

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 116 OF 2018

ALONGWITH

ARBITRATION PETITION NO. 117 OF 2018

ALONGWITH

ARBITRATION PETITION NO. 118 OF 2018

ALONGWITH

ARBITRATION PETITION NO. 119 OF 2018

ALONGWITH

ARBITRATION PETITION NO. 120 OF 2018

Maharashtra State Electricity
Transmission Company Ltd through
Its Superintending Engineer

... Petitioner

Vs.

Lustre Engineering Corporation and Anr.

... Respondents

Mr. Anil Sakhare, Senior Advocate a/w. Mr. Rohan Mirpuri i/b. Mr. Ashok Gade and Mr. Sagar Jadhav for the Petitioner.

Mr. Nigel Quraishy i/b. Mr. Dushyant Krishnan for Respondent no. 1.

CORAM : A. K. MENON, J.

RESERVED ON : 25th FEBRUARY, 2021

PRONOUNCED ON : 3rd MAY, 2021

JUDGMENT :

1. Called for final hearing and disposal. These are petitions under Section 34 of the Arbitration and Conciliation Act, 1996 [“the Arbitration Act”] seeking to challenge an Arbitral Award dated 23rd May, 2018 passed by an Arbitral Tribunal appointed pursuant to Section 18 (3) of the The Micro, Small and Medium Enterprises Development Act, 2006 [“MSME Act”].

2. The petitioners are aggrieved by the Award dated 23rd May, 2018 which according to the petitioners was passed without following due process of law. No issues were framed nor was any evidence led. No opportunity was offered to the petitioner to meet the case against them and thus it is contended that the Award is in violation of the principles of natural justice. Before dealing with the contentions of parties briefly put the facts are as follows :

3. The petitioner is engaged in the transmission of electricity. Respondent no. 1 had filed five petitions petition before the Micro and Small Enterprises Facilitation Council [“the Facilitation Council” / “the Council”] under Section 18(1) of the MSME Act. In all these petitions the claims arise out of different Work Orders. All of them are identical in nature and hence by consent the facts relating to the impugned order in the first of these petitions being Arbitration Petition no. 116 of 2018 is taken up for consideration.

4. The claim pertains to alleged delay in payment in respect of work of construction of a Transformer, Gantry and Equipment Foundation T/F oil soak pit, cable trench, earthing pits, pipe line and metal spreading work for a 50 MVA, 100/22 KV 4th T-F @ Vasai S/Stn. The claims were for principal sums and interest. Similar claims have been lodged in other cases as well. It transpires that the petitioner had invited offers from interested parties to carry out work as defined above and the respondent had made an offer which came to be accepted on terms and conditions specified by the petitioner in an enquiry number 4600 dated 20th September, 2010 and the acceptance which was communicated on 24th September, 2010.

5. Pursuant to an application filed by the respondent on 1st April, 2017 under Section 18 of the MSME Act and the Maharashtra Micro and Small Enterprises Facilitation Council Rules 2007 ("MSME Rules") the Facilitation Council passed an order to initiate Arbitration on 14th February, 2018 in Petition no. 38 of 2017. The claim in the petition was for delayed payment of a sum of Rs. 17,03,735 /- towards principal and a sum of Rs. 8,52,775/- towards interest. Thus a total of Rs. 25,56,510/- was claimed as on date of filing the petition. The order to initiate arbitration recorded that the Facilitation Council held conciliation meetings between the parties on two occasions after due notice to all. The respondent in the application viz. the petitioner herein had not responded to the attempts at settlement and was not interested in conciliation and hence conciliation proceedings were terminated and arbitration proceedings were initiated. The Council ordered that it

would act as the Arbitral Tribunal. Notices were accordingly issued to the parties.

6. The basis of the claim is a purchase/work order copy of which is at Exhibit D to the petition dated 24th September, 2010. It is addressed by the petitioner to the respondent and sets out the scope of work i.e. erection of an additional transformer including supply of required material and civil works at Mahape Sub-station, Kalwa. The work order was of a value of Rs.3,88,64,583/-. It provided for security deposit of 5% of the order value and it contained numerous other terms and conditions. It interalia provided for packing, forwarding and transportation, watch and ward, bringing of material on site, supervision of the work to be carried out at site subject to the approval of the Executive Engineer.

7. Reference is also made to the general conditions of contract included by reference in clause no. 55. A payment schedule was also provided for according to which 70% of the total cost of the material was to be released after supply of material at site, balance 30% of the cost of material after successful commissioning. The bills against the labour component were to be paid first and others in running account bills and a final bill. After meeting certain initial objections to the maintainability, the respondents insisted that the petition was maintainable before the Council. Subsequently pursuant to an order of the Council a conciliation meeting was held on 19th December, 2018 and after discussions it was noted that the respondent had

revised their claim. These claims were so revised in view of the fact that the petitioner had already paid the total amount of the bills and retention money in all those cases and no dues were pending. It is the case of the petitioner that all bills and retention amounts had been already settled and the respondent was requested to withdraw the claim for interest. The respondent however acting through its partner was not agreeable to withdraw the claim for interest and thus the reference proceeded.

8. On or about 24th February, 2018 the respondent in response to a query from the Facilitation Council submitted that the total amount outstanding is an interest component of Rs.10,47,031/-. The principal amount was shown as "Nil". This communication was in response to direction by the Council to submit detailed statements giving particulars of payment and receipt of payments. However what was submitted by the respondent is just a single page letter mentioning the total amount due as Rs. 10,47,031/-. An annexure to the letter sets out nine bill numbers, bill amounts, due dates, balance amounts, date of payments and number of days delay. On this basis interest was computed from 6th July, 2016 to 14th February, 2018. The reason for claiming interest from 6th July, 2016 is not understood since the tabulated statement itself shows that payments of the nine bills were made between 17th June, 2015 to 29th May, 2017. Interest was then computed on the bill amounts to arrive at a total of Rs. 10,47,031/-.

9. In an affidavit in reply, the petitioner contended that the reference was not maintainable under the provisions of the Act. That the requirement under the Act was that an applicant would have investment in plant and machinery not exceeding Rs. 5 crores, whereas the schedule of assets disclosed by the respondent in their petition disclosed an investment of Rs.11,96,22,322/-. From the record available with the petitioner- Corporation the amounts due to the respondent – contractor had already been paid as of 13th June, 2017 and nothing was then due. Moreover it was contended that the work involved was that of erection of a transformer. The time limit had also expired. The work site was handed over to the respondent on 21st January, 2015 and the contract contemplated completion of work by 20th May, 2016 excluding the monsoon period. The total civil work done was of a value of Rs. 77,97,538. 62 and of which the applicant had completed the work on 20th May, 2016 for an amount of Rs. 77,93,035.09. While dealing with the merits of the claim the petitioner contended that the six bills submitted by the respondent had all been paid within reasonable time and there was no occasion to charge any interest. It was contended that the payments could be made only after getting necessary sanctions and approvals and that itself took up a reasonable amount of time.

10. On behalf of the petitioner Mr. Sakhare submitted that the sixth and final bill was delayed since there was quantity variations in various items of the work order. The final bill was then processed and clubbed with others i.e.

the electrical and civil work bills were clubbed and submitted to the competent authority. The quantity variation required modification of the purchase order in the SAP system failing which the payment would not have been cleared. After requisite approvals, Purchase Order modification was required to be carried out in the SAP system and following these changes payments were processed. It is therefore contended that on behalf of the petitioners there was no delay in paying the principal sum and hence no justification in claiming interest. Without prejudice it was contended that in view of the fact that the principal amount had already been paid no reference could have been filed under Section 18 to claim only interest.

11. It is also contended that the MSME Act does not contain any provision to claim only interest when principal sums have already been paid, especially because there was no clause for payment of interest on delayed payments in the contract in question. Mr. Sakhare therefore submitted there was no merit in the claim filed by the respondent before the Facilitation Council despite which at a hearing described as a final hearing on merit on 23rd May, 2018 a four member Council consisting of the Ex-officio Chairperson, Joint Director of Industries, a Member Secretary who was the Deputy Director of Industries and two members of the Council observed on facts that both civil and electrical works had been undertaken pursuant to the work order of erection of an additional transformer which included the supply of requisite materials and civil work.

12. The Award noted that there was delay in the work and which were caused due to the petitioners constraints. Delay in the work did not result in any penalty being levied on the respondent. The case of the respondent was that having completed the activity of “electrical contracting, overhauling / repairs of power transformers” they were entitled under the work order to certain payments in the sum of Rs. 17,03,735/- at the time of filing the petition. The respondent had submitted its revised claim along with interest on delayed payment. According to the respondent the delay was between one month and eleven months. In the case of nine bills several of these amounts were paid in installments resulting in delays.

13. The Award records the contention of the petitioner being a Government undertaking a Work Order had been placed during the financial year 2014-15 and it was contended that being a work order the provisions of the MSME Act 2006 were not applicable. The work was completed on 20th May, 2016 and the entire principal sum had been paid within the reasonable time taken for passing of the bills. The respondent had not acceded to the requests of withdrawing the claim for interest. The Council proceeded then to hold that after taking into considering the records, documentary evidence submitted by the respondent it had decided on merits and passed an order on 23rd May, 2018 which is reproduced below :

ORDER

1. *The reference Petition No. 38/2017 is allowed in terms of prayer.*

2. *The Respondent is required to pay to the Petitioner a principal amount of “Nil” along with interest as per the Section 16A of the MSMED Act, 2006 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. *The Principal and interest amount are to be paid by the Respondent to the Petitioner within a period of one month from the date of receipt of this Award.*
4. *No Order as to costs.*
5. *The case is disposed off and closed.*
6. *This order is issued on this 23 day of May, 2018.*

The order records that the petition was allowed as prayed. It required the petitioner to pay no amounts towards principal but directed payment of interest under Section 16A of the MSME Act on every invoice amount when payable after a deduction of 30 days till realisation of the amount to the petitioner. The operative order in clause 2 therefore requires to be analysed to understand the true meaning and effect of the order.

14. Mr. Sakhare submitted that the order lacked clarity and it was not possible to understand the scope of the order from a plain reading of the operative portion or even considering the findings of the Facilitation Council. Being aggrieved by the order the above petitions came to be filed. At the hearing of the petition for admission the Advocates on both sides agreed that the matter be sent back to the Facilitation Council for providing

clarifications without which the award was not meaningful. After the matter was remanded to the Facilitation Council pursuant to the consent minutes signed between the parties which were made order of the Court, the Facilitation Council made what is described as an “Additional award” as per the order dtd. 07.12.2018 by the “Hon’ble High Court, Bombay”. By this Additional Award the Facilitation Council proceeded to calculate the interest payable in addition to the Award issued by the Facilitation Council on 23rd May, 2018 while recording that “other terms and conditions” of the Award issued by the Council remained the same. A tabulated statement was thereafter appended to the additional Award listing out the nine invoices forming subject matter of Petition. 38 of 2017, Bill nos, Bill dates, Due dates, Amounts due, Amounts paid, Dates of payment, Bank interest rate multiplied three times, the delay in the number months and computation of interest till date of receipt of payments. In this manner a computation was arrived at unilaterally.

15. One other interesting factor is that the original award was made by a Council consisting of four members whereas the additional award is made by five members, two of whom were entirely new to the dispute. The five member Council therefore consisted of three members from the original Facilitation Council which passed the Award and two new incumbents who had not participated in the hearing prior to the first and main award.

16. The petitioner is aggrieved by the original Award and the Additional Award passed pursuant to the limited remand in terms of the Consent Minutes of Order. Mr. Sakhare representing the petitioner submitted that the original Award does not quantify any amount payable. The principal amount already having been paid there was no question of payment of interest. Even assuming that the petitioner had liability to pay interest the said amount is not been quantified in co-relation to the principal sum. My attention was invited to the order dated 7th December, 2018 passed by this Court which required the Facilitation Council to convey to the High Court the corrections in the Award, their interpretation of the Award and an Additional Award and in terms the amount payable under the decree. Mr. Sakhare submitted that this was not done within the time of 12 weeks granted by the order or even thereafter. He submitted that the period of 12 weeks expired on 6th March, 2019 despite which the Council had not conveyed the decretal amount to the High Court.

17. In the meanwhile in view of the Additional Award having been passed an interim application was filed by the petitioner seeking amendment to the petition to incorporate a challenge to the Additional Award. This amendment is being opposed as being barred by limitation since according to the respondent the original Award had merged with the Additional Award as a result of which the Arbitration petition pending in this Court became infructuous. Mr. Sakhare submitted the Court had remanded the matter

under Section 34(4) of the Arbitration Act. He submitted that the order erroneously refers to Section 33 in the minutes. He contended that the remand was at all times contemplated as one under Section 34(4) since these petitions under Section 34 have been kept pending. He then submitted that the Council did not communicate its decision to this Court nor did it decide within the allocated 12 weeks as required by the order of the High Court. The petitioners have filed the interim application in the pending Arbitration Petition on their own after having coming to learn of the decision of the Council. He therefore submitted there was no fresh cause of action that had arisen. The interim application is therefore not barred by the law of limitation. According to Mr. Sakhare there was no question of any merger as pleaded by the respondent.

18. Mr. Sakhare then submitted that reference to Section 33 is erroneous because under Section 33(1) a party could approach the Tribunal for correction of errors, clerical or otherwise or to interpret any aspect of the Award. The Tribunal is then empowered to entertain such a request and provide its interpretation and/or correct errors on its own within thirty days. Section 33(4) provides an option to a party to make request to make an additional award in the event –of any claim being omitted and the tribunal is authorised to make such an Award within 30 days of receipt of such a request. The Tribunal also has the power to extend time to ensure compliance with the appropriate Sections. According to Mr. Sakhare the decision of the Tribunal rendered on 25th May, 2018 was not under Section 33 and was

under Section 34(4) since the Arbitration petition continued to be pending. According to him the minutes incorrectly made reference to Section 33. Thus he submitted that the interim application for amendment is not barred either by limitation or on account of merger of the original Award with the latter Award. He submitted that the Tribunal had failed to comply with the order of the High Court and hence any order passed beyond the period of 12 weeks would be vitiated as without authority.

19. Mr. Sakhare submitted that if the Council had communicated its decision within twelve weeks as directed by this Court, the petitioner would be entitled to file its objection in law. In this behalf reliance is placed on the decision of the Supreme Court in *Kinnari Mullick and Anr. vs. Ghanshyam Das Damani*¹ by contending that the Court had only two options after the Award was pronounced. One was to set aside the Award under Section 34 and the second option to adjourn proceedings to enable tribunal to take suitable action to eliminate grounds for challenge under Section 34. According to Mr. Sakhare this Court had exercised the second option to eliminate grounds for challenge and that is the reason why reference to Section 33 in the minutes is incorrect. He then submitted that the Arbitral Tribunal had failed to comply with the order of this Court within time and not having done so, the petitioners on its own filed the interim application. The amendment was required in view of the Award dated 25th April, 2019 and it is not a fresh application under Section 34.

¹ (2018)11 SCC 328

20. Reliance is placed on the decision of the Supreme Court in *State of Maharashtra vs. Hindustan Construction Co. Limited*² (2010) 4 SCC 518 in this respect Mr. Sakhare submitted that without prejudice to the aforesaid in the event the order passed by the Tribunal of 25th April, 2019 is treated as Additional Award under Section 33(5) the doctrine of merger would not apply since these petitions under Section 34 can still be prosecuted and can be decided on merits. The Additional Award can therefore form subject matter of challenge in the present petition itself. Reliance is placed on the decision of Delhi High Court in *Prakash Atlanta Jv & Ors. vs National Highways Authority of India & Ors.*³ in support of the contention that the concept of merger will not apply in the case of an Additional Award.

21. The next submission on behalf of the petitioner is on the aspect of compliance, if any, required with Section 19 of the MSME Act. In support of his contention that Section 19 of the Act would not be attracted Mr.Sakhare submitted that the requirement of depositing 75% of the amount of the Award will not be attracted since the principal sum is described as Nil. Since the principal sum was Nil when the Award was passed the question is whether there was any requirement of deposit as contemplated under Section 19. Even otherwise the Award as originally passed did not quantify any amount. It was not therefore an executable Award which is the reason why the parties agreed to have the matter sent back under orders of this Court.

² (2010) 4 SCC 518

³ (2016) SCC online Delhi 743

Even thereafter the computation is not forthcoming as contemplated and provisions of Section 19 would not be attracted since it is only interest that is sought to be awarded, that too when the contract did not provide for interest.

22. The third ground of challenge canvassed by Mr. Sakhare is the improper constitution of the tribunal as being in violation of Section 10 of the Arbitration Act. It is contended that the MSME Act contemplates a tribunal of not less than three members and not more than five. The Arbitration Act on the other hand contemplates parties having the freedom to decide on the number of Arbitrators, provided that the number of arbitrators shall not be an even number. Provisions of Section 10 are said to be applicable to the instant case and there was no consent sought from the petitioner to constitute this new tribunal upon remand. Mr.Sakhare contended and in my view correctly that when the Award was initially passed on 23rd May, 2018 the Tribunal consisted of four persons whereas when the further order / Additional Award dated 25th April, 2019 came to be passed upon remand the Tribunal consisted of five members, two out of these five were new and were not part of the tribunal when the original Award dated 23rd May, 2018 was passed.

23. Reliance is placed on affidavit filed by the petitioners Advocate Mr. Mukund Rao Kadam which sets out that some of the hearings took place before three arbitrators and some before four. The contents of the affidavit

are not controverted. The Supreme Court had in the case of *M. K. Global Financial Services Limited vs. Girdhar Sondhi* ⁴ observed that if there are matters not contained in the record of the Tribunal but were relevant for determining issues arising under Section 34(2)(a) such fact should be brought on record by filing affidavits. Not having controverted the contents of the affidavit Mr. Sakhare submitted that the contents of Kadam's affidavit dated 29th January, 2020 will have to be considered as true.

24. Mr. Sakhare then submitted that notwithstanding any of the above the Award is bad in law in terms of Section 34(2)(a)(iii) & (v) because the petitioner had no notice of constitution of the Tribunal or the composition of the Tribunal. The Tribunal is constituted without consent of the petitioner. Last but not the least, the petitioner was deprived of an opportunity to present its case including by raising objection to the constitution of the Tribunal. He therefore submitted that the Award suffers from a patent illegality having been contrary to the fundamental policy of Indian Law and failure to adopt a judicial approach thus amenable to challenge under Section 34(2)(b)(ii) of the Arbitration Act.

25. Mr. Sakhare placed reliance on the decision of the Supreme court in *Associate Builders vs. Delhi Development Authority*⁵. It is also contended that following *Associate Builders (supra)* a judicial approach was required to be followed by the Tribunal which it has not. Mr. Sakhare submitted that there

⁴ (2018) 9 SCC 49

⁵ (2015) 3 SCC 49

were no pleading to support the alleged delay in payment. The work order provides for stages for submission of bills, verification of bills and their certification. No pleadings are to be found on these aspects. Dealing with these aspects that clause 28 of the work order specifies the verification process by three authorities. There was no challenge to this in the Arbitral Reference. Delay in payments was not one of the reasons for filing the petitions under Section 18(3) of the MSME Act. The principal sum had by then been paid over albeit after filing the claim but in the absence of any evidence or contractual provisions for payment of interest the award represents a patent illegality. The Award is passed without application of mind and lacks judicial approach. The Tribunal has framed no issues and called for no evidence. The respondent made no attempt to lead any evidence. No documents were proved by the respondent. The Award being a non speaking Award containing no reasons there is no application of mind.

26. The contention on behalf of the petitioner is that the respondent neither produced any evidence to establish how there was delay in the first place nor the entitlement to interest in the event of there being delay. In respect of each bill, delay had to be proved and liability had to be established. It is not in doubt that principal sums had been paid over and therefore it was incumbent upon respondent to establish these facts prior to seeking interest. It is therefore reiterated that the Award suffers from a patent illegality being in contravention of Section 31(3) of the Arbitration Act, thus susceptible to setting aside under Section 34(2A).

27. Mr. Sakhare submitted that even otherwise, the respondent had filed copy of letter dated 24th November, 2016 referring to the final bill which clarifies that no other claims will be raised in respect of the work. He therefore submitted that there are similar letters in all cases forming subject matter of these petitions. Thus in the absence of any specific claim there was no occasion to pass any further award. Mr. Sakhare also relied upon the decision in *M/S Dyna Technologies Pvt.Ltd. vs M/S Crompton Greaves Ltd.*⁶ and submitted that reasoning of the tribunal should be adequate and intelligible. In the present case the Award satisfies neither requirement and is therefore liable to be set aside. When the principal amount was admittedly “Nil” there was no question of making any payment of interest.

28. The next point urged by Mr. Sakhare is that the mandate of the tribunal came to an end upon expiry of 90 days from the letter dated 14th February, 2018 viz. on 13th May, 2018. Whereas the award was made only on 23rd May, 2018. Thus having been passed after expiry of the mandate the award is *void ab initio*. Mr. Sakhare submitted that the petitioner had not consented to extension of time nor was such a request made by the Council or the respondent. The matter was remanded to the Council by the Court to complete the specified exercise within 12 weeks which expired on 6th March, 2019 and an additional award is seen to have been passed on 25th April, 2019. Once again after the expiry of time granted. Thus without authority of law.

⁶ 2019 SCC OnLine SC 1656.

29. Reliance is placed on the decision of the Delhi High Court in *Bata India Limited vs Avs International Private Limited*⁷ in support of the contention that Section 18 of the MSME Act would have overriding effect over other laws including the Arbitration Act and therefore the period of 90 days was not negotiable and could not have been extended. Provisions of Section 18(5) are to be held to be binding and therefore an Award passed beyond the period of 90 days would not be good in law and therefore would have to be set aside. The Delhi High Court had also placed reliance on the decision of the Gujarat High Court in *Principal Chief Engineer Vs. Manibhai and Brothers (Sleeper) and Ors.*⁸. *Manibhai* (supra) was subject matter of SLP 17434 of 2017 which came to be rejected upholding the decision of the Gujarat High Court. Thus the period of 90 days is said to be sacrosanct and any order passed beyond that period would be invalid. Furthermore upon remand by the High Court, the Council was granted 12 weeks' time (which is about 84 days). However the additional award was not made till 25th April, 2019. On this basis Mr. Sakhare contended that the Award is likely to be set aside.

30. The petitions are opposed by Mr. Quraishy on behalf of the respondents. He submitted that under Section 19 of the MSME Act, deposit of 75% of the amount awarded was a pre-condition and this Court could not entertain this petition without such a deposit. He relied upon a summary of

⁷ (2019) SCC Online Delhi 9801

⁸ AIR 2005 SC 3549.

claims under the six petitions and contended that the principal amount due was Rs.2,75,684/- and interest amounted to Rs.2,16,58,476.61 as of 30th April, 2019 and Rs.2,98,67,411.14 as on 12th October, 2020. According to Mr. Quraishy unless 75% of these amounts were deposited this petition could not be entertained. He demanded strict compliance with Section 19.

31. The next plank of opposition was limitation. According to him the remand was under Section 33(1)(a) of the Arbitration Act and not under Section 34(3). Inviting my attention to a tabulated statement containing dates of various work orders, completion dates, the dates of references and part amounts received prior to conciliation, he submitted that all payments had not been received when reference were filed. The balance payment of the principal sums was received after the references were made and it was for this reason that the principal sum payable was shown to be “Nil” in some of the cases. Nevertheless without prejudice to the bar under Section 19 Mr. Quraishy submitted that when the parties agreed to approach the Facilitation Council they so agreed under Section 33 for correction, interpretation and for an additional award and not under Section 34(4). The question that arises is whether the High Court remanded the matter under Section 33 or Section 34(4).

32. Mr. Quraishy further submitted that since the petition was filed without fulfilling the pre-condition of deposit / payment of 75% the petitions cannot be entertained. He therefore called for summary rejection of these

petitions. According to him the remand could not be under Section 34(4) since the Minutes signed by the parties referred to the requirement of interpretation of the amount payable. The parties were to approach the Council under Section 33 and the Council was to correct / interpret the award under Section 33. The High Court had not passed any order on the merits of the case to take any action to eliminate grounds for setting aside. If the High Court had remanded the matter under Section 34(4) it would be seen in the order of the High Court which would have considered the effect of the Award and the need for eliminating grounds for setting aside of the Award. No such order has been passed.

33. In my view unless the Court was satisfied that there were grounds for setting aside the award the occasion for remand would not have arisen. However this aspect would have to be considered in more detail after I deal with all the points raised by Mr. Quraishy.

34. According to Mr. Quraishy the Arbitration Act does not invite intervention of the Court and even when it does it is required to be kept at the bare minimum. It is therefore contended that the contention of the petitioners that pendency of Section 34 petitions would imply that the remand was made pursuant to Section 34(4) cannot be sustained since correction of the Award and interpretation of the Award falls within the scope of Section 33 and the parties had, by consent, agreed to go back to the tribunal under Section 33 and that being the case the consequences of Section 33 would apply. Mr.

Quraishy canvassed the point that the High Court had not found it appropriate or requested a party to go back to the tribunal on the basis that it would eliminate ground for setting aside the Arbitral Award and especially since the statute expressly prohibits a challenge to the Award unless a deposit is made. For ease of reference Section 19 of the MSME Act is reproduced below :

19. Application for setting aside decree, award or order.—No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent. of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court.

Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case, subject to such conditions as it deems necessary to impose.

Absence of a deposit/payment of an amount equal to 75% would automatically bar prosecution of the petition.

35. Mr. Quraishy then submitted that the petition would be barred under the law of limitation since the period of limitation under Section 34(3) would

run only from the date when an application under Section 33 has been disposed. That disposal occasioned on 25th April, 2019 and no fresh petition had been filed. Mr. Quraishy disputed the petitioners contention that the correction of the Award must relate back to the original challenge in the pending petition. There being no separate petition filed challenging the Additional Award he contended that any challenge would now be barred by the law of limitation and that the present set of petitions would not be of any assistance. The amendment itself is barred.

36. Mr. Quraishy submitted the Supreme Court in the case of *Ved Prakash Mithal and Sons vs. Union of India*⁹ (2018) online SCC 3181 upheld the interpretation of a single judge of the Delhi High Court that the period of limitation under Section 34(3) would run only when the application under Section 33 is disposed. Whether or not the Award is modified, computation of limitation must begin from the date that the application under Section 33 is disposed. This would entail that the present petitions are infructuous and that the petitioners ought to have filed a fresh petition. Not having been filed the challenge is not maintainable in its current form. Mr. Quraishy then submitted that limitation does not stop running upon remand. He submits that in the absence of any provision under the Arbitration Act or the Limitation Act and considering Section 19 of the MSME Act, there is no occasion to hold that limitation had stopped running or that the correction to the Award relates back to the earlier award. According

⁹ (2018) online SCC 3181

to him there are two different awards which are subject matter of challenge and the challenge to the additional award was not filed within time. Thus the awards become executable. The challenge to the Award dated 25th May, 2018 cannot be entertained in view of the bar under Section 19 and the only option for the petitioner is to challenge the additional award by depositing 75% of the amount awarded.

37. Mr. Quraishy then adverted to certain arguments on the merits of the case. He submitted that the petitioners contention that the impugned award is violative of Section 31 has no merit. That the work contemplated under the works order having been carried out and no objection having been raised, payment should have been made within 45 days failing which interest was liable to be paid under Section 16. Thus even if any other period was to be agreed upon, liability under Section 16 had not been waived. The Award according to Mr. Quraishy was a reasoned one and there is no occasion to fault it. The Award inasmuch as it is issued after an expiry of 90 days, Mr. Quraishy contends is not relevant because the period of 90 days is not mandatory and coupled with "reality and practicality of the situation" the period of 90 days is to be treated as directory.

38. Alluding to the challenge to the constitution of the tribunal, Mr. Quraishy submitted that the conciliation having been failed it was open to the Council to take up the arbitration itself. There is no question of any further consent required from the petitioner. He submitted that consent may

have been necessary under provisions of the Arbitration Act and in particular Section 11(2) but in view of Section 18(3) of the MSME Act which has an overriding effect over the Arbitration and Conciliation Act there is no merit in the challenge. The Council is required to be of not less than three members and not more than five and that is for the Council to decide. It is not open to the parties to decide the constitution of the Council. Mr. Quraishy submitted that while it is true that the Council which heard the matter in the first instance was of four members and the one heard that heard the matter upon remand consisted of five members, this is not an aspect that the parties are contesting and the appointment of the members of the Facilitation Council was actually challenged by the petitioner and hence the composition cannot be faulted.

39. Mr. Quraishy submitted that the change of the constitution of the tribunal and increase in the number of members of the Council from four to five is no ground for challenging an otherwise reasoned Award. Reasons being that interest was payable by the petitioners under the Act and that had been computed. There is no other dispute that had been adjudicated which required any detailed reasons. On this basis he submitted that the constitution of the Council with five members is not to be faulted. According to Mr. Quraishy the members of the Council had arrived at a unanimous decision upon remand and there is no challenge to that.

40. On the aspect of absence of due process Mr. Quraishy submitted that the Council was not bound by rules of Civil Procedure Code or the Evidence Act and therefore there was no occasion for the petitioners to mount any challenge on that count. According to Mr. Quraishy the Award is a reasoned award and it speaks for itself and is passed within the framework of law. The Award of interest is in accordance with Section 16 of the Act and the Arbitrator could not have decided a different rate. The Council is required to Award interest at three times bank rate notified by the Reserve Bank of India and that is how the interest was computed. He submitted that none of the grounds of challenge were valid. The calculation of interest has been provided by the tribunal in a tabular form and reasons are obvious from that table. Mr. Quraishy therefore submitted that all petitions are liable to be rejected.

CONCLUSIONS

41. The learned counsel for the both the parties have taken me through the impugned Awards, relevant pleadings, the factual aspects involved and the law on the subject. At the outset it would be appropriate to describe the scope of this challenge. There are in all five Arbitration petitions which are being considered. For the sake of convenience the factual aspects in Arbitration Petition no. 116 of 2018 are being dealt with. Both sides agree that in the remaining petitions i.e. Arbitration Petition nos. 117 of 2018, 118 of 2018, 119 of 2018 and 120 of 2018 the facts are all identical. It all pertains to work done, principal sums have been paid and the claim survives to the

extent it concerns interest. A birds eye view of the Awards in the five petitions is given in the table below:

Arbitration Petition No	Petition No.	Claim Amount			Amount granted as per Award dated 23.05.2018
		Principal	Interest	Total	
ARP/116/2018	38/2017	17,03,735.00	8,52,775.50	25,56,510.50	Principal amount– Nil Along with Interest per S.16(A) of MSMED Act, 2006 on each and every due amount Invoice when became payable after deduction of 30 days, till the realisation of amount to the
ARP/117/2018	39/2017	9,16,921.00	18,37,811.00	27,54,732.00	
ARP/118/2018	36/2017	14,95,869.00	18,19,207.00	33,15,076.00	
ARP/119/2018	40/2017	2,53,681.00	4,04,640.85	6,58,321.85	
ARP/120/2018	41/2017	5,33,586.00	3,09,140.70	8,42,726.70	

Perusal of this table indicates the basis of the Award. The principal sums in all the five cases have been paid. Interest has been claimed under Section 16A on the amount of each of the invoices from the date they became payable after giving credit for a period of 30 days.

42. Before I proceed to examine the Award and the Additional Award it will be appropriate to consider what the parties agreed to when the Award was sent back to the Council and in that respect we must refer to the order dated 7th December, 2018. The order was passed by consent. It transpires that the parties had attempted to arrive at amount payable under the Award and despite their efforts there was no consensus emerging or interpreting the award or ascertaining the amounts payable under the Awards. The parties found the Award unintelligible. The parties therefore agreed to approach the

Facilitation Council for correction and interpretation of the Award and passing of the Additional Awards. They agreed to submit in writing all their queries with documentation. Thus the Council was required to correct and interpret the Award and make Additional Awards by calculating the amount payable and draw up a decree within 12 weeks and then convey the correction and interpretation and additional award and the amount payable under the decree to the High Court. Thus the scope of the inquiry was to conclude upon drawing up a decree and communicating it to the Court. All contentions of the parties were kept open. This was agreed to in clause 6 of the Consent Minutes. The matter was then adjourned. The Minutes are signed by the respective Advocates and parties. Thus when so presented the Court passed an order in terms thereof. The Minutes did refer to Section 33 of the Act. One of question is whether this application was sent to the tribunal under Section 33 or Section 34(4). For that matter it would be appropriate to examine the two Sections. Section 33 and 34(4) are reproduced for ease of reference:

33. Correction and interpretation of award; additional award.—

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under Sub-Section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of Sub-Section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under Sub-Section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under Sub-Section (2) or Sub-Section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this Section.

Section 34(4) : *On receipt of an application under Sub-Section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.*

Consideration of this aspect is necessary to determine the scope of the challenge and whether the challenge as originally filed would survive or whether the challenge in the petitions would be rendered infructuous in view of the Additional Award passed by the Tribunal upon remand.

43. Under Section 33 the parties are entitled to request the Arbitral tribunal to correct clerical, typographical or computational or other similar errors after notice to the other parties. The parties may also request the tribunal to give an interpretation of a specific point or part of the Award and if the tribunal considers it justified, it shall make a correction or provide an interpretation within 30 days from receipt of the request and such interpretation would form part of the Arbitral Award. Under Sub-Section 3 the tribunal may carry out these corrections on its own initiative, but within

30 days from the date of the Award. This Sub-Section does not arise for consideration in the present case since the tribunal has not adopted this course. Under sub Section 4 the tribunal may be requested within 30 days from the receipt of the Award to make an additional award as to the claims presented, but omitted from the Arbitral Award and if such request is found justifiable, an additional award shall be made within 60 days of receipt of the request. The tribunal is also empowered to extend the duration of time within which the correction, interpretation or additional award is to be issued and all such corrections, interpretations and additional award shall be subject to provisions of Section 31 as regards the form and content of the arbitral award.

44. Sub Section (2) of Section 31 is material inasmuch as it provides that in an Arbitral proceeding with more than one arbitrator, signature of majority of the members shall be sufficient so long as the reason for omission of any signature is stated. In the instant case the original award was passed by four arbitrators and the revised Award by five arbitrators, two of whom are new and were not part of the Council which passed the main award. Section 31 also provides for payment of interest of 2% higher than the current rate prevailing. Thus on analysing Section 33, the following becomes clear viz. correction, interpretation and additional award can be carried out only upon one of the parties making a request to the tribunal. The 30 days period within which such an application is to be made may be enlarged by parties by consent. As a result request for correction interpretation and additional

award can be made beyond 30 days period but the essential part is that under Section 33 it is for one or the other or both parties to apply. The Tribunal also is empowered to carry out corrections, offer an interpretation or an additional award of its own initiative. Thus Section 33 operates at the request of a party or parties or by the initiative of the tribunal itself. It does not contemplate the Court stepping in .

45. Section 33 forming part of Chapter VI deals only with making of arbitral award and termination of the proceedings. Section 34 falls under Chapter VII which deals with recourse against an arbitral award. Under the scheme of the Act therefore, recourse against an arbitral award is considered only after termination of proceedings. Thus under Section 34(1) an application can be made to Court to set aside the Award which the Court may do only if the party applying establishes on the basis of the record of the tribunal that it was either under any incapacity or the arbitration agreement was not valid, the applicant did not have proper notice of the appointment of the arbitrator or of the proceedings or if the award dealt with the dispute not in contemplation of the parties or it was beyond the scope of submission to arbitration. If matters submitted are separable from those not submitted, only that part which was not subject matter to submission of arbitration can be set aside.

46. The other ground for setting aside the award is composition of the tribunal or procedure adopted not being in accordance with the agreement

between the parties. Once again, if such agreement was in conflict with Part I of the Arbitration Act this ground would not be available. Under Section 34(2)(b) the award could be set aside if the Court found that the subject matter was not capable of settlement by arbitration or if the award is in conflict with public policy of India. The explanation deals with what public policy would entail. Under the amended provisions an award could also be set aside if the Court finds the award vitiated by patent illegality appearing on the face of the Award and not merely on the ground of erroneous application of law or by re-appreciation of evidence. Sub Section (3) sets time limit for seeking setting aside of an award at three months after the date on which an applicant receives the arbitral award or within three months from date of disposal of a request under Section 33. The period of three months is extendable by another 30 days if the Court finds sufficient cause for not applying within time. Under Sub-Section (4) the Court may on an application by the party adjourn the proceedings for some time to give an opportunity to the tribunal to either resume the arbitral proceedings or adopt measures to eliminate grounds of setting aside the award.

47. Thus in the case at hand one of the aspects that has arisen for consideration is whether the application to the tribunal for correction, interpretation and additional award was made pursuant to Section 34(4) and I am of the view in facts of the case the matter referred was clearly pursuant to Section 34(4). As stated earlier, if I have to accept Mr. Quraishy's submission that the application was one made under Section 33 alone, the

respondent must demonstrate that the parties, any one or both of them requested the tribunal to correct errors contemplated under Section 33(1)(a) and that the parties agreed and requested tribunal to give an interpretation or correct the award. The tribunal has not in the present case done so of its own initiative. In the case at hand however, all that the parties have done is to agree that the Award is incapable of interpretation and therefore request correction and interpretation and seek issuance of an additional award after termination of proceedings under Chapter VI and after presentation of a petition seeking recourse against an arbitral award. Once the matter crosses the threshold of Chapter VII and an application for setting aside an arbitral award is filed in a Court, the parties would not be in a position to apply for correction without leave of the Court. It is possible that an application for correction may be filed by one party to the arbitral proceeding and an application for setting aside under Section 34 has been filed by another party. In such a situation the correction ensuing from such application may well be one under Section 33. For instance a party who has not challenged the award, but has applied for correction will be entitled to contend that the order passed by the arbitral tribunal was one under Section 33. However, if a party seeks correction after challenge petition is filed, an application could only be made under Section 34(4) and a party would not be able to make an application under Section 33 without leave of the Court under Section 34(4). This becomes clear on a plain reading of the aforesaid two Sections.

48. In the present case I am of the firm view that it is only after the filing of the petitions challenging the award that the parties deemed it appropriate to approach the tribunal to seek interpretation, correction and renewed application of award. The order of the Court does not specify that this is under Section 33 although the Minutes did and indeed it could not since it is the Court which has adjourned the proceeding under Section 34(3) in order to enable a determination by the Arbitral Tribunal to either resume proceedings or take such measures so as to eliminate grounds of challenge. This is an indication that the challenge was not mature or that the challenge was possibly premature since the tribunal is being given an opportunity to either resume proceeding or take action to eliminate grounds for setting aside the award. In the first option the tribunal may be expected to incorporate its decision on the subject matter of arbitration after resuming arbitral proceedings for it is possible it may have omitted to do so in the first round. In the second scenario there is a presumption that grounds for setting aside arbitral award exist. Failing such presumption a party would not be expected to agree to submit to the tribunal under Section 33 or to request a Court to adjourn the proceeding in order to approach the tribunal under Section 34.

49. There is a distinction between an application under Section 33 and that under Section 34(4). Whereas Section 33 contemplates correction of an award for computational, typographical or clerical errors or to give an interpretation on a specific point which may or may not require an additional

award to be made on the claims, Section 34(4) operates in a different area where the challenge to the award is adjourned to enable the tribunal to resume proceedings. Resumption of proceedings may be as a result of the necessity to apply for an additional award or for interpretation on any part. If the proceedings are to be resumed before the arbitral tribunal, it is indicative of the need to hear both parties since a pure interpretation under Section 33 would not require or justify resumption of arbitral proceedings. To consider the second aspect of Section 34(4) the tribunal is given an opportunity to eliminate grounds for setting aside the arbitral award. Existence of such grounds is therefore presumed. An application under Section 34(4) may be opposed by one party if it believes that there were no ground for setting aside award or there were sufficient ground for setting aside the award without going back to the tribunal.

50. The facts of the present case are peculiar inasmuch as the parties agreed to go back to the tribunal under Section 33 since Minutes of the order makes reference to Section 33 but the subject matter of the Minutes appears to be an attempt to arrive at an amount payable under the award which would require an interpretation of the amount payable. Clause 2 of the Minutes records the helplessness of both the parties in arriving at a consensus and identifying the amount payable under the award. Both parties were thus *ad-idem* that they could not identify the amount payable. The award was thus unexecutable for vagueness. The parties therefore appear to have consented to approach the Facilitation Council under Section 33 for

correction, interpretation and issuance of an additional award. Clause 3 of the consent minutes records this. It also records that parties would submit in writing all their queries and documentary evidence in the form of affidavits as directed by the Council within eight weeks. Thereafter Council would correct, interpret and issue an additional award by calculating the amount payable and thereby draw up a decree. It was also agreed between the parties that the Council would convey the correction, interpretation and issue additional award to the High Court directly along with interest payable under the award and it for this reason that the parties agreed to adjourn the matter and sought leave of the Court with liberty to apply. Parties agreed that all contentions of the parties are kept open meaning the challenge in the petition was unaffected and this agreement was without prejudice to the rights and contentions of both parties. The parties however sought an adjournment in order to enable the tribunal to decide.

51. Thus once having sought an adjournment and the Court having passed an order in terms of the minutes as can be seen from the operative portion of the Court's order it will constitute an application under Section 34(4) read with Section 33. The Court has therefore adjourned the matter after observing that the parties have agreed that grounds may exist for setting aside the award since they were unable to arrive at consensus for interpreting the amount payable and that being the primary mover had agreed with leave of the Court to approach the Council under Section 33. The application for adjournment of proceedings was granted. It could have been so granted only

under Section 34(4). The arbitral tribunal therefore had opportunity to resume arbitral proceedings rather than merely eliminate grounds for setting aside since paragraph 3 of the consent minutes provide that the parties had agreed to submit in writing all queries and documentary evidence in the form of affidavits. This would entail in my view a resumption of arbitral proceeding since parties submissions of documentary evidence probably would have involved a contest on the material sought to be placed before the Facilitation Council which would have required resumption of arbitral proceeding and after hearing the parties. Here the Council erred seriously in not hearing the parties before issuing the Additional Award.

52. Thus in my view, although the language used in the consent minutes signed by the parties refers to approaching the Council under Section 33., the power contemplated under Section 33 was restricted to correction, interpretation and issuance of an additional award. However, in view of the parties having agreed to submit in writing queries / documentary evidence in support of their respective cases or *“as directed by the Micro and Small Enterprises Facilitation Council within 8 weeks”* it implies a hearing before the Facilitation Council to seek appropriate directions. Thus this is an application under Section 34(4) which seeks to provide an opportunity to the Council to resume arbitral proceedings, eliminate grounds of challenge as also carry out correction in the award, interpret any specific portion thereof and with the possibility of issuing an additional award. It is therefore not an

application under Section 33 per se but one under Section 34(4) with a consensual request to the tribunal to invoke its power under Section 33 and after hearing parties.

53. Having come to the conclusion that the order dated 7th December, 2018 was one under Section 34(4) let us now consider the merits of the challenge. The challenge as originally filed takes up various grounds. Firstly that there was no application of mind. The order initiating arbitration was without proper adjudication, no consent was given to appointment of the Council. Under Section 11(2) of the Arbitration Act consent of the petitioner was required and that the number of arbitrators could not have been an even number, even considering Section 10 of the Arbitration Act. In the instant case there were four arbitrators forming part of the Council. Later, on remand the order was passed by five arbitrators which is in violation of Section 10 and therefore the award is assailed on that ground as well. Apart from the other ground of not framing issues, not giving any reasons, it is submitted that the impugned award is vague. It observes that the principal amount had already been paid and interest was being demanded at 41.1% and stated to be effectively awarded at 27%.

54. By way of an amendment carried out on 5th October, 2020 paragraph 13(a) to 13(c) were added in the petition seeking to challenge the additional award dated 25th April, 2019 as well amongst other grounds. The petitioner pleaded additional grounds q(i) and q(ii). These amendments are sought to be

challenged as having been made beyond time since the additional award was dated 25th April, 2019. Thus the amendment was carried out beyond the time available for challenging the Award under Section 34(4). On this aspect of the matter I am unable to agree with Mr. Quraishy that the petition is barred by law of limitation in view of the fact that the amendment was carried out beyond time and in effect Mr. Quraishy's contention that the original petition was rendered infructuous upon passing of the consent order on 7th December, 2018 cannot be accepted. When the petition was adjourned, the challenge was very much subsisting and it is during the subsistence of this challenge that the consensual request was made which could inter alia eliminated grounds for challenge. The original award and the additional award had not merged. A merger would entail that the original award would stand with correction and interpretation under Section 33. However in the case at hand the tribunal has thought it fit to also issue an additional award but no hearing has been granted. A perusal of the order dated 7th December, 2018 reads as follows

“The Learned Advocates appearing for the parties have tendered Minutes dated 7th December, 2018. They submit that the Minutes be taken on record and an order be passed in terms of the Minutes. The Minutes are taken on record and marked 'X' for identification. The Minutes are signed by the Advocates for the parties. Order in terms of Minutes marked 'X'. Stand over to 26th April, 2019. Liberty to apply.”

All petitions were adjourned. The adjournment is clearly as contemplated under Section 34(4). It is thereafter that an additional award has been passed that too beyond time. In the additional award certain amounts have been computed. I will shortly examine the original award and the additional award when dealing with the challenge to the awards per se.

55. One of the contentions of the petitioners and as canvassed by Mr. Sakhare before the order dated 7th December, 2018 came to be passed the petitioners had filed affidavit of Narayan Ramanth Chakor, Additional Executive Engineer (C), M.S.Elect.Trans.Co. Ltd. in which the deponent stated that the calculation submitted by the respondent were erroneous and that at best the interest calculation would reveal that total amount due would be Rs.4,31,080/- is explained in Exhibit A to the first petition. Likewise in other petitioners also affidavits have been filed and the amounts computed on behalf of the petitioners. Thus even according to the petitioner if any interest was payable the computation was incorrect. It is after this affidavit was filed that the parties agreed to go back to the tribunal in terms of the minutes and the order passed thereon. Mr. Sakhare has stressed his submission that the award is bad in law since the Council did not communicate its decision within 12 weeks and there was no occasion to address the Facilitation Council before they took their decision on remand. I have already held that the petition is not barred by the limitation. I am of the view that the interim application is also not barred by limitation since the petition was simply adjourned under Section 34(4). I am in agreement with the submission of

Mr. Sakhare that there was no novation of the original award so to speak. The adjournment of the petitions permitted the parties to go back to the Council and the petitioner had filed the interim application by way of abundant caution even before the Council could communicate its decision and upon failure of the Council to submit the communication within the 12 weeks period specified in the order dated 7th December, 2018. If this was done in time parties would have filed their objection.

56. The decision in *Kinnari Mullick (supra)* applies squarely to the facts at hand inasmuch as the Court could only set aside the Award or adjourn the matter when the petition was first urged and in view of the consensual approach of the party the Court adjourned the matter in the first instance. Having adjourned the matter the Facilitation Council has proceeded to publish an additional award which according to it complies with the direction of the High Court. The question is whether the petition under Section 34 today survives as against both the original award and the additional award and in my view the answer must be in the affirmative. The facts in *Kinnari Mullick (supra)* reveal that the Award had already been set aside and the Court had suo moto sent the parties to the tribunal. This was found to be unsustainable inasmuch as the Supreme Court found that the limited discretion available to the Court under Section 34(4) would have been exercised only upon a written application made by a party to the arbitral proceeding and the court could not exercise this power suo moto. Moreover this request had to be made by the parties in writing and before

the Award was formally set aside. It is only then that a request could be made to the arbitral tribunal and the Court also observed that if the party to the proceeding does not request the Court to defer the proceeding pending before it, then it is not open to such a party to move an application under Section 34(4) since upon setting aside of the Award the main proceeding under Section 34 would have been disposed and the Court would become functus officio. Thus the limited jurisdiction of the Court under Section 34(4) was to be invoked and to be exercised by the Court before an Award was set aside. That is precisely what has happened in the instant case inasmuch as pending the decision on the 34 petition the parties sought an adjournment to go back to the Council for obtaining correction, interpretation or additional award so as to eliminate the ground of challenge and if thought fit to resume proceedings before the tribunal.

57. As far as the amendment is concerned in *Hindustan Construction Company Ltd. (supra)* the Supreme Court was considering amendment for incorporation of additional grounds in an application under Section 34 or a memo of appeal under Section 37. When the application was filed after expiring of limitation period under Section 34(3) the Court observed that it would not denude the Court of power to grant leave to amend if required in the interest of justice. However, if addition of new grounds is sought without any foundation in the application for setting aside, the Award would be rightly rejected by the Court. More so when an amendment application

under Section 34 had not been sought before Court of first instance. The Court held that amendments and additions of grounds by way of amendment is tantamount to filing a fresh application. In all situations, amendments would normally not be allowed, however the words “the Court finds that included in Section 34(2)(b) would enable a court to permit an amendment in peculiar circumstances of the case and if so warranted in the interest of justice”.

58. I am of the view that in the present case the amendment was certainly required in view of the tribunal having passed a subsequent award during the pendency of the present petitions and for that reason also I hold that the amendment is not barred by the law of limitation. Thus in effect there is no absolute bar against amendment being allowed provided the party applying had laid the foundation in the original petition under Section 34. Absent such foundation no amendment to add new grounds or material could be permitted. In the instant case the restriction to amendment contemplated in *Hindustan Construction Company Ltd. (supra)* cannot apply since the petitions were kept pending only to enable the parties to obtain the necessary interpretation, corrections and if necessary an additional award. If the intention of the Court was to permit a subsequent and renewed challenge upon the corrections being made by the Facilitation Council or upon interpretation of the Award by it or the passing of additional award the present petitions need not have been kept pending but would have been disposed. For this reason also the direction to the Facilitation Council is not

one purely under Section 33 since the petitions would not have been kept pending nor would they have been adjourned.

59. On the aspect of merger I do not believe that there is any doubt created by the mixed bag remand to the arbitral tribunal inasmuch as provision of Section 33 and 34 are both clear in their meaning. They are capable of harmonious construction without reference to other provisions and there is certainly no occasion to accept the respondents contention that there has been a merger as a result of the additional award. The Awards are separate and distinct and operate independently. The first seeks to fix liability and the additional award seeks to quantify it. It is only on account of the interpretation and correction that an additional award was found necessary, more so since effectively the tribunal had revisited the disputes and the reliefs and in an attempt to make an intelligible award it proceeded to issue the additional award. Thus the legislative intent of Sections 33 and 34 are both clear and there is no conflict. The unique nature of the order passed by this court on 7th December, 2018 contemplated a combination of solutions offered by Section 33 for correction, interpretation and issuance of additional award as well as an opportunity to the tribunal to resume the arbitral proceeding and in that manner remove any scope of challenge.

60. Let us now examine the Awards themselves to see whether they are susceptible to a challenge as contemplated under Section 34. The first Award dated 23rd May, 2018 is to be found at Exhibit “F” to the petition. The Award

was forwarded on 23rd May, 2018. The findings and the operative portion have already been reproduced elsewhere in this judgment. The finding reveals that the respondent-claimant had received the principal amounts after filing of the applications with the Council. The process of conciliation had failed and therefore the Council had decided the matter on merits. This is recorded as a finding of the Council under the heading “Findings and reasoning”. It does not take much effort to observe that the award is bereft of any reasons. The order allows the petition *“in terms of prayer”*. However when one peruses the copy of the petition filed by the respondent before the Council there are no specific prayers. The petition proceeds on the basis of the work orders in question. It contains a synopsis. The prayer is said to be part of item no. 17 in Annexure 3. However, all that it refers to is an unspecified and attached page number. Going by the synopsis attached to Annexure 3 the following appears in column 14.

Amount Yet to receive (In) Rs.	2,53,681.00
Interest @ 41.1 %	4,04,640.85
Amount of Principal and interest	6,58,321.85

This in effect appears to be the prayer which has been allowed. The awards are bereft of any reasons whatsoever for granting this prayer. When the award is read in its entirety it sets out brief details of the work, case of the petitioner, the case of the respondent and proceeds to observe that the Council had taken into consideration the record, documentary evidence

submitted by the claimant and had given stage wise notices to the petitioner herein. It conducted hearings for conciliation and arbitration. However while allowing the reference in terms of the prayer no reasons are forthcoming. There is no finding as to how if at all the computation of interest is correct. The item no. 2 of the operative order reads as follows :

2. The Respondent is required to pay to the Petitioner a principal amount of "Nil" along with interest as per the Section 16A of the MSMED Act, 2006 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.

When one reads this portion it is clear that the Council expects the petitioner herein to pay the principal amount which is described as "Nil" along with interest under Section 16A on the amount of each and every invoice when they become payable after deduction of 30 days. What it implies is that there would be credit period of 30 days after which the bill would have become payable forthwith. The last words of clause 2 of the operation portion reads as follows *"till the realization of the amount to the petitioner"*. This makes little sense, if at all, inasmuch as the principal amount having been paid in its entirety the amount falling due towards interest would only be from the due date, after giving credit for 30 days till payment of the principal sum. There was no question of including the word *"till the realisation of the amount to the petitioner"* since the amount would have been crystallized as on date of payment of the principal amount. It is not intended by this order that the

petitioner would be liable to pay interest on interest. That is certainly not evident from the award nor is it the case of the respondent. In clause 3 the Council orders as follows :

“3. The Principal and interest amount are to be paid by the Respondent to the Petitioner within a period of one month from the date of receipt of this Award.. ”

Once again reference to principal in clause 3 is devoid of any meaning since principal amount adjudged as “Nil” having been paid before the passing of the Award.

61. On this basis I am of the view that the Award is not intelligible and obviously incapable of execution for being vague and expecting an unspecified amount to be paid. The award is certainly not executable. This was obviously the reason for the order dated 7th December, 2018 came to be passed. Let us therefore examine the order passed on remand on 25th April, 2019. This is to be found at Exhibit “H” to the petition and described in the reference column the order of this Court dated 7th December, 2018. It also contemplates all these petitions in serial order along with Petition no. 38 of 2017 which was before the Council. It is therefore evident that it is the very same petition in which first award was passed that was subject matter of consideration. It would not be difficult to see that what is contemplated here is the resumption of arbitral proceeding under Petition 38 of 2017. The Original Award reads as follows :

ORDER

1. *The reference Petition No. 38/2017 is allowed in terms of prayer.*
2. *The Respondent is required to pay to the Petitioner a principal amount of "Nil" along with interest as per the Section 16A of the MSMED Act, 2006 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. *The Principal and interest amount are to be paid by the Respondent to the Petitioner within a period of one month from the date of receipt of this Award.*
4. *No Order as to costs.*
5. *The case is disposed off and closed.*
6. *This order is issued on this 23 day of May, 2018.*

Place : Konkan

Date : 05. 2018

sd/-

(G.V. Bellale)
Member Secretary
Deputy Director of Industries

sd/

(S.G.Rajput)
Ex-Officio Chairperson
Joint Director of Industries
Konkan Region
Directorate of Industries holding
the post of Additional
Development Commissioner
(Industries)

sd/-

(Umesh Tayade)
Member, MSEFC &
Chairman, AAMA

sd/-

(K. R. Gopi)
Member MSEFC &
Chairman, SSEA

The Council has then proceeded to make additional awards by calculating the interest amount payable in addition to the award issued by the Council

on 23rd May, 2018. The additional award reads is as follows :

"Additional award as per the order dated 07.12.2018 by the Hon'ble High Court, Bombay

ORDER

For the reference Petition No. 38/2017 as per directives given by the Hon'ble High Court, Bombay order dated 07.12.2018, and as per the request of Petitioner and Respondent under Reference No. 3 & 4, the additional award by calculating the interest amount payable In addition to the award issued by the Council on 23.05.2018 is as follows. Other terms and conditions of the award issued by the Council remains same."

The Additional award is followed by a table of interest computation to which I will deal with shortly. The last sentence of the Additional Award makes it evident that the original award continues to hold fort and the present additional award is exactly what it says *"in addition to the award issued by the Council on 23.05.2018"* When we peruse this additional award what follows is tabulated interest computation in Petition no. 38 of 2017. It sets out nine different bill nos, bill dates, their due dates the 30th date from the bill date and mentions , several particulars of amounts due, amounts received, date of payment, three times RBI bank rate as on date of bill / RBI rates are mentioned against each invoices without any cross reference to any documents, delay in number of months, interest on amounts received till date of payment and interest upto two different sets of dates (30.4.19 and 31.5.2019) are provided. In particular and as pointed out by the petitioners no opportunity appears to have been given to the petitioner to show cause

against this computation. The rate of interest applied does not seem to be cross referenced with the base rate from which the rate is derived and entered in this column which I have notionally numbered as column no. 8 for this judgment. The 11 columns are briefly described below.

1	2	3	4	5	6	7	8	9	10	11
S. No.	Bill No	Bill Date	Due Date 30 days from the bill date	Amount (Rs)	Amount Recd.	Date of Payment	3 times of RBI Bank Rate as on date of bill/100	Delay in months	Interest on received amount till date of receipt of payment	Interest upto 4/30/2019 5/31/2019

62. Thus, I find that in the Additional Award there is no co-relation with the first. The first award simply states that the prayer is allowed, the prayer includes interest computation at 41.1%. The additional award fails to specify the base rate applied and in that respect, is once again bereft of reasoning. There is no evidence of any corrections having been made or any interpretation provided. The procedure contemplated under Section 33 does not appear to have been followed. The consent minutes provided for parties to submit documentary evidence and it was in my view necessary for the Council to grant a hearing to the parties. The Additional Award is passed without granting any such hearing. It is in this behalf that it is relevant to note that the petitioners representative i.e. their Advocate Mr. Mukund Manikrao Kadam has filed an affidavit dated 29th January, 2020 deposing to the fact that no proper notice was given. The affidavit of Mr. Mukund Manikrao Kadam Advocate for the petitioners is on record of this petition. The deposition firstly proceeds to find fault with the constitution of

the Council. The petitioner was unaware of the exact composition of the Council till they received the Award dated 23rd May, 2018 which was signed by four arbitrators. This was in violation of Section 10. It was further stated that several applications had been filed by the petitioners about the constitution of the tribunal but these were not decided. The impugned order dated 25th April, 2019 also finds mention in the affidavit. This is the additional award which the deponent states was passed once again without following any procedure. A request was made to follow procedures under the Arbitration Act but this fell on deaf ears. This however pertains to the earlier award and to my mind loses significance in view of the remand order.

63. The affidavit further states that no issues were framed and no findings were rendered on the issues. More particularly and critically the affidavit states that the tribunal did not provide any opportunity to the parties to present evidence. It appears that the tribunal did not hear parties at all on these aspects. In paragraph 11 it is stated by the deponent that during the hearing of the matter before the Council there were two or sometime three arbitrators i.e. the Chairman and one or two members. The number of arbitrators were never made known to the parties. It is only upon the award being issued that the petitioners realised that there were four members in the Council. The affidavit in my opinion does indicate that there was no proper hearing or consideration of the aspects on which corrections were sought.

64. I have not heard any submission on behalf of the respondent either from Mr. Quraishy to the effect that hearings took place and both parties attended before the Council to make their submissions pursuant to the remand. In these circumstances I am of the view that the petitioner would be entitled to rely upon decision of the Supreme court in *M. K. Global Financial Services Limited (supra)* in which the Supreme Court found that in relation to matters not found in the record in paragraph no 21 the Supreme Court clarified the legal position by stating that an application for setting aside of an Arbitral Award will not require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record and are relevant for the purposes of determination of issues arising under Section 34 they may be brought to the notice of the Court by way of affidavits by both parties. In that case it is observed that cross examination of persons swearing affidavit should not be allowed unless absolutely necessary as the truth will emerge on reading affidavits filed by both parties.

65. In the present case the affidavit of Mr. Kadam has not been controverted nor have I heard the respondents to make any submissions in that behalf and indeed none are contained in the written submission as well. I am therefore inclined to and will be justified in holding that the contents to the extent that no hearing was granted despite a request to follow basic procedure appear to be correct. The Council did not afford a complete opportunity to the parties despite the order of remand. For that reason I am of the view that the award being bereft of any reasons and being passed without

an opportunity to the petitioner to show cause against the computation of interest would fail the test under Section 34 as lacking a judicial approach and amounting to an award which is contrary to the fundamental policy of Indian Law. The Award would therefore be liable to be set aside under Section 34(2)(b)(ii).

66. This is an aspect which has been considered in great detail by the Supreme Court in the decision of *Associate Builders (supra)*. The Council has proceeded to pass the additional Award without ascertaining the views of the petitioners, no opportunity has been given to the petitioners to deal with the documents, if any, filed on record by the claimant / respondent. The Award to that extent is clearly without reasons. It is a non-speaking award. It does not disclose the manner in which the Council came to its decision in computing the amount of interest. These are aspects which would have to be established before the Council in respect of each and every bill. Not having given an opportunity to the petitioner to show cause against such computation and having disregarded the computation provided by the petitioners in this petition and reference being had to the affidavit filed on behalf of the petitioners, I am of the view that the award suffers from a patent illegality on the face of the award. For these reasons the Award is liable to be set aside.

67. The Supreme Court in its decision of *Ssangyong Engineering And Construction Co. Ltd. vs National Highways Authority Of India*¹⁰ has

¹⁰ 2019 SCC OnLine SC 677

observed and reiterated its observation in paragraph 42 of *Associate Builders (supra)* that although a mere contravention of the substantive law of India is itself not a ground available for setting aside an arbitral award. If an arbitrator gives no reasons he contravenes Section 31(3) of the Arbitration Act and that would amount to a patent illegality. This is an aspect which has been dealt with in some detail in the decision in *Associate Builders (supra)*. In this behalf I may observe that in paragraph 41 of *Ssangyong Engineering (supra)* the Supreme Court had observed that a finding based on documents taken behind the back of parties would also qualify as decision based on no evidence as decision is not based on evidence lead by the parties and will therefore have to be characterised as perverse.

68. In the instant case the Council does not appear to have permitted the petitioners an opportunity to deal with documentation relied upon by the respondent / claimant and that in my view would be hit by the Supreme Court's findings that this approach of the Facilitation Council would be perverse. Moreover under Section 34(2)(a)(iii) the petitioner would have been found to be unable to present its case for want of a proper opportunity to deal with documentary evidence on the basis of which the interest has been computed. It is not necessary to delve into the details since on the face of it it appears that no such opportunity was granted and it is not the case of the respondent that any such opportunity was granted.

69. One other contention raised on behalf of the petitioner is that the MSME Act would not apply and the provisions would not entail liability since the contract in question was a works contract and not one for supply of materials or services to be rendered. A works contract has already been held to be falling outside the scope of a reference under the MSME Act. This has been so held not only by this Court in *Sterling And Wilson Private Ltd. vs Union Of India And 3 Ors*¹¹ . but this view has been taken also by the Allahabad High Court in *Rahul Singh vs. Union of India*¹² on which reliance was placed by Mr Quraishy. This was also the view of a Division Bench of the Delhi High Court in the case of *Shree Gee Enterprises vs Union of India and Anr.*¹³ that would entail the Council not having the jurisdiction to entertain the claim. Mr. Quraishy had also relied upon decision of *Ved Prakash Mittal & Sons vs. Union of India*¹⁴. However I find that *Ved Prakash Mittal (supra)* will not be of any assistance to him since on the aspect of limitation what it holds is that disposal of an application under Section 33 and that limitation to challenge the award would have to be computed from the date of such disposal and disposal would mean either by allowing the application or rejecting it. This contention would have been relevant but for my holding that the additional award did not give rise to a fresh cause of action to challenge the award that the pending petition was competent

¹¹ AIR 2017 Bom 242

¹²Writ Petition C no. 2316 of 2016

¹³(2015) SCC online Delhi 13169

¹⁴ AIR 1984 Delhi 325

enough for that purpose and therefore the amendment to the petition justifies to incorporate the challenge. The decision of the Rajasthan High Court in the case of *Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.*¹⁵ would once again deal with the provisions of Section 16 and the date from which interest was payable to a supplier in the event of failure of the buyer to pay the money due for the supplies made while the provisions of the act are not in dispute. This decision will not come to the assistance of Mr. Quraishy since I have already held that the Council was duty bound to provide an opportunity to show cause against the computation of interest and given the unreasoned award, there is no occasion for the petitioner or even this Court to appreciate the basis of the additional award.

70. The requirement of a reasoned award has been highlighted by the Supreme Court in *Dyna Technologies Private Limited vs. Crompton Greaves Limited*¹⁶ The Supreme Court has in paragraph 36 of that decision observed that the mandate of Section 31(3) of the Arbitration Act would require intelligible and adequate reasons which can, in appropriate cases, even be implied by Courts on a fair reading of the Awards and documents referred to thereunder. That no elaborate judgment is required to be passed by the arbitrators having regard to speedy resolution of a dispute.

71. The Supreme Court further observed that the requirement of a reasoned award must satisfy three characteristics. They must be adequate,

¹⁵(2013) 9 SCC 32

¹⁶2019 SCC online 1656.

intelligible and proper. The reasoning should not reveal a flaw in the decision making process and that would make the award unintelligible. In the present case I am clearly of the view that the Award is been rendered unintelligible by failure to give reasons for the basis of the computation of interest in the additional award. No reference being had to the document evidencing the base rates of interest and documents on which the computation is based and an opportunity to the petitioners to deal with the contentions. The decision making process is also rendered vulnerable in the facts at hand. Thus the award is liable to be set aside since these defects have not been cured despite an opportunity being granted to the Facilitation Council by the order dated 7th December, 2018.

72. Summarizing I find that the order dated 7th December, 2018 was one under Section 34(4) of the Arbitration Act. Hence the challenge to the Additional Award was within the scope of these petitions, the amendments included. As regards the change in the number of members of the Facilitation Council, the total number having undergone a change cannot in itself be enough to render the Awards invalid if the reconstituted council had heard the parties since the Council consisted of two new members. The Additional Awards have been passed by the reconstituted Council and the new members would have had opportunity of assessing the merits on both sides and evaluating the documentary evidence and material that the parties could have placed before the Council. This they have failed to do. Failure to do so will attract the ills of lacking in a judicial approach. The Awards are thus also

rendered bad for want of a judicial approach in deciding the matter even after the limited scope of the remand.

73. The failure to adhere to time schedules is one aspect which has been urged by the petitioner. However, I am of the view that non submission of its interpretation within the 12 weeks specified by the High Court is something that the High Court would have considered had there been a request for condonation of delay. However, in the present set of facts there is nothing on record to suggest that the Council in fact sought an extension of time. However, in view of the fact that the petitioners have then moved for an amendment and a challenge to the Additional Award, I am of the view there is no occasion to decide this issue in the current set of facts. Hence that aspect is left open for consideration in an appropriate case. That having been said I am of the firm view that the petitions are not barred by the law of limitation to the extent it contains a challenge to the Additional Awards. The Facilitation Council has in my view failed to eliminate grounds for challenge of the Awards. Moreover, the Council has also not offered its interpretation on the original Award. Thirdly the Council has not passed a decree in the exact amount payable merely by publishing the Additional Award which does not cross reference the relevant bills would not be compliant with this order passed by this Court. Being a Works Contract this and other Courts have taken a view that a claim under a works contract would not fall within the scope of the MSME Council. This is evident from the fact that the respondent

was to send in running bills as the work progressed. It is not merely question of supply or rendering services but an indivisible assignment that was entrusted to the respondent. Apart from *Sterling And Wilson Private Ltd. (supra)* this Court has also taken a view in the case of *M/s. P. L. Adke vs. Wardha Municipal Corporation / Council* ¹⁷ in the aforesaid circumstances all Awards are liable to be set aside.

74. For all the aforesaid reasons I am of the view that the petition must succeed and in view thereof I pass the following order in all these petitions.

(i) The impugned awards dated 23rd May, 2018 and the Additional Awards dated 25th April, 2019 passed by the Micro and Small Enterprises Facilitation Council are hereby set aside.

(ii) Parties are left to seek their independent remedies if permissible in law.

(iii) Arbitration Petitions are disposed in the above terms. In view of the disposal of the Arbitration Petitions all pending Applications are disposed as infructuous.

(iv) No orders as to costs.

(A. K. MENON, J.)

¹⁷ ARA(ST)-30508-19-ARA-7-2019