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HIGH COURT OF CHHATTISGARH, BILASPUR**WA No. 56 of 2022**

M/s Sew Infrastructure Limited Registered Office At 6-3-871, Snehlata, Green Lands Road, Begumpet, Hyderabad, District- Hyderabad-500016 (Telangana) Through Its Power of Attorney Holder Shri K. Ganapathi Rao S/o Shri Venkatanarayana, District : Hyderabad, Telangana

---- Appellant**Versus**

1. Micro and Small Enterprises Facilitation Council C.G. Director of Industries, Chhattisgarh, Udyog Bhawan, Ring Road No. 1, Telebandha, Raipur, Chhattisgarh, District : Raipur, Chhattisgarh
2. M/s- Core Fab Projects Pvt. Ltd. 141/21, 2nd Floor, Matoshree Complex, Infront of Steel City Hospital, Maharaja Chowk, Durg, District- Durg, Chhattisgarh.

---- Respondents

(Cause Title taken from Case Information System)

For Appellant : Mr. Ashish Shrivastava, Senior Counsel assisted by Mr. Shikhar Sharma and Mr. Aman Saxena, Advocates.

For Respondent No. 2 : Ms. Ginni Jaitley Rautray, Mr. P.R. Patankar and Mr. Vaibhav Dhar Diwan, Advocates.

Date of Hearing : 23.02.2022

Date of Judgment : 12.05.2022

Hon'ble Mr. Arup Kumar Goswami, Chief Justice

Hon'ble Mr. N.K.Chandravanshi, Judge

C A V Judgment

Per Arup Kumar Goswami, Chief Justice

This writ appeal is presented against an order dated 14.01.2022, passed by the learned Single Judge in Writ Petition (C) No.4235 of 2021, whereby the writ petition filed by the petitioner-appellant was dismissed.

2. The appellant, which is a Company registered and incorporated under the provisions of the Indian Companies Act, 1956, is engaged in the field of construction of large infrastructure development projects. It had entered into an agreement on 23.05.2012 along with its other Consortium Members with National Mineral Development Corporation Limited (NMDC) in respect of the works pertaining to Civil, Supply of Fabricated Building Steel Structures including Sheeting & Glazing and Receipt, Unloading, Storage and Transportation from Stores to Erection Site, Erection including Supervision, etc. relating to Steel Melting Shop (Package No.6) for 3.0 MTPA NMDC integrated Steel Plant at Nagarnar, Chhattisgarh, valued at Rs.643.77 Crores, approximately. The appellant had placed a letter of award of contract (LAC) to respondent No.2 on 29.12.2012, which was followed by a contract agreement dated 06.06.2013, for supply of Fabrication and Transportation to site, building steel structures for Steel Melting Shop (Package No.06), at a total price of Rs.17,78,52,500/- of approximately 2,500 MT. The time for completion of the above works was 15 months from the effective date of contract, which is 06.05.2013.

3. It is not necessary to dilate on all the details for the purpose of disposal of this appeal. Suffice it to say that three amendments, being (i) amendment dated 10.07.2013, (ii) amendment dated 06.06.2013, and (iii) amendment dated 05.05.2014, were signed with regard to price and supply. It is alleged by the appellant that there was failure on the part of respondent No. 2 in adhering to the terms of the agreement, but it raised bill for Rs.46,27,70,759/-, which was disputed by the appellant and it is stated that the balance amount payable by the appellant to the respondent

No. 2 is only Rs. 25,00,000/-.

4. The respondent No. 2 subsequently filed a claim petition before respondent No. 1, *i.e.*, Micro & Small Enterprises Facilitation Council, for short, Facilitation Council, by invoking Section 20 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short, the Act of 2006) in the month of August, 2018 claiming Rs.7,89,33,137/-, which included the outstanding amount of Rs.43,60,936/-, claim towards the price escalation of Rs.3,53,99,216/- and interest from 13.12.2016 to 18.06.2018 amounting to Rs.3,91,72,985/-.

5. As stated in the writ petition, after receiving the notice, the appellant filed reply to the claim petition by disputing the claims lodged and praying for dismissal of the application. A rejoinder was filed by the respondent No. 2 on 23.11.2020.

6. Though, not stated in the writ petition as was originally filed, subsequently, on 22.10.2021, the appellant filed an application for taking documents on record in which an order dated 12.04.2021 passed by the learned Single Judge of this Court in WP(227) No. 22/2021, a copy of the letter dated 18.08.2021 issued by the Deputy Director, Facilitation Council and copy of the general conditions of contract were annexed. Perusal of the order dated 12.04.2021 would go to show that grievance was expressed by the appellant to the effect that without resorting to conciliation proceedings under Section 18(2) of the Act of 2006, an arbitration proceeding under Section 18(3) of the Act of 2006, was initiated. Noticing that the Facilitation Council had given only an opportunity to the parties to “compromise the matter” and there being no indication in the proceedings

of the Facilitation Council that any conciliation proceeding had been taken up as required under Section 18(2) of the Act of 2006, the writ petition was disposed of holding that initial proceeding under Section 18(3) was erroneous and accordingly, directed the Facilitation Council to take up conciliation proceeding under Section 18(2) of the Act of 2006 before taking up the arbitration proceeding under Section 18(3) of the Act of 2006.

7. In the writ petition, there is no averment about the outcome of the conciliation proceeding which was directed to be taken up by the Facilitation Council, but it would appear from the pleadings in the writ petition that the conciliation proceeding had failed and was terminated and that the arbitration proceeding was again initiated by the Facilitation Council. The appellant had submitted an objection dated 12.10.2021 to the effect that (i) the Facilitation Council having been consisted of 04 numbers of Arbitrators, the same is in violation of Section 10 of the Arbitration and Conciliation Act, 1996 (for short, the A&C Act), which provides that the arbitral tribunal should not consist of even number of Arbitrators, (ii) Facilitation Council having acted as Conciliator, in terms of Section 80 of the A&C Act, they cannot act as Arbitrator, but in violation of the said provision, the Facilitation Council had also taken up the role of the Arbitrators, (iii) no declaration in terms of Section 12 of the A&C Act was made indicating that the Arbitrators were not having any interest in the arbitration proceedings, (iv) terms of reference had not been recorded.

8. It is pleaded that without deciding the objections raised by the appellant, the Facilitation Council posted the matter on 26.10.2021 for passing of the award.

9. It is in the background of the aforesaid facts, the writ petition was filed praying for the following reliefs:

“10. RELIEF (S) SOUGHT :

10.1 It is prayed that this Hon'ble Court may kindly be pleased to call for the entire records pertaining to the case of the Petitioner from the possession of the respondent No.1, for its kind perusal.

10.2 This Hon'ble Court may kindly be pleased to issue a writ in the nature of mandamus directing that the respondent No.1 under Section 18 of the Act of 2006 has no jurisdiction to adjudicate disputed claim of escalation/price variation, hence the proceeding instituted in the Case No. G/05/S/00169/54 are without jurisdiction.

10.3 This Hon'ble Court may kindly be pleased to issue a writ in the nature of mandamus directing, that the arbitration proceedings instituted by the respondent No.1, without following due procedure contemplated under Arbitration and Conciliation Act, 1996, is also not maintainable.

10.4 Any other relief/reliefs, which this Hon'ble Court may think fit and proper in the facts and circumstances of the case, with cost of the petition, may also please be granted to the petitioner.

10.5 This Hon'ble Court may kindly be pleased to issue writ in the nature of certiorari and quash the order dated 12.10.2021.”

10. Subsequently, the writ petition was amended stating that the objection of the appellant was rejected arbitrarily by an order dated 12.10.2021 wherein it was also wrongly recorded that final arguments were heard at length. The said order also came to be impugned by way of amendment.

11. The learned Single Judge disposed of the writ petition as follows:

“10. Considered on the submissions.

11. According to the facts present, the petitioner had earlier preferred WP227 No.22/2021, which was decided by this Court vide order 12.4.2021 and directions were issued to the respondent No.2 to take up proceedings of conciliation as required under Section 18(2) of the Act, 2006 before proceeding under Section 18(3) of the Act, 2006. The sitting of the respondent No.1 was held on 3.8.2021. The minutes of this proceeding mentions about the order dated 12.4.2021 of WP227 No.22/2021. The minutes further mentions that both the parties made a declaration that there can be no conciliation between them, therefore, the proceeding under Section 18(2) of the Act, 2006 was closed and proceeding under Section 18(3) of the Act, 2006 was initiated.

12. The minutes of the proceeding held on 3.8.2021 are not very specific regarding the role of the members of respondent No.1 in the conciliation proceeding, but it is very specific that there is a declaration of the parties that there is no possibility of any conciliation between them, hence, it

cannot be said with affirmation that the members of the respondent No.1 had in fact acted to conciliate on the dispute present between the parties.

13. The question raised by the petitioner is legal on the basis of the facts present, that the respondent No.1 had itself taken up the conciliation proceeding under Section 18(2) of the Act, 2006 and, therefore, the arbitration proceeding by the respondent No.1 itself is against the provision under Section 80 of the Act, 1996. Although the Single Bench of the High Court of Karnataka has in the case of M/s Pal Mohan Electronics (supra) expressed a view that the Section 80 of the Act, 1996 expresses against the empowerment of the facilitation Committee to act as a arbitrator, subsequent to being a conciliator, but this view has not been supported or rectified of any other High Court. The view of Allahabad High Court in the case of M/s Cummins Technologies India(supra), in the case of Supreme Court in Bhaven Construction through Authorised Signatory Premjibhai k. shah (supra), in the case of Delhi High Court in Bata India Limited Vs. AVS International Private Limited (supra), in the case of Patna High Court in the Best Towers Private Limited (supra), in the case of Madras High Court in Eden Exports Company (supra) and similar view is expressed in the case of Delhi High Court in Badri Singh Vinimay Private (supra) are to this effect that the bar under Section 80 of the Act, 1996 shall not be

applicable to the proceeding before the facilitation Committee under the provisions of the Act, 2006 and, further, that the Section 24 of the Act, 2006 is very clear on this point showing that the provisions under the Act, 2006, have overriding effect over the provision under Page No.9 any other act including the Act, 1996. Hence, I am of this view that the petition filed is without any substance, which is liable to be dismissed.”

12. The Act of 2006 was enacted to provide for facilitating promotion and development and enhancing competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto.

13. Chapter V of the Act of 2006 relates to 'delayed payments to micro and small enterprises'. Chapter V contains Sections 15 to 25, imposing an obligation upon the buyer to make payment and providing for an adjudicatory forum in the event of there being any dispute between a buyer and supplier. Section 15 of the Act of 2006 deals with liability of buyer to make payment. Section 16 lays down the date from which and the rate at which interest is payable. Section 17 obligates the buyer to pay the amount due with interest for any goods supplied or services rendered by the supplier. Section 18 provides for making a reference to the Facilitation Council with regard to any amount due under Section 17.

14. Section 18(1), (2), (3), (4) of the Act of 2006 is relevant for the purpose of our case and therefore, the same is extracted hereinbelow:

“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.”

15. Section 20 of the Act of 2006 provides that the State Government shall, by notification, establish one or more Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification.

16. Mr. Ashish Shrivastava, learned senior counsel for the appellant submits that Section 80 of the A&C Act prohibits a conciliator to act as an arbitrator and in gross violation of the same, the Facilitation Council, which acted as a conciliator, also started conducting arbitration proceeding and as such, the entire proceeding is vitiated. It is submitted that the learned Single Judge did not advert to the contention raised by the appellant that composition of the Facilitation Council, which is in even number, is in violation of Section 10 of the A&C Act and the same goes to the root of the matter. He has further submitted that without giving declaration in terms of Section 12 of the A&C Act that the Members of the Facilitation Council is not having any interest in respect of the arbitration proceeding, the arbitration proceeding initiated is vitiated. It is also submitted that no finding has been recorded with regard to the contention advanced that due to non-recording of terms of reference, arbitration proceeding initiated cannot be sustained in law. He has submitted that in gross violation of Sections 21, 23 and 24 of the A&C Act, the arbitration proceeding was commenced

without giving adequate opportunity to the parties for filing their statement of claims and counter-claims, etc and only on the basis of the pleadings in the conciliation proceeding, Facilitation Council has started the arbitration proceeding. It is contended that the dispute as raised by the respondent No. 2, which includes the claim towards price escalation, is beyond the purview of the Facilitation Council and the Facilitation Council did not consider this aspect of the matter though it goes to the root of the controversy.

17. Learned senior counsel for the appellant relies on the decisions of the Hon'ble Supreme Court in *M/s. Vijeta Construction v. M/s. Indus Smelters Ltd. & Another*, rendered on 23.09.2021 in Civil Appeal No. 5934 of 2021, *Jharkhand Urja Vikas Nigam Limited v. State of Rajasthan & Others*, reported in *2021 SCC OnLine SC 1257*, and the decision of the Madras High Court in *Ved Prakash v. P. Ponram*, rendered in Original Side Appeal No. 231 of 2019 on 23.01.2020, the decision of the Karnataka High Court in *M/s. Pal Mohan Electronics Pvt. Ltd. v. The Secretary, Department of Small Scale Industries & Others* (WP No. 9485 of 2017) on 27.03.2019, the decision of the Madhya Pradesh High Court in *Sasan Power Limited, Singrauli v. Madhya Pradesh Micro and Small Enterprises Facilitation Council and Another*, reported in *2020 SCC OnLine MP 2976*, the decision dated 06.08.2018 of the Bombay High Court in *Gujarat State Petronet Ltd. v. Micro & Small Enterprises Facilitation Council & Others* (Writ Petition No. 5459 of 2015).

18. Ms. Ginni Jaitley Rautray, learned counsel for the respondent No. 2 submits that pursuant to the order of this Court dated 12.04.2021, date of

conciliation proceeding was fixed on 13.07.2021 and the conciliation having failed, conciliation proceeding was terminated by the Facilitation Council and arbitration proceeding was initiated. It is submitted that the pleadings before the Facilitation Council were completed and oral arguments of the parties on merits of the case were heard and the parties were directed to file their written submission on or before 22.10.2021 and accordingly, the parties had also filed their written submissions before the Facilitation Council on 22.10.2021. It is submitted that the quorum of the Facilitation Council which took part in the conciliation proceeding under Section 18(2) of the Act of 2006, is no longer available as the term is over and therefore, the matter would have to be heard by a new quorum of Facilitation Council, and as such, on facts, the plea taken by the appellant that the Facilitation Council having taken up the conciliation proceedings is debarred from initiating the arbitration proceeding, is not tenable. It is submitted that there is no illegality in the Facilitation Council taking up the arbitration proceeding after termination of the conciliation proceeding and in this connection, she places reliance on the decisions rendered by the Allahabad High Court in *M/s. Cummins Technologies India Pvt. Ltd. v. Micro and Small Enterprises Facilitation Council & Others* (WPC No. 7785/2020), by the Patna High Court in *The Best Towers Pvt. Ltd. v. Reliance Communication Limited* (LPA No. 1036/2018), the Madras High Court in *M/s. Refex Energy Limited v. Union of India*, reported in *2016-3-L.W. 711*, *Eden Exports Company v. Union of India*, reported in *2012 SCC OnLine Mad 4570*, and a decision of this High Court in *M/s. JMS Mining Services Pvt. Ltd. v. State of Chhattisgarh & Others*, rendered in WA No.

100-103 of 2017.

19. On the basis of the above judgments, it is submitted by Ms. Rautray that in view of Section 24 of the Act of 2006, the provisions of Section 18 of the Act of 2006 would have an overriding effect over any other law for the time being in force including the A&C Act.

20. It is submitted that Section 10 of the A&C Act will have no application and the same is inconsistent with the provisions of Section 21(1) of the Act of 2006. She submits that in statutory arbitration under the Act of 2006, notice under Section 21 of the A&C Act is not required to be given. Disclosure under Section 12 of the A&C Act is not necessary as the arbitration is being conducted by the Facilitation Council. It is further submitted that there is no merit in the contention that the claim made on account of price escalation cannot be adjudicated by the Facilitation Council while it conducts arbitration proceeding. The appellant had filed written statement on 03.04.2019. The appellant had filed its reply and counter claim dated 03.08.2021 to the rejoinder filed by the respondent No. 2 on 23.11.2020 and the respondent No. 2 had also filed reply to the reply and counter claim filed by the appellant on 24.08.2021.

21. Sections 21 and 24 of the Act of 2006 are relevant and they are extracted hereinbelow:

“21. Composition of Micro and Small Enterprises Facilitation Council.—

(1) The Micro and Small Enterprise Facilitation Council shall consist of not less than three but not more than five members

to be appointed from among the following categories, namely:—

- (i) Director of Industries, by whatever name called, or any other officer not below the rank of such Director, in the Department of the State Government having administrative control of the small scale industries or, as the case may be, micro, small and medium enterprises; and
- (ii) one or more office-bearers or representatives of associations of micro or small industry or enterprises in the State; and
- (iii) one or more representatives of banks and financial institutions lending to micro or small enterprises; or
- (iv) one or more persons having special knowledge in the field of industry, finance, law, trade or commerce.

(2) The person appointed under clause (i) of sub-section (1) shall be the Chairperson of the Micro and Small Enterprises Facilitation Council.

(3) The composition of the Micro and Small Enterprises Facilitation Council, the manner of filling vacancies of its members and the procedure to be followed in the discharge of their functions by the members shall be such as may be prescribed by the State Government.

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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.

22. Section 80 of the A&C Act reads 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.”

23. Part III of the A&C Act is under the heading 'Conciliation'. It begins with Section 61 and ends with Section 81.

24. Section 75 of the A&C Act is as follows:

75. Confidentiality - Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

25. In *M/s Vijeta Constructions* (supra), the Hon'ble Supreme Court while dealing with the clauses of conciliation of the Council observed that conciliators are to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute and at that stage the Facilitation Council is not required to adjudicate the

dispute. At that stage the Facilitation Council has no jurisdiction to make thorough enquiry and take evidence. However, once the conciliation fails and the settlement is not arrived at during the conciliation and thereafter when the arbitration proceeding commences as per Section 18(3), the Facilitation Council as an arbitrator shall have all the powers of the arbitrator as are available under the provisions of the A & C Act.

26. In *Jharkhand Urja Vikas Nigam Limited* (supra), the Hon'ble Supreme Court at paragraphs 9, 11 and 12 observed as follows:

“9. Only on the ground that even after receipt of summons the appellant has not appeared the Facilitation Council has passed order/award on 06.08.2012. As per Section 18(3) of the MSMED Act, if conciliation is not successful, the said proceedings stand terminated and thereafter Facilitation Council is empowered to take up the dispute for arbitration on its own or refer to any other institution. The said Section itself makes it clear that when the arbitration is initiated all the provisions of the Arbitration and Conciliation Act, 1996 will apply, as if arbitration was in pursuance of an arbitration agreement referred under sub-section (1) of Section 7 of the said Act.

11. From a reading of Section 18(2) and 18(3) of the MSMED Act it is clear that the Facilitation Council is obliged to conduct conciliation for which the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 would apply, as if the conciliation was initiated under Part III of the

said Act. Under Section 18(3), when conciliation fails and stands terminated, the dispute between the parties can be resolved by arbitration. The Facilitation Council is empowered either to take up arbitration on its own or to refer the arbitration proceedings to any institution as specified in the said Section. It is open to the Facilitation Council to arbitrate and pass an award, after following the procedure under the relevant provisions of the Arbitration and Conciliation Act, 1996, particularly Sections 20, 23, 24, 25.

12. There is a fundamental difference between conciliation and arbitration. In conciliation the conciliator assists the parties to arrive at an amicable settlement, in an impartial and independent manner. In arbitration, the Arbitral Tribunal / arbitrator adjudicates the disputes between the parties. The claim has to be proved before the arbitrator, if necessary, by adducing evidence, even though the rules of the Civil Procedure Code or the Indian Evidence Act may not apply. Unless otherwise agreed, oral hearings are to be held.”

27. In ***Ved Prakash*** (supra), the Madras High Court held as follows:

“8.6 Section 18 of the MSMED Act has been upheld by the Division Bench of this Court in **M/s Refex Energy Limited, by its Managing Director Vs. Union of India and another dated 02.06.2016** referred supra, in which it has been held as follows.

“20. A cursory reading of the aforesaid provision makes it clear that a conciliator could not act as an arbitrator. It is no doubt true that sections 18(2), 18(3) and 18(4) have given dual role for the Facilitation Council to act both as Conciliators and Arbitrators. According to the learned counsel for the appellants, the Facilitation Council should not be allowed to act both as Conciliators and Arbitrators. This contention, though prima facie appears to be attractive, it is liable to be rejected on a closer scrutiny. Though the learned counsel would vehemently contend that the Conciliators could not act as Arbitrators, they could not place their hands on any of the decisions of upper forums of law in support of their contentions. As rightly pointed out by the learned single Judge, section 18(2) of MSMED Act has borrowed the provisions of sections 65 to 81 of the Arbitration and Conciliation Act for the purpose of conducting conciliation and, therefore, section 80 could not be a bar for the Facilitation Council to conciliate and thereafter arbitrate on the matter. Further the decision of the Supreme court in (1986) 4 SCC 537 (Institute of Chartered Accountants of India v. L.K. Ratna), on this line has to be borne in mind.

One should not forget that the decision of the Facilitation Council is not final and it is always subject to review under Article 226 of the Constitution of India and, therefore, the appellants are not left helpless.”

8.7 Thus, the issue involved is no longer *res integra*. Therefore, there is no bar to proceed further after the termination of conciliation proceedings. However, as discussed by us earlier, such proceedings by way of an arbitration shall not be conducted by the very same persons, who acted as conciliators. Thus, we hold so by taking note of Section 75 of the Arbitration and Conciliation Act, 1996, which lays emphasis on the confidentiality of the conciliator. When a conciliator is expected to maintain confidentiality of the matters conveyed to him, he cannot thereafter change his role by involving himself in a continuing process, such as, arbitration. As Section 65 to 81 of the Arbitration and Conciliation Act, 1996, are applicable to the proceedings under Section 18 of the MSMED Act, such conciliators, after termination, shall not act as arbitrators. We may also note that this aspect of the matter has not been dealt with by the Division Bench of this Court, which rightly held that the Facilitation Council perform the twin roles. As there is a marked difference between the role

of the Facilitation Council and the person appointed by it to perform as arbitrator, one shall not perform the twin roles unless and of course parties voluntarily affirm to it.”

28. In *M/s Pal Mohan Electronics* (supra), the Karnataka High Court at paragraphs 12, 13, 14, 15 held as follows:

“12. The controversy in the present writ petition is in reading the provisions of section 18(3) of the MSMED Act. A Facilitation Facilitation Council, as provided under section 18 (2) of the MSMED Act, may itself conduct conciliation proceedings or refer conciliation proceedings to another institution or centre which offers such services; and section 18 (3) of the MSMED Act stipulates that if the conciliation proceedings under section 18 (2) of the MSMED Act stands terminated without any settlement, the Facilitation Council may either itself take up the dispute for arbitration or refer the dispute for arbitration to another institution/centre which offers alternate dispute redressal services. If a Facilitation Council after conducting a failed conciliation proceedings, could also take up arbitration of the dispute, then such Facilitation Council would be acting both as a conciliator and an arbitrator in a given dispute. This would not be permissible if the provisions of the Arbitration Act apply as the provisions of Section 80, stipulate that unless the parties have agreed to the contrary, a conciliator shall not act as an arbitrator in any arbitral proceedings where

conciliation proceedings were conducted by such arbitrator. The provisions of Section 80 of the Arbitration Act reads as follows:

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.

13. Therefore, the question is whether the restriction under section 80 of the Arbitration Act would apply to the Facilitation Council. The provisions of section 18 (3) of the MSMED Act is categorical that the Arbitration Act shall apply to a dispute taken up for arbitration after the failure of the conciliation as if such arbitration was in pursuance of an arbitration agreement referred to in subsection (1) of section 7 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. The MSMED Act not only provides for an arbitration even though there may not be an agreement for referring the dispute between a "buyer" and a "supplier" to an arbitration, but also stipulates that the provisions of the Arbitration Act shall apply to such arbitration. There is nothing in the provisions of section 18 (3) of the MSMED Act to indicate that any particular provision of the Arbitration Act is intended to be excluded to an arbitration provided for under section 18 (3) of the Act.

14. The next incidental question is, should any exclusion be read because of the provisions of section 24 of The MSMED Act which reads as follows:

"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."

It is obvious from a plain reading of the provisions of section 24 of the MSMED Act that overriding effect is given to the provisions of sections 15 to 23 thereof wherever any law is inconsistent with the provisions thereof. Indeed, the objective of the provisions of Chapter - V of the Act, which includes provisions of section 15 to 23, is to provide for an expedited and efficacious closure

of a dispute, either by conciliation or by arbitration. But, from this alone should it be inferred that a Facilitation Council could act both as a Conciliator and Arbitrator, merely because Section 18(3) of the MSMED Act stipulates that the Facilitation Council could take up the dispute for arbitration if the conciliation proceedings fail and a contrary intent is not obvious from the plain reading of the provisions of section 18 (3) of the Act.

15. The provisions of section 80 of the Arbitration Act 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) of the MSMED Act and applying the provisions of section 24 of the Act. A learned single judge of the High Court of Judicature at Patna in the decision rendered on 19.6.2018 in Reliance Communications Ltd versus the State of Bihar and others (WP No. 8077 of 2018) has considered similar questions, and concluded thus:

"The existence of an arbitration agreement is assumed through the deeming fiction in section 18 (3) of the MSMED Act with reference to section 7 (1) of the Arbitration Act, and must be understood as being merely for the purposes of statutorily fulfilling the foundational requirement of an arbitration agreement

for proceeding under the Arbitration Act. This is the extent of the deeming fiction which does not go to suggest the existence of any further agreement between the parties for the purpose of section 80 of the Arbitration Act to the effect that they have agreed that a conciliator would also be competent to act as arbitrator. As stated above, section 18 (2) and 18 (3) of the MSMED Act both seek to adopt the provisions of section 80 of the Arbitration Act. Further, section 24 of the MSMED Act with its overriding effect comes into play only in cases of inconsistencies between the two enactments. A harmonious reading of these provisions clearly indicates that section 80 of the Arbitration Act has been adopted and requires to be given full effect to. Accordingly, the Facilitation Council may act either as conciliator or as arbitrator or it may choose to refer the dispute at either or both stages to any centre or institution providing alternate dispute resolution services, but it cannot act as both conciliator and arbitrator itself.”

29. In ***Sasan Power Limited*** (supra), the Madhya Pradesh High Court at paragraphs 48 and 49 observed as follows:

“48. The different High Courts have taken different views on the interpretation of Section 18 of the Act of 2006. The Bombay High Court in certain cases opined that the Council

cannot act as conciliator as well as arbitrator. The Madras High Court opined that the same person, who has acted as conciliator cannot act as an arbitrator. The Division Bench of Patna High Court in *Best Towers Pvt. Ltd.* (supra) has given a totally different interpretation to Section 18 aforesaid and clarified that the Council can act as an arbitrator upon the failure of conciliation proceedings.

49. At the cost of repetition, it is apposite to mention that if a plausible view is taken by the Council, it does not warrant interference by this Court. The impugned decision taken by Council is in consonance with the view taken by certain High Courts. Thus, no interference can be made by this Court at this Court at this stage under Article 226/227 of the Constitution. However, it will be open for the Council to proceed with arbitration proceedings by excluding Shri C.K. Minj as a Member of arbitral body or refer the matter to any other institute or center proceeding alternative dispute resolution service.”

30. In *Gujarat State Petronet Limited* (supra), the Bombay High Court at paragraphs 17, 18, 19, 21 and 22 observed as follows:

“17. This takes us to consider the next issue raised by Mr. Kane, learned counsel for the petitioner that the respondent No.1 – MSEFC having itself conducted the conciliation proceedings, could not have decided to itself initiate the arbitration proceedings under Section 18(3) of the MSMED

Act. We find merit in this submission.

18. Section 18(1) of the MSMED Act provides for reference to the Council of a dispute with regard to any amount due under Section 17. Sub-section (2) of the Section 18 contemplates of conduct of conciliation either by Council itself or by seeking assistance of any institution or centre providing alternate dispute resolution services. For purpose of such conciliation proceedings, the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 are applicable. Sub-section (3) thereof, makes a provision for arbitration if the conciliation proceedings between the parties are not successful and stand terminated without any settlement either by the Council itself or by reference to any institution or centre providing alternate dispute resolution services. To such arbitration, the provisions of Section 65 to 81 of the Arbitration and Conciliation Act, 1996 are made applicable.

19. A plain reading of sub-sections (2) and (3) of Section 18 of the MSMED Act makes it clear that it 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 providing 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. xxx xxx xxx

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:

xxx xxx xxx

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.”

31. The view taken in the aforesaid cases is that once the Facilitation Council acts as a conciliator, in view of provision of Section 80 of the A&C Act, it is prohibited from acting as arbitrator.

32. Now we take note of the judgments cited by Ms. Rautray.

33. In *M/s Cummins Technologies India Pvt. Ltd.* (supra), the question posed was as to whether after the Facilitation Council had attempted to conciliate between the parties, it can act as an arbitrator for adjudication of the dispute. The Allahabad High Court observed as follows at paragraphs 37, 40, 43, 46, 47, 54, 55, 56, 57, 58, 59, 62 & 63:

“37. Therefore, sub-section (2) of Section 18 leaves it open to discretion of MASEF Council to either itself proceed on the Reference by first conducting Conciliation or refer the matter to an Institution or Centre providing alternate dispute resolution services to conduct Conciliation. In either case, Reference made under sub-section (1) shall first proceed for conciliation and when such Conciliation is proceeded, for the purpose of procedure, Sections 65 to 81 of Act, 1996 shall apply as if conciliation was initiated under Part-III of Act, 1996. As we have already said, Part-III of Act, 1996 deals with 'Conciliation'. It takes into its ambit Sections 61 to 81. For the purpose of sub-section (2), entire Part-III has not been made applicable and it is only Sections 65 to 81, which have

been made applicable by virtue of sub-section (2) of Section 18 of MSMED Act, 2006. The obvious reason is that these provisions deal with the procedure for Conciliation after application for Conciliation is made and Conciliators are appointed under Act, 1996. This procedure has been applied by conciliation which is to be made under Section 18(2) of MSMED Act, 2006. This is called legislation by Reference. Sections 65 to 81 of Act, 1996 have been made applicable for conciliation under Section 18(2) of MSMED Act, 2006 by making provision of Act, 1996 applicable by legislative reforms.

40. Sections 61 to 64 have not been made applicable to the Conciliation proceedings as contemplated in Section 18(2) of MSMED Act, 2006 for the reason that when a Reference is made, MASEF Council shall proceed with the conciliation either itself or refer the matter to an Institution or Centre and therefore, stage up to appointment of 'Conciliator' is already covered by Section 18 sub-sections (1) and (2). That is why, only further procedure provided under Sections 65 to 81 has been made applicable for Conciliation under Section 18(2) of MSMED Act, 2006. Sections 65 to 81 have been made applicable by Section 18(2) of MSMED Act, 2006 with respect to Conciliation as contemplated under sub-

section (2) and not for arbitration contemplated by subsection (3). Therefore, applicability of Sections 65 to 81 will be confined only to the Conciliation proceedings under Section 18(3) and not beyond that.

43. Even otherwise, by virtue of Section 61 of Act, 1996 the provisions of Part-III would be applicable so long as otherwise it is not provided by any other law or parties have decided or agreed and therefore, the provisions of Part-III will not prevail over otherwise provisions of MSMED Act, 2006 and, on the contrary, will have to subserve and surrender to the provisions of MSMED Act, 2006.

46. Moreover, Section 80 of Act, 1996 by virtue of Section 61 of said Act, cannot override provisions of MSMED Act, 2006 and therefore, it cannot be said that Section 80 of Act, 1996 will exclude MASEF Council to act as Arbitrator, since it has been Conciliator in the dispute and arbitration therefore cannot be proceeded by it. This argument in fact suppresses and goes contrary to what has been specifically provided in Section 18(3) and (4) of MSMED Act, 2006.

47. When read conjointly Section 24 is further clarificatory and fortifies what we have said earlier. Again it provides that Sections 15 to 23 of MSMED Act, 2006 shall have effect over any otherwise law. This is an

overall overriding effect given by Section 24 to Section 18 of MSMED Act, 2006 and in that view of matter Section 18 of MSMED Act, 2006 cannot be read so as to render subordinate to Section 80 of Act, 1996. The counsel for petitioner advancing argument otherwise, in our view, is not correct and the same is accordingly rejected.

54. To us, the two parts of the judgment of Bombay High Court in Gujarat State Petronet Ltd. (Supra) are contradictory. We find ourselves with great respect in disagreement to the aforesaid view taken by Bombay High Court in paragraphs 20 and 21 of the judgment for the reason that Sections 65 to 81 have been applied by Reference under Section 18(2) to conciliation but under sub-Section (3) entire Act, 1996 has been applied, which includes Section 61 of Act, 1996 also. Simultaneously, sub-section (4) of Section 18 very specifically states that notwithstanding anything provided otherwise, MASEF Council shall have jurisdiction to arbitrate when the 'Supplier' is located within its local jurisdiction and 'Buyer' is within India and in such a case when a declaratory and mandatory provision is provided in sub-section (4), Section 80 of Act, 1996 could not have been given overriding effect so as to denude MASEF Council its authority to act as Arbitrator. We accordingly hold and

find ourselves unable to be persuaded by the aforesaid Division Bench decision of Bombay High Court.

55. Then there is a Single Judge judgment of Karnataka High Court in Pal Mohan Electronics Pvt. Ltd. Vs. The Secretary, Department of Small Scale Industries and others, 2019 (5) Kar.LJ. 72. Therein M/s Pal Mohan Electronics Pvt. Ltd. (hereinafter referred to as "PMEPL") was engaged in the business of electronics. Maharashtra State Electricity Distribution Co. Ltd. (hereinafter referred to as "MSEDCL"), invited bids for supply, installation, connection and commission of GSM and GPRS Modems for HT Consumers' Meters, LT Consumers' Meters and Feeder Meters. M/s PMEPL made its bid and was successful. It was issued Purchase Order dated 28.3.2011. It was subsequently modified on multiple occasions. Ultimately MSEDCL terminated the contract with petitioner alleging certain lapses in the working of the Modem. Reference was made under Section 18(1) of MSMED Act, 2006 to MASEF Council. Facilitation Council did enter into dispute for conciliation and when it failed, proceeded to act as 'Arbitrator'. This was objected by PMEPL. The Court formulated following question for adjudication:

"Whether Facilitation Council, having conducted conciliation proceedings under section 18(2) of

the Act could itself conduct arbitration proceedings under section 18(3) of the Act."

56. Following the same reason as given by Bombay High Court in Gujarat State Petronet Ltd. Vs. Micro and Small Enterprises Facilitation Council and others (supra) the learned Single Judge of Karnataka High Court observed that Section 80 of Act, 1996 must be read with Section 18(3) of MSMED Act, 2006. Paragraph-13 of judgment reads as under:

"13. Therefore, the question is whether the restriction under section 80 of the Arbitration Act would apply to the Facilitation Council. The provisions of section 18 (3) of the MSMED Act is categorical that the Arbitration Act shall apply to a dispute taken up for arbitration after the failure of the conciliation as if such arbitration was in pursuance of an arbitration agreement referred to in subsection (1) of section 7 of the Arbitration Act inasmuch as it says that 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. The MSMED Act not only provides for an arbitration even though there may not be an agreement for referring the dispute

between a "buyer" and a "supplier" to an arbitration, but also stipulates that the provisions of the Arbitration Act shall apply to such arbitration. There is nothing in the provisions of section 18 (3) of the MSMED Act to indicate that any particular provision of the Arbitration Act is intended to be excluded to an arbitration provided for under section 18 (3) of the Act."

57. We find that learned Single Judge, while considering Section 18(3) of MSMED Act, 2006 vis-a-vis Section 80 of Act, 1996 has not at all adverted to Section 18(4) of MSMED Act, 2006.

58. Next question considered was, should any exclusion be read because of Section 24 of MSMED Act, 2006 and it was answered by observing as under:

"It is obvious from a plain reading of the provisions of section 24 of the MSMED Act that overriding effect is given to the provisions of sections 15 to 23 thereof wherever any law is inconsistent with the provisions thereof. Indeed, the objective of the provisions of Chapter - V of the Act, which includes provisions of section 15 to 23, is to provide for an expedited and efficacious closure of a dispute, either by conciliation or by arbitration. But, from this alone should it be

inferred that a Facilitation Council could act both as a Conciliator and Arbitrator, merely because Section 18(3) of the MSMED Act stipulates that the Facilitation Council could take up the dispute for arbitration if the conciliation proceedings fail and a contrary intent is not obvious from the plain reading of the provisions of section 18 (3) of the Act."

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

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. ”

35. In *The Best Towers Pvt. Ltd* (supra), the Patna High Court in paragraphs 20, 21 and 22 observed as follows :

“20..... 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. Subsection (2) of Section 18 enjoins upon the Facilitation 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 Facilitation Council or reference of such conciliation to any Institution or center 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 Facilitation Council cannot act as an Arbitrator as in the present case when after having attempted conciliation proceedings and its termination in failure, the Facilitation 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, sub-

section (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.

21. The second reason why we differ from the view of the learned Single Judge is that the 2006 Act was enacted as a complete code in itself and it is for this reason that the authority to conciliate and arbitrate were enacted and

provided for in a different form for the promotion, development and facilitation of delayed payments arising out of disputes of small industries under the 2006 Act. The platform for resolution of disputes was, therefore, created under Section 18 of the 2006 Act in order to avoid the rigors and settlement of disputes at a pre-arbitration stage itself.

22. The status of the 2006 Act conferring the jurisdiction on the Facilitation Council to resolve disputes is further fortified by a bare perusal of sub-section (4) of Section 18 to either act as a Conciliator or Arbitrator in respect of a dispute anywhere in India. The aforesaid provision, therefore, also clearly rules out the possibility of reading a bar on the role of the Facilitation Council to act as an Arbitrator if it has performed the role of Conciliator. The argument of the learned counsel for the respondent petitioner, as accepted by the learned Single Judge, therefore, overlooks the aforesaid intention that can be easily gathered from a reading of the entire provisions of the 2006 Act, particularly the provisions of Section 18 and Section 24 thereof.”

36. In *Eden Exports Company* (supra), Division Bench of the Madras High Court at paragraph 22 observed as follows:

“22. A cursory reading of the aforesaid provision makes it clear that a conciliator could not act as an arbitrator. It is

no doubt true that sections 18(2), 18(3) and 18(4) have given dual role for the Facilitation Council to act both as Conciliators and Arbitrators. According to the learned counsel for the appellants, the Facilitation Council should not be allowed to act both as Conciliators and Arbitrators. This contention, though prima facie appears to be attractive, it is liable to be rejected on a closer scrutiny. Though the learned counsel would vehemently contend that the Conciliators could not act as Arbitrators, they could not place their hands on any of the decisions of upper forums of law in support of their contentions. As rightly pointed out by the learned single Judge, section 18(2) of MSMED Act has borrowed the provisions of sections 65 to 81 of the Arbitration and Conciliation Act for the purpose of conducting conciliation and, therefore, section 80 could not be a bar for the Facilitation Council to conciliate and thereafter arbitrate on the matter. Further the decision of the Supreme court in (1986) 4 SCC 537 (Institute of Chartered Accountants of India v. L.K. Ratna), on this line has to be borne in mind. One should not forget that the decision of the Facilitation Council is not final and it is always subject to review under Article 226 of the Constitution of India and, therefore, the appellants are not left helpless.”

37. In *M/s. Refex Energy Limited* (supra), the Division Bench of the

Madras High Court, while considering the challenge made to the validity of Section 18 of the Act of 2006 on the ground that the same is ultra vires Article 14 of the Constitution of India, which was earlier held to be valid in *M/s. Eden Exports Company* (supra), quoted with approval paragraph 20 thereof which is noticed already.

38. In *JMS Mining Services Pvt. Ltd.* (supra), one of the questions that had fallen for consideration of this Court was as to whether the Facilitation Council having entered into arbitration after it acted as conciliator, the entire arbitration proceeding by the Facilitation Council is vitiated. The question was answered at paragraph 7, in the following manner:

“7. Section 24 of the MSM Act provides that the provisions of Sections 15 to 23 of that Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, if the law relating to territorial jurisdiction, subject matter jurisdiction or pecuniary jurisdiction is referable to any other law and the provision of any other such law is inconsistent with the provisions of Sections 15 to 23 of the MSM Act, the provisions of the MSM Act, in particular, those contained in Sections 15 to 23 of that Act will have overriding effect over all such laws. This being the effect of Section 24 of the MSM Act, primacy to be given is to Section 18 of the MSM Act insofar as the case in hand is concerned. Section 18 opens up with yet another non-obstante clause and provides that any party to a dispute

may, with regard to any amount due under Section 17 of the MSM Act make a reference to the Chhattisgarh Facilitation Council. Section 17 of the MSM Act provides that for any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under Section 16. What therefore becomes available for dispute resolution proceedings provided in Section 18 of the MSM Act is the statutory eligibility to the amounts that could be treated as due under Section 17 read with Section 18 of the MSM Act. When the supplier has invoked the provisions of Section 18 of the MSM Act, the Chhattisgarh Facilitation Council is duty bound under sub-section (2) of Section 18 to conduct conciliation. The said sub-section read alongwith sub-section (3) of Section 18 of the MSM Act obliges the Chhattisgarh Facilitation Council to proceed to have arbitration in the event of conciliation failing. On failure of such conciliation, the Chhattisgarh Facilitation Council may either itself take up the dispute for arbitration or refer it to an institution or center providing alternative dispute resolution services for such arbitration. There is thus an incorporation by the relevant provisions of the A&C Act to govern the proceedings which would have commenced with the application of reference under Section 18 of the MSM Act. Once statutory sanction is

given to a particular authority which is the conciliator, to be, by itself or himself, the arbitrator, there cannot be any challenge to the arbitrator's authority on the ground of dual office or dual responsibility. The proceedings provided through the various sub-sections of Section 18 of the MSM Act operates notwithstanding any other law for the time being in force. Therefore, any inhibition in the realm of law relating to arbitration including the A&C Act, to a conciliator being an arbitrator in the same case, does not affect the arbitral proceedings under sub-sections (2) and (3) of Section 18 of the MSM Act. This being the net result of the analysis of the relevant provisions, we are of the view that the award made by the Chhattisgarh Facilitation Council under the MSM Act could be challenged only under the provisions of the A&C Act.”

39. In these decisions, view has been taken that Facilitation Council can act as arbitrator upon failure of conciliation proceeding.

40. Division Bench of this Court in ***JMS Mining Services Pvt. Ltd.*** (supra), had already held that any inhibition in the realm of law relating to arbitration including A & C Act, to a conciliator being an arbitrator in the same case, does not affect the arbitral proceeding under Section 18(2) and 18(3) of the Act of 2006. Though Section 80 of A & C Act was specifically not taken note of, the same will not make any difference as we find ourselves in agreement with the view taken in ***M/s Cummins Technologies India Pvt. Ltd.*** (supra), ***The Best Towers Pvt. Ltd*** (supra), ***M/s. Reflex Energy Limited***

(supra) and *Eden Exports Company* (supra). The reasonings assigned will also squarely apply with regard to the contentions urged by Mr. Shrivastava qua Sections 10, 12, 21, 23 & 24 of the A & C Act.

41. No provision has been brought to our notice by Mr. Shrivastava to demonstrate that Facilitation Council cannot arbitrate in regard to a claim towards price escalation while conducting arbitration and therefore, the submission is without any merit.

42. In view of the above discussion, we find no merit in this appeal and accordingly, the appeal is dismissed. The parties to this proceeding will appear before Facilitation Council on 15.06.2022. No cost.

Sd/-
(Arup Kumar Goswami)
CHIEF JUSTICE

Sd/-
(N.K.Chandravanshi)
JUDGE