A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA Nos.8 and 13 of 2020

(From the judgment dated 31.01.2020 passed by the Learned District Judge, Cuttack in Arbitration Petition No.1 of 2017 arising out of award dated 29.09.2016 passed by Micro and Small Enterprises Facilitation Council, Cuttack, Odisha)

(In ARBA No.8 of 2020)

M/s National Aluminum Company Ltd., Bhubaneswar .... ***Appellant***

-versus-

M/s. Orissa Coal Chem. Pvt. Ltd., Cuttack and Ors. .... ***Respondents***

Advocates appeared in the case:

For Appellant : *Mrs. Pami Rath, Adv.*

-versus-

For Respondents : *Mr. G. Agarwal, Adv.*
Mr. Ashok Sahu, Adv.
(for Respondent No.1)
Mr. Ch. Satyajit Mishra, AGA
(for Respondent No.2)

(In ARBA No.13 of 2020)

M/s. Orissa Coal Chem. Pvt. Ltd., Cuttack .... ***Appellant***

-versus-

M/s National Aluminum Company Ltd., Bhubaneswar & Ors. .... ***Respondents***

Advocates appeared in the case:

For Appellant : *Mr. G. Agarwal, Adv.*
Mr. Ashok Sahu, Adv.

-versus-

For Respondents : *Mrs. Pami Rath, Adv.*
(for Respondent No.1)
Mr. Ch. Satyajit Mishra, AGA
(for Respondent No.2)

CORAM:
DR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-27.07.2023
DATE OF JUDGMENT:-01.08.2023

Dr. S.K. Panigrahi, J.

1. Both the Appeals under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "A&C Act") have been filed against judgment dated 31.01.2020 passed by the learned District Judge, Cuttack in Arbitration Petition No.1 of 2017 arising out of award dated 29.9.2016 passed by Micro and Small Enterprises Facilitation Council, Cuttack, Odisha. As both the Appeals are preferred against the same judgment, it is considered prudent to deal with them together.

I. FACTUAL MATRIX OF THE CASE:

2. M/s Orissa Coal Chem. Pvt. Ltd. (hereinafter referred to as "Supplier") was registered as a Small Scale Industry in 1991, having its corporate office at Cuttack and factory at Dhenkanal. The Supplier had a long standing relationship with M/s National Aluminum Company Ltd. (hereinafter referred to as "Buyer") for the supply of hard coal-tar pitch to the smelter plant of the Buyer.
3. The present dispute had first arisen over purchase order dated 18.5.1994 which was issued in favour of the Supplier by the Buyer for supply of coal-tar. It is alleged that the Buyer was not making

timely payments to the Supplier which led to a severe cash-crunch situation and ultimately affected the production. On account of the stoppage of production and consequent inability to supply, the Buyer withheld a total amount of Rs.21,89,041/- from the Seller's account. Despite this being the state of affairs, purchase orders were subsequently placed on 24.12.1998 and 9.2.1999 for additional supply of coal-tar by the Buyer. At this juncture, the Supplier has submitted that he made a request to the Buyer *vide* letter dated 26.2.1999 to release the outstanding amount of Rs. 33,14,041/- including interest in its favour, without which the Supplier claimed that as a Small Scale Industry it could not fulfill its supply obligations.

4. The Buyer *vide* its letter dated 29.5.1999 raised the issue of Supplier not having furnished performance bank guarantees with respect to the latest purchase orders and also threatened to offload the contracted quantities at the risk and cost of the Supplier if supply wasn't resumed. The Buyer is said to have released payments amounting to only Rs.9,50,469/- by 16.06.1999, leaving an outstanding amount of Rs.23,63,572/- on the said date. In these circumstances, the Supplier informed the Buyer in its letter dated 16.06.1999 that it was not in a position to supply the coal-tar quantities unless payments were released in its favour and that it was usual business practice that despite the requirement, the Supplier would not have to furnish a

performance bank guarantee for subsequent orders of additional quantities as it had already furnished the same earlier. The Supplier had additionally reiterated that it would resume supply from July, 1999 upon expeditious payment of the outstanding amount.

5. However, *vide* letter dated 26.7.1999, the Buyer terminated the purchase order. Furthermore, *vide* letter dated 10.8.1999, it was communicated to the Supplier that the entire outstanding amount of Rs.23,62,572/- stood forfeited by the Buyer.
6. Thereafter, as the Buyer did not respond to the Supplier's representations for release of the outstanding amount, the Supplier filed a petition for settlement of disputes as provided under Section 6 (2) of the Interest on Delayed Payment of Interest Act, 1993 (hereinafter referred to as "IDPI Act") before the Industrial Facilitation Council (hereinafter referred to as "IFC") for recovery of Rs.74,79,424/- including interest on 10.6.2001.
7. The Buyer filed its counter on 10.1.2002 refuting the claims of the Supplier and raised additional issues of maintainability and limitation.
8. It is pertinent to mention herein that while the petition was pending before the IFC, the Buyer had nominated an arbitrator for adjudicating the disputes between the parties. Upon learning the same, the Supplier had approached this Court vide W.P.(C) No.5832 of 2002 seeking quashing of the aforementioned

arbitration proceedings. This Court vide order dated 20.02.2005 in W.P.(C) No.5832 of 2002 directed that there would be a stay on the arbitration proceedings pending before the arbitrator appointed by the Buyer till such time as the IFC takes a decision on all issues raised before it, including its jurisdiction. The parties were permitted to challenge the decision of the IFC on any point before the appropriate forum if they were aggrieved. Accordingly W.P.(C) No.5832 of 2002 was disposed of.

9. The IDPI Act was repealed soon after, and the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "MSMED Act") came into force. The IFC therefore stood disbanded and the Micro and Small Enterprises Facilitation Council (hereinafter referred to as "MSEFC") was established by the State Government. All pending cases under the IFC accordingly stood transferred to the MSEFC for disposal in terms of Section 32 of the MSMED Act.

10. The Supplier filed its written submissions on 17.6.2006 and on 16.9.2006, the Buyer filed an application under Section 16 of the A&C Act challenging the jurisdiction of the IFC.

11. On 9.10.2010, the MSEFC called upon the Supplier to file an up to date claim and accordingly, the Supplier submitted a claim for Rs 12,20,47,820/- on 28.9.2010. On 29.7.2011, the Buyer submitted an additional counter raising the issue of jurisdiction, alleging the

enhanced claim was beyond the terms of reference and the same was barred by limitation.

12. In the meanwhile, the Buyer approached this Court vide W.P.(C) No.6979 of 2012 alleging that the issue of jurisdiction was not considered by the MSEFC. This Court vide its order dated 6.4.2016 disposed of W.P.(C) No.6979 of 2012 with the direction that the MSEFC would consider the claims as also the question of maintainability of the MSEFC's jurisdiction expeditiously within a period of six months.

13. The MSEFC's 45th Sitting vide order dated 28.6.2016 directed the Buyer to explore the possibility of an amicable settlement with the Supplier within fifteen days. After expiry of the said period, the Buyer sought 15 more days, however, the settlement did not fructify.

14. On 31.8.2016 at the MSEFC's 47th Sitting, the Buyer filed another application challenging the jurisdiction of the MSEFC and the applicability of the MSMED Act.

15. Ultimately, on 29.9.2016 at the MSEFC's 48th Sitting, the MSEFC passed a final Award in favour of the Supplier and directed the Buyer to pay a sum of Rs.23,74,931/- along with interest as per Sections 15 and 16 of the MSMED Act.

16. Aggrieved, the Buyer challenged Award dated 29.9.2016 before the learned District Judge, Cuttack in ARBP No. 1 of 2017 under Section 34 of the A&C Act.

17. The learned District Judge, having heard the parties, vide order dated 31.01.2020, set aside the Award dated 29.09.2016 and remitted the dispute back to the MSEFC for fresh adjudication.

18. Now that the facts leading up to the instant Appeals have been laid down, this Court shall endeavour to summarise the contentions of the Parties and the broad grounds that have been raised to seek the exercise of this Court's limited jurisdiction available under S. 37 of the A&C Act.

II. APPELLANT'S SUBMISSIONS:

19. The counsel for the Supplier assails the judgment of the Learned District Judge mainly on the ground of the Learned District Judge having gone beyond the contours of his powers prescribed under Section 34 of the A&C Act. It is alleged that the learned District Judge has reappreciated evidence and decided the entire dispute afresh on merits which is impermissible in law. It is further contended that the application under Section 34 of the A&C Act preferred by the Buyer is defective for having not been accompanied with the mandatory pre-condition of depositing 75% of the awarded amount. It is submitted that the Buyer filed an application for exemption of making the deposit which was subsequently disallowed. However, it is the Supplier's contention that this means that the application under Section 34 of the A&C Act was validly instituted only on 17.5.2017, when the Buyer deposited 75% of the award amount excluding interest, which is

beyond the 90 days +30 days limit prescribed under Section 34 of the A&C Act. Therefore, it was contended that the appeal under Section 34 of the A&C Act should not have been entertained at all by the Learned District Judge.

III. RESPONDENT'S SUBMISSIONS:

20. *Per contra*, learned counsel for the respondent imputes the order of the learned District Judge to the extent that the learned District Judge directed that the dispute be adjudicated afresh by the MSEFC. It is contended that after setting aside the award, the Ld. District Judge does not have the power to remit the matter for fresh consideration. The award in itself, they submit, ought to have been set aside given the lack of consistent hearings, lack of perusal of evidence, publication of the award on unstamped paper and the lack of conciliation proceedings. It was also submitted that the MSEFC does not have the jurisdiction to adjudicate upon the enhanced claims as the first instance of the dispute arose way back in 1994/1999 when the MSMED Act had not been notified. Moreover, it was further submitted that there was a dispute over who was the Director of the Supplier Company, and the claim petition having been filed by a person who was not authorised to do so renders the entire proceeding *non est*.

IV. ISSUES FOR CONSIDERATION:

21. Having heard the parties and perused the materials available on record, this Court has identified the following solitary issue to be determined:

A. Whether the order of the learned District Judge warrants interferencekeeping in mind the limitations of this court's powers under Section 37 of the A&C act?

V. ISSUE A: WHETHER THE ORDER OF THE LD. DISTRICT JUDGE WARRANTS ANY INTERFERENCE KEEPING IN MIND THE LIMITATIONS OF THIS COURT'S POWERS UNDER SECTION 37 OF THE A&C ACT?

22. The MSMED Act is a complete legislation aimed at the advancement, growth and improvement of small enterprises in the country. The Abid Hussain Committee (1997) and Study Group under Dr. S.P. Gupta (2000) draw our attention to the requirement of an appropriate, efficacious and alternate dispute resolution system which can help these small enterprises thrive in a fast growing economy like ours.

23. One of the foremost requirements for the Micro, Small and Medium Enterprise (hereinafter referred to as "MSME") industry is the availability of credit and shorter working capital cycles. The working capital of an MSME is essential to run their small-scale operations.

24. The IDPI Act recognized the importance of access to capital and shorter cash flow cycles for MSMEs. The IDPI Act mandated

payment of interest to MSME vendors on delayed settlements of their dues. In 2006, the MSMED Act replaced the IDPI Act.

25. The MSMED Act provided for the establishment of MSME Facilitation Councils as the one-stop shop for resolution of disputes under the MSMED Act. Section 18 of the MSMED Act reads as:

> *"18. (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 (Recovery of Amount Due), 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 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 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. …*

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

[Emphasis is ours]

26. It flows from a bare perusal of the above that there is a two tiered dispute resolution system provided in the MSMED Act itself for facilitating the promotion and development, and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto.

27. So far as the A&C Act, 1996 is concerned, its Bill, taking into account the United Nations Commission on International Trade Law (UNCITRAL) Model Law and Rules, sought to achieve following amongst other objects:

i. to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;

ii. to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

iii. to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal.

28. The Arbitration and Conciliation Bill came on the Statute Book as the Arbitration and Conciliation Act, 1996 (26 of 1996). It came into force on 22.08.1996. As per the long title of the Act, the said Act was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation, and for matters connected therewith and incidental thereto.

29. The intention of the legislature while enacting the A&C Act was mainly the prompt and efficacious disposal of matters. The A&C Act has been set forth with the objective to curtail the interference of the courts into the arbitral proceedings. In order to further advance this objective while granting an opportunity to maintain a check on it, a provision to set aside the award has been included. But even then, it was provided that an award may only be set aside as it does not fulfill certain criteria envisaged therein.

30. The MSMED Act, 2006, *ab incunabulis,* had grown from the need for a comprehensive legislation to provide an appropriate legal framework and extend statutory support to the micro and small enterprises to enable them to develop and grow into medium ones. As noted above, the MSMED Act lays down a two tiered system for dispute resolution. Only if the conciliation initiated under Section 18 (2) is not successful then without any such settlement between the parties, the Facilitation Council under

Section 18 (3) is to either itself take up the dispute for arbitration or refer to it any institution or center providing alternate dispute resolution services for such arbitration. Thereon, the provisions of the A&C Act are made applicable to the dispute as if the arbitration so commenced was in pursuance of an arbitration agreement.

31. The main objectives amongst others of the A&C Act were to make provision for an arbitral procedure which was fair, efficient and capable to meet the needs of the specific arbitration and to minimize the supervisory role of courts in the arbitral process. The furtherance of these objectives as well as the remedies available to the parties are therefore squarely applicable and available, to any dispute between parties under the MSMED Act which is attempted to be resolved.

32. As the A&C Act in its entirety is to apply to the MSMED Act as soon as a dispute is referred to arbitration by the Facilitation Council under Section 18(3), therefore, an appeal against such an award passed by the Facilitation Council or any institution/ centre appointed by it would lie under Section 34 and subsequently, Section 37 of the A&C Act.

33. The Facilitation Council or any institution/center appointed by it for conducting an arbitration under Section 18(3) of the MSMED Act is for all intents and purposes considered a Court faced with the task of adjudicating the dispute before him. An unfettered

scope of intervention in their functioning would defeat the spirit and purpose of the MSMED Act read with the A&C Act. Therefore, as the remedy of appeal against such an award of the MSEFC is under Section 34 of the A&C act, the scope of intervention of the Courts is limited.

34. In this regard, it is deemed apt to advert to the decision of the Supreme Court in ***Oil & Natural Gas Corporation Ltd. v. Western Geco International Limited***[1] which was subsequently discussed in ***Associate Builders v. Delhi Development Authority***[2]**.** The position of law was clarified and laid down recently by the Supreme Court in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI***[3]and more recently reiterated in ***UHL Power Company Ltd. v. State of Himachal Pradesh***[4]**.**

35. As per the current settled position of law laid down by the Supreme Court, an award can be set aside only if the award is against the public policy of India. The award passed in pursuance of an arbitration under Section 18(3) of the MSMED Act can, therefore, also be set aside under Sections 34/37 of the Arbitration Act, if the award is found to be contrary to, (a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal.

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[1](2014) 9 SCC 263
[2](2015) 3 SCC 49
[3](2019) 15 SCC 131
[4](2022) 4 SCC 116

36. The scope of Section 37 of the Arbitration Act was further analysed by the Supreme Court in ***MMTC Limited v. Vedanta Limited***[5] where it was held that any such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34.A similar view, as stated above, has been resonated in ***K. Sugumar v. Hindustan Petroleum Corpn. Ltd.***[6] by the apex Court.

37. This Court had the opportunity to peruse the Arbitral Award dated 29.9.2016 passed by MSEFC, Cuttack, Odisha and the Ld. District Judge's judgment and order dated 31.1.2020.There is no doubt a troubling proclivity of the Courts tasked with hearing challenges to the arbitral award, embarking on a journey of dissecting and re-assessing factual aspects. Keeping in mind the limited scope of this Court's interference as well as this Court's inability to enter into the merits of the matter, this Court shall examine whether the learned District Judge's judgment warrants any interference keeping in mind the principal contentions put forth by the parties.

38. Section 18(2) of the MSME Act provides, on receipt of a reference, the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or center providing alternate dispute resolution services by making a reference to such an

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[5](2019) 4 SCC 163

[6](2020) 12 SCC 539

institution or center, for conducting conciliation. It is only in the event that such conciliation fails, shall the Council proceed to enter into the realm of arbitration under Section 18 (3) of the MSMED Act. Section 18(2) of the MSMED Act further provides that Sections 65 to 81 of the A&C Act shall apply to such a conciliation attempt.

39. It is pertinent to mention herein that the basic tenet of a conciliation proceeding is derived from a person being appointed as the conciliator who shall then assist the parties in an "independent" manner in their attempt to reach an amicable settlement of their dispute. The purpose behind making this a mandatory pre-cursor to the MSEFC entering into the realms of arbitration is that the parties have the opportunity to explore the possibility of privately settling their issue with the assistance and support of an independent person, who would facilitate such dialogue.

40. In the facts of the present case, the Facilitation Council also deriving its powers from the A&C Act, has the power to decide on its own jurisdiction and whether a dispute presented before it is maintainable or not. An appropriate application under Section 16 was filed by the Buyer who disputed the enhanced claims submitted by the Supplier under the MSMED Act. The Buyer allegedly aggrieved by the non-consideration of his Section 16 application had approached this Court, wherein vide order dated

6.4.2016, this Court had directed the Council to consider all the pending applications in the matter including the maintainability of the arbitration proceedings preferably within six months. This was brought to the attention of the Council, who took note of the same on 28.6.2016 at their 45th sitting. However, the said direction was merely acknowledged by the Council on 28.6.2016, who then proceeded to direct the Buyer to amicably settle with the Supplier in 15 days, failing which the matter would run its course.

41. At this juncture, this Court is perturbed as to how the Council did not refer the parties for a proper attempt of conciliation despite the statutory mandate prescribed under Section 18(2). Firstly, no reference to Section 18(2) of the MSMED Act was made, and secondly, no conciliator was appointed. The parties were merely directed to "make an amicable settlement". On 31.8.2016, at the 47th sitting, the Buyer brought the same to the notice of the Council vide an application seeking recall of the order dated 28.6.2016.

42. On 29.9.2016, at their 48th sitting, the Council met and proceeded to pass the award under Section 18(3) of the MSMED Act. A perusal of the award shows the form of the same as thus - a brief reproduction of the facts, a narration of the issue caused by the purported Directors of the Supplier Company with regards to who is eligible/ineligible to file the claim statement and participate in the proceedings on behalf of the Supplier, recording

the statement of the counsel for the Buyer to adjudicate upon the Section 16 A&C Act application, and then, directly the award.

43. The learned District Judge has taken note of the same in the impugned judgment. The learned District Judge has remarked on the Council's failure to consider evidence adduced by the parties, the non-compliance of Section 18(2) of the MSMED Act and the failure to pass any order on the Section 16 A&C Act Application preferred by the Buyer. It shocks this Court that such an award could have been passed at all. One which lacks any reasoning, any proper application of mind, and which goes against the mandate prescribed by the very statute which gives it its powers.

44. Keeping in mind the parties' contentions, it is noticed that the learned District Judge has at no point entered the merits of the case or examined the evidence produced by the parties. The learned District Judge has limited himself to taking note of the gross irregularities and non-conformity committed by the MSEFC in its award, which in this Court's opinion also, for the reasons stated above, is patently illegal and shocks the conscience of this Court.

VI. CONCLUSION:

45. The Arbitrator is a Judge chosen by the parties and his decision is final as long as it is founded in fairness and justice. "*quialiquidstatuerit parte inauditaaltera, aequum licet dixerit, baud aequumfecerit*" that is, "justice should not only be done but should

manifestly be seen to be done". A decision must be be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective. The award cannot be passed on the *ipse dixit* of the arbitrator. Since an award is subject to judicial review, it is important that such award must disclose the mind of the arbitrator.

46. The MSEFC as established by the Government of Odisha in furtherance of the MSMED Act has a paramount purpose to perform. Its aim is to provide an effective, expeditious and equitable dispute settlement system to the micro and small enterprises so that they too may flourish in this power packed economy of ours. These small players are usually more susceptible to hurt and they rarely have the means to recover. The entire rationale as far as establishing the MSEFC is that they can prevent these small players from quitting the game when they are hurt and provide them with faster dispensation of justice so that they may not be taken advantage of and can recover.

47. The award passed by the MSEFC in the instant case shocks this Court to its core. The frequent reshuffling of the Council members leading to grave miscarriage of natural justice to the parties, the continuation of proceedings for years altogether when the statute, in fact, envisions disposal within 90 days, the

reluctance in offering the route of conciliation to the parties - the sordid state of affairs are disheartening and self-defeating.

48. If the MSMED Act has to be read with the A&C Act, the MSEFC established under the MSMED Act must not just in letter, but in spirit as well, step into the shoes of an Arbitrator. It must perform its duties to the parties keeping in mind the rigors of the A&C Act. Ensuring that the principles of natural justice are followed, evidence is properly perused, the award is well reasoned and shows the mind of the maker, are inviolable pillars of our justice system. The State Government would do well to develop a fresh *modus operandi* keeping the aforesaid observations in mind so as to fully give life to the objectives sought to be achieved by the MSMED Act. It is imperative that some modality must be adopted to see that the composition of the Council during the course of a proceeding remains unaltered to give a fair and level playing field to the parties before it.

49. In the light of the discussion above, keeping the settled principles of law in mind and for the reasons given above, this Court is of the considered view that the MSEFC award dated 29.9.2016 was correctly set aside and the matter was remitted back to the MSEFC for fresh adjudication by the learned District Judge in his impugned order.

50. The parties are, however, directed to appear before the concerned MSEFC within 15 days from the date of this order to

facilitate the Council to adjudicate afresh on the dispute between the parties in strict terms of Section 18 of the Act. The same shall be decided preferably within a period of 90 days.

51. Therefore, the challenge in ARBA No.8 of 2020 fails and is dismissed. So far as the assailing in ARBA No.13 of 2020 is concerned, the same also lacks merit and stands dismissed in light of the discussion hereinabove. No order as to costs.

(Dr. S.K. Panigrahi)
Judge

Orissa High Court, Cuttack,
Dated the 1st August, 2023/