HON'BLE THE ACTING CHIEF JUSTICE DILIP B. BHOSALE

AND

THE HON'BLE SRI JUSTICE S.V. BHATT

W.P.No.15228 OF 2015

PC: *(Per the Hon'ble the Acting Chief Justice Dilip B. Bhosale)*

This writ petition under Article 226 of the Constitution of India challenges the provisions contained in Sections 16 and 21 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short "the Act) as unconstitutional. The petitioner also seeks direction to the 3rd respondent not to proceed with adjudication of the dispute raised by the 4th respondent.

The only ground of challenge to the provisions contained in Section 21 of the Act, as submitted by Mr.Vedula Srinivas, learned counsel for the petitioner, is that the composition of the Micro and Small Enterprises Facilitation Council (for short, "the Council") does not consist of a judicially trained person and such deficiency renders Section 21 unconstitutional. In other words, the only ground on which the provisions contained in Section 21 are challenged is that the Council, being an independent judicial tribunal for adjudication of the disputes between the parties, ought to have consisted of a judicially trained Member. Apart from this ground, the provisions are not challenged on any other ground before this Court. Though challenge to Section 16 of the Act is raised by the petitioner, learned counsel for the petitioner did not make any submissions in respect thereof.

Mr.Vedula Srinivas, learned counsel for the petitioner, at the outset invited our attention to the judgment of the Supreme Court in **UNION OF INDIA V. PRESIDENT, MADRAS BAR ASSOCIATION** in support of the ground of challenge. On the basis of this judgment, he submitted that the Council should have members, having rank, capacity and status equal to the rank, status and capacity of the Court for dealing with matters/disputes contemplated under the provisions of the Act. Reliance was also placed on the judgment of the Supreme Court in **NAMIT SHARMA V. UNION OF INDIA** in support of the very similar contention. Based on this judgment, he submitted

that complete lack of judicial expertise in the Council may render the decision making process impracticable, inflexible and in a given case, contrary to law. He submitted that availability of expertise of judicial members in the Council would facilitate the decision making more practical, effective and meaningful, besides giving semblance of justice being done.

On the other hand, Mr.P.Vishnu Vardhan Reddy, learned counsel appearing for respondent No.4, placed reliance upon an unreported judgment of the Division Bench of Madras High Court dealing with the provisions of the Act, in particular Section 19 thereof, wherein the constitutional validity of the provisions was under challenge. Based on this judgment, he submitted that the Division Bench of Madras High Court upheld the constitutional validity of the provisions contained in Section 21 of the Act. He also placed reliance upon the judgment of Kerala High Court in support of his contention. Similarly, the learned Assistant Solicitor General also placed reliance upon the very same judgments to contend that the since the Council constituted in exercise of powers granted under Articles 323-A and 323-B of the Constitution of India, the petitioner cannot be heard to contend that the judicial member has to preside over the Council or the Members should have legal background.

Since we are dealing with the challenge to the provisions contained in Section 21 of the Act, we are not entering into the facts of the present case. Suffice it to say that according to respondent No.4, the petitioner is liable to pay to respondent No.4 a sum of Rs.40 crores.

Section 21 of the Act provides for composition of the Council.
It would be relevant to reproduce the said Section to understand the exact composition of the Council:

> "**Composition of Micro and Small Enterprises Facilitation Council –**
>
> (1) The Micro and Small Enterprises Facilitation Council shall consist of not less than three but not more than five members to be appointed from among

the following categories, namely:-

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

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

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

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

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

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

From plain reading of Section 21, it is true that it does not consist of a judicially trained person. In view thereof, it is necessary to look into the jurisdiction of the Council and the procedure that Council needs to follow whenever reference is made by an aggrieved party.

Section 18 of the Act provides for reference to the Council. It would be relevant to reproduce the said section which reads thus:

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 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.

(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.

From plain reading of the provisions contained in Section 18, it is clear to us that any party to a dispute may, with regard to any amount due under Section 17, make a reference to the Council. The Council, on receipt of reference under sub-section (1), has option to either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate disputes resolution services by making a reference to such an institution or centre, for conducting conciliation and in that event the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (for short “the Act of 1996”) shall apply to such a dispute as if such a conciliation was initiated under Part III of that Act. It further provides that when the conciliation is not successful, the Council shall either itself take up the dispute for arbitration or refer to any institution or centre providing alternate disputes resolution

services for such arbitration and in that event the provisions of the Act of 1996 shall 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.

It is not in dispute, in the present case, that there is
arbitration clause in the agreement executed between the parties. Sub-section (4) of Section 18 provides, notwithstanding anything contained in any other law for the time being in force, the Council or the centre providing alternate disputes 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. Every reference made under this section requires to be decided within 90 days from the date of making such a reference. Having regard to the scheme of Section 18 read with Section 21, it is clear that the Council can function as conciliator and/or arbitrator under the provisions of Act of 1996. From plain reading of the provisions contained in Section 18, it is clear that the persons, either to act as conciliators and/or arbitrators, need not be judicially trained persons and this proposition is not in dispute before us.

In this backdrop, we have perused the judgments relied upon
by the learned counsel for the petitioner. The Supreme Court in **MADRAS BAR ASSOCIATION**'s case (1 supra) considered the challenge to the constitutional validity of Parts I-B and I-C of the Companies Act, 1956, inserted by the Companies (Second Amendment Act, 2002) providing for the constitution of the National Company Law Tribunal and the National Company Law Appellate Tribunal. The contentions raised, to which our attention was specially invited by the learned counsel appearing for the petitioner, was that Parliament does not have the legislative competence to vest intrinsic judicial functions that have been traditionally performed by the High Courts for nearly a century in any Tribunal outside the judiciary and that the constitution of National Company Law Tribunal and transferring the entire company jurisdiction of the
High Court to the Tribunal which is not under the control of the judiciary is in violation of the doctrine of separation of power and independence of the judiciary which are parts of the basic structure of the Constitution.

It is not in dispute that the National Company Law Tribunal was constituted under Article 223-B of the Constitution. While dealing with the challenge, the Supreme Court in **MADRAS BAR ASSOCIATION**'s case (1 supra) at paragraph 101 observed thus:

> "Independent judicial tribunals for determination of the rights of citizens, and for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the Rule of Law. Rule of Law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the executive. Another facet of the rule of law is equality before law. The essence of equality is that it must be capable of being enforced and adjudicated by an independent judicial forum. Judicial independence and separation of judicial power from the executive are part of the common law traditions implicit in a Constitution like ours which is based on the Westminster model."

In paragraph 106, the Supreme Court observed thus:

> "We may summarize the position as follows:
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> (a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.
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> (b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a judicial tribunal. This means that such tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters
> and the members of the Tribunal should have the independence and security of tenure associated with Judicial Tribunals.
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> (c) Whenever there is need for "tribunals", there is no presumption that there should be technical members in the tribunals. When any jurisdiction is shifted from courts to tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into

> technical or special aspects, where presence of technical members will be useful and necessary, tribunals should have technical members. Indiscriminate appointment of technical members in all tribunals will dilute and adversely affect the independence of the judiciary.
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> (d) The legislature can re-organize the jurisdictions of judicial tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of the courts). Similarly while constituting tribunals, the legislature can prescribe the qualifications/eligibility criteria. The same is however subject to judicial review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive."

From the observations made by the Supreme Court in this case itself would show that this judgment has no application to the facts of the present case, wherein the challenge was to a Council constituted under Section 21 of the Act. That apart, the powers conferred on the Council are only as Conciliators and/or Arbitrators and when they so act, they are governed by the provisions of the Act of 1996.

Even in the judgment in **NAMIT SHARMA**'s case (2 supra), the Supreme Court considered the constitution of State Information Commission under the provisions of the Right to Information Act, 2005. While dealing with the similar challenge, the Supreme Court in paragraph 5 of the judgment observed thus:

> "The petitioner, a public spirited citizen, has approached this Court under Article 32 of the Constitution stating that though the Right to Information Act, 2005 (for short 'Act of 2005') is an important tool in the hands of any citizen to keep checks and balances on the working of the public servants, yet the criterion for appointment of the persons who are to adjudicate the disputes under this Act are too vague, general, ultra vires the Constitution and contrary to the established principles of law laid down by a plethora of judgments of this Court. It is the stand of the petitioner that the persons who are appointed to discharge judicial or quasi-judicial functions or powers under the Act of 2005 ought to have a judicial approach, experience, knowledge and

> expertise. Limitation has to be read into the competence of the legislature to prescribe the eligibility
> for appointment of judicial or quasi-judicial bodies like
> the Chief Information Commissioner, Information Commissioners and the corresponding posts in the States, respectively.
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> The legislative power should be exercised in a manner which is in consonance with the constitutional principles and guarantees. Complete lack of judicial expertise in the Commission may render the decision making process impracticable, inflexible and in given cases, contrary to law. The availability of expertise of judicial members in the Commission would facilitate the decision-making to be more practical, effective and meaningful, besides giving semblance of justice being done. The provision of eligibility criteria which does not even lay down any qualifications for appointment to the respective posts under the Act of 2005 would be unconstitutional, in terms of the judgments of this Court in the cases of Union of India v. Madras Bar Association,[(2010) 11 SCC 1]; Pareena Swarup v. Union of India [(2008) 14 SCC 107];L. Chandra Kumar v. Union of India [(1997) 3 SCC 261]; R.K. Jain v. Union of India [(1993) 4 SCC 119]; and S.P. Sampath Kumar v. Union of India[(1987) 1 SCC 124].

From plain reading of the observations made by the Supreme Court in the aforementioned judgment, we are satisfied that the function of the Council is not in line with the functioning of a Civil Court or Tribunal constituted under the provisions of Articles 323-A and 323-B of the Constitution. Exercise of powers by the Council under the provisions of the Act, in particular Section 18 thereof, does not give, in our firm opinion, a colour of judicial functioning on the Council.

As it is evident from the scheme of Act that the Parliament intended to provide for mediation and/or resolution of disputes arising between a class of individuals through Council in accordance with Act 1996. The procedure provided for resolution is through mediation and/or arbitration. Therefore, in the absence of a judicially trained member in the Council, it cannot be said that Section 21 of the Act is unconstitutional.

The High Court of Madras in unreported common judgment dated 20.11.2012 in **M/s.EDEN EXPORTS COMPANY V. UNION OF INDIA** while dealing with the constitutional validity of the very same provision held that when the Council is not a Tribunal constituted in exercise of the powers conferred under Articles 323-A and 323-B of the Constitution, the appellant cannot be heard to contend that judicial

member has to preside over the Council or the Members should have legal background. We are in agreement with the view expressed by the High Court of Madras for the reasons stated above.

In the circumstances, we do not find any merit in the challenge to the provisions in Sections 18 and 21 of the Act, being unconstitutional. Hence, the writ petition is dismissed.

Consequently, miscellaneous petitions, if any pending, also stand disposed of.

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DILIP B. BHOSALE, ACJ

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S.V.BHATT, J

Date: 11.08.2015

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