

A.F.R.**Court No. - 34****Case :-** WRIT - C No. - 7785 of 2020**Petitioner :-** M/S Cummins Technologies India Private Limited**Respondent :-** Micro And Small Enterprises Facilitation Council And 2 Others**Counsel for Petitioner :-** Aditya Singh Parihar, Himanshu Kapoor, Prateek Dhandra**Counsel for Respondent :-** C.S.C.**Hon'ble Sudhir Agarwal,J.****Hon'ble Rajeev Misra,J.**

1. Petitioner, M/s Cummins Technologies India Private Limited, has filed present writ petition under Article 226 of Constitution of India with a prayer to issue a writ of Mandamus commanding respondent-1, i.e., Micro and Small Enterprises Facilitation Council, Directorate of Industries, Kanpur (hereinafter referred to as "MASEF Council") to adjudicate and pass necessary orders on petitioner's application dated 7.2.2020 filed under Section 16 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") and refer Claim Petition No. 14 of 2018, raising dispute between petitioner and respondent-3, i.e., M/s Roots Cooling System Pvt. Ltd. to an Institution, Centre or Arbitrator for Arbitration under Act, 1996. In the alternative, petitioner has also prayed that this Court should declare that respondent-1, i.e., MASEF Council has no jurisdiction to entertain Claim Petition No. 14 of 2018, raising a dispute between petitioner and respondent-3 in terms of Section 80 of Act, 1996.

2. Facts in brief, as pleaded in writ petition, are, that, petitioner is a Company incorporated under Companies Act, 1956 (hereinafter referred to as "Act, 1956"), validly existing and continuing under Provisions of Companies Act, 2013 (hereinafter referred to as "Act, 2013"). Petitioner is a Subsidiary Company and its Holding Company is "M/s Cummins Inc".

3. Cummins Inc which is an American Fortune 500 Company, has its Headquarter at Columbus, Indiana, United States. Holding Company is engaged in designs, manufactures, and distribution of Engines, Filtration and Power Generation products. It has its presence approximately in 190 countries and territories through a network of more than 600 Companies. It also own independent distribution through approximately 6,000 dealers.

4. The present writ petition has been filed by M/s Cummins Technologies India Private Limited through Mr. Zoheb Hasan, an Authorized Representative in terms of Letter of Authority dated February 25, 2020.

5. Respondent-1 is Micro and Small Enterprises Facilitation Council, Directorate of Industries, Kanpur, which is an executive arm of respondent-2, engaged in discharging functions entrusted to it under Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "MSMED Act, 2006"). It acts for implementation of Government Policies for all round development of industries in State of U.P.

6. Respondent-2 is State of U.P. through Chief Secretary, Department of MSMED and Export Promotion, responsible for economic development of State of Uttar Pradesh.

7. Respondent-3 preferred an application under Section 18 of MSMED Act, 2006 before respondent-1 seeking recovery of Rs. 84,80,577/- (Principal amount Rs.40,61,228 + interest Rs.44,19,349), claiming it, a dispute between parties as contemplated under Chapter V of MSMED Act, 2006. Earlier thereto, Conciliation proceedings were initiated, which remained unsuccessful. Petitioner also moved an application under Section 16 of Act, 1996 on 7.2.2020, praying that respondent-1 should refer the dispute between parties to any Institution/Arbitrator or Centre providing alternate dispute resolution services for Arbitration on account of lack of jurisdiction with respondent-

1 to act as an Arbitrator for resolving the dispute between parties in the light of Section 80 of Act, 1996, which has not been adjudicated upon by respondent-1 on the last date of hearing i.e. 17.02.2020, despite the fact that jurisdiction issue goes to the root of the matter and was expressly pressed by petitioner on 17.02.2020. Respondent-1 even did not issue notice and call for reply from respondent-3, thereby acting in complete derogation of the mandate of Section 16 of Act, 1996.

8. The case set up by petitioner is that after respondent-1 has attempted to conciliate between parties, it cannot act as an 'Arbitrator' for adjudication of the dispute. Reliance is placed on Section 18 of MSMED Act, 2006 and Section 80 of Act, 1996.

9. The short question up for consideration is, “whether respondent-1 can adjudicate the dispute between parties as an 'Arbitrator' or it has no such jurisdiction?”

10. Record shows that M/S Cummins Technologies India Private Limited is a private Company incorporated under Act, 1956. It is registered as a Small Enterprise under provisions of MSMED Act, 2006 with Director of Companies, Noida, Gautam Budha Nagar, Uttar Pradesh and allotted Entrepreneur No. 09/010/12/03128 dated 29.09.2009. It is also registered with District Industries Centre, Noida, U.P., Gautam Budha Nagar (hereinafter referred to as “DIC”), under Small Scale Industry vide Registration No.20/78/3597/PMT/SSI/12 dated 08.12.2004. Recently under new scheme of the State Government, respondent-3 is registered as “Udyog Aadhaar” vide Registration No.UAN-UP28B0011387 dated 02.12.2017.

11. Respondent-3 was awarded a work supply contract for “Supply & Installation of Ventilation System” for QSK project at District Satara (State of Maharashtra), as per requirement of M/S Cummins Technologies India Private Limited, SEZ Unit, Plot No. B3-1, Village Surwadi Nandal, Talphaltan, District Satara (State of Maharashtra).

Respondent-3 was given multiples orders for supply and services. The cost of basic work was Rs. 407.62 Lacs (i.e. Supply Rs. 380.49 Lacs and Services Rs.27.13 Lacs) (Excluding Duty and Taxes), in view of work orders dated 10.12.2012, 23.09.2013 and 15.01.2016 as amended from time to time. Respondent-3 supplied all the materials and executed job within time. It claimed to have violated no condition of Work Order. Time to time invoices were raised but a sum of Rs. 40,61,227.55/- has remained outstanding, besides interest thereon. Claiming Rs.40,61.227.55 as principal amount and Rs.44,19,349/- towards interest, respondent-3 filed an Application/Claim Petition under Section 18 of MSMED Act, 2006, dated 09.02.2018 before respondent-1 claiming that petitioner is liable to pay the aforesaid claim under Sections 16 and 17 of MSMED Act, 2006 and claim is maintainable before respondent-1 since buyer is located within India as per Section 18(4) of MSMED Act, 2006.

12. Respondent-1 after receiving claim, issued notice to petitioner requiring it to submit reply. By order dated 27.02.2018 it also called upon parties for settlement. Consequently, notices were issued by respondent-1 vide letter dated 05.04.2018 to parties to appear on 17.04.2018 for settlement. Respondent-1 on 17.04.2018 passed following order:

"उक्त सन्दर्भ आज दिनांक 17-04-2018 को कौंसिल के समक्ष सुलह हेतु प्रस्तुत किया गया। आवेदक पक्ष की ओर से श्री रामजीवन, अधिकृत प्रतिनिधि एवं विपक्षी की ओर से श्री हिमांशु कपूर, अपने वकालतनामा के साथ उपस्थित। पक्षकारों द्वारा अवगत कराया गया कि उनके मध्य सुलह समझौते की वार्ता चल रही है।

काउंसिल द्वारा पक्षकारों को सन्दर्भ सुलह समझौते से निस्तारित किये जाने वास्ते 30 दिन के समय प्रदान किया गया। पक्षकारों को आदेशित किया जाता है कि वे सन्दर्भ में बकाया भुगतान का विवाद निर्धारित समय से आपसी सुलह से करते हुए काउन्सिल को अवगत कराना सुनिश्चित करें। अन्यथा पक्षकारों के मध्य सुलह समझौता न होने दृष्टिगत आर्बिट्रेशन एण्ड कन्सीलियेशन एक्ट-1996 की धारा 76 के प्राविधानानुसार सन्दर्भ में चल रही सुलह की कार्यवाही स्वतः समाप्त मानी जायेगी।

पक्षकारों द्वारा सन्दर्भ सुलह से निस्तारित न किये जाने की स्थिति में सन्दर्भ आगामी बैठक में आर्बिट्रेशन से निस्तारित किये जाने हेतु सूचीबद्ध किया जाये। इस आदेश की प्रमाणित प्रति पक्षकारों को ई-मेल/ स्पीड पोस्ट से प्रेषित की जाये।”

(Emphasis added)

13. On 29.08.2018, a notice was issued to petitioner by respondent-1 directing it to make payment within 15 days from date of receipt of notice, failing which reference/petition filed by respondent-3 shall be registered. The parties could not settle the matter, hence vide order dated 16.09.2019 respondent-1 directed petitioner to file objection/written statement, so that matter may be decided on merits as per provisions of MSMED Act, 2006.

14. Petitioner filed its objection/reply dated 19.10.2019. It also filed an application/petition dated 01.02.2020, requesting respondent-1 to refer the dispute to any Institution/Arbitrator or Centre providing alternate dispute resolution services in terms of Section 18(3) of MSMED Act, 2006 observing that since MASEF Council itself has conducted conciliation proceedings, it is prohibited from acting as Arbitrator by virtue of Section 80 of Act, 1996. It is this application, on which no order has been passed by respondent-1, hence present writ petition has been filed stating that respondent-1 is disqualified to proceed to adjudicate dispute as an 'Arbitrator' and instead it has to refer dispute to another body.

15. Heard Sri Himanshu Kapoor and Sri Prateek Dhanda, Advocates, appearing for petitioner and learned Standing Counsel representing respondent no.2.

16. The question raised before this Court is “whether MASEF Council can act as 'Arbitrator' for adjudication of dispute between the parties or it is obliged to refer the matter to another body and cannot decide on its own?”

17. A pure legal question has been raised, therefore, with the consent of counsel for petitioner and learned Standing Counsel appearing for

respondent-2, we proceed to decide writ petition finally at the stage of admission.

18. For promoting and developing and also enhancing competitiveness of Micro, Small and Medium Enterprises, since there was no statutory provisions dealing with the problem in detail; MSMED Act, 2006 was enacted by Parliament and came into force on 02.10.2006.

19. The Statement of Object and Reasons show that “Small Scale Industry” was defined by Notification issued under 11(b) of Industries Development and Regulation Act, 1951 (hereinafter referred to as “IDR Act, 1951”). Section 29-B of IDR Act, 1951 provided for notifying reservation of items for excluding manufacture in Small Scale Industry Sector. Besides above, there existed no legal framework to deal with the Small Scale Industry Sector, which played major role in the economic of the Country. Time to time need for a comprehensive Central enactment to provide an appropriate legal framework in the sector to facilitate its growth and development was felt necessary, particularly, when in many other Countries, similar Statutes were already framed.

20. Keeping with the pace of globalization and showing due concern for the development of Small and Medium Enterprises, MSMED Act, 2006 was enacted with an intention to provide Statutory definition of “Small Enterprises and Medium Enterprises”; for establishment of a National Small and Medium Enterprise Board, High Level Forum consisting Stake Holders for participative revenue and making recommendations on the policies and programmes for development of Small and Medium Enterprises; for classification of Small and Medium Enterprises on the basis of investment in planned machinery or equipment and establishment of an Advisory Committee to recommend in the related matter; empower Central Govt. to notify programmes, guidelines or instructions for facilitating promotion and development and enhancing competitiveness of Small and Medium Enterprises; to empower State

Govt. to specify by notification that provision of Labour Laws specified in Clause 9(2) will not apply to Small and Medium Enterprise employing up to 50 employees with a view to facilitate upgradation of Small Enterprises into Medium Enterprises; make provisions for ensuring timely smooth flow of credit to Small and Medium Enterprises to minimize the instances of sickness amongst the industries and enhance competitiveness of such Enterprises in accordance with guidelines or instructions of Reserve Bank of India (hereinafter referred to as “RBI”); empowers Central and State Governments to notify preference policies in respect of procurement of goods and service products of profits by Small Enterprises by the Ministry/Department and public sector enterprises; empower Central Govt. to create fund or funds for facilitating promotion and development and enhancing competitiveness of Small Enterprises and Medium Enterprises; to prescribe harmonious example of stream line procedures for inspection of Small and Medium Enterprises under Labour Laws enumerated in Clause-15 having regard to the need of permitting self registration or self certification by such enterprise; prescribe for maintenance of records and filing of return of Small and Medium Enterprises with a view to reduce multiplicity of even overlapping type return be filed; and further improvement in interest of delayed payments to Small Scale Ancillary undertaking Act, 1993 and making that enactment part of proposed legislature and to repeal that enactment.

21. The term “Board” has been defined in Section 2(c) of MSMED Act, 2006 and it reads as under :-

(c) "Board" means the National Board for Micro, Small and Medium Enterprises established under section 3;

22. Other relevant terms defined in Section 2 are, 'Buyer', 'Enterprise', 'Medium Enterprise', 'Micro Enterprise', 'Small Enterprise' and 'Supplier' and the relevant provisions of MSMED of Act, 2006 defining above terms in clauses (d), (e), (g), (h), (m), and (n) read as under:-

(d) "**Buyer**" means whoever buys any goods or receives any services from a supplier for consideration;

(e) "**Enterprise**" means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act/ 1951 or engaged in providing or rendering of any service or services;

(g) "**Medium Enterprise**" means an enterprise classified as such under sub-clause (ii) of clause (a) or sub-clause (iii) of clause (b) of sub-section (1) of section 7;

(h) "**Micro Enterprise**" means an enterprise classified as such under sub-clause (1) of clause (a) or sub-clause (1) of clause (b) of sub-section (1) of section 7;

(m) "**Small Enterprise**" means an enterprise classified as such under sub-clause (it) of clause (a) or sub-clause (ii) of clause (b) of sub-section (1) of section 7;

(n) "**Supplier**" means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes,

23. Section 3 provides for establishment of Board by Central Government by Notification known as "National Board for Micro, Small and Medium Enterprises" (hereinafter referred to as "NBMSME"). Head office of the Board is to be at Delhi. Constitution of the Board is provided in Section 3(3), which we are skipping for the time being.

24. Functions of the Board are provided in Section 5, which reads as under:-

“5. Functions of Board - The Board shall, subject to the general directions of the Central Government, perform all or any of the following functions, namely:-

(a) examine the factors affecting the promotion and development of micro, small and medium enterprises and review the policies and programmes of the Central Government in regard to facilitating the promotion and development and enhancing the competitiveness of such enterprises and the impact thereof on such enterprises;

(b) make recommendations on matters referred to in clause (a) or on any other matter referred to it by the Central Government which, in the opinion of that Government, is necessary or expedient for facilitating the promotion and development and enhancing the competitiveness of the micro, small and medium enterprises; and

(c) advise the Central Government on the use of the Fund or Funds constituted under section 12.”

25. With regard to delayed payment of Micro and Small Enterprises, Chapter 5 contains Sections 15 to 25, imposing an obligation upon Buyer to pay. It also provide an adjudicatory forum in case of a dispute between Buyer and Supplier.

26. Section 15 deals with liability of buyer to make payment; Section 16 provides the date from which rate of interest is payable; Section 17 makes the buyer liable to pay amount with interest for any goods or services rendered by Supplier and Section 18 deals with 'Reference' a dispute for adjudication to MASEF Council.

27. Section 18 is relevant in the present writ petition and is reproduced as under:

“18. Reference to Micro and Small Enterprises Facilitation Council -

(1) Reference : *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) Conciliation : *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) Arbitration : *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.”

(Emphasis added)

28. Composition of MASEF Council is provided in Section 21 of MSMED Act, 2006. The aforesaid Council is to be established by State Government by Notification as provided in Section 20. Both Sections 20 and 21 read as under:

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

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

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

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

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

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

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

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

29. Section 24 says that Sections 15 to 23 shall have effect notwithstanding anything contained in any other law for the time being in force and this provision is also of utmost importance in this petition, hence reproduced as under:-

“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.”

(Emphasis added)

30. Act, 1996 was enacted to consolidate and amend the laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. The Scheme of Act shows that it has four Parts; i.e. Part-I dealing with Arbitration; Part-II dealing with Enforcement of Certain Foreign Awards; Part-III Conciliation and Part-IV having Supplementary Provisions.

31. Part-I is further divided in ten Chapters, while Part-II has two Chapters and Part-III and IV have no Chapters separately.

32. Part-I, Chapter-I has Sections 2 to 6; Chapter-II has Sections 7 to 9; Chapter-III contains Sections 10 to 15; Chapter-IV has Sections 16 and 17; Chapter-V has Sections 18 to 27; Chapter-VI deals with Sections 28 to 33; Chapter-VII has single Section, i.e., 34; Chapter-VIII deals with Sections 35 and 36; Chapter-IX has single Section 37 and Chapter-X has within its ambit Sections 38 to 43. Similarly, Part-II Chapter-I deals with Sections 44 to 52 and Chapter-II deals with Sections 53 to 60. Part-III deals with Sections 61 to 81 and Part-IV deals with Sections 82 to 86.

There are three Schedules appended to Act, 1996. The First Schedule deals with “Convention on the Recognition and Enforcement of Foreign Arbitral Awards”. The Second Schedule deals with “Protocol on Arbitrations Clauses” and Third Schedule deals with “Convention of the Execution of Foreign Arbitral Awards”. Further details of Act, 1996, we propose to consider at later stage whenever it would be appropriate.

33. Now reverting back to MSMED Act, 2006, we propose to deal with Section 18 threadbare to find out the scope and ambit of aforesaid provision and the extent to which provisions of Act, 1996 have been made applicable thereto or are superseded by MSMED Act, 2006 due to “*non-obstante*” clause contained in Section 18(1) and (4) as also Section 24.

34. Interestingly, we find that there are two sub-sections in Section 18 which commences with *non-obstante* clause.

35. First of all Sub-section (1) of Section 18 commences with *non-obstante* clause. It says that irrespective of anything contained in any other law for the time being in force, any party to a dispute with regard to any amount due under Section 17 can make a Reference to MASEF Council. It confers a right upon a party, who is entitled to claim certain amount under Section 17, which is not being paid by other party, who is liable to pay, to raise dispute by making a Reference to MASEF Council. The right under Section 17 talks of right of Supplier to claim payment in respect of goods supplied and services rendered and also lays a corresponding obligation upon buyer that he is liable to pay such amount as due, to Supplier along with interest which is to be computed as per Section 16 of MSMED Act, 2006. This right of making a Reference has been given an overriding effect on any contrary available law.

36. When a Reference is made under sub-section (1) of Section 18; then sub-section-(2) provides procedure, which shall be followed by MASEF Council. Sub-section (2) of Section 18 of MSMED Act, 2006 shows that Council either shall itself proceed with the Reference by

conducting 'Conciliation' in the matter or seek assistance of any Institution or Centre providing alternate dispute resolution services. Where such assistance is sought by MASEF Council from any Institution or Centre, it shall make a 'Reference' to such Institution or Centre for conducting Conciliation.

37. Therefore, sub-section (2) of Section 18 leaves it open to discretion of MASEF Council to either itself proceed on the Reference by first conducting Conciliation or refer the matter to an Institution or Centre providing alternate dispute resolution services to conduct Conciliation. In either case, Reference made under sub-section (1) shall first proceed for conciliation and when such Conciliation is proceeded, for the purpose of procedure, Sections 65 to 81 of Act, 1996 shall apply as if conciliation was initiated under Part-III of Act, 1996. As we have already said, Part-III of Act, 1996 deals with 'Conciliation'. It takes into its ambit Sections 61 to 81. For the purpose of sub-section (2), entire Part-III has not been made applicable and it is only Sections 65 to 81, which have been made applicable by virtue of sub-section (2) of Section 18 of MSMED Act, 2006. The obvious reason is that these provisions deal with the procedure for Conciliation after application for Conciliation is made and Conciliators are appointed under Act, 1996. This procedure has been applied by conciliation which is to be made under Section 18(2) of MSMED Act, 2006. This is called legislation by Reference. Sections 65 to 81 of Act, 1996 have been made applicable for conciliation under Section 18(2) of MSMED Act, 2006 by making provision of Act, 1996 applicable by legislative reforms.

38. Section 61 of Part-III of Act, 1996 deals with the "Application and scope" of Part-III. It says that save as otherwise provided by any law for the time being in force and unless the parties have otherwise agreed, Part-III shall apply to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto. Sub-

section (2) further says that if under some other law for the time being in force certain disputes are not to be submitted to conciliation then Part-III shall not be applicable. Part-III in general, on its own has application subject to any other law and also to the extent, parties have not agreed otherwise. It saves the procedure, otherwise provided, under any law or by parties by mutual agreement and subject to that only, Part-III of Act, 1996 is applicable in general. For the purpose of Section 18(3) of MSMED Act, 2006, however, Section 61 has not been applied, therefore, the subsequent procedure of Part III is not to be read for the purpose of Section 18(3) of MSMED Act, 2006.

39. Section 62 deals with Commencement of conciliation proceedings and provides that the party initiating conciliation shall send to the other party a written invitation to conciliate under Part-III, briefly identifying the subject of the dispute. As per sub-section (2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate. If other party refuses or rejects invitation, there will be no conciliation proceedings. Sub-section (4) deals with situation where other party fails to submit reply either way. In such a case, after thirty days from the date on which invitation was sent by one party, it shall have an election either to treat failure of reply as 'rejection of invitation' and if he so elects, information shall be given to other party. Then Section 63 deals with number of conciliators providing that one conciliator is mandatory but if the parties so agree there may be 2 or 3 conciliators. Section 64 deals with appointment of 'Conciliators'. These provisions of Act, 1996 have also not been made applicable for conciliation under Section 18(2) of MSMED Act, 2006.

40. Sections 61 to 64 have not been made applicable to the Conciliation proceedings as contemplated in Section 18(2) of MSMED Act, 2006 for the reason that when a Reference is made, MASEF Council shall proceed with the conciliation either itself or refer the matter to an Institution or

Centre and therefore, stage up to appointment of 'Conciliator' is already covered by Section 18 sub-sections (1) and (2). That is why, only further procedure provided under Sections 65 to 81 has been made applicable for Conciliation under Section 18(2) of MSMED Act, 2006. Sections 65 to 81 have been made applicable by Section 18(2) of MSMED Act, 2006 with respect to Conciliation as contemplated under sub-section (2) and not for arbitration contemplated by sub-section (3). Therefore, applicability of Sections 65 to 81 will be confined only to the Conciliation proceedings under Section 18(3) and not beyond that.

41. Sub-section (3) will come into operation when Conciliation initiated under sub-section (2) remains unsuccessful and stands terminated without any settlement between the parties. Meaning thereby, when parties fail to reach to a settlement in the Conciliation proceedings under sub-section (2) the conciliation proceedings shall stand terminated. Then next stage of arbitration will arise. For this purpose, sub-section (3) provides the method that arbitration can be taken up by MASEF Council itself or it may refer it to any Institution or Centre providing alternate dispute resolution services. Here also we find that sub-section (3) of Section 18 of MSMED Act, 2006 empowers MASEF Council to itself act as an 'Arbitrator' to take up the arbitration and adjudicate or it may refer the same to be adjudicated by any Institution or Centre providing alternate dispute resolution services.

42. For such arbitration, whether taken up by Council itself or referred to any Institution or Centre, for the purpose of procedure, the entire Act, 1996 has been made applicable as if arbitration was pursuant to an arbitration agreement referred to in Section 7 of Act, 1996. Sub-section (4) re-enforces and makes the authority to enter upon the arbitration. Sub-section (3) is made mandatory by providing that notwithstanding anything provided in any other law otherwise, MASEF Council itself or Centre or Institution providing alternate dispute resolution services shall have

jurisdiction to act as an 'Arbitrator' or 'Conciliator' under Section 18 in a dispute between 'Supplier' located within its jurisdiction and a 'Buyer' located anywhere in India, Therefore in the contingencies referred to in sub-section 4 of Section 18 of MSMED Act, 2006, jurisdiction to act as arbitrator has been conferred upon Council as well as an Institution, as the case may be. This provision prevails over any otherwise provision in any other law. The only condition to attract sub-section (4) is that Supplier is located within the jurisdiction of the Council or the Institution or Centre, which enter upon the dispute as an Arbitrator and Buyer is located in India.

43. Even otherwise, by virtue of Section 61 of Act, 1996 the provisions of Part-III would be applicable so long as otherwise it is not provided by any other law or parties have decided or agreed and therefore, the provisions of Part-III will not prevail over otherwise provisions of MSMED Act, 2006 and, on the contrary, will have to sub-serve and surrender to the provisions of MSMED Act, 2006.

44. In the present case, it is not in dispute that respondent-3 is Supplier and he is located in the jurisdiction of MASEF Council and petitioner, the Buyer, is located in State of Maharashtra, satisfying the requirement of sub-section (4) of Section-18 so as to make it applicable in case in hand.

45. Both sub-sections 3 and 4 of Section 18 of MSMED Act, 2006, when read together, even otherwise, make it abundantly clear and mandatory that MASEF Council, if itself has entered into dispute as an Arbitrator, it shall have jurisdiction to do so and if it refers the matter to any Institution or Centre that will also have jurisdiction irrespective of otherwise law provided in any other Statute and that will also override Section 80 of Act, 1996.

46. Moreover, Section 80 of Act, 1996 by virtue of Section 61 of said Act, cannot override provisions of MSMED Act, 2006 and therefore, it cannot be said that Section 80 of Act, 1996 will exclude MASEF Council

to act as Arbitrator, since it has been Conciliator in the dispute and arbitration therefore cannot be proceeded by it. This argument in fact suppresses and goes contrary to what has been specifically provided in Section 18(3) and (4) of MSMED Act, 2006.

47. When read conjointly Section 24 is further clarificatory and fortifies what we have said earlier. Again it provides that Sections 15 to 23 of MSMED Act, 2006 shall have effect over any otherwise law. This is an overall overriding effect given by Section 24 to Section 18 of MSMED Act, 2006 and in that view of matter Section 18 of MSMED Act, 2006 cannot be read so as to render subordinate to Section 80 of Act, 1996. The counsel for petitioner advancing argument otherwise, in our view, is not correct and the same is accordingly rejected.

48. Now we proceed to consider the authorities relied by counsel for petitioner in support of his submissions.

49. The first is a Division Bench judgment of Bombay High Court in **Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council and others, AIR 2018 Bom. 265**. Therein M/s Gujarat State Petronet Ltd. (hereinafter referred to as "GSPL") floated a tender for supply, installation, construction, testing, commissioning and development of Fire Fighting System at its gas receiving station in June, 2007. Several bidders including respondent-3 participated in the tender process and upon evaluation of bids, respondent-3 was declared successful bidder. Work Order/Purchase Order was issued. After completion of work, there arose a dispute regarding completion of work, quality of work and payment of money. Respondent-3 approached MASEF Council by making a Reference under Section 18(1) of Act, 2006 seeking payment of Rs.36,60,054.64/-. GSPL filed its reply raising an objection that MASEF Council has no jurisdiction to try and entertain Reference in view of Arbitration Agreement in the Purchase Order. MASEF Council by order dated 29.04.2015 terminated Conciliation

proceedings under Section 18(2) and decided itself to entertain Arbitration, entering into dispute as an Arbitrator. This order was challenged in the writ petition and jurisdiction of MASEF Council to entertain dispute as an 'Arbitrator' was challenged.

50. The writ petition was pressed by GSPL relying on a Division Bench decision Nagpur Bench of Bombay High Court in **M/s Steel Authority of India Ltd. And another Vs. The Micro, Small Enterprise Facilitation Council and another, AIR 2012 Bombay 178**. Arbitration by MASEF Council was supported by respondent-3 relying on Section 18(3) and a decision of Gujarat High Court in **First Appeal No. 637 of 2016 (Principal Chief Engineer Vs. M/s Manibhai and Brothers)** decided on 5th July, 2017.

51. Considering rival submissions, Bombay High Court in **Gujarat State Petronet Ltd. (Supra)** held that MSMED Act, 2006 contains special provision for providing delayed payment to such 'Enterprises'. A special procedure for recovery of amount due towards supply of goods and services rendered thereto has been laid down. It further observed that MSMED Act, 2006 does not contemplate arbitration through an 'Arbitrator' appointed by the parties but provides for special forum in the form of MASEF Council or under aegis of any Institution or a Centre providing alternate dispute resolution services as referred by MASEF Council. Section 19 of MSMED Act, 2006 which mandates pre-deposit of 75% of awarded amount, ensures recovery of dues and thus safeguards the interest of all Micro, Small and Medium Enterprises. Act, 1996 do not contains such similar provisions. MSMED Act, 2006 is a special enactment, enacted with an object of facilitating promotion and development and enhancing, competitiveness of Micro, Small and Medium Enterprises, which do not command significant bargaining power. The MSMED Act, 2006 provides for institutional arbitration. Having said so, Court further said:

*“...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 MASEFC 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”.*

(Emphasis added)

52. On this aspect Division Bench of Bombay High Court found that a Division Bench of Gujarat High Court in **M/s Manibhai and others (supra)**, has followed a Division Bench judgment of this Court i.e. Allahabad High Court in the case of **Paper and Board Convertors Vs. U.P. State Micro and Small Enterprise (Writ Petition No. 24343 of 2014)** decided on 29th April, 2014, and that has been affirmed by Supreme Court while dismissing appeal on 5.7.2017 from judgment of Gujarat High Court Hence it followed the proposition laid down by Gujarat High Court and this Court on this aspect.

53. Thereafter it proceeded to consider separately. The question, whether MASEF Council having acted as 'Conciliator' can further act as an 'Arbitrator' under Section 18(3). Answering the same, it has held that in view of Section 80 of Act, 1996 it cannot be done. Paragraphs 20 and 21 reads as follows:

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”

54. To us, the two parts of the judgment of Bombay High Court in **Gujarat State Petronet Ltd. (Supra)** are contradictory. We find ourselves with great respect in disagreement to the aforesaid view taken by Bombay High Court in paragraphs 20 and 21 of the judgment for the reason that Sections 65 to 81 have been applied by Reference under Section 18(2) to conciliation but under sub-Section (3) entire Act, 1996 has been applied, which includes Section 61 of Act, 1996 also. Simultaneously, sub-section (4) of Section 18 very specifically states that notwithstanding anything provided otherwise, MASEF Council shall have jurisdiction to arbitrate when the 'Supplier' is located within its local jurisdiction and 'Buyer' is within India and in such a case when a declaratory and mandatory provision is provided in sub-section (4), Section 80 of Act, 1996 could not have been given overriding effect so as to denude MASEF Council its authority to act as Arbitrator. We accordingly hold and find ourselves unable to be persuaded by the

aforesaid Division Bench decision of Bombay High Court.

55. Then there is a Single Judge judgment of Karnataka High Court in **Pal Mohan Electronics Pvt. Ltd. Vs. The Secretary, Department of Small Scale Industries and others, 2019 (5) Kar.LJ. 72**. Therein M/s Pal Mohan Electronics Pvt. Ltd. (hereinafter referred to as “PMEPL”) was engaged in the business of electronics. Maharashtra State Electricity Distribution Co. Ltd. (hereinafter referred to as “MSEDCL”), invited bids for supply, installation, connection and commission of GSM and GPRS Modems for HT Consumers' Meters, LT Consumers' Metes and Feeder Meters. M/s PMEPL made its bid and was successful. It was issued Purchase Order dated 28.3.2011. It was subsequently modified on multiple occasions. Ultimately MSEDCL terminated the contract with petitioner alleging certain lapses in the working of the Modem. Reference was made under Section 18(1) of MSMED Act, 2006 to MASEF Council. Council did enter into dispute for conciliation and when it failed, proceeded to act as 'Arbitrator'. This was objected by PMEPL. The Court formulated following question for adjudication:

“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.”

56. Following the same reason as given by Bombay High Court in **Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council and others (supra)** the learned Single Judge of Karnataka High Court observed that Section 80 of Act, 1996 must be read with Section 18(3) of MSMED Act, 2006. Paragraph-13 of judgment reads as under:

“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 exclude to an arbitration provided for under section 18 (3) of the Act.”

57. We find that learned Single Judge, while considering Section 18(3) of MSMED Act, 2006 vis-a-vis Section 80 of Act, 1996 has not at all adverted to Section 18(4) of MSMED Act, 2006.

58. Next question considered was, should any exclusion be read because of Section 24 of MSMED Act, 2006 and it was answered by observing as under:

“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.”

59. Karnataka High Court in fact followed the judgment of Bombay High Court in **Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council and others (supra)** and Gujarat High Court in **Principal Chief Engineer Vs. M/s Manibhai and Brothers (supra)**. We find that in para-15, learned Single Judge has observed that Section 80 of Act, 1996 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) and applying Section 24. Unfortunately, when we enquired, are not shown any such alleged salutary principle which could have been given an overriding effect over express statutory provision providing otherwise. Further, we also find that Section 18(4) has been completely overlooked and no reason has been given by referring to Section 18(4) as to why MASEF Council cannot act as Arbitrator, when a specific declaration has been made that it shall have jurisdiction to act an Arbitrator. For application of Section 18(4) to that extent, there is no such condition provided. In our view, therefore, aforesaid Single Judge judgment will not help petitioners and we record our respectful disagreement with the aforesaid authority of the learned Single Judge of Karnataka High Court.

60. We inquired from learned counsel for petitioner as to where such alleged salutary principles that a Conciliator cannot act as an arbitrator is laid down but he could place nothing before us except Section 80 of Act, 1996. Having gone through Section 80, we find that even prohibition therein that Conciliator shall not act as an Arbitrator or as Representative or Counsel of the party in any arbitration or judicial proceedings is not

absolute proposition but it permits parties to have an agreement otherwise. What actually is contemplated therein is that when a Conciliator has formed a particular opinion but parties did not agree to such opinion, in order to avoid any scope of bias on the part of such conciliator, he should not be an arbitrator when such a dispute proceeds for arbitration. This is also clear from the fact that prohibition is also that such Conciliator shall not act as representative or counsel of one of the party when the matter is taken in judicial proceedings. We further find that this principle was recognized in Article 18 of United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”); adopted UNCITRAL Model Law on international commercial arbitration practice. It was adopted in 1985. From the preamble of Act, 1996 we find that the aforesaid Model Law as also Conciliations Rules which were adopted by UNCITRAL in 1980, have been broadly taken into consideration in enactment of Act, 1996. What we feel is that the above prohibition recognized in Section 80 is consistent with one of the well known principle of natural justice that no person shall be Judge in his own cause, of which the element of absence of bias or prejudice is one of the integral aspects. The aforesaid principle cannot be given a pedestal so as to override a mandatory provision made by Legislature, that too, by giving it an overriding effect, and, in our view, Court must endeavour to adhere and uphold the clear and specific provision instead of finding out certain principle which has not been preserved by Legislature. Validity of Section 18(3) and (4) of MSMED Act, 2006 is not under challenge before us. Therefore the provision has to be read, interpreted and followed as it is.

61. There is one more aspect. Normally an Arbitral Tribunal consists of sole Arbitrator or two Arbitrators with or without an Umpire. In such a case, there may be an element of personal prejudice or bias on the part of such persons constituting Arbitral Tribunal, if one of them or all of them have also acted as Conciliator. However, that is not the position in respect of a Reference made under Section 18 (1) of MSMED Act, 2006 since

MASEF Council is a statutory body. Section 21 of MSMED Act, 2006 provides that such Conciliator shall have members not less than three but not more than five. The composition of Council is also given in Section 21(1) (i) to (iv) and it includes Director of Industries or any other officer not below the rank of such Director, in the Department of State Government; Office Bearer or Representatives of Association of Micro or Small Industries or Enterprises; Representatives of Banks and Financial Institutions lending to micro or small enterprises. The persons mentioned in Clause (iv) of Section 21(1) may be brought in Council in the alternative of Representative of Banks and financial institutions lending to Micro and Small Enterprises, if it is found necessary to include persons having special knowledge in the field of industry, finance, law, trade or commerce. Director is Chairperson of MASEF Council. Therefore, the statutory body like MASEF Council does not suffer the element of personal prejudice or bias as is available in the case of individual persons constituting Arbitral Tribunal. It may be that persons constituting MASEF Council at the time of conciliation may not be the same when the said Conciliator took up the matter for arbitration. Therefore, central idea beyond the embargo created by Section 80(1) available in case of individuals constituting Arbitral Tribunal is absent in the matter covered by Section 18 of MSMED Act, 2006 since here, the Council, which is permitted to act as Conciliator as well as Arbitrator is a statutory body having not less than three persons but upto five persons and, therefore, the element of personal bias, prejudice is absent in such a case.

62. Even otherwise, as we have already discussed, Section 80 itself permits an otherwise agreement between the parties. Meaning thereby the embargo that Conciliator shall not be Arbitral Tribunal is not absolute. That being so, the mandatory and overriding effect contained in Section 18(3) and 18(4) and Section 24 of MSMED Act, 2006 cannot be whittled down by referring to a salutary principle though, in our view, no such salutary principle having force of law to the extent that a legislative

provision must be read as sub-serving is recognized or available.

63. In view of above discussion, we are clearly of the view that MASEF Council having acted as Conciliator is not barred from working as Arbitral Tribunal to arbitrate the dispute under Section 18(3) and such jurisdiction of MASEF Council has been given overriding effect by virtue of Section 18(4) and Section 24 which have to be given complete swing in the area covered by same. The argument, therefore, advanced otherwise by learned counsel for petitioner is hereby rejected. The question, formulated above, is answered against petitioner and we hold that MASEF Council is not prohibited from working as Arbitrator itself for adjudication of dispute between the parties and it is not obliged to refer the matter to any other body.

64. No other point has been argued.

65. The writ petition lacks merits. Dismissed, accordingly.

Order Date :- 3.3.2020

Prajapati