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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 29th January, 2021

\+ **W.P.(C) 1134/2021 & CM APPL. 3201/2021**

PIYA BAJWA ..... Petitioner

Through: Mr. Nikilesh R., Advocate. (M: 9810460429)

versus

MICRO AND SMALL ENTERPRISES FACILITION CENTRE AND ANR. ..... Respondents

Through: Mr. Ramesh Singh and Mr. Shok Chandra, Advocates.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done by video conferencing.

2. The Petitioner has impugned letter dated 31st December, 2020 issued by the Micro and Small Enterprises Facilitation Council *(hereinafter, 'Facilitation Council')* by which the Petitioner has been called to participate in the conciliation process and also file a reply.

3. The impugned communication issued by the Facilitation Council dated 31st December, 2020 reads as under:

> *"The MSEF Council, Delhi is in receipt of a reference filed u/s 18(1) of the MSMED Act, 2006 by the Claimant M/s Sharp Travels (India) Ltd., Application/Temp No. DL08E0001555/S/00122 against the outstanding dues of Rs. 308307 which is to be paid by you to the Claimant.*
>
> *I am directed to inform you that the MSEF Council, Delhi has **decided that** the conciliation process should be taken up first before release of outstanding dues to the Claimant, failing which a Notice to personally appear before the Council*

> *will be served to you for taking further necessary action in the matter.*
>
> *Further, I am to inform you that as per Section 16 of the MSMED Act, 2006 the Respondent will be liable to pay the compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.*
>
> *It is therefore requested to file the reply of outcome of the conciliation process held between both of you within 30 days."*

4. Ld. counsel for the Petitioner emphasizes on the words *"decided that"* to argue that the Facilitation Council has taken a decision in the matter that the Petitioner ought to release the outstanding dues. According to the Petitioner, since the claim is time barred, such a decision could not have been taken without hearing the Petitioner.

5. The submission of Mr. Nikilesh R., ld. counsel appearing for the Petitioner is that the claim of Respondent No.2 is time barred and before embarking on the conciliation process, the question as to whether the claim is even maintainable should be considered by the Facilitation Council. Without doing the same, deciding that the conciliation process should be initiated would be premature.

6. Mr. Ramesh Singh, ld. counsel, on the other hand, submits that the Facilitation Council has merely called the parties for exploring conciliation in terms of Sections 18(1) and 18(2) of the Micro, Small and Medium Enterprises Development Act, 2006 *(hereinafter, 'MSME Act')*. If the conciliation process fails then the remedies of the Petitioners are available in

terms of Sections 18(3) and (4) of the MSME Act. The conciliation process is meant to resolve the disputes between the parties in an amicable manner.

7. The apprehension of the Petitioner is that the Petitioner may be forced to enter into a settlement with Respondent No.2 though, according to the Petitioner, the claim is time-barred.

8. The scheme of the MSME Act has been discussed in detail in the judgment of a ld. Single Judge of this Court in ***BHEL vs. The Micro and Small Enterprises Facilitation Centre & Anr., [W.P.(C) 10886/2016, decided on 18th September, 2017]***. The Court observed therein as under:

> *"9. At the outset, it is relevant to observe that the Act was enacted with the object of facilitating the promotion, development and enhancing the competitiveness of small and medium enterprises…*
>
> ***…***
>
> *10. Section 18(1) of the Act contains a non obstante clause and enables any party to a dispute to make a reference to the Micro and Small Enterprises Facilitation Council (MSEFC).*
>
> *…*
>
> ***14.*** *A plain reading of Section 18(2) of the Act indicates that on receipt of a reference under Section 18(1) of the Act, the Council [MSEFC] would either conduct conciliation in the matter or seek assistance of any institution or centre providing alternate dispute resolution services. It also expressly provides that Section 65 to 81 of the A&C Act would apply to such a dispute as it applies to conciliation initiated under the Part III of the A&C Act.*
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> ***15.*** *It is clear from the provisions of Section 18(2) of the Act that the legislative intention is to incorporate by reference the provisions of Section 65 to 81 of the A&C Act to the conciliation proceedings conducted by MSEFC.*

> ***16.*** *Section 18(3) of the Act expressly provides that in the event the conciliation initiated under Section 18(2) of the Act does not fructify into any settlement, MSEFC would take up the disputes or refer the same to any institution or centre providing alternate dispute resolution services for such arbitration.*
>
> ***17.*** *It is at once clear that the provision of Section 18(3) of the Act do not leave any scope for a non-institutional arbitration. In terms of Section 18(3) of the Act, it is necessary that the arbitration be conducted under aegis of an institution-either by MSEFC or under the aegis of any "Institution or Centre providing alternate dispute resolution services for such arbitration"."*

9. The issue that had arisen in ***BHEL (supra)*** was as to whether the arbitration clause contained in the General Conditions of Contract would prevail or the Facilitation Council could refer the disputes to arbitration by a recognized institution or centre providing ADR services. What is, relevant in the context of the present petition is the communication dated 31st December, 2020 wherein, in the opinion of this Court, the Facilitation Council has merely observed that the conciliation process should be taken up first. The Petitioner has been asked to explore conciliation and report the outcome of the same within 30 days. The scheme of the MSME Act and setting up of a Facilitation Council is to ensure that small and medium enterprises are not forced to litigate for long durations in Courts and avail of expensive legal remedies. A perusal of Section 18 of the MSME Act clearly shows that upon a reference being made to the Facilitation Council, the Facilitation Council may conduct conciliation or seek assistance of any institution for providing ADR services. The mere fact that the Facilitation

Council has given notice for starting a conciliation process does not mean that there is a pre-judging of issues by the Facilitation Council or that the claim is within limitation. Conciliation is a process in which both parties would be called and made to sit across the table to amicably resolve their disputes. If there is no amicable resolution, the parties are permitted to avail of the remedies provided under Section 18(3) and (4) of the MSME Act.

10. From the impugned communication it is also clear that if the conciliation process between the parties fails, the Facilitation Council would itself be conducting the conciliation proceedings. Exploring of conciliation or mediation prior to invoking arbitration or litigation is the scheme not only in the MSME Act but also in various other enactments. For example, Section 89 of the CPC, as amended in 2002, laid enormous emphasis on exploring settlement where there existed an element of settlement which may be acceptable to the parties. This process of pre-litigation mediation has achieved statutory recognition in the Commercial Courts Act, 2015 where under Section 12A pre-institution mediation and settlement has been provided for. Merely because notice for exploring conciliation has been issued does not mean that the legal defence of limitation would be wiped out in case the dispute is not resolved.

11. The apprehension expressed by the Petitioner that the Petitioner may be forced to resolve a time-barred claim would be assuaged by clarifying that in the conciliation process, the Petitioner would be entitled to place its case in an informal manner, along with recording therein that the claim itself is time barred. If the conciliation fails, then the parties can avail of their remedies in accordance with law under Section 18 of the MSME Act.

Participation in the conciliation process shall be without prejudice to the rights and contentions of the parties concerned.

12. The time to file the reply before the Facilitation Council is extended till 15th February 2021.

13. With these observations the present petition, along with all pending applications, is disposed of.

14. Copy of this order be sent to the Deputy Commissioner, Micro and Small Enterprises Facilitation Council, Udyog Sudan, 419, FIE, Patparganj Industrial Area, Delhi-110092.

PRATHIBA M. SINGH
JUDGE

JANUARY 29, 2021
dj/T
(Corrected and released on 2nd February, 2021)