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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.A No.968 of 2024

AES India (Pvt.) Ltd., an existing company under the Companies Act, 2013 with its registered address at 108, Himalaya Palace, 65, Vijay Block, Laxmi Nagar, East Delhi, New Delhi-110092 represented through its authorised signatory, Shri Rajendra Narayan Pattnaik aged about 58 years, S/o late Shri Prabhakar, presently residing at 232 A, Shree Jagannath Vihar, Road No. 1, Lane 10, Bhubaneswar-751003.

...Appellant

-Versus-

1. **State of Odisha** represented through its Principal Secretary, Micro, Small & Medium Enterprises Department, Odisha Secretariat, Sachivalaya Marg, Bhubaneswar-751001.
2. **Micro and Small Enterprises Facilitation Council, Cuttack**, at-Directorate of Industries, Killa Maidan, Buxi Bazar, Odisha - 753001 represented through the Director of Industries.
3. **M/s Kalinga Insulation**, a partnership firm having its office at Udayabhat, Dochhaki, P.O.-Paradipgarh, P.S.-Paradip, District-Jagatsinghpur represented through its Managing Partner, Jyotish Kumar Acharya S/o Jugal Kishore Acharya.
4. **Odisha Power Generation Corporation Ltd.**, an existing company under the Companies Act, 2013 with its registered office at

Zone-A, 7th Floor, Fortune Tower, Chandrasekharpur, Bhubaneswar,
Orissa - 751023 represented through its Executive Director.

5. **Odisha Power Generation Corporation Limited**, IB Thermal
Power Station, At/P.O- Banharpali, District-Jharsuguda, represented
through its Director (Operation).

...Respondents

Advocates appeared in the cases:

For the Appellant: Mr. Sudipto Sarkar, Senior Advocate
Mr. S. Satyakam, Advocate
Ms. Adyasha Kar, Advocate

For Respondent No.1: Mr. Debakanta Mohanty,
Addl. Government Advocate

For Respondent No.3: Mr. Manoj Kumar Mishra,
Senior Advocate
Mr. Digambar Mishra, Advocate

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MURAHARI SRI RAMAN

JUDGMENT
05.11.2024

Chakradhari Sharan Singh, CJ.

1. In the present intra-court appeal, the appellant has challenged
a judgment and order of this Court dated 28.03.2024 passed by a
learned Single Judge of this Court in W.P.(C) No.36825 of 2023

whereby the learned Single Judge has declined to entertain a challenge to an award passed by the Micro and Small Enterprises Facilitation Council, Cuttack (“the Council”, in short) under Article 226 of the Constitution of India, holding that the said award can be challenged only in accordance with the provisions prescribed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Arbitration and Conciliation Act”).

2. Before we address the pleadings and factual aspects and the grounds taken by the appellant to assail the impugned order passed by the learned Single Judge, it would be beneficial to notice the relevant provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (“the MSMED Act”, in short) and the Arbitration and Conciliation Act.

2.1 Chapter-V of the MSMED Act contains the provision relating to “Delayed Payments to Micro and Small Enterprises” within the meaning of Section 2(h) and 2(m) of the said Act. Section 18 of the MSMED Act as it then existed, prior to its amendment, read as under:

18. Reference to micro and small enterprises facilitation council.-

1. Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

2. On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

3. Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

4. Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

5. *Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.*

(Underscored for emphasis)

2.2. Respondent No.3 is covered by the provisions of MSMED Act. Part-III of the Arbitration and Conciliation Act contains provision for conciliation. Section 62 to 75 of the Act lay down the procedure for conciliation proceeding. Section 76 of the Arbitration and Conciliation Act deals with the termination of conciliation proceedings, which reads as under:

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.

3. It is primarily the case of the appellant/writ petitioner that the award made by the Council ought to have been interfered with under Article 226/227 of the Constitution of India as there was no conciliation held in accordance with the procedure prescribed, which is a condition precedent for initiation of arbitration proceeding under Section 18 (3) of the MSMED Act and, therefore, the arbitral award is a nullity.

4. Learned Single Judge after having noticed the rival submissions made on behalf of the parties and taking into account various judicial pronouncements, has held as under:

13.1 On a plain reading of the case law, it is clear that the jurisdiction of a Court may be classified into several categories, which are broadly described as (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction and (iii) jurisdiction over the subject matter.

13.2 So far as the territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be raised at the earliest possible opportunity and in any case at or before the settlement of issues. If objection with regard to territorial or pecuniary jurisdiction is not raised at the earliest possible opportunity, it cannot be allowed to be taken at a subsequent stage. The aforesaid case law also makes it

clear that jurisdiction as to the subject matter is however totally distinct and stand on a different footing. Where the Court has no jurisdiction over the subject matter of the dispute by reason of any limitation imposed by the statute, charter or commission, it cannot take up the cause or matter. An order passed by a Court having no jurisdiction is a nullity. Endeavour was made by Mr. Rath, learned Senior Advocate for the Petitioner to bring the instant case under the third category stating that the Council had no jurisdiction to proceed with the arbitration without conducting an effective conciliation under Section 18(2) of the MSMED Act. As discussed earlier, this Court has already held that there is no infirmity in the process of conciliation. Further, no objection with regard to the jurisdiction of the Council to proceed with the arbitration was raised, as required under Section 16 of the Arbitration Act. In any event, the proceeding of arbitration before the Council having all characteristics of an arbitration proceeding under the Arbitration Act, the objection with regard to competence or jurisdiction of the Arbitrator can only be challenged in a proceeding under Section 34 of the Arbitration Act and not before that. Thus, the issue with regard to competence of the Arbitrator (the Council) can only be raised in a properly constituted petition under Section 34 of Arbitration Act as provided under Section 19 of MSMED Act and not in a proceeding under Article 227 of the Constitution of India, as in the instant case.

14. Accordingly, this Court is constrained to hold that the writ petition in the present form is not maintainable and hence stands dismissed. However, in the facts and circumstances, there shall be no order as to costs.

5. Mr. Sudipto Sarkar, learned Senior Counsel appearing on behalf of the appellant has vehemently argued that in the present case, there was no conciliation proceeding held in accordance with the procedure prescribed and termination of conciliation proceeding before the Council and, therefore, the arbitration proceeding undertaken by the council was completely beyond jurisdiction. He has placed reliance on the Supreme Court's decision in case of *Jharkhand Urja Vikas Nigam Limited v. State of Rajasthan and others, (2021) 19 SCC 206* to strengthen his contention. Reliance has also been placed by him on the Supreme Court's decision in case of *Vijeta Construction v. Indus Smelters Ltd. and another, 2021 SCC OnLine SC 3436* and *Shri Mahavir Ferro Alloys Pvt. Ltd. v. Passary Minerals Ltd. and others, 2023 SCC OnLine Ori 880*. He has submitted that the conciliation was purportedly initiated on 17.11.2022 and on the very next date on 27.12.2022, the conciliation was terminated ostensibly on the ground that no proposal was received from the parties. He has argued that the Council clubbed the arbitral and conciliation proceeding together, as the parties were directed to file their pleadings for arbitration in response to pleadings filed at the stage of conciliation. He has submitted that such clubbing of arbitration and conciliation proceeding

is impermissible under the MSMED Act. He has also argued that the impugned award dated 07.09.2023 was passed in violation of principles of natural justice inasmuch as no opportunity was afforded to the appellant to cross-examine the sole witness of respondent No.3 based on whose evidence the award was passed. He submits that the learned Single Judge failed to appreciate that no conciliation proceeding as mandated by Section 18 of the MSMED Act was conducted which envisages a two tier system for dispute resolution. An arbitration proceeding can be initiated under Section 18(3) of the MSMED Act only if conciliation between the erring parties fails. Assailing the view taken by learned Single Judge that the appellant could have made an application under Section 16 of the Arbitration and Conciliation Act questioning the competence of arbitration tribunal, it has been submitted by learned Senior Counsel for the appellant that since the appellant was asked to file a counter affidavit before initiation of the arbitral proceeding, it had no opportunity to file application under Section 16 of the Act.

6. Mr. Mishra, learned Senior Counsel appearing on behalf of the contesting respondent No.3, on the other hand, has submitted that the

impugned order passed by learned Single Judge does not suffer from any legal infirmity requiring interference in the present intra-court appeal. He has submitted that the Council after undertaking the conciliation proceeding has specifically recorded that the conciliation proceeding failed, whereafter the arbitration proceeding was undertaken as prescribed under Section 18 (3) of the Act. He submits that the learned Single Judge has rightly declined to interfere with the award with a liberty to the appellant to question the same in accordance with the provisions under Section 34 of the Arbitration and Conciliation Act.

7. From the materials on record, it is evident that by an order dated 17.11.2022, the conciliation process under Section 18 (2) of the MSMED Act was initiated for amicable settlement of the disputes between the parties. By a subsequent order dated 27.12.2022, the Council declared failure of the conciliation process under Section 18 (2). Thereafter, it invoked arbitration clause under Section 18 (3) of the Act. It is the appellant's case that there is no semblance of any attempt to conciliate the dispute in accordance with the provisions under the Arbitration and Conciliation Act.

8. Upon careful scrutiny of the arguments advanced on behalf of the appellant, it appears that the appellant in the writ proceeding attempted to assail the opinion of the Council that conciliation between the parties had failed, on various grounds including the ground that effective steps were not taken for conciliation. The appellant had appeared before the Council in the conciliation proceeding, completely denying the claim of the respondent and had asserted to the extent of saying that it sought to abuse the beneficial legislation i.e. MSMED Act and sought to unjustly enrich itself at the cost of the appellant. Taking into account the rival stands by the parties, the Council had terminated the conciliation process under Section 18 (2) of the MSMED Act on 17.11.2022. The appellant participated in the arbitration proceeding, as is evident from the impugned award made by the Council. From the award, it does not appear that the appellant ever raised any issue of non-compliance of the requirement under Section 18 (2) of the MSMED Act read with the provisions under Part-III of the Arbitration and Conciliation Act.

9. The decision rendered in case of *Jharkhand Urja Vikas Nigam Limited* (supra) is not applicable in the present facts and

circumstances of the case. In case of ***Jharkhand Urja Vikas Nigam Limited*** (supra), the appellant before the Supreme Court had not appeared in the proceeding for conciliation and on the very first date of appearance, an order was passed by the Council directing the appellant and/or its predecessor Jharkhand State Electricity Board to pay a sum of Rs.78,74,041/- towards principal claim and Rs.91,59,705 towards interest. In the said case, no arbitration proceeding was found to have been initiated in accordance with the provisions of Arbitration and Conciliation Act. In such view of the matter, the Supreme Court had held in paragraph-18 as under:

18. The order dated 6-8-2012 is a nullity and runs contrary not only to the provisions of the MSMED Act but contrary to various mandatory provisions of the Arbitration and Conciliation Act, 1996. The order dated 6-8-2012 is patently illegal. There is no arbitral award in the eye of the law. It is true that under the scheme of the Arbitration and Conciliation Act, 1996, an arbitral award can only be questioned by way of application under Section 34 of the Arbitration and Conciliation Act, 1996. At the same time, when an order is passed without recourse to arbitration and in utter disregard to the provisions of the Arbitration and Conciliation Act, 1996, Section 34 of the said Act will not apply. We cannot reject this appeal only on the ground that the appellant has not availed the remedy under Section 34 of the Arbitration and Conciliation Act, 1996.



10. In the facts and circumstances of the present case, learned Single Judge has rightly declined to interfere with the arbitral award which could have been assailed by the appellant under Section 34 of the Arbitration and Conciliation Act.

11. There is no legal infirmity in the impugned order passed by the learned Single Judge. We do not find any merit in the present appeal, which is accordingly dismissed.

(Chakradhari Sharan Singh)
Chief Justice

M.S. Raman, J. I agree.

(M.S. Raman)
Judge

S.K. Guin, PA

