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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ARB.P. 402/2019, I.A. 10589/2019**

BATA INDIA LIMITED ..... Petitioner

Through: Mr. Neeraj Grover, Adv.

versus

AVS INTERNATIONAL PRIVATE LIMITED ..... Respondent

Through: Mr. Tanvir Nayar, Adv.

\+ **O.M.P.(I) (COMM.) 201/2019**

BATA INDIA LIMITED ..... Petitioner

Through: Mr. Neeraj Grover, Adv.

versus

AVS INTERNATIONAL PVT. LTD. & ANR. ..... Respondents

Through: Mr. Tanvir Nayar, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 09.08.2019

SANJEEV NARULA, J.

ARB.P. 402/2019

1. By way of the present petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter 'the A&C Act'), the Petitioner prays that the parties be referred to arbitration under the aegis of Delhi International Arbitration Centre to adjudicate the disputes that have arisen between the parties.

Brief Facts:

2. Petitioner (BATA India Ltd.), is a company manufacturing footwear. Respondent [AVS International Pvt. Ltd., also Respondent No. 1 in OMP(I)(Comm) 201/2019] is also engaged in the same business. Respondent No. 2 in OMP(I)(Comm) 201/2019, is the MSME Facilitation Council (hereinafter 'the Council'). Petitioner entered into a contract with the Government of India for supply of footwear to the Indian Navy and the Respondent agreed to manufacture and supply such footwear incompliance with the terms of the said contract. To this effect, the parties entered into an agreement dated 7th January, 2016 which was valid for a period of one year and subsequently a fresh Manufacturing Agreement was executed between the parties on 10th January, 2017. In respect of the said contract, certain disputes arose between the parties as Indian Navy raised several issues regarding the quality and/or defective supply of the footwear. In these circumstances, demands were raised by the Petitioner against the Respondent followed by legal notices dated 21st July 2018, 8th December 2018 and 23rd January 2019. Parties attempted to resolve the disputes amicably and several meetings took place in this regard. During this process, on 23rd January 2019, Respondent apprised the Petitioner that it is a registered MSME enterprise and the provisions of MSME Development Act, 2006 are applicable to the Respondent. On 22nd April 2019, the Council sent a notice to the Petitioner on a claim/reference filed by the Respondent under the provisions of the MSME Act, 2006 (hereinafter 'the MSME Act'). Thereafter, under Section 18 of the MSME Act, Conciliation proceedings were held on 16th May 2019, which Petitioner did not attend. Accordingly,

the proceeding was adjourned for 21st May, 2019. On the said date, the representative of the Petitioner was present and he informed the Council that settlement talks between the parties were in progress. On the basis of the aforesaid statement, the Council gave one month's time to the parties to conclude the settlement talks. However on 28th May 2019, the Petitioner sent a notice to the Respondent and the Council, terminating the Conciliation proceedings under 76(d) of the A&C Act. In the same notice Petitioner also invoked the arbitration clause contained in the manufacturing agreement dated 10th January 2017.

3. Following the termination, the Council under Section 18(3) of the MSME Act entered upon reference, on 12th June 2019 to arbitrate the disputes between the parties and issued a notice informing the parties to appear before them. The parties were also informed that the reference would be disposed on merits on the basis of the material available before it, in terms of Section 25 of the A&C Act, read with Section 15 to 23 of the MSME Act.

4. Concomitantly, Petitioner filed the present petition on 15th June 2019, along with I.A. 8574/2019, inter alia seeking an order restraining the respondent from proceeding further before the Council for adjudication of disputes by arbitration during the pendency of the present petition. Petitioner also filed OMP(I)(Comm) 201/2019, seeking restraining orders against Respondent No.2, from passing any order in the proposed arbitration during the pendency of the present petition.

5. In the meanwhile, on 19th June 2019, Petitioner also filed a representation

before the Council requesting it to refer the matter to any institute providing alternate dispute resolution services. The Council adjourned the proceedings to enable the Respondent to file reply to the said representation.

Proceedings in the petition

6. Arguments were heard on several dates. The present petition along with OMP(I)(Comm) 201/2019 was listed for hearing for the first time on 19th June, 2019 before the Vacation Judge. On the said date, notice was issued to the Respondent and thereafter the matter was taken up on 24th June 2019. On the said date, Respondent stated that there was no urgency in the matter and accordingly the Vacation judge listed the matter before the Roster Bench.

7. On 2nd July, 2019, learned Counsel for the Petitioner informed the Court that without prejudice to its rights and contention, Petitioner had filed a representation before the Council, inter alia requesting them not to embark upon the arbitration proceedings itself and instead refer the parties to any institution providing alternate dispute resolution services. Both the learned counsel for the parties without prejudice to their rights and contentions agreed that before the Court finally decides the petitions, the Council be directed to take a final view on the pending representation. Taking note of the above statement, the Court passed the following order:

> **"ARB.P. 402/2019**
> 2. Learned counsels for the parties have been heard at considerable length. By way of the present petition, the Petitioner prays that the parties may be referred for

arbitration under the aegis of Delhi International Arbitration and Conciliation Centre. Learned counsel for the Petitioner has raised several grievances and inter alia impugns the order dated 11th June, 2019, passed by the U.P. Micro Small Enterprises Facilitation Council whereby it has entered upon reference in terms of Section 18(3) of the Micro Small and Medium Enterprises Act, 2006. Learned Counsel for the Petitioner contends that since the facilitation council acted as Conciliator, it is now impermissible for them to assume the role of the Arbitral tribunal. At the outset, the learned counsel for the Respondent opposes the present petition on the ground of maintainability. However on instruction from her client she states that Respondent has no objection, in case, the matter is referred to any institution or centre providing alternate dispute resolution services for such arbitration. However, she further contends that this decision should he left open to be considered by the Facilitation Council.

3. At this juncture, learned counsel for the Petitioner informs the court that, his client has made a representation dated 19th June, 2019, wherein inter alia, a request has been made to refer the matter for arbitration to an institution. This representation is presently pending. He says that though in the said representation a request has been made for referring the matter to Delhi International Arbitration and Conciliation Centre, however, his clients would have no objection in case, the arbitration is carried out under the aegis of any other institution or centre providing alternate dispute resolution services. Thus, both the counsels without prejudice to the rights and contentions agree that the facilitation council may make a decision for referring the matter to an institution.

4. Accordingly, in view of the statements made by both the counsels, before hearing the matter any further, it is considered appropriate to direct the Facilitation Council to decide the representation dated 19 June, 2019 for referring

> the parties to arbitration under any institution or centre. The decision shall be conveyed to this court within two weeks from today. The centre while deciding the representation shall take into consideration the stand of the parties as noted above."

8. Pursuant to the directions of this Court, the Council passed a detailed order, dated 24th July 2019, rejecting the representation of the Petitioner and *inter alia* it decided to arbitrate the disputes itself and declined to refer the matter to any institution or centre for arbitration. The relevant extract of the said order reads as under:

> "Peruse the representation dt 19.06.2019. The parties had entered into Agreement for the work under terms & Condition contained therein, The Agreement between the parties contained clause 25 under which there will be Sole Arbitrator appointed by M/s Bata India Ltd and the venue of Arbitration shall be at Delhi.
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> The main point raised, by M/s Bata India Ltd. In their representation dated 19.06.2019 is that the Petition u/s 11(6) of the Arbitration & Conciliation Act, 1996 for referring the dispute for Arbitration to Delhi International Arbitration Centre is not inconsistent with the M.S.M.E.D Act 2006 as Section 18(3) of the said Act provides
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> The Arbitration & Conciliation Act, 1996 is General Statute & M.S.M.E.D Act, 2006 is a Special Statute.
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> The Sub Section 3 of Section 18 of the Act No. 27 of 2006 provides that provisions of the Arbitration & Conciliation Act, 1996 shall apply to dispute as if the Arbitration was in pursuance of Arbitration agreement referred to sub section 1 of Section 7 of Arbitration Act. The Sub Section 1 ol Section 7 of Arbitration & Conciliation Act, 1996 define the Arbitration Agreement. The Sub Section 3 of the section 18 of Micro, Small and Medium Enterprises Development Act, 2006 contemplate substitution of

agreement of parties by statutory agreement i.e. Forum of Arbitration under agreement is substituted by Forum under statutory agreement which is M.S.M.E.D Act, 2006.

U/s 18 (3) of the.M.S.M.E.D Act 2006, Forum for Arbitration is Facilitation Council and U/s 18(4) of the M.S.M.E.D Act, 2006, the place, of Arbitration is in where the supplier is loeated. In this case, supplier is located at Agra, U.P. Therefore, Facilitation Council has jurisdiction to take up the dispute for Arbitration & Place of Arbitration will be at Kanpur.

Moreso, Micro, Small & Medium Enterprises Development Act, 2006 is special statute. The Section 24 of the Micro, Small & Medium Enterprises Development Act has overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being enforced therefore, objection U/s 12,13 & 80 has no effect on arbitration before the council.

U/s 18(3) of the M.S.M.E.D Act,2006 the Facilitation Council has power either to take up itself the dispute for Arbitration or refer to any institution Centre providing the alternative dispute resolution services. The Council therefore has discretion to take up the Arbitration itself or refer to any institution or centre providing the alternative dispute resolution Service.

The Council vide its Order dt 11.06,2019 has already decided, to arbitrate the dispute itself i.e. it exercised it is discretion, hence at this stage the matter cannot be referred to Institution or centre providing institutional Arbitration.

Order

In View of reasons given hereinbefore, representation of M/s Bata India Limited Dated 19.06.2019 is rejected."

Case of the Petitioner:

9. Petitioner contends that disputes are now liable to be referred to

Arbitration in terms of Clause 25 of the Agreement and this Court has territorial jurisdiction to entertain the present petition. It is also contended that as per Section 18 (3) of the MSME Act, upon the termination of the Conciliation proceedings, the dispute could either be taken up by the Council itself, for Arbitration or they could be referred to any institution or Centre providing Institutional Arbitration Services. By virtue of Section 80 of the A&C Act, the Council would be barred from acting as the Arbitral Tribunal under Section 18 (3) of the MSME Act, since it has already acted as the Conciliator under Section 18(2) of the MSME Act.

Case Of The Respondent:

10. Respondent contends that on 22nd April, 2019, the Council had sent a notice to the Petitioner on a claim/reference filed by the Respondent under the provisions of the MSME Act. Petitioner did not attend or submit agreement of conciliation and on 28th May 2019, Petitioner sent a notice to the Respondent, under Section 76(d) of the A&C Act and invoked the arbitration clause contained in the agreement. Petitioner has never participated in the conciliation proceedings and bar under Section 80 is not attracted. Even otherwise the Council is fully competent to embark upon the arbitration proceedings in terms of the provisions of the MSME Act. He further submits that the present petition is completely misconceived as none of the sub-sections of Section 11 of the A&C Act, empower the Court to interfere in the decision making process of the Council. The Council has entered upon reference vide letter dated 12th June, 2019 and if the Petitioner is aggrieved by the constitution of the Arbitral Tribunal or it has any grievance with respect to the jurisdiction of the Arbitral Tribunal it has to

raise its disputes under Section 13 and 16 of the A&C Act.

Analysis and Findings:

11. The Court has heard the parties at length. The MSME Act, has been enacted with the object of facilitating, promoting, development and enhancement of competitiveness of the micro, medium and small enterprises. Section 18 (1) of the MSME Act contains a non obstante clause and enables any party to a dispute to make a reference to the MSME Council. It would be apposite to note the said section, which read as under:

> "(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 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 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 the Act
> (4) Notwithstanding anything contained in any other law for the time being in force, the Micro, Small and Medium 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 reference."

12. Section 24 of the MSME Act, also contains a non-obstante clause which read as under:

> "24. 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. A plain reading of Section 18 of the MSME Act, would show that upon receipt of reference under Section 18 (1) of the MSME Act, the Council could either itself conduct the Conciliation in the matter or seek assistance of any institution or centre providing alternate disputes resolution services. It is also expressly provided that Section 65 to 81 of the A&C Act, would apply to such disputes as it applies to the Conciliation initiated under Part-III of the A&C Act. It is thus clear that the provisions of Section 18 of the MSME Act, incorporate the legislative intent to apply the provisions of Section 65 to 81 of the A&C Act to the Conciliation proceedings conducted by the Council. Section 18(3) of the MSME Act provides that in the event the Conciliation initiated under section 18 (2) of the MSME Act does not fructify into a settlement, the Council can take up the disputes itself for arbitration or refer them to any institution or centre providing alternate disputes resolution services for such Arbitration.

14. It is also relevant to note that the judgement of this Court in ***BHEL v. Micro and Small Enterprises Facilitation Centre*** (W.P.(C) 10886/2016), dated 18th September 2019. Though, the challenge in the said case was to the decision of the Council terminating the conciliation proceedings and referring the disputes to Delhi International Arbitration Centre (DIAC), however, the ratio of the said decision squarely applies to the facts of the present case. The Court considered the contention of the parties therein and held that there was no inconsistency between the arbitration agreement and Section 18 (3) of the MSME Act. In the aforesaid judgment, the Court also took note of the decision of another coordinate Bench of this Court - ***GE T&D India Ltd. V. Reliable Engineering Projects and Marketing, 2017 SCCOnline Del 6978***, wherein the Court has held that the MSME Act (overrides the A&C Act), to the extent it provides for a special forum of adjudication of the disputes involving a supplier registered under the MSME Act.

15. Learned counsel for the Petitioner tried to distinguish the aforesaid judgment and contended that the arbitration proceedings initiated by the Council are non-est. He submits that MSME Council cannot act as an Arbitrator, once it has acted as the Conciliator for resolution of disputes arising out of the same cause of action, between the same parties. Heavy reliance is placed on Section 80 of the A&C Act, which reads as under:

> "Role of the Conciliator: 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;

(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings."

16. Petitioner also relies upon the judgment of the Bombay High Court in ***Gujrat States Patronet Ltd. V. Micro and Small Enterprises Facilitation Council, AIR 2018 Bombay 265*** wherein the Court has held as under:

"20. 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.

21. 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."

22. **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.**

23. 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.

24. 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."

17. Per contra, learned counsel for the Respondent has relied upon the judgment of Patna High Court in LPA No. 1036 of 2018, dated 14th February 2019, ***Best Towers Pvt Ltd v. Reliance Communication Ltd***, relevant portion of which reads as under:

"20. … … On a dispute being raised with regard to delay in payments or any amount due, a forum named as a Facilitation Council is created under Section 18 of the Act where any party to a dispute may make a reference to the Facilitation Council. Sub-section (2) of Section 18 enjoins upon the Council to either itself conduct a conciliation or seek the assistance of any Institution or Centre providing alternate dispute resolution services by making a reference to it. The provisions of Section 65 to Section 81 of the Arbitration and Conciliation Act, 1996 are to apply to such a dispute as if the conciliation was under Part-III of the 1996 Act. Thus, the first step on the reference of a dispute is to undertaking

a conciliation effort by the Council or reference of such conciliation to any Institution or Centre as provided therein. The words "shall apply" in respect of Section 65 to Section 81 of the 1996 Act, therefore, clearly stipulates that in an effort of conciliation the same process will be adopted in respect of conciliation proceedings with a specific bar in Section 80 that the Conciliator shall not act as an Arbitrator or as a representative or Counsel of a party in "any arbitral or judicial proceedings in respect of a dispute that is the subject of conciliation proceedings". Thus, according to Section 80 the Conciliator cannot act as an Arbitrator. The question raised before us by the learned counsel for the respondent petitioner is that if the Facilitation Council acts as a Conciliator then the Council cannot act as an Arbitrator as in the present case when after having attempted conciliation proceedings and its termination in failure, the Council itself has proceeded to arbitrate which it could not have done in terms of Section 80 of the 1996 Act read with Section 18(2) of the 2006 Act. This argument on behalf of the respondent petitioner has been accepted by the learned Single Judge that has been questioned by the appellant contending that Section 24 of the 2006 Act clearly provides that Sections 15 to 23 thereof shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. **What we find is that sub-section (2) of Section 18 only refers to conciliation and the procedure to be followed in terms of Part-III of the 1996 Act to the extent of Section 65 to Section 81 thereof. Immediately thereafter, subsection (3) of Section 18 introduces an absolutely novel procedure allowing the commencement of arbitration proceedings with a mandate on the Council that in the event conciliation ends in failure, 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 1996 Act "shall then" apply to the disputes as if the arbitration was in pursuance of an agreement. The overriding effect given to this provision in terms of Section 24 of the 2006 Act, in our opinion, clearly overrides any bar as suggested by the**

learned counsel for the respondent petitioner under Section 80 of the 1996 Act. It is trite law that the meanings assigned and the purpose for which an enactment has been made should be construed to give full effect to the legislative intent and we have no doubt in our mind that the provisions of Section 18(3) mandates the institution of arbitration proceedings under the 2006 Act itself and it is "then" that the provisions of the Arbitration and Conciliation Act, 1996 shall apply. The institution of arbitration proceedings would be governed by sub-section (3) of Section 18 of the 2006 Act which having an overriding effect cannot debar the Facilitation Council from acting as an Arbitrator after the conciliation efforts have failed under sub-section (2) of Section 18 of the Act. **A combined reading of sub-section (2) and sub-section (3) of Section 18 of the 2006 Act read with the overriding effect under Section 24 thereof leaves no room for doubt that any inconsistency that can possibly be read keeping in view Section 80 of the 1996 Act stands overridden and the Facilitation Council can act as an Arbitrator by virtue of the force of the overriding strength of sub-section (3) of Section 18 of the 2006 Act over Section 80 of the 1996 Act.** The conclusion of the learned Single Judge that there is a prohibition on the Council to act in a dual capacity is, therefore, contrary to the clear intention of the legislature and, therefore, the verdict that the Facilitation Council lacked inherent jurisdiction does not appear to be a correct inference. **Thus, on a comparative study of the provisions referred to hereinabove, there is no scope for any doubt with regard to the overriding effect of the provisions of the 2006 Act that empowers the Facilitation Council to act as an Arbitrator upon the failure of conciliation proceedings.** The cloud of suspicion and doubt about the role of the Facilitation Council, therefore, stands clarified on the basis of the analysis made by us hereinabove.

21. The second reason why we differ from the view of the learned Single Judge is that **the 2006 Act was enacted as a complete code in itself and it is for this reason that the authority to conciliate and arbitrate were enacted and**

provided for in a different form for the promotion, development and facilitation of delayed payments arising out of disputes of small industries under the 2006 Act. The platform for resolution of disputes was, therefore, created under Section 18 of the 2006 Act in order to avoid the rigors and settlement of disputes at a pre-arbitration stage itself.

22. **The status of the 2006 Act conferring the jurisdiction on the Facilitation Council to resolve disputes is further fortified by a bare perusal of sub-section (4) of Section 18 to either act as a Conciliator or Arbitrator in respect of a dispute anywhere in India. The aforesaid provision, therefore, also clearly rules out the possibility of reading a bar on the role of the Facilitation Council to act as an Arbitrator if it has performed the role of Conciliator.** The argument of the learned counsel for the respondent petitioner, as accepted by the learned Single Judge, therefore, overlooks the aforesaid intention that can be easily gathered from a reading of the entire provisions of the 2006 Act, particularly the provisions of Section 18 and Section 24 thereof."

18. Reliance is also placed upon the judgment of the Madras High Court in ***Eden Exports Company & Ors v. Union of India, 2013 (1) MadLJ 445*** relevant portion of which reads as under:

"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.**"

and ***M/s Refex Energy Ktd, Mumbai v. Union of India, AIR 2016 Madras 139,*** wherein it has been held as under:

> **"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."

19. On a perusal of the aforesaid judgments passed by the Division Bench of respective High Courts, there appears to be divergence and conflict in views

on the legal question urged by the Petitioner qua the applicability of Section 80 of the A&C Act.

20. However, the difference of opinion and contrasting views of various High Courts does not affect or impede this Court to decide the present petition. In so far as the jurisdiction of the MSME Council, under Section 18 of the MSME Act is concerned, there cannot be any doubt that in all the decisions referred above, the Courts have consistently held that the provisions of the MSME Act are applicable *dehors* the arbitration clause. In this regard it is relevant to note the decision of the Gujrat High Court in ***Principal Chief Engineer v Mani Bhai and Brothers***, wherein the Court held:

> "6.1. It cannot be disputed that the Act 2006, is a Special Act and as per Section 24 of the Act, 2006, the provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, Section 18 of the Act, 2006 would have overriding effect or any other law for the time being in force including Arbitration Act, 1996 and therefore, if there is any dispute between the parties governed by the Act, 2006, the said dispute is required to be resolved only through the procedure as provided under Section 18 of the Act, 2006. Thus, considering Section 18 of the Act, 2006, after conciliation has failed as per Section 18(2) of the Act, 2006, thereafter as per sub-Section (3) of Section 18, 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 (2) of Section 18 of the Council shall have jurisdiction to take up dispute for arbitration. Therefore, once the Council itself is acting as an Arbitrator in that case, thereafter the Council who acts as an Arbitrator has no authority and/or jurisdiction to entertain the application under Section 8 of the Arbitration Act, 1996. Section 8 of the Arbitration Act, 1996 would be applicable in case where any proceedings are pending before the "Judicial Authority". "Judicial Authority" is not defined in the Arbitration Act, 1996. However, in the case of ***SBP & Co. vs Patel Engineering Ltd and anr., (2005) 8 SCC 618***, it is observed by the Hon'ble Supreme Court that "Judicial Authority" as such is not defined in Section 2(e) of the Act and would also, in our opinion include other courts and may even include a special Tribunal like the Consumer Fourm. Even in the case of **Morgan Securities and Credit Pvt Ltd (supra),** the Hon'ble Supreme Court has observed that in its ordinary parlance "Judicial Authority" would comprehend a Court defend under the Act but also courts which would either be a Civil Court or other authorities which perform judicial functions or quasi judicial functions.

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 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.

10. In view of the above and for the reasons stated above, no error has been committed by the learned Council in not entertaining the application under Section 8 of the Arbitration Act, 1996.We see no reason to interfere with the order passed by the learned Council. **As observed herein above and considering the sub-section (1) of Section 18 of the Act, 2006 the Facilitation Council has jurisdiction to act as Arbitrator and /or conciliator any dispute between the parties and that Council had only one of two courses of action open to it, either to conduct an arbitration itself or to refer the parties to a centre or institution providing alternative dispute resolution services stipulated in Section 18 (3) of the Act, 2006.** Therefore, while dismissing the present appeal, it is observed that Council shall now act in accordance with provision of sub-section (3) of Section 18 and either to conduct an arbitration itself or refer the parties to a centre or institution providing alternate dispute resolution services. With the above observations, present appeal is dismissed. No costs. In view of dismissal of the First Appeal, Civil Application stands dismissed accordingly."

21. The said decision was challenged before the Supreme Court in ***Principal Chief Engineer v. M/s Manibhai & Bro,*** SLP No. 17434/2017 decided on 5th July 2017 where the Supreme Court by a speaking order observed as under:

"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."

22. Since the decision of the Gujrat High Court has been affirmed by the Supreme Court, I have no hesitation to hold that Section 18 of the MSME Act, would override the provisions of the arbitration clause agreed to between the parties and consequently the arbitration proceedings before the Council are in accordance with law. Petitioner's contention qua the bar under Section 80 of the A&C Act, is subject matter of different views of the High Courts, referred above. However, notwithstanding the conflicting views on this issue, the Court cannot grant the relief sought in the present proceedings. The provisions of Section 11(6) of the A&C Act would be attracted only under the situations which are enumerated under the said provision, which reads as under:

> "(6) Where, under an appointment procedure agreed upon by the parties,—
>
> (a) a party fails to act as required under that procedure; or
>
> (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
>
> (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

> a party may request [1][the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

23. Petitioner is unable to show as to how any of the aforesaid sub-clauses can be invoked in the present case. Thus, the petition is not maintainable. There is also merit in the submission of the Respondent that the facts of the case as noted above do not indicate that the Council has indeed performed the role of a Conciliator. No doubt the Conciliation proceedings were initiated and the Petitioner joined the conciliation process, but that was only to request the Council to defer its decision since the parties were negotiating settlement. Thereafter, the Council was informed that the settlement had not fructified and notice of termination of the Conciliation process was sent. Thus, the Council never actively acted as a Conciliator between the parties.

24. Be that as it may, under Section 11 (6) of the A&C Act, I would not have the jurisdiction to test the legality of the decision dated 24th July, 2019, passed by the Council. The Petitioner would have to avail its remedies under the relevant provisions of the A&C Act to challenge the jurisdiction of the Arbitral Tribunal. I do not find any merit in the present petition and same is dismissed. Pending applications if any are disposed of.

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25. The present petition inter alia seeks the following prayers:

> "31. In light of the aforesaid facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to stay the proposed arbitration proceedings scheduled to be initiated before the respondent no.2 on 19/5/2019 and restrain the respondent no.2 from passing any order in the proposed arbitration during the pendency of petitioner's petition under section 11 (6) for reference of dispute between the parties to arbitration under the aegis of Delhi International Arbitration Centre."

26. In view of the decision rendered in arbitration petition bearing No. **ARB.P. 402/2019**, there is no ground to grant the relief sought in the present petition. More so since the existence of the Arbitration agreement is not disputed and the arbitration proceedings initiated under the MSME Act are in accordance with law, there is no ground or reason to entertain the present petition and the same is dismissed.

27. The next date before the Court i.e. 20th August, 2019 stands cancelled. Pending applications if any are disposed of.

SANJEEV NARULA, J

AUGUST 09, 2019
Pallavi