

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 1078 of 2019

**GPT Infra projects Limited
Vs
M/S. Miki Wire Works Pvt. Ltd.**

For the Petitioner : Mr. Anirban Roy
Mr. Debangshu Dinda
Mr. Varun Kothari

For the Opposite party : Mr. Arnab Chakraborty
Ms. Pragya Bhowmick

Heard on : 19.01.2023

Judgment on : 13.03.2023

Ajoy Kumar Mukherjee, J.

1. Present application under Article 227 of the Constitution of India has been preferred by reason of order No. 31 dated 17th January 2019 passed by Civil Judge (Senior Division), 2nd Court, Barasat in Misc. Case 22 of 2017, arising out of Arbitration Execution case No. 87/2016.

2. Petitioner contended that the petitioner engaged, inter-alia in the business of manufacturing concrete sleepers used by Indian Railways and on a regular basis, petitioner supplies to the Indian Railways, concrete sleepers as used in the railway tracks. In order to effect a fresh supply of concrete sleepers to the Indian Railways, the petitioner placed upon the opposite party two purchase orders being P.O. No. 20004783 dated 1st October, 2012 and P.O. No. 20005311 dated 29th November, 2012 respectively for the supply of HTS Wires. The opposite party agreed to supply the same and in terms of said two purchase orders the total value covered thereunder was Rs. 2,18,44,132/-. Clause 14 of the terms and conditions of the purchase orders contained an arbitration clause and in terms of clause 15 of the terms and conditions of the said purchase order *inter alia* specified that the Courts at Kolkata alone will be vested with exclusive jurisdiction to receive, try and entertain any action initiated by and between the parties in the matter arising out of said agreement.

3. Pursuant to and in terms of the said two purchase orders, the opposite party supplied an aggregate quantity 302 M.T. of the said goods to the petitioner and raised its invoice upon the petitioner. Petitioner upon receipt of the said goods, caused manufacturing concrete sleepers for the purpose of effecting delivery to the Indian Railways. Petitioner alleged in the course of process of manufacturing of the said concrete sleepers from the said goods supplied by the opposite party, it was found that out of the concrete sleepers so manufactured with the said goods about 14,640 nos. concrete sleepers were

found to be defective by the inspecting authorities of Indian Railways which were below the specification, as a result whereof the concrete sleepers manufactured from the said goods could not be offered by the petitioner to meet the demands of the Indian Railways.

4. By reason of the Indian Railways not accepting supply of the concrete sleepers, petitioner had to suffer loss and damages to the tune of Rs. 2,26,43,395/-. Correspondence exchanged between the parties thereafter, when petitioner complained about the sub-standard and inferior quality of the said goods supplied by the opposite party against said two purchase orders. The opposite party, denying the said goods to be of sub-standard and inferior quality, called upon petitioner to pay for the said goods. Opposite party informed the petitioner about the initiation of a proceeding by the opposite party before the Jharkhand Micro Small Medium Enterprises Facilitation Council at Ranchi (hereinafter referred as MSME council) which is a body constituted under Micro Small and Medium Enterprises Development Act, 2006 (hereinafter referred as MSMED Act).

5. Petitioner submits that the dispute and differences that arose between the parties were covered by the arbitration agreement contained in the purchase order and the parties have accepted said arbitration agreement and the provisions of the Act of MSMED is not applicable. He further alleged at no point of time, opposite party informed the petitioner that it has registered complain under the provisions of the said Act and from the purchase orders it is evident that the provisions of said Act is not applicable to the opposite party

and as such the opposite party cannot have filed the said complaint under the MSMED Act before the said council at Ranchi.

6. Owing to the supply of defective materials by the opposite party, petitioner claims that he is entitled to receive money on account of loss and damages from the opposite party and in view of the terms and conditions contained in the purchase orders, petitioner by a letter dated 25th February, 2013, invoked the arbitration agreement and appointed an arbitrator in terms thereto for adjudication of dispute between the parties and an application under section 9 of the Arbitration and Conciliation Act 1996 (in short Act of 1996) was also filed before the learned Civil Judge at Barasat which was however dismissed by an order dated 14th March, 2013. Being aggrieved, the petitioner preferred an appeal before the Division Bench of this court, being FMAT 1945 of 2013 and said appeal is still pending for disposal.

7. Petitioner further states that the complaint made by the opposite party under section 18 of the said MSMED Act was registered as case No. JHMSEFCO1 of 2013. After being aware of the said complaint case, petitioner herein filed an application under section 8 of the Act of 1996, praying for reference of the dispute being the subject matter of the complaint case for arbitration. Simultaneously opposite party had challenged the jurisdiction and authority of the learned arbitrator appointed by the petitioner. Such challenge to the authority of the learned arbitrator ultimately did not succeed and learned arbitrator submitted an award on 12th December, 2013. Challenging award dated 12th December 2013, the petitioner filed writ petition in the High

Court at Jharkhand at Ranchi which was registered as W.P.(C) No. 6 of 2014 but said writ petition has been dismissed by an order dated 3rd March 2016. Being aggrieved by that order petitioner preferred an appeal being LPA No. 186 of 2016.

8. The opposite party in the meantime filed an execution proceeding for execution of the said award dated 12th December, 2013 in the court of Learned sub Judge (I) Ranchi which was registered as Execution case no. 4 of 2014 and the learned executing court at Ranchi was pleased to pass an order of attachment of the bank account of the petitioner. Subsequently on the basis of application made by the opposite party, execution proceeding had been transferred to the District Court at Barasat, West Bengal as the properties situate within the local jurisdiction of such court. Petitioner alleged that upon receipt of notice from the bank, petitioner became aware of the present execution case filed by the opposite party which has been re-numbered as Arbitration Execution case no.87 of 2016.

9. Mr. Roy learned counsel appearing on behalf of the petitioner submits that the said award dated 12th December 2013 is not executable. The said award is nullity as it is not an award within the meaning of the Act of 1996. Said Council under the MSMED Act did not have the jurisdiction to pass the award and the said award has been passed by the authority lacking inherent jurisdiction.

10. Accordingly challenging the executability of the said award, petitioner filed an application under section 47 of the Code of Civil Procedure (in short

Code) which was registered as Misc.Case No. 22 of 2017 and the opposite party contested the said application by filing written objection. However, learned court below after hearing parties passed the impugned order by which the court below dismissed the petitioner's application under section 47 read with section 151 of the code, with cost of Rs. 50,000/- to be paid to the opposite party.

11. Mr. Roy further contended that section 18 of the MSMED Act provides for two fold remedies, first being a conciliation and in the event conciliation fails, then arbitration but the court below failed to appreciate that in the present case there had been no termination of conciliation process in terms of section 18(2) of the said Act. Furthermore under section 18(3) of the said Act, the procedure or process of arbitration under the Arbitration Act of 1996 does not get incorporated in the MSMED Act 2006 and the court below acted illegally with material irregularity without appreciating that it is only upon the termination of the conciliation that the provisions of arbitration under the Act of 1996 gets incorporated and then only, an arbitral reference in terms of the Act of 1996 can commence. Learned court below did not consider that in the present case there had not been any reference of the dispute between the parties to arbitration invoking section 18(3) of the MSMED Act and failed to consider that since there had not been any termination of the conciliation under section 18(2) of the Act of 2006, the provision of the Act of 1996 could not have been applied to the dispute between the parties in terms of section 18(3) of the Act 2006. Learned court below failed to appreciate that the

question with regard to award being a nullity is a the question of jurisdiction and same pertains to the execution of the award and therefore ought to have been decided finally on merits. Furthermore the award has been passed by the counsel which has not been formed in terms of the rules of the Jharkhand Facilitation Council and had in any event *funtus officio* after lapse of 90 days. Learned court below should not have held that an application under section 34 of the Act of 1996 ought to have been filed to challenge the award but the same was not filed only to avoid the deposit of 75% as required under section 19 of the MSMED Act. Accordingly Mr Roy learned Counsel for the petitioner submits that court below did not consider, where there is lack of inherent jurisdiction it goes to the root of the competence of the court to try the case and a decree or award which is a nullity is void and can be declared to be void by any court in which it is presented.

12. Petitioner in support of his contention relied upon the following judgment:-

- (i) Official Trustee, West Bengal and others Vs. Sachindranath Chatterjee and another, AIR 1969 SC 823**
- (ii) Harpal Singh Vs. Ahok Kumar and another, (2018) 11 SCC 113**
- (iii) Rafique Bibi Vs. Sayed Waliuddin & others, (2004) 1 SCC 287**
- (iv) Tata Chemicals limited Vs. Commissioner of Customs (preventive) Jamnagar ,(2015) 11 SCC 628**
- (v) SRS Investment Bengal Tiger Ltd Vs. Rahul Todi and others**

(vi) *Electro Steel Limited Bocaro Vs. State of Jharkhand*

13. Learned counsel appearing on behalf of the opposite party Mr. Chakraborty submits that the present application under section 227 of the Constitution of India has been filed by the petitioner in complete abuse of the process of law and an *ad interim* order has been obtained and enjoyed by them behind the back of the opposite party. In fact the petitioner/ award debtor had only tried to stall the proceeding before the court by preferring series of applications before different Courts of Law. The issue as to whether the Industrial Facilitating Counsel constituted under the MSMED Act should proceed with the Reference or not was set at rest for the time being by the order dated July 8th, 2013 passed by the Division Bench of this court, where this court has made it specifically clear to the parties that they would be free to raise respective contentions before the said Tribunal. Opposite party further contended that though the learned trial judge at Barasat while rejecting the application under section 9 of the Act of 1996 had categorically observed that *prima facie* there exists no arbitration agreement between the parties and the High Court had given the parties to raise their respective contention before the Tribunal yet, in a sheer abuse of the process of law and only to frustrate the proceeding before the said council, the petitioner/award debtor continued its arbitration proceeding with their purported nominated sole arbitrator who had virtually no jurisdiction to entertain such reference. He further contended, in spite of several opportunities being granted to the petitioner award/ debtor to

settle the claim through the council under section 18(2) of the said Act, the petitioner/award debtor had failed to do so. In such circumstances, finding no other option MSME Counsel had declared that inspite of several opportunities being given to the award debtor/petitioner herein, it had failed to settle the claim through the conciliation and thus the said Council proceeded to invoke and exercise it's jurisdiction under section 18(4) of the said MSME Act as an arbitrator and also proceed to pass necessary order upon hearing the parties. In any event the finding of fact by the Council acting as an arbitrator cannot be questioned in any collateral proceeding without following the procedure established in law. The opposite party/award holder had also initiated a declaratory suit being Title suit no. 227 of 2013 before learned sub-judge, IV Ranchi praying for a declaration that there is no arbitration agreement between the parties. The petitioner herein appeared and filed an application under section 8 of the Act of 1996, but said application under section 8 was dismissed by the learned sub-judge, IV at Ranchi vide order dated 16.09.2013. Challenging the said order dated 16.09.2013, petitioner preferred writ petition before Hon'ble High Court of Jharkhand at Ranchi being WP (C) no. 7066 of 2013 but said writ petition was subsequently dismissed as withdrawn on 05.10.2015.

14. However the petitioner/award debtor went on with the arbitration proceeding with their nominated Arbitrator. Mr. Subhasis Mitra, which was challenged by the opposite party herein under section 34 of the Act of 1996 by filing a Misc. Case being No. 10 of 2014 before the learned Civil Judge Senior

Division at Ranchi and on December 11, 2015, the said court found the application under section 34 of the 1996 Act to be not maintainable in view of the fact that the court of Barasat had already passed same order in section 9 application.

15. Mr. Chakraborty learned counsel appearing for the opposite party further submits that the award debtor/petitioner herein had already moved two parallel proceedings in order to nullify the award dated 02.09.2013 passed by the said MSME Council. Section 19 of the MSMED Act makes it clear that no application for setting aside any decree/award or order of said Council passed under the said Act can be made nor the same can be made maintainable before any court unless the appellant has deposited with it 75% of the amount in terms of the award. It is evident from the fact that in order to evade the liability of depositing 75% of the awarded amount, the petitioner has chosen not to file any proceeding under section 34 of the Act of 1996 by making direct challenge of the award and indirectly by filing an application before the executing court under section 47 of the code, the petitioner is trying to evade its liability and thereby virtually calling upon the court to sit in appeal over the award. In fact the award has been passed by a competent forum under a particular statute and there is no inherent lack of jurisdiction. The points raised by the award debtor are all pertains to alleged procedural irregularity and the same has already been raised in W.P(C) no. 06 of 2016 which was dismissed on contest and cannot be reiterated by way of filing an application under section 47 of the code. The provisions in respect of the Act of 1996

would be squarely applicable in the case of arbitration being initiated by the council under the MSMED Act. He further argued that it is clear that in view of time mandate provided in section 34 the Act of 1996, no application can be filed by the award/debtor under section 34, as more than 120 days have elapsed from the date on which the award debtor/petitioner had received the award and now by filing said application under section 47, the petitioner is virtually trying to get rid of the award indirectly which it could not achieve directly because of the challenge to the same became time barred by reason of the provision of section 34 of the Act 1996. Being unsuccessful in all the aforesaid proceedings now the instant section 47 application has been filed without exhausting the statutory appeal under section 34 of the Act of 1996.

16. His further contention is section 47 has a very limited scope and cannot be invoked in alternate to an appeal provisions where the petitioner has failed to exhaust the remedy under section 34 and when it has already remained unsuccessful till date in it's alternative attempts before the writ court. On the other hand since the appeal under section 34 has become time barred, the opposite party has accrued right to get the award executed in a court of law. There is no procedural impropriety or finding of fact which can be assailed of under section 47 of the code and court cannot virtually assume the role of an Appellate Court in a section 47 proceeding specifically when such appeal became time barred.

17. He further submits that provisions of passing an award by the MSMED council within 90 days is merely a directory provision and cannot be said to be

mandatory in as much as MSMED Act itself does not provide for any consequence for those awards passed after 90days. Furthermore once the Division Bench of this High Court has been pleased to give opportunity to the parties to raise their respective submissions before the Tribunal vide it's order dated 08.07.2013, the award was passed on 02.09.2013, that is within 90 days from such date. The objection regarding the council having eight members is also at best procedural irregularity which ought to have been taken at the first instance before the council by filing an objection and not having done so and participating in the proceeding by asking for time does not call for any intervention at this stage in as much as award was passed unanimously and by a number of members more than the minimum members prescribed. The MSMED Act clearly provides jurisdiction to the council to act as arbitrator and such Act has an over riding effect over the other general statute, since the MSMED Act is a special statue applicable to the small medium and micro enterprises (MSME). Accordingly learned counsel for the opposite party submits that the order impugned is quite justified and the present application is liable to be dismissed with exemplary cost.

18. Learned counsel for the petitioner raised his argument mainly contending that the MSME facilitation council at Ranchi, despite the arbitration clause and exclusive jurisdiction clause , passed the said award on 12th December, 2013 in favour of the opposite party. Accordingly in the court below the petitioner has challenged the said award as void *ab initio* by filing a

petition under section 47 of the Code of Civil procedure on the following grounds:-

- (i)** The MSME facilitation counsel consisted of eight members in violation of section 21 of the MSMED Act 2006.
- (ii)** Such award was passed after lapse of more than 90 days in violation of section 18(5) of the MSMED Act 2006.
- (iii)** The award dated 12th December 2013 was passed without holding any conciliation proceeding in violation of section 18(2) of the MSMED Act 2006.

19. In view of above the issue involved for adjudication is whether the award dated 12th December, 2013 was passed in violation of section 18 and 21 of the MSMED act 2006 and section 10 of the Arbitration Conciliation Act, 1996.

20. Petitioners contention is that no conciliation proceeding held before the initiation of the arbitration proceeding which is mandatory under 18(2) of the MSMED Act. He further submits that from the award it becomes evident that council admits that the conciliation proceeding has not been terminated which is a pre condition for initiation of arbitration under the MSMED Act. It is only on the termination of such conciliation that the rest of the arbitration and conciliation Act is imbibed into the MSMED Act by the provisions of section 18(3) of the Act of 1996. As long as there is no termination as mandated under section 18(3) MSMED Act, the

Arbitration and Conciliation Act 1996 could not have been given effect to by and under the MSMED Act.

21. On perusal section 18(2) of Act of 2006 it appears that the counsel shall either itself conduct conciliation in the matter or seek the assistance of any institution or centers providing alternative dispute resolution services by making a reference to such an institution or center for conducting conciliation and the provisions of section 65 to 81 of the Act of 1996 shall apply to such dispute as if conciliation was initiated under part III of the Act. That does not mean that the said provisions if not scrupulously followed the award becomes void. In fact learned counsel for the opposite party submits that several persuasions were made with the petitioner herein for settlement but they did not pay any bid to such request.

22. Then comes the question that the award was passed by the Facilitation Counsel Ranchi consisting of eight members which is not in conformity with law. On the contrary section 2(1) of the MSMED Act speaks such council shall consist of not less than 3 but not more than 5 members. It is also argued such constitution is also in violation of section 10 of the arbitration and conciliation Act 1996, which provides that the number of arbitrator shall not be an even number.

23. In the present case the petitioner did not choose to file any application under section 34 of the Act of 1996 against said award but filed a writ petition before the High Court at Jharkhand. In the said writ petition they have taken this ground along with others grounds which they have

taken in the application under section 47, but it did not find support before the Hon'ble High Court at Jharkhand and ultimately said writ petition was dismissed on 03.03.2016. In fact the High Court observed that the award debtor/petitioner can very well make the said challenge regarding composition of the tribunal, in a section 34 proceeding and as such the writ was found to be not maintainable on the ground of specific provisions of section 18,19,23 of the MSMED Act beside the availability of alternative remedy under section 34 of the Act of 1996. Petitioner submits that challenging the said order they have filed appeal being LPA 156 of 2013 but till date they have not taken appropriate steps for it's disposal.

24. It is true that section 21(1) of the MSMED Act 2006 provides that the council shall consists of not less than 3 (three) but not more than 5 (five) members but in the said Act section 21(3) provides for the state government to make rules including rules regarding composition of the council. Opposite party submits that earlier by virtue of Rule of 2007 the council was formed of eight members but subsequently under 2017 Rules brought parity with the rules under the provisions of section 21 (1)of the said Act and present council comprising of 8 members was formulated and composed under the earlier Rule of 2007. Accordingly I am agreeable with learned counsel for the opposite party that applying "defacto doctrine" even the orders passed by a Tribunal constituted under the Act which was subsequently declared *ultravires* is protected under the Defacto doctrine. Furthermore in ***Balvant N. Viswamitra and others. Vs. Yadav Sadashiv Mule (dead) through***

Irs. and others. reported in **AIR 2004 SC 4377**, paragraph 14 and paragraph 20 reads as follows:-

“14. Suffice it to say that recently a Bench of two Judges of this Court has considered the distinction between null and void decree and illegal decree in Rafique Bibi v. Sayed Waliuddin [(2004) 1 SCC 287] . One of us (R.C. Lahoti, J., as His Lordship then was), quoting with approval the law laid down in Vasudev Dhanjibhai Modi [(1970) 1 SCC 670 : (1971) 1 SCR 66] stated: (SCC pp. 291-92, paras 6-8)

“6. What is ‘void’ has to be clearly understood. A decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in the court passing the decree must be patent on its face in order to enable the executing court to take cognisance of such a nullity based on want of jurisdiction, else the normal rule that an executing court cannot go behind the decree must prevail.

7. Two things must be clearly borne in mind. Firstly, ‘the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be “a nullity” and “void” but these terms have no absolute sense: their meaning is relative, depending upon the court's willingness to grant relief in any particular situation. If this principle of illegal relativity is borne in mind, the law can be made to operate justly and reasonably in cases where the doctrine of ultra vires, rigidly applied, would produce unacceptable results.’ (Administrative Law, Wade and Forsyth, 8th Edn., 2000, p. 308.) Secondly, there is a distinction between mere administrative orders and the decrees of courts, especially a superior court. ‘The order of a superior court such as the High Court, must always be obeyed no matter what flaws it may be thought to contain. Thus a party who disobeys a High Court injunction is punishable for contempt of court even though it was granted in proceedings deemed to have been irrevocably abandoned owing to the expiry of a time-limit.’ (ibid., p. 312)

8. A distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the executing court; the remedy of a person aggrieved by such a decree is to have it set aside in a duly constituted legal proceedings or by a superior court failing which he must obey the command of the decree. A decree passed by a court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings.”

(emphasis supplied)

25. Accordingly there is a difference between inherent lack of jurisdiction and the procedural impropriety. In the present case evidently by virtue of section 15,16,17 and 18 read with section 2(b) (1), Explanation (i) and (ii), Facilitation Council clearly had jurisdiction in the subject matter in dispute

and therefore the present case cannot be construed as a case of inherent lack of jurisdiction. In fact the MSMED Council Act clearly provides the council's statutory jurisdiction to arbitrate on a dispute pertaining to payment to be made against supply made by an MSME. Accordingly I am agreeable with the contention that composition of the counsel taking eight members can hardly be said to be a defect in the composition of the Tribunal and not a case of inherent lack of jurisdiction. Inherent lack of jurisdiction is generally referred to the context of the subject matter of dispute. Here in the present case the eight members were unanimous and no member had put any dissenting note and as such it cannot be said that arbitration award passed by such counsel lacks inherent jurisdiction. Furthermore during the arbitral proceeding the petitioner herein never raised any objection regarding such composition. Section 4 of the said Act of 1996 provides for the waiver of right to object which clearly states that a party who knows that any provision of the part-I from which the parties may derogate or any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non compliance, then it shall be deemed to have waived his right to so object. Section 16 of the Act of 1996 provides for competence of Arbitral Tribunal to rule its jurisdiction and Section 16(2) provides that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.

26. Both section 21(1) of the MSMED Act and section 10 of the Arbitration and Conciliation act deals with the composition of the arbitral tribunal. In

Narayan prasad Lohia Vs. Nikunj Kumar Lohia & others reported in **(2002) 3 SCC 572** had an occasion to consider and decide as to whether the number of arbitrators and the provisions of section 10 of the arbitration Act is a derogable provision or not. In the said judgment in paragraph 16 it has been held that the provisions of section 10 is a derogable provisions and it is open for a party either to challenge the defect in composition of the tribunal or not to choose to object on such score. However if a party wants to object on such score the same has to be done prior to filing of statement of defence under section 16(2) of the Act. Furthermore the scope of judicial intervention in arbitral matter is very little as per section 5 of Act 1996 and it is not open for a court to go into such an issue apart from the procedure laid down in the Act of 1996 in section 16(2) and 34(2) (V) of the Act of 1996. In the present case admittedly the petitioner did not file any application under section 34 of the code against the award, challenging the composition of the tribunal.

27. In **Bhawarlal Bhandari Vs. Universal heavy Mechanical Lifting Enterprises** reported in **AIR 1999 SC 246** the Apex Court has discussed scope of section 47 and held that executing court cannot go beyond the decree unless it is passed by court lacking inherent jurisdiction. The mere ground of absence of jurisdiction would not be entertained in a proceeding under section 47. In **Rafique Bibi Vs. Sayed Waliuddin and others** reported in **(2004) 1 SCC 287** the difference between no jurisdiction and irregularity of procedure has been distinguished in paragraph 8 of the judgment and held

that a decree suffering from illegality or irregularity of procedure cannot be termed inexecutable by the Executing court.

28. Regarding the objection raised by the petitioner about forum selection and arbitration clause in the agreement, it has been stated by the petitioner that since there exists an arbitration clause between the parties no reference before the MSME Facilitation Council at Ranchi would lie and any award passed thereunder is without jurisdiction and unenforceable. Furthermore the purchase order contained exclusive jurisdiction clause which provides that the courts of Calcutta will have exclusive jurisdiction over any dispute arising between the parties and as such MSME Facilitation Council at Ranchi does not have any jurisdiction and could not have passed the said award. In reply the learned counsel for the opposite party submits that there is no such arbitration clause as the purchase order forwarded to the opposite party contained only one page which does not disclose any arbitration clause, and he has raised serious doubt about existence of arbitration agreement and he further contended that in the earlier decision the court rejected such contention of the petitioner.

29. Without verifying the truthfulness even if I assume that there was any arbitration agreement between the parties, even then in view of section 18(4) of the MSME Act of 2006, such agreement is of no consequence in the case of an MSME as said section makes it clear that it confers jurisdiction to MSME Facilitation Council to act as an arbitrator and conciliator in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in

India. Section 18(1) of the Act of 2006 confers statutory jurisdiction to MSME Facilitation Counsel to have jurisdiction notwithstanding anything contained in any other law for the time being in force. In conjoint reading of section 18(1), 18(4) and 24 of the MSMED Act of 2006, it is clear that sections 15 to 23 of MSMED Act shall have an overriding effect on any other laws and/or any inconsistent provisions contained in any other law. Therefore section 18 of the MSMED Act provides for statutory arbitration in case of failure of settlement, irrespective of whether there is any arbitration agreement or not. Interm of section 15,16,17 and 18 read with section 2(b) explanation (i) and (ii), the opposite party has a clear right under the Act of 2006, to refer the dispute before the Council.

30. The petitioner has raised another issue which pertains to section 18(5) of the Act of 2006 that reference made to such counsel shall be decided within a period of 90 days from the date of reference which has not been allegedly done in the present case. Preamble of MSMED Act 2006 states that this is an Act to provide for facilitating the promotion and development and enhancing competitiveness of micro, small and medium enterprises and for matter connected therewith or incidental thereto. It is expedient to provide for facilitating the promotion and development and enhancing the competitiveness of micro small and medium enterprises and for matters connected therewith or incidental thereto. The said Act does not provide for any penal consequence of failure to conclude the reference within a period of 90 days. In absence of any penal consequence it can very well be said that the

provisions laid down in section 18(5) is directory in nature and not mandatory, and cannot oust the jurisdiction of any authority for passing award merely on the ground of expiry of such period. In fact the Act of 2006 clearly indicates that the same has been enacted in order to help growth and development of MSME and therefore there is no scope to interpret section 18(5) in a manner to deprive an MSME from getting benefit from an award passed by the council, merely because the award passed after the expiry of 90 days. In this context learned counsel appearing on behalf of the opposite party has drawn my attention that this court in its order dated 08.07.2013 directed the parties to make their contention before the tribunal and the award was passed on 02.09.2013 which is within three months from the date which is in fact is substantive compliance of the said directory provision. He further alleged that the petitioner had continuously tried to get adjournments and as such he cannot be permitted to take advantage of his own wrong by saying 90 days have expired so the award is illegal. He further point out that the reason lies for not filing any application challenging the award under section 34 is section 19 of the Act of 2006 which clearly operates as a bar to challenge an Award passed by the council unless 75% of the awarded amount is deposited.

31. Section 47 of the Code has a narrow and microscopic Scope and thus cannot be equated as a provisions of Appeal. In this context learned counsel appearing on behalf of the opposite party relied upon paragraph 13 of judgment of this court in ***Delhi Cloth & General Mills Co. Ltd. Vs. Ramji das Shriram & others*** reported in ***AIR 1982 Cal 34*** where it was held that

in execution no plea that merely challenges the validity or propriety of the decree on the ground that it is contrary to the provision of law, can be raised.

32. Moreover section 35 of the Act of 1996 provides that subject to part-I an arbitral award shall be final and binding on the parties and section 36(1) says where time for making an application to set aside the arbitral award has expired then subject to the provisions of sub-section (2) such award becomes executable as it reaches its finality.

33. The case law relied by the petitioner in ***Tata Chemicals limited Vs. Commissioner of Customs (preventive) Jamnagar*** reported in **(2015) 11 SCC 628**, it appears that the said case is factually distinguishable which pertain to an executive action of collecting samples by the Custom Authority. and it had not dealt with any proceeding similar to the present one. In fact there is no dispute in the settled proposition of law that if the law requires that something be done in a particular manner , it must be done in that manner but here factual aspect is completely different and in the present case such issue regarding termination of conciliation proceeding or constitution of arbitral tribunal was never raised in Arbitration proceeding and as such award passed in accordance with law. Similarly in ***Harpal Singh Vs. Ashok Kumar and another*** reported in **(2018) 11 SCC 113**, in para 8 and 9 it was clearly observed that said case relates to inherent lack of jurisdiction but in the present case composition of board has been questioned which has already been turned down and does not fall within the category of “inherent lack of jurisdiction” because by no stretch of imagination it can be said that MSME

counsel has no jurisdiction with the subject matter of the dispute. In **Rafique Bibi Vs. Sayed Waliuddin and others (2004) 1 SCC 287** which has been relied by the petitioner has clearly held in para 8 that a decree suffering from illegality or irregularity of procedure cannot be termed inexecutable and remedy of a person aggrieved by such a decree is to have it set aside in a duly constituted legal proceedings or by a superior court, failing which he must obey the command of the decree. In the present case the petitioner even did not challenge the award or get it set aside by filing application under section 34 of the Act of 1996 and as such ratio of said case does not support petitioner's contention.

34. The facts and circumstances of the case in **SRS Investment Bengal Tiger Ltd Vs. Rahul Todi and others** relates to case where court held that executing court was justified in holding that application under section 47 of CPC were maintainable despite pendency of application under section 34 of the Act against arbitral award. In the present case Award has not been challenged by filing application under section 34 and as such award is straightway executable and said case has no factual semblance with present case. Learned counsel for the opposite party pointed out that in the said judgment the judgment of **Naryan Prasad Lohia Case** was not considered and as such does not have binding precedent to be followed in the present case. He further drawn my attention that the **Electro Steel Limited Bocaro Vs. State of Jharkhand** also did not consider aforesaid **Narayan Prasad lohia's** judgment which is a prior decision of the Apex Court and as such does not

have binding precedent before this court. In fact ratio laid down in Narayan Prasad Lohia's Judgment is in anchor-seat, which has clearly defined, when to object and where to object about composition of Arbitral Tribunal.

35. Considering all these I find that the present application has been filed only to drag the proceeding and to gain undue and unfair advantage by filing cases one after another and as such it is liable to be dismissed with exemplary costs.

36. In view of above C.O. 1078 of 2019 is dismissed with a cost of the Rs. 5,00,000/- to be paid by the petitioner to the opposite party herein within a period of four weeks, failing which the petitioner will be precluded from making any prayer in the arbitration execution proceeding being 87 of 2016 pending before learned Civil Judge (Senior Division) 2nd Court, at Barasat, North 24 Pargabas.

Connected application, if any accordingly disposed of.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)