

REPORTABLEIN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**CIVIL APPEAL NO.5934 OF 2021**

M/s Vijeta Construction

..Appellant (S)

VERSUS

M/s Indus Smelters Ltd. & Anr.

..Respondent (S)

ORDER**M. R. Shah, J.**

Delay condoned.

Leave granted.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 12.03.2012 passed by the High Court of Chhattisgarh at Bilaspur in writ petition (c) No.418 of 2012, by which the High Court has dismissed the said writ petition as not maintainable in view of remedy available to the original petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act), the original respondent No.1 has preferred the present civil appeal.

2. That the dispute arose between the parties which could not be resolved. The case on behalf of the respondent herein was that it supplied TMT bar to the appellant herein valuing Rs.2,44,92,846/- out of which it received Rs.1,24,50,000/-. The appellant had not made payment of the remaining amount, therefore, the respondent being supplier approached the Chairman, Micro Small and Medium Enterprises Facilitation Council (hereinafter referred to as the Facilitation Council) constituted under the Micro Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the MSMED Act) for small scale industries.
3. By order dated 10.01.2012 the Facilitation Council closed the said proceedings by observing that Facilitation Council has been constituted with limited object and jurisdiction and the Facilitation Council has no jurisdiction to make thorough enquiry and take evidence and decide truth about the challenged document. The Facilitation Council also observed that parties are at liberty to move before the competent court.
4. Feeling aggrieved and dissatisfied with the order dated 10.01.2012, the respondent herein preferred writ petition (C) No.418 of 2012 before the High Court of Chhattisgarh at Bilaspur.

By the impugned order, the High Court has dismissed the said writ petition by observing that order passed by the Facilitation Council rejecting the application can be said to be an award under Section 18 of the MSMED Act and as per Section 18 (2) and (3), the provision of the Arbitration Act shall apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to Sub-Section (1) of Section 7 of the MSMED Act and therefore such an order would be amenable to the appeal under Section 34 of the Arbitration Act before the district court. Thus by the impugned order the High Court has dismissed the said writ petition on the ground of availability of an alternate remedy of filing an appeal against the order passed by the Facilitation Council dated 10.01.2012.

5. Feeling aggrieved and dissatisfied with the impugned order passed by the High Court dismissing the writ petition preferred by the respondent herein however holding that the order passed by the Facilitation Council rejecting the application can be said to be an award and therefore as per the provision of the Arbitration Act shall apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to Sub-Section (1) of Section (7) of the Arbitration Act and therefore against such an order appeal

under Section 34 of the Arbitration Act shall be maintainable, the original respondent has preferred the present appeal.

6. Learned counsel appearing on behalf of the appellant has vehemently submitted that in the facts and circumstances of the case the order of the Facilitation Council impugned before the High Court cannot be said to be an award as by such an order the Facilitation Council did not conclusively settle the dispute and rejected the application simply on the ground of jurisdiction and on the ground that the Facilitation Council has no jurisdiction to make thorough enquiry and take evidence and decide the truth about the challenged document.
 - 6.1 It is submitted by the counsel appearing on behalf of the appellant that therefore when the order passed by the Facilitation Council impugned before the High Court cannot be said to be an award, the same was not amenable to the appeal before the district court under Section 34 of the Arbitration Act.
7. Per contra learned counsel appearing on behalf of the respondent – original applicant has vehemently submitted that the order passed by the Facilitation Council rejecting the application can be said to be an “award” and therefore such an order of rejecting the claim petition/application before the Facilitation Council can be

challenged before the district court under Section 34 of the Arbitration Act.

7.1 It is further submitted that as such the Facilitation Council was not justified in observing that it has no jurisdiction to make thorough enquiry and take evidence and that the Facilitation Council has been constituted with limited object and jurisdiction. Heavy reliance is placed on Section 27 of the Arbitration Act. It is submitted that the Facilitation Council has all the jurisdiction which are available to the Arbitrator under the provisions of the Arbitration Act including taking the evidence.

8. We have heard the learned counsel appearing on behalf of the respective parties at length.

9. At the outset, it is required to be noted and it is not in dispute that the parties are governed by the provisions of MSMED Act. As per the MSMED Act if there is any dispute between the parties the dispute is required to be resolved by following the procedure as prescribed under Section 18 of the MSMED Act. It cannot be disputed that the MSMED Act being a Special Act the procedure as prescribed under the MSMED Act is required to be followed if there is any dispute between the parties. Section 15 of the MSMED Act provides for liability of the buyer to make payment to micro small and medium enterprises. Section 16 of the MSMED

Act provides for the interest payable. Section 17 of the MSMED Act provides 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. Section 18 of the MSMED Act provides for resolution of the dispute between the supplier – micro and small enterprises and the buyer. Section 19 of the MSMED Act further provides that 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.

Section 15 to Section 19 of the MSMED Act which are relevant for our purpose read as under:-

15. Liability of buyer to make payment.—Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day: Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

16. Date from which and rate at which interest is payable.—Where any buyer fails to make payment of the amount

to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

17. Recovery of amount due.—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.

18. Reference to Micro and Small Enterprises Facilitation Council.—(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council. (2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act. (3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act. (4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as

an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India. (5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.

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.

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.

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).

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 sub-section (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.

10. In the present case no such procedure has been followed by the Facilitation Council as required to be followed under Section 18 of

the MSMED Act. It is to be noted that the proceedings before the Facilitation Council/Conciliator was at the stage of conciliation. It is true that at the stage of conciliation under Sub-Section (2) of Section 18, the conciliator (Facilitation Council) was not required to permit the parties to lead the evidence and adjudicate the dispute. At the same time, if there was no amicable settlement during the conciliation or under Sub-Section (2) of Section 18 then the arbitration proceedings were required to be initiated as provided under Sub-Section (3) of Section 18 which have not been initiated in the present case. Therefore, as such, the matter is required to be remitted to the Facilitation Council to follow the procedure under Section 18 of the MSMED Act by quashing and setting aside the order dated 10.01.2012 passed by the Facilitation Council as well as the impugned judgment and order passed by the High Court in writ petition No.418 of 2012.

11. Now so far as the observations made by the Facilitation Council, Chhattisgarh, Raipur in order dated 10.01.2012 that the Facilitation Council has been constituted with limited object and jurisdiction and the council has no jurisdiction to make thorough enquiry and to take evidence is concerned, the aforesaid cannot be accepted. As per the scheme of the MSMED Act, the Facilitation Council has a dual role to play, one as a Conciliator as per Sub-

Section (2) of Section 18 and thereafter in case the conciliation is unsuccessful as an Arbitrator as per Sub-Section (3) of Section 18. As a Conciliator the role of the Conciliator - Facilitation Council is, as observed hereinabove, 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 proceedings commences as per Sub-Section (3) of Section 18, the Council as an arbitrator shall have all the powers of the arbitrator as are available under the provisions of the Arbitration Act. Therefore the Facilitation Council is not right in observing that the council has no jurisdiction to make thorough enquiry and take evidence and that the council has been constituted with limited object and jurisdiction.

12. In view of the above and for the reasons stated above, the order passed by the Micro Small and Medium Enterprises Facilitation Council, Chhattisgarh, Raipur dated 10.01.2012 in case

No.26/MSTFC/2009 as well as the impugned judgment and order passed by the High Court in writ petition (c) No.418 of 2012 are hereby quashed and set aside. Matter is remitted to the Micro Small and Medium Enterprises Facilitation Council, Chhattisgarh, Raipur to decide case No. 26/MSTFC/2009 afresh in accordance with law and on its own merits after following the procedure as required under Section 18 of the MSMED Act and as per the observations made hereinabove. As the dispute is very old, the Facilitation Council is directed to complete the proceedings within a period of six months from the date of receipt of this order. There shall be no order as to costs.
Pending applications, if any stand disposed of.

.....J.
(M. R. SHAH)

.....J.
(A. S. BOPANNA)

New Delhi,
September 23, 2021

ITEM NO.7 Court 13 (Video Conferencing)

SECTION IV-C

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 5934/2021 @ SLP (C) No. 32052/2013

M/S VIJETA CONSTRUCTION

Appellant(s)

VERSUS

M/S. INDUS SMELETTERS LTD & ANR.

Respondent(s)

IA No. 4/2013 - APPLN. FOR BRINGING ON RECORD SUBSEQUENT EVENT
IA No. 1/2013 - CONDONATION OF DELAY IN FILING
IA No. 2/2013 - CONDONATION OF DELAY IN REFILEING / CURING THE
DEFECTS
IA No. 3/2013 - EXEMPTION FROM FILING O.T.
IA No. 5/2014 - STAY APPLICATION)

Date : 23-09-2021 These matters were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE M.R. SHAH
HON'BLE MR. JUSTICE A.S. BOPANNA

For Appellant(s) Ms. Akanksha Sisodia, Adv.
Mr. Anup Jain, AOR

For Respondent(s) Mr. Nitin Gaur, Adv.
Mr. Ranjit Kumar Sharma, AOR

UPON hearing the counsel the Court made the following
O R D E R

Delay condoned.

Leave granted.

The Appeal is disposed of in terms of the signed reportable
Order.

(R. NATARAJAN)
ASTT. REGISTRAR-cum-PS

(NISHA TRIPATHI)
BRANCH OFFICER

(Signed reportable Order is placed on the file)