.1 In the event of any dispute or difference arising out of the execution of the Order/Contract or the respective rights and liabilities of the parties or in relation to interpretation of any provision by the Seller/Contractor in any manner touching upon the Order/Contract, such dispute or difference shall (except as to any matters, the decision of which is specifically provided for therein) be referred to the arbitration of the person appointed by the competent authority of the Purchaser.

Subject as aforesaid, the provisions of Arbitration and Conciliation Act, 1996 (India) or statutory modifications or re-enactments thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause. The venue of arbitration shall be at New Delhi.

30.2 In case of order/contract on Public Sector Enterprises (PSE) or a Govt. Deptt., the following clause shall be applicable:—

In the event of any dispute or difference relating to the interpretation and application of the provisions of the Order/Contract, such dispute or difference shall be referred to by either party to the arbitration of one of the arbitrators in the department of public enterprises. The award of the arbitrator shall be binding upon the parties to the dispute, Provided, however, any party aggrieved by such award may make a further reference for setting aside or

revision of the award to the Law secretary, Deptt. of Legal Affairs, Ministry of Law & Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary or Additional Secretary when so authorized by the Law Secretary, whose decision shall bind the parties hereto finally and conclusively.

30.3 The cost of the arbitration shall be borne equally by the parties."

**19.** It is apparent from the plain reading of clause 30(1) above, that the DRIPLEX and BHEL had agreed to refer disputes to an arbitrator appointed by BHEL and this in material variance with the provisions of Section 18(3) of the Act. In this view, the contention that there is no conflict between the arbitration agreement and Section 18 (3) of the Act, is not persuasive. The arbitration clause under the GCC provides for an arbitration by an arbitrator to be appointed by BHEL, which is repugnant to an institutional arbitration.

**20.** As noticed above, Section 24 of the Act contains an non-obstante provision and, expressly provides that the provisions of Section 15 to 23 of the Act will have an overriding effect. Thus, the provisions of Section 18(3) of the Act cannot be diluted and must be given effect to notwithstanding anything inconsistent, including the arbitration agreement in terms of section 7 of the A&CAct.

**21.** If one examines the scheme of the provision of Section 15 to 23 of the Act, it is apparent that the scheme is to provide a statutory framework for Micro and Small Enterprises to expeditiously recover the amounts due for supplies made by them. This is in conformity with the object of the Act to minimise the incidence of sickness in Small and Medium Enterprises and to enhance their competitiveness. It is understood that the Small and Medium Enterprises do not command a significant bargaining power and-as indicated in the statement of object and reasons of the Act-the object of the Act is, *inter alia*, to extend the policy support and provide appropriate legal framework for the sector to facilitate its growth and development. It is, apparently, for this reason that Section 18(3) does not contemplate an arbitration to be conducted by an arbitrator which is to be appointed by either party, but expressly provides that the same would be conducted by MSEFC or by any institution or a centre providing alternate dispute resolution services.

**22.** Section 19 of the Act also ensures a more expedient recovery by making pre-deposit of 75% of the awarded amount a pre condition for assailing the award. The.benefit of this provision is not available in case of arbitrations in terms of agreements between the parties (and not by a statutory reference under Section 18(3) of the Act).

**23.** In *BHEL* v. *State of U.P.* (Supra), a Division Bench of the Allahabad High Court had considered the case where the agreement between the disputing parties contained an arbitration clause, however, the MSEFC had decided to arbitrate the disputes under Section 18(3) of the Act. BHEL was also the petitioner in that case and, had approached the Court seeking that the proceedings before Uttar Pradesh State Micro and Small Enterprises Facilitation Council be set aside and the said Council be directed to decide BHEL's objection under Section 8 of the A & C Act (that is, that the disputes be referred to Arbitration in terms of the agreement between the parties therein). The Division Bench of Allahabad High Court had repelled BHEL's contention and held as under:—

"In this view of the matter, the relief of certiorari for quashing all the proceedings before the Council is manifestly misconceived. The proceedings had been entertained by the Council in pursuance of the provisions of the Act. Though there may be an arbitration agreement between the parties, the provisions of Section 18(4) specifically contain a non obstante clause empowering the Facilitation Council to as an Arbitrator. Moreover, section 24 of the Act states that sections 15

to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

**24.** The Punjab and Haryana High Court in *The Chief Administrative, COFMOW* (supra) had rejected the contention that provisions of Section 18(3) of the Act for referring the disputes to arbitration would apply only where there was no arbitration agreement between the parties.

**25.** A coordinate bench of this court has in *GE T & D India Ltd.* (supra) had unequivocally held as under:—

> "In the present case, therefore, the Court is satisfied that the MSMED Act to the extent it provides for a special forum for adjudication of the disputes involving a 'supplier' registered thereunder, overrides the Act i.e., the Arbitration and Conciliation Act 1996."

**26.** The Calcutta High Court in the case of *National projects Construction Corporation Limited* (supra) had also concluded that in cases where an arbitration agreement existed between two parties and one such party was an entity within the meaning of the Act, the Council established under the Act would have jurisdiction to arbitrate the disputes between such parties. The Court further observed as under:—

> "When there exists an arbitration agreement between two parties and one of such parties to the arbitration agreement is an entity within the meaning of the Act of 2006, the Council established under the provisions of the Act of 2006 or any institution or centre identified by it has the jurisdiction to arbitrate such disputes on a request being received by such Council for such purpose."

**27.** This court, respectfully, is unable to concur with the view of the Bombay High Court in *Steel Authority of India* v. *The Micro, Small Enterprise Facilitation Council* (supra). In that case, the Court had reasoned that Section 24 of the Act, which was enacted to give an overriding effect to provisions of Section 15 to 23 of the Act would override only such provisions which were inconsistent with Section 15 to 23 of the Act. And, since the Court was of the view that there was no inconsistency between the provisions of Section 18(3) of the Act and the agreement between the parties to refer the disputes to arbitration under the 'A&C Act', it held that the arbitration agreement between the parties could not be rendered ineffective.

**28.** This Court-for the reasons as stated hereinbefore-is unable to subscribe to the view that there is no inconsistency between the arbitration agreement and section 18 (3) of the Act; Section 18(3) contemplates only an institutional arbitration and not an *ad hoc* arbitration. In the present case, the provision that only BHEL would appoint the arbitrator, plainly, runs contrary to the mechanism under section 18(3) of the Act. Further, in terms of Section 19 of the Act, the award rendered pursuant to an arbitration under Section 18(3) of the Act cannot be assailed by the party (other than the supplier), without depositing seventy-five percent of the amount awarded. Concededly, Section 19 would be inapplicable to an award, which is rendered pursuant to an arbitration that is not conducted in terms of Section 18(3) of the Act.

**29.** Mr. Vachher, earnestly contended that there was no issue with regard to MSEFC conducting the conciliation proceedings, however, MSEFC could not, on failure of such conciliation proceedings, refer the disputes to arbitration in view of an express agreement between BHEL and DRIPLEX. This contention is unsustainable. The agreement between the parties also includes provisions for an amicable resolution of their inter se disputes (clause 29 of GCC). Thus, it is difficult to find any rationale why Section 18 of the Act would override part of the dispute resolution clause and not the other.

**30.** There is also much merit in Mr. Nandrajog's contention that BHEL had not raised any objections for referring of the disputes to arbitration under Section 18(3) of the Act and, thus, would be estopped from raising this contentions at this stage.

Paragraph 3 of the replies filed on behalf of BHEL, which are similarly worded in both the cases, read as under:—

> "In view of the above directions, the following reply is being submitted to the claim lodged by Driplex. However, the present reply to the claim is only a preliminary reply and BHEL reserves its right to take any other or further grounds or make further averments in case the matter is referred to Arbitration under the MSMED Act. BHEL also reserves its rights to file a Counter claim, if so advised, against Driplex in case the dispute is referred to Arbitration."

**31.** It is apparent from the above that BHEL had proceeded on the basis that if the conciliation proceedings failed, the disputes would be referred to arbitration under the Act and, thus, they cannot be permitted to assail the orders passed by MSEFC under Section 18(3) of the Act. It was not *BHEL's case*, as is apparent from its replies filed before MSRFC, that reference to arbitration would necessarily have to be as per the agreement between the parties and not under the Act. Thus, they cannot be permitted to agitate this issue in these proceedings.

**32.** In view of the above, the petitions are dismissed with costs quantified at Rs. 25,000/- in each case.

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**W.P.(C) 5004/2017**

**Ramky Infrastructure Private Limited v. Micro and Small Enterprises Facilitation Council**

**2018 SCC OnLine Del 9671**

**In the High Court of Delhi at New Delhi**

(BEFORE VIBHU BAKHRU, J.)

M/s. Ramky Infrastructure Private Limited ..... Petitioner

*v.*

Micro and Small Enterprises Facilitation Council & Anr. ..... Respondents

W.P.(C) 5004/2017 & CM No. 21615/2017

Decided on July 4, 2018

Advocates who appeared in this case:

For the Petitioner: Mr. Moni Cinmoy.

For the Respondents: Mr. Varun Nischal, Advocate for R-1 with Mr. Nikhil Nimesh, Sr. Assistant, MSEFC.

Mr. Shashank Garg and Mr. Tariq Khan, Advocates for R-2.

The Judgment of the Court was delivered by

**VIBHU BAKHRU, J.**:— The petitioner (hereafter 'RIL') has filed the present petition impugning the reference (hereafter 'the impugned reference') made by respondent no. 1 (hereafter 'the Council') on 15.02.2017, whereby the disputes between RIL and respondent no. 2 (hereafter 'GCIL') were referred to arbitration to be conducted under the aegis of Delhi International Arbitration Centre (hereafter 'DIAC'). The impugned reference was made by the Council in terms of the provisions of Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereafter 'the Act') as the Council found that the efforts for an amicable conciliation of disputes between RIL and GCIL had failed.

**2.** RIL has assailed the decision of the Council to make the impugned reference, essentially, on two grounds. First, it claims that the disputes between RIL and GCIL, which have been referred to arbitration, had arisen in respect of transactions that were entered into in the year 2010. At the material time, GCIL was not registered under the Act and, as a consequence, was not a 'supplier' as defined under Section 2(n) of the Act, and, therefore, the Council has no jurisdiction to refer the subject disputes or parties to arbitration. Second, RIL contends that the impugned reference was made without affording RIL sufficient opportunity to present its case and, therefore, the impugned reference is arbitrary. These contentions are disputed by the respondents.

**3.** Briefly stated, the relevant facts necessary to address the controversy involved in the present petition are as under:—

3.1 RIL is a company incorporated under the Companies Act, 1956 and is an integrated construction, infrastructure development and management company. It is stated that RIL has executed a number of projects in various sectors such as water and waste water management, transportation, irrigation, industrial construction, power transmission and distribution etc.

3.2 GCIL is a company incorporated under the Companies Act, 1956 and is, *inter alia*, engaged in the business of civil, electrical and mechanical construction and other allied activities.

3.3 The parties entered into a contract whereby RIL awarded civil work relating

to Anoxic Tank and Pipe Line etc at RIL's project at Delhi International Airport, to GCIL. RIL issued two work orders in the later part of the year 2009 (the date of the one Work Order is not legible and the other Work Order is dated 10.10.2009). GCIL claims that it completed the civil works as awarded to it on 10.12.2010. Further, GCIL claims that besides the initial work, it also carried out further work of the value of Rs. 6,09,61,727/- against which Rs. 5,85,26,685/- was paid by RIL.

3.4 GCIL claims that despite several reminders, RIL failed to pay the balance amounts due to it.

3.5 On 04.07.2015, the Commissioner of Industries, Govt of NCT of Delhi issued "Entrepreneurs Memorandum Part-II Acknowledgement" indicating GCIL's registration as a Service Enterprise for Civil Construction.

3.6 On 04.08.2015, GCIL made a reference to the Council under Section 18 of the Act, claiming a sum of Rs. 1,91,71,260/- including interest, as due and payable by RIL. The amounts claimed by GCIL are disputed by RIL.

3.7 On receipt of reference, the Council issued a notice dated 31.08.2015 scheduling a hearing on 08.09.2015. On that date, none was present on behalf of RIL and, therefore, the Council decided to issue a fresh notice to RIL to appear along with its reply. The next meeting was scheduled on 09.10.2015 and a notice dated 24.09.2015 for the said meeting was also issued by the Council. However, RIL did not attend the hearing on 09.10.2015. Thereafter, the Council once again issued a notice dated 02.02.2016 for a meeting scheduled on 12.02.2016.

3.8 Thereafter, four meetings were held on - 12.02.2016, 10.03.2016, 05.04.2016 and 17.10.2016 - before the Council. On 17.10.2016, the Council concluded that conciliation was not possible and decided to terminate the conciliation proceedings and refer the case to DIAC for initiating arbitration proceedings.

3.9 On receipt of reference, DIAC issued a notice to RIL. RIL also filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 before the Arbitral Tribunal. However, this Court is informed that the same has also been dismissed.

***Submissions***

**4.** Mr. Moni Cinmoy, the learned counsel appearing for RIL advanced submissions, essentially, on two fronts. First, he submitted that the Council has no jurisdiction to entertain the reference under Section 18 of the Act or make a reference under Section 18(3) of the Act since the disputes in question related to the works that were completed in 2010 and at the material time, GCIL had not filed the Memorandum as contemplated under Section 8(1) of the Act. He submitted that the Memorandum submitted by GCIL was registered on 04.07.2015 and, therefore, prior to the said date, GCIL could not be considered as a 'supplier' within the meaning of Section 2(n) of the Act. Second, he submitted that the decision of the Council to make the impugned reference was in violation of the principles of natural justice, as RIL was not afforded adequate opportunity to respond to the claims made by GCIL.

**5.** The learned counsel appearing for the Council countered the aforesaid submissions. Mr. Garg, the learned counsel appearing for GCIL also countered the submission made on behalf of RIL. He contended that six hearings were held before the Council, out of which four were attended by the representatives of RIL and, therefore, there was no merit in the submission that RIL was not afforded sufficient opportunity to present its case. He submitted that since RIL had participated in four meetings before the Council without any reservations, RIL had waived its right to object to the jurisdiction of the Council to entertain a reference under Section 18 of the Act or to make a reference under Section 18(3) of the Act. Next, he submitted that there was no dispute that GCIL had filed the Memorandum as required under Section 8

(1) of the Act and, therefore, was a supplier as defined Section 2(n) of the Act. He further stated that on the date of making a reference under Section 18 of the Act, GCIL was registered with the Industries Department, Government of NCT of Delhi and, therefore, the jurisdiction of the Council to make a reference could not be questioned. He also referred to the decision of a Coordinate Bench of this Court in *GE T & D India Limited* v. *Reliable Engineering Projects and Marketing*, (2017) 238 DLT 79; the decision of the Division Bench of the Allahabad High Court in *Hameed Leather Finishers* v. *Associated Chemical Industries Kanpur Pvt. Ltd.* : (2013) SCC OnLine All 9058; and the decision of the High Court of the State of Telangana and the State of Andhra Pradesh in *The Indur District Cooperative Marketing Society Ltd.* v. *Micropiex (India), Hyderabad* in support of his contention that it was not necessary that GCIL be registered with the Industries Department at the time of rendering services or supplying products in order to qualify for making a reference under Section 18 of the Act.

***Reasons and Conclusion***

**6.** The first and foremost question to be addressed is whether the proceedings before the Council that culminated in making the impugned reference can be at fault as being violative of the principles of natural justice. The counter affidavit filed on behalf of the Council and the documents produced along with it clearly establish that notices had been issued to RIL. RIL claims that it did not receive the notices for the meetings held on 08.09.2015 and 09.10.2015. But, there is no dispute that representatives of RIL had attended the meeting held on 12.02.2016. On the said date, RIL was given an opportunity to file a reply. However, RIL failed to do so. It is claimed on behalf of RIL that it did not have a copy of the documents submitted by GCIL and, therefore, was unable to file a response. This contention is not persuasive. In the event, RIL did not have the necessary documents, it was always open for RIL to demand the same. However, no communication has been produced on record whereby RIL had made any such demand on GCIL or respondent no. 1. Representatives of RIL also attended the meeting held on 10.03.2016, which was adjourned at the request of RIL. RIL was once again directed to file a reply within a period of ten days. Thus, RIL can have no grievance of not being afforded sufficient opportunity to put forth its case. Representatives of RIL also attended the next conciliation meeting, which was held on 05.04.2016. On the said occasion, RIL sought further time to settle the disputes amicably. However, no further progress was made and, therefore, on 17.10.2016, the Council decided to terminate the conciliation proceedings and refer the disputes to DIAC.

**7.** In view of the above, RIL's contention that the impugned reference was made in violation of the principles of natural justice is wholly unmerited.

**8.** The next question to be addressed is whether the impugned reference made by the Council under Section 18(3) of the Act was without jurisdiction.

**9.** In order to address the aforesaid issue, it is necessary to refer the relevant provisions of the Act. Section 15 of the Act provides that where a supplier supplies any goods or renders any services, the buyer would be obliged to make payment for the same on or before the date agreed between him and the supplier and if there is no such agreement, then on or before the appointed day. The 'appointed day' is defined under Section 2(b) of the Act to mean the day following immediately after expiry of the period of 15 days from the day of acceptance or deemed acceptance of any goods or services by a buyer from a supplier.

**10.** Section 16 of the Act mandates that in the event, the buyer fails to pay the amount due as specified under Section 15 of the Act, the buyer would be liable to pay compound interest with monthly rests to the supplier at the rate equivalent to three times the bank rate as notified by the Reserve Bank of India. Section 17 of the Act

provides that the buyer would be liable to pay the amounts with interest as provided under Section 16 of the Act.

**11.** Sub-section 1 of Section 18 of the Act enables any party to the dispute with regard to the amounts due under Section 17 of the Act, to make a reference to the Council. Sections 15, 16, 17 and 18 are relevant and are set out below:—

"**15. Liability of buyer to make payment.-** Where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefore on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:

Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

**16. Date from which and rate at which interest is payable. -** Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

**17. Recovery of amount due. -** For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16.

**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 subsection (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 to it any 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.** As is apparent form the above, the reference as contemplated under Section 18 (1) of the Act is a reference of a dispute with regard to any amount due under Section

17 of the Act. Thus, the first and foremost question to be considered is whether the disputes referred to by the Council are with regard to the amount due under Section 17 of the Act. A plain reading of Section 17 of the Act indicates that it provides for recovery of amounts due in respect of the goods supplied or services rendered "by the supplier". Further, Section 17 of the Act has to be read in conjunction with Section 15 and 16 of the Act. As noticed above, Section 15 of the Act obliges the buyer to make payments for the goods or services supplied by "any supplier" within the time specified. Similarly, Section 16 of the Act contemplates payment of interest where the buyer has failed to pay the amount due to the supplier as required under Section 15 of the Act.

**13.** In view of the above, it is necessary that the disputes that can be referred under Section 18(1) of the Act arise in respect of non payment of goods supplied or services rendered by a supplier. It obviously follows that for a reference to be made to the Council under Section 18(1) of the Act, it must relate to the disputes arising out of amounts due for goods supplied or services rendered by a supplier at the material time.

**14.** The contention that if a party to the dispute falls within the definition of "supplier" at the time of making the reference, the Council would have jurisdiction to resolve the disputes or refer the same to arbitration, is unmerited. Section 18(1) of the Act does not refer to a reference being made by a supplier; it enables "any party" to a dispute to make a reference to the Council. However, the dispute must be one which is in regard to "any amount due under Section 17 of the Act".

**15.** As noticed above, the provisions of Section 17 of the Act have to be read in conjunction with Section 15 and 16 of the Act. Thus, the obligation contemplated under Section 17 of the Act relates to the liability of a buyer and is only with respect of goods supplied or services rendered by a 'supplier'.

**16.** The term 'supplier' is defined under Section 2(n) of the Act, which reads as under:—

> "2(n). "supplier" means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes.-
>
> (i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956);
>
> (ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956);
>
> (iii) any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises;

**17.** A plain reading of the definition of the term 'supplier' - Section 2(n) of the Act - indicates that it is not an expansive definition but an exhaustive one. A supplier is defined to mean a micro or small enterprise, which has filed a Memorandum with the authority and includes three other types of entities as indicated in the three clauses of Section 2(n) of the Act. It is settled law that the definition, which uses the expression "means" and "includes" to define a term, is exhaustive. (See: *Thalappalam Service Cooperative Bank Limited* v. *State of Kerala*, (2013) 16 SCC 82).

**18.** A "micro enterprise" is defined under Section 2(h) of the Act to mean an enterprise as classified as such under Section 7(1)(a)(i) or Section 7(1)(b)(i) of the Act and a "small enterprise" is defined under Section 2(m) of the Act to mean an enterprise classified as such under sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b) or subsection 1 of Section 7 of the Act.

**19.** Section 2(e) of the Act defines the term 'enterprise' to, *inter alia*, mean an industrial undertaking or a business concern or any other establishment engaged in providing or rendering of any services.

**20.** Sections 2(e) of the Act is set out below:

> (e) "enterprise" means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951) or engaged in providing or rendering of any service or services;

**21.** Clauses (h) and (m) of Section 2 of the Act defines the term "micro enterprise" and "small enterprise". The said clauses are set out below:—

> "(h) "micro enterprise" means an enterprise classified as such under sub-clause (i) of clause (a) or sub-clause (i) of clause (b) of sub-section (1) of section 7;
>
> * * *
>
> m)"small enterprise" means an enterprise classified as such under sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b) of sub-section (1) of section 7."

**22.** In terms of Section 7(1)(a) of the Act, an enterprise, which is engaged in the manufacturing and production of goods pertaining to any industries specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 is categorized as a micro enterprise if the investment in the plant and machinery does not exceed 25 lakh rupees. The said enterprise is classified as a small enterprise if the investment in plant and machinery exceeds 25 lakhs but does not exceed 5 crore rupees. In terms of Section 7(1)(b) of the Act, an enterprise engaged in providing or rendering of services is categorized as a micro enterprise if the investment in equipment does not exceed 10 lakh rupees, and such enterprise is classified as a small enterprise if the investment in equipment is more than 10 lakh rupees but does not exceed 2 crore rupees. Thus, if an enterprise is classified as a micro or a small enterprise within the meaning of Section 7(1)(a)(i) and (ii) & Section 7(1)(b)(i) and (ii) of the Act, and has filed the Memorandum under Section 8(1) of the Act, it would plainly fall within the definition of a supplier.

**23.** There is no dispute in the present case that CGIL falls within the definition of the micro/small enterprise and would be classified as such even at the time of execution of the contract awarded by RIL. The only controversy raised is that at the material time (at the time of execution of the contract), GCIL had not filed a Memorandum as required under Section 8(1) of the Act. This brings us to the central question - whether it was mandatory for a small/medium enterprise to file the Memorandum under Section 8(1) of the Act in order to fall within the definition of a supplier under Section 2(n) of the Act.

**24.** An examination of Section 2(n) of the Act indicates that it is in two parts. The first limb defines a supplier to mean a micro or small enterprise which has filed a memorandum with the authority referred to in sub-section (1) of Section 8 of the Act and the second limb refers to (i) National Small Industries Corporation; (ii) the Small Industries Development Corporation of a State or a Union territory; and (iii) a company, co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises. The two limbs are joined by the word "and". Usually, this would mean that the conditions as specified in both the limbs must be satisfied. However, it is obvious that the same is not the apposite way to read Section 2(n) of the Act. This is so because, admittedly, neither the National Small Industries Corporation - which is a Government of India Enterprise - nor the Small Industries Development Corporation of a State or a Union territory is required to file a memorandum as referred to under Section 8(1) of the Act. Thus, the two limbs of Section 2(n) of the Act are required to

be read to exhaust all categories. The second limb, which specifies three categories to fall within the definition of the term 'supplier', is in addition to the category of small and medium enterprises that have filed the Memorandum under Section 8(1) of the Act. Thus, the term 'supplier' as defined under Section 2(n) of the Act must be read to comprise of four categories: (i) micro or small enterprises that have filed the Memorandum under Section 8(1) of the Act; (ii) National Small Industries Corporation; (iii) Small Industries Development Corporation of a State or a Union territory; and (iv) a company co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises or rendering services provided by such enterprises.

**25.** The aforesaid view is also fortified by the decision of the Supreme Court in the case of *Thalappalam Service Cooperative Bank Limited* (supra). In that case, the Supreme Court was concerned with interpreting the definition of the term "public authority" as defined under Section 2(h) of the Right to Information Act, 2005. The said definition is also in two parts. The first limb consists of four categories and the second limb comprises of two other categories. Although, the definition of the said term uses both the expressions "means" and 'includes" - as in the case of Section 2(n) of the Act - the second limb consists of two categories that do not fall within the four categories indicated in the first limb. The relevant extract of the said decision is set out below:—

"**29.** The expression "public authority" is defined under Section 2(h) of the RTI Act, which reads as follows:

"***2. Definitions***. - In this Act, unless the context otherwise requires:

* * *

(h) "public authority" means any authority or body or institution of self-government established or constituted -

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government, and includes any—

(i) body owned, controlled or substantially financed;

(ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government"

XXXX XXXX XXXX

31. Section 2(h) exhausts the categories mentioned therein. The former part of 2 (h) deals with:

(1) an authority or body or institution of self-government established by or under the Constitution,

(2) an authority or body or institution of selfgovernment established or constituted by any other law made by the Parliament,

(3) an authority or body or institution of self-government established or constituted by any other law made by the State legislature, and

(4) an authority or body or institution of self-government established or constituted by notification issued or order made by the appropriate government.

**32.** The Societies, with which we are concerned, admittedly, do not fall in the abovementioned categories, because none of them is either a body or institution of self-government, established or constituted under the Constitution, by law made by the Parliament, by law made by the State Legislature or by way of a notification issued or made by the appropriate government. Let us now examine whether they

fall in the latter part of Section 2(h) of the Act, which embraces within its fold:

(5) a body owned, controlled or substantially financed, directly or indirectly by funds provided by the appropriate government,

(6) non-governmental organizations substantially financed directly or indirectly by funds provided by the appropriate government."

**26.** As noticed above, there is no dispute that GCIL would fall within the definition of micro/small enterprise even at the material time when it had executed the contract with RIL. GCIL is a company and the services provided by GCIL are clearly services rendered by a micro/small enterprise and, therefore, GCIL - being engaged in supply of services rendered by a micro/small enterprise - would fall within the fourth category of entities that are included as a 'supplier': that is, a company, co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises or rendering services provided by such enterprises. It is not necessary for such entities to have filed the Memorandum under Section 8(1) of the Act.

**27.** The contention that the entities falling under Section 2(n)(iii) of the Act are only those entities that source goods/services from other micro/small enterprises, is not persuasive as it is difficult to accept that an entity sourcing goods/services from a third party micro/small enterprise would be 'supplier' but would cease to be one if it sources the same from its undertaking.

**28.** In view of the above, the contention that the impugned reference is without jurisdiction is unmerited.

**29.** For the reasons stated above, the petition is dismissed. The pending application is also disposed of. The parties are left to bear their own costs.

———

**C.O. No. 106 of 2018**

**Exide Industries Limited v. C.G. Enterprise**

**2018 SCC OnLine Cal 4783 : AIR 2018 Cal 212**

**In the High Court of Calcutta**
**Civil Revisional Jurisdiction**
**Appellate Side**
(BEFORE SABYASACHI BHATTACHARYYA, J.)

C.O. No. 106 of 2018

Exide Industries Limited

*v.*

M/s. C.G. Enterprise

With
C.O. No. 107 of 2018

Exide Industries Limited

*v.*

M/s. C.G. Corporation

With
C.O. No. 108 of 2018

Exide Industries Limited

*v.*

M/s. C.G. Corporation

C.O. No. 106 of 2018, C.O. No. 107 of 2018 and C.O. No. 108 of 2018
Decided on July 18, 2018, [Hearing concluded on: 13.07.2018]

For the petitioner in all the matters: Mr. Samrat Sen, Mr. Mainak Bose, Ms. Manali Bose, Ms. Soni Ojha

The Judgment of the Court was delivered by

**SABYASACHI BHATTACHARYYA, J.**:— The aforesaid three revisional applications, arising out of connected orders, are taken up for hearing together. Despite repeated service, the opposite party is not represented and as such, the matters are taken up for hearing ex parte.

**2.** In an agreement entered into between the parties on March 3, 2014, there was an arbitration clause. By virtue of the said clause, the parties had agreed to refer the difference, disputes or questions arising between them as to the meaning or effect of the agreement or as to the rights or liabilities of the parties arising thereunder or any matters or things relating to the agreement or arising out of or in connection therewith, either during the continuance of the agreement or after any termination or purported termination thereof, to an arbitrator to be appointed by the petitioner-company only. Such arbitral proceeding was to be held in Kolkata in accordance with, and subject to, the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force (hereinafter referred to as "the 1996 Act").

**3.** Upon disputes having arisen between the parties, the petitioner appointed an arbitrator of its choice by a letter dated April 1, 2016.

**4.** Subsequently, the petitioner received a notice under Section 18(2) of the Micro,

Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "the 2006 Act") from a Facilitation Council at Thane, Maharashtra, formed under the said Act, intimating the petitioner that the petitioner was required to appear before the said council and submit its defence statement within fifteen days from the date of such notice, failing which ex parte orders would be passed. From such notice, the petitioner learnt that the opposite party had filed a petition under Section 18(1) of the 2006 Act.

**5.** On April 18, 2016, a representation was made on behalf of the petitioner before the said Facilitation Council intimating the council that an arbitrator had already been appointed pursuant to the arbitration agreement between the parties and that the arbitral proceedings had already commenced under the 1996 Act. By such representation, the Facilitation Council was requested to keep the proceedings before it in abeyance and not to take any further steps therein. Thereafter a letter was issued on behalf of the opposite party to the petitioner containing certain allegations against the petitioner.

**6.** The first sitting of the reference under the 1996 Act was held on April 29, 2016. Thereafter several sittings were held by the arbitrator. After taking several adjournments, the opposite party filed its counter-statement before the sole arbitrator. Subsequently a demurrer application was filed by the opposite party, challenging the jurisdiction of the sole arbitrator to entertain the dispute, primarily on the ground that a proceeding was already pending under the 2006 Act. Vide order dated March 23, 2017, the sole arbitrator dismissed the demurrer application by the opposite party on the ground that Section 16 of the 1996 Act specifically provided that such an application had to be made prior to the filing of the statement of defence and that the opposite party had failed to do so. Meanwhile, at the 12$^{th}$ sitting of the arbitral reference, held on March 17, 2017, the arbitrator informed the parties that the period of 12 months, as stipulated in Section 29-A(1) of the 1996 Act, would expire on March 31, 2017 and as such, an extension of the said time would be required for the arbitrator to proceed with the matter. Learned counsel for the petitioner proposed to have the time extended by a further period of 6 months as envisaged in Section 29-A of the 1996 Act.

**7.** However, at the 13$^{th}$ sitting, held on March 21, 2017, learned counsel appearing for the opposite party handed over a letter dated March 21, 2017 conveying that the opposite party did not wish to consent to the extension of time.

**8.** In the above scenario, the petitioner filed an application before the District Judge at Alipore, District: South 24 Parganas under Section 29-A(4) of the 2006 Act, praying for an extension of the arbitrator's mandate.

**9.** The opposite party took a preliminary objection as to the maintainability of the said application on the ground that, in view of the enactment of the 2006 Act, no arbitral reference under the 1996 Act was maintainable.

**10.** The petitioner, in the meantime, had taken out three writ petitions in connection with the present three matters, bearing Writ Petition (C) No. 5378 of 2017, Writ Petition (C) No. 5379 of 2017 and Writ Petition (C) No. 5380 of 2017. In such proceedings, the High Court at Bombay passed an order dated May 3, 2017, by which all further proceedings of all those matters initiated under the 2006 Act before the Facilitation Council, were stayed.

**11.** Ultimately, the learned District Judge at Alipore, by his order dated November 30, 2017, dismissed on contest the applications, filed by the petitioner, in all three matters, under Section 29-A(4) of the 1996 Act.

**12.** Being thus aggrieved, the petitioner has preferred the present three revisional applications.

**13.** It is argued by learned senior Advocate appearing for the petitioner that the

District Judge applied wrong legal tests in dismissing the petitioner's applications under Section 29-A(4) of the 1996 Act. It was observed by the District Judge that the arbitral proceeding under the 1996 Act was not maintainable once it was found that the opposite party was covered under the 2006 Act. It was further opined by the District Judge that since the writ petitions were pending in the Bombay High Court in connection with the proceedings under the 2006 Act, and since the matters in issue in the instant case were closely related to the issues to be decided in such writ petitions, the extension of time for the arbitrator to proceed would depend on the outcome of the said writ petitions. It was also held by the District Judge that since a small scale enterprise was involved in the matter, the said Court was not in a position to extend the time unless and until the writ petitions were disposed of. The District Judge held that the petitioner could not on the one hand, by filing the writ petitions challenging the jurisdiction of the Facilitation Council, pray for allowing a private arbitrator to adjudicate, and on the other hand try to get some reliefs indirectly by praying for extension of time in the present proceeding.

**14.** Learned senior Advocate for the petitioner argues that the entire premise of the impugned order was bad in law. The writ petitions pending in the Bombay High Court had no connection with the prayer for extension of time to continue with the present arbitral proceeding.

**15.** It is submitted that the options before the District Judge, while hearing the applications for extension of time under Section 29-A(4) of the 2006 Act, were limited. The Court could extend the time and, if it found that the proceedings had been delayed for reasons attributable to the Arbitral Tribunal, might even order reduction of fees of the arbitrator by not exceeding five per cent for each month of such delay. The Court could also substitute the arbitrator while extending the period. In case of such substitution, the arbitral proceedings would continue from the stage already reached and on the basis of the evidence and material already on record. In the event of a fresh arbitrator being appointed under the said section, the re-constituted Arbitral Tribunal would be deemed to be in continuation of the previously appointed Arbitral Tribunal.

**16.** It is argued on behalf of the petitioner that, apart from the aforesaid options, the Court below did not have any other, while deciding an application under Section 29-A(4) of the 2006 Act.

**17.** In any event, the Court below did not have the power to stay an arbitral proceeding for any reason under Section 29-A of the 2006 Act. Even if extension of mandate was refused to the arbitrator, the substituted arbitrator would have to continue with the arbitral proceedings, as per the scheme of the said section. Not only did the District Judge exceed his jurisdiction by staying the arbitral proceeding itself, such excess of jurisdiction was all the more glaring since such stay was made subject to the fate of the writ proceedings pending in the Bombay High Court, which had no nexus with the present proceedings.

**18.** In this context, learned senior Advocate appearing for the petitioner cites a judgment reported at 2013 SCC OnLine Bom 1789 [*Faridabad Metal Udyog Pvt. Ltd.* v. *Anurag Deepak*]. It was held in the said judgment by the Bombay High Court, inter alia that provisions under the arbitration agreement existing between the parties would not be affected by enactment of the 2006 Act and the dispute between the parties would be governed by the provisions of the existing arbitration agreement, under the 1996 Act.

**19.** Learned senior Advocate appearing for the petitioner next cites a judgment reported at 2013 SCC OnLine Bom 547 [*Hindustan Wires Limited* v. *Mr. R. Suresh*], in support of the proposition that it could not be said that, because Section 18 of the 2006 Act provided a forum of arbitration, an independent arbitration agreement

entered into between the parties would cease to have effect. It was held that no provision in the 2006 Act negated or rendered ineffective an arbitration agreement entered into between the parties. There was no inconsistency between an arbitration conducted by the council under the 2006 Act and that conducted by an arbitrator under the 1996 Act.

**20.** The next judgment cited on behalf of the petitioner was reported at AIR 2012 Bom 178 [*Steel Authority of India Ltd.* v. *Micro, Small Enterprise Facilitation Council, through Joint Director of Industries, Nagpur Region, Nagpur*]. In the said judgment, a Division Bench of the Bombay High Court (Nagpur bench) held that because Section 18 of the 2006 Act provides for a forum of arbitration, an independent arbitration agreement entered into between the parties could not be said to cease to have effect. It was further held that the overriding effect of Section 24 of the 2006 Act would not have the effect of negating an arbitration agreement.

**21.** In the light of the aforesaid submissions and the materials on record, certain provisions of law, as set out below, are to be considered:

**ARBITRATION AND CONCILIATION ACT, 1996:**

**29-A. Time-limit for arbitral award. -** *"(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.*

*Explanation.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.*

*(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.*

*(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.*

*(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:*

*Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay. (5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.*

*(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.*

*(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.*

*(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.*

*(9) An application filed under sub-section (5) shall be disposed of by the*

*Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."*

**MICRO, SMALL AND MEDIUM ENTERPRISE DEVELOPMENT ACT, 2006:**

*"**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 to it any 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."*

*"**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."*

**22.** A perusal of the 2006 Act reveals that Section 24 thereof provides only that the provisions of Section 15 to 23, contained in Chapter V thereof, shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. The said chapter deals with delayed payments to micro and small enterprises. The individual sections being Section 15 to 23, deal with liability of buyer to make payment, date from which and rate at which interest is payable, liability of the buyer for recovery of amount due, reference to Micro and Small Enterprises Facilitation Council, as to deposit of 75 per cent of the amount in terms of the decree, award or order in cases of applications for setting aside such decrees, awards or orders, establishment and composition of the aforesaid council, requirement to specify unpaid amount with interest in the annual statement of accounts and interest not to be allowed as deduction from the income.

**23.** As rightly laid down by the Bombay High Court in the cited decisions, Section 24 only gives overriding effect to Sections 15 to 23 against anything which is inconsistent therewith, contained in any other law for the time being in force.

**24.** The 1996 Act provides an independent forum and procedure and modalities governing adjudication by such forum and related matters, which do not infringe upon the domain of the 2006 Act. As such, the overriding effect given in Section 24 of the 2006 Act cannot, in any manner, curtail the jurisdiction of an arbitrator adjudicating upon a dispute within the contemplation of the 1996 Act.

**25.** As such, in the present case, there could not arise any question of granting stay of the arbitral proceedings, commenced in terms of a pre-existing arbitration agreement between the parties, on the ground either of enactment of the 2006 Act or the pendency of any proceeding under the said Act.

**26.** That apart, the power of the Court, while deciding an application under Section 29-A(4) of the 1996 Act, is limited. The Court cannot, under the said provision, stay the arbitral proceedings in connection with which extension of time is sought. The arbitral proceedings, under the scheme of Section 29-A, would continue in any event, either before the existing arbitrator upon extension of time, with or without any term or condition being imposed, or under a substituted arbitrator, from the stage already reached and on the basis of evidence and material already on record. The re-constituted Arbitral Tribunal, if any, shall be deemed to be in continuation of the previously appointed Arbitral Tribunal. As such, there is no option before the Court taking up an application under Section 29-A(4) to stay the arbitral proceedings itself on any ground whatsoever.

**27.** Moreover, the stay granted by the Bombay High Court in connection with the proceedings initiated by the opposite party under the 2006 Act could have no nexus with the present arbitral proceedings. Whatever result would be arrived at in the said writ petitions would only affect the proceedings under the 2006 Act, pending in Maharashtra, and would not touch the arbitral proceedings going on in Kolkata, before the sole arbitrator, in any manner whatsoever.

**28.** In view of such legal position, learned senior Advocate for the petitioner was justified in contending that the impugned orders in all the three matters were passed without jurisdiction. Accordingly, C.O. No. 106 of 2018, C.O. No. 107 of 2018 and C.O. No. 108 of 2018 are allowed, thereby setting aside the respective impugned orders dated November 30, 2017 passed by the District Judge at Alipore, District: South 24 Parganas, respectively in Miscellaneous Case No. 260 of 2017, Miscellaneous Case No. 261 of 2017 and Miscellaneous Case No. 259 of 2017.

**29.** The District Judge at Alipore, District: South 24 Parganas is directed to re-hear the applications under Section 29-A(4) of the 1996 Act, filed by the petitioner in the three cases, and to pass a reasoned order in the light of the observations made above as well as in accordance with the provisions of Section 29-A of the 1996 Act.

**30.** There will be no order as to costs.

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**Writ Petition No. 5459 of 2015**

**Gujarat State Petronet Ltd. v. Micro and Small Enterprises Facilitation Council**

**2018 SCC OnLine Bom 2039 : (2018) 5 AIR Bom R 821**

**In the High Court of Bombay**
**Civil Appellate Jurisdiction**
(BEFORE RANJIT MORE AND ANUJA PRABHUDESSAI, JJ.)

Gujarat State Petronet Ltd. a company incorporated under the Companies Act, 1956 having its registered office at GSPC Bhavan, Sector 11, Gandhinagar, Gujarat - 382010 ..... Petitioner

*v.*

1. Micro and Small Enterprises Facilitation Council, Konkan Division, Office of the Joint Director of Industries, Konkan Division, Office Complex Building, Opposite Modella Chek Naka, Wagle Estate Corner, Thane - 400604.
2. State of Maharashtra through its Chief Secretary, Mantralaya, Mumbai, Maharashtra - 400 032.
3. Krunal Engineering Works, a sole proprietary concern through its proprietor Mr. Kamalakar V. Salvi having its address at Krunal Compound, Near HINDALCO, Survey No. 285, Gala No. 1, Ganesh Nagar, Vitava, Ganapatipada, Kalwa (East), Thane, Maharashtra 400 605 ..... Respondents

Writ Petition No. 5459 of 2015

Decided on August 6, 2018, [Date of Reserving Judgment: 4th July, 2018]

Mr. Marwendra Kane along with Ms. Chitra Sundar I/b. W.S. Kane and Co., advocates for the petitioner.

Mr. A.P. Vanarse, AGP for the State.

Mr. Suhas M. Oak along with Mr. Sagar Joshi, advocate for respondent No. 3.

The Judgment of the Court was delivered by

**RANJIT MORE, J.**:— Rule. Rule is made returnable forthwith and, by consent, the petition is heard finally.

**2.** Heard Mr. Kane, learned counsel for the petitioner, Mr. Oak, learned counsel for respondent No. 3 and Mr. Vanarse, learned AGP for the State.

**3.** By invoking jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner is seeking following reliefs:

*(a) That this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction calling for records and proceedings of the impugned order dated 29th April 2015 passed by Respondent No. 1 in Petition No. 39A/2011 before Respondent No. 1 (Exhibit "E" to the Petition) and after going through the legality, validity and propriety thereof, be pleased to quash and set aside the same;*

*(b) That this Hon'ble Court be pleased to issue a writ of prohibition or a writ in the nature of prohibition or any other appropriate writ, order or direction prohibiting Respondent No. 1 from exercising any further jurisdiction over the MSME Reference and specifically prohibiting Respondent No. 1 from entering upon*

*arbitration in the Petition No. 39A/2011 before Respondent No. 1;*

*(c) That this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing Respondent No. 1 to refer the disputes between the Petitioner and Respondent No. 3 forming subject matter of Petition No. 39A/2011 before Respondent No. 1 to an independent arbitration in terms of Clause 14 of the said Purchase Order (annexed and marked as Exhibit A to the Petition).*

**4.** The brief facts giving rise to the present petition are as follows:

The petitioner floated a tender for supply, installation, construction, testing, commissioning and development of Fire Fighting System at the petitioner's gas receiving station in June, 2007. Several bidders including respondent No. 3 participated in the tender process and upon evaluation of the bids, respondent No. 3 was declared by the petitioner to be a successful bidder.

**5.** On 18th July, 2007, in pursuance of the said tender, the purchase order, came to be issued to respondent No. 3 by the petitioner. Clause 14 of the said purchase order contained arbitration clause.

**6.** There was dispute between the parties regarding completion of tender work, quality of work and the payment of money for the tender work as agreed under the said purchase order. Respondent No. 3 thereafter approached respondent No. 1-Micro and Small Enterprises Facilitation Council (for short "MSEFC") by making MSME reference seeking compensation of Rs. 36,60,054/64 paise from the petitioner and served copy of the same upon the petitioner on 14th October, 2011. The petitioner, by filing reply to this reference application on 17th November, 2011 and 19th February, 2015, inter alia raised a preliminary objection that respondent No. 1 - MSEFC has no jurisdiction to try and entertain the said reference. The objection was taken on the ground that the parties have clearly and unequivocally agreed for an independent arbitration agreement in the said purchase order.

**7.** By an order dated 29th April, 2015, respondent No. 1 - MSEFC terminated the conciliation proceedings as unsuccessful due to lack of interest of the petitioner for conciliation and amicable settlement and decided to itself initiate arbitration proceedings. This order is impugned in the present petition.

**8.** In short, the petitioner is questioning the jurisdiction of respondent No. 1 - MSEFC in entertaining the reference under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short "the MSMED Act") in a dispute which has arisen between the petitioner as a buyer of goods from respondent No. 3 as seller.

**9.** Mr. Kane, learned counsel for the petitioner submitted that the reference under Section 18 of the MSMED Act is not tenable in the present case before the MSEFC since there is an arbitration agreement between the parties. According to the learned counsel for the petitioner, reference can be entertained by the MSEFC only when there is no arbitration agreement between the parties. He further submitted that there is no inconsistency between existence of independent arbitration agreement and the arbitration which the MSEFC is bound to undertake under the MSMED Act. Mr. Kane submitted that the arbitration agreement between the parties could have been ignored only if arbitration in pursuant thereof was inconsistent with the provisions of the MSMED Act which has an overriding effect over any law. In support of his contention, he strongly relied upon the decision of the Division Bench of Nagpur Bench of this Court in *Steel Authority of India Ltd.* v. *The Micro, Small Enterprise Facilitation Council*, AIR 2012 BOMBAY 178. Mr. Kane further submitted that even assuming for the sake of argument that respondent No. 1 - MSEFC has jurisdiction to entertain the reference under Section 18 of the MSMED Act, once the MSEFC conducts conciliation proceedings and fails, in that case, the MSEFC itself cannot initiate arbitration

proceedings under Section 18(3) of the MSMED Act.

**10.** Mr. Oak, learned counsel for respondent No. 3 contested the petition vehemently. He submitted that taking into consideration the objects sought to be achieved by the MSMED Act and particularly the provision under Sections 18 and 24 thereof which gives an overriding effect to the provisions of the said act, respondent No. 1 - MSEFC rightly entertained the dispute. He submitted that since the conciliation proceedings have failed for non-cooperation on the part of the petitioner, the MSEFC was justified in itself initiating the arbitration proceedings under Section 18(3) of the MSMED Act. Mr. Oak, in order to support his contention, relied upon a decision of the Gujarat High Court in FA No. 637 of 2016 dated 5th July, 2017 (*Principal Chief Engineer* v. *Manibhai and Bros (Sleeper)*).

**11.** In order to appreciate the rival contentions, it is necessary to see the objects of the MSMED Act. The Government of India felt it necessary to extend policy support for the small enterprises so that they are enabled to grow into medium ones, adopt better and higher levels of technology and achieve higher productivity to remain competitive in a fast globalisation area. The Government of India also felt it necessary to address concerns of entire small and medium enterprises sector and the sector is provided with single legal framework. The Central Government, accordingly, enacted the MSMED Act 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.

**12.** For appreciating the controversy, we must see the provisions of Sections 15, 17, 18, 19 and 24 which read as follows:

> **15. Liability of buyer to make payment.-** Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day;
>
> Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.
>
> **16. ....**
>
> **17. Recovery of amount due.-** For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16.
>
> **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 to any 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 disputes 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.

**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.

20. ....

21. .....

22. .....

23. .....

**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."

**13.** The act has enacted special provisions for preventing delayed payments to such enterprises and special procedure for recovery of the amount due towards supply is also laid down. Chapter V of the Act contains these special provisions.

**14.** Section 15 of the Act provides that the buyer is liable to make payment for the goods purchased from Micro and Small Enterprises on or before the date agreed upon between them and the supplier in writing or, where there is no agreement in this behalf, before the appointed date. Provided that, in no case, the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

**15.** Section 16 of the Act provides that notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, the buyer shall be liable to pay compound interest with monthly rests to the supplier on the amount due from the appointed day or, as the case may be, from the date immediately following the date agreed upon at three times of the bank rate notified by the Reserve Bank.

**16.** Section 17 of the Act provides that the buyer shall be liable to pay the entire amount i.e. price of goods with interest as contemplated under section 16.

**17.** Section 18 of the Act provides for making reference i.e. reference of dispute by any of the parties to the Micro and Small Enterprises Facilitation Council.

**18.** Section 19 of the Act provides setting aside decree, award or order made by the Council which acts like an arbitrator.

**19.** Section 24 of the Act gives an overriding effect to the provisions of Sections 15

to 23 which provide statutory framework for micro, small and medium enterprises to address the issues of delayed payment. Sub-section (1) of Section 18 contains non-obstante clause which enables the party to a dispute to make a reference to MSEFC. Similarly, sub-section (4) of Section 18 which also contains a nonobstante clause provides for arbitration to be conducted by MSEFC or any institution or a centre providing alternate dispute resolution services. It is thus evident that the act does not contemplate arbitration through an arbitrator appointed by the parties but provides for special forum in the form of MSEFC or under the aegis of any institution or a centre providing alternate dispute resolution services as referred by MSEFC. Furthermore, Section 19 which mandates pre-deposit of 75% of awarded amount ensures expedient recovery of the dues and thus safeguard the interest of micro, small and medium enterprises. The Arbitration Act 1996 and/or the arbitration agreement entered into by the parties does not contain such provisions.

**20.** It is to be noted that the MSMED Act is a special enactment, enacted with an object of facilitating the promotion and development and enhancing i.e. competitiveness of micro, small and medium enterprises, which do not command significant bargaining power. It is with this object that the Act provides for institutional arbitration. Keeping in mind the object of the Act and non-obstante clause in Section 24 of the Act, we are of the view that the provisions of Sections 15 to 23 of the Act will have an overriding effect, notwithstanding anything inconsistent in any other law or the arbitration agreement as defined under Section 7 of the Arbitration Act, 1996. Thus, notwithstanding the provisions of the Arbitration Act 1996 and the existence of an arbitration agreement, any party can make a reference to MSEFC with regard to the amount due under Section 17, and such council or the institution or centre identified by it, will have jurisdiction to arbitrate such dispute.

**21.** In *Steel Authority of India Ltd.* (supra), there was an agreement between the buyer and the seller and clause 22 of the agreement contained the arbitration clause. The supplier invoked clause 22 of the agreement and proposed to appoint Justice C.P. Sen (Retired) as Arbitrator to settle the dispute through arbitration. The buyer, however, in pursuance of clause 23 of the general conditions of contract, appointed one Mr. S.K. Gulati as an Arbitrator for resolving the disputes between the parties. The Arbitrator appointed by the buyer issued notices to the parties asking them to submit their claim. However, the supplier, instead of filing claim before the Arbitrator, objected the arbitration stating that the matter may be either referred to Justice C.P. Sen (Retired) or it should go before the Micro and Small Enterprises Facilitation Council established under the 2016 Act. The buyer declined to enter into another mode of settlement of dispute before the Council, since it had already appointed an Arbitrator. The supplier went ahead and filed a reference under Section 18 of the 2016 Act. The buyer raised an objection before the Council objecting its jurisdiction. The Council, however, decided to proceed with the matter. The buyer approached the approached the High Court questing the jurisdiction of the Council. The Division Bench of this Court, in paragraph 11, held as under:

> *"11. Having considered the matter, we find that Section 18(1) of the Act, in terms allows any party to a dispute relating to the amount due under Section 17 i.e. an amount due and payable by buyer to seller; to approach the facilitation Council. It is rightly contended by Mrs. Dangre, the learned Addl. Government Pleader, that there can be variety of disputes between the parties such as about the date of acceptance of the goods or the deemed day of acceptance, about schedule of supplies etc. because of which a buyer may have a strong objection to the bills raised by the supplier in which case a buyer must be considered eligible to approach the Council. We find that Section 18(1) clearly allows any party to a dispute namely a buyer and a supplier to make reference to the Council. However, the question is; what would be the next step after such a reference is made, when*

*an arbitration agreement exists between the parties or not. We find that there is no provision in the Act, which negates or renders an arbitration agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the provisions of Section 15 to Section 23 including Section 18, which provides for forum for resolution of the dispute under the Act- would not have the effect of negating an arbitration agreement since that section overrides only such things that are inconsistent with Section 15 to Section 23 including Section 18 notwithstanding anything contained in any other law for the time being in force. Section 18(3) of the Act in terms provides that where conciliation before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution and that the provisions of the Arbitration and Conciliation Act, 1996 shall thus apply to the disputes as an arbitration in pursuance of arbitration agreement referred to in Section 7(1) of the Arbitration and Conciliation Act, 1996. This procedure for arbitration and conciliation is precisely the procedure under which all arbitration agreements are dealt with. We, thus find that it cannot be said that because Section 18 provides for a forum of arbitration an independent arbitration agreement entered into between the parties will cease to have effect. There is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996."*

**22.** Similar question fell for consideration before the Apex Court in *Manibhai and Bros (Sleeper)* (supra). In this case, the supplier being a registered Small-scale Entrepreneur approached the Council under Section 18 of the MSMED Act claiming the outstanding amount of Rs. 1,19,07,858/- with interest against the buyer. The Council initially resorted to conciliation proceedings and thereafter, declared the award. The award was challenged by the buyer by way of filing special civil application before the learned Single Judge of the Gujarat High Court. The same was dismissed and thereafter letters patent appeal was filed before the Division Bench of the same Court. The letters patent appeal was allowed only on the ground that the buyer has already moved an application under Section 8 of the Arbitration Act 1996 and, no order was passed on the said application. The Division Bench, accordingly, remanded the matter to the Council. The Council again rejected the buyer's application under Section 8 of the Arbitration Act, 1996 and, therefore, the buyer approached the High Court by way of first appeal.

**23.** The argument, similar to the present one, was advanced before the the Division Bench of the Gujarat High Court that once there is an arbitration agreement in existence, the dispute is required to be referred for arbitration and thus, the application under Section 8 of the Arbitration Act, 1996 could not have been dismissed. The Division Bench of the Gujarat High Court followed the decision of the Allahabad High Court in the case of *Paper and Board Convertors* v. *U.P. State Micro and Small Enterprise* in writ petition No. 24343 of 2014 and held that the Council has jurisdiction to act as an arbitrator or conciliator in a dispute between the parties and the Council has only one of the two courses of action open to it: either to conduct an arbitration itself or to refer the parties to a centre or institution providing alternate dispute resolution services stipulated in sub-section (3) of Section 18 of the MSMED Act. Consequently, the Division Bench of the Gujarat High Court did not find any error in the decision of the Council in not entertaining the buyer's application under Section 8 of the Arbitration Act, 1996. The Division Bench of the Gujarat High Court also referred to the decision of the Nagpur Bench of this Court in *Steel Authority of India Ltd.* (supra) and expressed inability to agree with it. The relevant discussion is

contained in paragraph 7.0. to 8.0. which reads as under:

> *"7.0 Identical question came to be considered by the Division Bench of the Allahabad High Court in the case of* Paper and Board Convertors *(supra). While interpreting the very provision of Section 18 of the Act, 2006, in para 12, the Division Bench has observed and held as under:*
>
> > *12. The non-obstane provision contained in subsection (1) of Section 18 and again in subsection (4) of Section 18 operates to ensure that it is a Facilitation Council which has jurisdiction to act as an arbitrator or Conciliator in a dispute between a supplier located within its jurisdiction and a buyer located anywhere in India. The Facilitation Council had only one of the two courses of action open to it: either to conduct an arbitration itself or to refer the parties to a centre or institution providing alternate dispute resolution services stipulated in sub-section (3) of Section 18.*
>
> *7.1. After observing as above, the Division Bench of the Allahabad High Court has set aside the order passed by the Facilitation Council directing the parties to place its version before the sole arbitrator in terms of the rate contract agreement and restored the proceedings back to the Council and directed the Council to act in accordance with the provisions of sub-section (3) of Section 18 and either conduct the arbitration itself or refer the arbitral proceedings to any institution or centre providing alternate dispute resolution services.*
>
> *8.0 Now, so far as reliance placed upon the decision of the Division Bench of the Bombay High Court in the case of* Steel Authority of India Ltd. *(supra) relied upon by Shri Patel, learned advocate for appellant, for the reasons stated above provision of Act 2006 referred herein above and the Act 2006 being Special Act under which the parties are governed, we are not in agreement with the view taken by the Division Bench of the Bombay High Court and we are in complete agreement with the view taken by the Division Bench of the Allahabad High Court in the case of* Paper and Board Convertors *(supra).*

**24.** The decision of the Division Bench of the Gujarat High Court in *Manibhai And Brothers (Sleeper)* (Supra) was challenged before the Apex Court by filing Diary No. 16845 of 2017. These proceedings came to be disposed of by the Division Bench of the Hon'ble Apex Court by its order dated 5th July, 2017, which reads as follows:

> "We have given our thoughtful consideration to the submissions advanced before us yesterday and today.
>
> We are satisfied, that the interpretation placed by the High Court on Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, in the impugned order, with reference to arbitration proceeding is fully justified and in consonance with the provisions thereof.
>
> Having affirmed the above, we are of the view, that all other matters dealt with in the impugned order are not relevant for the adjudication of the present controversy, and need not be examined.
>
> The special leave petition is dismissed in the above terms. Pending applications stand disposed of."

**25.** The above order of the Apex Court apparently shows that the Apex Court approved the view of the Gujarat High Court in *Manibhai and Brothers (Sleeper)* (supra) and the Allahabad High Court in *Paper and Board Convertors* (supra). In that view of the matter, the submission of Mr. Kane, learned counsel for the petitioner, that the reference made by respondent No. 3 and entertained by respondent No. 1 - MSEFC is not maintainable in view of the independent arbitration agreement between the parties cannot be entertained and the same is liable to be rejected.

**26.** This takes us to consider the next issue raised by Mr. Kane, learned counsel for

the petitioner that the respondent No. 1 - MSEFC having itself conducted the conciliation proceedings, could not have decided to itself initiate the arbitration proceedings under Section 18(3) of the MSMED Act. We find merit in this submission.

**27.** Section 18(1) of the MSMED Act provides for reference to the Facilitation Council of a dispute with regard to any amount due under Section 17. Sub-section (2) of Section 18 contemplates of conduct of conciliation either by council itself or by seeking assistance of any institution or centre providing alternate dispute resolution services. For purpose of such conciliation proceedings, the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 are applicable. Subsection (3) thereof, makes a provision for arbitration if the conciliation proceedings between the parties are not successful and stand terminated without any settlement either by the Council itself or by reference to any institution or centre providing alternate dispute resolution services. To such arbitration, the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 are made applicable.

**28.** A plain reading of sub-sections (2) and (3) of Section 18 of the MSMED Act makes it clear that is is obligatory for the Council to conduct conciliation proceedings either by itself or seek assistance of any institute or centre providing alternative dispute resolution services. The provisions of Sections 65 to 81 of the Arbitration Act 1996 are made applicable to conciliation proceedings. In the event, the conciliation proceedings are unsuccessful and stand terminated, the Council can either itself take up the dispute for arbitration or refer it to any institution or centre proving alternate dispute resolution services for such arbitration. The provisions of Arbitration Act 1996, in its entirety, are made applicable as if the arbitration was in pursuance of the arbitration agreement referred to in sub-section(1) of Section 7 of the Arbitration Act, 1996.

**29.** It is thus evident that sub-section (2) and sub-section (3) of the MSMED Act vests jurisdiction in the Council to act as conciliator as well as arbitrator. The question is in view of the provisions of Section 80 of the Arbitration Act 1996, the Council which has conducted the conciliation proceedings is prohibited from acting as arbitrator. As stated earlier, certain provisions of Arbitration Act 1996 including Section 80 are specifically made applicable to conciliation proceedings contemplated by Section 18(2) of the MSMED Act. Whereas provisions of Arbitration Act 1996, in its entirety, are made applicable to the arbitration and conciliation proceedings contemplated by sub-section (3) of Section 18 of the MSMED Act.

**30.** A harmonious reading of these provisions clearly indicate that Section 80 of the Arbitration Act, 1996 is applicable to conciliation as well as arbitration proceedings under sub-sections (2) and (3) of Section 18 of the MSMED Act. Section 80 of the Arbitration Act, 1996 reads thus:

> **"80. Role of conciliator in other proceedings**
>
> Unless otherwise agreed by the parties -
>
> (a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings; and
>
> (b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings."

**31.** A plain reading of Section 80 makes it clear that the conciliator cannot act as an arbitrator or his representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute. It is thus evident that the MSEFC cannot act as conciliator as well as arbitrator, or it may choose to refer the dispute to any centre or institution providing alternate dispute resolution services for the parties to conciliation or arbitration. However, once the MSEFC acts as conciliator, in view of provisions of Section 80, it is prohibited from acting as arbitrator.

**32.** Admittedly, in the present case, respondent No. 1 conducted the conciliation proceedings between the petitioner and respondent No. 3 and by the impugned order, terminated the same as being unsuccessful. What is surprising is that respondent No. 1 - MSEFC, having conciliated the dispute between the parties and conciliation proceedings being unsuccessful and terminated, the MSEFC itself initiated to arbitrate the dispute between the same parties. In our view, respondent No. 1-MSEFC itself, could not have initiated arbitration proceedings between the petitioner and respondent No. 3. In terms of the provisions of sub-section (3) of Section 18 the MSMED Act, respondent No. 1-MSEFC ought to have referred the dispute between the petitioner and respondent No. 3 to any institution or centre providing alternate dispute resolution services for arbitration. The impugned order, so far as it relates to authorising respondent No. 1 - MSEFC to initiate arbitration proceedings/arbitral dispute cannot be sustained and the same deserves to be quashed and set-aside.

**33.** We, accordingly, dispose of the petition by passing the following order:

1. We hold that the despite independent arbitration agreement between the petitioner and respondent No. 3, respondent No. 1 - MSEFC has jurisdiction to entertain reference made by respondent No. 3 under Section 18 of the MSMED Act.
2. Clause 2 of the operative part of the impugned order i.e."**Arbitration proceeding be initiated U/s 18(3) of MSMED Act 2006 and that this council shall act as an Arbitrator Tribunal**" is quashed and set-aside and respondent No. 1 - MSEFC is directed to refer the dispute between the petitioner and respondent No. 3 to any institution or centre providing alternate dispute resolution services for arbitration. Respondent No. 1 - MSEFC shall take necessary steps as expeditiously as possible and, in any case, within a period of four weeks from the date of receipt of this order.
3. Rule is, accordingly, made absolute in the above terms.

———

**W.P.(C) 6564/2016**

**Mangalore Refinery & Petrochemicals Ltd. v. Micro and Small Enterprises Facilitation Council**

**2019 SCC OnLine Del 6860**

**In the High Court of Delhi at New Delhi**

(BEFORE VIBHU BAKHRU, J.)

Mangalore Refinery & Petrochemicals Ltd. ..... Petitioner;

*v.*

Micro and Small Enterprises Facilitation Council and Another ..... Respondents.

W.P.(C) 6564/2016 & CM No. 26926/2016

Decided on January 24, 2019

Advocates who appeared in this case :

Mr. J.P. Sengh, Sr. Advocate with Mr. Jai Bansal, Mr. Shahi Pratap Singh, Ms. Mrigna Shekhar, Ms. Manisha Mehta and Mr. Akash Mishra, Advocates.

Mr. Sanjay Dewan and Ms. Nishima Arora, Advocates for R-1.

The Order of the Court was delivered by

**VIBHU BAKHRU, J.**:— The petitioner has filed the present petition, *inter alia*, impugning an order dated 16.06.2016 passed by respondent no. 1 (the Micro and Small Enterprises Facilitation Council - hereafter 'the Council'), whereby the petitioner and respondent no. 2 (Driplex Water Engineering Ltd.) were referred to arbitration under the aegis of the Delhi International Arbitration Centre (DIAC).

**2.** The principal controversy raised in the present petition is that the impugned order falls foul of the arbitration clause, as contained in the Agreement entered into between the concerned parties. It is the petitioner's case that the Council has no jurisdiction to refer the disputes contrary to the express terms of the arbitration agreement (arbitration clause).

**3.** Briefly stated, the relevant controversy arises in the following context:

3.1 On 08.07.2009, the petitioner invited tenders for supply and services comprising of Design, Engineering, Supply, civil work, erection testing etc. of DM water and CPU plant package for Phase III refinery project of the petitioner. Pursuant to the aforementioned invitation, respondent no. 2 submitted its bid, which was found to be the lowest. Accordingly, on 01.12.2009, the petitioner issued a Letter of Acceptance (LOA) awarding the contract to respondent no. 2, for a total contract price of Rs. 51,00,00,000/-. The LOA was duly accepted by respondent no. 2.

3.2 The entire work was required to be completed within a period of eighteen months from the date of issue of the LOA, that is, by 31.03.2011. However, the works could not be completed within the stipulated time. Subsequently, the work was completed on 11.03.2013 and a completion certificate was issued by the petitioner. It is the petitioner's case that the delay in completion of the project is entirely due to reasons attributable to respondent no. 2. This is stoutly disputed by respondent no. 2.

3.3 After the works were completed, respondent no. 2 submitted its final bill. Admittedly, certain amounts were withheld by the petitioner. Although respondent no. 2 had raised certain claims, it is contended that respondent no. 2 had voluntarily given up these claims by submitting a No Claim Certificate dated

25.09.2013.

3.4 According to the petitioner, no cause of action survived after the issuance of the No Claim Certificate dated 25.09.2013. This is also disputed by respondent no. 2. According to respondent no. 2, the said No Claim Certificate was conditional and was without prejudice to the claims, which had already been raised. It is also contended that the said Certificate was not issued with free consent.

3.5 On 09.07.2014, respondent no. 2 filed an application under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereafter the 'MSMED Act'), before the Council raising certain claims in respect of the aforementioned LOA. Notices were issued by the Council to explore the possibilities of conciliation between the parties. The impugned order indicates that at a meeting held on 12.02.2016, the Council had directed the claimant to file a reply. Apparently, the same was not filed within the stipulated time. However, it is the petitioner's case that it had filed a reply on 03.03.2016 (that is, the date on which the hearing was fixed). The impugned order further indicates that both parties were encouraged to explore the possibility of conciliation, in mutual interest. However, the Council found that the parties were not interested in conciliation and, accordingly, by an order dated 16.06.2016, referred the parties to arbitration under the aegis of the DIAC.

**4.** Mr. Sengh, learned senior counsel appearing for the petitioner, has assailed the impugned order on three fronts. First, he contended that there was an arbitration agreement between the parties in terms of which only a "notified claim" could be referred to arbitration. He submits that the disputes raised by respondent no. 2 do not relate to notified claims and, therefore, reference to arbitration under the aegis of the DIAC is wholly without jurisdiction.

**5.** Second, he contends that the petitioner had already issued a No Claims Certificate and, therefore, the contract was discharged by accord and satisfaction. He submits that in the circumstances, there were no disputes that had to be referred to arbitration.

**6.** Third, he submitted that respondent no. 2 was not a small enterprise within the definition of Section 7 or Section 8 of the MSMED Act.

**7.** Insofar as the first contention is concerned - that is, regarding the jurisdiction of the Council to refer the disputes to arbitration that are not covered under the arbitration agreement - the same is no longer *res integra*. This Court has, in a number of decisions now, held that the reference under Section 18 of the MSMED Act is a statutory reference and is *dehors* any arbitration agreement between the parties (See: *Ramky Infrastructure Private Ltd.* v. *Micro and Small Enterprises Facilitation Council*: W.P.(C) 5004/2017, decided on 04.07.2018). It has also been held that the Council is not bound by the terms of the arbitration agreement while making such reference (See: *Bharat Heavy Electricals Limited* v. *The Micro and Small Enterprises Facilitations Centre*: W.P.(C) 10886/2016, decided on 18.09.2017).

**8.** A Coordinate Bench of this Court has further held that the dispute resolution mechanism under Section 18 of the MSMED Act overrides the arbitration clause under the contract (see: *GE T & D India Ltd.* v. *Reliable Engineering Projects and Marketing*: OMP (Comm) No. 76/2016, decided on 16.02.2017).

**9.** The Division Bench of the Allahabad High Court in *BHEL* v. *State of UP*: W.P.(C) 11535/2014, decided on 24.02.2014 had held that even though there may be an arbitration agreement between the parties, the provisions of Section 18(4) of the MSMED Act contains a *non-obstante* clause in empowering the Council to act as an Arbitrator. It is also noticed that in terms of Section 24 of the MSMED Act, the provisions of the MSMED Act would have an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

**10.** In this view, the scope of reference before the DIAC is also not circumscribed in any manner by the terms of the arbitration agreement between the parties.

**11.** Insofar as the petitioner's contention regarding the No Claim Certificate is concerned, the question whether the contract had been discharged by accord and satisfaction is a matter of dispute, and the petitioner is not precluded from raising the same before the Arbitral Tribunal. Plainly, the impugned order referring the parties to the DIAC cannot be faulted on this ground.

**12.** Mr. Sengh had contended that respondent no. 2 is not a small enterprise within the meaning of Section 7 of the MSMED Act, inasmuch as, its fixed assets exceed an aggregate value of Rs. 5 crores. He had also submitted that in the given circumstances, respondent no. 2 could not have been issued a Memorandum under Section 8 of the MSMED Act. He also emphasised that the Council had failed to consider the aforesaid contention while passing the impugned order.

**13.** It is seen that no such ground was taken before the Council at the material time. After the proceedings were concluded before the council, the petitioner had filed an application dated 06.05.2016, *inter alia*, contending that Suez Environment and Degremont (a French Company) had purchased shares of respondent no. 2 and, therefore, respondent no. 2 was no longer a small or medium enterprise since it was a part of a multinational corporation. It was submitted that Suez Environment and Degremont is a € 15 billion business group.

**14.** This Court is of the view that the impugned order cannot be faulted on this ground. First of all, the said contention was not raised before the Council at the material time. Secondly, the contention now advanced - that the fixed assets of respondent no. 2 exceeded the threshold as stipulated in Section 7 of the MSMED Act - was not one of the contentions advanced, even in the application filed by the petitioner. It is also important to note that no such ground had been taken by the petitioner in this petition as well.

**15.** Mr. Sengh had referred to Ground C as raised in the petition to contend that the petitioner had specifically urged that the petitioner's assets had exceeded the threshold amount as stipulated under Section 7 of the MSMED Act. This contention is plainly erroneous as is evident from the plain language of Ground C, which is set out below:—

> "C. Because as per Section 8 of the Act, any industry having invested in plant and machinery of more than one crore rupees but not more than ten crore rupees, cannot register themselves under the Act, based on the same parameters, it is humbly submitted that a dispute raised more than 10 crores at the same time cannot be entertained under Section 18 of the Act. It is a different issue as to how the Respondent No. 2 got themselves registered under the Act."

**16.** It is apparent from the above that the ground raised by the petitioner is that the Council cannot entertain a dispute more than Rs. 10 crores. Although the petitioner had raised a doubt as to registration of respondent no. 2 under section 8 of the MSMED Act, it had not asserted that the value of plant and machinery of respondent no. 2 had exceeded the specified value. In view of the above, the contention that the petitioner's assets exceeded the maximum stipulated value appears to be an afterthought and does not warrant any interference.

**17.** This Court is not persuaded to accept that any interference in the impugned order is warranted. The petition is, accordingly, dismissed. The pending application stands disposed of.

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