AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 221 of 2022

- The Collector And District Mission Director, Office Of The District Project, Rajiv Gandhi Shiksha Mission (SSA), District Balrampur - Ramanujganj Chhattisgarh - 497119.

---- Petitioner

Versus

1. The Micro and Small Enterprises Facilitation Council, Chhattisgarh Director Of Industries, Chhattisgarh Udhyog Bhawan, Ring Road No.1, Telibandha, Raipur Chhattisgarh - 492001.

2. M/S Noybl Infotech Pvt. Ltd., Through Its Director, Sh. Vishal Rampuria, Having Its Office At - 54/602, Dangania, Near CSEB Office, Raipur, District - Raipur Chhattisgarh - 492013.

----Respondents

For Petitioner	:	Ms. Akanksha Jain,Advocate.
For Respondent No.2	:	Shri Ashutosh Singh Kachhawaha, Advocate.

Hon'ble Shri Justice Rakesh Mohan Pandey

Order on Board

11.03.2024

1) The petitioner has filed this petition seeking the following relief(s):-

> "**10.1** That the Hon'ble Court may kindly be pleased to call for the entire records pertaining to the case of the impugned order dated 16.2.2021 (Annexure P/1) from the possession of Respondent No.1, for its kind perusal.
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> **10.2** That the Hon'ble Court may kindly be pleased to quash the order dated 16.2.2021 pronounced on 29.5.2021 passed by respondent No.1 (Annexure P/1).
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> **10.3** 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."

2) The facts of the present case are that the petitioner is the District Mission Director of Rajiv Gandhi Shiksha Mission (SSA), District

Balrampur-Ramanujganj. The Mission is an autonomous registered Society. The petitioner entered into an agreement with respondent No. 2 for the sale and supply of a Biometric Unit (Finger Print Scanner and Tablet, Standalone or embedded) and for the creation of a website based District School Management Information System (MIS) at the District Level along with the operation, management and maintenance of the hardware and software for a period of one year. The agreement was made effective from 25.10.2014. A total of 1235 units of fingerprint scanners and 1235 units of tablets were purchased and installed as per the terms of the agreement. The work order was issued on 25.10.2024. Respondent No. 2 raised bills from time to time according to the terms of the contract. It is further pleaded in the Writ Petition that the petitioner was paid in accordance with the terms of the contract through various cheques. The details are as under:

> "The amount to the tune of Rs. 9,73,200/- via cheque no. 000334 dated 29/11/2014, Rs. 20,85,000/- via cheque no. 000335 dated 24/03/2015, Rs. 9,61,029/- via cheque no. 000339 dated 15/04/2015, Rs. 24,45,651/- via cheque no. 000341 dated 09/06/2015, Rs. 31,96,584/- via cheque no. 003448 dated 21/10/2015, Rs. 41,67,500/- via cheque no. 007626 dated 18/03/2016, Rs. 41,67,250/- via cheque no. 007629 dated 31/03/2016, Rs. 67,47,300/- via cheque no. 003444 dated 06/08/2016, Rs. 22,100,76/- through RTG from the office of District Education Officer and Rs. 29,27,167/- via cheque no. 003445 dated 26/08/2016 were paid to the Respondent No. 2 alongwith VAT and TDS, as full and final payment, in consonance with the agreement."

3) The biometric machines were installed by respondent No. 2 in four phases between the period from 01.01.2015 to 19.12.2015 and bills inclusive of the periodic management, maintenance and up-gradation costs were raised by respondent No. 2 and the same were cleared by the petitioner. Respondent No. 2 raised a bill in

relation to periodic maintenance from 01.05.2016 to 30.04.2017 to the tune of Rs. 75,00,000/- and for new parts of hardware of biometric machine Rs.21,12,708/-, a total of Rs.96,12,708/-. The bills were not cleared therefore respondent No. 2 approached respondent No. 1 i.e. Micro and Small Enterprises Facilitation Council, Chhattisgarh (MSEFC) for the resolution of dispute under Section 18(1) of the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act, 2006). Respondent No. 1 passed an award against the petitioner on 29.05.2021 and directed the petitioner to make payment of Rs. 96,12,708/-, the outstanding amount of the bills raised by respondent No. 2 and the interest part to the tune of Rs. 77,60,813/-, a total of Rs. 1,73,73,521/- within a period of 30 days. The petitioner has challenged the award passed by respondent No. 1.

4) Learned counsel for the petitioner would submit that the impugned order dated 16.02.2021 pronounced on 29.05.2021 has been passed by respondent No. 1 in a cryptic manner and without jurisdiction. It is further argued that the proceedings were conducted by respondent No. 1 against the principles of natural justice and public policy. The provisions of the MSMED Act, 2006 were not invoked and followed. It is also submitted that respondent No. 2 cannot be said to be a ‘supplier’ and the petitioner to be a ‘buyer’ within the definition contained under Sections 2(n) and 2(d) of the MSMED Act, 2006. It is also argued that no conciliation proceeding was conducted by respondent No. 1 according to provisions of Section 18 of the MSMED Act, 2006 and the Council proceeded for arbitration. The arbitration proceedings were

conducted by the same composition of the members of the Council who were in the conciliation proceedings. It is further contended that the conciliation and arbitration proceedings were concluded on the same day and respondent No. 1 subsumed the role of the arbitrator and concluded the arbitration proceedings. It is also contended that the conciliation proceedings were never terminated, no order was passed for the appointment of an arbitrator and no summons was issued to the petitioner in this regard. It is also argued that according to the mandate of Section 18(2) of the Act, 2006, the Council is under obligation to conduct conciliation proceedings in accordance with Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996'). It is also submitted that according to the mandate of Section 18(3) of the Act, 2006 in the event conciliation fails there should be specific order in this regard. Learned counsel for the petitioner would further argue that the order passed by respondent No. 1 cannot be termed as an award as the same has not been passed in accordance with the provisions of Section 18 of the Act, 2006.

5) In support of her contention, she placed reliance on the judgments passed by the Hon'ble Supreme Court in the matter of **Jharkhand Urja Vikas Nigam Limited vs. The State of Rajasthan and Ors.** reported in **2021 SCC Online SC 1257,** paras 10, 11 and 13 and the matter of **M/s. Vijeta Construction vs. M/s. Indus Smelters Ltd. And Anr.** reported in **2021 SCC Online SC 3436,** paras 9.1, 9.2, 9.3 and 11.

6) On the other hand, learned counsel for respondent No. 2 would oppose the submissions made by counsel for the petitioner. He

would submit that the writ petition under Article 226 of the Constitution of India is not maintainable as there is an efficacious alternative remedy to challenge the award by filing an application under Section 34 of the Act, 1996. He would further submit that the work order was issued in favour of respondent No. 2 on 25.10.2014. He would refer to clause B of the agreement dated 25.10.2014 which specifically deals with scope and says that operation, management and maintenance of the Hardware and Software for the period of one year from the date of completion of the Pilot project at Raipur Block or the date of completion of Scaled Up project in the entire District, as and when the circumstances fit so, further extendable based on project requirement. He would also submit that on 22.04.2015, another work order was issued to complete the scaled-up project at different sites in Balrampur District. Similarly, on 22.07.2015, the third work order was placed for the installation of 612 biometric machines across different sites in Balrampur District. On 21.10.2015, the fourth work order for the installation of 500 biometric attendance machines was issued by the petitioner. He would contend that by virtue of the above-stated work orders, a total of 1413 biometric attendance machines were installed by respondent No. 2. He would submit that the work order comprised of three components:-

> "**A** – The answering respondent has to supply and install the biometric attendance machine in the selected government schools of Balrampur District and the supplier would be entitled to get installation charges;
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> **B** – After installation, respondent No.2 would be entitled to get fees for software development; and,
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> **C** – The cost of annual periodic maintenance and up-gradation and respondent No. 2 would get its cost as per agreement."

7) Learned counsel for respondent No. 2 would further submit that respondent No. 2 installed devices and software from 01.05.2015 to 30.04.2017 and therefore, he raised bills for supply, periodic maintenance and up-gradation from 01.04.2015 to 27.12.2016 and thereafter, from the year 2016 to 2017. He would further submit that the claim of respondent No. 2 was denied, therefore, he approached respondent No. 1 according to Section 18(1) of the Act, 2006 being micro industry. He would also submit that respondent No. 2 was registered under the MSMED Act as a Micro Industry on 05.03.2010. The order sheet of respondent No. 1 would show that a claim was made under Section 18 of Act, 2006 by respondent No. 2 against the petitioner on 19.09.2019. On 03.10.2019, the summons was issued to the petitioner through speed post. The summons was issued according to the provisions of Section 18 of the Act, 2006 for conducting conciliation in the matter for resolving the disputes through MSEFC and if the conciliation fails in the disputed matter, the arbitration proceeding would be initiated and the award would be passed. The petitioner did not appear therefore another summons was issued on 07.01.2020 through speed post noting that the case is fixed for hearing on 20.01.2020 and the petitioner as well as respondent No. 2 was intimated to appear on the said date and time before the Council along with necessary documents/reply. On 31.01.2020, a similar summons was sent through speed post. On 03.12.2020, the parties were granted time to file a written statement / reply / application / correspondence / document. On 16.12.2020, again summons was issued to the parties. In the summons dated 28.01.2021, respondent No. 1

specifically observed in the note that the non-applicant is required to submit a written statement / response in respect of the applicant's application dated 27.05.2020 and thereafter, on 16.02.2021 / 29.05.2021 the award was passed. He would contend that sufficient opportunity was afforded to the petitioner and thereafter, an award has been passed. He would further contend that according to provisions of Section 19 of the Act, 2006 the petitioner has to deposit 75% of the award amount to challenge the award and just to avoid such mandatory provision, the petitioner has filed this petition.

8) In support of the submissions, he placed reliance on the judgments passed by the Hon'ble Supreme Court in the matter of **Tirupati Steels vs. Shubh Industrial Components and Anr.,** reported in (**2022) 7 SCC 429**, **Bhaven Construction vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited**, reported in **(2022) 1 SCC 75**, **Gujarat State Civil Supplies Corporation Ltd. vs. Mahakali Foods Pvt. Ltd. (Unit 2) and Anr.,** reported in **(2023) 6 SCC 401**.

9) I have heard learned counsel appearing for the parties and perused the documents present on the record.

10) The petitioner has challenged the award dated 16.02.2021 pronounced on 25.09.2021 on the ground that the opportunity of hearing was not afforded and the same cannot be termed as an 'award' according to provisions of Section 18(3) of MSMED Act, 2006.

11) From a perusal of the summons issued to the petitioner on 03.10.2019 according to provisions of Section 18 of the Act, 2006

for conducting conciliation it would be evident that there was specific noting that if the conciliation fails in the disputed matter, the arbitration proceeding would be initiated. On 07.01.2020, again summons was issued to the petitioner whereby the petitioner was granted time to file necessary documents/reply. On 31.01.2020, a similar summons was again sent through speed post. On 03.12.2020, the parties were granted time to file a written statement/ reply/ application/ correspondence/ document. Thereafter, the summons was again issued on 16.12.2020. In the summons dated 28.01.2021, respondent No. 1 specifically observed in the note that the non-applicant is required to submit a written statement / response in respect to the applicant's application dated 27.05.2020 and thereafter, the award was passed.

12) In the matter of **Jharkhand Urja Vikas Nigam Limited (supra),** the Hon'ble Supreme Court set aside the impugned arbitral award as the entire proceeding was conducted by the Council without affording any opportunity of hearing and the procedure contemplated under Section 18 of the MSMED Act, 2006 was not complied with. In the aforesaid matter, the Council issued a summons on 18.07.2012 for the appearance of the appellant before the Council on 06.08.2012 and on 06.08.2012 itself the award was passed. In relevant paragraphs 2, 10, 11 & 13, it was observed and held as under:-

> "**2**. The appellant herein, which is the successor company of erstwhile Jharkhand State Electricity Board, entered into a contract with the 3rd respondent - M/s. Anamika Conductors Ltd., Jaipur, for supply of ACSR Zebra Conductors. Respondent No.3 claiming to be a small scale industry, has approached the Rajasthan Micro and Small Enterprises Facilitation Council, claiming an amount of Rs.74,74,041/- towards the principal amount of bills and an amount of Rs.91,59,705.02 paise towards interest. On the

ground that the appellant has not responded to earlier notices, the Council issued summons dated 18.07.2012 for appearance of the appellant before the Council on 06.08.2012. Only on the ground that on 06.08.2012 the appellant has not appeared, the order dated 06.08.2012 was passed by the Council directing the appellant to make the payment to the 3rd respondent, as claimed, within a period of thirty days from the date of the order.

10. 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.

11. If the appellant had not submitted its reply at the conciliation stage, and failed to appear, the Facilitation Council could, at best, have recorded the failure of conciliation and proceeded to initiate arbitration proceedings in accordance with the relevant provisions of the Arbitration and Conciliation Act, 1996, to adjudicate the dispute and make an award. Proceedings for conciliation and arbitration cannot be clubbed.

13. The order dated 06.08.2012 is a nullity and runs contrary not only to the provisions of MSMED Act but contrary to various mandatory provisions of Arbitration and Conciliation Act, 1996. The order dated 06.08.2012 is patently illegal. There is no arbitral award in the eye of law. It is true that under the scheme of the Arbitration and Conciliation Act, 1996 an arbitral award can only be questioned by way of application under Section 34 of the Arbitration and Conciliation Act, 1996. At the same time when an order is passed without recourse to arbitration and in utter disregard to the provisions of Arbitration and Conciliation Act, 1996, Section 34 of the said Act will not apply. We cannot reject this appeal only on the ground that appellant has not availed the remedy under Section 34 of the Arbitration and Conciliation Act, 1996. The submission of the learned senior counsel appearing for the 3rd respondent that there was delay and laches in filing writ petition also cannot be accepted. After 06.08.2012 order, the appellant after verification of the records has paid an amount of Rs.64,43,488/- on 22.01.2013 and the said amount was received by the 3rd respondent without any protest. Three years thereafter it made an attempt to execute the order in Execution Case No.69 of 2016 before the Civil Judge, Ranchi, which ultimately ended in dismissal for want of territorial jurisdiction, vide order dated 31.01.2017. Thereafter S.B. Civil Writ Petition No.11657 of 2017 was filed questioning the order dated 06.08.2012 before the Rajasthan High Court. In that view of the matter

> it cannot be said that there was abnormal delay and laches on the part of the appellant in approaching the High Court. As much as the 3rd respondent has already received an amount of Rs.63,43,488/- paid by the appellant, without any protest and demur, it cannot be said that the appellant lost its right to question the order dated 06.08.2012. Though the learned counsel appearing for the respondents have placed reliance on certain judgments to support their case, but as the order of 06.08.2012 was passed contrary to Section 18(3) of the MSMED Act and the mandatory provisions of the Arbitration and Conciliation Act, 1996, we are of the view that such judgments would not render any assistance to support their case."

13) The facts of the present case are distinguishable from the facts of **Jharkhand Urja Vikas Nigam Limited (supra).** In the present case, despite the service of summons, the petitioner did not turn up, therefore, the conciliation proceeding was closed, and the arbitration proceeding was initiated and thereafter an award was passed.

14) In the matter of **M/s Vijeta Construction (supra),** while dealing with a similar issue the Hon'ble Supreme Court in paragraphs 9.1, 9.2, 9.3 and 11 held as under:

> "**9.1** Therefore as per the scheme of the MSMED Act when there is a dispute between the micro and small enterprises – supplier and buyer, the same is required to be resolved by following the procedure as prescribed under Section 18 of the MSMED Act, reproduced hereinabove. As observed hereinabove, the MSMED Act is a Special Act and as per Section 24 of the MSMED Act, the provisions of Section 15 to 23 shall have overriding effect notwithstanding inconsistent therewith contained in any other law for the time being in force. Therefore, Section 18 of the MSMED Act would have overriding effect over any other law for the time being in force including the Arbitration Act (to the extent inconsistent) and therefore if there is any dispute between the parties governed by the MSMED Act the said dispute has to be resolved only through the procedure as provided under Section 18 of the MSMED Act. As per Sub-Section (1) of Section 18, 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, may approach by way of a reference/ application to the Micro and Small Enterprises Facilitation Council. As per Sub-Section (2) of Section 18, on receipt of a reference under sub-section (1), the Council **shall** have to resolve the dispute through conciliation either by the

Council itself or seek the assistance of any institution or centre providing alternate dispute resolution (ADR) services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply to such a dispute as if the conciliation was initiated under Part III of the Arbitration Act. Thus at the stage of conciliation the council/conciliator have to bear in mind the provisions of sections 65 to 81 of the Arbitration Act, which read as under:—

> "65. Submission of statements to conciliator.—(1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party (2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party. (3) At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate. Explanation.—In this section and all the following sections of this Part, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.
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> 66. Conciliator not bound by certain enactments.—The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).
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> 67. Role of conciliator.—(1) The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. (2) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. (3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute. (4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

68. Administrative assistance.—In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

69. Communication between conciliator and parties. —(1) The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately. (2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

70. Disclosure of information.—When the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate: Provided that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

71. Co-operation of parties with conciliator.—The parties shall in good faith co-operate with the conciliator and, in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

72. Suggestions by parties for settlement of dispute. —Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

73. Settlement agreement.—(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations. (2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement. (3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively. (4) The

conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

74. Status and effect of settlement agreement.—The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

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.

76. Termination of conciliation proceedings.—The conciliation proceedings shall be terminated— (a) by the signing of the settlement agreement by the parties, on the date of the agreement; or (b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or (c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or (d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

77. Resort to arbitral or judicial proceedings.—The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

78. Costs.—(1) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties. (2) For the purpose of sub-section (1), “costs” means reasonable costs relating to— (a) the fee and expenses of the conciliator and witnesses requested by the conciliator with the consent of the parties; (b) any expert advice requested by the conciliator with the consent of the parties; (c) any assistance provided pursuant to clause (b) of sub-section (2) of section 64 and section 68. (d) any other expenses incurred in connection with the conciliation proceedings and the settlement

agreement. (3) The costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.

79. Deposits.—(1) The conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in sub-section(2) of section 78 which he expects will be incurred. (2) During the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party. (3) If the required deposits under sub-sections (1) and (2) are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration. (4) Upon termination of the conciliation proceedings, the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.

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.

81. Admissibility of evidence in other proceedings.—The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,— (a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute; (b) admissions made by the other party in the course of the conciliation proceedings; (c) proposals made by the conciliator; (d) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator."

9.2 As per Sub-Section (3) of Section 18 after conciliation fails under Sub-Section (2) of Section 18 of the MSMED Act, and conciliation initiated under sub-section (2) is not successful, conciliation 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 ADR services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 shall then apply to the dispute as if

the arbitration was in pursuance of an arbitration agreement referred to in subsection (1) of section 7 of that Act. Therefore only after the procedure under Sub-Section (2) of Section 18 is followed and the conciliation fails and then and then only the arbitration proceedings commences and thereafter the provisions of the Arbitration Act shall then apply.

9.3. In light of the aforesaid statutory provisions under the MSMED Act as well as the Arbitration Act, the order passed by the Facilitation Council dated 10.01.2012 which was the subject matter before the High Court is required to be tested. From the order passed by the Facilitation Council rejecting/dismissing the reference/application and the stage at which such an order was passed we are of the opinion that the Facilitation Council has not followed the procedure as was required to be followed under Section 18 of the MSMED Act read with Sections 65 to 81 of the Arbitration Act, as reproduced hereinabove. It is required to be noted that at the initial stage the Facilitation Council was performing the duty as a Conciliator for which the provisions of Sections 65 to 81 shall be applicable. It is true that at the stage of conciliation, the role of the conciliator (Facilitation Council) is to assist the parties to reach an amicable settlement of their dispute as provided under Section 67 of the Arbitration Act. At that stage the parties are not required to lead the evidence and at that stage the role of the conciliator is not to adjudicate the dispute between the parties, but to reach an amicable settlement of the dispute between the parties. Once the conciliation fails thereafter as per Sub-Section (3) of Section 18 of the MSMED Act, the arbitration proceedings commences and the conciliation proceedings stands terminated and thereafter the Facilitation Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing ADR services for such arbitration and the provisions of the Arbitration Act shall then apply to the dispute as if the arbitration is in pursuance of an arbitration agreement referred to Sub-Section (1) of Section 7 of the Arbitration Act. At that stage and thereafter the Facilitation Council shall act as an Arbitrator and the provisions of Arbitration Act shall then apply to the dispute as if arbitration was in pursuance of an arbitration agreement referred to Sub-Section (1) of Section 7 of the Arbitration Act including the appeal under Section 34 to the district court against the award declared by the Facilitation Council or any institution or centre providing alternate dispute resolution (ADR) services to whom the dispute is referred for arbitration.

11.Now so far as the observations made by the Facilitation Council, Chhattisgarh, Raipur in order dated 10.01.2012 thattheFacilitation Council has been constituted with limited objectandjurisdiction and the council has no jurisdiction to make thoroughenquiry and to take evidence is concerned, the aforesaid cannot beaccepted. As per the scheme of the MSMED Act, the FacilitationCouncil has a dual role to play,

> one as a Conciliator as per SubSection (2) of Section 18 a nd thereafter in case the conciliation isunsuccessful as an Arbitrator as per SubSection (3) of Section 18. As a Conciliator the role of the Conciliator Facilitation Council is, as observed hereinabove, to assist the parties i n anindependent and impartial manner in their attempt to r each an amicable settlement of their dispute and at thatstagetheFacilitation Council is not required to adjudicat e the dispute. Atthat stage the Facilitation Council has no j urisdiction to make thorough enquiry and takeevidence.However,oncetheconciliation fails and the set tlement is not arrived at during the conciliation and thereafter when the arbitration proceedings commences as per SubSection (3) of Section 18, the Coun cil asan arbitrator shall have all the powers of the arbitrator as areavailable under the provisions of the Arbitration Act. Therefore theFacilitation Council is not right in observing th at the council hasno jurisdiction to make thorough enquiry and take evidence and that the council has been constituted with limited object and jurisdiction."

15) In the matter of **Vijeta Construction (supra)** the Hon'ble Supreme Court has held that the dispute between the supplier and buyer should be resolved by following the procedure as prescribed under Section 18 of the MSMED Act, 2006. It is further observed that the MSMED Act, 2006 is a Special Act and as per Section 24 of the MSMED Act, the provisions of Sections 15 to 23 of the MSMED Act shall have overriding effect notwithstanding inconsistent therewith contained in any other law for the time being in force. Sections 65 to 81 of the Act, 1996 shall apply to such a dispute. If conciliation is not successful, it would stand terminated without any settlement between the parties and the Council shall either take up the dispute for arbitration or refer it to any institution. In the present case, the petitioner did not appear, therefore, the Council itself took up the dispute for arbitration and again summons was issued to the petitioner but he did not appear. It is not a case where no opportunity was afforded to the petitioner and the award was passed, therefore the judgment cited by the petitioner is of no help.

16) Some provisions of the Micro, Small and Medium Enterprises Development Act, 2006 are quoted herein below for reference which would be relevant for the disposal of this petition:-

> **Section 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.
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> (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 ittoany 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.
>
> **Section 19: Application for setting aside decree, award or order:-**
>
> No application for setting aside any decree, award or

> other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent. of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:
>
> Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case, subject to such conditions as it deems necessary to impose.

17) From a perusal of the documents annexed to the writ petition and the return filed by the respondents, it is quite vivid that the Council has followed the procedure contemplated under Section 18 of the MSMED Act, 2006. With regard to the issue of jurisdiction, there is no such provision which bars the jurisdiction of the Facilitation Council from arbitrating the dispute between the parties.

18) In the matter of **Tirupati Steels (supra),** the Hon'ble Supreme Court observed and held that the High Court permitting the proceedings under Section 34 of the Arbitration Act, 1996 without insistence for making a pre-deposit of 75% of the awarded amount is unsustainable and the same deserves to be quashed. It reads thus:-

> **8.** The question which is posed for consideration of this Court is, whether, the pre-deposit of 75% of the awarded amount as per Section 19 of the MSMED Act, 2006, while challenge to the award under Section 34 of the Arbitration Act, 1996, is made mandatory or not, is now no longer res integra in view of the decision of this Court in *Gujarat State Disaster Management Authority* v. *Aska Equipments Ltd., (2022) 1 SCC 61* While interpreting Section 19 of the MSMED Act, 2006 and after taking into consideration the earlier decision of this Court in *Goodyear India Ltd.* v. *Norton Intech Rubbers (P) Ltd., (2012) 6 SCC 345,* it is observed and held that the requirement of deposit of 75% of the amount in terms of the award as a pre-deposit as

per Section 19 of the MSMED Act, is mandatory. It is also observed that however, at the same time, considering the hardship which may be projected before the appellate court and if the appellate court is satisfied that there shall be undue hardship caused to the appellant/applicant to deposit 75% of the awarded amount as a pre-deposit at a time, the court may allow the pre-deposit to be made in instalments. Therefore, it is specifically observed and held that pre-deposit of 75% of the awarded amount under Section 19 of the MSMED Act, 2006 is a mandatory requirement.

9. In para 13 of the aforesaid judgment, *(2022) 1 SCC 61,* it is observed and held as under : (*Aska Equipments case, (2022) 1 SCC 61* p. 64, para 13)

> "*13*. On a plain/fair reading of Section 19 of the MSME Act, 2006, reproduced hereinabove, at the time/before entertaining the application for setting aside the award made under Section 34 of the Arbitration and Conciliation Act, the appellant-applicant has to deposit 75% of the amount in terms of the award as a pre-deposit. The requirement of deposit of 75% of the amount in terms of the award as a pre-deposit is mandatory. However, at the same time, considering the hardship which may be projected before the appellate court and if the appellate court is satisfied that there shall be undue hardship caused to the appellant-applicant to deposit 75% of the awarded amount as a pre-deposit at a time, the court may allow the pre-deposit to be made in instalments."

10. In view of the aforesaid decision of this Court in *Aska Equipments case, (2022) 1 SCC 61*, the impugned order passed by the High Court permitting the proceedings under Section 34 of the Arbitration Act, 1996 without insistence for making pre-deposit of 75% of the awarded amount is unsustainable and the same deserves to be quashed and set aside.

19) In the matter of **Bhaven Construction (supra)** the Hon'ble Supreme Court observed and held thus**:-**

> **17.** Thereafter, Respondent 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Articles 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as

> "**34.** ***Application for setting aside arbitral award***.— (1) *Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)*".
>
> (emphasis supplied)
>
> The use of term "only" as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.

18. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a constitutional right. In *Nivedita Sharma* v. *COAI, (2011) 14 SCC 337,* this Court referred to several judgments and held : (SCC p. 343, para 11)

> "*11*. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation — *L. Chandra Kumar* v. *Union of India, (1997) 3 SCC 261*. *However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy*. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

20) In the matter of **Bhaven Construction (supra),** the Hon'ble Supreme Court in clear terms held that the challenge to the ruling of the arbitrator passed under Section 16 of the Act, 1996 under Article 226/227 of the Constitution of India is not permissible except in exceptionally rare circumstances and discretion cannot be exercised to allow judicial interference beyond procedure established under the Act, 1996.

21) In the matter of **Gujarat State Civil Supplies Corpn. Ltd. (supra)** it was observed and held by the Hon'ble Supreme Court that the MSMED Act, 2006 being a special law and the Arbitration Act, 1996 being a general law, the provisions of the MSMED Act would have precedence over or prevail over the Arbitration Act, 1996. It was also observed and held that even if the Arbitration Act, 1996 is treated as a special law, then also the MSMED Act, 2006 having been enacted subsequently in point of time i.e. in 2006, it would have an overriding effect, more particularly in view of Section 24 of the MSMED Act, 2006 which specifically gives an effect to the provisions of Sections 15 to 23 of the Act over any other law for the time being in force, which would also include the Arbitration Act, 1996. It reads thus:-

> **42.** Thus, the Arbitration Act, 1996 in general governs the law of Arbitration and Conciliation, whereas the MSMED Act, 2006 governs specific nature of disputes arising between specific categories of persons, to be resolved by following a specific process through a specific forum. Ergo, the MSMED Act, 2006 being a special law and the Arbitration Act, 1996 being a general law, the provisions of the MSMED Act would have precedence over or prevail over the Arbitration Act, 1996. In *Silpi Industries case, (2021) 18 SCC 79,* also, this Court had observed while considering the issue with regard to the maintainability and counter-claim in arbitration proceedings initiated as per Section 18(3) of the MSMED Act, 2006 that the MSMED Act, 2006 being a special legislation to protect MSMEs by setting out a statutory mechanism for the payment of interest on delayed payments, the said Act would override the provisions of the Arbitration Act, 1996 which is a general legislation. Even if the Arbitration Act, 1996 is treated as a special law, then also the MSMED Act, 2006 having been enacted subsequently in point of time i.e. in 2006, it would have an overriding effect, more particularly in view of Section 24 of the MSMED Act, 2006 which specifically gives an effect to the provisions of Sections 15 to 23 of the Act over any other law for the time being in force, which would also include the Arbitration Act, 1996.

22) In the matter of **M/s India Glycols Limited & Anr Vs. Micro and**

Small Enterprise Facilitation Council, Civil appeal No. 7491/2023 the Hon'ble Supreme Court clearly held that the deviation from statutory provisions is not permissible. It was a case where the Facilitation Council passed an award and a Writ Petition under Article 226/227 of the Constitution of India was filed directly challenging such award, which was dismissed by the High Court. The Hon'ble Supreme Court in para-10 to 13 held as under:-

> **"10.** In terms of Section 19, an application for setting aside an award of the Facilitation Council cannot be entertained by any court unless the appellant has deposited seventy-five per cent of the amount in terms of the award. In view of the provisions of Section 18(4), where the Facilitation Council proceeds to arbitrate upon a dispute, the provisions of the Act of 1996 are to apply to the dispute as if it is in pursuance of an arbitration agreement under sub-section (1) of Section 7 of that Act. Hence, the remedy which is provided under Section 34 of the Act of 1996 would govern an award of the Facilitation Council. However, there is a super added condition which is imposed by Section 19 of MSMED Act 2006 to the effect that an application for setting aside an award can be entertained only upon the appellant depositing with the Council seventy-five per cent of the amount in terms of the award. Section 19 has been introduced as a measure of security for enterprises for whom a special provision is made in the MSMED Act by Parliament. In view of the provisions of Section 18(4), the appellant had a remedy under Section 34 of the Act of 1996 to challenge the award which it failed to pursue.
>
> **11.** In the judgment of this Court in Gujarat State Civil Supplies Corporation Limited (supra), a two-Judge Bench of the Court has observed, in the course of drawing its conclusions, that: "The proceedings before the Facilitation Council/ institute/ Centre acting as an arbitrator/Arbitral Tribunal under Section 18(3) of the MSMED Act 2006 would be governed by the Arbitration Act, 1996."
>
> **12.** The appellant failed to avail of the remedy under Section 34. If it were to do so, it would have been required to deposit seventy-five per cent of the decretal amount. This obligation under the statute was sought to be obviated by taking recourse to the jurisdiction under Articles 226/227 of the Constitution. This was clearly impermissible.
>
> **13**. For the above reasons, we are in agreement with the view of the Division Bench of the High Court that the writ petition which was instituted by the appellant was not

maintainable.”

23) Taking into consideration the facts discussed above and the law laid down by the Hon’ble Supreme Court, in my considered opinion, no case is made out for interference.

24) Accordingly, this petition fails and is hereby **dismissed**. However, the petitioner would be at liberty to avail the remedy available under the law.

Sd/-

(Rakesh Mohan Pandey)
Judge

Nimmi