Neutral Citation No. - 2023:AHC:122271-DB

A.F.R.

Reserved on 19.4.2023

Delivered on 31.5.2023

Court No. - 40

Case :- WRIT - C No. - 27768 of 2019

Petitioner :- Bata India Limited And Another

Respondent :- U.P. State Micro And Small Enterprise Facilitation Council And Another

Counsel for Petitioner :- Chandra Bhan Gupta

Counsel for Respondent :- Ashok Kumar Singh,Ashok Kumar Singh, Sujeet Kumar

Hon'ble Mahesh Chandra Tripathi,J.

Hon'ble Manjive Shukla,J.

(Delivered by Hon'ble Manjive Shukla,J.)

1. Heard Mr. Neeraj Grover and Mr. Chandra Bhan Gupta, learned counsel for the petitioners, Mr. Anil Kumar Mehrotra assisted by Mr. Srijan Mehrotra, learned counsel for Respondent No. 2.

2. Petitioners by filing this writ petition have challenged the order dated 11.6.2019 passed by U.P. State Micro and Small Enterprises Facilitation Council (hereinafter referred to as the 'Council'), whereby the decision has been taken that in view of Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the 'Act of 2006'), the Council itself will arbitrate the dispute in between the petitioners and Respondent No.2. Petitioners have also challenged the order dated 24.7.2019 passed by the Council whereby the

petitioners' representation pursuant to order dated 2.7.2019 passed by Delhi High Court in Arbitration Petition No.402/2019, for referring the arbitration between petitioners and Respondent No.2 to any institution or centre providing alternate dispute resolution services, has been rejected.

Brief facts of the Case

3. Brief facts of the case are that Petitioner No.1 is a company incorporated under Indian Companies Act, 1930 and is India's largest retailer and leading manufacturer of footwear and accessories. Petitioner No.1 in addition to manufacturing its goods in its own factories also appoint various manufacturers during the course of its business for manufacturing certain goods for its retail sales as well as for institutional supply including the supply to various government organizations.

4. Respondent No.2 - AVS International Private Limited is a company incorporated under the Companies Act, 1956 and is also manufacturer of footwear. Petitioner No.1 and Respondent No.2 entered into an agreement on 7.1.2016 for supply of goods by Respondent No.2 to the petitioners. The said agreement was valid for a period of one year and thereafter, a fresh agreement was entered into in between Petitioner No.1 and Respondent No.2 on 10.1.2017 and under the said agreement Respondent No.2 agreed to manufacture and supply the footwear to the petitioners who were having rate contract with the Government of India to supply the footwear to Indian Navy. Respondent No.2 in the aforesaid agreement was under obligation to supply the footwear as per the terms of the rate contract in between Petitioner No.1 and Government of India.

5. Petitioners in the writ petition have pleaded that Respondent No.2 committed several breaches of the terms of the

manufacturing agreement and the purchase order regarding timely delivery of goods and further several issues were raised by the Indian Navy regarding inferior quality and defective supply of the footwear manufactured and supplied by Respondent No.2. It has been further pleaded in the writ petition that due to aforesaid reasons Indian Navy rejected the goods thrice and levied late delivery penalty which, as per the agreed terms, was to be borne by Respondent No.2 and as such, the petitioners deducted such charges from the amount payable to Respondent No.2.

6. Respondent No.2 raised demand regarding its pending amounts through various legal notices and thereafter, petitioners and Respondent No.2 attempted to resolve the disputes amicably amongst themselves.

7. Respondent No.2 is a registered Micro, Small and Medium Enterprise and as such, the provisions of the Act of 2006 are applicable to it.

8. Respondent No.2, in the aforesaid circumstances, approached to U.P. State Micro and Small Enterprises Facilitation Council at Kanpur Nagar by filing Claim Petition No.58 of 2019. The Council while entertaining the aforesaid claim petition issued conciliation notice to petitioners in exercise of its powers under Section 18(2) of the Act of 2006 for joining conciliation proceedings on 21.5.2019. Petitioners' representative and the representative of Respondent No.2 appeared in the conciliation proceedings before the Council on 21.5.2019 and the Council was apprised that parties themselves are negotiating for a settlement and for that reason the Council granted one month's time to the parties to conclude negotiations. However, the parties could not arrive at the settlement and petitioners decided to terminate the conciliation

proceedings as per Section 76(4) of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act of 1996).

9. Since there was provision for arbitration under Clause 25 of the agreement entered into in between Petitioner No.1 and Respondent No.2, as such petitioners filed the petition under Section 11(6) of the Act of 1996 before Delhi High Court for appointment of Arbitrator. Petitioners also informed regarding termination of conciliation proceedings with Respondent No.1 to the Council in aforementioned Claim Petition No.58 of 2019. The Council again issued a notice on 6.6.2019 to the parties for conciliation proceedings on 11.6.2019. Petitioners' authorized representative attended the proceedings on 11.6.2019 before the Council and apprised the Council that petitioners have already approached Delhi High Court for reference of the dispute between petitioners and Respondent No.2 for institutional arbitration through the Delhi International Arbitration Centre under the aegis of Delhi High Court and further requested the Council to formally terminate the conciliation proceedings pending before it. The Council passed an order dated 11.6.2019 whereby exercising powers under Section 18(3) of the Act of 2006 the Council itself decided to arbitrate the dispute in between petitioners and Respondent No.2.

10. Petitioners, in the aforesaid circumstances, again approached to Delhi High Court by filing I.A. No.8574 of 2019 in Arbitration Petition No.402 of 2019. The Vacation Bench of Delhi High Court issued notice to Respondent No.2 on the application and fixed the date for hearing in the matter on 24.6.2019. While the aforesaid I.A. was pending adjudication before the Delhi High Court, petitioners filed a representation on 19.6.2019 before the Council requesting therein to withdraw its proposal of entertaining arbitration issue through itself and refer to the parties for

institutional arbitration through “Delhi International Arbitration Centre”, an alternate dispute resolution arbitration centre set up under the aegis of Delhi High Court.

11. The Delhi High Court heard the aforesaid I.A. No. 8574 of 2019 filed in Arbitration Petition No.402 of 2019 and passed an order on 2.7.2019. The order dated 2.7.2019 is reproduced as under:-

> ***“I.A. 8572/2019 (exemption)***
>
> *1. Exemption allowed subject to all just exceptions.*
>
> ***ARB.P. 402/2019***
>
> *2. Learned counsels for the parties have been heard at considerable length. By way of the present petition, the Petitioner prays that the parties may be referred for arbitration under the aegis of Delhi International Arbitration and Conciliation Centre. Learned counsel for the Petitioner has raised several grievances and inter alia impugns the order dated 11th June, 2019, passed by the U.P. Micro Small Enterprises Facilitation Council whereby it has entered upon reference in terms of Section 18(3) of the Micro Small and Medium Enterprises Act, 2006. Learned Counsel for the Petitioner contends that since the facilitation council acted as Conciliator, it is now impermissible for them to assume the role of the Arbitral tribunal. At the outset, the learnedcounsel for the Respondent opposes the present petition on the ground of maintainability. However on instruction from her client she states that Respondent has no objection, in case, the matter is referred to any institution or centre providing alternate dispute resolution services for such arbitration. However, she further contends that this decision should be left open to be considered by the Facilitation Council.*
>
> *3. At this juncture, learned counsel for the Petitioner informs the court that, his client has made a representation dated 19th June, 2019, wherein inter alia, a request has been made to refer the matter for arbitration to an institution. This representation is presently pending. He says that though in the said representation a request has been made for referring the matter to Delhi International Arbitration and Conciliation Centre, however, his clients would have no objection in case, the arbitration is carried out under the aegis of any other institution or centre providing alternate dispute resolution services. Thus, both the counsels without prejudice to the rights and contentions agree that the facilitation council may make a decision for referring the matter to an institution.*
>
> *4. Accordingly, in view of the statements made by both the counsels, before hearing the matter any further, it is considered appropriate to*

direct the Facilitation Council to decide the representation dated 19th June, 2019 for referring the parties to arbitration under any institution or centre. The decision shall be conveyed to this court within two weeks from today. The centre while deciding the representation shall take into consideration the stand of the parties as noted above.

5. List on 26th July, 2019.

6. Registry is directed to send a copy of this order to U.P. Micro Small Enterprises Facilitation Council.

7. Copy of this order be given dasti."

12. Thereafter, the Council pursuant to the aforesaid order dated 2.7.2019 heard the matter pending before it and ultimately rejected the representation of the petitioners for referring the dispute for arbitration to an institution providing alternate dispute resolution services and further affirmed its earlier decision dated 11.6.2019 and thereby Council itself proceeded to arbitrate the dispute. Later on, Arbitration Petition No.402 of 2019 was heard and decided by Delhi High Court vide judgment and order dated 9.8.2019. The Delhi High Court vide aforesaid judgment and order dated 9.8.2019 rejected the prayer of the petitioners for referring the dispute to the Arbitrator as per arbitration clause contained in the agreement, exercising its powers under Section 11(6) of the Act of 1996.

Submissions On Behalf Of The Petitioners

13. Learned counsel for the petitioners has submitted that Clause 25 of the agreement entered into by the parties categorically provides for mechanism of arbitration in respect of disputes arising out of the said agreement. Clause 25 of the agreement is reproduced as under:-

25. Governing Laws and Arbitration:

In case of any dispute between the Parties, the Parties shall attempt to resolve the dispute amicably and the aggrieved Party shall send a notice to the other Party requesting to settle the dispute amicably. If the Parties are unable to resolve such dispute within 15 days as of the initial communication as stated above, the aggrieved Party may refer

the matter to arbitration under the provisions of the Arbitration and Conciliation Act, 1996, to be decided by a sole arbitrator appointed by BIL. The venue of the Arbitration proceedings shall be at Delhi. The proceedings and the award shall be in English and the arbitrator's decision shall be final and conclusive. The parties shall bear the arbitration expenses in equal proportion.

The courts of Delhi shall have exclusive jurisdiction regarding any issue arising out of the arbitration process above and with respect to interim relief, all in accordance with the Arbitration and Conciliation Act, 1996.

This Agreement shall be governed by and interpreted in accordance with the laws of India with specific territorial jurisdiction of Delhi Courts.

Each party hereto shall be bound by the award rendered by the arbitrators."

14. Learned counsel for the petitioners has further submitted that since there was a dispute between the petitioners and Respondent No.2 and as per the agreement the said dispute was to be resolved by referring the matter to an Arbitrator as per clause 25 of the agreement, therefore the petitioners filed Arbitration Petition No.402 of 2019 before Delhi High Court and a prayer was made that an institutional arbitrator providing alternate dispute resolution services may be given the responsibility to arbitrate the dispute in question.

15. Learned counsel for the petitioners has also submitted that the dispute in question involves adjudication of complicated technical issues and therefore, Delhi International Arbitration Centre under the aegis of Delhi High Court would be a best institution to arbitrate the dispute between the petitioners and Respondent No.2.

16. Learned counsel for the petitioners has invited attention of this Court towards the provisions of Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006. For ready reference, Section 18 of the Act of 2006 is extracted as under:-

"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 to it 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 dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."

17. Learned counsel for the petitioners has vehemently argued that Section 18(2) of the Act of 2006 provides that the Council on receipt of a reference 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 in the said conciliation proceedings the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 will be applicable. Learned counsel for the petitioners has further argued that no doubt Section 18(3) of the Act of 2006, in case of failure of conciliation proceedings, gives power to the Council either itself take up the dispute for arbitration or to refer it to any institution or centre

providing alternate dispute resolution services but since conciliation proceedings initiated by the Council under Section 18(2) of the Act of 2006 failed and since the Council itself was Conciliator, therefore in view of the prohibition contained in Section 80 of the Act of 1996, the Council itself could not have taken up to arbitrate the disptue between the parties. For ready reference, Section 80 of the Act of 1996 is extracted as under:-

> *"**80. Role of conciliator in other proceedings.—**Unless otherwise agreed by the parties,-*
>
> *(a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;*
>
> *(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings."*

18. Learned counsel for the petitioners has empathetically argued that Section 18(2) of the Act of 2006 categorically provides that Sections 65 to 81 of the Act of 1996 will apply in the conciliation proceedings before the Council and therefore, the categorical prohibition imposed under Section 80 of the Act of 1996 that the Conciliator cannot be an Arbitrator, will be applicable in the case in question and thereby the Council could not have taken to itself to arbitrate the dispute between the petitioners and Respondent No.2.

19. Learned counsel for the petitioners has relied upon a judgment dated 6.8.2018 rendered by the Division Bench of High Court of Bombay in **Writ Petition No.5459 of 2015, Gujrat State Petronet Ltd. vs. Micro and Small Enterprises Facilitation Council and others.** Learned counsel for the petitioners has submitted that the aforesaid judgment squarely covers the issues in question and the Division Bench of the High Court of Bombay in the aforesaid judgment has categorically held that Section 18(2) of the Act of 2006 categorically provides that Section 80 of the Act of

1996 will be applicable and where the Council itself was Conciliator and in the event of conciliation proceedings having been failed, the Council itself cannot take up to arbitrate the dispute between the parties. Relevant portion of the judgment dated 6.8.2018 is extracted as under:-

> *19. A plain reading of sub-sections (2) and (3) of Section 18 of the MSMED Act makes it clear that is is obligatory for the Council to conduct conciliation proceedings either by itself or seek assistance of any institute or centre providing alternative dispute resolution services. The provisions of Sections 65 to 81 of the Arbitration Act 1996 are made applicable to conciliation proceedings. In the event, the conciliation proceedings are unsuccessful and stand terminated, the Council can either itself take up the dispute for arbitration or refer it to any institution or centre proving alternate dispute resolution services for such arbitration. The provisions of Arbitration Act 1996, in its entirety, are made applicable as if the arbitration was in pursuance of the arbitration agreement referred to in sub-section(1) of Section 7 of the Arbitration Act, 1996.*
>
> *20. It is thus evident that sub-section (2) and sub-section (3) of the MSMED Act vests jurisdiction in the Council to act as conciliator as well as arbitrator. The question is in view of the provisions of Section 80 of the Arbitration Act 1996, the Council which has conducted the conciliation proceedings is prohibited from acting as arbitrator. As stated earlier, certain provisions of Arbitration Act 1996 including Section 80 are specifically made applicable to conciliation proceedings contemplated by Section 18(2) of the MSMED Act. Whereas provisions ofArbitration Act 1996, in its entirety, are made applicable to the arbitration and conciliation proceedings contemplated by sub-section (3) of Section 18 of the MSMED Act.*
>
> *21. A harmonious reading of these provisions clearly indicate that Section 80 of the Arbitration Act, 1996 is applicable to conciliation as well as arbitration proceedings under sub-sections (2) and (3) of Section 18 of the MSMED Act. Section 80 of the Arbitration Act, 1996 reads thus :*
>
> > *"80. Role of conciliator in other proceedings*
> >
> > *Unless otherwise agreed by the parties -*
> >
> > *(a) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings; and*
> >
> > *(b) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.*

22. A plain reading of Section 80 makes it clear that the conciliator cannot act as an arbitrator or his representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute. It is thus evident that the MSEFC cannot act as conciliator as well as arbitrator, or it may choose to refer the dispute to any centre or institution providing alternate dispute resolution services for the parties to conciliation or arbitration. However, once the MSEFC acts as conciliator, in view of provisions of Section 80, it is prohibited from acting as arbitrator.

23. Admittedly, in the present case, respondent No.1 conducted the conciliation proceedings between the petitioner and respondent No.3 and by the impugned order, terminated the same as being unsuccessful. What is surprising is that respondent No.1 - MSEFC, having conciliated the dispute between the parties and conciliation proceedings being unsuccessful and terminated, the MSEFC itself initiated to arbitrate the dispute between the same parties. In our view, respondent No.1-MSEFC itself, could not have initiated arbitration proceedings between the petitioner and respondent No.3. In terms of the provisions of sub-section (3) of Section 18 the MSMED Act, respondent No.1 - MSEFC ought to have referred the dispute between the petitioner and respondent No.3 to any institution or centre providing alternate dispute resolution services for arbitration. The impugned order, so far as it relates to authorising respondent No.1 - MSEFC to initiate arbitration proceedings/arbitral dispute cannot be sustained and the same deserves to be quashed and set-aside.

24. We, accordingly, dispose of the petition by passing the following order :

1. We hold that the despite independent arbitration agreement between the petitioner and respondent No.3, respondent No.1 - MSEFC has jurisdiction to entertain reference made by respondent No.3 under Section 18 of the MSMED Act.

2. Clause 2 of the operative part of the impugned order i.e."Arbitration proceeding be initiated U/s 18(3) of MSMED Act 2006 and that this council shall act as an Arbitrator Tribunal" is quashed and set-aside and respondent No.1 - MSEFC is directed to refer the dispute between the petitioner and respondent No.3 to any institution or centre providing alternate dispute resolution services for arbitration. Respondent No.1 - MSEFC Shubhada S Kadam 23/24 wp 5459.15.doc shall take necessary steps as expeditiously as possible and, in any case, within a period of four weeks from the date of receipt of this order.

3. Rule is, accordingly, made absolute in the above terms."

20. Learned counsel for the petitioners has also argued that the Micro, Small and Medium Enterprises Council is not well equipped to arbitrate the dispute between petitioners and Respondent No.2

whereas Delhi International Arbitration Centre under the aegis of Delhi High Court is well equipped to carry out the quality arbitration proceedings and thereby has submitted that even if the discretion was with the Council either itself to arbitrate the dispute or to refer it to an institution dealing with alternate dispute resolution services, it was in the fitness of things that Council ought to have referred the matter to an institution.

21. Learned counsel for the petitioners has thus concluded his arguments and has prayed that the petitioners' writ petition deserves to be allowed by this Court in the light of the aforesaid judgment and order dated 6.8.2018 passed by the Division Bench of the High Court of Bombay in Writ Petition No.5459 of 2015 and thereby to quash the impugned orders dated 24.7.2019 and 11.6.2019 passed by the Council.

Submissions On Behalf Of Respondent No.2

22. Learned counsel appearing for Respondent No.2 has submitted that Arbitration Petition No.402 of 2019 filed by the petitioners before Delhi High Court was dismissed vide judgment and order dated 9.8.2019 but the petitioners without disclosing and annexing the copy of the aforesaid judgement has filed the writ petition before this Court challenging therein the orders passed by the Council whereas the Delhi High Court has considered the provisions of the Act of 2006 as well as the Act of 1996 and has rejected the petition filed by the petitioners vide judgment and order dated 9.8.2019. Relevant portion of the aforesaid judgment and order dated 9.8.2019 is extracted as under:-

> *"20. However, the difference of opinion and contrasting views of various High Courts does not affect or impede this Court to decide the present petition. In so far as the jurisdiction of the MSME Council, under Section 18 of the MSME Act is concerned, there cannot be any doubt that in all the decisions referred above, the Courts have consistently*

held that the provisions of the MSME Act are applicable dehors the arbitration clause. In this regard it is relevant to note the decision of the Gujrat High Court in Principal Chief Engineer v Mani Bhai and Brothers, wherein the Court held:

"6.1. It cannot be disputed that the Act 2006, is a Special Act and as per Section 24 of the Act, 2006, the provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Therefore, Section 18 of the Act, 2006 would have overriding effect or any other law for the time being in force including Arbitration Act, 1996 and therefore, if there is any dispute between the parties governed by the Act, 2006, the said dispute is required to be resolved only through the procedure as provided under Section 18 of the Act, 2006. Thus, considering Section 18 of the Act, 2006, after conciliation has failed as per Section 18(2) of the Act, 2006, thereafter as per sub-Section (3) of Section 18, 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 to it 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 dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (2) of Section 18 of the Council shall have jurisdiction to take up dispute for arbitration. Therefore, once the Council itself is acting as an Arbitrator in that case, thereafter the Council who acts as an Arbitrator has no authority and/or jurisdiction to entertain the application under Section 8 of the Arbitration Act, 1996. Section 8 of the Arbitration Act, 1996 would be applicable in case where any proceedings are pending before the "Judicial Authority". "Judicial Authority" is not defined in the Arbitration Act, 1996. However, in the case of SBP & Co. vs Patel Engineering Ltdand anr., (2005) 8 SCC 618, it is observed by the Hon"ble Supreme Court that "Judicial Authority" as such is not defined in Section 2(e) of the Act and would also, in our opinion include other courts and may even include a special Tribunal like the Consumer Fourm. Even in the case of Morgan Securities and Credit Pvt Ltd (supra), the Hon"ble Supreme Court has observed that in its ordinary parlance "Judicial Authority" would comprehend a Court defend under the Act but also courts which would either be a Civil Court or other authorities which perform judicial functions or quasi judicial functions.

7.0 Identical question came to be considered by the Division Bench of the Allahabad High Court in the case of Paper and Board Convertors (supra). While interpreting the very provision of Section 18 of the Act, 2006, in para 12, the Division Bench has observed and held as under:

12. The non-obstane provision contained in sub-section (1) of section 18 and again in sub-section (4) of Section 18 operates to ensure that it is a Facilitation Council which has jurisdiction to act as an arbitrator or Conciliator in a dispute between a supplier located within its jurisdiction and a buyer located anywhere in India. The Facilitation Council had only one of the two courses of action open to it: either to conduct an

arbitration itself or to refer the parties to a centre or institution providing alternate dispute resolution services stipulated in sub-section (3) of Section 18.

10. In view of the above and for the reasons stated above, no error has been committed by the learned Council in not entertaining the application under Section 8 of the Arbitration Act, 1996.We see no reason to interfere with the order passed by the learned Council. As observed herein above and considering the sub-section (1) of Section 18 of the Act, 2006 the Facilitation Council has jurisdiction to act as Arbitrator and /or conciliator any dispute between the parties and that Council had only one of two courses of action open to it, either to conduct an arbitration itself or to refer the parties to a centre or institution providing alternative dispute resolution services stipulated in Section 18 (3) of the Act, 2006. Therefore, while dismissing the present appeal, it is observed that Council shall now act in accordance with provision of sub-section (3) of Section 18 and either to conduct an arbitration itself or refer the parties to a centre or institution providing alternate dispute resolution services. With the above observations, present appeal is dismissed. No costs. In view of dismissal of the First Appeal, Civil Application stands dismissed accordingly."

21. The said decision was challenged before the Supreme Court in Principal Chief Engineer v. M/s Manibhai & Bro, SLP No. 17434/2017 decided on 5th July 2017 where the Supreme Court by a speaking order observed as under:

"We have given our thoughtful consideration to the submissions advanced before us yesterday and today.

We are satisfied, that the interpretation placed by the High Court on Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, in the impugned order, with reference to arbitration proceeding is fully justified and in consonance with the provisions thereof.

Having affirmed the above, we are of the view, that all other matters dealt with in the impugned order are not relevant for the adjudication of the present controversy, and need not be examined.

The special leave petition is dismissed in the above terms. Pending applications stand disposed of."

22. Since the decision of the Gujrat High Court has been affirmed by the Supreme Court, I have no hesitation to hold that Section 18 of the MSME Act, would override the provisions of the arbitration clause agreed to between the parties and consequently the arbitration proceedings before the Council are in accordance with law. Petitioner"s contention qua the bar under Section 80 of the A&C Act, is subject matter of different views of the High Courts, referred above. However, notwithstanding the conflicting views on this issue, the Court cannot grant the relief sought in the present proceedings. The provisions of Section 11(6) of the A&C Act would be attracted only under the

situations which are enumerated under the said provision, which reads as under:

"(6) Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request 1[the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

23. Petitioner is unable to show as to how any of the aforesaid sub-clauses can be invoked in the present case. Thus, the petition is not maintainable. There is also merit in the submission of the Respondent that the facts of the case as noted above do not indicate that the Council has indeed performed the role of a Conciliator. No doubt the Conciliation proceedings were initiated and the Petitioner joined the conciliation process, but that was only to request the Council to defer its decision since the parties were negotiating settlement. Thereafter, the Council was informed that the settlement had not fructified and notice of termination of the Conciliation process was sent. Thus, the Council never actively acted as a Conciliator between the parties.

24. Be that as it may, under Section 11 (6) of the A&C Act, I would not have the jurisdiction to test the legality of the decision dated 24 th July, 2019, passed by the Council. The Petitioner would have to avail its remedies under the relevant provisions of the A&C Act to challenge the jurisdiction of the Arbitral Tribunal. I do not find any merit in the present petition and same is dismissed. Pending applications if any are disposed of.

O.M.P.(I) (COMM.) 201/2019

25. The present petition inter alia seeks the following prayers:

"31. In light of the aforesaid facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to stay the proposed arbitration proceedings scheduled to be initiated before the respondent no.2 on 19/5/2019 and restrain the respondent no.2 from passing any order in the proposed arbitration during the pendency of petitioner's petition under section 11 (6) for reference of dispute between the parties to arbitration under the aegis of Delhi International Arbitration Centre."

26. In view of the decision rendered in arbitration petition bearing No. ARB.P. 402/2019, there is no ground to grant the relief sought in the present petition. More so since the existence of the Arbitration agreement is not disputed and the arbitration proceedings initiated

under the MSME Act are in accordance with law, there is no ground or reason to entertain the present petition and the same is dismissed.

23. Learned counsel appearing for Respondent No.2 has argued that keeping in view to provide for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and matters connected therewith or incidental thereto, the legislature has enacted the Micro, Small and Medium Enterprises Development Act, 2006. Section 24 of the aforesaid Act of 2006 categorically gives overriding effect to Sections 15 to 23 of the Act notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 24 of the Act of 2006 is extracted as under:-

"24. Overriding effect.—The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

24. In the light of the aforesaid Section 24 of the Act of 2006, learned counsel appearing for Respondent No.2 has vehemently argued that in view of the provisions made in aforementioned Section 24 thereby giving overriding effect to Sections 15 to 23 of the Act, the reference made by Respondent No.2 to the Council and thereby order passed by the Council to itself proceed to arbitrate the dispute is well within the jurisdiction of the Council.

25. Learned counsel appearing for Respondent No.2 has vehemently argued that the legislature under Section 18(2) of the Act has given discretion to the Council either to proceed to conciliate itself or to seek assistance of any institution or centre providing alternate dispute resolution services and Sections 65 to 81 of the Act of 1996 have been made applicable only in respect of the procedure to be adopted by the Conciliator during the conciliation proceedings. It has been further argued that the

legislature under Section 18(3) of the Act of 2006 has given absolute discretion to the Council that in the event of failure of conciliation proceedings either to itself arbitrate the dispute or to refer the matter to an institution providing alternate dispute resolution services, therefore, the bar of Section 80 of the Act of 1996 providing prohibition that the conciliator cannot become Arbitrator will not be applicable in the matters under the Act of 2006. It has been further stressed upon that so far as the jurisdiction of the Council to arbitrate the disputes is concerned, the legislature has given absolute discretion to the Council and in respect of that discretion the provisions of the Act of 1996 will not be applicable as the Act of 2006 is a special legislation dealing with a particular field and further, the provisions of Sections 65 to 81 of the Act of 1996 have been made applicable only in respect of procedure adopted by the Council while conciliating or carrying out the arbitration proceedings.

26. Learned counsel appearing for Respondent No.2 has relied upon the Division Bench judgment of this Court rendered on 3.3.2020 in Writ-C No.7785 of 2020 wherein it has been held that the prohibition contained in Section 80 of the Act of 1996 will not be applicable to the Council while exercising its jurisdiction enshrined under Sections 18(2) and 18(3) of the Act of 2006. Relevant portion of the judgment and order dated 3.3.2020 is extracted as under:-

> *"59. Karnataka High Court in fact followed the judgment of Bombay High Court in* ***Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council and others (supra) and Gujarat High Court in Principal Chief Engineer Vs. M/s Manibhai and Brothers (supra).*** *We find that in para-15, learned Single Judge has observed that Section 80 of Act, 1996 incorporates a salutary principle that a 'Conciliator' cannot act also as an Arbitrator and this salutary principle cannot be whittled down or excluded by inferring a contrary intent in the provisions of Section 18(3) and applying Section 24. Unfortunately, when we enquired, are not shown any such alleged salutary principle which could have been given an overriding effect over express statutory provision providing otherwise. Further, we also find*

that Section 18(4) has been completely overlooked and no reason has been given by referring to Section 18(4) as to why MASEF Council cannot act as Arbitrator, when a specific declaration has been made that it shall have jurisdiction to act an Arbitrator. For application of Section 18(4) to that extent, there is no such condition provided. In our view, therefore, aforesaid Single Judge judgment will not help petitioners and we record our respectful disagreement with the aforesaid authority of the learned Single Judge of Karnataka High Court.

60. We inquired from learned counsel for petitioner as to where such alleged salutary principles that a Conciliator cannot act as an arbitrator is laid down but he could place nothing before us except Section 80 of Act, 1996. Having gone through Section 80, we find that even prohibition therein that Conciliator shall not act as an Arbitrator or as Representative or Counsel of the party in any arbitration or judicial proceedings is not absolute proposition but it permits parties to have an agreement otherwise. What actually is contemplated therein is that when a Conciliator has formed a particular opinion but parties did not agree to such opinion, in order to avoid any scope of bias on the part of such conciliator, he should not be an arbitrator when such a dispute proceeds for arbitration. This is also clear from the fact that prohibition is also that such Conciliator shall not act as representative or counsel of one of the party when the matter is taken in judicial proceedings. We further find that this principle was recognized in Article 18 of United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); adopted UNCITRAL Model Law on international commercial arbitration practice. It was adopted in 1985. From the preamble of Act, 1996 we find that the aforesaid Model Law as also Conciliations Rules which were adopted by UNCITRAL in 1980, have been broadly taken into consideration in enactment of Act, 1996. What we feel is that the above prohibition recognized in Section 80 is consistent with one of the well known principle of natural justice that no person shall be Judge in his own cause, of which the element of absence of bias or prejudice is one of the integral aspects. The aforesaid principle cannot be given a pedestal so as to override a mandatory provision made by Legislature, that too, by giving it an overriding effect, and, in our view, Court must endeavour to adhere and uphold the clear and specific provision instead of finding out certain principle which has not been preserved by Legislature. Validity of Section 18(3) and (4) of MSMED Act, 2006 is not under challenge before us. Therefore the provision has to be read, interpreted and followed as it is.

61. There is one more aspect. Normally an Arbitral Tribunal consists of sole Arbitrator or two Arbitrators with or without an Umpire. In such a case, there may be an element of personal prejudice or bias on the part of such persons constituting Arbitral Tribunal, if one of them or all of them have also acted as Conciliator. However, that is not the position in respect of a Reference made under Section18 (1) of MSMED Act, 2006 since MASEF Council is a statutory body. Section 21 of MSMED Act, 2006 provides that such Conciliator shall have members not less than three but not more than five. The composition of Council is also given in Section 21(1) (i) to (iv) and it includes Director of Industries or any other officer not below the rank of such Director, in the Department of State

Government; Office Bearer or Representatives of Association of Micro or Small Industries or Enterprises; Representatives of Banks and Financial Institutions lending to micro or small enterprises. The persons mentioned in Clause (iv) of Section 21(1) may be brought in Council in the alternative of Representative of Banks and financial institutions lending to Micro and Small Enterprises, if it is found necessary to include persons having special knowledge in the field of industry, finance, law, trade or commerce. Director is Chairperson of MASEF Council. Therefore, the statutory body like MASEF Council does not suffer the element of personal prejudice or bias as is available in the case of individual persons constituting Arbitral Tribunal. It may be that persons constituting MASEF Council at the time of conciliation may not be the same when the said Conciliator took up the matter for arbitration. Therefore, central idea beyond the embargo created by Section 80(1) available in case of individuals constituting Arbitral Tribunal is absent in the matter covered by Section 18 of MSMED Act, 2006 since here, the Council, which is permitted to act as Conciliator as well as Arbitrator is a statutory body having not less than there persons but upto five persons and, therefore, the element of personal bias, prejudice is absent in such a case.

62. Even otherwise, as we have already discussed, Section 80 itself permits an otherwise agreement between the parties. Meaning thereby the embargo that Conciliator shall not be Arbitral Tribunal is not absolute. That being so, the mandatory and overriding effect contained in Section 18(3) and 18(4) and Section 24 of MSMED Act, 2006 cannot be whittled down by referring to a salutary principle though, in our view, no such salutary principle having force of law to the extent that a legislative provision must be read as sub-serving is recognized or available.

63. In view of above discussion, we are clearly of the view that MASEF Council having acted as Conciliator is not barred from working as Arbitral Tribunal to arbitrate the dispute under Section 18(3) and such jurisdiction of MASEF Council has been given overriding effect by virtue of Section 18(4) and Section 24 which have to be given complete swing in the area covered by same. The argument, therefore, advanced otherwise by learned counsel for petitioner is hereby rejected. The question, formulated above, is answered against petitioner and we hold that MASEF Council is not prohibited from working as Arbitrator itself for adjudication of dispute between the parties and it is not obliged to refer the matter to any other body.

27. Learned counsel appearing for Respondent No.2 has also vehemently submitted that the issue involved in this writ petition regarding applicability of prohibition contained in Section 80 of the Act of 1996 in the conciliation and arbitration proceedings before the Council under Sections 18(2) and 18(3) of the Act of 2006 has already been considered and decided by the Hon’ble Supreme

Court vide judgment and order dated 31st October, 2022 rendered in SLP (C) No.12884/2020, **Gujarat State Civil Supplies Corporation Ltd. vs. Ramkrishna Foods Pvt. Ltd. and another** along with other connected Civil Appeals, reported in **2022 SCC OnLine SC 1492.**

28. Learned counsel appearing for Respondent No.2 has invited attention of this Court that the Division Bench judgment rendered by the High Court of Bombay was also under challenge before the Hon'ble Supreme Court in the aforementioned case and the Hon'ble Supreme Court has categorically held that the prohibition contained under Section 80 of the Act of 1996 will not be applicable to the Council while exercising its jurisdiction under Sections 18(2) and 18(3) of the Act of 2006.

29. Learned counsel appearing for Respondent No.2 has drawn attention of this Court towards paragraph 4 of the aforesaid judgment of the Hon'ble Supreme Court wherein the Hon'ble Supreme Court has been pleased to formulate three issues involved in the matter. Paragraph 4 of the aforesaid judgment dated 31st October, 2022 is reproduced as under:-

> *"4. In the background of afore-stated spectrum of cases, following common questions of law arise for consideration:*
>
> *(i) Whether the provisions of Chapter-V of the MSMED Act, 2006 would have an effect overriding the provisions of the Arbitration Act, 1996?*
>
> *(ii) Whether any 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 under sub-section (1) of Section 18 of the said Act, if an independent arbitration agreement existed between the parties as contemplated in Section 7 of the Arbitration Act, 1996.*
>
> *(iii) Whether the Micro and Small Enterprises Facilitation Council, itself could take up the dispute for arbitration and act as an arbitrator, when the council itself had conducted the conciliation proceedings under sub-section (2) of the Section 18 of MSMED Act, 2006 in view of the bar contained in Section 80 of the Arbitration Act, 1996."*

30. Learned counsel appearing for Respondent No.2 has also invited attention of this Court towards relevant paragraphs of the aforesaid judgment dated 31st October, 2022 rendered by the Hon'ble Supreme Court and conclusion drawn by the Hon'ble Supreme Court contained in paragraph 34 of the aforesaid judgment. For ready reference, relevant portion of the aforesaid judgment dated 31st October, 2022 rendered by the Hon'ble Supreme Court is extracted as under:-

> *"25. Thus, the Arbitration Act, 1996 in general governs the law of Arbitration and Conciliation, whereas the MSMED Act, 2006 governs specific nature of disputes arising between specific categories of persons, to be resolved by following a specific process through a specific forum. Ergo, the MSMED Act, 2006 being a special law and Arbitration Act, 1996 being a general law, the provisions of MSMED Act would have precedence over or prevail over the Arbitration Act, 1996. In Silpi Inustries case (supra) also, this Court had observed Bharat Sewa Sansthan Vs. U.P. Electronics Corporation; AIR 2007 SC 2961. while considering the issue with regard to the maintainability and counter claim in arbitration proceedings initiated as per Section 18(3) of the MSMED Act, 2006 that the MSMED Act, 2006 being a special legislation to protect MSME's by setting out a statutory mechanism for the payment of interest on delayed payments, the said Act would override the provisions of the Arbitration Act, 1996 which is a general legislation. Even if the Arbitration Act, 1996 is treated as a special law, then also the MSMED Act, 2006 having been enacted subsequently in point of time i.e., in 2006, it would have an overriding effect, more particularly in view of Section 24 of the MSMED Act, 2006 which specifically gives an effect to the provisions of Section 15 to 23 of the Act over any other law for the time being in force, which would also include Arbitration Act, 1996.*
>
> *26. The court also cannot lose sight of the specific non obstante clauses contained in sub-section (1) and sub-section (4) of Section 18 which have an effect overriding any other law for the time being in force. When the MSMED Act, 2006 was being enacted in 2006, the Legislative was aware of its previously enacted Arbitration Act of 1996, and therefore, it is presumed that the legislature had consciously made applicable the provisions of the Arbitration Act, 1996 to the disputes under the MSMED Act, 2006 at a stage when the Conciliation process initiated under sub-section (2) of Section 18 of the MSMED Act, 2006 fails and when the Facilitation Council itself takes up the disputes for arbitration or refers it to any institution or centre for such arbitration. It is also significant to note that a deeming legal fiction is created in the Section 18(3) by using the expression 'as if' for the purpose of treating such arbitration as if it was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act, 1996. As held in K. Prabhakaran v. P. Jayarajan18, a legal fiction presupposes the existence of the State of facts which may not exist*

and then works out the consequences which flow from that state of facts. Thus, considering the overall purpose, objects and scheme of the MSMED Act, 2006 and the unambiguous expressions used therein, this court has no hesitation in holding that the provisions of Chapter-V of the MSMED Act, 2006 have an effect overriding the provisions of the Arbitration Act, 1996.

27. The submissions made on behalf of the counsel for the Buyers that a conscious omission of the word "agreement" in sub-section (1) of Section 18, which otherwise finds mention in Section 16 of the MSMED Act, 2006 implies that the arbitration agreement independently entered into between the parties as contemplated under Section 7 of the Arbitration Act, 1996 was not intended to be superseded by the provisions contained under Section 18 of the MSMED Act, 2006 also cannot be accepted. A private agreement between the parties cannot obliterate the statutory provisions. Once the statutory mechanism under sub- section (1) of Section 18 is triggered by any party, it would override any other agreement independently entered into between the parties, in view of the non obstante clauses contained in sub-section (1) and sub-section (4) of Section 18.

(2005) 1 SCC 754 The provisions of Sections 15 to 23 have also overriding effect as contemplated in Section 24 of the MSMED Act, 2006 when anything inconsistent is contained in any other law for the time being in force. It cannot be gainsaid that while interpretating a statute, if two interpretations are possible, the one which enhances the object of the Act should be preferred than the one which would frustrate the object of the Act. If submission made by the learned counsel for the buyers that the party to a dispute covered under the MSMED Act, 2006 cannot avail the remedy available under Section 18(1) of the MSMED Act, 2006 when an independent arbitration agreement between the parties exists is accepted, the very purpose of enacting the MSMED Act, 2006 would get frustrated.

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. One of the submissions made by the Ld. Counsels for the Buyers was that if the party Supplier was not the "supplier" within the meaning of Section 2(n) of the MSMED Act, 2006 on the date of the contract entered into between the parties, it could not have made reference of dispute to Micro and Small Enterprises Facilitation Council under Section 18(1) of the MSMED Act, 2006 and in such cases, the Council would not have the jurisdiction to decide the disputes as an arbitrator.

32. At this juncture, a very pertinent observations made by this Court in Silpi Industries case (supra) on this issue are required to be reproduced: -

"26. …… In our view, to seek the benefit of provisions under MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the

supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under MSMED Act. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court, in the judgment in the case of Shanti Conductors Pvt. Ltd. v. Assam State Electricity Boardhas held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act…..

….by taking recourse to filing memorandum under sub-

section (1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which appellant entered into contract with the respondent. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of MSMED Act 2006, by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation."

33. Following the above-stated ratio, it is held that a party who was not the "supplier" as per Section 2(n) of the MSMED Act, 2006 on the date of entering into the contract, could not seek any benefit as a supplier under the MSMED Act, 2006. A party cannot become a micro or small enterprise or a supplier to claim the benefit under the MSMED Act, 2006 by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods or rendering services. If any registration, is obtained subsequently, the same would have the effect prospectively and would apply for the supply of goods and rendering services subsequent to the registration. The same cannot operate retrospectively. However, such issue being jurisdictional issue, if raised could also be decided by the Facilitation Council/Institute/Centre acting as an arbitral tribunal under the MSMED Act, 2006.

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."

31. Learned counsel appearing for Respondent No.2 has also invited attention of this Court towards paragraph 35(IV) of the aforesaid judgment and order dated 31st October, 2022 passed by the Hon'ble Supreme Court wherein the Division Bench judgment of the High Court of Bombay, relied upon by the counsel appearing for the petitioners, has been set aside to the extent of the finding that the Facilitation Council itself could not have decided to initiate arbitration proceedings under Section 18(3) of the MSMED Act, 2006. Paragraph 35(IV) of the aforesaid judgment of the Hon'ble Supreme Court is extracted as under:-

> *"(IV) C.A. …… of 2022 (@ SLP (C) No. 31227 of 2018*
>
> *(i) In this appeal, the appellant Gujarat State Petronet Ltd. (original petitioner) has challenged the order dated 06.08.2018 passed by the High Court of Bombay, whereby the High Court held that the reference made to the Facilitation Council was maintainable in spite of the independent arbitration agreement. The High Court also held that the Facilitation Council having itself conducted the conciliation proceedings, it could not have decided to initiate arbitration proceedings under Section 18 (3) of the MSMED Act, 2006.*
>
> *(ii) In the instant case, the respondent no.1 i.e., Krunal Works (original respondent no.3) had invoked Section 18 (1) of the MSMED Act, 2006 by approaching the Micro and Small Enterprises Facilitation Council. In the said reference, the appellant GSPL had raised an objection with regard to the jurisdiction of the Facilitation Council to entertain the reference in view of an arbitration agreement existing between the parties. The Facilitation Council had initiated conciliation proceedings between the parties, however the same having failed, the Council vide the Order dated 29.04.2015, decided to take up the dispute for arbitration. The said order was challenged by the GSPL before the Bombay High Court.*
>
> *(iii) In our view, both the issues have been elaborately discussed and concluded hereinabove by holding that the reference to Facilitation Council by a party to a dispute with regard to any money due under Section 17 would be maintainable despite an independent arbitration agreement existing between the parties and that the Facilitation Council could also take up the dispute for arbitration and act as an arbitrator as contemplated under Section 18 (3) of the MSMED Act, 2006 despite the bar contained in Section 80 of the Arbitration Act 1996.*
>
> *(iv) The impugned order passed by the High Court, therefore to the extent it records the finding that the Facilitation Council could not have decided to initiate arbitration proceedings by itself under Section 18 (3)*

of the MSMED Act, 2006 deserves to be set aside and is accordingly set aside.

(v) The arbitration proceedings before the Facilitation Council shall be proceeded further as per the Arbitration Act, 1996. The Appeal stands disposed of accordingly."

32. Learned counsel appearing for Respondent No.2 on the strength of the aforesaid judgments cited by him has concluded his arguments and has prayed that the writ petition filed by the petitioners may be dismissed by this Court.

Findings

33. We have considered the submissions advanced by learned counsels appearing for the parties.

34. We find that the legislature has enacted Micro, Small and Medium Enterprises Development Act,2006 for a special purpose, that is to facilitate the promotion, development and to enhance the competitiveness of Micro, Small and Medium Enterprises and matters connected therewith or incidental thereto and that is why, Section 24 of the Act of 2006 provides that Sections 15 to 23 of the Act of 2006 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. The aforesaid Act of 2006 contains various provisions to deal with Micro, Small and Medium Enterprises and therefore, the Act of 2006 is a special law dealing with Micro, Small and Medium Enterprises and for that purpose, Section 24 of the Act of 2006 has given overriding effect to Sections 15 to 23 of the Act of 2006.

35. Section 18(1) of the Act of 2006 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, make a reference to the Micro and Small Enterprises Facilitation Council. Section 18(2) of the Act of 2006 provides that

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 shall apply to such a dispute as if the conciliation was initiated under Part III of that Act. Section 18(3) of the Act of 2006 provides that 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 to it 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 dispute as if the arbitration was in pursuance of an arbitration agreement referred to in Sub-section (1) of Section 7 of that Act.

36. We find that the provisions under 18 of the Act of 2006 have overriding effect in view of the provisions contained in Section 24 of the Act of 2006. The legislature in Section 18(2) of the Act of 2006 has categorically provided that the Council may either itself act as a Conciliator or may refer the matter for conciliation to any institution providing alternate dispute resolution services and the procedure of conciliation proceedings will be carried out as per Sections 65 to 81 of the Act of 1996. Thereafter, the legislature under Section 18(3) of the Act of 2006 has given absolute discretion to the Council that in the event of failure of the conciliation proceedings either Council itself can proceed to arbitrate the dispute between the parties or Council may refer the arbitration to an institution providing alternate dispute resolution

services and it has been further provided that during such arbitration the provisions of the Act of 1996 will be applicable.

37. We find that so far as the selection of forum of arbitration is concerned, the legislature has given absolute discretion to the Council that either Council itself can proceed to arbitrate the dispute between the parties or can refer the dispute for arbitration to an institution providing alternate dispute resolution services and in exercise of the said discretion the provisions of the Act of 1996 have not been made applicable. Rather after exercise of the said discretion in selection of forum of arbitration proceedings, the provisions of the Act of 1996 are made applicable in respect of procedure to be adopted by the Arbitrator.

38. We also find that the Act of 2006 is a special law and in view of the provisions made in Section 24 of the said Act, the discretion given to Council under Section 18(3) of the Act of 2006 for selecting the forum of arbitration between the parties has overriding effect and therefore, at the stage of selection of forum for arbitration by the Council the prohibition contained in Section 80 of the Act of 1996 will not be applicable.

39. We also find that Delhi High Court while dismissing the petition filed by the petitioners i.e. Arbitration Petition No.402 of 2019 has considered the issue regarding prohibition contained in Section 80 of the Act of 1996 and has concluded that the prohibition contained in 80 of the Act of 1996 will not be applicable in the case of Council selecting forum for arbitration in exercise of its powers under section 18(3) of the Act of 2006.

40. We further find that the Division Bench of this Court vide judgment and order dated 3.3.2020 rendered in Writ-C No.7785 of 2020 has decided the issue regarding applicability of prohibition contained in Section 80 of the Act of 1996 in the proceedings under

Section 18(3) of the Act of 2006 and has held that the Act of 2006 is a special law and has been enacted for a special purpose and therefore, the discretion given to the Council for selecting forum for arbitration between the parties is an absolute discretion with the Council and hence, the prohibition contained in Section 80 of the Act of 1996 will not be applicable. Paragraph 62 and 63 of the aforesaid judgment rendered by the Division Bench of this Court are extracted as under:-

> *62. Even otherwise, as we have already discussed, Section 80 itself permits an otherwise agreement between the parties. Meaning thereby the embargo that Conciliator shall not be Arbitral Tribunal is not absolute. That being so, the mandatory and overriding effect contained in Section 18(3) and 18(4) and Section 24 of MSMED Act, 2006 cannot be whittled down by referring to a salutary principle though, in our view, no such salutary principle having force of law to the extent that a legislative provision must be read as sub-serving is recognized or available.*
>
> *63. In view of above discussion, we are clearly of the view that MASEF Council having acted as Conciliator is not barred from working as Arbitral Tribunal to arbitrate the dispute under Section 18(3) and such jurisdiction of MASEF Council has been given overriding effect by virtue of Section 18(4) and Section 24 which have to be given complete swing in the area covered by same. The argument, therefore, advanced otherwise by learned counsel for petitioner is hereby rejected. The question, formulated above, is answered against petitioner and we hold that MASEF Council is not prohibited from working as Arbitrator itself for adjudication of dispute between the parties and it is not obliged to refer the matter to any other body.*

41. We also find that the issue in respect of applicability of prohibition contained in Section 80 of the Act of 1996 in the proceedings under Section 18(3) of the Act of 2006 has already been considered and decided by the Hon'ble Supreme Court vide its judgment and order dated 31st October, 2022 rendered in SLP (C) No.12884/2020, **Gujarat State Civil Supplies Corporation Ltd. vs. Ramkrishna Foods Pvt. Ltd. and another** (along with other connected Civil Appeals), reported in **2022 SCC OnLine SC 1492.** The Hon'ble Supreme Court in paragraph 4 of the aforesaid

judgment and order dated 31st October, 2022 has framed questions and Question No.(iii) framed by the Hon'ble Supreme Court is extracted as under:-

> *"4. xxxxx*
>
> *(iii) Whether the Micro and Small Enterprises Facilitation Council, itself could take up the dispute for arbitration and act as an arbitrator, when the council itself had conducted the conciliation proceedings under sub-section (2) of the Section 18 of MSMED Act, 2006 in view of the bar contained in Section 80 of the Arbitration Act, 1996."*

42. The Hon'ble Supreme Court after discussing the legal provisions of the Act of 2006 and the Act of 1996 has given answer to the aforesaid question in Paragraph No. 34 of the aforesaid judgment and order dated 31.10.2022, which is extracted as under:-

> *"34 (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.*

43. Learned counsel for the petitioners has based his arguments on the judgment and order dated 6.8.2018 rendered by the Division Bench of High Court of Bombay in **Writ Petition No.5459 of 2015, Gujrat State Petronet Ltd. vs. Micro and Small Enterprises Facilitation Council and others,** but we find that the Hon'ble Supreme Court in the aforementioned judgment and order dated 31st October, 2022 has set aside the judgment of High Court of Bombay to the extent it records finding that the Facilitation Council could not have decided to initiate arbitration proceedings by itself under Section 18(3) of the Act of 2006. Relevant portion of the aforesaid judgment dated 31st October, 2022 rendered by the Hon'ble Supreme Court, is extracted as under:-

> *"35.(IV)(iv) -The impugned order passed by the High Court, therefore to the extent it records the finding that the Facilitation Council could not*

have decided to initiate arbitration proceedings by itself under Section 18 (3) of the MSMED Act, 2006 deserves to be set aside and is accordingly set aside.

44. We find that the legislature has enacted a special law in the form of Act of 2006 containing the special provisions in respect of Micro, Small and Medium Enterprises and further the legislature has given overriding effect to Sections 15 to 23 of the Act of 2006. Thus, the discretion given to Facilitation Council under Section 18(3) of the Act of 2006 in respect of selection of forum of arbitration between the parties is absolute and has overriding effect to any other law. Therefore, in the event of conciliation proceedings being carried out by the Council and on its failure the Council itself can proceed to arbitrate the dispute between the parties and the prohibition contained in Section 80 of the Act of 1996 will have no application in exercise of the said discretion by the Council.

45. The law in respect of the application of prohibition contained in Section 80 of the Act of 1996 has already been dealt by the Division Bench of this Court and by the Hon'ble Supreme Court in the aforementioned judgments and it has been categorically held that where Facilitation Council was itself Conciliator and in the event of conciliation proceedings being failed, the Council under Section 18(3) of the Act of 2006 itself can proceed to arbitrate the dispute and there the prohibition contained in Section 80 of the Act of 1996 will have no application.

46. So far as the second argument advanced by the learned counsel for the petitioners that Delhi International Arbitration Centre under the aegis of Delhi High Court is an expert body and is well equipped to carry out the quality arbitration proceedings and therefore, the dispute in question should be referred to the said Arbitration Centre, is concerned, we find that the legislature has

framed special law in the form of Act of 2006 to deal with various kinds of issues involved in the functioning of Micro, Small and Medium Enterprises and therefore, the legislature under the Act of 2006 has provided for constitution of the Facilitation Council comprising of the experts of the field of Micro, Small and Medium Enterprises and therefore, it is absolutely misconceived on the part of the petitioners to argue that the Facilitation Council is not well equipped to carry out the arbitration of the dispute between the petitioners and Respondent No.2. Thus, the said argument advanced by the learned counsel for the petitioners lacks merit and is rejected.

47. In view of the aforesaid reasons, we do not find any illegality or infirmity in the orders dated 11.6.2019 and 24.7.2019 passed by the Facilitation Council in Claim Petition No.402 of 2019.

48. Accordingly, the writ petition filed by the petitioners is **dismissed.**

Order Date :- 31/05/2023

Salim