IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.8077 of 2018

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Reliance Communications Limited, having its registered Office at H Block, 1st Floor, Dhirubhai Ambani Knowledge City, Navi Mumbai-400071, through its authorised Signatory Mukesh Kumar aged about 40 years, Son of Gopal Sharan Singh, Gandhinagar, Aashiana Nagar, Sector-4, Police Station-Rajiv Nagar, Patna-800025 (Bihar).

.... Petitioner

Versus

1. The State of Bihar through the Secretary, Department of Industries, Secretariat, Bailey Road, Patna.
2. The Director, Department of Industries, Secretariat, Bailey Road, Patna.
3. The Micro and Small Industries Facilitation Council, through its Chairman, Patna.
4. The Best Towers Private Limited, 9/2 BIADA Industrial Estate, Patliputra, Patna, through its Managing Director.

.... Respondents

With

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Civil Writ Jurisdiction Case No. 8086 of 2018

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Reliance Communications Limited, having its registered Office at H Block, 1st Floor, Dhirubhai Ambani Knowledge City, Navi Mumbai-400071, through its authorised Signatory Mukesh Kumar aged about 40 years, Son of Gopal Sharan Singh, Gandhinagar, Aashiana Nagar, Sector-4, Police Station-Rajiv Nagar, Patna-800025 (Bihar).

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Versus

1. The State of Bihar through the Secretary, Department of Industries, Secretariat, Bailey Road, Patna.
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3. The Micro and Small Industries Facilitation Council, through its Chairman, Patna.
4. The Best Towers Private Limited, 9/2 BIADA Industrial Estate, Patliputra, Patna, through its Managing Director.

.... Respondents

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Appearance :
(In CWJC No.8077 of 2018)
For the Petitioner : Mr. Rajendra Narain, Sr. Advocate
Mr. Rakesh Kumar Sinha
Mr. Anuj Prakash, Advocates.

For the Respondents : Mr. Ranjeet Kumar
Mr. Jai Kishore Sharma
Mrs. Ranjeeta Singh, Advocates.
For the State : Mr. Kinkar Kumar, SC-9
Mr. Avinash Shekhar, AC to SC-6
(In CWJC No.8086 of 2018)
For the Petitioner : Mr. Rajendra Narain, Sr. Advocate
Mr. Rakesh Kumar Sinha
Mr. Anuj Prakash, Advocates.
For the Respondents : Mr. Ranjeet Kumar
Mr. Jai Kishore Sharma
Mrs. Ranjeeta Singh, Advocates.
For the State : Mr. Kinkar Kumar, SC-9
Mr. Avinash Shekhar, AC to SC-6

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

CAV JUDGMENT

Date: 19-06-2018

Heard learned counsel for the petitioner and learned counsel for the respondents.

2. These writ petitions have been filed for quashing the common order dated 06.02.2018 passed by the Micro, Small and Medium Enterprises Facilitation Council, Patna (hereinafter referred to as “the Council”) in Reference Case No. 05/2015 and Reference Case No. 01/2016 in which the petitioner has been directed to make payment of a sum of Rs. 4,91,33,701/- plus compound interest totalling to Rs. 62,08,65,575/-, and a sum of Rs. 2,04,44,080/- plus compound interest totaling to Rs. 25,25,01,087/- respectively as on 30.09.2017 to respondent no. 4 against the latter’s unpaid bills; and for restraining the Council from passing further orders in the said matters.

3. The facts of both cases are almost identical and both writ petitions are accordingly taken up for disposal together at the

admission stage itself with the consent of parties.

4. The brief facts according to the petitioner are that it had engaged the services of the respondent no. 4 by issuing several work orders for carrying out construction work for establishment of towers for mobile services and providing ancillary works and materials in that regard. The respondent no. 4 approached the Council under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short "MSMED Act") claiming that certain payments had not been made by the petitioner for works carried out. The Council by its order dated 30.06.2016 directed the payments to be made. The petitioner challenged the order dated 30.06.2016 in C.W.J.C. No. 14884 of 2016 with C.W.J.C. No. 15044 of 2016 which were disposed of by judgment dated 11.04.2017 by a Bench of this Court with the following observations –

> *"69. So, on analysis of the aforesaid provisions, it is very much clear that the Facilitation Council has miserably failed to follow the procedure provided under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 Act, but it appears that on the first day the Facilitation Council decided to lis itself, directed payment and when the objection was raised, then it thought fit to send the matter for arbitration, but the procedure followed is strange procedure, not compatible to the provisions of the Act and not known to the law. If the Facilitation Council has already directed for payment, the question of again sending the matter to the arbitrator is misplaced procedure, instead it should first tried to*

conciliate the dispute, in failure to adjudicate the same, either the Facilitation Council itself conducted conciliation or refer the matter to the third party, then arbitration stage had come to adjudication the dispute in terms of Section Arbitration and Conciliation Act, 1996.

***74**. So from the above quotations and discussions, it is apparently clear that either the Facilitation Council will take the burden on its shoulder for arbitration or it relegates the matter to anybody. Either the Facilitation Council or anybody while making arbitration will follow the certain provision of Code of Civil Procedure as mention in Section 19 of the Act for the arrival to a fair and proper conclusion.*

***75**. For the foregoing reasons, the impugned order containing memo No.3898 dated 27.10.2016 and the order containing memo No.3913 dated 28.10.2016 passed by the Facilitation Council are hereby quashed. But, it is not end of the matter, this Court directs both the parties to appear before the Facilitation Council within 15 days from the date of passing the order of this Court. They should present themselves, the Facilitation Council will make effort to resolve the dispute, in failure, either the Facilitation Council itself will take responsibility of arbitrator or refer the matter to third party, according to the provisions of the Act, for arbitration."*

5. The petitioner unsuccessfully carried the matter in LPA No. 827 of 2017 which was dismissed by judgment dated 17.07.2017 with a direction to the Council to decide the issue within a period of 60 days from the date of receipt/production of a copy of the order.

6. In the de novo proceedings taken up on 16.08.2017, the

Council initiated conciliation proceedings and both parties were directed to sit together for conciliation of their accounts and amicably settle the quantum of interest to be paid. The matter was again taken up on 07.09.2017 and finally on 21.09.2017 but the Council found that the petitioner was not interested in disposal of the cases as it had neither verified the claim nor sat with the applicant for conciliation. It is however the claim of the petitioner that from the very beginning it was evident that the Council was extremely hostile towards the petitioner and its members were sitting with prejudiced minds. However, no objection was raised by the petitioner considering that it was participating in conciliation proceedings and also in absence of any provision for such objection under Section 12 of the Arbitration and Conciliation Act, 1996 (for short, "the Arbitration Act"). The Council recorded that conciliation was not possible by reason of non-cooperation by the petitioner and accordingly recorded that the conciliation had failed and was finally closed, and took a decision to start arbitration proceeding under Section 18(3) of the MSMED Act. The Council then commenced arbitration proceeding and held the first sitting on 21.11.2017 and on the request of the petitioner, adjourned to 28.11.2017. Thereafter, the proceeding continued and finally culminated in the impugned order dated 06.02.2018 (Annexure-6).

7. Mr. Rajendra Narain, learned Senior counsel appearing on behalf of the petitioner, has challenged the impugned order dated

06.02.2018 as being wholly arbitrary as well as without jurisdiction. Apart from adverting to various circumstances to allege that the Council was proceeding with a prejudiced attitude against the petitioner, he has also submitted that the Council inherently lacked jurisdiction to conduct the arbitration proceeding, and as such the impugned arbitration award is *non est* in law. It is submitted that Section 18(2) of the MSMED Act deals with conciliation and specifically adopts the provisions of Sections 65 to 81 of the Arbitration Act. A perusal of Section 80 of the Arbitration Act discloses that there is a complete bar, in absence of an agreement to the contrary, for a conciliator to act as an arbitrator in any arbitral or judicial proceeding in respect of a dispute that has been the subject of conciliation proceedings. It is submitted that the Council having acted as conciliator was statutorily barred from sitting as arbitrator as was done in the instant case, and this has dealt a fatal blow to the arbitration award. It is submitted that no doubt the Council has been invested with the power to act as conciliator under Section 18(2) and as arbitrator under Section 18(3) of MSMED Act, but these provisions are easily reconciled with Section 80 to mean that the Council can sit as arbitrator only in a situation where it does not conduct conciliation itself but refers the conciliation to an institution or centre providing alternate dispute resolution as contemplated under Section 18(2) of the MSMED Act. Reliance is placed on Harshad Chiman Lal Modi vs. DLF Universal Ltd.

and another, (2005) 7 SCC 791.

8. Mr. Ranjeet Kumar, learned counsel appearing for the respondent no. 4, on the other hand, submits that the arbitration award suffers from no infirmity or lack of jurisdiction, rather it is completely legal and valid and therefore requires no interference. It is pointed out at the very outset that MSMED Act, 2006 is an enactment subsequent to the Arbitration Act, 1996, and as such Parliament was conscious of the provisions of the existing Act. In this backdrop, Section 24 was specifically incorporated to provide that Sections 15 to 23 of the MSMED Act would have an overriding effect over all other laws. It is therefore submitted that in case of inconsistency, the provisions of Sections 15 to 23 of the MSMED Act must be given primacy over the Arbitration Act. Thus, Section 18 of the MSMED Act would prevail over Section 80 of the Arbitration Act, more so as the latter provision does not contain any *non obstante* clause. Reliance has been placed on two decisions of Division Benches of the Madras High Court in the cases of *M/s Eden Exports Company Vs. Union of India* [W.A. No. 2461 of 2011 and analogous cases decided on 20.11.2012] and *Refex Energy Limited Vs. Union of India and Others* [W.P. No. 17785 of 2016 and analogous case decided on 02.06.2016].

9. Mr. Ranjeet Kumar further invites reference to paragraph 75 of the judgment dated 11.04.2017 passed in the first round of litigation in C.W.J.C. No. 14884 of 2016 wherein this Court had

also contemplated that the Facilitation Council would make effort to resolve the dispute, and in case of failure, either the Facilitation Council itself would take up responsibility of an arbitrator or refer the matter to the third party according to the provisions of the Act, for arbitration. It is therefore submitted that this Court in so many words had already directed that the Council would be competent to take up the responsibility of arbitrator. In this view of the matter, the submission of the petitioner that the Council could not act as an arbitrator is completely misconceived and contrary to the order of this Court. As stated above, the said judgment was also not interfered with in LPA.

10. It is then submitted that in view of the deeming fiction contained in Section 18 of the MSMED Act, the existence of agreement between the parties is assumed and it is within the jurisdiction of the Council to act as arbitrator or conciliator. The jurisdiction exercised is not dependent upon an agreement consciously entered into between the parties. The Council assumes jurisdiction immediately upon reference by the aggrieved party and consent of the other party is not necessary. Section 80 of the Arbitration Act which begins with the words “unless otherwise agreed by the parties”, does not thus come to the aid of the petitioner as such agreement is deemed to exist by operation of law.

11. It is lastly submitted that objection with regard to jurisdiction was not raised by the petitioner before the Council at the

appropriate time. From the record of proceedings of the Council dated 21.09.2017, it transpires that the conciliation was terminated upon its failure and the Council decided to start arbitration proceeding under Section 18(3) of the MSMED Act. It is evident from the proceedings of the Council's sitting on 16.11.12017 as well that no objection regarding its jurisdiction was raised by the petitioner. Rather the petitioner participated in the proceeding before the Council by seeking ~~for~~ some time to respond to the claim submitted by the respondent no. 4 as this was the first date for arbitration, and the matter was adjourned to 28.11.2017, granting a last chance to the petitioner. The petitioner has itself admitted in paragraph 11 of the writ petition that it did not raise any objection and participated before the Council. It was only on the last occasion i.e. on 28.12.2017, over three months after conciliation was closed, that the petitioner challenged the jurisdiction of the Council to act as arbitrator, on which date the Council observed that detailed award was being passed separately. It is therefore submitted that the petitioner, having participated in the proceedings before the Council, could not be permitted to turn around to question ~~of~~ the validity of proceedings or the jurisdiction of the arbitrator.

12. Reliance has been placed on behalf of the respondents on a judgment of Division Bench of the Madras High Court in the case of *M/s Eden Exports Company Vs. Union of India* [W.A. No. 2461 of 2011 and analogous cases decided on 20.11.2012] wherein it has been held

as follows –

> ***"21**. 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.*
>
> ***25**. In all these writ petitions filed by various companies challenging the award / order passed by the Arbitrators / Facilitation Council, the question to be gone into is whether such writ petitions could be maintained before this Court. If one carefully goes through the provisions of the MSMED Act under Chapter V, in particular Section 18, it could be seen*

that the said Act is in consonance with the Arbitration and Conciliation Act, 1996. Moreover, the award / order passed by the Arbitrators / Facilitation Council is similar and identical to that of the award passed under Section 31 of the Arbitration and Conciliation Act. Section 5, which is contained in Part I of the Arbitration Act, defines the extent of judicial intervention in arbitration proceedings. It says that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in that Part. The Hon'ble Supreme Court in (2000) 4 SCC 539 (P. Anand Gajapathi Raju v. P.V.G. Raju), has held that the judicial intervention in arbitration proceedings should be minimal. Keeping in view the object of the MSMED Act, we have no hesitation in adopting Section 5 of the Arbitration and Conciliation Act, 1996, which prohibits interference of the judicial authority, to the awards passed under the MSMED Act.

***26**. Apart from the reason stated above, these writ petitions were filed without complying with the provisions contained in Section 19 of the MSMED Act, which contemplates pre-deposit of 75% of the decree amount. The petitioners cannot overtake Section 19 and invoke Article 226 of the Constitution before this Court. As we have held that pre-deposit of 75% is mandatory, we see no reason to entertain the present writ petitions. Moreover, once the petitioners have submitted themselves to the jurisdiction of the Council and when the decision of the Council went against them, they cannot turn round and state that the Council has no jurisdiction or the conciliators cannot sit as arbitrators or the pre-deposit of 75% is against the provisions of law. As rightly pointed out by the learned single Judge it is always open to the petitioners to move the appropriate civil court*

for relief or to invoke arbitration clause, if provided in the agreement. Hence, we are not inclined to entertain the present writ petitions filed challenging various awards / orders passed by the Facilitation Council and they are liable to be dismissed.

For the reasons stated above, subject to the observations made, all the writ appeals and the writ petitions stand dismissed. There shall be no order as to costs. Interim order, if any, shall stand vacated. Consequently, the connected Miscellaneous Petitions are closed."

13. The said decision was taken note of by a subsequent Division Bench judgment of the same Court in *Refex Energy Limited Vs. Union of India and Others* [W.P. No. 17785 of 2016 and analogous case decided on 02.06.2016], wherein it was felt that there was no need for deviation.

14. Before proceeding further for deciding the issues raised, it is necessary to reproduce the relevant provisions of the two enactments as under.

Micro, Small and Medium Enterprises Development Act, 2006

*" **18**. Reference to Micro and Small Enterprises Facilitation Council-*

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

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

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.*

Arbitration and Conciliation Act, 1996

12. Grounds for challenge.—*[(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—*

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if--

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.]

13. Challenge procedure.— *(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.*

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within

fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

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;

(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings."

15. I have given my careful consideration to the rival submissions on behalf of the parties. The core issue that arises for

decision in the present case concerns the jurisdiction of the Council to act in the capacity of Arbitrator, having already acted in the capacity of Conciliator in a failed attempt to resolve the dispute between the parties.

16. The MSMED Act was enacted as a special law for facilitating the promotion and development, and enhancement of the competitiveness of micro, small and medium enterprises, and contains detailed provisions for the benefit of such enterprises. Chapter V of the MSMED Act comprises Sections 15 to 25 and deals with "delayed payments to micro and small enterprises". Section 18(1) of the MSMED Act begins with a *non obstante clause* and provides for reference to the Facilitation Council of a dispute for payment for goods supplied and services rendered by the supplier, together with interest. Section 18(2) contemplates the conduct of conciliation for resolving the dispute either by the Council itself or by seeking assistance of any institution or centre providing alternate dispute resolution services. For purposes of such conciliation proceedings, Sections 65 to 81 (including Section 80) of the Arbitration Act are applied. Section 18(3) makes a provision for arbitration in the event of unsuccessful conciliation terminated without any settlement, either by the Council itself or by reference to any institution or centre for providing alternate dispute resolution services. To such arbitration, the provisions of the Arbitration Act in its entirety are made applicable, with the assumption of the existence of

an arbitration agreement referred to Section 7(1) of the Arbitration Act. Section 24 of the MSMED Act gives an overriding effect to Sections 15 to 23, thus including Section 18, of the MSMED Act in cases of inconsistencies with any other law.

17. It is significant to note that the jurisdiction to act as Conciliator or Arbitrator has been vested in the Council and in any other institution or centre for providing alternate dispute resolution services to which reference may be made. The question is whether the application of Section 80 of the Arbitration Act, which, *inter alia*, contains a prohibition against a conciliator acting as arbitrator unless otherwise agreed by the parties, is ousted, as sought to be contended on behalf of the respondents. It is noteworthy that Section 18(2) of the MSMED Act dealing with conciliation proceeding specifically applies only certain provisions, including Section 80, of the Arbitration Act to the dispute. Section 18(3) of the MSMED Act dealing with arbitration proceedings applies the entire Arbitration Act to the dispute. There is thus nothing in Section 18 of the MSMED Act to suggest that the bar contained in Section 80 of the Arbitration Act is not intended to apply. It is however to be considered whether Section 24 of the MSMED Act has overriding effect so as to negate the effect of Section 80.

18. The respondents have sought to contend that ordinarily a conciliator is prohibited from acting as an arbitrator in view of the bar contained in Section 80 of the Arbitration Act. This is

however subject to a contrary agreement between the parties. It has been submitted that such an agreement has been presumed to exist under Section 18(3) of the MSMED Act, which creates an exception to the ordinary bar contained in Section 80 of the Arbitration Act. There is thus no impediment for the Council to act as a conciliator as well as arbitrator, more so as Section 24 of the MSMED Act has an overriding effect over Section 80 of the Arbitration Act.

19. I am unable to agree with the aforesaid submission of the respondents, which, no doubt, appears attractive at first blush. On close scrutiny, I find that it suffers from a fundamental flaw. The existence of an arbitration agreement is assumed through the deeming fiction in Section 18(3) of the MSMED Act with reference to Section 7(1) of the Arbitration Act, and must be understood as being merely for the purpose of statutorily fulfilling the foundational requirement of an arbitration agreement for proceeding under the Arbitration Act. This is the extent of the deeming fiction which does not go on to suggest the existence of any further agreement between the parties for the purpose of Section 80 of the Arbitration Act to the effect that they have agreed that a conciliator would also be competent to act as arbitrator. As stated above, Sections 18(2) and 18(3) of the MSMED Act both seek to adopt the provisions of Section 80 of the Arbitration Act. Further, Section 24 of MSMED Act with its overriding effect comes into play only in cases of inconsistencies between the two enactments. A

harmonious reading of these provisions clearly indicates that Section 80 of the Arbitration Act has been adopted and requires to be given full effect to. Accordingly, the Council may act either as Conciliator or as Arbitrator or it may choose to refer the disputes at either or both stages to any centre or institution providing alternate dispute resolution services, but it cannot act as both conciliator and arbitrator itself. Viewed from this angle, there is no inconsistency between the provisions of Section 18 of the MSMED Act and the provisions of Section 80 of the Arbitration Act. Accordingly, I am of the view that Section 24 of the MSMED Act would not have any application in such circumstances inasmuch as it comes into play only in cases of inconsistencies between the two enactments.

20. The observations of this Court made in paragraph 25 of the judgment dated 11.04.2017 passed in CWJC No. 14884 of 2016 cannot be read in a manner to mean that this Court had directed the Council to take up the responsibility of the Arbitrator, as sought to be contended by the respondents. The observation must be read as a whole and it was duly indicated that the Council itself would take up the responsibility of the Arbitrator or refer the matter to the third party according to the provisions of the Act for arbitration. The course of action to be adopted by the Council was therefore mandated to abide by the provisions of the Act for arbitration.

21. The Division Bench of the Madras High Court in *M/s*

Eden Exports Company Vs. Union of India (supra) has affirmed the judgment of the learned Single Judge which contains detailed reasons for the view taken therein. It would therefore be apposite to refer to the judgment of the learned Single Judge from which the relevant paragraphs may be extracted hereinbelow –

> *"34. The other argument made by the learned Advocate General and by Mr. T. Mohan was that under the provisions of Sections 18(2), 18(3) and 18(4), the Facilitation Council was given dual role of conciliator in terms of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 and thereafter it was conferred with the jurisdiction to act as Arbitrators. This goes against the norms of fairness. Under Section 80 of the Arbitration and Conciliation Act, 1996, it has been made clear that conciliator cannot act as an arbitrator. Section 80(a) reads as follows:*
>
> *"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;"*
>
> *35. Having incorporated the said provision under Section 18(2), it is not open to the Facilitation Council to act an conciliator as well as arbitrator. They have not agreed for the council to discharge the dual role. If they decide to act as conciliators, then they must relegate the parties to an outside arbitrator. In alternative, if they decide to arbitrate the matter, then they should send the parties for conciliation by an outside authority to do conciliation. The argument addressed by the counsel in this regard is not*

based upon any legal foundation. It can be stated that it may be based on the principle of fairness. Even a regular civil court, by 1976 amendment, has been made to conciliate in cases of matrimonial disputes and they are not prohibited by the CPC from deciding the lis between the parties.

36. Section 18(2) only borrows the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act for the purpose of conducting conciliation. It is not a bar for the same council to arbitrate on the matter. But however if there is any allegation of bias is made out, certainly such issues can be gone into in a judicial review based on concrete materials. In order to avoid the allegation of lack of fairness in other higher forums, it is open to the council to evolve its own rule of business by which members who had participated in the Conciliation may not sit in the Arbitral proceedings. But it is entirely for the Facilitation Council to evolve such a rule of business in future. On that ground, no direction can be issued by this Court.

37. In this context, it is necessary to refer to the judgment of the Supreme Court in Institute of Chartered Accountants of India Vs. L.K. Ratna reported in 1986 (4) SCC 537. In that case, the Supreme Court held that members of Chartered Accountants who sit in the disciplinary Tribunal should not participate in the council meeting to approve their own decision and it may hit on grounds of bias. It is for the Facilitation Council to keep in mind such principle so as to avoid future attacks against their orders in other legal forums.

38. The last attack was against the power being vested

with the Facilitation Council to arbitrate the matter and finally to determine the rights of parties can cause prejudice to the buyers. That argument overlooks the fact that the MSMED Act do not foreclose judicial review by any other judicial forum notwithstanding the overriding effect given under Section 24. At the maximum, the Facilitation Council acts as arbitrators at the first instance. It does not foreclose the parties from further agitating the matter to establish their rights in an appropriate legal forum."

22. With utmost respect, I am unable to persuade myself to subscribe to the aforesaid view for my reasons stated hereinafter –

(a) The legal foundation for the prohibition to act both as Conciliator and Arbitrator on the part of the Council is to be found in Section 80 of the Arbitration Act. This section has been adopted in Sections 18(2) and 18(3) of the MSMED Act and thus I am unable to agree that it is a mere question of fairness to be left at the discretion of the Council whether or not to act in both capacities. Reference to the 1976 Amendment by which a regular civil court was made to conciliate in cases of matrimonial suit and not prohibited by the CPC from deciding the lis between the parties, is presumably to Order XXXII-A of the Code of Civil Procedure. I may even take note that similar provision has been made in Section 9 of the Family Courts Act, 1984 which is almost in paria materia with corresponding provision under Order XXXII-A of the CPC. The essence of the distinction here is that while such procedure for settlement between the parties has been so enacted

specifically in CPC and Family Courts Act. Section 80 of Arbitration Act on the other hand, provides for just the contrary and prohibits the Council from acting in dual capacity. It is also relevant to take note of the change in approach effected by the Code of Civil Procedure (Amendment) Act, 1999 by which Section 89 was inserted in the CPC after its earlier repeal in 1940, and reads as follows —

> *"89. Settlement of disputes outside the Court.*
> *(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for -*
>
> *(a) arbitration;*
>
> *(b) conciliation*
>
> *(c) judicial settlement including settlement through Lok Adalat; or*
>
> *(d) mediation.*
>
> *(2) Where a dispute has been referred-*
>
> *(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.*
>
> *(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;*

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

Corresponding changes were also made by inserting Rules 1-A, 1-B and 1-C in Order X of the CPC as follows –

"1-A. Direction of the Court to opt for any one mode of alternative dispute resolution.

After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

1-B. Appearance before the conciliatory forum or authority.

Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

1-C. Appearance before the Court consequent to the failure of efforts of conciliation.

Where a suit is referred under rule 1-A and the presiding officer of conciliation forum or authority is satisfied that it

would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it."

These rules provide for alternate dispute resolution by outside agencies and not by the court itself. It thus depends on what is contemplated by the specific provisions enacted in the law and in the present case, Section 80 of the Arbitration Act prohibits dual function by the Council.

(b) If Section 18(2) of the MSMED Act borrows the provisions of Sections 65 to 81 of the Arbitration Act, I do not perceive any reason for inferring that Section 80 of Arbitration Act is intended to be excluded and that it would not constitute a bar for the Council to arbitrate on the matter.

(c) It is most significant to note that the learned Single Judge has expressed his view that in order to avoid the allegation of lack of fairness, it would be open to the Council to evolve its own rule of business by which members who had participated in the conciliation may not sit in the arbitral proceedings. I am of the view, however, that MSMED Act contemplates the conciliation proceedings to be conducted by the Facilitation Council as a body and not by its members acting in their individual capacity. Besides, in my view, such a situation may become unworkable in view of Section 21 of the MSMED Act which mandates that the Council shall consist of not less than three but not

more than five members. As such, a quorum of three members is necessary for the Council to be validly constituted, whether for the purposes of conciliation or for arbitration. Considering that the Council can consist of a maximum of only five members, it would not be even possible to constitute the Council with the minimum quorum of three members for conducting arbitration, none of whom had participated earlier in the conciliation process.

(d) I am of the view that, if at all, the judgment of the Supreme Court in *Institute of Chartered Accountants of India v. L.K. Ratna (supra)* supports the case of the present petitioner as it recognizes the need to dissociate a decision making body from the approving body.

(e) I am also of the view that mere availability of judicial review would not validate the Council act as arbitrator if it is otherwise disqualified from doing so, having already conducted the conciliation. The Council would inherently lack jurisdiction to act as arbitrator and any order passed by it would be *non est* and a nullity as in the present case. The initiation of the arbitration proceeding by the Council in such circumstances would itself be a matter which causes the prejudice to the petitioner.

23. In *Harshad Chiman Lal Modi vs. DLF UNIVERSAL Ltd. and another, (2005) 7 SCC 791,* it has been held as follows –

> *"Ms. Malhotra, then contended that Section 21 of the Code, requires that the objection to the jurisdiction must be taken*

by the party at the earliest possible opportunity and in any case where the issues are settled at or before settlement of such issues. ...

We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity."

24. It is thus evident from the above that if an authority inherently lacks jurisdiction, the resultant order can be challenged at any stage and a person cannot be non-suited merely because he failed to raise an objection at the earliest point of time. The petitioner has submitted that no such objection was raised with regard to the Council's jurisdiction for want of any legal provision for doing so. I am of the view that if an authority or body lacks inherent jurisdiction, mere participation in the proceedings by the parties cannot confer jurisdiction whether by consent or otherwise. It is therefore not

necessary to test whether or not the petitioner was entitled to question the Council's jurisdiction under the provisions of Sections 12 or 34 of the Arbitration Act or any other legal provisions. It would also not be necessary to adjudicate whether or not the arbitration award passed by the Council could be challenged under Section 34 of the Arbitration Act as a *non est* order can well be quashed in judicial review.

25. In these circumstances, the impugned order dated 06.02.2018 passed by the Council (Annexure-6 in both these writ petitions) must be held to be without jurisdiction and *non est* in law and is accordingly quashed. The matter is remitted back to the Micro, Small and Medium Enterprises Facilitation Council, Patna to make an appropriate reference as contemplated in Section 18(3) of the MSMED Act for arbitration of the disputes between the parties in accordance with law.

26. Both these writ petitions stand allowed.

(Vikash Jain, J)

Md. Ibrarul/BT

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	21.06.2018
Transmission Date	N.A.