IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.21943 Of 2016
(Through hybrid mode)

M/S. JSW Steel Ltd .... ***Petitioner***

Mr. Y. Das Senior Advocate
with Mr. R.Roy, Advocate

-versus-

Micro And Small Enterprise Facilitation Council and others .... ***Opposite parties.***

Mr. S.P.Mishra, Senior Advocate
For O.P.2

CORAM: JUSTICE ARINDAM SINHA

ORDER
07.04.2022

Order No.	
28.	**1.** Petitioner has moved Court praying that proceedings initiated by opposite party no.1 under section 18 in Micro, Small and Medium Enterprises Development Act, 2006 (MSEFC Case no.17 of 2014) and award dated 28th June, 2016, be quashed and set aside. The writ petition was heard by this Bench on a few occasions.
	2. Mr. Das, learned senior advocate appears on behalf of petitioner and had earlier submitted, challenge in the writ petition is directed against the proceeding, concluded by award dated 28th June, 2016 in arbitration reference under the Act. Short point is that award holder cannot be said to be a supplier within meaning of clause (n) in

definitions section (2). Sub-clause (ii) under clause (a) in sub-section (1) of section 7 limits enterprises, such as award holder, in being called a small enterprise, to those whose investment on plant and machinery is more than Rs.25 lakhs but does not exceed Rs.5 crores. He referred to pages 110 and 111 of the writ petition to show from schedule of fixed assets of opposite party no.2 (supplier), it had plant and machinery as on 1st April, 2010 at Rs.6.54 crores and the same as on 1st April, 2011 at Rs.5.47 crores. This is relevant information in relation to the claim for payment made and forwarded as a demand under the Act by said opposite party.

3. Mr. Mishra, learned senior advocate appears on behalf of opposite party no.2 and was heard on 7th December, 2021, when he had submitted that his client has three units. The unit situated at Khurda has been assessed to be a Small Manufacturing Enterprise by the committee formed as per decision of the government in Micro, Small and Medium Enterprises (MSME) Department. The committee, on 30th March, 2015 certified the status of his client's said unit. The document is annexure A/2 in the preliminary counter filed by his client, appearing at running page 266. His client had filed additional affidavit reply on behalf of his client to bring on record fact of his client having three separate units, as aforesaid, one in Khurda.

4. He submitted further, all supplies were made to petitioner from the unit at Khurda. The supplies were made by his client in years 2009 to 2013. His client had certification as on 6th May, 2008 for the Khurda Unit, being disclosure in the writ petition at page 75. The order for supply is dated 30th June, 2009 and the supplies were made pursuant thereto, as completed in year 2013.

5. On 4th March, 2022 hearing of the writ petition was on circulars dated 29th September, 2015 and 3rd March, 2016. Relevant text from order dated 4th March, 2022 is reproduced below.

> *"2. Mr. Das, learned senior advocate appears on behalf of petitioner and draws attention to two documents disclosed under memo dated 11th January, 2022, filed by opposite party no.2. The first is circular dated 29th September, 2015, issued by Additional Development Commissioner (Micro, Small and Medium Enterprises). Text of the circular is reproduced below.*
>
> > *"The matter regarding clubbing of various enterprises (whether located in the same district or in various districts of the state/country) under the same ownership have been examined by this office.*
> > *2. The competent Authority, after examining the issue in depth, has decided that the investments in Plant & Machinery/Equipments of all enterprises under same ownership shall be clubbed together while assessing the status of MSMEs as per provisions under the MSMED Act, 2006.*
> > *3. This supersedes all earlier orders/letters/ clarifications issued in this*

regard.

4. This issues with the approval of Special Secretary & Development Commissioner (MSME).”

The second document is circular dated 3rd March, 2016. The text of the circular is reproduced below.

“Reference is invited to circular no. 5(2)/4/2015-MSME Pol. Dated 29.09.2015 issued from this office.

2. It is to inform that the above referred to circular has been withdrawn with immediate effect.

3. This issues with the approval of Hon’ble Minister for Micro, Small and Medium Enterprises.”

3. He, then draws attention to his client’s affidavit in response to the circulars. He submits with reference to paragraph 5 in the affidavit, on information obtained, there was no clubbing as a result of withdrawal circular dated 3rd March, 2016. On query from Court he relies on sections 22 and 27 in Micro, Small and Medium Enterprises Development Act, 2006 to submit, not only is opposite party no.2 ineligible to be a small enterprise, since all its units clubbed together will take the working capital above the prescribed limit, said opposite party did not disclose its claimed status and thereby exposed his client to penalty under section 27.

4. What emerges is that there is no notification regarding clubbing of enterprises or units that make the aggregate working capital ineligible for certification as a micro or small or medium enterprise, as the case may be. Internal correspondence between

> *departments/offices will not be relied upon by Court. There has been demonstration that Khurda unit of opposite party no.2 had received certification. On query from Court Mr. Mishra clarified that there was disclosure of the two circulars to demonstrate that there was no notification for clubbing and the dispute regarding nonpayment arose in year, 2013-14, at a time before the circulars came into existence.*"

6. On 16th March, 2012 Mr. Das reiterated his submissions, earlier made. He referred to additional reply on behalf of opposite party no.2, affirmed on 2nd December, 2021, page 17 to show that on addition in plant and machinery totalling Rs.9.32 crore, Kashipur (Uttarakhand) unit of opposite party no.2 could not continue to remain a small enterprise. He drew attention to sub-clauses (i) to (iii) under clause (a) in section 7(1), Micro, Small and Medium Enterprise Development Act, 2006 to submit, added value of plant and machinery in said unit exceeded categorization as small enterprise and came within category of medium enterprise. Turning to definition of supplier under clause (n) in definitions section 2, he submitted, meaning given does not include a medium enterprise. On query from Court he submitted, claim was made by said opposite party, before the council, on supplies made from the Kashipur unit, but later withdrawn.

7. Today Mr. Das relies on several judgments.

(i) **Judgment dated 15th December, 2021** of the Supreme Court in **Civil Appeal no.2899 of 2021** (**Jharkhand Urja Vikas Nigam Limited Vs. State of Rajasthan and others**), paragraphs 10 to 13. He submits, in that case prescribed procedure was not followed by the council. The Supreme Court intervened. It is applicable to facts in this case, where the award is a result of breach of the procedure and as such, it should be set aside and quashed.

(ii) **Order dated 23rd September, 2021** of the Supreme Court in **Civil Appeal no.5934 (Vijeta Construction Vs. Indus Smelters Ltd. and others**), paragraphs 9.2 to 10. He submits, here too the Supreme Court found that prescribed procedure had not been followed by the council and there was interference.

(iii) **Vidya Drolia Vs. Durga Trading Corporation** reported in (**2021**) **2SCC 1,** paragraph 48. Mr. Das submits, the Supreme Court said that judgment in rem determines the status of a person or thing and such a judgment is conclusive evidence against all persons whether parties, privies or strangers of the matter actually decided. The certification received by opposite party no.2 is akin to judgment in rem in as much as it tends to bind his client, who was not party nor privy to the making of it. As such, the validity of the certificate is excluded from arbitration as it is an action in rem. The validity be examined by Court, to quash the same.

(iv) **Order dated 27th August, 2010** passed by a Division Bench of the High Court of Bombay at Nagpur, available at **2010 SCC On Line Bom 2208** (**Steel Authority of India Limited vs. MSEFC, Nagpur**), paragraph 11.

(v) **Order dated 1st March, 2021** of a Single Judge in the High Court of Bombay in **Arbitration Appeal (St) no.30508 of 2019** (**P.L. Adke Vs. Wardha Municipal Corporation**), paragraph 29 and 38 in Manupatra print. Mr. Das submits, where there is arbitration agreement, there cannot be a reference under the 2006 Act, was view expressed by the learned Single Judge. He submits further, the view is pending adjudication in the Supreme Court. Hearing has been concluded and judgment reserved.

(vi) **Order dated 5th January, 2022** passed by this Bench in **W.P.(C) no.27216 of 2020** (**Bajaj Electricals Limited Vs. Micro and Small Enterprise Facilitation Council**), paragraphs 12 and 13. Mr. Das submits, this Bench has held on maintainability of writ petitions in matters of arbitration and interfered on finding that petitioner in that case had not been heard. His client too had not been heard on its contention that opposite party no.2 cannot call itself a small enterprise and therefore, invoke mechanism of the 2006 Act to obtain purported award. Without prejudice to the contention he reiterates, the prescribed procedure was also not followed.

8. Mr. Mishra submits, none of the judgments relied upon are applicable to the case at hand. On approach to the council, there was conciliation proceeding. Several sittings were held by the council in attempting conciliation and on failure thereof, there was adjudication and award.

9. On the question of maintainability of the writ petition in matters of arbitration, submission was made on behalf of opposite party no.2 that it is not maintainable. Award has been passed and remedy of petitioner, in event petitioner seeks to challenge it, is under section 34 in Arbitration and Conciliation Act, 1996. Contra submission was that there has been demonstration of it being a rare case where there should be judicial review on wrongful invocation of the 2006 Act and in any event violation of prescribed procedure resulting in impugned award.

10. The facts will appear from record of submissions above. Opposite party no.2 had certification as on 6th May, 2008 for its Khurda unit, from where admittedly all supplies were made to petitioner. The supplies were made under purchase order dated 13th June, 2009 and supplies were completed in year 2013. Opposite party no.2 alleged non-payment and ultimately approached the council under the 2006 Act. Impugned award dated 28th June, 2016 says total supply value was in excess of Rs.36 crores. Upon adjustment of part payments, balance outstanding was Rs.1,93,81,657.88/-. Claim of Rs.4,98,60,326.33 was filed before the council by opposite party no.2. The council held 45 sittings.

11. First, Court must deal with challenge mounted on contention that opposite party no.2 cannot claim itself to be a small enterprise, for invoking mechanism under the 2006 Act. The certificate is dated 6th May, 2008 and is of date prior to the purchase order. The dispute arose on part of the payment for the supplies remaining outstanding. Prayers in the writ petition are for interference with the award. Scope of the prayers do not include a challenge to the certificate itself and the issuing authority was accordingly not impleaded as opposite party.

12. In **Vidya Drolia** (supra) the Supreme Court had declared on interpretation of judgments in rem. The certificate cannot be equated with a judgment in rem. The authority issued the certificate on being satisfied that opposite party no.2, at its unit at Khurda, was eligible to have certification as a small enterprise. There is no question of petitioner being privy or party to the proceeding for issuance of the certificate simply because petitioner had not applied to the authority as a supplier connected to opposite party no.2. **Vidya Drolia** (supra) is of no aid to petitioner.

13. Petitioner had also contended on clubbing. Nothing further in addition to what was already said in order dated 4th March, 2022, extracted and quoted above, is required to be said.

14. Regarding procedure followed culminating in impugned award, on perusal of it Court finds that the council had submission made to it on behalf of petitioner that there would be amicable settlement. Few paragraphs from the award are extracted and reproduced below.

> *"The O.P. filed time petition to file counter to the rejoinder before the Council in it is 38th sitting. The Council allowed 15 days time and directed both the parties to have an amicable settlement within one month as agreed upon & report the same to the Council.*
>
> *Both the parties were present before the Council in its 42nd sitting of MSEFC on 20.01.2016.*
>
> *The petitioner submitted before the Council that the case is pending since 24.04.2014 and the unit is facing financial hardship for pending of his claim on O.P.*
>
> *Initiating the discussion, the advocate on behalf of the O.P. submitted before the Council that the management of Gupta Power Infrastructure Ltd. is in touch with the management of JSW Steel Ltd., Karnataka to have amicable settlement & prayed 7 days time to intimate its outcome to the Council. In response to it the representative of the petitioner declined to have such*

> *information to the Council. As a result, the Council may go ahead towards disposal of the case. The Council went through the deliberation made by both the parties and directed the O.P. to have amicable settlement with the petitioner and inform its outcome to the Council in writing within 7 days from to-day i.e. 20.01.2016. If no communication is received from the O.P. within the stipulated period, award shall be given for payment of the outstanding dues with interest as per MSMED Act, 2006. xx xx xx"*

It does appear the council acted as conciliator in allowing parties to arrive at amicable settlement.

15. Further submission was made on behalf of petitioner, by reliance on sub-section (2) in section 18 of the 2006 Act and section 80 in Arbitration and Conciliation Act, 1996. Mr. Das had submitted that conciliator cannot be arbitrator. In this case, he submitted, if the council is held as having caused conciliation then it could not thereafter itself have adjudicated on the disputes as arbitrator.

16. Though section 80 in the 1996 Act says that unless otherwise agreed by the parties, inter alia, conciliator shall not act as arbitrator but section 18 in the 2006 Act says, inter alia, the council shall either itself conduct conciliation or seek assistance in the matter and where the conciliation initiated is not successful, the council shall either itself take up the disputes for arbitration or refer it to any institution. The

2006 Act came after the 1996 Act and section 24 in it gives overriding effect to section 15 to 23 in the Act. As such, the council has legislative mandate to be both conciliator as well as arbitrator, under section 18 in the 2006 Act overriding section 80 in the 1996 Act.

17. In **Jharkhand Urja Vikas Nigam Limited** (supra) the facts were that appellant before the Supreme Court had not appeared in the proceeding for conciliation and on the very first date of its appearance, it was directed by the council to pay towards principal and interest. The Supreme Court set aside the award and left it open to the council to either take up the dispute of its own or to refer the same in terms of section 18. Here, 45 sittings were held by the council. It does appear that petitioner participated, if not in all of them, in most.

18. In **Vijeta Construction** (supra) the Supreme Court interfered on finding that the facilitation council did not follow the procedure as required to be followed under section 18 of the 2006 Act. It is on facts found in the case. The facts were as would appear from paragraph 3 in the order.

> *"3. By order dated 10.01.2012 the Facilitation Council closed the said proceedings by observing that Facilitation Council has been constituted with limited object and jurisdiction and the Facilitation Council has no jurisdiction to make through enquiry and take evidence and decide truth about the challenged*

> *document. The Facilitation Council also observed that parties are at liberty to move before the competent court."*

Clearly **Vijeta Construction** (supra) is not applicable**.**

19. In **Steel Authority of India Limited** (supra) there was arbitration agreement between the buyer and supplier. The arbitration agreement stood invoked. After the supplier had submitted to the reference, it thereafter went to the council and invoked the mechanism under the 2006 Act. It is on those facts that the Division Bench of High Court of Bombay at Nagpur said that the council is not entitled to proceed under the provisions of section 18 (3) in view of independent arbitration agreement dated 23rd September, 2005 between the parties. The Division Bench, thereafter, gave direction for participation in the conciliation, which shall be conducted by the council. This decision too is inapplicable to the case at hand as the arbitration agreement between the parties, if there was one, was not invoked by opposite party no.2.

20. Coming to **Bajaj Electricals Limited** (supra), an order passed by this Bench, there is recollection that the contention was of petitioner, in that case, not having been heard. However, there is reference in **Bajaj Electricals limited** (supra) to an earlier order of this Bench, being **order dated 20th December, 2021** in **W.P.(C)**

no.28464 of 2020 (Rolta India Limited Vs. Micro and Small Enterprises Facilitation Council and another), whereby the challenge to breach of the procedure by the council was rejected by this Bench on being bound by view taken by a co-ordinate Bench on **order dated 22nd September, 2021** in **W.P.(C) no.20234 of 2020** (**Anupam Industries Ltd. vs. State of Odisha and others**), confirmed in appeal by the first Division Bench of this Court.

21. For forgoing reasons, where award has been passed, Court does not find this to be a rare case for judicial review. The writ petition is not maintainable. Petitioner is left to find remedy, as may be available to it in law.

22. The writ petition is dismissed.

(Arindam Sinha)
Judge

Prasant