6IN THE HIGH court OF JUDICATURE AT MADRAS

DATED: 02.06.2016

CORAM:

THE HONOURABLE MR.SANJAY KISHAN KAUL, CHIEF JUSTICE

AND

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

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

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

Versus

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

2. M/s.Passive Infra Projects P Limited, by its Director,
   Sh.Varun Agrawal, Delhi 110088. Respondents

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

For petitioner : Mr.Srinath Sridevan

For respondents : Mr.V.P.Sengottuvel-R1

ORDER

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

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

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

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

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

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

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

e. Since a conciliation under section 18(2) is a pre-requisite for the

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

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

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

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

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

(c) 2008 (7) SCC 454 (United India Insurance Co. Ltd Vs Ajay Sinha & another).

5. The learned counsel for the petitioner also submitted that the other provisions of the MSMED Act, except section 18, were tested before this court and upheld by the division bench of this court, in a batch of writ petitions in WA.No.2461 of 2011 (Eden Exports Company Vs Union of India & Others), by order dated 20.11.2012. Under the circumstances and grounds, the learned

counsel for the petitioner prayed for the declaration against section 18 as sought for in this writ petition.

6. Per contra, the learned counsel appearing for the 1st respondent contended that the grounds mostly raised by the petitioner are factual in nature and have to be tested before the Arbitrator. The learned counsel also contended that the parliament has the power to legislate as the enactment was made in public interest to cover a class of industries exercising its power under the Entry 52 of List I of VII Schedule of the constitution.

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

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

9. Entry 52 of List I reads as follows:-

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

10. Entry 24 of List II reads as follows:-

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

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

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

of industries covered under the act.

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

> "7. Entry 24 of List II is "industries" subject to the provisions of Entries 7 and 52. Entry 52 of List I covers industries, the control of which by the Union is declared by parliament by law to be expedient in the public interest, trade and commerce within the State subject to the provisions of Entry 33 of List III is in Entry 26 of List II. Entry 33 of List III relates to trade and commerce, in, and the production, supply and distribution of-
>
> a. The products of any industry, where the control of such industry by the Union is declared by parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;
>
> b. Foodstuffs, including edible oil-seeds and oils; and certain other articles. The interrelation to these articles in obvious. All industries fall within Entry 24 of List II. The State Legislature is exclusively competent to make laws in respect of industries. But, inasmuch as the entry in subject to Entry 52 of List I, where parliament by law declares that it is expedient in the public interest for the Union to control any specified industry, the parliament will have the entire power to make any law in respect of such control led industry, and correspondingly the State Legislature under Entry 24 will cease to have competence to make laws in respect of the controlled industry".

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

> 33. Trade and commerce in, and the production, supply and distribution of, -
>
> a) the products of any industry where the control of such industry by the Union is declared by parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

b) foodstuffs, including edible oilseeds and oils;

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

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

e) raw jute.

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

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

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

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

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

are similarly situated.

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

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

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

"7.Arbitration agreement:-

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

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

(3) An arbitration agreement shall be in writing.

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

(a) a document signed by the parties;

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

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

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

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

18. But, the Legislature in its wisdom, was very careful in drafting section 18 MSMED Act, providing solace to the parties,

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

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

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

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

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

appellants are not left helpless."

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

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

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

but also to service industries.

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

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

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

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

> Section 18. Reference to Micro and Small Enterprises Facilitation Council:-
>
> (1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

> (2). On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.
>
> (3). Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996, shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.
>
> (4). Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.
>
> (5). Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.

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

> "6. Thereafter, after a lapse of more than 3 years from the signing of the settlement agreement, the 2nd respondent filed a

claim petition under section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, before the Micro and Small Enterprises Facilitation Council (hereinafter referred to as "MSME Facilitation Council"), claiming a principal amount of Rs.1,86,00,000/- (Rupees One Crore Eighty Six Lakhs only) along with interest thereon under section 16 of the Act.

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

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

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

26. It is, therefore, clear that the petitioner has participated in the conciliation proceedings. Since the petitioner has raised objections, there was no possibility for settlement and the matter has been referred to Justice Shri S.S.Dahiya under Chapter V in accordance with law and therefore, the contention of the learned counsel for the petitioner is hereby rejected.

27. The next contention, put forth by the petitioner, is that having entered into a settlement agreement, the 2nd respondent has waived its right to

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

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

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

(S.K.K., CJ.) (R.M.D., J.)
02.06.2016

THE HONOURABLE CHIEF JUSTICE
and
R.MAHADEVAN, J.

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Index:Yes/No
Web:Yes/No
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To:

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

WP.No.17785 of 2016

02.06.2016