

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE**

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

W.P.O. 293 of 2023

Anupam Industries Limited & Anr.

Vs.

West Bengal Micro Small Enterprise

Facilitation Council & Anr.

For the petitioner : Dr. Kamlesh Vaidankar, Adv.
Mr. Arnab Dutta, Adv.
Ms. Prerana Choudhury, Adv.

For the respondent no. 2 : Mr. Moinak Bose, Adv.
Mr. Debkumar Sen, Adv.

For the State : Mr. Soumitra Mukherjee, Adv.

Last Heard on : 20.04.2023.

Delivered on : 25.04.2023.

Moushumi Bhattacharya, J.

1. The petitioners seek quashing of an arbitration case registered by the respondent no. 1, West Bengal Micro Small Enterprise Facilitation Council (Council) against the petitioners. The petitioners seek setting aside of all

proceedings initiated or being conducted by the Facilitation Council under Arbitration Case no. 04 of 2018. The petitioner no. 1 is the buyer and the respondent no. 2 is the supplier in transactions entered into between the parties in 2013. The writ petition does not give any particulars of the transactions.

2. The expressions “buyer” and “supplier” are being used as defined under section 2 (d) and (n) respectively of The Micro, Small and Medium Enterprises Development Act, 2006. The petitioner no. 1 is the respondent in an ongoing arbitration proceeding pending before the Council. The proceedings were initiated by the respondent no. 2 as the supplier / claimant. The respondent no. 2 admittedly supplied goods in terms of the transactions entered into between the parties.

3. Learned counsel appearing for the respondent no. 2 / supplier has raised a preliminary objection on the maintainability of the writ petition. The objection rests on the ground that the petitioners cannot seek a mandamus for quashing of the arbitration proceedings pending before the Council since the petitioners have an alternative and adequate statutory remedy under The Arbitration and Conciliation Act, 1996. Counsel submits that the petitioners can initiate proceedings under section 37 of the 1996 Act and questions the jurisdiction of the tribunal under section 16 of the said Act. Counsel also relies on the provisions of the MSMED Act and on section 18(3) in particular to submit that the respondent no. 2 was duly registered as an MSME under section 8 of the 2006 Act. In this connection it is submitted that the

respondent no. 2 was admittedly a supplier under the MSMED Act and was registered since May, 2008 which was prior to the transactions entered into between the parties.

4. Learned counsel appearing for the petitioners relies on several judgments including of the Supreme Court, the Bombay High Court and the Gujarat High Court to urge that existence of an alternative remedy under the 1996 Act should not deter the Court from entertaining the writ petition. Counsel submits that the arbitration proceeding before the Council is liable to be quashed since the Council cannot act both as a conciliator as well as an arbitrator. Counsel further submits that the claim of the respondent no. 2 as a supplier is not maintainable since its registration under the MSMED Act is subsequent to the date of the transaction.

5. The preliminary objection raised on behalf of the respondent no. 2 on the maintainability of the writ petition is required to be dealt with first. The petitioners have sought for issuance of a writ in the nature of mandamus for quashing of the arbitration proceeding pending before the Facilitation Council. The provisions of The Arbitration and Conciliation Act, 1996, however provide for several routes of statutory redress to an aggrieved party. This would include section 34 which gives recourse to a party against an arbitral award; section 37(1) and (2) which provides for appeal from certain orders. Section 16 empowers the arbitral tribunal to rule on its own jurisdiction including on any objection in respect of the existence or validity of the arbitration agreement. Section 16(2)-(5) provides for a plea being raised before the arbitral tribunal on

the ground of competence and jurisdiction where the tribunal shall decide on the plea and where such plea is rejected, the arbitral tribunal shall continue with the arbitral proceeding and make an arbitral award. The aggrieved party can thereafter make an application for setting aside of such arbitral award / decision under section 34.

6. Therefore, the petitioners have multiple effective alternative statutory remedies under the 1996 Act. The prayer for quashing of the arbitration proceedings pending before the Council is also contrary to section 18(3) of the MSMED Act, 2006. Section 18(1) deals with reference to the Micro and Small Enterprises Facilitation Council and makes the provision exclusive and applicable regardless of any other law for the time being in force. Section 18 starts with a non-obstante clause. Section 18(1) authorises a party to a dispute with regard to any amount due in relation to goods supplied or services rendered by the supplier to make a reference to the Council. 18(2) empowers the Council to either conduct conciliation by itself or through an institution providing alternate dispute resolution services. Section 18(3) provides for a post-conciliation scenario on the failure of the conciliation proceedings where a Council is under a mandate to then take up the dispute for arbitration either by itself or refer it to a center providing ADR services. Section 18(3) further provides that the dispute shall be decided under the provisions of the 1996 Act as if the arbitration is pursuant to an arbitration agreement as defined under section 7(1) of the 1996 Act.

7. The above provisions of the MSMED Act hence makes it clear that the Facilitation Council has been conferred with exclusive powers to decide a dispute under the provisions of the 1996 Act after the failure of the conciliation proceedings. The fact that the conciliation failed would appear from the Council's letter dated 12.3.2020 which records that the conciliation process has been terminated as the parties could not arrive at a settlement. The letter also records that the Council will proceed to initiate arbitration under section 18(3) read with 18(4) of the MSMED Act. This letter was addressed to both the parties including the petitioner no. 1. The other relevant letter issued by the Council is of 21.10.2022 which was again addressed to both the parties, recording that arbitration was initiated under section 18(3) of the MSMED Act and they were requested to attend the proceedings on 4.11.2022. The letter also mentions relevant particulars in relation to the arbitration.

8. These letters would show that the Council proceeded to initiate arbitration under section 18(3) only after termination of the conciliation proceedings under the said provision. Hence, the contention of the petitioners that the Council did not have jurisdiction to entertain the dispute is belied by the statutory as well as the factual position.

9. Several decisions of the Supreme Court and the High Courts have conclusively settled that a Writ Court exercising jurisdiction under Article 226 of the Constitution will step back and decline to exercise its discretionary powers in issuing writs and directions where there is an adequate alternative

remedy. There is of course no bar on the Court from entertaining a matter even in the face of an alternative remedy where sufficient reason exists for interference; the restraint shown by the Court is more of a self-imposed restraint. The Court in such cases generally directs the parties to explore and exhaust the alternative remedy available to them and seek recourse before the alternative forum. In the present case, the 1996 Act was enacted for the purpose of consolidating laws relating to domestic and international commercial arbitration. The MSMED Act of 2006 is a special statute as it was specifically enacted for facilitating the promotion and development of micro, small and medium Enterprises and enhancing their competitiveness.

10. The alternative statutory remedy in the present case is not only sufficient and effective but also multi-layered. The petitioners can seek recourse through any of the remedies available under the 1996 Act; the petitioners have instead chosen to approach the Writ Court and invoke its extraordinary powers under Article 226 of the Constitution. This was precisely the point in *Bhaven Construction vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited; (2022) 1 SCC 75* where the Supreme Court noted that the High Court erred in exercising its discretionary power under Articles 226 and 227 of the Constitution since the issue of jurisdiction must first be dealt by the Tribunal under section 16 of the 1996 Act. The Supreme Court relied on *Deep Industries Ltd. v. ONGC; (2020) 15 SCC 706* in this context.

11. The decisions cited by the petitioners may be distinguished as follows. In *M/s. Silpi Industries etc. vs. Kerala State Road Transport Corporation; 2021 SCC*

OnLine SC 439, the issue before the Supreme Court was whether the provisions of the Limitation Act, 1963 were applicable to the arbitration proceedings initiated under the MSMED Act. Paragraph 18 of the said decision would show that the Supreme Court held in favour of the Facilitation Council to decide the dispute with regard to the amount due under section 17 and further held that the provisions of the Limitation Act would be applicable to arbitration proceedings under section 18(3) of the MSMED Act. The decision of a Division Bench of the Gujarat High Court in *M/s. Nik San Engineering Co. Ltd. vs. M/s. Easun Reyroller Limited; R/Letters Patent Appeal No. 619 of 2019* dealt with the issue of identity of the Supplier under section 2(n) of the MSMED Act. The decision of a Division Bench of the Bombay High Court in *JSW Steel Ltd. vs. Kamlakar V. Salvi; Writ Petition No. 12897 of 2016* considered the constitutional validity of section 16 of the MSMED Act. The Court relied upon *Silpi Industires* and held that the supplier should have a permanent registration certificate under section 8 of the MSMED Act. A Single Bench decision of the Gujarat High Court in *Anupam Industries Ltd. vs. The State Level Industry Facilitation Council; R/Special Civil Application No. 2825 of 2020* follows the Bombay High Court decision in *JSW Steel*. The Court was of the view that the Facilitation Council can have jurisdiction only where the supplier is registered under section 8 of the MSMED Act at the time of the transaction. These cases do not assist the petitioners for answering the preliminary question of maintainability. The decisions are more on the entitlement of a party to a dispute being identified as a “supplier” under the MSMED Act.

12. The petitioner's contention with regard to the Facilitation Council not having jurisdiction for lack of registration of the respondent no. 2 as an MSME Unit should next be dealt with.

13. Section 2(n) of the MSMED Act defines a "supplier" as a micro or small enterprise which has filed a memorandum with the authority referred to in section 8(1) of the Act. The petitioners' objection to the respondent no. 2 being a supplier would appear from an affidavit filed by the petitioners where it has been stated that the respondent no. 2 applied for Udyog Aadhar registration on 22.11.2017 which is 4 years after the transaction. The petitioners have hence alleged that the respondent no. 2 was not a supplier as on the date of the transaction. The admitted fact, however, is that the registration under Udyog Aadhar was introduced by the Central Government only in 2017 which was further changed to the Udyam Scheme from 1.7.2020. The respondent no. 2 is registered under the Udyam Scheme which would appear from the records. The records also show that the respondent no. 2 applied for an MSME Unit on 29.5.2008 before the District Industries Center, Kolkata which was long before the transaction between the parties. The District Industries Center, Directorate of Cottage and Small Scale Industries was the notified authority in the State at the relevant point of time. Even otherwise, according to learned counsel for the parties, the admitted fact is that the petitioners have already made part payment to the respondent no. 2 of about Rs. 36 lakhs and approximately Rs. 50 lakhs stands outstanding as on date – as submitted by counsel.

14. In *Marine Craft Engineers Private Limited vs. Garden Reach Shipbuilders and Engineers Limited* decided by this Court in A.P. No. 831 of 2018 it was held that the date of execution of a contract between a buyer and a supplier under the MSMED Act loses relevance for the application of the said Act provided the supplier claims recovery of the amount due under section 17 for goods supplied after the date of registration. The Court also held that the supplier would not be disqualified from making a reference to the Facilitation Council only on the basis of whether the supplier was registered as an MSME Unit on the date of the contract.

15. The above facts persuade the Court to hold that the respondent no. 2 was statutorily-entitled to make a reference to the Council for adjudication of the disputes.

16. The point of maintainability is accordingly answered in favour of the respondent no. 2 and against the petitioners. The instances carved out for interference in *Whirlpool Corporation v. Registrar of Trademarks; (1998) 8 SCC 1* would not apply to the present case since the petitioners have not been able to make out a compelling case for interference on the grounds of breach of the principles of natural justice, infraction of their constitutional rights or otherwise. More significantly, the petitioners have not explained as to why the petitioners are not seeking recourse under the statutory remedies available to the petitioners under The Arbitration and Conciliation Act, 1996. The petitioners can very well wait for the Council to pronounce its decision in the

form of an Award or otherwise and then seek suitable recourse under the 1996 Act or as the petitioners may be advised.

17. The Court is not willing to set aside or interfere with the ongoing arbitration proceedings before the Facilitation Council for the reasons as stated above.

18. WPO 293 of 2023 is accordingly dismissed as not maintainable.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)