IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.01.2020

Coram

The Honourable Mr.Justice **M.M.SUNDRESH**

and

The Honourable Mr.Justice **KRISHNAN RAMASAMY**

**Original Side Appeal No.231 of 2019**

Ved Prakash (Authorized Representative)
M/s Karmic Energy Private Limited,
851, Ground Floor, Udyog Vihar Phase-V,
Gurgaon, Haryana-122 016. ... Appellant

Vs.

P.Ponram, Managing Partner,
M/s Unicon Engineers,
513-A/6, Bharathi Road,
Chinnavedampatty,
Coimbatore-641 049. ... Respondent

Original Side Appeal is filed under Order XXXVII of the Arbitration and Conciliation Act, 1996, read with Clause 15 of the Letters Patent against the order and decree dated 08.01.2019 made in O.P.No.424 of 2018.



For Appellant : Mr.Rajkumar Jhabakh
For Respondents : Mr.B.Manoharan

**JUDGMENT**

**(Judgment of the Court was delivered by M.M.SUNDRESH,J.)**

This appeal has been preferred against the dismissal of O.P.No.424 of 2018.filed invoking Section 34 of the Arbitration and Conciliation Act, 1996, by which, the award dated 05.08.2016 has been confirmed.

**2. Brief Facts:-**

**2.1.**The appellant before us was the purchaser while the respondent, supplier. The respondent is engaged in manufacturing of Electro Static Precipitation(ESP) components. Supplies were made to the appellant by the respondent. As there was substantial due from the appellant to the respondent, after making all efforts, an approach was made by seeking a reference under the provisions of Micro, Small & Medium Enterprises Development Act, 2006 (hereinafter referred to as 'MSMED Act') to the Micro and Small Enterprises Facilitation Council (for short 'MSEF Council') by invoking Section 18 of the MSMED Act. The Council sent its letter along with enclosures to the appellant, by the letter dated 10.05.2015. To be noted, the respondent has given due intimation to the appellant that he would initiate proceedings under MSMED Act through their communication

dated 26.12.2015. After due acknowledgement of the notice by MSEF Council, the appellant sent a letter stating that it would go under the arbitration as per the following clause contained in the agreement sent by the parties.

> "**N.Arbitration:**
> If at any time, any question, dispute, or difference whatsoever shall arise between the Purchaser and the Supplier upon or in relation to or in connection with the contract, either party may forthwith give to the other notice in writing of the existence of such question, dispute or difference and the same shall be referred to the adjudication of one Arbitrator to be nominated by the Purchaser in their sole discretion only with place of Arbitration being New Delhi. The award to be given by such arbitrator shall be final and binding on the parties hereto."

The appellant also intimated the respondent about the appointment of an Arbitrator by the communication dated 03.06.2016.



**2.2.**Objections were also raised through the counsel before the MSEF Council. The appellant, after taking sufficient time, did not choose to appear further. Accordingly, the conciliation proceedings were closed and thereafter, the arbitration proceedings started. The appellant continued to

be absent in view of his stand that the proceedings before the MSEF Council is not maintainable. By going through the relevant records, the award was passed on 05.08.2016.

**2.3.**Upon coming to know of the award having been passed followed by the execution proceedings, the appellant approached this Court invoking Section 34 of the Arbitration and Conciliation Act while seeking pre-deposit, which is the condition precedent mandated under Section 19 of the MSMED Act. The appellant contended that the very proceeding itself is not maintainable. It was accordingly answered by the learned single Judge through the following passage in the order dated 22.03.2017.

> "**8.** At this juncture, it is appropriate to consider the case of **Edukanti Kistamma (Dead) through LRs. V. S.Venkatareddy (dead) through Lrs (2010 (1) SCC 756)**, where the Supreme court explained that a special statute would be preferred over a general one where it is beneficial. It was explained that the purport and object of the Act must be given its full effect by applying the principles of "purposive construction". The question whether the dispute resolution mechanism under Section 18 of the MSMED Act overrides the arbitration clause under the contract has to be answered in the affirmative. As was explained in **Waman Shriniwas Kini V. Ratilal Bhagwandas & Co. (A.I.R. 1959 S.C. 689)** an agreement

contrary to a statutory provision that prohibits it would be unenforceable.

**8.1.**Thus, it is clear that, out of two enactments, the provisions of the MSMED Act would prevail especially when it has a overriding provision under Section 24 where it has been clearly said that Section 15 to 23 shall have the overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, the contention that the award passed by the Council is patently illegal , has to be rejected and it is rejected accordingly."

**2.4.**An appeal was preferred before this Court in O.S.A.No.96 of 2017, which was also disposed of on 25.10.2017. The following is the requisite finding given.

"17. On the short point that Section 19 of MSMED Act is non-negotiable, we are not inclined to interfere with the order of the learned Single Judge. No infirmity or illegality in the order of the learned Single Judge has been pointed out before us.

18. In fact, the learned Single Judge has been considerate in permitting the appellant to make pre-deposit in three instalments. Therefore, we are of the considered opinion that there is no need to interfere with the order of the learned Single Judge.

19. At this juncture, learned counsel for the appellant

made a request to us that the time granted by the learned Single Judge for pre-deposit of 75% of the Award amount may be extended. Mr.R.Sankara Narayanan, learned Senior Counsel appearing for the counsel on record for the respondent in his usual fairness did not oppose this request.

20. Therefore, we are inclined to say that pre-deposit of 75% of the Award amount as contained in Section 19 of MSMED Act be made by the appellant, for which three instalments were permitted by the learned Single Judge vide order dated 22.03.2017 in Application No.1511 of 2017 in O.P. Diary No.6821 of 2017, now stands extended/modified. The extended/modified time frame is that the aforesaid 75% of the pre-deposit Award amount shall now be made in three equal fortnightly instalments and the first instalment shall be within a fortnight from the date of receipt of a copy of this judgment. In all other aspects of the matter, the order of the learned Single Judge stands confirmed.

21. With the above observations and directions, the appeal is disposed of. Interim order already granted by this Court vide order dated 10.08.2017 shall continue to operate for a period of eight weeks from the date of receipt of a copy of this order. Considering the nature of the matter and the trajectory of the proceedings, there will be no order regarding costs. Consequently, CMP.Nos.6698 & 8485 of 2017 are disposed of."

**2.5.**Challenging the aforesaid order, a Special Leave Petition in SLP No.3931 of 2018 was filed by the appellant, which was also disposed of on 12.02.2018 by merely giving further time for pre-deposit of 75% of the Award Amount.

**2.6.**Thereafter, the appellant made the said deposit though it is the case of the respondent that appropriate amount has not been paid. The learned single Judge, however, did not go into the said issue while deciding to take up O.P.No.424 of 2019 on merit. Accordingly, it was dismissed by rejecting the contention of the appellant on the question of maintainability. Challenging the same, the present Original Side Appeal has been filed.

**3.<u>Submissions of the learned counsel for the appellant</u>:**

**3.1.**Mr.Rajkumar Jhabakh, learned counsel appearing for the appellant, has laid two submissions. It is his first submission that the mechanism provided under the MSMED Act will have to give way to the agreed terms contained in the agreement by way of arbitration. For the aforesaid submission, reliance has been made on the judgment of the Division Bench of the High Court of Bombay at Nagpur in **M/s Steel Authority of India Ltd., V. Micro, Small Enterprise Facilitation Council**

**(2010 SCC Online Bom. 2208)**.

**3.2.**The other contention raised is to the continuation of the proceedings from conciliation to arbitration by the same persons of the MSEF Council. It is submitted that this procedure is contrary to the Arbitration and Conciliation Act, 1996.

**4.<u>Submissions of the learned counsel for the respondent</u>:**

**4.1.**The learned counsel appearing for the respondent submits that the appeal itself is not maintainable as the appellant has not complied with the pre-deposit of 75%. This 75% would mean the one awarded by the MSEF Council along with the interest component. The appellant did not even choose to appear for conciliation in person. In fact, he did not want conciliation as it was his case that the proceedings are not maintainable. Thus, he was aware of the proceedings. Strangely, he did not even pursue his stand of initiation of arbitral proceedings. The first contention sought to be raised has become concluded against the appellant in the earlier proceedings. He further submitted that the second contention also does not hold good in view of Section 18 of the MSMED Act having been upheld by the Division Bench of this Court in **M/s Refex Energy Limited, by its**

**Managing Director Vs. Union of India and another dated 02.06.2016**.

**4.2.**It is further submitted that the judgment of the Division Bench of Bombay High Court relied upon by the appellant has been impliedly overruled by the Apex Court which upheld the contra view of the High Court of Gujarat at Ahmedabad in **Principal Chief Engineer Vs. M/z Manibhai and Brothers (Sleeper), the Apex Court in Diary No.16845/2017 dated 05.07.2017,** wherein the interpretation on Section 18 of MSMED Act, has been upheld. Thus the appeal is liable to be dismissed.

**5.DISCUSSION:**

We have already narrated the facts. As there is no dispute with respect to the same including the non participation of the appellant in the conciliation and arbitration proceedings except appearance through the counsel at the initial stage. We would like to concentrate on the law governing the subject.



**6. Section 18 of the MSMED Act.**

**6.1. "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."

**6.2.** Section 18(1) deals with reference to Micro and Small Enterprises Facilitation Council. It contains a non obstante clause. Thus it has a precedent over the other law. This is also a special Act. As recorded, this provision under Section 18 has also been held to be constitutionally valid.

**6.3.**Under Section 18(2) of the Act, it is open to the Council to undertake the process of conciliation either by it or through a deciding authority. The proceedings are to be conducted in tune with Sections 65 to 81 of the Arbitration and Conciliation Act, 1996.

**6.4.**Sub Section 3 of Section 18 of the Act speaks of further follow up action on the termination of conciliation initiated under Sub Section 2. However, if it becomes a failure, in such a case, the Council by itself can take up the dispute for arbitration or refer it to any institution or Centre.

This provision provides for both roles to the Council. The Council being a statutory body and not associated with either the supplier or the purchaser, and therefore independent, has been given the role to act either as conciliator or arbitrator or both. Thus, no bias or likelihood of bias can be attributed against a statutory party whose role is defined accordingly. Perhaps, an element of likelihood of bias might arise, when some persons acting on behalf of the Council act as conciliators and thereafter arbitrators. Therefore, while no allegation of likelihood of bias raised against the Council there is a possibility of the Conciliators getting impacted while discharging their roles as such and thereafter, changing them to that of Arbitrators. This may not be advisable. There is a marked difference between a conciliator acting as an arbitrator and vice versa. An Arbitrator may act as an conciliator during the course of arbitral proceedings. However, the role of conciliator being different and distinct, he would be better advised not to take the role of an Arbitrator thereafter, between the same parties pursuant to the termination of conciliation. This would ensure an element of fairness in action.



**7.<u>Arbitration and Conciliation Act, 1996:-</u>**

**7.1.**Section 30 of the Act speaks of settlement between the parties,

which is to be encouraged by the Arbitral Tribunal. It is apposite to refer the same hereunder.

> **30. Settlement.—**
>
> (1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.
>
> (2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
>
> (3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.
>
> (4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.



Thus, Section 30 of the Arbitration and Conciliation Act, 1996 is meant to encourage the parties to arrive at a settlement through the aegis of the arbitral Tribunal and importantly with the agreement of the parties. After

that, the agreed terms would confirm part of the award of the Tribunal.

**7.2.**Part-III of the Act deals with Conciliation. Section 80 speaks of the role of a conciliator in other proceedings. Even here, the bar to act as an arbitrator between the same parties would arise when there is no consent. This Act, once again reiterates the position that a conciliator is not required to act as an arbitrator unless agreed upon as against the arbitrator indulging in conciliation.

**8. Arbitration agreement Vs. Section 18 of the MSMED Act:**

**8.1.**As stated, the Act would certainly have a primacy. It also provides for arbitration preceded by conciliation. One has to see the object and rationale behind the special enactment which is to encourage the parties to go for negotiation followed by the arbitration. In **M/s Steel Authority of India Ltd., V. Micro, Small Enterprise Facilitation Council (2010 SCC Online Bom. 2208)**, the Division Bench of Mumbai High Court has held as follows.

> 11. Having considered the matter, we find that Section 18 (1) of the Act, in terms allows any party to a dispute relating to the amount due under Section 17 i.e. an amount due and payable by buyer to seller; to approach

the facilitation Council. It is rightly contended by Mrs. Dangre, the learned Addl. Government Pleader, that there can be variety of disputes between the parties such as about the date of acceptance of the goods or the deemed day of acceptance, about schedule of supplies etc. because of which a" buyer may have a strong objection to the bills raised by the supplier in which case a buyer must be considered eligible to approach the Council. We find that Section 18(1) clearly allows any party to a dispute namely a buyer and a supplier to make reference to the Council. However, the question is; what would be the next step after such a reference is made, when an arbitration agreement exists between the parties or not. We find that there is no provision in the Act, which negates or renders an arbitration agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the provisions of Section 15 to 23-including section 18, which provides for forum for resolution of the dispute under the Act-would not have the effect of negating an arbitration agreement since that section overrides only such things that are inconsistent with Section 15 to 23 including Section 18 notwithstanding anything contained in any other law for the time being in force. Section 18(3) of the Act in terms provides that where conciliation before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution and that the provisions of

the Arbitration and Conciliation Act, 1996 shall thus apply to the disputes as an arbitration in pursuance of arbitration agreement referred to in Section 7 (1) of the Arbitration and Conciliation Act, 1996. This procedure for arbitration and conciliation is precisely the procedure under which all arbitration agreements are dealt with. We, thus find that it cannot be said that because Section 18 provides for a forum of arbitration an independent arbitration agreement entered into between the parties will cease to have effect. There is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996."

**8.2.**After having held as above, the Division Bench was pleased to direct the parties to exhaust Sections 18 (1) and (2) of the MSMED Act before resorting to the arbitration as agreed upon by way of an agreement, which is as follows.



"14. In the circumstances, we hold that respondent No.1- Council is not entitled to proceed under the provisions of Section 18 (3) of the Act in view of independent arbitration

agreement dated 23.09.2005 between the parties. The petitioners and respondent no.2 shall, however, participate in the conciliation, which shall be conducted by respondent no.1-Council under the provisions of Section 18 (1) and (2) of the Act. Respondent no.1-Council shall complete the process of conciliation within a period of two weeks from the date the parties appear before it. The parties are directed to appear before respondent no.1-Council on 25.10 .2010."

**8.3.** The law laid down in the aforesaid judgment of the Division Bench, in our considered view, makes a party to undergo a process both under the MSMED Act and thereafter before the Arbitrator as per the terms of the agreement. Once a party is bound to exhaust Section 18 (1) and (2) of the MSMED Act, he has to go further by seeking remedy under Section 18 (3) of the MSMED Act.

**8.4.**The judgment of the Division Bench of the High Court of Bombay, Nagpur Bench, has been taken note of and not found in agreement by the Division Bench of the High Court of Gujarat at Ahmedabad in **Principal Chief Engineer Vs. M/z Manibhai and Brothers (Sleeper)**. We place on record the following passage.

"6.2. Considering the aforesaid decisions of the Hon'ble Supreme Court and the law laid down by the Hon'ble Supreme Court, the Council acting under Section 19 of the Act, 2006 cannot be said too be "Judicial Authority" performing judicial function or quasi judicial functions. As observed herein above, after conciliation failed, thereafter once the Council act as an Arbitrator itself, thereafter the Council had no jurisdiction to entertain the application under Section 8 of the Act. On fair reading of subsection (3) of Section 18 only in a case where the Council itself does not act as an Arbitrator and decide to refer the parties, centre or institution providing alternate dispute resolution services as observed in subsection (3) of Section 18 the provision of the Arbitration Act shall then apply to the dispute if the arbitration is in pursuance of the Arbitration Act refer to subsection (1) of Section 7 of that Act.

8.0. Now, so far as reliance placed upon the decision of the Division Bench of the Bombay High Court in the case of **M/s. Steel Authority of India Ltd and Anr (supra)** relied upon by Shri Patel, learned advocate for appellant, for the reasons stated above provision of Act 2006 referred herein above and the Act 2006 being Special Act under which the parties are governed, we are not in agreement with the view taken by the Division Bench of the Bombay High Court and we are in complete agreement with the view taken by the Division Bench of the Allahabad High Court in the case of **Paper and Board Convertors (supra).**"

**8.5.**Challenge was made to this judgment before the Apex Court in Diary No. 16845 of 2017 dated 05/07/2017 which was dismissed with the following order.

> "We have given our thoughtful consideration to the submissions advanced before us yesterday and today.
> We are satisfied, that the interpretation placed by the High Court on Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, in the impugned order, with reference to arbitration proceeding is fully justified and in consonance with the provisions thereof. Having affirmed the above, we are of the view, that all other matters dealt with in the impugned order are not relevant for the adjudication of the present controversy, and need not be examined."

**8.6.** Section 18 of the MSMED Act has been upheld by the Division Bench of this Court in **M/s Refex Energy Limited, by its Managing Director Vs. Union of India and another dated 02.06.2016** referred supra, in which it has been held as follows.

> "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."



**8.7.**Thus, the issue involved is no longer *res integra*. Therefore,

there is no bar to proceed further after the termination of conciliation proceedings. However, as discussed by us earlier, such proceedings by way of an arbitration shall not be conducted by the very same persons, who acted as conciliators. Thus, we hold so by taking note of Section 75 of the Arbitration and Conciliation Act, 1996, which lays emphasis on the confidentiality of the conciliator. When a conciliator is expected to maintain confidentiality of the matters conveyed to him, he cannot thereafter change his role by involving himself in a continuing process, such as, arbitration. As Sections 65 to 81 of the Arbitration and Conciliation Act, 1996, are applicable to the proceedings under Section 18 of the MSMED Act, such conciliators, after termination, shall not act as arbitrators. We may also note that this aspect of the matter has not been dealt with by the Division Bench of this Court, which rightly held that the Council can perform the twin roles. As there is a marked difference between the role of the Council and the person appointed by it to perform as arbitrator, one shall not perform the twin roles unless and ofcourse parties voluntarily affirm to it.



**9. <u>Case on hand:-</u>**

In the case on hand, the appellant did not even take part in the conciliation process except by filing vakalath through his counsel. His

objection was with respect to the maintainability. Such a stand was taken even earlier by sending a reply to the respondent, when it wanted to go through the arbitration in accordance with the terms of the agreement. Even that process he did not adopt. Being aware of the entire proceedings, it was primarily concerned with the jurisdiction of the Council, thus, did not even appear to respond to the arbitration proceedings and raised any objection either on law or on fact. Its grievance is against the jurisdiction and not the persons.

**10.** The contentions raised before us, especially with respect to the jurisdiction, has also been raised on the earlier occasion. Though we deal once again in an elaborate manner, suffice it is to state that the intention of the appellant is to drag on the proceedings and avoid its liability. The Tribunal passed a speaking order on merit. Thus, looking from any perspective, we do not find any reason to allow this original side appeal and accordingly, the same is dismissed. However, we place on record the excellent argument made by the learned counsel appearing for the appellant. No costs.

**(M.M.S.,J.)** **(K.R.,J.)**

**23.01.2020**

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**M.M.SUNDRESH,J.**
**and**
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**O.S.A.No.231 of 2019**