

**IN THE HIGH COURT OF KARNATAKA
BENGALURU**

DATED THIS THE 27TH DAY OF MARCH 2019

BEFORE

THE HON'BLE MR. JUSTICE B. M. SHYAM PRASAD

W.P. No. 9485/2017 (GM)

BETWEEN:

M/S PAL MOHAN ELECTRONICS PVT. LTD.,
MOHAN PLAZA, 40 DLF, INDUSTRIAL AREA,
KIRTI NAGAR, NEW DELHI-110 015,
REPRESENTED BY ITS DIRECTOR
GAGANPREET SINGH SACHDEVA.

- PETITIONER

(BY SRI. K.K. SHARMA, SENIOR ADVOCATE FOR
SMT. M.C. NAGASHREE A/W
SMT. T.S. RAJARAJESHWARI, ADVOCATES)

AND:

1. THE SECRETARY,
DEPARTMENT OF SMALL SCALE INDUSTRIES,
VIKASA SOUDHA, BANGALURU-560 001.
2. THE KARNATAKA MICRO & SMALL
ENTERPRISES FACILITATION COUNCIL,
NO. 49, 2ND FLOOR, SOUTH BLOCK,
KHANIJA BHAWAN, RACE COURSE ROAD,
BENGALURU-560 001 REP. BY CHAIRMAN.
3. M/S KALKI COMMUNICATION
TECHNOLOGIES PVT. LTD.,
NO. 147, 5TH MAIN ROAD, SECTOR-7,
HSR LAYOUT, BENGALURU-560 012,
REP. BY ITS EVP & CFO
MRS. VANISHREE GURURAJ.

- RESPONDENTS

(BY SRI. K.S. DEVARAJ, ADVOCATE FOR C/R3,
SRI V. SREENATH, AGA FOR R1,
NOTICE SERVED ON R2)

THIS WRIT PETITION IS FILED PRAYING TO QUASH THE ORDER/ AWARD DATED 26.10.2016 PASSED BY THE R-2 IN CASE NO. 10/2015 AT ANNEX-B TITLED AS M/S KALKI COMMUNICATION TECHNOLOGIES PVT. LTD., VERSUS M/S PALMOHAN ELECTRONICS PVT. LTD., & ETC.

THIS WRIT PETITION HAVING BEEN HEARD ON 16.01.2019 AT THE PRINCIPAL BENCH, BENGALURU AND COMING ON FOR PRONOUNCEMENT OF ORDER THIS DAY, BEFORE DHARWAD BENCH THE COURT DELIVERED THE FOLLOWING:

ORDER

This writ petition is filed impugning the award dated 26.10.2016 by the Karnataka Micro and Small Enterprises Facilitation Council, Bengaluru (for short, '*Facilitation Council*'). The Facilitation Council, by the impugned award has allowed the respondent's Reference under section 18 (1) of the Micro, Small and Medium Enterprises Development Act, 2006 (for short, "*MSMED Act*"), holding that the petitioner is due in a total sum of Rs.60,40,525/-, including a sum of Rs.9,65,525/- as *CST difference* to the respondent, and the petitioner is directed to pay to the respondent, within

a period of 90 days from the date of the award, **(i)** the “CST difference” of Rs.9,65,525/- and **(ii)** the *Invoice Due* of ₹ 50,75,000/- with interest at 3 times the bank rate of interest notified by the Reserve Bank of India from the due date as per section 16 of Act. The petitioner has impugned the Facilitation Council's award dated 26.10.2016 on the short ground that the Facilitation Council, having conducted conciliation proceedings under section 18 (2) of the Act, could not have conducted arbitration proceedings under section 18 (3) of the Act; and if the Facilitation Council could not have conducted arbitration proceedings after the conduct of the conciliation proceedings, the impugned award would be impermissible in law.

2. The *lis* is in the following circumstances: the petitioner, who is engaged in the business of electronics, was successful in its bid with the Maharashtra State Electricity Distribution Co Ltd for supply, installation, connection and commission of “GSM and GPRS Modems for HT Consumers' Metres, LT Consumers' Metres and Feeder Metres. The petitioner, in

turn, invited quotations from the different vendors, including the respondent. The petitioner issued the Purchase Order dated 28.3.2011 to the respondent for supply, installation connection and commission of 1800 Data Concentrator Unit, a component of the Modems. This Purchase Order dated 28.3.2011 was modified on multiple occasions. The Maharashtra State Electricity Distribution Co Ltd terminated the contract with the petitioner alleging certain lapses in the working of the Modem.

3. The petitioner blames the respondent for the lapses in the working of the Modem, and the petitioner for this reason, and others, disputes the payment claimed by the respondent. The respondent has filed a Reference under section 18(1) of The MSMED Act for recovery of the *Invoice Due* (Rs.50,75,000/-), *CST difference* (Rs.9,65,525/-) and interest for the delay period (Rs.23,13,859/-) asserting that it was a small enterprise registered with the Department of Industries and Commerce, Government of Karnataka and

engaged in software development and computer related services.

4. The Facilitation Council issued Notice dated 09.10.2015 of the proceeding to the petitioner calling upon the petitioner to either make payment of the amount claimed by the respondent or to file written statement. The petitioner neither paid such amount nor filed written statement within the time contemplated under such Notice. Thereafter, the Facilitation Council held hearings on different dates. The details of such hearings, being of significance given the grounds urged in this writ petition, and as available in the impugned award, are detailed:

Date	Details of the facilitation Council proceedings
3.3.2016	The respondent and its counsel were present, but the petitioner remained absent.
6.4.2016	Both the petitioner and the respondent, were present along with the respective counsel. Detailed discussion were held, and proceedings were adjourned to 4.5.2016 for further conciliation.
4.5.2016	The petitioner and respondent, with the respective counsel, were present; it was submitted on behalf of the petitioner that a proposal for settlement was submitted to the respondent. Therefore, the Facilitation Council adjourned the proceedings to 8.6.2016 for reporting

	settlement.
8.6.2016	The respondent and its counsel were present, but the petitioner remained absent. The Facilitation Council was informed by the respondent that the petitioner had not approached any compromise proposal, and the petitioner had not even responded to personal requests for a compromise. The Facilitation Council held that conciliation proceedings could not be conducted in the absence of the respondent, and decided to issue notice to the petitioner once again.
10.8.2016	The petitioner and respondent, with their counsel, were present. It was submitted on behalf of the respondent that efforts would be made to settle the differences. Therefore the Facilitation Council adjourned the proceedings to 89 2016
8.9.2016	<p>The respondent was present, but the petitioner was absent. There was also no representation on behalf the petitioner. The Facilitation Council recorded that the conciliation proceedings were being conducted from the month of March, 2016, but the petitioner had not made any efforts to bring about settlement. The conciliation proceedings could not be conducted because the petitioner was absent.</p> <p>The Facilitation Council resolved to dispose of the reference in view of the definite timelines under The MSMED Attacking note of the fact that the petitioner had not filed objections statements nor reported any settlement</p>

5. Sri K.K. Sharma, the learned senior counsel for the petitioner, emphasizing the details of the proceedings/ hearings before the Facilitation Council, argued that it is

indisputable that the Facilitation Council did indeed itself conduct conciliation proceedings under section 18 (2) of the MSMED Act, and if this is indisputable, the prohibition contained in section 80 of the Arbitration and Conciliation Act, 1996 *viz.* that a Conciliator cannot act as an Arbitrator between the same parties, because of the provisions of Section 18(3) of the MSMED Act would apply and the Facilitation Council could not have passed the award.

6. The learned Senior counsel contended that on receipt of a Reference as contemplated under section 18 (1) of the Act, a Facilitation Council under the provisions of section 18 (2) of the MSMED Act can either itself conduct conciliation or seek assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre for conduct of the conciliation. The conciliation, whether before the Facilitation Council or the institution/centre to whom the reference is made by the Facilitation Centre, will be a conciliation proceeding under the provisions of the Arbitration and Conciliation Act, 1996 (for

short, '*Arbitration Act*) as section 18 (2) of the MSMED Act stipulates in express terms that such conciliation will be as if initiated under Part III of the Arbitration Act.

7. If conciliation initiated under section 18 (2) of the MSMED Act is not successful and stands terminated without any settlement between the parties, the provisions of section 18 (3) of the MSMED Act stipulates that the Facilitation Council shall either itself take up the dispute for arbitration or refer the arbitration to an institution or centre providing alternate dispute resolution services; and such arbitration will be as if it is an arbitration pursuant to an arbitration agreement referred to in section 7 (1) of the Arbitration Act. The expression in section 18 (2) of the Act, "*the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services*", cannot be read as providing that the Facilitation Council can itself take up a dispute for arbitration even if it has conducted the conciliation proceedings in such dispute. This is because of the clear mandate under section 18 (3) of

the MSMED Act with states that "*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 the Act*". If arbitration of a dispute, after the conciliation proceedings stands terminated without any settlement, is an arbitration under the Arbitration Act, the provisions of section 80 of the Arbitration Act would squarely apply. The provisions of section 80 of the Arbitration Act stipulates that no conciliator shall act as an arbitrator in respect of a dispute that is the subject of the conciliation proceedings conducted by it. As such, the impugned award is without authority in law.

8. The learned senior counsel relied upon the decisions of the division benches of Bombay High Court and Patna High Court in support of his argument that, because of the operation of section 80 of the Arbitration Act, the Facilitation Council, after having conducted the conciliation

proceedings itself, could not have entered reference of the arbitration proceedings.

9. The learned counsel for the respondent, on the other hand, contended that the petitioner had deliberately protracted proceedings before the Facilitation Council under the ruse of settling the dispute with the respondent, but had not taken any steps for settlement even when the respondent personally reached out for settlement. The reliance upon the embargo under section 80 of the Arbitration Act is totally misconceived because of the provisions of section 24 of the MSMED Act, which specifically stipulates that notwithstanding anything inconsistent in any other law, the provisions of sections 15 to 23 thereof shall prevail. The scheme under section 18 of the MSMED Act *inter alia* is intended to provide a definite scheme for expedited conciliation or arbitration of a reference by either a Micro or a Small or Medium enterprise with regard to any amount due under section 17 thereof, and therefore, the efficacious mode of deciding a reference under section 18 (1) of MSMED Act is

protected by the non-obstante clause in section 24 thereof. As such, to read the embargo contained in section 80 of the Arbitration Act would be obstructing the scheme and would be impermissible.

10. Therefore, the question that arises for consideration is: *Whether Facilitation Council, having conducted conciliation proceedings under section 18 (2) of the Act, could itself conduct arbitration proceedings under section 18 (3) of the Act.*

11. The MSMED Act is enacted to provide for facilitating the promotion and development and enhancing the competitiveness of Micro, Small and Medium Enterprises and for the matters connected therewith or incidental thereto, and Chapter V under the title, "*Delayed Payments To Micro And Small Enterprises*", gives effect to the objective of making *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*¹. This Chapter under section 15 mandates that a "*buyer*"² shall make payments to a "*supplier*"³ on or before the date agreed, and where there is no agreement in that regard, before the appointed day: and in no case the period agreed for payment by the "*buyer*" to the "*supplier*" shall exceed 45 days from the day of acceptance or the day of deemed acceptance. Section 16 stipulates that if the payment is not made to the "*supplier*" as provided under section 15, the "*buyer*" shall pay compound interest with monthly *rests* to the "*supplier*" at 3 times of the bank rate notified by the Reserve Bank. Section 17 stipulates that the buyer shall be liable to pay the amount with interest as provided under section 16. A detailed mechanism for conciliation and arbitration of a Reference of a dispute as regards payment of any amount due is provided under section 18, and Section 18(4) provides that a Reference under section 18 (1) should be decided within a period of 90

¹ From Paragraph 2 (f) of the Statement of Objects and Reasons of the Bill

² As denied under Section 2 (d) of the Act

³ As denied under Section 2 (n) of the Act

days from the date of making such Reference. Section 18 reads as follows:

"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 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. The controversy in the present writ petition is in reading the provisions of section 18(3) of the MSMED Act. A Facilitation Council, as provided under section 18 (2) of the

MSMED Act, may itself conduct conciliation proceedings or refer conciliation proceedings to another institution or centre which offers such services; and section 18 (3) of the MSMED Act stipulates that if the conciliation proceedings under section 18 (2) of the MSMED Act stands terminated without any settlement, the Facilitation Council may either itself take up the dispute for arbitration or refer the dispute for arbitration to another institution/centre which offers alternate dispute redressal services. If a Facilitation Council after conducting a failed conciliation proceedings, could also take up arbitration of the dispute, then such Facilitation Council would be acting both as a conciliator and an arbitrator in a given dispute. This would not be permissible if the provisions of the Arbitration Act apply as the provisions of Section 80, stipulate that unless the parties have agreed to the contrary, a conciliator shall not act as an arbitrator in any arbitral proceedings where conciliation proceedings were conducted by such arbitrator. The provisions of Section 80 of the Arbitration Act reads as follows:

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;

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

13. Therefore, the question is whether the restriction under section 80 of the Arbitration Act would apply to the Facilitation Council. The provisions of section 18 (3) of the MSMED Act is categorical that the Arbitration Act shall apply to a dispute taken up for arbitration after the failure of the conciliation as if such arbitration was in pursuance of an arbitration agreement referred to in subsection (1) of section 7 of the Arbitration Act inasmuch as it says that *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.* The MSMED Act not only provides for an

arbitration even though there may not be an agreement for referring the dispute between a "buyer" and a "supplier" to an arbitration, but also stipulates that the provisions of the Arbitration Act shall apply to such arbitration. There is nothing in the provisions of section 18 (3) of the MSMED Act to indicate that any particular provision of the Arbitration Act is intended to be excluded to an arbitration provided for under section 18 (3) of the Act.

14. The next incidental question is, should any exclusion be read because of the provisions of section 24 of The MSMED Act which reads as follows:

"24. Overriding - 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."

It is obvious from a plain reading of the provisions of section 24 of the MSMED Act that overriding effect is given to the provisions of sections 15 to 23 thereof wherever any law is inconsistent with the provisions thereof. Indeed, the objective

of the provisions of Chapter - V of the Act, which includes provisions of section 15 to 23, is to provide for an expedited and efficacious closure of a dispute, either by conciliation or by arbitration. But, from this alone should it be inferred that a Facilitation Council could act both as a Conciliator and Arbitrator, merely because Section 18(3) of the MSMED Act stipulates that the Facilitation Council could take up the dispute for arbitration if the conciliation proceedings fail and a contrary intent is not obvious from the plain reading of the provisions of section 18 (3) of the Act.

15. The provisions of section 80 of the Arbitration Act incorporates a salutary principle that a conciliator cannot act also as an arbitrator, and this salutary principle cannot be whittled down or excluded by inferring a contrary intent in the provisions of Section 18(3) of the MSMED Act and applying the provisions of section 24 of the Act. A learned single judge of the High Court of Judicature at Patna in the decision rendered on 19.6 2018 in Reliance Communications

Ltd *versus* the State of Bihar⁴ and others has considered similar questions, and concluded thus:

"The existence of an arbitration agreement is assumed through the deeming fiction in section 18 (3) of the MSMED Act with reference to section 7 (1) of the Arbitration Act, and must be understood as being merely for the purposes of statutorily fulfilling the foundational requirement of an arbitration agreement for proceeding under the Arbitration Act. This is the extent of the deeming fiction which does not go to suggest the existence of any further agreement between the parties for the purpose of section 80 of the Arbitration Act to the effect that they have agreed that a conciliator would also be competent to act as arbitrator. As stated above, section 18 (2) and 18 (3) of the MSMED Act both seek to adopt the provisions of section 80 of the Arbitration Act. Further, section 24 of the MSMED Act with its overriding effect comes into play only in cases of inconsistencies between the two enactments. A harmonious reading of these provisions clearly indicates that section 80 of the Arbitration Act has been adopted and requires to be given full effect to. Accordingly, the Council may act either as conciliator or as arbitrator or it may choose to refer the dispute at either or both stages to any centre or

⁴ W.P No. 8077 of 2018

institution providing alternate dispute resolution services, but it cannot act as both conciliator and arbitrator itself."

15. A Division Bench of the High Court of Bombay in *Gujarat State Petronet Ltd vs Micro And Small Enterprises Facilitation Council*⁵ has held thus:

"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 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 Act.

21. A harmonious reading of these provisions clearly indicate that Section 80 of the Arbitration Act, 1996 is

⁵ AIR 2018 Bombay 265

applicable to conciliation as well as arbitration proceedings under sub-sections (2) and (3) of Section 18 of the Act⁶.

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.

In the light of the aforesaid discussion, Writ Petition is allowed. *Rule* is issued and the order dated 26.10.2016 by the Karnataka Micro & Small Enterprises Facilitation Council, Bangalore in Case No. 10/2015 is quashed and the Karnataka Micro & Small Enterprises Facilitation Council, Bangalore is directed to refer the dispute between the petitioner and respondent no.2 to any institution or centre

⁶The extract of Section 80 of the Arbitration Act is not repeated

providing alternative dispute resolution services for arbitration and to take necessary steps in that regard as expeditiously as possible, and in any case, within a period of four weeks from the date of receipt of a copy of this order.

**Sd/-
JUDGE**

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