

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 12639 of 2021****With****CIVIL APPLICATION (FOR AMENDMENT) NO. 1 of 2022****In R/SPECIAL CIVIL APPLICATION NO. 12639 of 2021**

=====

M/S SANGANER ENVIRO PROJECT DEVELOPMENT**Versus****STATE OF GUJARAT**

=====

Appearance:

Appearance:

HARSH K RAVAL(9068) for the Petitioner(s) No. 1

ARJUN R SHETH(7589) for the Respondent(s) No. 3

GOVERNMENT PLEADER for the Respondent(s) No. 1

NOTICE SERVED for the Respondent(s) No. 2

=====

CORAM:HONOURABLE MR. JUSTICE A.S. SUPEHIA**Date : 15/07/2022****ORAL ORDER**

1. At the outset, learned advocate Mr.Arjun R. Sheth, appearing for respondent No.3 has submitted that this writ petition is required to be rejected in view of the order passed by the Division Bench dated 25.10.2021 passed in Letters Patent Appeal No.939 of 2021, wherein petitioner has challenged the interim order passed by this Court.

2. Learned advocate Mr. Harsh K. Raval, appearing for petitioner has placed reliance on the provisions of Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'the Act of 2006'), provides for reference to Micro and Small Enterprises Facilitation Council. It is submitted that as per the provisions of Sub-section (2) of Section 18 of the Act of 2006, 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 (hereinafter referred to as the 'Act of 1996') shall apply to such a dispute. It is further submitted that sub-section (3) of Section 18 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 it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Act 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. It is therefore, submitted that once the conciliation proceedings were initiated by the Council, it was not permissible to it to have acted as an arbitrator invoking the provisions of sub-section (3) of Section 18 of the Act of 2006, and thus, the impugned orders dated 26.11.2020 (Annexure-5, at page-54), requires to be set aside.

3. Learned advocate Mr. Sheth, appearing for respondent No.3 has submitted that in fact, the prayers made in the writ petition would not survive, since after the impugned order dated 26.11.2020, an arbitral award has been passed in the arbitration proceedings being Arbitration Award No.11 of 2021 dated 03.09.2021. He has submitted that by way of the Civil Application, now the petitioner is challenging the very same award which is not permissible and the petitioner has already challenged the same in the proceedings under Section 34 of the Act, being Civil Misc. Application No.66 of 2022 before the District Court at Gandhinagar.

4. In response, learned advocate Mr. Raval has submitted that in view of aforesaid submission that original order dated 26.11.2020, itself is nullity, and hence, the writ petition is maintainable.

5. I have heard the learned advocates for respective parties to the *lis*. I have also perused the relevant documents.

6. The facts, which are established from the submissions advanced by the learned advocates appearing for the respective parties is that :-

(a) The petitioner has challenged the order dated 26.11.2020, whereby the Chairman of Micro and Small Enterprise Facilitation Council, Gandhinagar, Gujarat has observed that the arbitration proceedings under section 18(3) of the MSMED Act, 2006, would be strictly conducted as per the provisions of Arbitration and Conciliation Act, 1996.

(b) By the Arbitral Award No.11 of 2021, dated 03.09.2021 - 12.10.2021 the arbitration proceedings has been finally decided.

(c) The petitioner being aggrieved of the aforesaid award has challenged the same, under section 34 of the Act, by filing Civil Misc. Application No.66 of 2022 before the District Court at Gandhinagar.

7. At this stage, it would be apposite to notice that by the order dated 27.09.2021, the Coordinate Bench of this Court after hearing the respective parties has rejected the request of the petitioner for staying of the proceedings of the arbitration. The very same contention which was taken before this Court

today has been negated by the Coordinate Bench by a comprehensive order, few paragraphs of the same are extracted hereinbelow :-

1.2 It is submitted that Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'the Act of 2006'), provides for reference to Micro and Small Enterprises Facilitation Council. Sub-section (2) of Section 18 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 (hereinafter referred to as the 'Act of 1996') shall apply to such a dispute. It is further submitted that sub-section (3) of Section 18 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 it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Act 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. It is therefore, submitted that once the conciliation proceedings were initiated by the Council, it was not permissible to it to have acted as an arbitrator invoking the provisions of sub-section (3) of Section 18 of the Act of 2006.

1.6 It is further submitted that the council concluded the conciliation proceedings without any settlement and in the same proceedings, it had ordered to refer the dispute to the arbitration and itself has become arbitratral tribunal. It is also submitted that according to the provisions of Section 80 of the Act of 1996, there is a complete bar, in absence of any agreement to the contrary, for a conciliator to act as an arbitrator in any arbitral or judicial proceedings in respect of the dispute that has been the subject matter of conciliation proceedings. It is therefore, submitted that Section 80 of the Act of 1996, is fully applicable to the proceedings. Under the circumstances, the council could not have passed the order dated 6.8.2021 rejecting the preliminary objection of the petitioner and declaring that it had full authority to act, both as a conciliator and arbitrator.

2.2 It is further submitted that the issue framed by this Court, namely, "Whether the respondent No.2 i.e. Micro and Small Enterprises Facilitation Council is empowered to act as an Arbitrator since the Council itself has acted as a Conciliator?", would fall within the realm of the jurisdiction of the arbitrator. While inviting the attention to the proceedings of 204th MSME Meeting held on 27.8.2021, it is submitted that admittedly, the application is under Section 16

of the Act of 1996 challenging the jurisdiction of the arbitrator and it is well settled proposition of law that when the jurisdiction of the arbitrator, is challenged, it would be available to the parties to challenge only after the award is given by the arbitrator. Therefore also, against the order dated 6.8.2021, the petition would not be maintainable and it would be open to the petitioner to challenge after the award is rendered by the Council under the provisions of Section 18(3) of the Act of 2006.

6. The petitioner, is aggrieved by the order dated 6.8.2021 whereby, the Council, while rejecting the preliminary objection raised by the petitioner, has declared that the Council has full authority to act, both as a conciliator as well as arbitrator. The contention raised by the learned counsel appearing for the petitioner is to the effect that once the Council has acted as a conciliator in the matter, it would be impermissible to the Council to act as an arbitrator in view of the provisions of section 80 of the Act of 1996. The provisions of Section 18 of the Act of 2006 is worth referring to.

"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 it to 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."

7. Sub-section (1) of Section 18 starts with a non-obstante clause providing 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. Sub-section (2) 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 Act of 1996 shall apply to such a dispute. Similarly, subsection (3) of Section 18 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 it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Act 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.

8. Further, Section 24 of the Act of 2006, provides for overriding effect. It envisages that 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. Section 24 reads thus:-

"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."

9. Pertinently, the Act of 2006 has been enacted to provide for facilitating the promotion, development and enhancing the competitiveness of Micro, Small and Medium Enterprises and for matters connected therewith or incidental thereto. The Act of 2006, is a Special Act for the benefit of Small and Medium Enterprises. Chapter V deals with Delayed Payment to Micro and Small Enterprises and Section 18, provides for Reference to Micro and Small Enterprises Facilitation Council. Section 24 is a provision dealing with overriding effect, whereby the provisions of Sections 15 to 23 including Section 18 have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. 10. Therefore, sub-section (3) provides that where the conciliation is initiated under sub-section (2) is not successful and stands terminated, the Council either itself to take the dispute for arbitration or refer it to any institution or centre. Clearly, sub-section (3) provides for arbitration by the Council itself. As against this, Section 80 of the Act of 1996, which is under Chapter III heading "Conciliation", envisages that unless otherwise agreed by the parties, 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. Prima facie, this Court, is of the opinion that the applicability of the provisions of Section 80, would stand excluded by virtue of Section 24 of the Act of 2006, it being inconsistent with the provisions of sub-section (3) of Section 18, which provides that if conciliation is not successful, the Council itself take up the dispute or refer it to any institution or centre. At this stage, the observations made by the Allahabad High Court in the case of *The Best Towers Private Limited (supra)* are worth referring to. Paragraph 24 whereof, reads thus:-

"24. We may at the outset undertake a comparative study of the provisions of the MSMED Act, 2006 and the Arbitration and Conciliation Act, 1996. To begin with the object and reasons for enacting the 2006 Act was to clearly protect the development of Micro, Small and Medium Enterprises and to extend support to them to enable them to grow and adopt higher levels and higher productivity to remain competitive in a fast globalization era. It is for this reason, a single legal framework was required to facilitate the promotion and development of such industries. The statement of objects and reasons in Clause 2(d)(h) clearly recites that the procedure also envisages to make further improvements in respect of delayed payments. In this background, the appellant before us is a supplier within the meaning of Section 2(n) of the 2006 Act and the respondent-petitioner is a buyer within the meaning of Section 2(d) of the Act. To facilitate the resolution of disputes relating to delayed payments, Chapter-5 was incorporated in the Act fixing a statutory liability on the buyer to make payments within a specified time. Section 16 fixes the liability of payment of interest and Section 17 empowers the supplier to receive payments with interest thereon. On a dispute being raised with regard to delay in payments or any amount due, a forum named as a Facilitation Council is created under Section 18 of the Act where any party to a dispute may make a reference to the Facilitation Council. Sub-section (2) of Section 18 enjoins upon the Council to either itself conduct a conciliation or seek the assistance of any Institution or Centre providing alternate dispute resolution services by making a reference to it. The provisions of Section 65 to Section 81 of the Arbitration and Conciliation Act, 1996 are to apply to such a dispute as if the conciliation was under Part-III of the 1996 Act. Thus, the first step on the reference of a dispute is to undertaking a conciliation effort by the Council or reference of such conciliation to any Institution or Centre as provided therein. The words "shall apply" in respect of Section 65 to Section 81 of the 1996 Act, therefore, clearly stipulates that in an effort of conciliation the same process will be adopted in respect of conciliation proceedings with a specific bar in Section 80 that the Conciliator shall not act as an Arbitrator or as a representative or Counsel of a party in "any arbitral or judicial proceedings in respect of a dispute that is the subject of conciliation proceedings". Thus, according to Section 80 the Conciliator cannot act as an Arbitrator. The question raised before us by the learned counsel for the respondent petitioner is that if the Facilitation Council acts

as a Conciliator then the Council cannot act as an Arbitrator as in the present case when after having attempted conciliation proceedings and its termination in failure, the Council itself has proceeded to arbitrate which it could not have done in terms of Section 80 of the 1996 Act read with Section 18(2) of the 2006 Act. This argument on behalf of the respondent petitioner has been accepted by the learned Single Judge that has been questioned by the appellant contending that Section 24 of the 2006 Act clearly provides that Sections 15 to 23 thereof shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. What we find is that sub-section (2) of Section 18 only refers to conciliation and the procedure to be followed in terms of Part-III of the 1996 Act to the extent of Section 65 to Section 81 thereof. Immediately thereafter, subsection (3) of Section 18 introduces an absolutely novel procedure allowing the commencement of arbitration proceedings with a mandate on the Council that in the event conciliation ends in failure, the Council shall "either itself" take up the dispute for arbitration or refer it to any Institution or Centre providing alternate dispute resolution services for such arbitration and the provisions of the 1996 Act "shall then" apply to the disputes as if the arbitration was in pursuance of an agreement. The overriding effect given to this provision in terms of Section 24 of the 2006 Act, in our opinion, clearly overrides any bar as suggested by the learned counsel for the respondent petitioner under Section 80 of the 1996 Act. It is trite law that the meanings assigned and the purpose for which an enactment has been made should be construed to give full effect to the legislative intent and we have no doubt in our mind that the provisions of Section 18(3) mandates the institution of arbitration proceedings under the 2006 Act itself and it is "then" that the provisions of the Arbitration and Conciliation Act, 1996 shall apply. The institution of arbitration proceedings would be governed by sub-section (3) of Section 18 of the 2006 Act which having an overriding effect cannot debar the Facilitation Council from acting as an Arbitrator after the conciliation efforts have failed under sub-section (2) of Section 18 of the Act. A combined reading of sub-section (2) and sub-section (3) of Section 18 of the 2006 Act read with the overriding effect under Section 24 thereof leaves no room for doubt that any inconsistency that can possibly be read keeping in view Section 80 of the 1996 Act stands overridden and the Facilitation Council can act as an Arbitrator by virtue of the force of the overriding strength of sub-section (3) of Section 18 of the 2006 Act over Section 80 of the 1996 Act. The conclusion of the learned Single Judge that there is a prohibition on the Council to act in a dual capacity is, therefore, contrary to the clear intention of the legislature and, therefore, the verdict that the Facilitation Council lacked inherent jurisdiction does not appear to be a correct inference. Thus, on a comparative study of the provisions referred to hereinabove, there is no scope for any doubt with regard to the overriding effect of the provisions of the 2006 Act that empowers the Facilitation Council to act as an Arbitrator upon the failure of conciliation proceedings. The cloud of suspicion and doubt about the role of the Facilitation Council, therefore, stands clarified on the basis of the analysis made by us hereinabove."

No strong reasons have been put-forth by the learned counsel for the petitioner before this Court to not to concur with the view taken in the case of The Best Towers Private Limited (supra) of the Patna High Court. Therefore, the contention raised by the learned advocate for the petitioner that once the Council has acted as a conciliator under the provisions of sub-section (2) of Section 18, and since, the provisions of Sections 65 to 81 of the Act of 1996 are applicable, the restriction contained in Section 80 of the Act of 1996 would apply and the Council cannot act as an arbitrator under sub-section (3) of Section 18 of the Act of 2006, does not deserve to be accepted and is hereby rejected

12. Besides, as is discernible from the record, the application was filed under Section 16 of the Act of 1996 challenging the jurisdiction of the arbitrator and it is well settled that a plea raised before an Arbitral Tribunal under Section 16 of the Act of 1996, challenging the jurisdiction and/or competence of the Tribunal, if rejected, has to wait until the award is passed by the Tribunal, and cannot be challenged by way of a writ petition. On this ground also, the interim relief as prayed for, does not deserve to be granted.

8. The Coordinate Bench vide comprehensive order dated 27.09.2021, after recording the relevant provisions of both the Acts, Arbitration as well as MSMED Act, has observed and held that “therefore, the contention raised by the learned advocate for the petitioner that once the Council has acted as a conciliator under the provisions of sub-section (2) of Section 18, and since, the provisions of Sections 65 to 81 of the Act of 1996 are applicable, the restriction contained in Section 80 of the Act of 1996 would apply and the Council cannot act as an arbitrator under sub-section (3) of Section 18 of the Act of 2006, does not deserve to be accepted and is hereby rejected.

9. The petitioner being aggrieved of the aforesaid order filed Letters Patent Appeal No.939 of 2021, which was disposed of vide order dated 25.10.2021, the same reads as under : -

“Learned advocate for the appellant fairly submits that the prayers sought for in the present appeal has become infructuous by virtue of the award passed by the Tribunal which the appellant proposes to challenge in accordance with law. Hence,

keeping open all the questions including the one urged in the present Appeal, this appeal stands disposed of. All the pending applications consigned to record."

10. The present petitioner-appellant withdrew the Letters Patent Appeal before the Division Bench for the reason that the same has become infructuous by virtue of the award passed by the Tribunal i.e. award dated 03.09.2021 / 12.10.2021, which the appellant proposes to challenge in accordance with law.

11. Thus, the petitioner withdrew the Letters Patent Appeal for the reason that the arbitral award dated 03.09.2021 / 12.10.2021 was passed and he was contemplating of challenging of the same. It appears that after the aforesaid withdrawal of the Letters Patent Appeal, the petitioner has challenged the said award under the provision of Section 34 of the Act by filing the proceedings being Civil Misc. Application No.66 of 2022 before the District Court at Gandhinagar, the same is still pending.

12. Thus, from the proceedings initiated and narrated recorded hereinabove, the petitioner has very conveniently withdrawn the Letters Patent Appeal challenging the interim order of this Court, and has subsequently filed Civil Application before this Court challenging the very same award, which is challenged by him under Section 34 of the Act by filing the proceedings being Civil Misc. Application No.66 of 2022 before the District Court at Gandhinagar, the same is still pending.

13. The petitioner thus has initiated two proceedings one before this Court by way of filing Civil Application No.1 of 2022 in Special Civil Application No.12639 of 2021 and the proceedings before the Court below under the provisions of

section 34 of the Act. The very contention which are raised before this Court, has been rejected by the interim order, the challenge in Letters Patent Appeal is also withdrawn. Thus, the interim order rejecting the contention which is raised before this Court, has become final. After the interim order and the aforementioned proceedings are undertaken. The arbitration proceedings are over, the arbitral award dated 03.09.2021 / 12.10.2021 is passed. The same is challenged by way of proceedings being Civil Misc. Application No.66 of 2022 before the District Court at Gandhinagar, the same is still pending and hence, the present writ petition, will not survive in view of the action of the petitioner in undertaking proceedings under Section 34 of the Act and the withdrawal of the Letters Patent Appeal.

14. The writ petition thus is rejected in terms of the interim order dated 27.09.2021 and in light of subsequent proceedings. Civil Application also stands rejected.

MAHESH BHATI/62

(A. S. SUPEHIA, J)

THE HIGH COURT
OF GUJARAT

WEB COPY