IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

(1) CWP No.23016 of 2011 (O&M)
Date of Decision:13.12.2011

Welspun Corp. Ltd. ... Petitioner

Versus

The Micro and Small, Medium Enterprises Facilitation Council, Punjab and others.

... Respondents

(2) CWP No.23017 of 2011 (O&M)

Welspun Corp. Ltd. ... Petitioner

Versus

The Micro and Small, Medium Enterprises Facilitation Council, Punjab and others.

... Respondents

(3) CWP No.23018 of 2011 (O&M)

Welspun Corp. Ltd. ... Petitioner

Versus

The Micro and Small, Medium Enterprises Facilitation Council, Punjab and others.

... Respondents

(4) CWP No.23019 of 2011 (O&M)

Welspun Corp. Ltd. ... Petitioner

Versus

The Micro and Small, Medium Enterprises Facilitation Council, Punjab and others.

... Respondents

(5) CWP No.23023 of 2011 (O&M)

Welspun Corp. Ltd. ... Petitioner

Versus

The Micro and Small, Medium Enterprises Facilitation Council, Punjab and others.

... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Puneet Bali, Advocate and
Mr. Amit Parashar, Advocate,
for the petitioner.

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1. Whether reporters of local papers may be allowed to see the judgment? YES
2. To be referred to the reporters or not? YES
3. Whether the judgment should be reported in the digest? YES

K. KANNAN, J. (Oral)

1. All the 5 writ petitions challenge the order passed by the Chairman, Industrial Facilitation Council before which the 3rd respondent-Mithila Malleables Pvt. Ltd. had sought initially for conciliation for the dispute arising out of a claim towards cost of equipments for supplies effected to the petitioner. On an attempt of the Council to proceed with conciliation, in spite of the petitioner raising an objection and expressing his unwillingness to participate, the petitioner had earlier approached this Court through CWP Nos.13107 to 13112 of 2011. This Court had observed that the parties could not be compelled for conciliation and if he was not willing to have the benefit of such conciliation, he was entitled to seek reference for arbitration. When the proceedings went back to the Council, the petitioner had by that time issued a notice to the seller seeking for arbitration in the manner contemplated by the agreement between parties. The agreement provided for a reference to arbitral Tribunal in case of disputes between

themselves through the procedure established under the Arbitration and Conciliation Act, 1996 (for short, 'the Act, 1996'). The 3rd respondent-seller did not respond to the notice and instead sought the Council itself to act as an Arbitrator by invoking Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 (for short, 'the Act, 2006').

2. The Council rejected the plea of the petitioner that the agreement provided for a reference to arbitration under the Act, 1996 and that the dispute shall not be adjudicated before the Council. According to the petitioner Section 18(3) of the Act, 2006 must be read harmoniously with the Arbitration Act, 1996 and it shall give place to the latter Act. The Council rejected the plea of the petitioner and proceeded to hold that the Act, 2006 was a special central enactment that provided for a mechanism realization of amount for goods supplied by a seller to a buyer, both of which were industries to which the provisions of the Act, 2006 had admittedly applied, the provisions of the Act, 1996, which was a general enactment has to be read down to give a full play for the applicability of the Act, 2006. The Council, while proceeding to pass the impugned order, had observed that for consideration of the the dispute relating to the entitlement or otherwise of the 3rd respondent-company to secure the value for the goods supplied, the parties were to appear before the Council at the next hearing, which would be communicated

separately. This order was passed on 15.11.2011 and that is in challenge in all the above writ petitions.

3. There is no denying the fact that the petitioner and the 3rd respondent fulfill the respective capacity as buyer and seller in the manner contemplated by the Act, 2006. There is also no denying the fact that the 3rd respondent claims that he has supplied goods for which the payments had not been made in full by the petitioner, while the petitioner has serious issues about some breach of the terms of the contract and denies the alleged claim to entitlement by the 3rd respondent. The petitioner has on the other hand counter claims for the loss, which the petitioner was alleged to have suffered by the conduct of the 3rd respondent by breach of some of the essential terms of contract of supply.

4. Learned counsel appearing for the petitioner would mount several objections on the validity of the order. Firstly, he would contend that the Act, 2006, which contemplates a resolution of a dispute under Section 18 through a reference, is in the context of a recovery of amount provided under Section 17 of the Act, 2006.

> *"Recovery of amount due. - For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16."*

Learned counsel would read to this provision to mean that it

contemplates a buyer's liability to pay the amount with interest as provided under Section 16 and to that extent it excludes any possibility of any counter claim by the buyer against the seller. I would reject this objection right away, for, a liability to pay is invariably a reckoning of the mutual rights of the parties and when Section 17 contemplates a buyer's liability to pay, the assessment cannot and ought not to exclude the liability of the seller to pay, if any. This issue was dealt within a slightly different context in the proceedings under the Recovery of Debts Due to Banks & Financial Institution Act, 1993, which originally did not contain a provision for making a set-off by a debtor. It came after the decision of Hon'ble the Supreme Court in ***"United Bank of India v. Abhjit Tea Co. (P) Ltd., 2000(7) SSC 357"*** that allowed for a plea for counter claim/set-off to be entertained that the law itself was amended explicitly by amending Section 19(6) of the 1993 Act to make explicit what the law even otherwise made possible. I would not, therefore, find that Section 17 does not fetter a buyer to plead that he is not liable to pay the money and that there is some entitlement, which he has against the seller himself. The Act, 2006 would, therefore, make possible a reference to include even a right, which a buyer claims against the seller.

5. Learned counsel would contend that the reading of Section 18 of the Act, 2006 makes it clear that insofar as it

makes provision for conciliation, the provisions of Sections 65 to 81 of the Act, 1996 as applicable, it should be so read that even the provision under Section 80 of the Act, 1996 that bars a Conciliator for acting as an Arbitrator must be applied. According to the learned counsel, Section 18(2) itself allows for a full applicability of Sections 65 to 81 and therefore, the non-obstante clause in Section 18(1) ought not to be used to eclipse Section 80 itself. In my view, this is not a correct reading of Section 18. The Act, 2006 itself contains provisions, which are at once consistent with the Act, 1996. It must be remembered that the Act, 2006 is also an Act of Parliament and it is a special enactment meant for a particular class of persons only namely the Micro, Small and Medium Enterprises and for facilitating the promotion, development and enhancing their *inter se* competitiveness. The Act insofar as it contains a specific provision for conciliation and arbitration is alive to the issue that it could come into conflict with some of the provisions of the Act, 1996. There could also be certain other conflicts relating to recovery modes provided under other Central enactments. Consequently, there is an express provision under Section 24, which spells out an overriding effect of the Act. If there was no conflict or likely to be a conflict, it will be even futile to introduce such a provision. We must read into every section of an enactment of Parliament, a wisdom, which the

Courts are bound to apply as having been exercised by the Legislature.

> "*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.*

To the extent to which Section 18 contains a particular procedure for an arbitration and the same Act also provides a particular method of setting aside an award passed by an Arbitrator, surely, the said provisions must have precedence over what is contained in the 1996 enactment.

> "*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.*
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> *(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.*

> *(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it 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. (emphasis supplied)*
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> *(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.*
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> *(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."*

Section 18(3) provides that where a conciliation initiated under Section 18(2) is not successful and stands terminated without any settlement between parties, the Council shall itself take up the dispute for arbitration. Therefore, when there is an express provision under Section 18(3) providing for conciliator to act as an Arbitrator, it will be untenable to contend that Section 18

will still apply. The restrive application to Section 18(3) is sought to be made by the counsel by contending that this clause will apply only in cases where there is no agreement between the parties for an arbitration in their own contract. According to the learned counsel, since the contract specifies that the parties shall be at liberty to seek for an arbitration under the Act, 1996, the said contract must prevail. If the statute does not save the sanctity of specific terms of contracts by making express provision that it shall be subject to any contract to the contrary, it must be so read that the legislation must prevail over the individual volition of parties.

6. In this case, if there was a contract between the parties to have an arbitration made under the Act, 1996 and the Conciliator had proposed to terminate its conciliatory postures, it was competent for it to treat itself as an Arbitrator and proceed the arbitral process in the manner contemplated under Section 18(3). I cannot read Section 18(3) in the manner canvassed by the learned counsel that Section 18(3) will apply only if there is no contract between the parties for a reference to arbitration under the Act, 1996. On the contrary, the latter part of Section 18(3) that the provisions of the Act, 1996 would apply to a dispute as if the arbitration was in pursuance of an arbitration agreement shall be read in such a way that it is applicable only to a situation where the Council deems fit to

refer to any institution for an alternate dispute resolution services for such an arbitration. Section 18(3) provides for two procedures: (i) on termination of conciliation, it can either take up the arbitration itself or (ii) refer the matter to arbitration as though there is an arbitral agreement between the parties. It is possible for a Council to make a reference to arbitration even in the absence of an arbitration agreement. If there is an arbitration agreement between the parties, it only means that the power is still available when the Council, without invoking its own powers. It can simply observe that in terms of the agreement between the parties, the parties shall be at liberty to have an arbitration done under the Act, 1996. It does not exclude a construction that whenever there is an arbitration clause, the Council does not have a power to act as an Arbitrator. Such an interpretation would render nugatory the first portion of Section 18(3) that allows it to proceed to arbitrate. I would, therefore, uphold the specific reasoning, which the impugned order makes in stating that:

> *"If Section 18 of the Act, 2006 provides for a mode of resolution of a dispute wherein this Council is to adjudicate acting as an arbitrator in terms of the Act, 1996, it would not be open for any party to oust the said jurisdiction of this Council which has been vested in terms of Section 18(3) of the Act, 2006 merely by creating a mutual agreement. The Agreement cannot over*

ride the provisions of the Act, 2006 in view of the aforesaid fact."

7. The learned counsel states, to a specific query as to why the petitioner has a problem for obtaining an adjudication through the Council as an Arbitrator, would contend that the contract between the parties contemplates appointment of an Arbitrator by each party and a provision for appointment of an Umpire, but that remedy will be lost if the Council itself has to act as an Arbitrator where his own individual volition comes to nought. The counsel would further contend that there are other stringent provisions of the Act, 2006, such as requirement of having to deposit 75% of the amount determined by the Arbitrator through an award for an application under Section 19, which an application under Section 34 of the Act, 1996 does not enjoin. This points out to the inconsistency in provisions between the Act, 2006 and the Act, 1996 but the Act, 2006 still obtains primacy of its application through the overriding effect, which we had stated above. If an arbitration made under Section 18 proceeds to an award directing the payment between the parties, the manner of setting aside the award cannot happen under Section 34 of the Act, 1996 but it has to be still only in the manner contained under Section 19 of the Act, 2006. Inevitably, it has to be so and if an express provision in a statute would contain a non-obstante clause and overriding effect of the Act, a full play to the same Act must be given and it

shall become possible to apply the Act, 1996 only to such matters of procedures as the Act, 2006 itself does not provide for. For instance, the Act, 2006 contains no procedure for conducting arbitral process; the Act, 2006 does not contain provisions for challenging the Arbitrator's impartiality; the Act, 2006 does not still contain any provision for enforcement of process where an award was obtained in a foreign jurisdiction. The above are merely illustrative and not exhaustive. But in respect of provisions relating to appointment of Arbitrator or commencement of arbitral process, the binding nature of arbitral award and the manner of redressal of a person not satisfied with the award would perforce have to conform to the provisions of section contained in Sections 18 and 19 of the Act, 2006. I would, therefore, find that if the Council found that the Act, 2006 empowers it to act as an Arbitrator, I would not find any error in the said order.

8. The learned counsel would also point out to me that in the order passed by this Court earlier in CWP No.13111 of 2011, it had been found that if there is a refusal to refer the matter to the arbitration, the petitioner was entitled to have the remedy under the Act, 1996 in terms of Section 11 but the manner in which the Council has provided to treat itself as an Arbitrator amounted to violation of the directions contained in the order. The Council has also dealt with this objection in the

order itself and in my view correctly. This clause could have obtained relevance where the arbitral dispute had not been referred to arbitration. As per the procedure under Section 18 (3), the reference could have been either by the Council acting itself as an Arbitrator or it could have made a reference to an Arbitrator constituted under the Act, 1996. If he had omitted to do either one of them, it should have been possible for the petitioner to apply under Section 11 of the Act, 1996. Admittedly, till date a resort to Section 11 had not been made. This has also been referred to in the impugned order. In a case, where the Council has constituted itself as an Arbitrator then, it has done an act allowing for appointment of an Arbitrator and setting the arbitral process in motion. Consequently, a need for appointment of an Arbitrator under Section 11 of the Act, 1996 does not arise.

9. There are at least 25 central enactments, which contain provisions for statutory arbitrations. The provisions that are frequently invoked are statutory arbitration provided under the Telegraph Act and amongst the State enactments, the State Cooperative Societies Act. The reference to statutory arbitration and the primacy that it obtains over contractual reference to independent modes of resolution of disputes had come before Hon'ble the Supreme Court in several cases. In "***Registrar, Cooperative Society v. Krishan Kumar Singhania, 1995(6)***

SCC 482" the Supreme Court dealt with a conflict between the statutory arbitration contained under the West Bengal Cooperative Societies Act and the Arbitration and Conciliation Act, 1996 and provided for a primacy of application of the State Act. In "***Punjab State Electricity Board v. Guru Nanak Cold Storage, 1996(5) SCC 411"***, the Supreme Court was considering the effect of some of the provisions of the Electricity Act and a provision for an arbitration outside the scope of the Act, 1996. These are merely to state that the issue is not *res integra.* The conflicts have existed and the Courts have never found it essential at all times to give the Act, 1996 a primacy. In this case, the Act, 2006 which is an Act of the Parliament and will hold itself field for determining the rights of parties for the disputes that they have arisen between a supplier and a buyer. The arbitral proceedings before the Council have not made much head way except that through the impugned order, it is clear that the Council has decided to accept the termination of conciliation proceedings and it has stated that the case was being adjourned and the parties will be informed the future date of hearing. The petitioner shall have his recourse only under the Act, 2006 and with reference to the procedures for which the Act, 2006 does not make provision for conducting the arbitral process, he shall be entitled to resort to the Act, 1996 to the extent to which it is applicable.

10. In the light of the above reasoning, the writ petitions challenging the impugned order ought to fail and accordingly dismissed.

DECEMBER 13, 2011 (**K. KANNAN**)
Rajan **JUDGE**