

JHARKHAND URJA VIKAS NIGAM LIMITED

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v.

THE STATE OF RAJASTHAN & ORS.

(Civil Appeal No. 2899 of 2021)

DECEMBER 15, 2021

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[INDIRA BANERJEE AND R. SUBHASH REDDY, JJ.]

Micro, Small and Medium Enterprises Development Act, 2006 – s.18(2), (3) – Claim by respondent no.3-supplier against appellant before the Rajasthan Micro and Small Enterprises Facilitation Council for payment of bill – Appellant did not appear before the Council on which Council directed the appellant to make payment as claimed – Challenge against – Held: Under s.18(3), when conciliation fails and stands terminated, the Council is empowered either to take up arbitration on its own or to refer the arbitration proceedings to any institution as specified in the said Section – The order of Council was a nullity and patently illegal – When conciliation was not successful, the said proceedings stood terminated and thereafter the Council ought to have proceeded to initiate arbitration proceedings – Arbitration and Conciliation Act, 1996.

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Allowing the appeal, the Court

HELD : If the appellant had not submitted its reply at the conciliation stage, and failed to appear, the Facilitation Council could, at best, have recorded the failure of conciliation and proceeded to initiate arbitration proceedings in accordance with the relevant provisions of the Arbitration and Conciliation Act, 1996, to adjudicate the dispute and make an award. Proceedings for conciliation and arbitration cannot be clubbed. In this case only on the ground that the appellant had not appeared in the proceedings for conciliation, on the very first date of appearance, that is, 06.08.2012, an order was passed directing the appellant and/or its predecessor/Jharkhand State Electricity Board to pay Rs.78,74,041/- towards the principal claim and Rs.91,59,705/- odd towards interest. The Facilitation Council did not initiate arbitration proceedings in accordance with the relevant provisions

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A of the Arbitration and Conciliation Act, 1996. The order dated 06.08.2012 is a nullity and runs contrary not only to the provisions of MSMED Act but contrary to various mandatory provisions of Arbitration and Conciliation Act, 1996. There is no arbitral award in the eye of law. It is true that under the scheme of the Arbitration and Conciliation Act, 1996 an arbitral award can only be questioned
 B by way of application under Section 34 of the Arbitration and Conciliation Act, 1996. At the same time when an order is passed without recourse to arbitration and in utter disregard to the provisions of Arbitration and Conciliation Act, 1996, Section 34 of the said Act will not apply. [Paras 11, 12, 13][504-C-G]

C *Rajkumar Shivhare v. Asst. Director, Directorate of Enforcement & Anr. (2010) 4 SCC 772 : [2010] 4 SCR 608 – referred to*

Case Law Reference

D [2010] 4 SCR 608 referred to Para 6

CIVIL APPELLATE JURISDICTION : Civil Appeal No.2899 of 2021.

From the Judgment and Order dated 11.12.2017 of the High Court of Judicature for Rajasthan Bench at Jaipur in D. B. Special Appeal
 E Writ No.1854 of 2017.

Anup Kumar, Saurabh Jain, Ms. Neha Jaiswal, Shivam Kumar, Ms. Shruti Singh, Advs. for the Appellant.

F Dr. Manish Singhvi, Kailash Vasdev, Sr. Advs., Milind Kumar, Nishit Agrawal, Shrey Kapoor, Harsh Mishra, Ms. Upasna Agrawal, Advs. for the Respondents.

The Judgment of the Court was delivered by

R. SUBHASH REDDY, J.

G 1. In this civil appeal, challenge is to the order dismissing the intra-court appeal preferred by the appellant in D.B. Special Appeal Writ No.1854 of 2017 passed by the High Court of Judicature at Rajasthan, Jaipur Bench, vide judgment and order dated 11.12.2017, confirming the order of the learned Single Judge in W.P. No.11657 of 2017. In the writ petition, the order dated 06.08.2012 passed by the 2nd respondent, i.e.,

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Rajasthan Micro & Small Industries Facilitation Council, Jaipur (in short, 'Council') was questioned. A

2. The appellant herein, which is the successor company of erstwhile Jharkhand State Electricity Board, entered into a contract with the 3rd respondent - M/s. Anamika Conductors Ltd., Jaipur, for supply of ACSR Zebra Conductors. Respondent No.3 claiming to be a small scale industry, has approached the Rajasthan Micro and Small Enterprises Facilitation Council, claiming an amount of Rs.74,74,041/- towards the principal amount of bills and an amount of Rs.91,59,705.02 paise towards interest. On the ground that the appellant has not responded to earlier notices, the Council issued summons dated 18.07.2012 for appearance of the appellant before the Council on 06.08.2012. Only on the ground that on 06.08.2012 the appellant has not appeared, the order dated 06.08.2012 was passed by the Council directing the appellant to make the payment to the 3rd respondent, as claimed, within a period of thirty days from the date of the order. B C

3. The said order was under challenge before the High Court by way of writ petition in Civil Writ Petition No.11657 of 2017, and same was dismissed by the learned Single Judge. An intra-court appeal preferred by the appellant was also ended in dismissal. Hence, this appeal. D

4. We have heard Sri Anup Kumar, learned Senior Standing Counsel appearing for the appellant; Dr. Manish Singhvi, learned Senior Counsel appearing for 2nd respondent and Sri Kailash Vasdev, learned Senior Counsel appearing for the 3rd respondent. Having heard the counsel for the parties we have perused the impugned order and other material placed on record. E

5. It is mainly contended by learned counsel for the appellant, as there were some disputes on the supplies made by the 3rd respondent, the bill amount due was not paid immediately. It is submitted that only on the ground that the appellant has not responded in the conciliation proceedings, straightaway the order was passed by the Council without giving proper opportunity. The order impugned in the writ petition was passed, in utter disregard to the mandatory provision under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short 'MSMED Act') and the provisions of Arbitration and Conciliation Act, 1996. It is submitted that even after the order passed by the Council on 06.08.2012, the appellant after inspecting the records, has paid the F G

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- A due amount Rs.63,43,488/- to the 3rd respondent. Such amount was paid after inspecting the records to the 3rd respondent, who had received that amount without any protest. After a period of three years thereafter, 3rd respondent has filed Execution Case No.69 of 2016 before the Civil Judge, Ranchi which ultimately ended in dismissal on the ground of maintainability. When the said order was challenged by way of writ
- B petition, said writ petition was subsequently dismissed as withdrawn. It is submitted that when the conciliation fails, as per Section 18(3) of the MSMED Act, Council has to initiate arbitration proceedings. On failure of conciliation, the Council shall either itself take up the dispute for arbitration or refer to any institution or centre providing alternate dispute
- C resolution services for such arbitration and the provisions of Arbitration and Conciliation Act, 1996 shall apply to the dispute, as if the arbitration was in pursuance of arbitration agreement referred to under sub-section (1) of Section 7 of Arbitration and Conciliation Act, 1996. It is submitted that in this case without following the procedure, straightaway the order
- D impugned in the writ petition was passed without giving any opportunity to the appellant to participate in the arbitration proceedings. It is submitted, as the said order was passed in utter disregard to the mandatory provisions of Arbitration and Conciliation Act, 1996 the said order is a nullity and cannot be termed as an award under provisions of Arbitration and Conciliation Act, 1996. It is further submitted that as per the terms
- E of the contract any dispute was subject to jurisdiction of civil courts at Ranchi and the 3rd respondent having agreed to such terms, had approached the Council in the State of Rajasthan. Thus it is submitted that the order passed by the Council is without jurisdiction and contrary to terms and conditions of the agreement.
- F 6. Dr. Manish Singhvi, learned senior counsel appearing for the 2nd respondent, i.e., Rajasthan Micro and Small Enterprises Facilitation Council has submitted that there are no grounds to interfere with the impugned order passed by the High Court. It is submitted that against the award passed by the Council on 06.08.2012, it was open to appellant to challenge the same before the competent forum under Section 34(3)
- G of the Arbitration and Conciliation Act, within the specified time. It is submitted that having failed to question the award before the competent forum, the appellant has made a belated attempt by questioning the order of the Council by way of writ petition, which was rightly dismissed by the learned Single Judge and confirmed by the Division Bench of the
- H High Court. It is submitted that as the appellant has not responded to the

various notices/summons issued by the Council, the Council itself has taken up the dispute and passed the award. A

Sri Kailash Vasdev, learned senior counsel appearing for the respondent no.3 has submitted that though the supplies were made as per the terms of the contract, the appellant has delayed the payment which necessitated the 3rd respondent to approach the Council. Though several notices were issued by the Council, appellant has not responded to the same and lastly by issuing summons on 18.07.2012 the Council has passed the award on 06.08.2012 by recording a finding that appellant is guilty of delay in paying the amounts due to the 3rd respondent. It is submitted that even after the award, a notice was issued to the appellant, instead to comply the award only an amount of Rs.63,43,488/- was paid. Thereafter as the awarded amount was not paid, the 3rd respondent has filed execution case before the civil court at Ranchi, same was questioned by the appellant by way of writ petition which was subsequently dismissed as withdrawn. It is submitted that Civil Judge at Ranchi has dismissed the execution case on the ground that it was not maintainable due to lack of territorial jurisdiction, since award was passed on 06.08.2012 at Jaipur. It is submitted that after a gap of nearly 9 months C.W.P. No.6885 of 2016 was filed by the appellant. It is submitted that the MSMED Act is a beneficial legislation to the small and medium enterprises. Though proper opportunity was given, the appellant has not responded to the same before the Council and there are no grounds to interfere with the impugned order passed by the High Court. It is submitted that when the award is passed by the Council it is open to challenge under Section 34 of the Arbitration and Conciliation Act, 1996 within the specified period and having failed to question the award belated attempt is made by filing writ petition before the High Court. Learned senior counsel placed reliance on a judgment of this Court in the case of *Rajkumar Shivhare v. Asst. Director, Directorate of Enforcement & Anr.*¹ in support of his submissions and further submitted that appellant has partly complied the award by paying an amount of Rs.63,43,488/-, as such it is not open to challenge the same at this point of time. B C D E F G

7. In the writ petition the appellant has challenged the order/award dated 06.08.2012 passed by the 2nd respondent-Council constituted under provisions of MSMED Act. The 3rd respondent has approached the Council seeking directions against the appellant for payment of delayed

¹ (2010) 4 SCC 772

A bill amount along with interest under provisions of MSMED Act. Immediately after filing application by initiating conciliation proceedings, Council has issued notices and as the appellant has not appeared summons were issued to the appellant on 18.07.2012 for appearance on 06.08.2012. The relevant portion of the summons dated 18.07.2012 issued by the Council reads as under :

B “Now, therefore, notice is hereby given to you to appear in person or through authorized representative before the Council on **6th August, 2012 at 3.30 P.M.** or on such day as may be fixed by the Council to submit in support of the claim/dispute and you are directed to produce on that day all the documents upon which you intend to rely in support of your defense.

C Take note that in default of your response within the period mentioned above, the dispute shall stand terminated. Otherwise the dispute shall be heard and reconciled with a view to the settlement of dispute and in case settlement is not arrived at, the Council shall either itself act as an arbitrator for final settlement of dispute or refer it to an institute for such settlement as per provisions of the Act.”

D 8. Only on the ground that even after receipt of summons the appellant has not appeared the Council has passed order/award on 06.08.2012. As per Section 18(3) of the MSMED Act, if conciliation is not successful, the said proceedings stand terminated and thereafter Council is empowered to take up the dispute for arbitration on its own or refer to any other institution. The said Section itself makes it clear that when the arbitration is initiated all the provisions of the Arbitration and Conciliation Act, 1996 will apply, as if arbitration was in pursuance of an arbitration agreement referred under sub-section (1) of Section 7 of the said Act.

Section 18 of the MSMED Act reads as under :

G **“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 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.”

9. From a reading of Section 18(2) and 18(3) of the MSMED Act it is clear that the Council is obliged to conduct conciliation for which the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 would apply, as if the conciliation was initiated under Part III of the said Act. Under Section 18(3), when conciliation fails and stands terminated, the dispute between the parties can be resolved by arbitration. The Council is empowered either to take up arbitration on its own or to refer the arbitration proceedings to any institution as specified in the said Section. It is open to the Council to arbitrate and pass an award, after following the procedure under the relevant provisions of the Arbitration and Conciliation Act, 1996, particularly Sections 20, 23, 24, 25.

A 10. There is a fundamental difference between conciliation and arbitration. In conciliation the conciliator assists the parties to arrive at an amicable settlement, in an impartial and independent manner. In arbitration, the Arbitral Tribunal/ arbitrator adjudicates the disputes between the parties. The claim has to be proved before the arbitrator, if necessary, by adducing evidence, even though the rules of the Civil
B Procedure Code or the Indian Evidence Act may not apply. Unless otherwise agreed, oral hearings are to be held.

11. If the appellant had not submitted its reply at the conciliation stage, and failed to appear, the Facilitation Council could, at best, have recorded the failure of conciliation and proceeded to initiate arbitration
C proceedings in accordance with the relevant provisions of the Arbitration and Conciliation Act, 1996, to adjudicate the dispute and make an award. Proceedings for conciliation and arbitration cannot be clubbed.

12. In this case only on the ground that the appellant had not appeared in the proceedings for conciliation, on the very first date of
D appearance, that is, 06.08.2012, an order was passed directing the appellant and/or its predecessor/Jharkhand State Electricity Board to pay Rs.78,74,041/- towards the principal claim and Rs.91,59,705/- odd towards interest. As it is clear from the records of the impugned proceedings that the Facilitation Council did not initiate arbitration
E proceedings in accordance with the relevant provisions of the Arbitration and Conciliation Act, 1996.

13. The order dated 06.08.2012 is a nullity and runs contrary not only to the provisions of MSMED Act but contrary to various mandatory provisions of Arbitration and Conciliation Act, 1996. The order dated
F 06.08.2012 is patently illegal. There is no arbitral award in the eye of law. It is true that under the scheme of the Arbitration and Conciliation Act, 1996 an arbitral award can only be questioned by way of application under Section 34 of the Arbitration and Conciliation Act, 1996. At the same time when an order is passed without recourse to arbitration and in utter disregard to the provisions of Arbitration and Conciliation Act,
G 1996, Section 34 of the said Act will not apply. We cannot reject this appeal only on the ground that appellant has not availed the remedy under Section 34 of the Arbitration and Conciliation Act, 1996. The submission of the learned senior counsel appearing for the 3rd respondent that there was delay and laches in filing writ petition also cannot be
H accepted. After 06.08.2012 order, the appellant after verification of the

records has paid an amount of Rs.64,43,488/- on 22.01.2013 and the said amount was received by the 3rd respondent without any protest. Three years thereafter it made an attempt to execute the order in Execution Case No.69 of 2016 before the Civil Judge, Ranchi, which ultimately ended in dismissal for want of territorial jurisdiction, vide order dated 31.01.2017. Thereafter S.B.Civil Writ Petition No.11657 of 2017 was filed questioning the order dated 06.08.2012 before the Rajasthan High Court. In that view of the matter it cannot be said that there was abnormal delay and laches on the part of the appellant in approaching the High Court. As much as the 3rd respondent has already received an amount of Rs.63,43,488/- paid by the appellant, without any protest and demur, it cannot be said that the appellant lost its right to question the order dated 06.08.2012. Though the learned counsel appearing for the respondents have placed reliance on certain judgments to support their case, but as the order of 06.08.2012 was passed contrary to Section 18(3) of the MSMED Act and the mandatory provisions of the Arbitration and Conciliation Act, 1996, we are of the view that such judgments would not render any assistance to support their case.

14. For the aforesaid reasons, this civil appeal is allowed, the impugned judgment and order is set aside. Consequently, the order/award dated 06.08.2012 passed by the 2nd respondent stand quashed. However, it is open to the 2nd respondent-Council to either take up the dispute for arbitration on its own or refer the same to any institution or centre providing alternate dispute resolution services, for resolution of dispute between the parties. It is needless to observe that for such arbitration, the Council shall follow the provisions of Arbitration and Conciliation Act, 1996 before passing any award. As we have not gone into merits of the claim made by 3rd respondent, it is open for the arbitral tribunal, to decide the matter on its own merits.