

(2015) 03 BOM CK 0165

In the Bombay High Court

Case No : Arbitration Petition No. 990 of 2014 and Notice of Motion (L) No. 1923 of 2014

Bharat Sanchar Nigam Ltd.

APPELLANT

Vs

The Maharashtra Micro and Small Scale Enterprises
Facilitation Council and Additional Commissioner (Revenue)
and Others

RESPONDENT

Date of Decision : 31-03-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 13, 14, 15, 15
Companies Act, 1956 — Section 617
Micro, Small and Medium Enterprises Development Act, 2006 — Section 18, 18 (3),
18(3)

Citation : (2015) 3 ABR 659

Hon'ble Judges : S.J. Kathawalla, J.

Bench : Single Bench

Advocate : Gautam Ankhad instructed by Shukla and Associates, for the Appellant

Judgement

S.J. Kathawalla, J.—BSNL-Bharat Sanchar Nigam Ltd. (BSNL) is a Company duly incorporated under Section 617 of the Companies Act 1956, and is registered as a Central Public Sector Enterprise providing telecom services in India, except Mumbai and Delhi. Respondent No. 1-The Maharashtra Micro and Small Scale Enterprises Facilitation Council and Additional Commissioner (Revenue), is a statutory functionary established under the Micro, Small Medium Enterprises Development Act, 2006 ("the Council"). The Respondent No. 2-- M/s. People Infocom Pvt. Ltd. ("PIPL") is a Company incorporated under the Companies Act, 1956. BSNL has entered into Agreements with PIPL for providing add on services to the customers of BSNL, details of which are set out hereinafter.

2. The present Petition is filed by BSNL under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 ("the Act").

3. The facts which have led to the filing of the present Petition are as under:

3.1 On 9th November, 2004, BSNL entered into an Agreement with PIPL whereunder PIPL agreed to provide SMS based Value Added Service to Cellular Mobile Subscribers of BSNL. This Agreement was non-exclusive and on revenue sharing basis. The said Agreement dated 9th November 2004 was renewed from time to time, i.e. on 2nd December 2005, 4th December 2006, 6th November 2007, 6th November 2008, 13th January 2009 and 23rd April 2010. Clause 11 of the Agreement dated 9th November 2004 provided that the disputes between the Parties shall be resolved by arbitration through a sole arbitrator appointed by the Chief Managing Director of BSNL.

3.2 Another Agreement dated 23rd November 2004 was also executed by and between BSNL and PIPL whereunder PIPL agreed to provide MMS/GPRS based value added services to the subscribers of BSNL. The Agreement dated 23rd November 2004 was renewed from time to time by renewal letters dated 24th November 2006, 23rd November, 2007, 1st March 2008, 16th April 2008 and 22nd August, 2008. This Agreement too provided that the disputes between the Parties would be resolved by arbitration through a sole arbitrator appointed by the Chief Managing Director of BSNL. The Agreements dated 9th November 2004 and 23rd November 2004 along with the renewal agreements/letters shall hereinafter be referred to as "the said Agreements".

3.3 Since the year 2004, PIPL submitted its monthly bills for services provided by it to BSNL for payment. BSNL scrutinized PIPL's bills and made payment of the bills in accordance with the said Agreements. Amounts which were not admissible were deducted and balance amounts as admissible were paid to PIPL from time to time. PIPL disputed the short payments and raised a claim of about Rs. 2.57 crores since the year 2005 in respect of the said Agreements. According to BSNL, on 12th December 2008, there was a conciliation meeting held between BSNL and PIPL with regard to short payment and Call Detailed Records (CDR's) were exchanged.

3.4 PIPL through its Advocates' letter dated 6th April 2009 invoked the arbitration clause contained in the said Agreements. On 10th February 2010, PIPL withdrew the letter/notice dated 6th April, 2009 invoking arbitration and clearly recorded that "...please note that the letter/notice dated 6th April 2009 hereby stands withdrawn/revoked/cancelled without any liability to you. Our clients however, state that the withdrawal of the notice/letter dated 6th April, 2009 is without prejudice to any of their rights that they may have under the said Agreements."

3.5 Post the withdrawal of the arbitration notice, BSNL and PIPL exchanged correspondence between the period 4th February 2011 and 14th March 2012, whereunder PIPL sought payment of its dues from BSNL and BSNL denied and disputed the claim of PIPL.

3.6 On 28th May 2012, PIPL forwarded its Application [under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act")], to

the Council seeking the following relief:

"This Facilitation Council/appropriate authority be pleased to allow this application and direct BSNL to pay a sum of Rs. 2,98,07,510 (Two Crores Ninety eight lacs Seven thousand five hundred ten) towards the outstanding invoices along with interest of 225,73,308 (Two crores Twenty Five Lacs Seventy Three Thousand Three Hundred and Eight) calculated @ 18% p.a. till 31st March 2012 in accordance with MSMED Act. We request that further interest be allowed till actual payment and realization of the amount.

3.7 In paragraph 4 (c) and Paragraph 6 of the said Application, PIPL stated as follows:

" 4 (c) : In April 2009 in order to get the things resolved, we issued a notice, through our Advocate to BSNL, to invoke Arbitration ("Notice"). The notice was not replied for a very long time, it is only when the time for renewing the Agreements arrived the BSNL Officials communicated that if we intend to renew the Agreements we will have to withdraw the Notice and the outstanding amounts would be cleared simultaneously. In the interest of long term relationship and with the assurance given by BSNL for clearing our dues, we withdrew the said notice vide our Advocates letter dated 10th February 2010. However, the payments have still not cleared..... "

"6. Arbitrator and Conciliator:-In the present connection, if we once again initiate the Arbitration proceedings with BSNL, we apprehend and doubt the transparency and fairness with which BSNL would handle the dispute and we believe that a fair trial would not be carried as the matter would come up before the sole Arbitrator being the Chairman and Managing Director of BSNL. It is therefore requested to the Divisional Commissioner to act as Arbitrator and Conciliator in connection with this application."

3.8 The Council by its notice/letter dated 11th July 2012, informed BSNL that PIPL has filed a Petition before the Council, being Petition No. 11 of 2012 praying for the recovery of the amount due i.e. Rs. 5,23,80,819 (Principal Rs. 2,98,07,510 + interest Rs. 2,25,73,309) and called upon BSNL to file its reply within 15 days from the date of receipt of the said notice/letter.

3.9 BSNL by its letter dated 14th September 2012, addressed to the Member Secretary of the Council recorded that it has received the Notice dated 11th July 2012 from the Council, calling for conciliation in respect of the purported disputes raised by PIPL and inviting BSNL for conciliation under Section 62 of the Act. BSNL, in its said letter further recorded that all the accounts between BSNL and PIPL have been settled and therefore the invitation for conciliation proceedings is rejected and the conciliation proceedings stands terminated. BSNL also recorded that if PIPL is of the view that any further amount is recoverable from BSNL, it would be open for PIPL to apply to the Chief Managing Director of BSNL for appointment of an Arbitrator under the said Agreements.

3.10 The Council by its letter dated 23rd October 2012 addressed to BSNL as well as PIPL informed them that the hearing of the Council is scheduled on 3rd November, 2012 between 11 a.m. and 2 p.m., and that the parties should attend the Meeting on time. In the Minutes of the Meeting held on 3rd November, 2012, the Council recorded that the representatives of both the Parties were present, and after hearing the representatives of the Parties, the Council has ordered that the Parties should try and arrive at an amicable settlement qua the balance outstanding claimed by PIPL from BSNL within a period of one month from the date of the order.

3.11 On 22nd January 2013, the Advocates for BSNL addressed a letter to the Member Secretary of the Council forwarding BSNL's affidavit in reply dated 16th January 2013 to the Council and recording that BSNL is once again rejecting the invitation for conciliation and therefore the conciliation proceedings stand terminated. In the said affidavit BSNL reiterated its stand as recorded in its Advocates letter dated 22nd January 2013 and further recorded that in the Meeting held on 3rd November 2012, BSNL had categorically submitted that they are not submitting to the jurisdiction of the Council and therefore the conciliation proceedings stood terminated. However the Council had not recorded the said submission made on behalf of BSNL in the Minutes of the Meeting held on 3rd November 2012.

3.12 In June 2013, PIPL filed an Application before the Council under Section 18 (3) of the MSMED Act, inter alia recording that the conciliation proceedings between the Parties have failed and praying that the dispute now be referred to arbitration. Paragraph 8 of the said Application is reproduced hereunder:

"8. The Petitioner submits that with reference to Clause No. 11 of the Agreements, as has been referred to by the Respondent, the same does not supersede the provisions of the Medium Enterprises Development Act, 2006 and the Hon"ble Council has jurisdiction to adjudge the current dispute and the provision of Medium Enterprises Development Act, 2006 shall prevail. Further the Petitioner has an apprehension that if Chairman and Managing Director of the Respondent Company is appointed as a sole arbitrator then the matter would not be to be decided in a impartial manner and undue advantage would be given to the Respondent. Hence in the circumstances all the disputes need to be referred and settled by referring them to arbitration in accordance with the provisions of the Micro, Small and Medium Enterprises Development Act, 2006."

3.13 On 21st October 2013, pursuant to the arbitration clause contained in the said Agreements, the Chairman and Managing Director of BSNL appointed Mr. Chandra Prakash as the sole arbitrator to determine the disputes between PIPL and BSNL. The Learned Sole Arbitrator on 29th October 2013, issued directions to the Parties to file their claims and counter claims. PIPL by its letter dated 15th November 2013, addressed to the learned Arbitrator Mr. Chandra Prakash informed him about the proceedings pending before the Council. PIPL, in its said letter also pointed out to the learned Arbitrator that since the arbitration

proceedings have already been initiated by PIPL and the notice of the same is already sent to BSNL, it is unfair on the part of BSNL to invoke the arbitration for the same cause of action before a different forum. The Learned Arbitrator was therefore requested to keep the matter in abeyance until the application filed before the Council was decided.

3.14 On 21st December 2013, a hearing was held before the Council which was attended by the representatives of the Parties along with their Advocates. From the Minutes of the Meeting held on 21st December 2013 (page 115 of the Petition), it appears that the Advocate for BSNL submitted before the Council that the disputes between the Parties should be referred to the Arbitrator already appointed by BSNL. Thereupon the Chairman of the Council pointed out that since there were 3 to 4 similar cases with the Council, the matter will be heard after examining and studying the various decisions of the High Court and adjourned the hearing to 18th January 2014. The hearing held on 18th January, 2014, before the Council was attended to by the representatives of BSNL and PIPL. From the Minutes of the Meeting/hearing held on 18th January 2014 (Page 116 of the Petition) it appears that BSNL raised the issue of jurisdiction of the Council and in support of its contention that the Council has no jurisdiction to proceed with the hearing of the disputes, submitted a copy of the judgment passed by this Court in the case of M/s. Faridabad Meta Udyog Pvt. Ltd. vs. Mr. Anurag Deepak, Sole Arbitrator. Thereupon the Council fixed the matter for further hearing on 1st February, 2014.

3.15 On 1st February 2014, both the Parties appeared before the Council and made submissions on the issue of jurisdiction, before it.

3.16 According to BSNL, the Council by its letter/notice dated 14th February 2014, informed BSNL that the next hearing before the Council is fixed on 15th February 2014. In the said letter/notice it was stated that the Minutes of the Meeting held on 1st February 2014, were enclosed therewith. Since no such Minutes were enclosed, the Advocate for BSNL contacted the Council and requested for a copy of the same. However, the Advocates for BSNL were informed that the same will be provided on the date of hearing i.e. on 15th February, 2014.

3.17 According to BSNL, a copy of the Minutes of the Meeting held on 1st February 2014 were handed over to them at the Meeting held on 15th February 2014. Upon perusal of the said Minutes it was observed that certain incorrect statements were recorded in the said Minutes which were pointed out to the Council. According to BSNL on 15th February 2014, it was categorically brought to the notice of the Council that (i) the arbitration proceedings before the learned Sole Arbitrator Mr. Chandra Prakash had already commenced, and that parallel proceedings cannot be commenced on the same subject matter; (ii) admittedly the cause of action and the subject matter of the dispute is even prior to the provisions of MSMED Act, 2006 coming into force and the said Act cannot be given retrospective effect; (iii) the Council will not have jurisdiction to try and

entertain the present dispute and (iv) there was no speaking order passed by the Council as to why the settled rule of law laid down in various judgments on the subject matter were not applicable.

3.18 From the Minutes of the Meeting held before the Council on 15th February 2014, it becomes clear that the representative of BSNL informed the Council that the Council had no jurisdiction to hold the arbitration as recorded in the Minutes of the Meeting held on 1st February 2014. The Council therefore gave time to BSNL to approach the appropriate forum before 15th April, 2014.

3.19 BSNL thereafter filed the present Petition under Sections 14 and 15 of the Act seeking termination of the mandate of the Council and a direction to PIPL to appear before the Ld. Arbitrator Mr. Chandra Prakash, who is appointed in accordance with the arbitration agreement.

4. The Learned Advocate appearing for BSNL has taken me through the various provisions of the MSMED Act. The Learned Counsel has strongly relied on the decision of the Division Bench of this Court in Writ Petition No. 2145 of 2010 in the case of M/s. Steel Authority of India Ltd. and another vs. Micro, Small Enterprises Facilitation Council, through Joint Director of Industries, Nagpur Region, Nagpur 2012 (6) AIR Bom R 670. In that case a writ petition was filed by M/s. Steel Authority of India, questioning the jurisdiction of the Council in entertaining a reference under Section 18 of the MSMED Act in disputes which had arisen between the parties thereto. Paragraphs 2, 3, 11, 12, 13 and 14 of the said Judgment are reproduced hereunder:

"2. This is a petition by M/s. Steel Authority of India, questioning the jurisdiction of Respondent No. 1-the Micro, Small Enterprises Facilitation Council (hereinafter referred to as "the Council") in entertaining a reference under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "the Act"), in disputes, which have arisen between the petitioners as a buyer of goods from Respondent No. 2- M/s. Vidarbha Ceramics Pvt. Ltd., as seller.

3. Respondent No. 2- M/s. Vidarbha Ceramics Pvt. Ltd. (hereinafter referred to as "the Supplier") has supplied certain goods to the petitioners (hereinafter referred to as "the Buyers") under a contract for supply of Fire Clay Refractory Coke-Oven. According to the Petitioners, the materials supplied by the supplier were defective and the supplier was, therefore, asked to replace the material. The supplier, apparently, admitted the defects in the material vide communications dated 01.01.2007, 25.01.2007 and 10.02.2007.

The supplier, thereafter, issued a notice to the petitioners and invoked clause 22 of the agreement between them and proposed to appoint Justice C.P. Sen (Retired) as Arbitrator to settle the dispute through arbitration. However, in pursuance to clause 23 of the general conditions of contract, the Petitioners exercised, its powers and appointed one Mr. S.K. Gulati as an Arbitrator for resolving the disputes between the parties. The Arbitrator issued notices to the

parties on 09.03.2009 asking them to submit their claim within 21 days. However, on 26.03.2009, the supplier instead of filing the claim submission before the Arbitrator, objected to the arbitration by stating that the matter be either referred to Justice C.P. Sen (Retired) or it should go before the Micro, Small Enterprise Facilitation Council (hereinafter referred to as "the Council") established under the Act. The petitioners declined to enter into another mode of settlement of dispute before the Council since it had already appointed an Arbitrator. On 17.04.2009, the supplier went ahead and filed a reference before the respondent no. 1-Council under Section 18 of the Act. The petitioners filed an objection before the Council contending that the matter cannot be entertained by it in view of the Arbitration and Conciliation Act, 1996.

11. Having considered the matter, we find that Section 18(1) of the Act, in terms allows any party to a dispute relating to the amount due under Section 17 i.e. an amount due and payable by buyer to seller; to approach the facilitation Council. It is rightly contended by Mrs. Dangre, the learned Addl. Government Pleader, that there can be variety of disputes between the parties such as about the date of acceptance of the goods or the deemed day of acceptance, about schedule of supplies etc. because of which a buyer may have a strong objection to the bills raised by the supplier in which case a buyer must be considered eligible to approach the Council. We find that Section 18(1) clearly allows any party to a dispute namely a buyer and a supplier to make reference to the Council. However, the question is; what would be the next step after such a reference is made, when an arbitration agreement exists between the parties or not. We find that there is no provision in the Act, which negates or renders an arbitration agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the provisions of Section 15 to 23-including section 18, which provides for forum for resolution of the dispute under the Act-would not have the effect of negating an arbitration agreement since that section overrides only such things that are inconsistent with Section 15 to 23 including Section 18 notwithstanding anything contained in any other law for the time being in force. Section 18(3) of the Act in terms provides that where conciliation before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution and that the provisions of the Arbitration and Conciliation Act, 1996 shall thus apply to the disputes as an arbitration in pursuance of arbitration agreement referred to in Section 7 (1) of the Arbitration and Conciliation Act, 1996. This procedure for arbitration and conciliation is precisely the procedure under which all arbitration agreements are dealt with. We, thus find that it cannot be said that because Section 18 provides for a forum of arbitration an independent arbitration agreement entered into between the parties will cease to have effect. There is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration

conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996.

12. At this stage, it is necessary to deal with another contention raised on behalf of the Council by Mrs. Dangre, the learned Addl. Government Pleader. According to the learned Addl. Government Pleader, the procedure of conciliation contemplated by Section 18(2) of the Act is a procedure, which has been specially enacted for the purposes providing a Forum for conciliation which itself is capable of settling a dispute between the micro, small and medium enterprises and any other party. We find that the arbitration agreement in question, like most arbitration agreements, does not contain a specific provision for conciliation and, therefore, it would be necessary for the parties to submit to the conciliation process under Section 18(2) of the Act notwithstanding the existence of an arbitration agreement. Undoubtedly, the Council may either itself conduct the conciliation in accordance with the provisions of Section 65 to 81 of the Arbitration and Conciliation Act, 1996 or as provided by Section 18(2) of the Act refer it to any institute or centre provided for alternate dispute resolution.

13. At one stage, it was also submitted at the bar that the procedure contemplated by Section 18 of the Act for resolution of dispute is not compulsory either for the seller or the buyer and the parties are free to adopt any course including the civil suit. We, however, find that it is not possible for the parties-whether a buyer or seller-to invoke jurisdiction of a Civil Court by filing Civil Suit in respect of its claim particularly since the requirement of conciliation is mandatory and the buyer or seller must approach the Council where there is a dispute with regard to any amount due under Section 17 of the Act.

14. In the circumstances, we hold that respondent no. 1-Council is not entitled to proceed under the provisions of Section 18(3) of the Act in view of independent arbitration agreement dated 23.09.2005 between the parties. The petitioners and respondent no. 2 shall, however, participate in the conciliation, which shall be conducted by respondent no. 1-Council under the provisions of Section 18(1) and (2) of the Act. Respondent no. 1-Council shall complete the process of conciliation within a period of two weeks from the date the parties appear before it. The parties are directed to appear before respondent no. 1-Council on 25.10.2010."

5. The Learned Advocate appearing for BSNL has submitted that though a Special Leave Petition (SLP) is preferred from the above decision of the Division Bench of this Court and the same has been admitted, there is no stay operating against the said order and therefore the ratio laid down in the said decision holds the field.

6. The learned Advocate appearing for BSNL also relied on the following Judgments passed by the learned Single Judge of this Court in:

(i) Hindustan Sires Ltd. vs. R. Suresh 1

(ii) M/s. Faridabad Metal Udyog Pvt. Ltd. Vs. Mr. Anurag Deepak and M/s. Bharat Petroleum Corporation Ltd., and

(iii) Supreme Cylinders Ltd. vs. R. Suresh 2

and has submitted that the learned Single Judge has in his said Judgments followed the decision of the Division Bench in Steel Authority of India Ltd. (supra) and has accordingly decided the arbitration petitions filed under Section 14 of the Act.

7. The Learned Advocate appearing for BSNL has next submitted that the claims raised by PIPL also pertain to the period much prior to the MSMED Act, 2006 coming into force as well as to BSNL's registration. The said Act cannot be said to have retrospective operation. In view thereof the Council would have no jurisdiction whatsoever to adjudicate on the present disputes. It is also submitted on behalf of BSNL that the apprehension of bias expressed by PIPL before the Council is unwarranted, and that the claim by PIPL is also barred by the law of limitation. It is also submitted that the arbitration proceedings in connection with the said Agreements between the Parties have already commenced before the learned Sole Arbitrator.

8. It is therefore submitted on behalf of BSNL that the reliefs sought in the above Petition be granted.

9. The Learned Advocate appearing for PIPL has inter alia made the following submissions:

(i) That the purported order dated 1st February 2014 is not an order passed in conciliation proceedings but an order passed under Section 18 of MSMED Act, 2006;

(ii) That the question raised in the present Arbitration Petition can be raised only under writ jurisdiction;

(iii) That the MSMED Act, 2006, is a special enactment and will prevail over the Arbitration and Conciliation Act, 1996;

(iv) That the provisions of Arbitration under the MSMED Act will prevail over the contractual arbitration agreement and thus appointment of a sole arbitrator as per the Arbitration Agreement is not valid;

(v) That the Judgment of this Court passed in M/s. SAIL vs. Micro, Small Enterprise Facilitation Council (supra) is challenged before the Hon"ble Supreme Court of India and the Hon"ble Supreme Court of India was pleased to grant leave; and

(v) That the Arbitration Petition is not maintainable and liable to be dismissed.

10. In support of its submissions, the Learned Advocate appearing for PIPL has relied on the following decisions:

- (i) Eden Exports Co. vs. Union of India³
- (ii) Lanco Infratech Ltd. vs. Micro and Small Enterprises Facilitation Council⁴
- (iii) Principal Chief engineer vs. Manibhai and others⁵
- (iv) Union of India and Another Vs. Delhi High Court Bar Association and Others,
- (v) Maharashtra State Electricity Board vs. Maharashtra Conductors Association (SSI)⁶;
- (vi) Maharashtra Conductor Association (SSI) vs. Maharashtra State Electricity Board 2008 (4) AIR Bom. R. 236
- (vii) M/s. Sanket Steel Industries vs. The Presiding Officer, Micro and Small Enterprises Facilitation Council and Ors.⁷
- (viii) Purbanchal Cables and Conductors Pvt. Ltd. Vs. Assam State Electricity Board and Another,
- (ix) Secur Industries Ltd. Vs. Godrej and Boyce Mfg. Co. Ltd. and Another-->
- (x) Lalitkumar V. Sanghavi (D) Th. L.Rs. Neeta Lalit Kumar Sanghavi and Another Vs. Dharamdas V. Sanghavi and Others,
- (xi) Kirloskar Brothers Ltd. vs. M/s. Fusion Controls⁸
- (xii) Modern Industries Vs. Steel Authority of India Ltd. and Others,
- (xiii) Reliance Industries Limited and Another Vs. Union of India (UOI), ; and
- (xiv) Govinda Menon Vs. Union of India (UOI),

It is submitted on behalf of PIPL that the above Petition be therefore dismissed.

11. I have considered the pleadings filed by the Parties, the submissions made by their Advocates and the case-law cited by them.

12. PIPL admittedly approached the Council to resolve the disputes between BSNL and PIPL by filing an Application dated 28th May, 2012. The said Application was made by PIPL under Section 18 of the MSMED Act. Section 18 of the MSMED Act is reproduced hereunder:

" 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 condition 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 subsection (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 "

From the above Section it is clear that upon receipt of a reference by the Council, the Council may either itself attempt to bring about conciliation between the Parties in the matter, or seek the assistance of an institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre for conducting conciliation under the provisions of Sections 65 to 81 of the Act, and 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 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 the Act.

13. The Council upon receipt of the said Application dated 28th May 2012 from PIPL, by its letter dated 11th July 2012 informed BSNL that the said reference has been filed before it by PIPL and that BSNL should file its reply to the same within 15 days from the date of receipt of the notice. BSNL by its letter dated 14th September 2012, rejected the invitation for conciliation proceedings and informed the Council that the conciliation proceedings stand forthwith terminated. The Council fixed a meeting on 3rd November 2012 which was attended by the representatives of BSNL as well as PIPL. On that day the Council gave 4 weeks time to the Parties to attempt an amicable settlement of their disputes. BSNL once again by its letter dated 22nd January 2013, informed the Council that it is rejecting the invitation for conciliation and also forwarded its Affidavit-in-Reply dated 16th January 2013, to the Council inter alia recording that BSNL had on 3rd November 2012 informed the Council that BSNL is not submitting to the jurisdiction of the Council, which fact was not recorded in the Minutes of the Meeting held on 3rd November 2012.

14. PIPL filed an application in June 2013 before the Council inter alia stating that the conciliation proceedings had failed and requested the Council to take up the dispute for arbitration under Section 18(3) of the MSMED Act.

15. Thereafter the Chairman and Managing Director of BSNL by his letter dated 21st October 2013 appointed Shri Chandra Prakash as an Arbitrator to decide the disputes between the Parties pursuant to the said Agreements executed by and between BSNL and PIPL. The Learned Arbitrator by his letter addressed to BSNL and PIPL issued certain directions to the Parties to file their claims/counter-claims before him. However, PIPL by its letter dated 15th November 2013, addressed to the learned Arbitrator recorded that since the arbitration proceedings were already initiated by PIPL and a notice to this effect was already sent to BSNL, it was unfair on the part of BSNL to invoke arbitration for the same cause of action before a different forum and requested the Arbitrator to keep the matter in abeyance until the application filed before the Council was decided. The Sole Arbitrator appointed by BSNL thereafter did not pursue the matter any further. Instead the representatives of BSNL and PIPL pursuant to the meeting fixed by the Council appeared before the Council on 21st December 2013 and the representative of BSNL submitted before the Council that the arbitration proceedings should be placed before the Arbitrator appointed by them. The meeting was adjourned to 18th January 2014 since the Chairman of the Council wanted to examine and study the case law on the subject.

16. On 18th January 2014, the Council recorded that the representative of BSNL raised the issue of jurisdiction qua the Council and submitted a copy of the Judgment passed by this Court in the case of M/s. Faridabad Meta Udyog Pvt. Ltd. vs. Mr. Anurag Deepak, Sole Arbitrator. This Judgment was obviously cited by BSNL in support of its submission that the Council has no jurisdiction to proceed with the Arbitration and not in support of the argument that the Council had no jurisdiction to hold the conciliation proceedings. The Council decided to hear the matter on 1st February 2014. From the Minutes of the Meeting held on 1st February 2014 (Page 120 of the Petition) it appears that arguments were once again advanced by the Advocates for the Parties with regard to the jurisdiction of the Council to proceed with the Arbitration, and the Council accepted the argument advanced by the Advocate for PIPL and came to the conclusion that the conciliation proceedings have come to an end and the arbitration proceedings will start before the Council, and that the Council itself will work as the Arbitral Tribunal. Since BSNL insisted that the Council had no jurisdiction to proceed with the arbitration proceedings, the Council having already decided that the conciliation proceedings had concluded, and the Council would now proceed with the arbitration proceedings, in the meeting held on 15th February 2014 gave an opportunity to BSNL to raise their grievance before the appropriate forum.

17. BSNL thereafter filed the above Petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996, inter alia seeking the following reliefs:-

"(a) The Hon"ble Court be pleased to terminate the mandate of Respondent No. 1 and direct PIPL to appear before the Ld. Arbitrator Mr. Chandra Prakash who is appointed in accordance with the arbitration agreement;

(b) The Hon"ble Court be pleased to quash and set aside the order dated 1st February 2014 passed by Respondent No. 1."

18. Sections 14, 15 and 16 of the Act read thus:

"14. Failure or impossibility to act.-(1) The mandate of an arbitrator shall terminate if-

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agreed to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this Section or sub-section (3) of Section 12.

15. Termination of mandate and substitution of arbitrator.-

(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate-

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

16. Competence of arbitral tribunal to rule on its jurisdiction.-(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that

purpose.-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

19. Section 14 of the Act is applicable only if an arbitrator, is made to act as an arbitrator under a mandate, and that mandate comes to an end making it impossible to act as an arbitrator, on the grounds set out in the said Section. Section 15 of the Act also provides for termination of the mandate of an arbitrator and the consequent substitution. Section 16 of the Act provides that where a plea is raised that an Arbitral Tribunal does not have jurisdiction, the Arbitral Tribunal shall decide such plea, and where the Arbitral Tribunal takes a decision rejecting the plea, the Arbitral Tribunal shall continue with the arbitral proceeding and make an arbitral award. A party aggrieved by the award is at liberty to make an application for setting aside the same under Section 34 of the Act.

20. In the present case, BSNL has throughout contended that the Council has no mandate to proceed with the arbitration proceedings, and has challenged the jurisdiction of the Arbitral Tribunal (Council) on that ground. The Council has, after hearing the Parties, decided that it has jurisdiction to proceed with the arbitration between the Parties. BSNL is no doubt aggrieved by this decision of the Council. However, BSNL cannot approach this Court with a prayer that the mandate of the Council (Arbitrator) stands terminated. The Arbitral Tribunal having rejected the plea of BSNL and having decided that it has jurisdiction to proceed with the arbitration is entitled in law to continue with the arbitral proceedings and make an arbitral award under sub-clause (5) of Section 16 of

the Act, and BSNL if aggrieved may challenge the final award as provided in sub-clause (6) of Section 16 of the Act. The Judgment of the Division Bench of this Court in *M/s. Steel Authority of India Ltd. and another vs. Micro, Small Enterprises Facilitation Council*, through Joint Director of Industries, Nagpur Region, Nagpur (*supra*) holding that in the facts of that case the Council did not have the jurisdiction to proceed with the arbitration is a decision given in a Writ Petition filed by *M/s. Steel Authority of India* challenging the jurisdiction of the Council. A similar relief cannot be sought by BSNL by way of a Petition filed under Sections 14 and 15 of the Act.

21. The argument advanced on behalf of BSNL that the learned Single Judge has in *Hindustan Sires Ltd. vs. R. Suresh, Sole Arbitrator, Faridabad Metal Udyog Pvt. Ltd. vs. Mr. Anurag Deepak* (*supra*) and *Supreme Cylinders Ltd. vs. R. Suresh* (*supra*) followed the view of the Division Bench of this Court in a petition under Section 14 of the Act also renders no assistance to BSNL. In that case the petition under Section 14 of the Act was filed by the supplier contending that the mandate of the arbitrator appointed under the Agreement executed between the parties had come to an end, *inter alia* on the ground of inordinate delay on the part of the learned arbitrator to conclude the arbitration proceedings and therefore prayed that the matter be referred to the Council. It is in this context that the learned Single Judge of this Court referred to the decision in *Steel Authority of India Ltd. (supra)* and held that the arbitrator appointed as per the agreement between the parties can proceed with the arbitration proceedings irrespective of Section 18 of the MSMED Act and that the mandate of the arbitrator has not come to an end even on the ground that the arbitration proceedings were delayed, because the application under Section 14 of the Act was made by the Petitioner in that matter after all the pleadings between the parties were filed before the learned arbitrator and he had fixed the matter for final hearing.

22. For the aforesaid reasons in my view the above Petition is not maintainable under Section 14 and/or 15 of the Arbitration and Conciliation Act, 1996, and the same is rejected. It is therefore not necessary for me to consider the other submissions advanced on behalf of BSNL pertaining to the retrospective applicability of the MSMED Act and the claim of PIPL being time barred. In view thereof, the above Petition is dismissed with a clarification that the dismissal of the Petition shall not preclude BSNL from pursuing any other remedy available to them in law.

23. PIPL has filed the above Notice of Motion alleging that the Officers of BSNL and its Advocate have committed contempt of court and that they be suitably punished for the same. It is submitted on behalf of PIPL, that after PIPL filed an Application before the Council seeking intervention of the Council under Section 18 of the MSMED Act, the Council issued a notice to BSNL on 11th July 2012, informing them about the filing of the said Application by PIPL and asking BSNL to appear before the Council and submit its defence statement. It is submitted

on behalf of PIPL that the Officers of the BSNL and its Advocate have disobeyed the mandate of the MSMED Act and by its letter/affidavit dated 14th September 2012, have rejected the invitation for conciliation proceedings by inter alia stating that, "We..... hereby reject the invitation for conciliation proceedings.....". It is submitted that this amounts not only to disobedience but also disregard towards the Council which is a statutory body. In support of this contention, the learned Advocate appearing for PIPL has relied on the decisions in the case of (i) Mrs. Hema Ravishankar Vs. K.R. Ravishankar, and (ii) M.Y. Shareef and Another Vs. The Hon"ble Judges of The High Court of Nagpur and Others, .

24. BSNL has in response submitted that there is no contempt whatsoever committed by the Officers of the BSNL or the Advocate for BSNL as alleged. It is submitted that the said letter merely uses the language/terms used under Section 62 (3) of the Arbitration and Conciliation Act, 1996. It is submitted that the case-law relied upon by PIPL in support of its contention that the Officers of the BSNL and its Advocate have committed contempt would not be applicable to the facts of the present case.

25. After considering the submissions advanced by the Learned Advocates appearing for the Parties, I am of the view that there is no contempt committed by the Officers of the BSNL and/or the Advocate for BSNL as alleged by PIPL. Section 62 (3) of the Act of 1996 reads as under:

"62. Commencement of conciliation proceedings.-(1) The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

(2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly."

26. BSNL has, in its letter addressed to the Council in response to its invitation for conciliation, inter alia responded as under:

"(2) All amounts have already been settled with the PETITIONER and we hereby reject the invitation for conciliation proceedings as more particularly contemplated under Section 62 (3) of the Arbitration and Conciliation Act, 1996 and hence the conciliation proceedings shall hereby stands terminated forthwith."

It is therefore clear that by the said letter BSNL has merely used the terms which are used under Section 62 (3) of the Act of 1996. In fact, admittedly BSNL has

despite rejecting the invitation for conciliation, throughout attended all the hearings before the Council, and has also advanced their submissions. The question therefore of the Officers of BSNL or the Advocate for BSNL having committed contempt as alleged by PIPL, does not arise and the said Notice of Motion is dismissed with costs.

27. After the Order is pronounced, the Learned Advocate appearing for BSNL has prayed that the Council be directed not to proceed with the arbitration proceedings for a period of four weeks from the date of this Order. The said prayer is granted. In view thereof, the Council shall not proceed with the arbitration proceedings upto 28th April, 2015.

1Order dated 4th April 2013 in Arbitration Petition No. 56 of 2013 2Judgment dated 30th April 2013, passed in Arbitration Petition No. 52 of 2013 3Madras High Court Judgment dated 20th Nov. 2012 in W.P. No. 2461 of 2010; 4Bombay High Court Judgment dated 24th October 2013 in Civil W.P. No. 6636 of 2013; 5Gujarat High Court Judgment dated 11th April 2012 in Letters Patent Appeal No. 1997 of 2011; 6Bombay High Court order dated 30th August 2004 in Arbitration Petition (O.S.) No. 328 of 2004 7Bombay High Court (Nagpur) Judgment dated 7th January, 2014 in WP No. 3414 of 2012. 8Unreported order of Bombay High Court dated 6th August, 2014 in Arb. Petition (A.S.) No. 48 of 2013