

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.10551 OF 2011
WITH
CIVIL APPLICATION NO.1383 OF 2012
WITH
CIVIL APPLICATION NO.166 OF 2013
AND
CIVIL APPLICATION NO.2420 OF 2016
IN
WRIT PETITION NO.10551 OF 2011**

Mazgaon Dock Ltd. ...Petitioner

Versus

Micro and Small Industries
Facilitation Council & Ors. ...Respondents

.....

Mr. M.P.S. Rao, Senior Advocate with Mr. S.D. Shetty and Ms S.S. Paralikar i/b. M/s. M.V. Kini and Co. for the Petitioner.

Mrs. R.M. Shinde, AGP for the Respondent -State.

Smt. Prabha U. Badadare for the Respondent No.2.

**CORAM : RANJIT MORE AND
SMT. ANUJA PRABHUDESSAI, JJ.**

DATED: 13th AUGUST, 2018.

P.C.:-

Rule. By consent of the parties rule is made returnable forthwith. Matter is heard finally.

2. Heard Mr. Rao, the learned senior counsel for the Petitioner, Smt. Prabha U. Badadare, the learned counsel for the Respondent No.2 and Mrs. R.M. Shinde, the learned AGP for the

Respondent -State.

3. The Petitioner is challenging the order dated 28th July, 2018 passed by the Respondent No.1-Micro and Small Industries Facilitation Council, Konkan Division directing the Petitioner to pay an amount of Rs.40,78,146/- with compounding interest thereof.

4. Pursuant to the tender invited by the Petitioner for fabrication of hull and superstructure unit of a dredger on or about 5th June, 2006, a contract was awarded to the Respondent No.2. The work under the above said contract was duly completed by the Respondent No.2 and a sum of Rs.1,23,99,995/- was duly paid to it in full and final discharge of the amount due thereunder. It is a further case of the Petitioner that at the request of the Respondent No.2 further work was allotted to it though no formal order was issued. Further it was argued and accepted that work was carried at the existing rates i.e. same rate as provided under work order dated 5th June, 2006 i.e. Rs.27 per kg. The Respondent No.2 raised the dispute regarding the rate and approached the Respondent No.1-Micro and Small Industries Facilitation Council. The Respondent No.1 thereafter issued notice to the Petitioner dated 23rd June, 2010. In furtherance of those notices

the Petitioner appeared before the Respondent No.1 and thereafter four meeting were held. Further the conciliation proceedings were unsuccessful. The Petitioner thereafter by two letters dated 13th June, 2011 and 22nd July, 2011 required the Respondent No.11 to refer the dispute for arbitration.

5. It is the grievance of the Petitioner that instead of referring the dispute for arbitration to an institution or center providing alternate dispute resolution services decided to conduct the arbitration itself and thereafter passed an arbitral award dated 28th July, 2011, which is impugned in the petition.

6. The issue whether Micro, Small and Medium Enterprises Council having itself conducted the conciliation proceeding could have decided itself the arbitration proceedings under the Micro, Small and Medium Enterprises Development Act, 2006 came for consideration before this Court in ***Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council, Writ Petition No.5459 of 2015 (Appellate Side)***. The Division Bench of this Court in paragraphs 17 to 22 observed as under:-

“17. This takes us to consider the next issue raised by Mr.Kane, learned counsel for the petitioner that the

respondent No.1 – MSEFC having itself conducted the conciliation proceedings, could not have decided to itself initiate the arbitration proceedings under Section 18(3) of the MSMED Act. We find merit in this submission.

18. Section 18(1) of the MSMED Act provides for reference to the Facilitation Council of a dispute with regard to any amount due under Section 17. Sub-section (2) of Section 18 contemplates of conduct of conciliation either by council itself or by seeking assistance of any institution or centre providing alternate dispute resolution services. For purpose of such conciliation proceedings, the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 are applicable. Sub-section (3) thereof, makes a provision for arbitration if the conciliation proceedings between the parties are not successful and stand terminated without any settlement either by the Council itself or by reference to any institution or centre providing alternate dispute resolution services. To such arbitration, the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 are made applicable.

19. A plain reading of sub-sections (2) and (3) of Section 18 of the MSMED Act makes it clear that it is obligatory for the Council to conduct conciliation proceedings either by itself or seek assistance of any institute or centre providing alternative dispute resolution services. The provisions of Sections 65 to 81 of the Arbitration Act 1996 are made applicable to conciliation proceedings. In the event, the conciliation proceedings are unsuccessful and stand terminated, the Council can either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration. The provisions of Arbitration Act 1996, in its entirety, are made applicable as if the arbitration was in pursuance of the arbitration agreement referred to in sub-section(1) of Section 7 of the Arbitration Act, 1996.

20. It is thus evident that sub-section (2) and sub-section (3) of the MSMED Act vests jurisdiction in the Council to act as conciliator as well as arbitrator. The question is in view of the provisions of Section 80 of the Arbitration Act 1996, the Council which has conducted the conciliation

proceedings is prohibited from acting as arbitrator. As stated earlier, certain provisions of Arbitration Act 1996 including Section 80 are specifically made applicable to conciliation proceedings contemplated by Section 18(2) of the MSMED Act. Whereas provisions of Arbitration Act 1996, in its entirety, are made applicable to the arbitration and conciliation proceedings contemplated by sub-section (3) of Section 18 of the MSMED Act.

21. A harmonious reading of these provisions clearly indicate that Section 80 of the Arbitration Act, 1996 is applicable to conciliation as well as arbitration proceedings under sub-sections (2) and (3) of Section 18 of the MSMED Act. Section 80 of the Arbitration Act, 1996 reads thus :

“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; and

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

22. A plain reading of Section 80 makes it clear that the conciliator cannot act as an arbitrator or his representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute. It is thus evident that the MSEFC cannot act as conciliator as well as arbitrator, or it may choose to refer the dispute to any centre or institution providing alternate dispute resolution services for the parties to conciliation or arbitration. However, once the MSEFC acts as conciliator, in view of provisions of Section 80, it is prohibited from acting as arbitrator.”

7. The decision of **Gujarat State Patronet Ltd.** (supra) is consequently applicable to the facts and circumstances of the case in as

much as that in the present case the Respondent No.1 having conducted the conciliation proceedings could not initiate the arbitration proceedings under Section 18(3) of the said Act.

8. Under the circumstances and in view of discussion supra, the impugned order cannot be sustained and is quashed and set aside. The Respondent No.1- Micro and Small Industries Facilitation Council, Konkan Division is directed to refer the dispute between the Petitioner and the Respondent No.2 to any institution or centre providing alternate dispute resolution services for arbitration as expeditiously as possible and, in any case, within a period of four weeks from the date of receipt of this order.

9. Rule is accordingly made absolute in terms of prayer clause (a). The Writ Petition stands disposed of.

10. The Civil Applications stand disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)

(RANJIT MORE, J.)

Megha
Shridhar
Parab

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by Megha
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2018.08.24
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