

**In the High Court at Calcutta
Original Civil Jurisdiction
Original Side
Commercial Division**

The Hon'ble Justice Sabyasachi Bhattacharyya

A.P. No.73 of 2023

**ESSAR OIL AND GAS EXPLORATION
AND PRODUCTION LIMITED,
-Versus-
GARGI TRAVELS PRIVATE LIMITED**

For the petitioner	:	Mr. Tridib Bose with Mr. V.V.V. Sastry, Advs.
For the respondent	:	Mr. Tanmoy Mukherjee with Mr. Amal Saha, Mr. Iresh Paul, Mr. Souvik Das, Mr. K.R. Ahmed, Mr. Rudranil Das & Mr. Soumyadip Panda, Advs.
Hearing concluded on	:	12.04.2023
Judgment on	:	20.04.2023

The Court:-

1. The crux of the dispute in the present case is whether, in the teeth of the pendency of a reference under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as, "the 2006 Act") to the Micro and Small Enterprises Facilitation

Council (MSEFC), this Court can pass an order under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, “the 1996 Act”).

2. Learned counsel for the petitioner contends that the contemplation of arbitration under Section 18 of the 2006 Act only comes into play once the conciliation fails. In the present case, since the conciliation stage is not yet over, there is no scope to argue that arbitration has begun before the MSEFC. Hence, there is no bar to proceed with the appointment of an Arbitrator under Section 11 of the 1996 Act.
3. Learned counsel further submits that Section 24, which confers overriding effect on the 2006 Act, is not attracted to the present case in view of the arbitration having not yet commenced.
4. Learned counsel cites a Division Bench Judgment of the Madhya Pradesh High Court in *M/s. Ujas Associates Vs. M/s. KJS Cement (India) Ltd.*, to highlight the proposition that sub-section (3) of Section 18 of the 2006 Act is the stage from which the Act of 1996 comes into operation. As such, it was held that the application filed under section 9 of the 1996 Act was not maintainable, since the applicability of the 1996 Act had not yet been reached.
5. Learned counsel next cites *M/s. Steel Authority of India Ltd. and another Vs. Micro, Small Enterprise Facilitation Council, through Joint Director of Industries, Nagpur Region, Nagpur*, reported at AIR 2012 Bom 178, where a Division Bench of the Bombay High Court held that Section 24 of the 2006 Act would not have the effect of negating an arbitration agreement since that Section overrides only such things that are inconsistent with Sections 15 to 23, including Section 18,

notwithstanding anything contained in any other law. Section 18(3) of the 2006 Act in terms provides where conciliation before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution. This procedure for arbitration and conciliation, it was further held, is precisely the procedure under which all arbitration agreements are dealt with. Thus, it was observed that it cannot be said that because Section 18 provides for a forum of arbitration, an independent arbitration agreement entered into between the parties will cease to have effect. **UP TO THIS**

6. Learned counsel appearing for the respondents cites *Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd. (Unit 2) and another*, reported at 2022 SCC OnLine SC 1492. In the said decision, the Supreme Court reiterated that the 2006 Act overrides the provisions of the 1996 Act, which is a general legislation, whereas the 2006 Act specifically governs disputes arising between specific categories of persons to be resolved by following a specific process through a specific forum. It was further held that no agreement entered into between the parties could be given primacy over statutory provisions.
7. Learned counsel also relies on a co-ordinate bench judgment of this Court rendered in 2017 SCC OnLine Cal 263 [*National Projects Construction Corporation Limited and another Vs. West Bengal State Micro Small Enterprises Facilitation Council and others*], where the same proposition was reiterated.

- 8.** Learned counsel also cites *Silpi Industries Etc. Vs. Kerala State Road Transport Corporation and another*, reported at 2021 SCC OnLine SC 439, to highlight that if the MSEFC is already moved for resolution of disputes, a counter-claim can be filed before the said forum. While rendering such judgment, the Supreme Court also took into consideration that the 2006 Act is a beneficial legislation to the Micro and Small Enterprises.
- 9.** Learned counsel for the respondent, in his usual fairness, also cites a judgment of *M/s. Porwal Sales Vs. M/s. Flame Control Industries*, dated August 14, 2018 rendered by a Learned Single Judge by the Bombay High Court where it was held, *inter alia*, that sub-section (4) of Section 18 cannot read as a provision creating an absolute bar to institution of any proceeding other than as provided under Section 18(1) of the 2006 Act, to seek appointment of an Arbitral Tribunal. However, it is submitted that in view of the ratio laid down in the Supreme Court in the cited judgment, the said decision of the Bombay High Court is not attracted to the present case.
- 10.** Upon a consideration of the respective provisions of the two Acts, read in conjunction with the ratio laid down in *Gujarat State Civil Supplies Corporation Ltd. (supra)*, as followed by the co-ordinate bench of this Court in *National Projects Construction Corporation Limited (supra)*, it is clear that the Supreme Court upheld the overriding effect of Section 24 of the 2006 Act.
- 11.** In fact, there cannot be any doubt to such proposition because the provisions of Sections 15 to 23 (including Section 18) of the 2006 Act

have been given overriding effect “notwithstanding anything inconsistent therewith contained in any other law for the time being in force”.

- 12.** However, the judgment of the learned Single Judge of the Bombay High Court in *M/s. Porwal Sales (supra)* is apt on the issue. The learned Single Judge of the Bombay High Court clearly distinguished a situation where a reference was made to the MSEFC Council, in which case no application under Section 11 of the Act would be maintainable. Although the respondent has argued that in the present case, such a reference has already been made, the same has to be taken with a pinch of salt, as the argument advanced by the petitioner squarely covers the issue to the extent that the stage of reference to arbitration within the contemplation of the 2006 Act only arises after the conciliation efforts fail. Sub-sections (1) and (2) of Section 18 of the 2006 Act merely envisage the conciliation stage, which is distinct and different from the arbitration stage and precedes the latter.
- 13.** In fact, insofar as such conciliation proceedings before the MSEFC is concerned, the provisions of Sections 65 to 81 of the 1996 Act have been made applicable, which pertain exclusively to conciliation and not arbitration. Hence, the provisions governing arbitration, including Section 11 of the 1996 Act, do not come into play at all up to the stage of Section 18(2) of the 2006 Act.
- 14.** If only 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 any institution or centre providing alternate dispute resolution services for such arbitration, which would then be governed by the provisions of the 1996 Act, insofar as arbitration is concerned. Thus, it is crystal-clear that only after the failure of the conciliation proceeding and termination thereof, the procedure governing arbitration under the 1996 Act can be invoked by the Council, either by resolving the disputes itself or by referring the dispute to an Arbitral Tribunal.

- 15.** Inasmuch as the second limb of reference under Section 18 of the 2006 Act is concerned, the same overlaps and coincides with a reference under the 1996 Act. In both cases, the matter is referred to arbitration before a Tribunal and is governed by the laws of arbitration as stipulated in the 1996 Act, the only distinction being that under the 2006 Act, the Council makes such reference whereas under the 1996 Act, either the parties choose the Tribunal or such reference is made by the High Court or the Supreme Court under Section 11 of the 1996 Act, which virtually stand on the same footing insofar as the reference to arbitration is concerned.
- 16.** Considering the judgments cited by the respondents, in paragraph no.29 of *Gujarat State Civil Supplies Corporation Ltd. (supra)* also, the Supreme Court reiterated that the provisions of the 1996 Act 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 refer it to any institute or centre for such arbitration as contemplated under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 (emphasis supplied). Thus, the stage when arbitration commences is reached only after the termination of the conciliation proceeding.

- 17.** However, it has also been held that no agreement entered into between the parties could be given primacy over the statutory provisions of Section 18 read with Section 24 of the 2006 Act.
- 18.** However, a harmonious construction of the ratio laid down therein clearly indicates that such stage would only commence after the failure of the conciliation proceedings, whereas in the present case, the matter has merely been referred to the MSEFC for conciliation and is still pending for such purpose. Having not reached the stage of arbitration under Section 18(3) of the 2006 Act, it cannot be said that the bar under Section 24 of the said Act is attracted at all.
- 19.** Section 24 envisages overriding effect of the 2006 Act only where there is anything inconsistent between the said Act and any other law.
- 20.** Such inconsistency or conflict does not arise at all until and unless the arbitration stage begins within the contemplation of Section 18(3) of the 2006 Act, after conciliation fails.
- 21.** Insofar as the judgment of the learned Single Judge of this Court in *National Projects Construction Corporation Limited (supra)* is concerned, the proposition in *Gujarat State Civil Supplies Corporation Ltd. (supra)* was reiterated. However, the context of consideration was whether the claim of the third respondent was live at that stage and, in view of the

existence of an arbitration agreement, whether the MSEFC had jurisdiction to arbitrate the disputes.

- 22.** The dispute arising in the said case was the converse of the present case. The petition had questioned the jurisdiction of the Facilitation Council in purporting to arbitrate in the disputes between the parties, in the teeth of the existence of an arbitration clause.
- 23.** In such context, the learned Single Judge held that the jurisdiction of the Council to take up the matter was not barred.
- 24.** Thus, the question posed before the Court and decided as a proposition in the said judgment was just the reverse of the present proposition. In the said case, the petitioner had questioned the jurisdiction of the Facilitation Council to arbitrate in view of the mere existence of an arbitration clause.
- 25.** However, in the present case, the jurisdiction of this Court under Section 11 of the 1996 Act has already been invoked.
- 26.** Hence, it is not the mere inchoate existence of an arbitration clause but the specific invocation of Section 11 on the basis of such clause under the 1996 Act, which has been challenged by the respondent.
- 27.** Thus, it cannot be automatically held that the ratio laid down in *National Projects Construction Corporation Limited (supra)*, would also hold true and have binding effect in its converse Avatar.
- 28.** *Silpi Industries Etc. (supra)* dealt with two issues, as spelt out in paragraph 13 thereof. The first was regarding the applicability of the Indian Limitation Act, 1963 to arbitration proceedings initiated under

Section 18(3) of the 2006 Act and the second, whether counter-claim is maintainable in such proceedings.

- 29.** Such questions are irrelevant in the present case, as here, the arbitration has not yet started under Section 18(3) of the 2006 Act before the Council at all. The question here is not whether a counter-claim is maintainable in an arbitration proceeding or whether limitation is applicable to a proceeding under Section 18(3) of the 2006 Act, but far removed from the same.
- 30.** In the instant case, we are dealing with the issue as to whether a prior reference to the MSEFC under Section 18(1) of the 2006 Act, which is still at the stage of conciliation and has not crossed the stage of subsection (2) of Section 18, debars this Court from passing an order under Section 11 of the 1996 Act on the basis of an independent arbitration clause between the parties.
- 31.** The decisions cited by the petitioner are now taken up for consideration. The Division Bench judgment of the Madhya Pradesh High Court in *M/s. Ujas Associates (supra)* upheld the proposition that the stage of applicability of the 1996 Act, including Section 9 thereof, had not been reached, since the conciliation proceedings had not yet terminated within the contemplation of Section 18(3) of the 2006 Act.
- 32.** However, such proposition does not help the petitioner much, simply because the application under Section 9 of the 1996 Act was dismissed as not maintainable at that stage, which might be construed as a double-edged sword for the petitioner.

- 33.** The question which rose for consideration in the said case was whether the application under Section 9 of the 1996 Act was maintainable before a reference to arbitration under Section 18(3) of the 2006 Act. The entire conspectus of consideration was an arbitration under Section 18(3) of the 2006 Act and, in such context, since the said sub-section specifically provides that the provisions of the 1996 Act regarding arbitration would apply once conciliation terminates, the court held that Section 9 of the 1996 Act was not applicable as yet.
- 34.** There was no iota of conflict in the said case between an independent reference sought under Section 11 of the 1996 Act on the basis of an arbitration clause, as against the pendency of a conciliation proceeding under the 2006 Act.
- 35.** Hence, the ratio laid down in the Madhya Pradesh High Court Judgment is rather beside the point insofar as the present issue is concerned.
- 36.** The Division Bench of the Bombay High Court at Nagpur, in *M/s. Steel Authority of India (supra)*, held that there is no provision in the 2006 Act which negates or renders an arbitration agreement entered into between the parties ineffective. As such, it was observed that Section 24 of the Act would not have the effect of negating an arbitration agreement since that Section overrides only such things that are inconsistent with Section 15 to 23 (including Section 18) of the 1996 Act.

- 37.** The same ratio is applicable in the present case as well. The question which has fallen for consideration before us is whether the reference to arbitration sought under Section 11 of the 1996 Act is at all maintainable in the teeth of the pendency of a conciliation proceeding under Section 18, sub-sections (1) and (2) of the 2006 Act.
- 38.** It is a germane consideration as to whether there is any specific bar stipulated in the 2006 Act to such reference to Arbitrator under Section 11 of the 1996 Act. The bar contemplated in Section 24 of the 2006 Act clearly elaborates that the overriding effect of the 2006 Act only comes into operation if and when there is anything inconsistent with Sections 15 to 23 of the 2006 Act contained in any other law for the time being in force. I do not find anything inconsistent *per se* between Section 11 of the 1996 Act and the reference to conciliation under Section 18(1) and (2) of the 2006 Act, to attract the rigour of Section 24 of the 2006 Act. Learned counsel for the petitioner is justified in law to argue that, as held in several of the cited judgments, the stage of arbitration under the 2006 Act only commences after failure and termination of the conciliation proceeding, which remains live till the stage of the Section 18(2) of the 2006 Act.
- 39.** Hence, it cannot be said that the bar of Section 24 is attracted at all to the present case.
- 40.** In the absence of such bar, there is nothing in either of the Acts to negate the provisions of Section 11 of the 1996 Act.
- 41.** In the present case, the existence of the arbitration clause has not been controverted in terms by the respondents. Even if a challenge is

thrown to the legality or otherwise of the agreement containing the arbitration clause, Section 16 of the Arbitration and Conciliation Act, 1996 specifically bolsters the doctrine of “Kompetenz kompetenz”. It is for the Arbitral Tribunal to decide all issues regarding its jurisdiction and the maintainability of the arbitration proceeding.

- 42.** Hence, it would be premature to decide such issues at the present juncture.
- 43.** Within the scheme of Section 11(6A) of the 1996 Act, this Court has only to look into the existence of an arbitration clause and, at best, to ascertain whether the dispute falls within the scope of such arbitration clause.
- 44.** Even Section 18(3) of the 2006 Act applies the procedural formalities of the 1996 Act to an arbitration which would proceed under the aegis of the MSEFC.
- 45.** Clause 15.0 of the present agreement between the parties contemplates that in the event the dispute is not resolved under conciliation, the aggrieved party being the claimant may appoint one Arbitrator and the other party shall appoint one Arbitrator, the two of whom would together appoint an Umpire.
- 46.** The seat of arbitration was fixed in Durgapur in West Bengal, thereby otherwise conferring jurisdiction on the Calcutta High Court to entertain and decide applications under Section 11 of the 1996 Act.
- 47.** A close scrutiny of the said clause shows that even as per the said Clause 15.0, on which the petitioner relies for taking out the present application for reference to Arbitrator, the parties are to first refer the

matter to conciliation. Only in the event the dispute is not resolved through conciliation, the aggrieved party, being the claimant, might appoint an arbitrator, which would be followed by the other party appointing an arbitrator, both of whom would then appoint an Umpire.

48. Thus, the Clause-in-question is not an arbitration clause simpliciter but a composite clause which contemplates conciliation at the first stage, following which reference is to be made to the arbitrators.
49. In the present case, the petitioner put forth a request to initiate conciliation proceeding in terms of Clause 15 of the work order/ agreement on March 31, 2022. However, the respondent had taken out an application under Section 156(3) of the Code of Criminal Procedure, 1973, thereby expressly indicating its intention not to subject itself to such conciliation proceeding.
50. Thereafter the petitioner sought arbitration, on which there was no consensus *ad idem* between the parties, for which the notice invoking arbitration dated October 14, 2022 was sent. Hence, the first limb of Clause 15 of the work order was effectively exhausted by the parties, leading to a failure of resolution by conciliation. Hence, the second stage of Clause 15 of the work order had set in. Thus, in view of the invocation, Section 21 of the 1996 Act was attracted and the arbitration proceeding was deemed to have commenced.
51. On the other hand, the reference to the Facilitation Council was still at the initial stage of conciliation and had not ripened into the stage of arbitration as contemplated under Section 18(3) of the 2006 Act.

Hence, till then, only Sections 65 to 81 of the 1996 Act were applicable to the pending proceedings before the Facilitation Council.

- 52.** In such background, there could not have been any bar for the petitioner to invoke the principles of Section 11 of the 1996 Act in view of the absence of consensus between the parties regarding appointment of arbitrator(s). In the absence of any specific bar, as discussed above, this Court is fully competent to take up and decide the application under Section 11, which is squarely maintainable under the law.
- 53.** Thus, the objection pertaining to the interplay between the 1996 Act and 2006 Act does not come in at all in the present case.
- 54.** As regards the arbitration clause-in-question, it is not in dispute that such clause exists, although the respondent might raise questions as to legality or otherwise of the same which, in any event, has to be decided by the Arbitrator, once appointed, within the contemplation of Section 16 of the 1996 Act.
- 55.** Thus, it transpires from the discussions above, there cannot be any impediment to appointment of an Arbitrator under Section 11 of the 1996 Act.
- 56.** Hence, AP No.73 of 2023 is allowed, thereby appointing Justice Md. Mumtaz Khan, a former judge of this Court, residing at 'Merlin River View', 15, Kabitirtha Sarani, Flat-Tide- 11E, Watgunj, Khidirpur, Kolkata, West Bengal 700023 (Mobile No. - 8336932293 /7439185970) as the sole Arbitrator to resolve the dispute between

the parties, subject to obtaining declaration/consent under Section 12 of the Arbitration and Conciliation Act, 1996.

(Sabyasachi Bhattacharyya, J.)