BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 07.09.2021

CORAM

THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P.(MD)No.13870 of 2021
and
WMP(MD) Nos.10822, 10824 & 10826 of 2021

Union of India,
Ministry of Defence,
HIGH ENERGY PROJECTILE FACTORY,
(formerly Heavy Alloy Penetrator Project (HAPP),
HAPP Town Ship Post,
Tiruchirapalli,
Tamilnadu - 620 025.
Represented by its Deputy General Manger,
Mr.Dr.C.Pandi Selva Durai. ... Petitioner

Vs

1. The Chairman,
   Uttar Pradesh (UP),
   State Micro & Small Enterprises Facilitation Council,
   (Statutory Arbitral Tribunal),
   Arbitral Situs - Directorate of Industries,
   Sarvodaya Nagar,
   G.T.Road, Kanpur,
   Uttar Pradesh - 208005.

2. The Mellcon Engineer Pvt Ltd.,
   Reg office at: B-297, Okhla Industries Area,
   Phase - I, New Delhi - 110020.

3. The Mellcon Engineer Pvt Ltd,
   Represented by its Managing Director,
   Mr.Rakash Kalia,
   B-297, Okhla Industries Area,
   Phase - I, New Delhi - 110020. ... Respondents

PRAYER: Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records relating to the impugned order in Reference No.154/2018 date of final award 12.12.2019 passed by the first respondent and quash the same as illegal and consequently direct the respondents 2 & 3 to comply Clause 19 of terms and condition and Annexure V, Clause 2(a), (b), (C) of terms and conditions vide supply order (SO) bearing SO No.HAPP/NC/CAP/SO/MP261400013/EO/2014-15 dated 02.03.2015.

For Petitioner : Mr.D.Saravanan

For R2 & R3 : Mr.Abhinav Parthasarathy

O R D E R

The prayer sought for in this Writ Petition is for a Writ of Certiorarified Mandamus, to quash the impugned order in Reference No.154/2018, dated 12.12.2019 passed by the first respondent and consequently direct the respondents 2 & 3 to comply Clause 19 of terms and condition and Annexure V, Clause 2(a), (b), (C) of terms and conditions vide supply order (SO) bearing SO No.HAPP/NC/CAP/SO/MP261400013/EO/2014-15 dated 02.03.2015.

2. The short facts which are required to be noticed for disposal of this Writ Petition are as follows:-

That the petitioner namely, High Energy Projectile Factory (formerly Heavy Alloy Penetrator Project (HAPP), (in short hereinafter would be called as HEPF), is a defence production unit functioning under the Ministry of Defence, Government of India. HEPF decided to purchase Nitrogen Plant, therefore, HEPF floated a tender during the year 2014. The supplier, the second and third respondents are the successful bidders. Hence, the petitioner decided to place supply order to the respondents, by order dated 25.02.2015, based upon which, Nitrogen Plant cost has been fixed as Rs.1,37,10,741/- (Rupees One Crore Thirty Seven Lakhs Ten Thousand Seven Hundred and Forty One only) and this communication had been sent to the second respondent on 02.03.2015.

3.Originally, the delivery period was fixed on or before 30.09.2015. Subsequently, at the request of the respondent, delivery period was extended from 30.09.2015 to 30.11.2015. It has further been extended upto 31.01.2016 and further extended upto 30.06.2016. The respondents 2 and 3 delivered the Plant only on 24.02.2016. Thereafter, joint inspection has been conducted and at that point of time, 90% of the plant cost, as fixed, has been paid by the petitioner to the second and third respondents, which cost around Rs.1,17,14,139/- (Rupees One Crore Seventeen Lakhs Fourteen Thousand One Hundred and Thirty Nine Only).

4.In this context, it is the grievance of the petitioner that, the respondents had not installed the plant in time and there has been huge delay not only in erecting, but also in commissioning of the plant, which, in fact, had been conducted only on 30.11.2016 against the original time fixed on 30.09.2015 and trial run was carried out on 08.03.2017. At that time, according to the petitioner, they found several deviations during the trial run. Therefore, the machine was put to halt.

5.In this regard, a performance guarantee test had not been conducted in terms of the contract conditions till 30.07.2017. According to the petitioner, the contract had not been performed by the respondents, therefore, 10% of the total value of the contract has not been paid expecting such successful performance guarantee test would be conducted by the respondents and in this regard, there has been a dispute between the petitioner and the respondents. Thereafter, there has been number of communications between the parties and ultimately, the respondents have referred the matter to the Council, called, State Micro and Small Enterprises Facilitation Council at Uttar Pradesh, under Section 15 and 16 of the Micro, Small and Medium Enterprises Development Act, 2006, hereinafter referred to as ''MSME Act''.

6.After such reference was made, the Council have taken up the matter, seems to have issued Notice to the petitioner, who was the opposite party or respondent before the Council in the reference made by the respondents. In response to the said notice, on 17.09.2018, the petitioner had given a reply, where, in short, the petitioner has stated that, there was failure on the part of the respondents in completing the performance guarantee, that was sought to be completed, within a time frame, without any delay or demur. Thereafter, according to the petitioner, no further communication whatsoever between the Council and the petitioner was made.

7.In that circumstances, the Council by order dated 12.12.2019, passed final award on the reference, thereby, the Council allowed the said reference in favour of the respondents herein and the petitioner herein, who is the buyer, was directed to pay the balance liquidated amount of Rs.24,41,239/- (Rupees Twenty Four Lakhs Forty One Thousand and Two Hundred and Thirty Nine Only) along with interest of Rs.24,41,141/- (Rupees Twenty Four Lakhs Forty One Thousand One Hundred and Forty Only Only), as per the provisions under Sections 16 of MSME Act, totalling a sum of Rs.48,82,380/- (Forty Eight Lakhs Eight Two Thousand Three Hundred and Eighty Only). The buyer was directed to pay the future interest also.

8.Felt aggrieved over the aforesaid order / award dated 12.12.2019 passed by the Council, the petitioner had in fact filed this Writ Petition with the aforesaid prayer.

9.Before the case was to be numbered, the Registry of this Court has raised objection with regard to the maintainability of this Writ Petition and in this regard, this Court, after hearing the learned counsel for the petitioner passed an order dated 04.08.2021, accepting the maintainability and directed to register the Writ Petition for hearing. The relevant portion of the order dated 04.08.2021 on the maintainability of the Writ Petition reads as follows:-

This Writ Petition at the SR stage has been posted before this Court as to the maintainability of the writ petition and in this regard, Office Note put up by the Registry has been perused.

2.Heard Mr.D.Saravanan, learned Central Government Senior Standing Counsel appearing for the Petitioner, who pointed out that, the dispute arose between the parties that is the petitioner and the respondents is pursuant to the supply order document dated 25.02.2015, wherein under the head 'Jurisdiction of Court', it has been restricted that the Civil Court at Tiruchirappalli shall only have jurisdiction to try all civil suits, legal proceedings arising out of or in any way touching or concerning the agreement.*

3.He would also rely upon Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006, wherein it has been stated that no application for setting aside any decree, award or other order made either by the Council itself or by an 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 percent of the amount in terms of the decree, award of, as the case may be, the other order in the manner directed by such Court.*

4.Relying upon this provision of the aforesaid Act as well as the contract between the parties, learned counsel for the petitioner submits that though the respondents are outside the territorial jurisdiction of this Court, insofar as the petitioner is concerned, it is located within the territorial jurisdiction of this Court and also the cause of action for filing this writ petition arises fully or majority within the territorial jurisdiction of this Court, as parties entered into an agreement where the jurisdiction of the Civil Court is also fixed within the jurisdiction at Tiruchirappalli, where the petitioner unit is located. Therefore, certainly, this writ petition can be filed before this Court under the enabling provision that is Section 19 of the aforesaid Act.*

> ***5.****Such submission made by the learned counsel for the petitioner has been considered and the related provision quoted by the learned counsel for the petitioner has been perused. In view of such clause contained in the agreement where the jurisdiction of the Court has been restricted to Tiruchirappalli, which comes within the territorial jurisdiction of this Court, this Writ Petition can very well be entertained by this Court, insofar as the territorial jurisdiction is concerned. Therefore, the objection raised in the Office Note referred to above may not be sustained. Hence, the Registry is directed to number this writ petition and post this matter on 05.08.2021 "For Admission" .*

10.Subsequently, when the Writ Petition came up for admission and for consideration of grant of interim order, this Court by order dated 05.08.2021 was pleased to grant, on *prima facie* satisfaction of the case projected by the petitioner, an interim order of stay. On receipt of notice from this Court, the respondents 2 & 3 entered appearance through their counsel and they filed counter affidavit also, where, *inter alia* they have stated that, first of all, this Writ Petition is not maintainable as the petitioner cannot invoke the extraordinary jurisdiction of this Court under Article 226 of Constitution of India, because if at all, any cause of action arise, which triggered the petitioner to file this petition, that has arisen only in the State of Uttar Pradesh, therefore, the Writ Jurisdiction of this Court cannot be invoked. Also, the respondents had raised objection that, since the impugned award is an award within the meaning of the provisions of the Arbitration Act, as against which, appeal would lie only under Section 34 of the Arbitration and Conciliation Act, 1996. (in short, hereinafter would be called as Arbitration Act). Therefore, on that ground also, this Writ Petition cannot be entertained by this Court, he objected.

11.Also, the respondents have raised a point that, under Section 19 of MSME Act, no application for setting aside any award or 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 applicant has deposited with it 75% of the amount in terms of decree, award of, as the case may be, the other order, in the manner directed by the Court.

12.Therefore, no Court can entertain any appeal in whatever form against the order or decree or award passed by the Council under Section 18 of the Act, unless or until the applicant or appellant, who file such an appeal deposits 75% of the award amount before the Court concerned. Therefore since it is a condition that 75% of the award or degree amount shall be payable as pre-requisite for entertaining such an appeal, in order to circumvent the same, since the petitioner has chosen to approach this Court by filing this Writ Petition under Article 226 of the Constitution, the same cannot be entertained.

13.Primarily raising these points, the respondents 2 and 3 had made averments in the counter affidavit. In support of the Writ Petition, Mr.D.Saravanan, the learned counsel appearing for the petitioner would canvass the point that, under Section 18 of the MSME Act, if any reference is made, on receipt of the same, there shall be first explore the possibility of conducting any conciliation, for which it could be referred to any Institution or Centre providing alternate dispute resolution services by making the reference by the Council or the Council itself can act as a conciliator and after the attempt is made for conciliating the issue between the parties, and if ultimately that attempt failed in conciliation, then the next possible action available before the Council is to refer the matter for any Arbitrator or Arbitral Tribunal or otherwise the Council itself can act as an Arbitral Tribunal. Accordingly, Arbitration can be conducted in the manner known to law established under the provisions of the Arbitration Act, then only award shall be passed.

14.The learned counsel appearing for the petitioner by relying upon Section 18 of the MSME Act, has vehemently contended, in the instant case no such attempt has been made by the Council, before passing the impugned order as there was no conciliation in the manner provided under Section 18 (2) or (3) of the Act. Since it is mandated on the part of the Council to either to complete the conciliation or to go for an arbitration, if the conciliation is failed, since both attempts have not been made in the manner known to law, the present order cannot be treated only as an award within the meaning of Section 18 of the MSME Act read with various provisions of the Arbitration Act. Therefore, the plea raised by the respondent that it shall be treated only as an award, and Section 34 of the Arbitration Act alone shall be invoked, otherwise, if at all, any appeal is filed before any Court including the appeal under Section 34 of the Arbitration Act, the petitioner should pay 75% of the award amount or degree amount or amount mentioned in the order should be paid, does not arise in this case. Therefore, the learned counsel for the petitioner would submit that, the petitioner is fully justified that the issue raised herein can very well be challenged before this Court, under Article 226 of the Constitution of India and hence the Writ Petition is entertainable. Further in view of the violation of Section 18 of the MSME Act, it is an utter failure in following the mandatory provisions under Section 18 of the MSME Act, for that reason alone the impugned order is vitiated. Hence it is liable to be interfered with and to be set aside, he contended.

15.Per Contra, Mr.Abhinav Parthasarathy, learned counsel appearing for the respondents 2 and 3 by relying upon the averments made in the counter affidavit and based on the instructions he received from the respondents would submit that, as has been averred in the counter affidavit, this Writ Petition is not maintainable for the reasons stated or referred to above.

16.Moreover, if at all, the petitioner has got any grievance over the impugned order passed by the Council that can very well be agitated in the manner known to law established under Section 19 of the MSME Act and in that case 75% of the award amount should have been deposited as pre-requisite, therefore without having resorted to such a method of filing an appeal after paying the 75% of the award amount as pre-requisite, the petitioner cannot straight away come to this Court, by invoking the extraordinary jurisdiction under Article 226 of the Constitution of India, he contended.

17.In support of his contention, the learned counsel appearing for the respondents has relied upon the decision of this Court reported in 2013 1 MLJ 4455. The learned counsel has also submitted that, in fact, the Council, after receipt of the reference from the respondents, has issued notice for conducting the conciliation and after receipt of the reply from the respondents therein, i.e., the petitioners herein by a letter dated 17.09.2018, the Council had come to the conclusion that there could be no chance of amicable conciliation between the parties, therefore invoking the power vested with them under Section 17 of the Arbitration Act, the conciliation was declared to be a failure one. Thereafter, as per Sub-Section 4 of Section 18 of the MSME Act, the Council itself acted as an arbitrator and accordingly the arbitration was conducted ultimately award has been passed through the impugned order. Therefore the said award which is impugned herein is strictly in consonance with the MSME Act. Therefore, as against the said award, if at all the petitioner has got any grievance, he has to be relegated only to the concerned Court, having jurisdiction over the Council, who passed the impugned order to file an appropriate appeal, under Section 34 of the Arbitration Act and in that case, naturally the petitioner has to scrupulously follow the mandatory pre-requisite deposit of 75% of the award amount and therefore without having resorted to such a method to be adopted, as contemplated under the provisions of the above referred legislations, since the petitioner has filed this Writ Petition, the same is liable to be dismissed for all these reasons, he contended.

18.I have considered the rival submissions made by the learned counsel appearing for the parties and perused the material placed before this Court.

19.Insofar as the first controversy as to whether the Writ Petition is maintainable before this Court under Article 226 of the Constitution of India, against the impugned order dated 12.12.2019 passed by the respondent Council is concerned, in fact, *prima facie* this Court found even at the time of admission stage, that the Writ Petition would be maintainable and accordingly entertained the Writ Petition. The reason for entertaining the Writ Petition is that, the place of suing against the parties has been fixed in terms of agreement that is the supply order, is the Civil Court at Tiruchirappalli. The Civil Court at Tiruchirappalli is located only within the territorial jurisdiction of this Court. Therefore, any issue arising out of the supply order dated 25.02.2015, in the considered opinion of this Court can very well be agitated within the territorial jurisdiction of this Court. Therefore, on that ground, the objection raised on behalf of the respondents is to be rejected and accordingly it has been rejected.

20.The further objection raised by the respondents is that, since the impugned order is an award within the meaning of the provisions of the Arbitration Act, as against which, at the first instance, appeal shall be filed before the concerned Court under Section 34 of the Arbitration Act. Insofar as this objection is concerned, in order to answer the same, the merit of the order, particularly in the manner in which the order has been passed has to be looked into.

21.If we look at the impugned order, the Council has recorded that, after receipt of the reference from the respondents, notice was issued to the opposite party that is the petitioner herein and in response to the same, the petitioner has given reply on 17.09.2018, which reads thus:-

> *The Supply Order under reference at (2) was placed on M/s.Mellcon Engineers Pvt Ltd for supply, erection and commissioning of Nitrogen plant at HAPP, Tiruchirappalli with delivery and commissioning schedule not later than 30.09.2015.*
> *The firm(supplier) supplied the plant and completed the joint/initial inspection on 16.06.2016 and initial payment 90% have been paid on 07.07.2016 as per terms and condition of Supply Order. Thereafter the firm erected the plant and failed in commissioning the plant by proving the Performance Guarantee Test.*
>
> *As per Supply Order Clause No.13.4 to 13.5.4, the balance 10% of paymnet shall be paid after commissioning and final acceptance of equipment at HAPP, Trichy against the following documents.*

a)Copy of original Invoice
b) Supplier claim in HAPP standard bill form.
c) Final acceptance Certificate issued by the purchaser
d)Warranty Certificate

But, ever after several extensions of delivery period (DP), the firm failed to complete the commissioning. Finally, a performance notice was issued to complete the commission within the last extended date of 20.09.2017 failing which the Supply Order would be short closed at firm's risk and cost. The firm has not responded to this notice and failed to prove the PGT and commissioning of the plant. This is totally against the firm's own commitment mentioned in the offer and indicates a clear breach of contract. The firm did not fill full the above SO condition for getting the balance 10% payment. Accordingly, the S.O was short closed under intimation to the firm.

Moreover, the above Supply order is governed by Arbitration Clause para 2 of Annexure -V, wherein all the disputes and differences arising out of or in any way touching or concerning this agreement shall be referred to Sole Arbitrator to be appointed by Director General of Ordnance Factories, Government of India. As per the S.O. Conditions, the firm should exhaust the same.

Please note that the Buyer (HAPP) has never certified that the information supplied by firm/petitioner and then included in this notice was true to the best of our knowledge and belief, as mentioned in the last para of MSEFC's letter under reference at(1).

(P.P.JAGDALE)
ADDL GENERAL MANAGER
FOR GENERAL MANAGER

22.This letter has been mentioned or quoted by the Council in the order impugned stating that, the buyer submitted a reply through letter dated 17.09.2018 and mentioned that the Firm has completed the joint inspection etc., This finding is in respect of the merits of the case. However the Council has further recorded in the impugned order that, the Facilitation Council under the aforesaid circumstances, came to the conclusion that conciliation is not possible, after which, the conciliation proceedings were terminated in the meeting dated 28.01.2019 under Section 76 of the Arbitration Act.

23.In this context, if we cull out the part of the reply of the petitioner dated 17.09.2018, it has been specifically stated that, the supply order is governed by Arbitration clause Para 2 of the Annexure V, wherein all the disputes and differences arising out of or in any way touching or concerning this agreement shall be referred to sole arbitrator to be appointed by the Director General of Ordnance Factories, Government of India.

24.Therefore, assuming the substance of the reply given by the petitioner dated 17.09.2018 is within the supply order concerned, it is governed by the Arbitration clause as per paragraph 2 of Annexure V of the supply order, under which, sole arbitrator should be appointed by the Director General of Ordnance Factories, Government of India.

25.Therefore, on reading of the said reply dated 17.09.2018, it is nowhere stated or there any whisper about the conciliation initiated in this regard by the Council.

26.Assuming that the conciliation has been initiated and it ended in failure, according to the Council, therefore terminated the conciliation under Section 17 of the Arbitration Act on 28.01.2019. In this context, if we look at Section 76 of the Arbitration Act, four circumstances have been mentioned under which, the conciliation already initiated and conducted can be terminated. In order to appreciate the same, Section 76 of the Arbitration Act is extracted here under:-

> **76.Termination of conciliation proceedings- The conciliation proceedings shall be terminated -**
> (a) by the signing of the settlement agreement by the parties on the date of the agreement; or
> (b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration: or
> (c) by a written declaration of the parties addresssed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration: or
> (d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

27.Among the four circumstances, the circumstance mentioned under clause (b) of Section 76 of the Arbitration Act, can be applied to the present case, as the Council itself has stated in the impugned order that they terminated the conciliation, therefore, if at all, by a written declaration of the conciliator, i.e., the Council herein, the conciliation was declared as terminated, that can be treated as a termination of conciliation.

28.However the pre-requisite is that such declaration shall be made by the conciliator only after consultation with the parties.

29.In this context, that 17.09.2018 letter alone has been mentioned by the Council stating that they had consulted the petitioner, and the petitioner had given certain factual matrix of the case and therefore, after going through the factual matrix, the Council has come to the conclusion, that the conciliation cannot be proceeded further. Therefore, they declared it as terminated in their meeting dated 28.01.2019.

30.First of all, there must be an effective consultation between the parties, specifically on the point, whether the conciliation can go on or can be terminated. Here, what actually has been initiated on the part of the Council, after getting the reference from the respondents, whether it is a conciliation or not itself is not known. Assuming that it is a conciliation, within the meaning under Section 18(1) of MSME Act, such conciliation must go on, where certain effective attempts should have been taken by the Council between the parties, to bring them under conciliation table and after such efforts have been taken, which ended in failure, then only the circumstances warrant the Council, to declare it that the conciliation can no longer be a possible one, therefore, it should be declared under Section 76 of the Arbitration Act, such declaration to be made under Sub Section (b) of Section 76 of the Arbitration Act. Here, no such procedure seems to have been adopted, as there is no evidence or whisper available on reading the impugned order. Therefore, this Court is of the firm view that, the very statement made by the Council under Section 76 of the Arbitration Act that the conciliation was terminated itself is wrong as it is not in consonance with the provisions of either Section 18 of the MSME Act or Section 76 of the Arbitration Act.

31.Apart from this infirmity, assuming that the Council has terminated the conciliation under Section 76 of the Arbitration Act, what shall be the next course of action mandatorily to be undertaken by the Council has also been explained under Section 18 of the MSME Act. In order to appreciate the same, the relevant provisions of the Section 18 of MSME Act is extracted here under:-

> *18.Reference to Micro and Small Enterprises Facilitation Council.-*
>
> *(1)Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.*

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the disputes as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.

32.Under Section 18(1), any party to a dispute may make a reference to the Council. On receipt of such reference under Section 18(2), the Council shall either itself conduct conciliation in the matter or seek assistance of any institution or centre providing alternate dispute resolution services. Therefore, the option available before the Council is on receipt of reference either the Council can act upon as a conciliator or can seek the assistance of any institution or Centre for conciliation to act as a conciliator.

33.Here in the case, assuming that the Council itself has assumed as a conciliator by exercising its power under Section 18 (2) of MSME Act, and accordingly they issued a notice to the opposite party that is the petitioner herein, that itself cannot be treated as a conciliation. Moreover, in response to the same, that reply was given by the petitioner on 17.09.2018, wherein the petitioner has not stated anything about the readiness or otherwise of conciliation. The petitioner has simply stated that, the supply order is governed by the Arbitration clause under Annexure V of the said supply order, therefore, sole arbitrator to be appointed by the Government of India, before whom, the issue shall be referred by way of arbitration. Thus, the said stand taken by the petitioner to refer the matter to the sole arbitrator to be appointed by the Government of India may not be justifiable in view of the provision namely Sub section 4 of Section 18 of the MSME Act. Sub section 4 makes it clear with a non-Obstante clause that, the Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an arbitrator or conciliator. Therefore, the power vested with the Council to act as arbitrator is well protected under Section 18(4) of the MSME Act. Therefore, the sole arbitrator clause, the petitioner wanted to invoke, as has been indicated in their reply dated 17.09.2018, could have been overcome easily by the Council. Therefore, in this context, we cannot find any fault with the Council to invoke Section 18 (4) of the MSME Act.

34.However whether Section 18 (4) of the MSME Act was properly invoked or under Sub-Section 3 and 4 of Section 18 of the MSME Act, whether proper arbitration has been conducted before the present impugned order is passed by the Council is the next question to be delve into.

35.In this context, sub section 3 of Section 18 makes it mandatory that, when a conciliation initiated under sub section 4 is not successful without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to any institution or centre providing alternate dispute resolution services for such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 and it shall apply to the disputes, if the arbitration was in pursuance to the arbitration agreement referred to in sub section 1 of Section 7 of the Act. In this context, if we look at the impugned order, after stating that the conciliation was terminated in the meeting on 28.01.2019 under Section 76 of the Arbitration Act, the Council took up the dispute itself as an arbitrator under Section 18(3) of the MSME Act. Assuming that the Council invoked the power under Section 18(3) read with 18(4) and taken up the dispute as arbitrator, the provisions of the Arbitration and Conciliation Act shall be applied in every procedure to be followed in this regard by the Council.

36.Here, after issuance of notice to the petitioner, for which the petitioner has given a reply on 17.08.2019, wherein, no further issue has been raised, no further notice had been given to the petitioner to bring both the parties on the arbitration table and nothing in this regard has been spelt out in the impugned order.

37.If at all, an arbitration to be conducted by the Council, the law is well settled in this regard that, though not strictly, but the procedure of Civil Procedure Code can very well be invoked in arbitration proceedings. The party shall be permitted to file their pleadings, counter pleadings and thereafter issue shall be framed and party shall be given opportunity to let in their evidence both in oral and documentary ways and if any oral evidence is let in, the opposite party can choose to cross-examine. Therefore, the procedure to be adopted in arbitration proceedings, is nothing but almost a replica of the Civil Court proceedings. Of course summarily proceedings should have been conducted in the manner provided under the Arbitration Act. In this case, if we look at the impugned order, nothing has been stated as to how and when such an arbitration has been conducted by involving both the parties in the arbitration proceedings.

38.Merely on the basis of the reference made by the respondents herein who are the petitioners before the Council and merely based on letter dated 17.09.2018 alone the Council has proceeded to conclude the matter and passed an award through the impugned order directing the petitioner to pay the aforesaid sum with interest etc.,

39.Therefore, this Court has no hesitation to hold that absolutely there has been no arbitration proceedings in the manner known to law conducted by the Council and since the conduct of arbitration is a mandatory one under Section 18(3) of the MSME Act and in that case since the Council has failed to conduct arbitration in the manner known to law, the impugned order, though it is styled as an award under Arbitration Act, cannot be treated as an award, therefore, the argument advanced by the respondents that, as against the impugned order or award, the petitioner has to invoke only Section 19 of the MSME Act or Section 34 of the Arbitration Act is liable to be rejected. Accordingly, it is rejected.

40.In view of the said discussions made, this Court has no hesitation to hold that, the Council has not followed the mandatory procedure contemplated under Section 18 of the MSME Act as well as the procedure as contemplated under various provisions of the Arbitration Act. Therefore the impugned order, styled as 'award', arising out of the arbitration proceedings under Arbitration act cannot be treated as an arbitration award. Therefore, the question of invoking either Section 19 of the MSME Act or Section 34 of the Arbitration Act does not arise. As such the impugned order is liable to be interfered with.

41.In view of the aforesaid discussions, this Court is inclined to dispose of this Writ Petition with the following orders:-

> "that the impugned order is set aside. The matter is remitted to the Council for re-consideration. While re-considering the same, it is open to the Council either to refer the matter to Arbitral Tribunal as per the choice of the parties or the Council itself can assume as an arbitrator within the meaning of Sub-Sections 3 and 4 of sub section 18 of MSME Act, and accordingly, the proceedings shall be conducted and concluded by invoking Section 18(3) of the MSME Act, as if it is an arbitration proceedings and in that case necessary provisions under the Arbitration Act and MSME Act shall be made applicable to such proceedings and in such case, proper opportunity shall be given to both the parties and the arbitration proceedings shall be conducted in the manner known to law as has been indicated in this order by invoking necessary provisions of the Arbitration Act and final award can be passed by the Council."

42. With these directions and remand order, this Writ Petition is ordered accordingly. However there shall be no order as to costs. Consequently, connected Miscellaneous petitions are closed."

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

vrn/lm

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1. The Chairman,
   Uttar Pradesh (UP),
   State Micro & Small Enterprises Facilitation Council,
   (Statutory Arbitral Tribunal),
   Arbitral Situs - Directorate of Industries,
   Sarvodaya Nagar,
   G.T.Road, Kanpur, Uttar Pradesh - 208005.

2. The Mellcon Engineer Pvt Ltd.,
   Reg office at:
   B-297, Okhla Industries Area,
   Phase - I, New Delhi - 110020.

3. The Mellcon Engineer Pvt Ltd,
   Represented by its Managing Director,
   Mr.Rakash Kalia,
   B-297, Okhla Industries Area,
   Phase - I, New Delhi - 110020.

+1 C.C. to Mr.D.Saravanan, Advocate S.R.No.28489.

+1 C.C. to Mr.Abinav Parthasarathi, Advocate, S.R.No.28483.

Order made in
W.P.(MD)No.13870 of 2021 and
WMP(MD) Nos.10822, 10824 & 10826 of 2021

Dated 07.09.2021

USK (03.01.2022) 16P 6C