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

## WRIT PETITION NO. 7899 of 2017

1. Bharat Electronics Ltd.
Kotdwar, Pauri Garhwal – 246149.
through Mr. D. K. Mehrotra,
General Manager

2. Senior Deputy General Manager
Bharat Electronics Ltd.
Kotdwar, Pauri Garhwal – 246149. ...Petitioners.

vs.

1. IBEX Integrated Business Express
Private Ltd.
D-20/11, TTC Industrial Area,
MIDC, Turbe, Navi Mumbai – 400 703.
Through Shri. Anjan Doshi,
Managing Director.

2. Chairman cum Managing Director
Mahanagar Telephone Nigam Ltd.
MTNL Bhavan, Lodhi Road,
New Delhi – 110 003.

3. Executive Director, Mahanagar
Telephone Nigam Limited, MTNL,
Delhi, Kurshid Lal Bhavan, Janpath,
New Delhi – 110 001.

4. Executive Director,
Mahanagar Telephone Nigam Ltd.
(MTNL), MTNL House, Prabhadevi,
Mumbai – 400 028. …Respondents.

## WITH
## CIVIL APPLICATION NO.562 OF 2018
## IN
## WRIT PETITION NO. 7899 of 2017

IBEX Integrated Business Express
Private Ltd.

D-20/11, TTC Industrial Area,
MIDC, Turbe, Navi Mumbai – 400 703.
Through Shri. Anjan Doshi,
Managing Director. ...Applicant/
(Orig. Respt No.1)

**IN THE MATTER BETWEEN**

1. Bharat Electronics Ltd.
Kotdwar, Pauri Garhwal – 246149.
through Mr. D. K. Mehrotra,
General Manager

2. Senior Deputy General Manager
Bharat Electronics Ltd.
Kotdwar, Pauri Garhwal – 246149. ...Petitioners.

vs.

1. IBEX Integrated Business Express
Private Ltd.
D-20/11, TTC Industrial Area,
MIDC, Turbe, Navi Mumbai – 400 703.
Through Shri. Anjan Doshi,
Managing Director.

2. Chairman cum Managing Director
Mahanagar Telephone Nigam Ltd.
MTNL Bhavan, Lodhi Road,
New Delhi – 110 003.

3. Executive Director, Mahanagar
Telephone Nigam Limited, MTNL,
Delhi, Kurshid Lal Bhavan, Janpath,
New Delhi – 110 001.

4. Executive Director,
Mahanagar Telephone Nigam Ltd.
(MTNL), MTNL House, Prabhadevi,
Mumbai – 400 028. …Respondents.

**WITH**
**CIVIL APPLICATION NO.2362 OF 2018**
**IN**
**WRIT PETITION NO. 7899 of 2017**

IDBI Bank Limited
a Company within the meaning
of Companies Act, 1956 and a
banking company within the meaning
of Section 5(C) of the Banking
Regulation Act having its Registered
Office at IDBI Tower, WTC Complex,
Cuffe Parade, Mumbai – 400 005.
through its Authorised Officer ...Applicant/Intervener

<u>**IN THE MATTER BETWEEN**</u>

1. Bharat Electronics Ltd.
Kotdwar, Pauri Garhwal – 246149.
through Mr. D. K. Mehrotra,
General Manager

2. Senior Deputy General Manager
Bharat Electronics Ltd.
Kotdwar, Pauri Garhwal – 246149. ...Petitioners.

vs.

1. IBEX Integrated Business Express
Private Ltd.
D-20/11, TTC Industrial Area,
MIDC, Turbe, Navi Mumbai – 400 703.
Through Shri. Anjan Doshi,
Managing Director.

2. Chairman cum Managing Director
Mahanagar Telephone Nigam Ltd.
MTNL Bhavan, Lodhi Road,
New Delhi – 110 003.

3. Executive Director, Mahanagar
Telephone Nigam Limited, MTNL,
Delhi, Kurshid Lal Bhavan, Janpath,
New Delhi – 110 001.

4. Executive Director,
Mahanagar Telephone Nigam Ltd.
(MTNL), MTNL House, Prabhadevi,
Mumbai – 400 028. …Respondents.

**WITH**
**WRIT PETITION NO. 9356 OF 2018**

1. Mahanagar Telephone Nigam Ltd.
MTNL House, Prabhadevi,
Mumbai – 400 028.
Executive Director.

2. Chairman / Managing Director
Mahanagar Telephone Nigam Ltd.
MTNL Bhavan, Lodhi Road,
New Delhi – 110 003.

3. Executive Director,
Mahanagar Telephone Nigam Ltd.
MTNL Delhi, Khurshid Lal Bhavan,
Janpath, New Delhi – 110 003.
Above Petitioner Nos.1, 2 & 3 have acted
through its authorised representative
Datta S. Aywale. ..Petitioners

vs.

1. IBEX Integrated Business Express
Private Ltd.
D-20/11, TTC Industrial Area,
MIDC, Turbe, Navi Mumbai – 400 703.
Through Shri. Anjan Doshi, MD.

2. Bharat Electronics Ltd.
Kotwar, Pauri, Garwal – 246 149.
Through Mr. D. K. Malhotra,
General Manager.

3. Senior Deputy General Manager
Bharat Electronics Ltd.
Kotwar, Pauri, Garwal – 246 149.
Senior Deputy General Manager ..Respondents

...

Ms. Dikshita P. Gupte, Advocate for the Petitioners in WP 9356/18

Ms. Meena H. Doshi, Advocate for the Petitioners in WP 7899/17.

Mr. Prathamesh Kamath a/w. Vidyesh Dhamdhere a/w. Inayat Ali Qureshi i/b. K. K. Associates, Advocate for Respondent No.1.

**CORAM : C. V. BHADANG, J.**
**RESERVED ON: 8th JANUARY 2020**
**PRONOUNCED ON: 20th JANUARY 2020**

**Common order :**

. The challenge in both these petitions is to the order dated 20/12/2014 and 31/3/2017 passed by the Facilitation Council ('Council' for short) under the Micro, Small and Medium Enterprises Development Act, 2006 ('2006 Act' for short). As such both these petitions are being disposed of by this common order.

2. The brief facts necessary for the disposal of the petitions may be stated thus-

That in the year 2006 Mahanagar Telephone Nigam Limited ('MTNL' for short)(petitioner in Writ Petition No.9356/2018) had floated a tender interalia for supply, installation and commissioning of convergent billing system and CRM system on turnkey basis. Bharat Electronics Limited ('BEL' for short)(petitioner in Writ Petition No.7899/2017) was awarded the said contract, vide Purchase Order dated 14/2/2006. It appears that BEL awarded a sub-contract of the said work to Ibex Integrated Business Express Private Ltd. ('IBEX' for short)(the first respondent in both these petitions). It is a matter of record that Clause 16 of the agreement between BEL and IBEX incorporated an arbitration clause.

3. Coming back to the Purchase Order dated 14/2/2006 by which the billing system contract was awarded to BEL, clause

Nos.12.1 to 12.4 thereof, incorporated the terms of payment. According to BEL, it was specifically provided that the payment will be made to IBEX (for the work which was subject matter of the sub-contract) whenever payment is made by MTNL to BEL.

4. It appears that IBEX raised certain bills for the work done on BEL and some of such bills were also paid by BEL. The contract between BEL and IBEX came to an end somewhere in August 2013 and BEL claims that MTNL did not make certain payments of the work of BEL, as a result of which no payment was also made by BEL to IBEX.

5. It is in these circumstances that, IBEX approached the Facilitation Council on 15/2/2014 for recovery of the said amount against BEL as well as MTNL. The said petition was registered as Original Petition No.49/2014.

6. BEL appeared before the Council and raised a preliminary objection to the maintainability of the petition for want of jurisdiction to entertain the dispute on the ground that there was an arbitration clause contained in the agreement between BEL and IBEX.

7. The said preliminary issue was heard by the Council and the Council by an order dated 20/12/2014 while refusing to uphold the the preliminary objection, held that the Council had jurisdiction to adjudicate the reference, in terms of Section 15 to 18 of the 2006 Act. This is the first order which is subject matter of challenge in this petition.

8. The reference before the Council proceeded further and the MTNL as well as BEL filed their reply on merits and the Council eventually by an award dated 31/3/2017 allowed the reference filed by IBEX in the following terms.

***ORDER***

> *1. The Reference Petition No.49/2014 is allowed in terms of prayer.*
>
> *2. Respondent is required to pay to the Petitioner Rs.1,78,56,996/- and deducted amount Rs.37,91,198/- total amount of Rs.2,16,48,194/- (Rupees Two Crore Sixteen Lakhs Forty Eight Thousand One Hundred Ninety Four only) alongwith interest on each and every due amount of the invoice when become payable after deduction of 30 days, till the realization of the amount to the petitioner.*
>
> *3. Respondent should release both the Performance Bank Guarantee (Mumbai & Delhi) of Rs.1 Cr. Each immediately.*
>
> *4. The Principle and Interest amounts are to be paid by the Respondent to the Petitioner within a period of One month from the date of receipt of this award.*
>
> *5. No order as to cost.*

9. Feeling aggrieved by the said award as well as order dated 20/12/2014, the petitioners are before this Court.

10. I have heard Ms. Dikshita Gupte, learned counsel for the petitioners in WP 9356/2018, Ms. Meena Doshi, learned counsel for

the petitioners in WP 7899/2017 and Mr. Prathamesh Kamat, learned counsel for the Respondent No.1.

11. Ms. Doshi, learned counsel for the petitioners has submitted that the reference before the Council was not maintainable for two reasons. Firstly that, there was an arbitration clause in the agreement between BEL and IBEX by which the work was sub-contracted to IBEX. It is submitted that therefore, the dispute ought to have been referred to an arbitrator as per the provisions of Section 8 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act' for short). In the submission of the learned counsel, the provisions of the Arbitration Act, being a special act, would override the provisions of the 2006 Act and thus the Council lacked jurisdiction to entertain the reference, made under Section 18 of the 2006 Act. Secondly, it is submitted that IBEX was not a micro, small or medium enterprise, within the meaning of the 2006 Act and as such, the IBEX could not have taken benefit of 2006 Act in making reference to the Facilitation Council. For this purpose, the learned counsel has referred to the "part II" which is an application filed by IBEX and submitted to the District Industries Center ('DIC' for short). It is submitted that the IBEX was initially registered as a medium enterprise in the services sector and by a modification effected on 6/3/2014, it was converted into a small enterprise, in the manufacturing sector. It is submitted that in any event there is no acceptable material to show that it was an enterprise governed by the 2006 Act. She therefore submits that the Facilitation Council was in error in assuming jurisdiction and entertaining the reference and in eventually passing the impugned award dated 31/3/2017. Except these, there are no other contentions raised.

12. Learned counsel for the petitioners in Writ Petition No.9356/2018 has adopted the submissions made on behalf of the petitioners in Writ Petition No.7899/2017. In addition thereto, it is submitted that there is no privity of contract between MTNL and IBEX and therefore no liability could have been fastened against MTNL by the Facilitation Council.

13. Mr. Prathamesh Kamat, the learned counsel for IBEX has raised a preliminary objection to the maintainability of these petitions. It is submitted that IBEX was indeed an enterprise governed by the 2006 Act, which would be evident from the certificate dated 9/12/2011 wherein IBEX was initially registered as a medium enterprise in the services sector and on 6/3/2014 it was converted into small enterprise in the manufacturing sector. It is submitted that as per Section 18(3) of the 2006 Act, the petitioners, if aggrieved by the award dated 31/3/2017, were required to challenge the same in accordance with Section 34 of the Arbitration Act and not by way of a petition under Article 227 of the Constitution of India.

14. It is submitted that in any event the order passed by the Facilitation Council on 20/12/2014 cannot be subject matter of challenge in the present petition. On behalf of the petitioners, reliance is placed on the decision of the Supreme Court in the case of **SBP & Co. vs. Patel Engineering Ltd. and Another (2005) 8 Supreme Court Cases 618.** Reliance is then placed on the decision of **Principal Chief Engineer vs. M/s. Manibhai and Brothers (Sleeper) & Anr. in First Appeal No.637/2016 decided on 20/6/2016** and the decision of the Andhra Pradesh High Court in

the case of **Ballapur Industriest Limited vs. Andhra Pradesh Micro, Small Enterprises Facilitation Council, Hyderabad 2014 SCC Online AP 1295.** It is submitted that the petitions as framed and filed are by clearly not maintainable.

15. By way of rejoinder the Learned counsel for the petitioners, have submitted that the award and order passed by the Facilitation Council is *exfacie* without jurisdiction and in such case, this Court can entertain the challenge under Article 227 of the Constitution of India.

16. I have carefully considered the rival circumstances and the submissions made.

17. Section 18(3) of the 2006 Act, provides for reference to Micro and Small Enterprises Facilitation Council. The said section envisages that 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 shall then apply to the dispute, as if the arbitration was in pursuance of an arbitration agreement referred to an sub-section (1) of section 7 of that Act.

18. Section 24 of the 2006 Act gives an overriding effect to the provisions of Section 15 to 23 of the 2006 Act over any other law for the time being in force. It can thus clearly be seen that where the

Facilitation Council has conducted the arbitration and passed an award the remedy of the party aggrieved would be to take recourse to Section 34 of the Arbitration Act. In order to achieve object of the 2006 Act, the provisions of the said Act have to be read conjointly with the provisions of the Arbitration Act which essentially aims at expeditious disposal of the dispute, with minimal Court interference, in such matters. It is necessary to note that in the matter of challenge to the award which is passed by the Facilitation Council, sub-section 3 of section 18 of 2006 Act would provide that the challenge has to be in accordance with the provisions of the Arbitration Act.

19. The Supreme Court in the case of **Patel Engineering** (supra) and several subsequent decisions has consistently held that the party aggrieved by the order of the Arbitrary Tribunal has to challenge the same in accordance with the provisions of the Arbitration Act and this appears to be the scheme of the Act. The Hon'ble Supreme Court has disapproved the practice of the High Courts in entertaining petitions under Article 226/227 of the Constitution of India challenging the orders passed by the Arbitrary Tribunal. Although the case of **Patel Engineering** (supra) involved a challenge to the interim order passed by the Arbitrary Tribunal, the ratio would squarely apply even where that challenge is sought to be raised to a final award by way of petition under Article 226 / 227 of the Constitution of India in the wake of a statutory remedy under Section 34 of the Arbitrary Act.

20. In that view of the matter, I decline to entertain the petition. It is thus not necessary to examine or to dwell upon the merits of the challenge to the impugned order and the award.

21. In the result, both the petitions are dismissed, with no order as to costs.

22. The amount deposited before this Court, alongwith interest, if any, shall be paid to the first respondent Integrated Business Express Private Ltd., after a period of six weeks.

23. All pending civil applications are disposed of.

24. At this stage, the learned counsel for the petitioner submitted that they will avail of an appropriate remedy against the impugned award, as may be available in law. It is made clear that this Court has not expressed any opinion on the merits of any such remedy and all the rival contentions including the issue of limitation are left open.

**C.V. BHADANG, J.**