

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 2283 OF 2022

Bhagwat Enterprises, a sole
proprietorship firm, through its Proprietor,
Mr. Dayabhai S/o. Panchanbhai Patel,
Aged : Major, having its office at 115,
Umiya Audhogik Sahakari Vasahat,
Kapsi, Bhandara Road, Nagpur
(Maharashtra State)

.... **PETITIONER.**

// VERSUS //

1. Micro and Small Enterprises Facilitation
Council, through Member Secretary &
Deputy Director of Industries, Nagpur.
2. M/s. Bharat Shipping Agency, a sole
proprietor ship firm having Udyog
Aadhar No.MH20D003678, dated
03.07.2018, through its Proprietor
Shri Prakash Khemka, aged about :
major, having office at Bharat Shipping
Agency, 5, Residency Road, Nagpur
(Maharashtra State)

.... **RESPONDENTS.**

Shri S.P.Bhandarkar, Adv. a/w.Ms Sejal Lakhani, Advocate for Petitioner.
Shri P.N.Kothari, Advocate for Respondent No.2.

CORAM : **ANIL S. KILOR, J.**
DATED : **FEBRUARY 09, 2023**

ORAL JUDGMENT :

1. Heard learned counsel for the petitioner and learned counsel for the respondent No.2. None for the respondent No.1, though served.

2. **RULE.** Rule made returnable forthwith. Heard finally by consent for the respective parties.

3. In this petition a challenge is raised to the order dated 11/01/2022 passed by respondent No.1 Minor and Small Enterprises Facilitation Council, allowing the claim of balance payment under Section 15 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the “MSMED Act”) for Rs.21,53,217/- for the service rendered by the respondent No.2 against the petitioner, with interest on delayed payment under Section 16 of the MSMED Act.

4. Brief facts of the present case are as under:

The respondent No.2 preferred petition under Section 18 read with Sections 15, 16 and 17 of the MSMED Act before the respondent No.1, thereby claiming to be a supplier under Section 2(n) of the Act of 2006, for recovery of balance and interest on delayed payment against the petitioner to the tune of Rs.21,53,217/-.

5. The petitioner filed its written statement denying all the allegations in toto. Consequently, after considering the material available on record, the impugned award was passed allowing the claim of the respondent No.2. Hence, this writ petition.

6. Ms Lakhani, learned counsel for the petitioner argues that the respondent No.1 has committed error in entertaining the petition as the Council failed to take into consideration that the Council who has conducted conciliation proceedings is prohibited from acting as an Arbitrator, as per the provisions of Section 80 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act of 1996”).

7. It is submitted that, admittedly, in the present case the respondent No.1 conducted conciliation proceedings between the petitioner and the respondent No.2 and terminated the same as being unsuccessful. It is therefore, submitted that the Council ought not to have acted as an Arbitrator. In support of her submissions, she has placed reliance on the following judgments of the Hon’ble Supreme Court of India:

- i) *Union of India ..vs.. U.P. State Bridge Corpn. Ltd.*, reported in (2015) 2 SCC 52;

- ii) *Voestalpine Schienen GMBH ..vs.. Delhi Metro Rail Corpn. Ltd.*, reported in **(2017) 4 SCC 665**;
- iii) *Ellora Paper Mills Ltd. ..vs.. State of M.P.*, reported in **(2022) 3 SCC 1**.

8. On the other hand, the learned counsel for the respondent No.2 strongly opposed the present writ petition on the ground that the entire petition is based on incorrect statements. It is submitted that the notice under Section 18(2) of the Act of 2006 was issued to the petitioner on 18/08/2020 informing that two conciliators were appointed by the Council viz. General Manager, District Industries Centre, Nagpur and General Manager, District Industries Centre, Wardha. It is pointed out that another notice under Section 18(2) of the MSMED Act dated 23/12/2020 was issued by the Council informing the parties that the conciliation failed and the Council decided to take the matter for arbitration. Thereafter, both the parties i.e. petitioner and the respondent No.2 participated in the proceedings and accordingly the award was passed. It is submitted that in the award it has categorically observed that there was a separate panel of conciliators, than the panel acted as Arbitrator. He, therefore, submits that no error has been committed by the Council to act as Arbitrator.

9. It is pointed out that the petitioner never objected for acting the Council as Arbitrator. On the contrary, with the consent of the petitioner only the Council acted as an Arbitrator.

10. It is lastly argued that under Section 80 of the Act of 1996 there is no bar for Council from acting as Arbitrator if the parties agree for the same. In support of his submission, he has placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of *Gujrat State Civil Supplies Corporation Ltd. ..vs.. Mahakali Foods Pvt. Ltd. & Anr.*, reported in **AIR 2022 SC 5545**.

11. I have perused the writ petition, documents filed along with the writ petition, reply and the impugned award.

12. The Hon'ble Supreme Court of India in the case of *Gujrat State Civil Supplies* (supra) has observed thus:

“28. There cannot be any disagreement to the proposition of law laid down in various decisions of this Court, relied upon by the learned counsel for the buyers that the Court has to read the agreement as it is and cannot rewrite or create a new one, and that the parties to an arbitration agreement have an autonomy to decide not only on the procedural law to be followed but also on the substantive law, however, it is equally settled

legal position that no agreement entered into between the parties could be given primacy over the statutory provisions. When the Special Act i.e., MSMED Act, 2006 has been created for ensuring timely and smooth payment to the suppliers who are the micro and small enterprises, and to provide a legal framework for resolving the dispute with regard to the recovery of dues between the parties under the Act, also providing an overriding effect to the said law over any other law for the time being in force, any interpretation in derogation thereof would frustrate the very object of the Act. The submission therefore that an independent arbitration agreement entered into between the parties under the Arbitration Act, 1996 would prevail over the statutory provisions of MSMED Act, 2006 cannot countenanced. As such, sub-section (1) of Section 18 of the MSMED Act, 2006 is an enabling provision which gives the party to a dispute covered under Section 17 thereof, a choice to approach the Facilitation Council, despite an arbitration agreement existing between the parties. Absence of the word 'agreement' in the said provision could neither be construed as casus omissus in the statute nor be construed as a preclusion against the party to a dispute covered under Section 17 to approach the Facilitation Council, on the ground that there is an arbitration agreement existing between the parties. In fact, it is a substantial right created in favour of the party under the said provision. It is therefore held that no party to a dispute covered under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Facilitation Council under Section 18(1) thereof, merely because there is an arbitration agreement existing between the parties.

29. The aforesaid legal position also dispels the arguments advanced on behalf of the counsel for the buyers that the Facilitation Council having acted as a Conciliator under Section 18(2) of the MSMED Act, 2006 itself cannot take up the dispute for arbitration and act as an Arbitrator. Though it is true that Section

80 of the Arbitration Act, 1996 contains a bar that the Conciliator shall not act as an Arbitrator in any arbitral proceedings in respect of a dispute that is subject of conciliation proceedings, the said bar stands superseded by the provisions contained in Section 18 read with Section 24 of the MSMED Act, 2006. As held earlier, the provisions contained in Chapter-V of the MSMED Act, 2006 have an effect overriding the provisions of the Arbitration Act, 1996. The provisions of Arbitration Act, 1996 would apply to the proceedings conducted by the Facilitation Council only after the process of conciliation initiated by the council under Section 18(2) fails and the council either itself takes up the dispute for arbitration or refers to it to any institute or centre for such arbitration as contemplated under Section 18(3) of the MSMED Act, 2006.

30. When the Facilitation Council or the institution or the centre acts as an Arbitrator, it shall have all powers to decide the disputes referred to it as if such arbitration was in pursuance of the arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act, 1996 and then all the trappings of the Arbitration Act, 1996 would apply to such arbitration. It is needless to say that such Facilitation Council/institution/centre acting as an arbitral tribunal would also be competent to rule on its own jurisdiction like any other arbitral tribunal appointed under the Arbitration Act, 1996 would have, as contemplated in Section 16 thereof.

31. 32. & 33 ...

34. The upshot of the above is that:

(i) Chapter-V of the MSMED Act, 2006 would override the provisions of the Arbitration Act, 1996.

(ii) No party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council, though an independent arbitration agreement exists between the parties.

(iii) The Facilitation Council, which had initiated the Conciliation proceedings under Section 18(2) of the MSMED Act, 2006 would be entitled to act as an arbitrator despite the bar contained in Section 80 of the Arbitration Act.

(iv) The proceedings before the Facilitation Council/institute/centre acting as an arbitrator/arbitration tribunal under Section 18(3) of MSMED Act, 2006 would be governed by the Arbitration Act, 1996.

(v) The Facilitation Council/institute/centre acting as an arbitral tribunal by virtue of Section 18(3) of the MSMED Act, 2006 would be competent to rule on its own jurisdiction as also the other issues in view of Section 16 of the Arbitration Act, 1996.

(vi) A party who was not the 'supplier' as per the definition contained in Section 2(n) of the MSMED Act, 2006 on the date of entering into contract cannot seek any benefit as the 'supplier' under the MSMED Act, 2006. If any registration is obtained subsequently the same would have an effect prospectively and would apply to the supply of goods and rendering services subsequent to the registration."

13. From the above referred observations, it is clear that the Facilitation Council which had initiated the conciliation proceedings under Section 18(2) of the Act of 2006 would be entitled to act as an Arbitrator despite the bar contained in Section 80 of the Act of 1996.

14. In the teeth of the above referred judgments, I revert back to the findings recorded by the respondent No.1 Council in paragraph 4, which reads thus:

“4. The matter was before a separate panel of conciliators on 08.09.2020, 10.11.2020, 01.12.2020, both the parties stated that conciliation is not possible & the matter was referred back to the Council as efforts for conciliation has failed. During the hearing on 23.12.2020 Conciliation was terminated, Council decided to take the dispute for arbitration, as NA has shown his readiness for Council doing the Arbitration, accordingly notice u/s. 18(3) was issued to both the parties.”(emphasis supplied)

15. From the categorical observations made by the Council that the panel of Conciliators were different and separate and on failure of conciliation, the Council decided to take the dispute for arbitration and as the petitioner has shown his readiness for the Council doing the arbitration, accordingly, notice under Section 18(3) of the MSMED Act was issued to both the parties, it is evident that as the petitioner shown its readiness for Council doing the arbitration, the proceeding was initiated and the award was passed. Hence, the petitioner now cannot be permitted to approbate and reprobate at the same time.

16. In the circumstances, as the Facilitation Council, which initiated the conciliation proceedings under Section 18(2) of the MSMED Act would be entitled to act as an Arbitrator, in view of the bar under Section 80 of the Act of 1996 stands superseded by the provisions

contained in Section 18 read with Section 24 of the MSMED Act, which has overriding effect over the provisions of the Act of 1996, as observed by the Hon'ble Supreme Court of India in the case of *Gujrat State Civil Supplies* (supra), I do not find any merit in the present case.

17. In that view of the matter and as the judgments cited by the learned counsel for the petitioner are of no help to the petitioner as they consider only the provisions of the Act of 1996 and not the point involved in the present writ petition or the one decided by the Hon'ble Supreme Court of India in the case of *Gujrat State Civil Supplies* (supra).

18. In the light of the observations made herein above, the Writ Petition is **dismissed**. No order as to costs.

(ANIL S. KILOR, J)

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