

A.F.R

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.39436 of 2021

***Orissa State Coop. Marketing
Federation Ltd. BBSR & Anr.***

.... Petitioner(s)

Mr. D. Mohapatra,
Advocate

-versus-

***Tulasi Modern Rice Mill,
Kendrapara & Anr.***

.... Opposite Party(s)

Mr. S.K. Jethy,
Adv. for the O.P.1
Mr. R.P. Mahapatra,
Addl. Govt. Adv. for the O.P.2

**CORAM:
JUSTICE BISWANATH RATH
ORDER
29.04.2022**

Order No.

10. 1. Short question involved herein is; once a proceeding is initiated on a complaint U/s.18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter in short be reflected as “the Act, 2006”), whether in the first go the Council following the provision at Section 18 of the Act, 2006 should undertake recourse of conciliation? and in case of failure of conciliation, for the provision at Sub-Section 3 of Section 18 of the Act, 2006 the proceeding is to land in a dispute and in such case if the Council is justified in deciding the dispute without taking recourse to the provision of the Act, 1996 ?

2. Advancing his submission while not raising the dispute that there involves a Section 18 proceeding Mr. Mohapatra, learned counsel for the Petitioners taking this Court to the observations of the Council at page 121 of the brief contended that the Council while passing the award did not comply the provision under Sub-section 3 of the Section 18 of the Act, 2006 and there is no taking recourse to the provision of the Act, 1996. Referring to the discussions in two paragraph above the award portion, a contention is raised that the conciliation proceeding was lastly taken up on 30.12.2020 and undisputedly the conciliation failed. Looking to the provision at Sub-section 3 of Section 18 of the Act, 2006 Mr. Mohapatra, learned counsel for the Petitioner contended that in the above situation it becomes a bounden duty of the Council to convert the proceeding to a dispute and to decide the same in terms of the provision in the Act, 1996. For the Council not following the procedure at Sub-section 3 of Section 18 of the Act, 2006, Mr. Mohapatra, learned counsel for the Petitioners contended that there is no scope for award and even if an award is passed such award is *non est* in the eye of law. Mr. Mohapatra, learned counsel for the Petitioners taking this Court to the condition in the agreement between the parties for having an Arbitration clause, said that once there is Arbitration clause provided in the contract between the parties, there is no question of taking up the matter through the Council under the Act, 2006. It is, at this stage of the matter, Mr. Mohapatra, learned counsel for the Petitioners also brought to the notice of this Court through the pleadings that in the meantime the Petitioners before even commencement of the conciliation, have already undertaken the exercise under the provision at the Act, 1996. It is thus contended that once the proceeding of arbitration in terms of the contract is

invoked, nothing prevented the contesting Opposite Parties particularly the Opposite Party No.1 to attend to the Arbitration proceeding and get its disputed resolved through Arbitration. Mr. Mohapatra, learned counsel for the Petitioners also to support his case, relied on a decision of the Madras High Court in W.P(MD) No.13870 of 2021 decided on 7.09.2021 and reading through paragraph no.39 & 40 therein, attempted to submit that the impugned order is otherwise also against the Law and claims that the matter be remitted back to the Council for its fresh exercise strictly in terms of the provision at Section 18(3) of the Act, 2006. Mr. Mohapatra, learned counsel for the Petitioners also brings to the notice of this Court a decision of this Court in ARBP No.39 of 2017 decided on 9.03.2018 to support his case.

3. In his opposition Mr. Jethy, learned counsel for the Opposite Party No.1 while strongly opposing the move of the Petitioners for availability of a provision for appeal prescribed U/s.19 of the Act, 2006, also contended that the Arbitration proceeding did not involve the claim of the Petitioners. It is further contended by Mr. Jethy, learned counsel for the Opposite Party No.1 that even though the Opposite Party No.1 has already attended to the Arbitration Proceeding, there is no possibility of resolution of the dispute being raised by the Petitioner. Mr. Jethy, learned counsel for the Opposite Party No.1, therefore, strongly objected to the claim of the Petitioners on the maintainability of the proceeding, for there is already existing of arbitration proceeding, the proceeding involved remains not maintainable. Mr. Jethy, learned counsel for the Opposite Party No.1 while not disputing that upon failure of conciliation, in an attempt of the Council in exercise of power U/s.18(2) of the Act, 2006 the proceeding has been converted to a

dispute, at the same time also did not dispute to the submission of Mr. Mohapatra, learned counsel for the Petitioners that after initiation of such dispute by the Council under Sub-section 3 of Section 18 of the Act, 2006, there has been no fresh calling of counter and following up of provisions in the Act, 1996. Mr. Jethy, learned counsel for the Opposite Party No.1, however, taking this Court to the provisions at Section 19 of the Act, 2006 contended that even though there is provision for appeal, but the Petitioners did not prefer the same and on the other hand the Petitioners are praying this Court for exercising the power under Article 226 of the Constitution of India with an attempt to avoid the statutory forum. Mr. Jethy, learned counsel for the Opposite Party No.1 here relying on a decision of this Court dated 29.07.2021 in W.P.(C) No.12584 of 2021, contended that for the view of the Hon'ble Single Judge the appeal shall lie. Mr. Jethy, learned counsel for the Opposite Party No.1 contended that the writ petition, in the circumstance, is not entertainable at this stage.

4. Considering the rival contentions of the parties, this Court finds, undisputedly there is commencement of proceeding U/s.18 of the Act, 2006 on a complaint being made by the Opposite Party No.1 and a reference arising out of it. For the relevancy of the provision at Section 18 of the Act, 2006, this Court takes note of the provision at Section 18 and Sub-sections (1)(2)(3) of the Act, 2006 herein below :-

“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.”

5. It is reading through the aforesaid provision, this Court finds, for the undisputed fact involved herein, reference based on the complaint of the Petitioner has been undertaken in a conciliation process under the provision of Sub-section 2 of Section 18, of the Act, 2006 by the Council and there is further disclosure through the impugned order that there has been failure of conciliation through the proceeding dated 30.12.2020. Looking to the question framed hereinabove, taking into account the provision at Sub-section 3 of Section 18 of the Act, 2006 also taken note hereinabove, this Court finds, once the Statute prescribes a specific procedure i.e. after the conciliation failure report is submitted without any settlement between the parties and involving an unsuccessful attempt, the Council shall either itself take up the dispute for arbitration or referrer it to any Institution or Centre providing alternate dispute

resolution for such arbitration and in such event the provision of the Act, 1996 shall come into play, here looking to the impugned order at Annexure-4, this Court finds, the Council has made the following observation:-

“Both the parties were present before the Council in its 84th Sitting of MSEFC held on 30.12.2020. The Petitioner submitted that he has supplied the materials to the O.P. since 2016. But the O.P. has made part payment leaving a balance of rupees thirty lakhs along with interest as per MSMED Act-2006.

The Council observed that so many hearings has been made on 16.11.2019, 19.02.2020, 20.08.2020, 24.09.2020 & 30.12.2020 in which O.P. was present on 25.06.2020, 20.08.2020, 24.09.2020 & 30.12.2020. The Petitioner submitted that the conciliation process with the O.P. was terminated without any settlement as per Section-18(2) of MSMED Act-2006. The Council perused the claim petition and counter submitted by both the parties. It is found that the claim of the petitioner was genuine and decided to make an award as follows.

AWARD

The Council ordered that the O.P. i.e. Managing Director, Odisha State Cooperative Marketing Federation Limited (MARKFED) At- Old Station Road, Kalapana Squire, Bhubaneswar, Dist.-Khurda-751006 to pay the principal amount of Rs.30,00,000(Rupees Thirty lakhs) only and interest amount of Rs.21,96,756.50 (Rupees Twentyone lakhs nintysix thousand seven hundred fiftysix rupees and fifty paise) only calculated up to 15.09.2019 as per Sectoin 15 & 16 of MSMED Act, 2006. Further, compound interest with monthly rests shall be payable at the rate of three times of the Bank rate as notified by Reserve bank of India from time to time till realization of dues. The O.P. is directed to pay the outstanding dues within 30 days.”

Reading through the above there is no doubt that both the parties were noticed to attend the 84th sitting of the Council on 30.12.2020, but it further goes to make it clear that the conciliation attempt failed in the 84th sitting of the Council i.e. on 30.12.2020. This Court here finds surprise that when the Statute says after the conciliation fails and the proceeding is taken up as a dispute, then the only option available with the Council is either itself to take up the dispute for arbitration or refer it to any Institution or Centre providing alternate dispute resolution services and again if the dispute is undertaken by the Council itself, the same is to be undertaken following the provision at the Arbitration and Conciliation Act, 1996. This Court here finds, the Council observing that there is failure in the conciliation has straightway jumped to the award and therefore there is no following of the procedure U/s.18(3) of the Act, 2006. Thus not only the proceeding vide Annexure-4 is bad but all subsequent proceedings arising out of and involved in Annexure-4 also stand terminated.

At this stage this Court also takes up the contentions raised by Mr. Mohapatra, learned counsel for the Petitioners that for there is already an arbitration proceeding under the terms of contract, the Opposite Parties has scope for undertaking their claim exercise in such proceeding, this Court here observes, for the dispute involving the arbitration initiated by the Petitioner is in the trap of counter claim against the Opposite party No.1 and did not involve the claim of the Opposite Party No.1, the Opposite Party No.1 may not have a recourse on their claim involving such arbitration proceeding. In any event Opposite Party No.1's claim also requires to be decided by way of a dispute by the Council but however, following the provisions in the Act, 1996. It is at this stage of the matter coming to

the objection of Mr. Jethy, learned counsel for the Opposite Party No.1 on the maintainability of the writ petition for the availability of provision of appeal at Section 19 of the Act, 2006 and to support his stand taking help of decision in W.P.(C) No.12584 of 2021, this Court observes, for the observation of this Court that the Council has not undertaken the exercise following the provision at Sub-section 3 of the Section 18 of the Act, 2006, the impugned order becomes *non est* in the eye of law and since there is requirement of undertaking a fresh dispute exercise, it may be futile to ask the Petitioners at this stage to go in appeal in such situation as it will be only wastage of time and the dispute since not decided in accordance with Law, has to come back to the Council. Further, Law has also been settled even through the Hon'ble Apex Court that when the Petitioners establish, there is infraction of legal provision, technicality on availability of alternate remedy has no room to play. This Court, therefore, turns down the objection on the maintainability of the writ petition being raised by Mr. Jethy, learned counsel for the Opposite Party No.1.

In the circumstance, this Court interfering in the order at Annexure-4 sets aside the same and declares, all further proceedings arising out of same are bad and deemed to be dropped. However, considering that there is requirement of fresh undertaking of the dispute in exercise of provision at Section 18(3) of the Act, 2006, this Court remits the matter back to the Council to re-commence the dispute proceeding from the date after 30.12.2020. Since the matter is decided in presence of both the contesting parties, this Court while directing both the parties to appear before the Council on 9.05.2022 also directs the Petitioners to put up their counter before the Council on the same date and it may be open to the Council to undertake the dispute exercise and dispose of the same strictly in terms of the

provision at Sub-section 3 of Section 18 of the Act, 2006, but however, on involvement of Petitioners and Opposite Party No.1.

6. The writ petition succeeds, but however, with an order of remand.

(Biswanath Rath)
Judge

Ayaskanta Jena

