Bombay High Court
Gujarat State Petronet Ltd vs Micro And Small Enterprises ... on 6 August, 2018
Bench: Ranjit More

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5459 OF 2015

Gujarat State Petronet Ltd. a company incorporated under the Companies Act, 1956 having its registered office at GSPC Bhavan, Sector 11, Gandhinagar, Gujarat - 382010.

Versus

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.

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.

CORAM : RANJIT MORE &
SMT.ANUJA PRABHUDESSAI, JJ.

DATE OF RESERVING JUDGMENT : 4th JULY, 2018 DATE OF PRONOUNCEMENT : 6th AUGUST, 2018 ORAL JUDGMENT : (Per 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;
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> (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.

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.

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 14 th October, 2011. The petitioner, by filing reply to this reference application on 17 th 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.

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.

5. 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.

6. 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 M/s.Steel Authority of India Ltd. and anr.

Versus The Micro, Small Enterprise Facilitation Council Shubhada S Kadam 5/24 wp 5459.15.doc and anr. 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.

7. 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 versus M/s. Manibhai and Bros (Sleeper)).

8. In order to appreciate the rival contentions, it is necessary to see the objects of the MSMED Act. The Government of India felt it Shubhada S Kadam 6/24 wp 5459.15.doc 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.

9. 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.
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> 16. ....
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> 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 Shubhada S Kadam 8/24 wp 5459.15.doc 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."

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.

Section 15 of the Act provides that the buyer is liable to make payment for the goods purchased from Micro and Small Enterprises on Shubhada S Kadam 9/24 wp 5459.15.doc 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.

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.

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.

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.

Section 19 of the Act provides setting aside decree, award or order made by the Council which acts like an arbitrator.

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10. 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 non- obstante 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.

11. 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 Shubhada S Kadam 11/24 wp 5459.15.doc 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.

12. 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.

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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 Shubhada S Kadam 13/24 wp 5459.15.doc 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."

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13. Similar question fell for consideration before the Apex Court in M/s. 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.

14. 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 Shubhada S Kadam 15/24 wp 5459.15.doc of the Gujarat High Court followed the decision of the Allahabad High Court in the case of Paper and Board Convertors vs. 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 M/s. 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 :
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> 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 Shubhada S Kadam 16/24 wp 5459.15.doc 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 M/s.Steel Authority of India Ltd. and anr. (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).

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15. The decision of the Division Bench of the Gujarat High Court in M/s. Manibhai And Brothers (Sleeper) (Supra) was challenged before the Apex Court by filing Diary No16845 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. "

16. The above order of the Apex Court apparently shows that the Apex Court approved the view of the Gujarat High Court in M/s.

Manibhai and Brothers (Sleeper) (supra) and the Allahabad High Court in Paper and Board Convertors (supra). In that view of the matter, the Shubhada S Kadam 18/24 wp 5459.15.doc 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.

17. 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.

18. 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. Sub-section (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 Shubhada S Kadam 19/24 wp 5459.15.doc 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.

19. 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.

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 Shubhada S Kadam 20/24 wp 5459.15.doc 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."

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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 Shubhada S Kadam 22/24 wp 5459.15.doc 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 Shubhada S Kadam 23/24 wp 5459.15.doc 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.

[SMT.ANUJA PRABHUDESSAI, J.] [RANJ

Shubhada S Kadam