

psv

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

**ARBITRATION PETITION NO.78 OF 2017
WITH
CIVIL APPLICATION NO.5 OF 2018**

M/s. Aadinath Sales through its Proprietor Shailesh Porwal	..Petitioner
Vs.	
M/s. Flame Control Industries	..Respondent

Mr.Nilesh Wable for Petitioner.
Mr.Amrut Joshi i/b. Mr.Sanket Mungle for Respondent.

**CORAM : G.S. KULKARNI, J.
DATE : 14th AUGUST, 2019**

P.C.:

This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) whereby the petitioner has prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences between the parties, contending that there is arbitration agreement between the parties as contained under the communication dated 3 February 2010 of the respondent appointing the petitioner as stockist. The respondent has invoked the jurisdiction of Micro and Small Enterprise Facilitation Council, Himachal Pradesh.

2. I have heard learned Counsel for the parties on this petition. My attention has been drawn to an order dated 17 July 2019 passed by this Court in Commercial Arbitration Application (L.) No.228 of 2019 wherein a similar issue had arisen in regard to a reference made to the Micro and Small Enterprise Facilitation Council under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short, “MSMED Act”) and what would be the status of the arbitration

agreement between the parties in such a situation. The Court considering the said issue passed an order dated 17 July 2019 which reads thus:-

“1. This Court had heard this application yesterday (16 July 2019) and had passed the following order:-

“1. In pursuance of the order dated 1 July 2019 passed by this Court, I have heard Mr.J.P. Sen, learned Senior Counsel who was appointed as Amicus, as also the learned Counsel for the parties to the proceedings. The learned amicus has drawn my attention to the various decisions on the issue. His submission is that the Division Bench of this Court in **“Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council, Konkan Division & Ors.”**¹ recognizes the correct position in law that it may not be possible for a party to invoke the arbitration agreement once the provisions of Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 are invoked. He has also drawn my attention to the orders which are passed by the Supreme Court on the proceedings of Civil Appeal no.6167 of 2013 arising from the decision of the Division Bench in **“Steel Authority of India Ltd. Vs. Micro Small Enterprise Facilitation Council”**² as also the order of the Supreme Court in Special Leave to appeal (Civil) no.31227 of 2018 arising out of the decision of the Division Bench of this court in **“Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council, Konkan Division & Ors.”** (supra) to submit that the issue of law as involved in this proceedings shall be considered by the Supreme Court in the listing of this matter on 23 July 2019.

2. It is submitted on behalf of the respondent that considering this position in law, even the ad-interim order granted by this Court is required to be vacated as urged on behalf of the respondent.

3. The court would be required to pass a detailed order on due consideration of these decisions. Stand over to 17 July 2019 at 3 p.m.”

2. Today when the Court intends to pass an order, learned Counsel for the applicant would submit that the

1 (2018)5 AIR Bom R. 821

2 AIR 2012 Bom 178

proceedings before the Supreme Court arising out of the decision of the Division Bench of this Court in “**Steel Authority of India Ltd. Vs. Micro Small Enterprise Facilitation Council**” as also the proceedings arising out of another decision of the Division Bench in “**Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council, Konkan Division & Ors.**”, would be listed on 23 July 2019 and therefore, this Court adjourn the hearing of this petition. Mr. Cama, learned Counsel for the respondent would not have any objection to this contention as urged on behalf of the petitioner, however, his objection is to the continuation of the ad-interim order passed by this Court on 1 July 2019 which is operating against the respondent, be vacated.

3. I am not inclined to continue the ad-interim orders passed by this Court, having perused the decision of this Court in **Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council, Konkan Division & Ors** and also considering the decision of the Division Bench of Gujarat High Court in “**Principal Chief Engineer Vs. M/s. Manibhai and Brothers**”³ and the further orders passed by the Supreme Court in “**Principal Chief Engineer vs. M/s. Manibhai & Ors (Sleeper)**” (Diary No.16845/2017) dated 5 July 2017 arising out of the decision of the Gujarat High Court in the case **Principal Chief Engineer Vs. M/s. Manibhai and Brothers (supra)** where the Supreme Court has observed thus :-

“ We are satisfied, that the interpretation placed by the High Court on Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, in the impugned order, with reference to arbitration proceeding is fully justified and in consonance with the provisions thereof.”

4. It now appears to be the position in law, that once a party has invoked the jurisdiction of Facilitation Council under Section 18 of the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006, a recourse to arbitration under the agreement between the parties is not available. Accordingly, the interim orders passed in this petition granting stay of the proceedings before the Facilitation Council stands vacated.

5. Needless to observe that all contentions of the parties are expressly kept open.

6. The parties are at liberty to move this proceedings

after the proceedings before the Supreme Court are concluded.

7. It is clarified that pendency of this proceeding shall not in any manner affect the proceedings before the Facilitation Council. It is also clarified that it will be open to the petitioner to raise all permissible contentions before the arbitral tribunal.”

3. Thus position in law is quite clear that once a party has invoked the jurisdiction of Facilitation Council under Section 18 of the MSMED Act, a recourse to arbitration under the agreement between the parties is not available. In the facts of the present case, the respondent has admittedly invoked the jurisdiction of the Himachal Pradesh Facilitation Council under Section 18 of the Act. The Facilitation Council is seized with the arbitration. The present petition would thus not be maintainable. The petition will have to be accordingly disposed of.

4. At this stage, Mr.Wable, learned Counsel for the petitioner would submit that the petitioner has been appointed as a stockist under the appointment order by the respondent and the provisions of the Act are not applicable and the facilitation council would not be competent to undertake any arbitration for adjudication of the disputes between the parties. I am afraid that this contention of Mr.Wable cannot be accepted in this proceeding, as it would be open to the petitioner to raise such an objection before the Facilitation Council who is already seized with the arbitration of the disputes between the parties.

5. It is clarified that the petitioner is not precluded from filing counter-claim as permissible in law.

6. The petition is accordingly disposed of in the above terms keeping open all contentions including all the objections raised on behalf of the

petitioner, and permitting the parties to agitate all the issues before the Facilitation Council.

7. In view of the above order, the interim order stands vacated.

8. The civil application would not survive in view of disposal of the petition. It is accordingly disposed of.

[G.S. KULKARNI, J.]