(2025) 07 CAL CK 0802

In the Calcutta High Court, Appellate Side

Case No : F.M.A.T. (ARB.AWARD) No.47 Of 2023

M/S BESCO Limited APPELLANT

Vs

M/s Hindcon Chemicals Pvt. Ltd RESPONDENT

Date of Decision : 08-07-2025

Acts Referred:

Code of Civil Procedure, 1908 — Section 105, Order 41 Rules 22, Order 41 Rules 33
Arbitration and Conciliation Act, 1996 — Section 10, 10(1), 20, 23, 24, 25, 31(5), 34, 34(1) 34(3), 37, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77,78, 79, 80, 80(a), 81
Micro, Small and Medium Enterprises Development Act, 2006 — Section 15, 16, 18, 18(2), 18(3), 19, 24

Citation : (2025) 07 CAL CK 0802

Hon'ble Judges : Sabyasachi Bhattacharyya, J;Uday Kumar, J

Bench : Division Bench

Advocate : Siddhartha Banerjee, Debjani Sengupta, Rajib Mullick, Ayantika Saha, Suman Dutta, Arnab Dutt, Kaustav Chandra Das, Jit Ray, Labani Dey

Final Decision : Disposed Of

Judgement

Sabyasachi Bhattacharyya, J

1. The present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") has been preferred by the respondent in an arbitral proceeding, against a judgment passed under Section 34 of the 1996 Act, thereby affirming the award passed by the West Bengal State Micro and Small Enterprises Facilitation Council (in brief, "the Council").

2. By the impugned award, the respondent (present appellant) has been directed to pay an amount of Rs.6,88,852/-, together with interest at three times the bank rate notified by the RBI with effect from the date of expiry of the period of 45 days from the day of acceptance or the day of deemed acceptance of the work as admissible under the provisions of Sections 15 and 16 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short, "the 2006 Act").

3. Learned counsel for the appellant argues that the Council acted contrary to the scheme of Section 18 of the 2006 Act in terminating the conciliation process, taking up the matter for arbitration, and passing the award by the self-same order dated September 21, 2011. It is contended that in terms of sub-section (3) of Section 18 of the 2006 Act, where the conciliation initiated under sub-section (2) is not successful and stands terminated, the Council has to take up the dispute for arbitration or refer it to any institution or centre, whereupon the provisions of the 1996 Act shall apply.

4. By placing reliance on Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan, reported at (2021) 19 SCC 206 , it is argued that upon the termination of the conciliation process, it is open to the Council to arbitrate and pass an award only after following the procedure under the relevant provisions of the 1996 Act, particularly Sections 20, 23, 24 and 25. The said provision stipulates that directions have to be passed for filing a statement of claim and defence, followed by hearings and written proceedings.

5. It was also held in the said judgments that there is a fundamental difference between conciliation and arbitration, and the Council could, at best, have recorded the failure of the conciliation and proceeded to initiate arbitration proceedings. Proceedings for arbitration and conciliation, it was held, cannot be clubbed. In the event there is such clubbing, the order is a nullity and can be challenged even without availing the remedy under Section 34 of the 1996 Act.

6. Whereas in a subsequent judgment of Gujarat State Civil Supplies Corporation Limited. v. Mahakali Foods Private Limited, reported at (2023) 6 SCC 401, it was held that the Council can itself act as conciliator as well as arbitrator, the said proposition has been questioned by a Three-Judge Bench of the Supreme Court in Tamil Nadu Cements Corporation Limited v. Micro and Small Enterprises Facilitation Council and Another, reported at (2025) 4 SCC 1, where it was observed that Gujarat State Civil Supplies Gujarat State Civil Supplies Corporation Limited v. Mahakali Foods (P) Ltd. reported at (2023) 6 SCC 401 (supra) was passed without noticing the judgment in Jharkhand Urja Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan, reported at (2021) 19 SCC 206 (supra). Accordingly, the Three-Judge Bench of the Supreme Court, differing with the view taken in Gujarat State Civil Supplies1 (supra), has referred the matter to a larger Bench, inter alia on the question as to whether the members of the Council, upon failure of conciliation proceedings, can themselves act as arbitrators.

7. Taking a cue from the above judgment, learned counsel next argues that same Council members could not have acted as arbitrators, after having themselves taken up the conciliation proceedings, since such a course of action violates Section 80 of the 1996 Act. It is argued that as per Section 18(2) of the 2006 Act, Section 65 to 81 of the 1996 Act, including Section 80, shall apply to a conciliation proceeding. Since Section 80(a) provides that the Conciliator shall not act as an Arbitrator, the award is vitiated on such count as well.

8. Learned counsel for the appellant next contends that four (4) Council Members acted as the arbitral tribunal, which violates Section 10 of the 1996 Act, which mandates that the number of arbitrators cannot be an even number.

9. Learned counsel appearing for the appellant further submits that the claim itself was time-barred, since the last bill raised by the claimant was dated May 23, 2006, whereas the reference was filed before the Council on June 4, 2010, after the statutory limitation period for a money claim.

10. That apart, it is argued that the award is totally unreasoned and should be set aside such score alone.

11. Learned counsel next argues that the learned court taking up the application under Section 34 of the 1996 Act dismissed such challenge on the ground of limitation alone. It is argued that as per Section 34(3) of the 1996 Act, a challenge has to be filed under Section 34 within three months from the date on which the applicant has received the arbitral award. In the present case, although in the year 2011, that is the same year as the passing of the award, a purported copy of the award was served by the respondent on the appellant, the same does not qualify as the delivery of a signed copy mandated under Section 31(5) of the 1996 Act. It is submitted that the requirement of law is that the arbitral tribunal has to deliver a signed copy of the award to the parties. Thus, the limitation period commences only upon such delivery.

12. In the present case, an application was filed by the appellant for a signed copy of the award, only upon which a signed copy was handed over. Since the challenge under Section 34 was filed within three months thereafter, the finding of the learned Judge taking up the application under Section 34, as to the said application being time-barred, was legally erroneous.

13. Learned counsel for the appellant further contends that even the service of copy of the award by the respondent was faulty on several counts. First, merely a photocopy, as opposed to a signed copy, was served. Secondly, the copy was served not by the Tribunal but by the respondent. Thirdly, it was served at the address of the Wagon Division of the appellant-Company, whereas the dispute arose between the claimant/respondent and the Foundry Division of the appellant-Company. By orders passed by the Company Law Board, the said two divisions had already been segregated and the management thereof had been separated previously. Thus, the service at the address of the O.P Tantia Group, which had been handed over the management of the Wagon Division as opposed to the A.P Tantia Group, who were then in charge of the Foundry Division, was not at all a good service.

14. Lastly, learned counsel for the appellant submits that the statutory pre-deposit of 75 per cent of the award, made on the principal awarded amount after the filing of the application under Section 34, was within the contemplation of law. Section 19 of the 2006 Act provides that a challenge to the award shall not be entertained unless such deposit is made. The effect thereof would be that the

challenge would not be taken up for disposal prior to such deposit, as opposed to the filing itself being barred due to non-deposit simultaneously with the application. Furthermore, there were several orders passed by the court taking up the Section 34 application for such deposits to be made later. The deposits were made pursuant to the said orders, which were never challenged by the respondent and have attained finality.

15. Learned counsel for the appellant cites Ajoy Kumar Banerjee and Others v. Union of India and Others reported at (1984) 3 SCC 127 for the proposition that a later general law will override a prior special law if the two are so repugnant to each other that they cannot co-exist, even though no express provision in that behalf is found in the general law. It is argued that the 1996 Act was amended in the year 2015, much after the promulgation of the 2006 Act, but no change was effected to Section 80 of the 1996 Act by the said amendment. Thus, the Legislature, in its wisdom, chose to retain Section 80 in the 1996 Act even after the 2015 amendment. Hence, the provision of Section 80 should be taken to be a provision of a general statute (the 1996 Act) which was retained even after the enactment of the 2006 Act and would override the provisions of the 2006 Act. As such, in terms of Section 80 of the 1996 Act [the provisions of which statute govern an arbitral proceeding under Section 18 (3) of the 2006 Act], the Council cannot act both as Conciliator and Arbitrator.

16. Learned counsel for the appellant also cites Union of India v. Tecco Trichy Engineers & Contractors, reported at (2005) 4 SCC 239, for the proposition that in case of a huge organisation like the Railways, as in the said case, the copy of the award has to be received by the person who has knowledge of the proceedings and who would be the best person to understand and appreciate the arbitral award and also to take a decision in the matter of moving an application under Section 33 or section 34 (1) of the 1996 Act. Thus, it is submitted that the service on the Wagon Division of the appellant in the present case was not a proper service.

17. Learned Counsel cites the judgment of a learned Single Judge of the Bombay High Court in the matter of E-Square Leisure (P) Ltd. v. K.K. Dani Consultants, reported at (2013) SCC OnLine Bom 183, where it was held that under Section 19 of the 2006 Act, there is a bar in entertaining a challenge against an award unless the pre-deposit of 75 per cent is made, but there is no bar in filing such challenge without the deposit, since the stage of entertaining an application comes only after filing the same.

18. In reply, learned senior counsel appearing for the claimant/respondent argues that the application under Section 34 was palpably barred by limitation. It is argued that Rule 4 (12) of the West Bengal Micro and Small Enterprises Facilitation Council Rules, 2006 (in short, “the 2006 Rules”) provides that copies of the award shall be made available within seven days of filing of an application. In the present case, the appellant itself had filed an application and obtained such a copy, thus endorsing the legal position enumerated in Rule 4 (12). It is

submitted that Section 31 (5) of the 1996 Act has to be read in the context of the 2006 Act, the Rules framed under which provide for making an application for getting a copy of the award.

19. It is contended that nothing prevented the appellant from making an application earlier, since the appellant was already aware of the award upon getting a photocopy of the same from the respondent but waited till July 10, 2023, that is long twelve years after the 2011 award, for preferring the challenge under section 34 of the 1996 Act.

20. Hence, it is argued that the learned Judge taking up the Section 34 application was justified in dismissing the challenge on the ground of limitation.

21. Learned senior counsel for the respondent next submits that Section 19 of the 2006 Act provides that a challenge against an award passed under the said Act has to be accompanied by 75 per cent of the awarded amount. It is argued that the 75 per cent has to be calculated on the total awarded amount including the interest which was granted in the award. In the present case, the deposit was made only to the tune of 75 per cent of the principal amount, thus violating Section 19 of the 2006 Act.

22. Also, the late deposit after four months from the filing of the application under Section 34 ought to have been a reason for dismissal of the challenge under Section 34 as well.

23. Learned senior counsel next cites Gujarat State Civil Supplies Gujarat State Civil Supplies Corporation Limited v. Mahakali Foods (P) Ltd. reported at (2023) 6 SCC 401 (supra) for the proposition that the legal position is clear that the bar under Section 80 of the 1996 Act stands superseded by Section 18, read with Section 24 of the 2006 Act and the Council itself can act both as a Conciliator and an Arbitrator.

24. Upon hearing learned counsel for the parties, the following issues fall for consideration before this Court:

I. Whether the application under Section 34 of the 1996 Act was time-barred;

II. Whether the non-deposit of 75 per cent of the entire awarded amount including interest would justify dismissal of the application under Section 34;

III. Whether the Council itself could act both as Conciliator and Arbitrator;

IV. Whether the composition of the Arbitral Tribunal, comprised of four Council members, being in violation of Section 10 of the 1996 Act, vitiated the impugned award;

V. Whether the claim itself was time-barred;

VI. Whether the award was otherwise vitiated in law.

Our findings on each of the said issues are respectively as follows:-

Whether the application under Section 34 of the 1996 Act was time-barred

25. To ascertain the starting point of limitation, we have to look to Section 34(3) of the 1996 Act. Section 18(3) of the 2006 Act, the parent provision which empowers the Council in the first place to take up the dispute for arbitration, itself stipulates that the provisions of the 1996 Act shall apply as if the arbitration was in pursuance of an arbitration agreement referred to in Section 7(1) of the 1996 Act.

26. The parameters of an appeal or a challenge to an award are to be derived from the provision which confers the right of appeal or challenge. There is nothing in the 2006 Act which confers such power. Section 19 of the 2006 Act merely provides a pre-condition for preferring a challenge, but is not the substantive provision creating the right of challenge.

27. Although Section 34 of the 1996 Act does not contemplate an "appeal" but an "application", the same is the governing provision which confers the right to challenge an arbitral award. Read in conjunction with Section 18(3) of the 2006 Act, thus, it is Section 34 of the 1996 Act which is the governing provision regarding challenges against an arbitral award passed by the Council. Also, the limitation period for preferring such challenge emanates from sub-section (3) of Section 34 of the 1996 Act itself and we cannot look elsewhere to ascertain the starting point of limitation.

28. Section 34(3) stipulates that an application for setting aside an award under the said provision may not be made after three months have elapsed from the date on which the party making that application had "received the arbitral award". The expression "received the arbitral award" cannot be equated with receiving a photocopy of the award, since the provision for delivery of award is provided in Section 31(5) of the 1996 Act which stipulates that after the arbitral award is made, a "signed copy shall be delivered" to each party.

29. Although Section 31(5) is grammatically couched in passive voice, without specifying who would deliver the copy, it is obvious that a signed copy of the award can only be delivered by the Tribunal itself and not any of the parties for two reasons – first, a "signed" copy necessarily means signed by the Arbitral Tribunal and not by one of the parties; secondly, since both the parties are equally at the receiving end of a signed copy, the intention of the Legislature cannot be that one of the parties can deliver such copy on the other.

30. The only interpretation which can be attributed to sub-section (5) of Section 31 is that it is incumbent upon the Arbitral Tribunal, after the award is made, to deliver a signed copy to each party. It is only the Tribunal which can furnish a signed copy and not the parties. Hence, Section 31(5), read in conjunction with Section 34(3), of the 1996 Act leaves no manner of doubt that the starting point of limitation for preferring a challenge under Section 34 is the date on which the signed copy of the arbitral award is received by the intending challenger of the award.

31. It is also to be noted that the Legislature, in its wisdom, has used the expression "arbitral award" in Section 34(3) and not "copy of the award". Hence, the starting point of limitation has to be the date on which the signed copy of the award delivered by the Arbitral Tribunal is received by the party intending to challenge the award.

32. The claimant/respondent argues that Rule 4 (12) of the 2006 Rules is applicable and circumscribes Section 31 (5) of the 1996 Act.

33. However, such argument is not tenable in law. Where the parent statute, that is, the 2006 Act itself does not contain any modality of service of copies of the award or, for that matter, the provision for preferring an appeal or the limitation period for the same, the Rules framed under such parent statute cannot be the guiding principle in that regard. It would be absurd to argue that Rule 4(12) of the 2006 Rules framed under the 2006 Act would govern the substantive provisions of the 1996 Act, a different statute altogether.

34. Another important aspect is that Rule 4 (12) does not carry any mandate on the parties to file any application; rather, it imposes a duty on the Council to make copies of the award available within seven days of filing of an application, if made. The filing of an application for getting copies of the award by the parties has not been made mandatory, but the issuance of copies thereof within seven days of such application, if filed, has been stipulated under Rule 4 (12) of the 2006 Rules.

35. As opposed thereto, Section 31(5) of the 1996 Act casts a mandate on the Arbitral Tribunal (here, the Council) to deliver a signed copy to each party. Hence, the filing of an application cannot be a sine qua non for delivery of the signed copy under Section 31 (5). Also, in the event the starting point of limitation as per Section 34(3) was intended by the Legislature to be the date of the award, it would be so provided, in which case the delay in filing of an application for a copy of the award by the party intending to challenge the award, after the limitation period, might still have been considered to be a determinant in calculating limitation. However, since sub-section (3) of Section 34 of the 1996 Act categorically provides that the starting point of limitation shall be the date when the award is received by the intending challenger, we cannot read Rule 4(12) into the same provision and hold that the challenge under Section 34 in the present case was time-barred merely because no application to obtain a copy of the award was made by the present appellant within three months from the date of the award.

36. Insofar as service of a photocopy by the respondent is concerned, the same does not satisfy the requirement of Section 31(5) or Section 34(5), since the former provision envisages delivery of a signed copy of the award by the Arbitral Tribunal and the latter provision contemplates receipt of the award and not a photocopy sent by a party.

37. However, the appellant's argument that the service of the photocopy at the

address of the current management of the Wagon Division of the appellant vitiated such service is not tenable in the eye of law.

38. The reliance placed by the appellant on Tecco Trichy Union of India v. Tecco Trichy Engineers & Contractors, reported at (2005) 4 SCC 239 (supra) in such context is misconceived. In the said case, the Supreme Court was considering the service on a particular Division of a huge organization like the Railways. There is a clear distinction between the different Departments, Divisions or Ministries of the Government, which are different autonomous wings of the Government in their own right, and the different divisions of the self-same non-Government company. The different divisions of a company do not constitute separate juristic entities. A company, as a whole, is a juristic entity in the eye of law and the law does not recognize its different internal departments or divisions as separate juristic entities. Thus, the service of copies on any of its divisions/ employees would tantamount to good service on the company itself.

39. The internal separation of the Wagon and the Foundry divisions of the appellant-company by an order of the Company Law Board was an internal matter of the appellant-company. So far as a third party (here, the present respondent) is concerned, service is complete if is effected at the registered office of the company.

40. However, nothing hinges on the same in view of our above observation that the service of the photocopy of the award is not germane at all.

41. Thus, the issue of limitation is decided against the respondent. We hereby hold that the application under Section 34 of the 1996 Act was filed within the statutory limitation period and the finding of the learned judge taking up the Section 34 application as to the same being barred by limitation is bad in law.

Whether the non-deposit of 75 per cent of the entire awarded amount including interest would justify dismissal of the application under Section 34

42. Insofar as the mandatory prior deposit of 75 per cent of the awarded amount is concerned, Section 19 of the 2006 Act merely provides that no application for setting aside an award made by the Council shall be “entertained” unless such amount is deposited. The expression “entertained” cannot be equated with “filed”. An application is only entertained when substantive orders are passed thereon. The stage of ‘entertaining’ an application comes only after the same is ‘filed’.

43. As per Section 19 of the 2006 Act, there is no mandatory requirement of making the deposit simultaneously with the filing of the application challenging the award. The law is that the application shall not be ‘entertained’ before the amount is deposited. Thus, even if an application under Section 34 challenging an award of the Council is filed without such deposit, the application shall merely be kept in limbo until the deposit is made. Only after such deposit is made, substantive orders can be passed on the application.

44. Another important facet in the present case is that there were several orders passed by the Section 34 court permitting the deposit of 75 per cent in terms of Section 19 after the filing of the application. Vide order no.3 dated July 17, 2023, it was recorded that although by an order dated July 12, 2023, the court had directed deposit of such amount, it was not mentioned therein as to whom the instalments were to be deposited with. By the order dated July 17, 2023, the court directed the appellant to deposit the awarded amount in three instalments before the learned Registrar, City Civil Court at Calcutta. The appellant having made such deposit within the time stipulated by the court, it cannot be said that the deposit was bad. Since the respondent has not challenged any of the said orders, those have attained finality and cannot now be reopened. The provisions of Section 105 of the Code of Civil Procedure are not applicable, since the Code itself is not applicable to arbitral proceedings in terms of the 1996 Act. Moreover, a challenge under Section 34 of the 1996 Act is not a regular civil appeal but is circumscribed by the contours of Section 34 itself. Hence, the provisions of Order XLI Rules 22 and 33 of the Code of Civil Procedure do not apply. Thus, no challenge can be preferred against the orders directing such deposit at the present stage, nor could such challenge be made in connection with the application under Section 34 of the 1996 Act.

45. In view of the court taking up the Section 34 application having directed deposit of 75 per cent only on the principal amount, the said chapter cannot now be reopened. Thus, the non-deposit of the amount of 75 per cent simultaneously with the Section 34 application or on the awarded amount including interest did not entail dismissal of the application under Section 34 of the 1996 Act.

Whether the Council itself could act both as Conciliator and Arbitrator

46. Section 18 of the 2006 Act is the source of the Council’s power to conduct conciliation and thereafter arbitration. Sub-sections (2) and (3) of Section 18 merely enable the applicability of the 1996 Act to such proceedings. The 1996 Act would not apply per se to conciliation and arbitration proceedings under the 2006 Act unless Section 18, sub-sections (2) and (3) of the 2006 Act so provided. Thus, the governing provision is Section 18 of the 2006 Act and not the provisions of the 1996 Act.

47. Section 24 of the 2006 Act, as well as the opening non obstante clause in Section 18 itself, clearly lend overriding effect to the provisions of Section 18 over all other statutes, including the 1996 Act.

48. The scheme of section 18 clearly delineates that the Council itself, and/or its designated institution or centre, shall conduct the conciliation as well as the arbitration proceedings.

49. Sub-section (4) of Section 18 further provides that notwithstanding anything contained in any law for the time being in force, the Council or the centre providing alternative dispute resolution services shall have jurisdiction to act both as arbitrator or conciliator under the said Section. Hence, the general

applicability of the provisions of Section 65 to 81 of the 1996 Act as stipulated in section 18(2) cannot be used to invoke the rigours of Section 80 of the 1996 Act in the teeth of the contrary provisions of Section 18, sub-sections (2), (3) and (4) of the 2006 Act.

50. Although in Tamil Nadu Cements Tamil Nadu Cements Corporation Limited v. Micro and Small Enterprises Facilitation Council and Another, reported at (2025) 4 SCC 1 (supra), it was observed by the Supreme Court that Gujarat State Civil Supplies Gujarat State Civil Supplies Corporation Limited v. Mahakali Foods (P) Ltd. reported at (2023) 6 SCC 401 (supra) did not take notice of Jharkhand Urja Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan, reported at (2021) 19 SCC 206 (supra), with utmost respect, Jharkhand Urja Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan, reported at (2021) 19 SCC 206 (supra) did not deal at all with the question as to whether the Council itself can act as conciliator and arbitrator.

51. The subject-matter of consideration in Jharkhand Urja Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan, reported at (2021) 19 SCC 206 (supra) was whether it was open to the Council to arbitrate and pass an award without following the procedure of the relevant provisions of the 1996 Act. It was held that the proceedings for conciliation and arbitration cannot be clubbed but have to be taken up separately by the Council.

Hence, the proposition laid down in Gujarat State Civil Supplies Gujarat State Civil Supplies Corporation Limited v. Mahakali Foods (P) Ltd. reported at (2023) 6 SCC 401 (supra) does not per se militate against Jharkhand Urja Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan, reported at (2021) 19 SCC 206 (supra).

52. It was clearly laid down in paragraph nos. 46 and 47 of Gujarat State Civil Supplies Gujarat State Civil Supplies Corporation Limited v. Mahakali Foods (P) Ltd. reported at (2023) 6 SCC 401 (supra) as follows:

"46. The submission therefore that an independent arbitration agreement entered into between the parties under the Arbitration Act, 1996 would prevail over the statutory provisions of the MSMED Act, 2006 cannot be countenanced. As such, sub-section (1) of Section 18 of the MSMED Act, 2006 is an enabling provision which gives the party to a dispute covered under Section 17 thereof, a choice to approach the Facilitation Council, despite an arbitration agreement existing between the parties. Absence of the word "agreement" in the said provision could neither be construed as casus omissus in the statute nor be construed as a preclusion against the party to a dispute covered under Section 17 to approach the Facilitation Council, on the ground that there is an arbitration agreement existing between the parties. In fact, it is a substantial right created in favour of the party under the said provision. It is therefore held that no party to a dispute covered under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Facilitation Council under Section 18(1) thereof, merely because there is an arbitration agreement existing between the parties.

47. The aforesaid legal position also dispels the arguments advanced on behalf of the counsel for the buyers that the Facilitation Council having acted as a Conciliator under Section 18(2) of the MSMED Act, 2006 itself cannot take up the dispute for arbitration and act as an arbitrator. Though it is true that Section 80 of the Arbitration Act, 1996 contains a bar that the Conciliator shall not act as an arbitrator in any arbitral proceedings in respect of a dispute that is subject of conciliation proceedings, the said bar stands superseded by the provisions contained in Section 18 read with Section 24 of the MSMED Act, 2006. As held earlier, the provisions contained in Chapter V of the MSMEDAct, 2006 have an effect overriding the provisions of the Arbitration Act, 1996. The provisions of the Arbitration Act, 1996 would apply to the proceedings conducted by the Facilitation Council only after the process of conciliation initiated by the Council under Section 18(2) fails and the Council either itself takes up the dispute for arbitration or refers to it to any institute or centre for such arbitration as contemplated under Section 18(3) of the MSMED Act, 2006."

53. There cannot be any manner of doubt, in view of the above proposition, that the Council acted well within its jurisdiction in acting in both capacities - as conciliator and arbitrator.

Whether the composition of the Arbitral Tribunal, comprised of four Council members, being in violation of Section 10 of the 1996 Act, vitiated the impugned award

54. Section 18 (3) of the 2006 Act provides that the provisions of the 1996 Act shall apply to an arbitral proceeding held by the Council. Thus, the provisions of Section 10 of the 1996 Act, at the first blush, ought also to apply to such a proceeding. Sub-section (1) of Section 10 of the 1996 Act provides that the parties are free to determine the number of arbitrators, provided that it shall not be an even number. However, Section 18 clearly provides that the Council "shall either itself or through the assistance of any institution or centre, conduct conciliation as well as arbitration".

55. The expression "Council" cannot be read down to mean only some of the members of the Council. The Council can, as a whole, proceed with such conciliation and arbitration proceeding.

56. Furthermore, a careful consideration of Section 10(1) of the 1996 Act shows that the fetter as to even numbers applies only when the parties themselves determine the number of arbitrators. As opposed thereto, an arbitration under Section 18(3) of the 2006 Act is a statutory arbitration, emanating from the 2006 Act, and governed by the provisions of the said Act. Hence, the bar restricting the number of arbitrators to even numbers, which is applicable when the parties themselves appoint arbitrators under the 1996 Act, is not attracted to a statutory arbitration under Section 18 (3) of the 2006 Act, where the reference to arbitration is mandated by statute in respect of micro, small scale and medium

enterprises and the provisions of the 1996 Act are made applicable merely by legal fiction created under Section 18 (3) of the 2006 Act.

57. As such, even if the number of the Council members who acted as arbitrators in the present case was four (an even number), it per se does not vitiate the award.

Whether the claim itself was time-barred

58. As per the claim of the claimant/ present respondent itself, the last bill on which the claim was made was raised on May 23, 2006 whereas the reference was filed before the Council on June 4, 2010. Thus, on a plain reading of the reference, it is a plausible argument that the claim was time-barred. However, we are of the opinion that it would be premature for us, sitting in judgment under Section 37 of the 1996 Act, to decide on such issue for the first time. Since the issue was not decided either by the Council or by the Section 34 court, we do not intend to decide the said issue, which is a mixed question of fact and law, without granting opportunity to both parties to adduce evidence.

59. There may be various factors involved, including whether there was any subsequent claim made within the limitation period by the claimant and/or if any acknowledgement was made of such claim by the respondent/present appellant within the contemplation of Section 18 of the Limitation Act. Thus, the issue of limitation cannot be decided conclusively at the present stage and is kept open for being decided, if at all, in an appropriate proceeding.

Whether the award was otherwise vitiated in law

60. On a plain reading of the award of the Council, which was challenged under Section 34 of the 1996 Act, the same cannot stand judicial scrutiny for two very important reasons.

61. First, it is well-settled that reason is the soul of a judgment / award.

62. Section 31(3) of the 1996 Act provides that the arbitral award shall state the reason upon which it is based, unless-

a) The parties are agreed that no reasons are to be given, or

b) The award is an arbitral award on agreed terms under Section 30.

63. Since none of the above exceptions are made out in the present case, the arbitral award of the Council had to furnish reasons. We do not find an iota of reason in the said award, nor did the Council advert to any of the pleadings of the parties or the materials on record to come to arrive at its conclusions.

64. The second and more fatal factor is that the Council acted in gross contravention of the scheme of Section 18 of the 2006 Act in taking up the arbitral proceeding simultaneously with the recording of the termination of conciliation and passing the award by the self-same order. Section 18, sub-sections (2) and (3) of the 2006 Act draw a clear line of demarcation between

the two proceedings. First, the Council or its designee has to take up the dispute for conciliation under sub-section (2) of Section 18 and thereafter, in the event the conciliation is not successful and stands terminated, it is to commence arbitral proceedings under sub-section (3) of Section 18, in which the case the provisions of the 1996 Act relating to arbitration shall apply.

65. The Supreme Court, in Jharkhand Urja8 (supra), clearly observed that it is open to the Council to arbitrate and pass an award only after following the procedure under the relevant provision of the 1996 Act, particularly Section 20, 23, 24 and 25.

66. Sections 23 and 24 categorically provide for filing of statements of claim and defence, hearing and written proceedings. Thus, an arbitral award without granting such opportunity and following such procedure is palpably vitiated and is a nullity in terms of the proposition laid down in Jharkhand Urja Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan, reported at (2021) 19 SCC 206 (supra). The Supreme Court, in the said judgment, clearly observed that the Council can at best record the failure of conciliation and proceed to initiate arbitration proceedings in accordance with the provisions of the 1996 Act. Proceedings for arbitration and conciliation, it was held, cannot be clubbed.

67. In the present case, the award of the Council suffers from the said malady in its fullest extent since, by the self-same order, the Council proceeded to record in a cryptic manner that the conciliation had failed since the buyer unit was absent in the last meeting and then, without initiating formally an arbitral proceeding or giving any opportunity of filing statements or hearing to either party, went on to pass an award outright in favour of the supplier unit. The Council even boldly recorded in the award that it was doing so without giving any "further" opportunity to the parties. The expression "further" was a misnomer since no prior opportunity of hearing in the arbitration proceeding was given at all to the parties and the only dates fixed previously were in the conciliation proceeding. In fact, even the opportunity of filing the statements of claim and defence was not given in connection with the arbitration proceeding. By the same order, the termination of conciliation was recorded and the Council proceeded straightaway to pass the arbitral award, although the arbitral proceeding was a non-starter and no opportunity was given to the parties at all, nor was any of the pleading or material adverted to. Hence, the award cannot stand a moment's judicial scrutiny.

68. In view of the above findings, FMAT (ARB.AWARD) No. 47 of 2023 is allowed on contest, thereby setting aside the impugned order, bearing Order No.10 dated August 22, 2023 passed by the learned Chief Judge, City Civil Court at Calcutta in Miscellaneous Case No.3956 of 2023 and allowing the application under Section 34 of the 1996 Act by setting aside the award dated September 21, 2011 passed by the West Bengal State Micro and Small Enterprises Facilitation Council in Case No. 170 of 2010 on the ground that the said award is vitiated by utter lack of reasons and due to non-compliance of Section 18 of the 2006 Act as well as the proposition laid down in Jharkhand Urja Vikas Nigam Ltd. v. State of

Rajasthan, reported at (2021) 19 SCC 206.

69. There will be no order as to costs.

70. Connected applications, if any, stand accordingly disposed of.

71. Interim orders, if any, stand vacated.

Later

After the above judgment is passed, learned Counsel appearing for the appellant points out that the appellant may be permitted to apply before the court taking up the Section 34 application for withdrawal of the deposit of 75% which was made before the said court.

Leave is granted to the appellant to make such application before the aforesaid court, subject to the said court deciding on the application in accordance with law.

