

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.O. No.1624 of 2023

**Indian Oil Corporation Limited and Anr.
Vs
Union of India and ors.**

For the petitioners	:	Mr. Soumya Majumdar, Adv., Ms. Sharmistha Ghosh, Adv., Mr. Amit Ghosh, Adv.
For the Union of India	:	Ms. Sarda Sha, Adv.
For the respondent no.4	:	Mr. Pranit Bag, Adv., Ms. Swarupa Ghosh, Adv., Ms. Minakshi Nag, Adv., Mr. Abhirup Chakraborty, Adv
For the State	:	Mr. Debangshu Dinda, Adv.
Hearing concluded on	:	13.10.2023
Judgment on	:	17.11.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioner/IOCL has challenged the reference of a dispute between the petitioner and respondent no.4 to the MSME Council under the Micro, Small and Medium Enterprises Act, 2006 (for short, "the MSME Act").
2. It is argued that the respondent no.4 itself had moved the appropriate court under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as, "the 1996 Act") and after refusal of interim

orders there, has referred the matter to the MSME Council. Having done so, the respondent no.4 is debarred by the doctrine of election.

3. It is contended that the petitioner has already given a notice seeking reference to arbitration and has set the ball in motion insofar as arbitration under the 1996 Act is concerned. Having themselves taken resort to Section 9 of the 1996 Act, the respondent no.4 is bound by *estoppel* from approaching the MSME Council afresh from the stage of conciliation.
4. It is argued that the respondent no.4 cannot claim the benefit of Section 24 of the MSMSE Act, which says that the said Act has overriding effect on other statutes, by dint of its own conduct in approaching the stipulated forum under the 1996 Act and having invoked the provisions of the same.
5. Learned counsel places reliance on *National Insurance Co. Ltd. v. Mastan and another*, reported at (2006) 2 SCC 641, in support of his arguments on the doctrine of election. In the said judgment, the Supreme Court observed that the doctrine of election is a branch of the Rule of *Estoppel* and postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both.
6. Learned counsel for the respondent no.4 refutes such submissions and argues that under Section 21 of the 1996 Act, the arbitral proceeding commences on the date on which a request for the dispute to be referred to arbitration is received by the respondent and not before such date. Section 9 of the 1996 Act also includes a pre-

arbitration stage at which the respondent no.4 invoked the said provision. Since the respondent no.4 did not have any alternative forum to obtain interim relief by virtue of the existence of an arbitration clause in the agreement between the petitioner and the respondent no.4, Section 9 was the only provision under which interim relief could be sought. It is contended that the MSME Act itself does not have any provision of seeking interim relief akin to Section 9 of the 1996 Act.

7. It is argued that nothing in the MSME Act prevents a party from approaching the appropriate court under Section 9 of the 1996 Act before taking the dispute to the MSME Council.
8. Learned counsel refers to *Hindustan Petroleum Corporation Limited and Another Vs. West Bengal State Micro, Small Enterprises Facilitation Council and Others*, reported at 2023 SCC OnLine Cal 1700, where it was observed that reference can be made to MSME Council even in respect of works contracts, as in the present case.
9. Learned counsel next relies on *Indian Oil Corpn. Ltd. v. Haryana Micro & Small Enterprise Facilitation Council and another*, reported at 2023 SCC OnLine P&H 1443, where the Punjab and Haryana High Court relied on the HPCL judgment of this Court and reiterated the same proposition.
10. Learned counsel next cites *Gujarat State Civil Supplies Corpn. Ltd. v. Mahakali Foods (P) Ltd. (Unit 2) and another*, reported at (2023) 6 SCC 401, for the proposition that the provisions of a special statute would override the provisions of the general statute. In the present case, it is

argued, the MSME Act is a special statute which overrides the 1996 Act. In the said judgment, such proposition was clearly laid down, it is contended. The Supreme Court observed that when the MSME Act was being enacted, the legislature was aware of the previous 1996 Act and therefore it is presumed that the legislature had consciously made applicable the provisions of the 1996 Act to the disputes under the MSME Act at a stage where the conciliation process initiated under Section 18(2) of the MSME Act fails and when the Facilitation Council itself takes up the dispute for arbitration.

- 11.** The Supreme Court observed in such context that an independent arbitration agreement would not prevail over the MSME Act.
- 12.** Learned counsel next relies on *Principal Chief Engineer v. Manibhai and Brothers (Sleeper)*, reported at 2016 SCC OnLine Guj 10012, for the proposition that once the Council acts as an Arbitrator, it has no jurisdiction to entertain an application under Section 8 of the 1996 Act.
- 13.** Learned counsel also relies on *Bata India Ltd. v. AVS International (P) Ltd.*, reported at 2019 SCC OnLine Del 9801, where the overriding effect of the MSME Act was reiterated by the Delhi High Court.
- 14.** The argument that the agreement between the parties being a works contract is thus precluded from reference to the MSME Council has not been harped upon much by the petitioners. In any event, as held by this court in *HPCL (supra)*, relied on by the Punjab and Haryana High Court in *IOCL Vs. Haryana MSME Council (supra)*, a reference may be made to the MSME Facilitation Council even in respect of a

works contract. In any event, it is well within the jurisdiction of the MSME Council while taking up a reference under Section 18 of the MSME Act to decide whether it has jurisdiction to entertain the matter. Hence, the said question need not be delved into in detail at this juncture.

- 15.** The first question which falls for consideration is whether a prior invocation of Section 9 of the 1996 Act by a party precludes it from approaching the MSME Council subsequently for conciliation and, on failure, arbitration.
- 16.** A part of the answer lies in the language of Section 9 of the 1996 Act itself.
- 17.** Sub-section (1) thereof provides that a “party” may seek an interim order, *inter alia*, before an arbitral proceeding. Section 2(h) of the 1996 Act provides that “party” means a party to an arbitration agreement. Thus, any party to an arbitration agreement has the option to approach a jurisdictional court for interim relief under Section 9 of the 1996 Act.
- 18.** Sub-section (2) provides that where a court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of 90 days from the date of such order.
- 19.** There are two alleviating factors for the respondent no.4 in the present case. First, the court did not pass “an order for any interim measure of protection under sub-section (1)” since the application of the respondent no.4 under Section 9 was refused. Secondly, the

respondent no.4 did not commence any arbitral proceedings within the period of 90 days or even thereafter under the 1996 Act. The worst fate which could befall the respondent no.4 for having not complied with Section 9(2) is that any interim order, if granted under Section 9(1), could be vacated. In the present case, there is no scope of the respondent no.4 suffering such fate since it never got any relief under sub-section (1).

- 20.** Even if the respondent no.4 had obtained an interim protection under Section 9, it would, at worse, have suffered from the interim order being vacated for non-compliance of Section 9(2) of the 1996 Act. However, sub-section (2) of Section 9 does not *per se* preclude a party to an arbitration agreement from approaching a court under Section 9 of the 1996 Act and thereafter taking resort to the MSME Act.
- 21.** Looking to the MSME Act itself, Section 18(1) of the same provides that 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 thereof, make a reference to the MSME Facilitation Council. Being qualified under the said sub-section, the respondent no.4 was at liberty to approach the Council.
- 22.** Sub-sections (2) and (3) of Section 18 contemplate two different scenarios. Whereas the former envisages a conciliation between the parties, the latter contemplates an arbitration where a conciliation initiated under sub-section (2) fails.
- 23.** Correspondingly, sub-section (2) enables the provisions in the 1996 Act pertaining to conciliation under Part III, that is, Sections 65 to 81

to apply with regard to conciliation under Section 18(2) of the MSME Act while sub-section (3) of Section 18 of the MSME Act enables applicability of the rest of the relevant provisions of the 1996 Act.

- 24.** Hence, if there was a conciliation effort preceding an arbitration under the 1996 Act, the applicable provisions would be substantially the same as in similar proceedings under the MSME Act.
- 25.** Nothing in Section 18(3) of the MSME Act precludes a party to an arbitration agreement from seeking an interim order under Section 9 of the 1996 Act before the arbitration takes place before the Facilitation Council or seeking enforcement under Section 36 of the 1996 Act after an award is passed by the Council under the MSME Act or preferring challenges under Sections 34 or 37 of the 1997 Act (of course, read in conjunction with Section 19 of the MSME Act which imposes a fetter of deposit of 75 per cent of the awarded amount in case of such a challenge).
- 26.** A prior conciliation effort does not necessarily take away the implicit arbitrability of the dispute, be it under the 1996 Act or the MSME Act. Thus, the remedy of Section 9 of the 1996 Act is available whenever there is an arbitration clause under Section 7 of the said Act, irrespective of where ultimately there is a conciliation between the parties or an arbitration, either under the 1996 Act or the MSME Act.
- 27.** The MSME Act does not have independent provisions governing the procedure of an arbitration and enables applicability of the relevant provisions of the 1996 Act on such score.

- 28.** Seen from such perspective, the prior approach by the respondent no.4 under Section 9 of the 1996 Act before the commencement of the reference to the MSME Council could not in any manner preclude it from approaching the Facilitation Council under the MSME Act.
- 29.** The overriding effect stipulated in Section 24 of the MSME Act has to be read in appropriate context. The said provision is applicable only when there is an inconsistency or conflict between the provisions of the MSME Act and any other statute, including the 1996 Act.
- 30.** There being no such inconsistency or conflict between Section 9 of the 1996 Act and Section 18 of the MSME Act in the context of the instant case, the overriding effect does not come into play at all.
- 31.** In *Gujarat State Civil Supplies (supra)* the Supreme Court observed *inter alia* that the MSME Act prevails over an independent arbitration agreement between the parties under the 1996 Act.
- 32.** Obviously, since Section 18(3) itself envisages a parity in governing procedure between the 1996 Act and the MSME Act where an arbitration agreement exists within the contemplation of Section 7 of the 1996 Act, the MSME Act prevails despite an independent arbitration agreement between the parties.
- 33.** However, in spite of the MSME Act prevailing over the 1996 Act, in the absence of any inconsistency between Section 9 of the 1996 Act and the MSME Act, as discussed above, the question of conflict or overriding effect does not come into play at the stage of Section 9 of the 1996 Act.

- 34.** The premise of the doctrine of election, as succinctly observed by the Supreme Court in *National Insurance Company (supra)*, cited by the petitioner itself, is that there must be two remedies available for the same relief, in which case the aggrieved party has the option to elect either of them but not both. There being nothing corresponding to Section 9 of the 1996 Act in the MSME Act, the question of two remedies being available for the same relief does not arise, thereby precluding the applicability of the doctrine of election. Hence, the said argument of the petitioner cannot be accepted.
- 35.** In any event, respondent no.4 was unsuccessful in obtaining relief under Section 9 of the 1996 Act and is justified in approaching the MSME Facilitation Council under the provisions of the MSME Act, there being no embargo to do so, since the respondent no.4 is an MSME Entity. Hence, there is no valid ground of the petitioners' challenge to the reference of the dispute to the MSME Facilitation Council.
- 36.** Accordingly, WPO No.1624 of 2023 is dismissed on contest without, however, any order as to costs.
- 37.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)

Later

At this juncture, learned counsel for the petitioner seeks stay of operation of the above order. However, since the writ petition has been dismissed, the stay of operation would not serve any useful purpose whatsoever. Accordingly, such prayer is refused.

(Sabyasachi Bhattacharyya, J.)