

**In the High Court at Calcutta
Original Civil Jurisdiction
Commercial Division**

The Hon'ble Justice Sabyasachi Bhattacharyya

AP-COM No. 789 of 2024

**Porel Dass Water & Effluent Control Private Limited
VS
The West Bengal Power Development
Corporation Limited and Ors.**

For the petitioner : Mr. Sabyasachi Chaudhury, Adv.
Mr. Satadeep Bhattacharyya, Adv.
Ms. Sriparna Mitra, Adv.
Mr. Arindam Paul, Adv.
Ms. Debarati Das, Adv

For the respondent : Mr. Jishnu Chowdhury, Adv.
Mr. Chayan Gupta, Adv.
Mr. Aritra Basu, Adv.
Mr. Rittick Chowdhury, Adv.
Mr. Aviroop Mitra, Adv.
Mr. Satrajeet Sen, Adv.

Hearing concluded on : 17.09.2024

Judgment on : 30.09.2024

Sabyasachi Bhattacharyya, J:-

1. The claimant in an arbitral proceeding under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the “MSME Act”) has preferred the instant application under Section 29A of the Arbitration and Conciliation Act, 1996, (in brief, “the 1996 Act”).
2. Learned counsel for the petitioner argues that as per Section 62 of the newly enacted The Mediation Act, 2023(for short, “the 2023 Act”),the MSME Act has been amended in the manner specified in its Seventh

Schedule. The Seventh Schedule incorporates certain changes in Section 18 of the MSME Act, in particular altering sub-sections (2) and (3) thereof to incorporate pre-arbitration mediation instead of conciliation by the MSME Facilitation Council(hereinafter referred as “the Council”).

3. The original sub-section (4) of Section 18 has been renumbered as sub-section (5). Instead, the newly-introduced sub-section(4) provides for arbitration by the Council or the Institution or the Centre providing alternative dispute resolution services to which it refers the matter if the mediation stands terminated.
4. The further change which is effected is that the previous sub-section (5) of Section 18, providing that every reference under Section 18 shall be decided within a period of ninety days from the date of making such a reference, now stands deleted.
5. It is contended that the 2023 Act came into force on and from its being notified on September 14, 2023, which was published in the Official Gazette on September 15, 2023.
6. It is argued that since the limitation of ninety days has been done away with by the deletion of sub-section (5) of Section 18, there is no longer any stipulation of time-limit for completion of an arbitral proceeding by the Council.
7. Section 56 of the 2023 Act, on the other hand, provides that the 2023 Act shall not apply to, or in relation to any mediation or conciliation commenced before the coming into force of the said Act. However, the

same does not include a similar saving clause in respect of pending arbitral proceedings.

8. In the present case, the period of ninety days has expired on or about May 8, 2023, since the reference was entered into on February 10, 2023. As such, this Court has the power under Section 29A of the 1996 Act, which has been applied by virtue of the newly-introduced sub-section (4) of Section 18 of the MSME Act, to extend the mandate of the Council, acting as Arbitrator.
9. In the alternative, it is contended by learned counsel for the petitioner that if Section 62 of the 2023 Act is not applicable, the original Section 18 is retained in the statute book. Even in such case, Section 29A applies in respect of MSME arbitrations. In support of the said contention, learned counsel cites *Magnum Opus IT consulting Private Limited v. Artcad Systems, Through its Proprietor Vinay Digambar Shende*, reported at 2022SCC OnLine Bom 2861.
10. Learned counsel appearing for the petitioner argues that the time limit of ninety days as stipulated in Section 18(5) of the MSME Act is directory and not mandatory. To support such contention, learned counsel cites *GPT Infra Projects Limited vs. Miki Wire Works Pvt. Ltd.* reported at 2023 SCC OnLine Cal 595, where a co-ordinate Bench of this Court held to that effect.
11. Learned counsel submits that Section 18(4) confers exclusive jurisdiction on the Council to take up the arbitral proceedings. In view of such specific mandate having been conferred on the Council, and since sub-section(1) as well as sub-section (4) of Section 18 contain

non obstante clauses, there cannot be any substitution of the Council even if the mandate expires, within the contemplation of either Section 29A or Section 15 of the 1996 Act.

- 12.** It is argued that the MSME Act being a special statute relating to MSME units, it has overriding effect on the 1996 Act. In support of the said proposition, the petitioner relies on a judgment reported at (2023) 6 SCC 401 [*Gujarat State Civil Supplies Corporation Limited V. Mahakali Foods Private Limited*].
- 13.** That apart, it is contended by the petitioner that there is no material presented in the instant case which can justify any substitution of the Council as the Arbitral Tribunal.
- 14.** Learned counsel appearing for the respondents contends that the provisions of the 2023 Act are not applicable in the instant case since Section 62 has not yet been notified.
- 15.** Learned counsel, in support of the said argument, places his reliance on Notification No. S.O.4384(E) dated October 9, 2023, published by the Ministry of Law and justice relating to the enforcement date of the 2023 Act. As per the said Notification, several Sections of the 2023 Act have been notified, thereby bringing those into force with effect from October 9, 2023. However, conspicuously, Section 62 of the 2023 Act does not find place in the said Notification.
- 16.** Learned counsel for the respondent next cites Unstarred Question No. 2192, answered on December 21, 2023, raised in the Rajya Sabha regarding implementation of the 2023 Act by a Member of Parliament, Shri. Vivek K. Tankha. In answer to the question as to what steps the

Government has taken to implement the 2023 Act, the Law Minister, Shri Arjun Ram Meghwal, replied that the 2023 Act is the standalone law on mediation, which has been enacted to establish a robust and efficacious mediation ecosystem in the country. As provided under Section 1(3) of the 2023 Act, some provisions of the Act have been notified vide Gazette Notification dated October 9, 2023.

- 17.** Thus, even the Law Minister referred only to the Notification dated October 9, 2023 in his reply dated December 21, 2023, indicating clearly that the said Notification was the only one holding the field as yet, which obviates the possibility of Section 62 having been implemented by notification as yet.
- 18.** Learned counsel for the respondent also relies on an unreported judgment of the Madras High Court dated March 19, 2024, reported at *Arb.O.P.(Com.Div.) No. 560 of 2023* in the matter of *Tamil Nadu Medical Services Corporation Limited vs. M/s Smilax Healthcare Pvt. Ltd.* where the Learned Single Judge of the Madras High Court also held that Section 62 of the 2023 Act is yet to be notified and the amended Section 18 of the MSME Act is yet to come into force.
- 19.** Learned counsel for the respondent next contends that the mandate of the Council, acting as the Arbitral Tribunal, in the present case came to an end on May 8, 2023, that is, ninety days after the reference was entered into on February 10, 2023. It is argued that as held in *Gujarat State Civil Supplies (supra)*, the provisions of the MSME Act have an overriding effect on the provisions of the 1996 Act. For such purpose,

the *non obstante* clauses in Section 18, sub-sections (1) and (4) were also considered in the said case.

- 20.** By a deeming legal fiction, the 1996 Act is applicable to arbitrations under the MSME Act. Thus, in view of the mandate in sub-section (5) of Section 18, which according to the respondent is mandatory, since the expression “shall” has been used, the mandate of the Council as an Arbitrator expires upon completion of the ninety day period. Since the time-limit does not arise from Section 29A(1), it is argued that there is no scope of extension under Section 29A(3) or Section 29A(4) of the 1996 Act.
- 21.** It is submitted that the only provisions which are applicable are Sections 14 and 15, in terms of which the Council becomes *de jure* unable to perform its function after the mandatory period of ninety days is over. Thus, the only option before the parties is to seek a substitution under Section 15(2) of the 1996 Act.
- 22.** Learned counsel next contends that Section 18(4) of the MSME Act, which contains an independent *non obstante* clause, provides that the Council shall have jurisdiction to act as an Arbitrator or Conciliator under the said Section in a dispute between the supplier and buyer. The said provision is sought to be explained by learned counsel for the respondent to the effect that the same was necessary in view of the bar in Section 80(a) of the 1996 Act which precludes the Conciliator from acting as an Arbitrator. Apart from such limited context, the rest of Section 18(3), which confers jurisdiction on the Council and sub-section (5), which mandates the reference to be concluded within

ninety days, apply. However, it is conceded that the bar does not preclude the appointment of a fresh Arbitrator under Section 15 of the 1996 Act.

23. Upon hearing learned counsel for the parties, it is clear that the following issues fall for consideration in the present case:

- I. Whether Section 18 of the MSME Act stands amended by Section 62 of the 2023 Act;
- II. Whether the Court having jurisdiction over an arbitral proceeding under the MSME Act has the authority/jurisdiction to substitute the Council or its designated nominee as Arbitrator in an arbitration under Section 18 of the MSME Act;
- III. Whether the mandate of the Council or its nominee under Section 18(3) of the MSME Act terminates after the expiry of ninety days from the date of making the reference.

I. Whether Section 18 of the MSME Act stands amended by Section 62 of the 2023 Act.

24. Taking first thing first, this Court takes judicial notice of Notification No. S.O.4384(E) dated October 9, 2023 issued by the Ministry of Law and Justice, which has also been referred to by the Law Minister in Parliament, in his answer to the query regarding the steps being taken to implement the 2023 Act. The said Notification declares several provisions of the 2023 Act to come into force from October 9, 2023.

However, Section 62 of the 2023 Act is conspicuous by its absence from the said array of Sections. As such, Section 62 has not yet been notified and thus, is not yet implemented, which signifies that the amendments under the said Section, as contemplated in the Seventh Schedule of the 2023 Act, have not yet come into force.

25. Thus, this question is answered in the negative. Section 18 of the MSME Act stands in its original form, unamended by the 2023 Act as yet.

II. Whether the Court having jurisdiction over an arbitral proceeding under the MSME Act has the authority/jurisdiction to substitute the Council or its designated nominee as Arbitrator in an arbitration under Section 18 of the MSME Act.

26. With regard to this issue, Section 18(3) of the MSME Act assumes relevance. The said provision, in unequivocal terms, confers jurisdiction exclusively on the Facilitation Council under the said Act to either take up the arbitration by itself or refer it to any institution or centre providing alternative dispute resolution services as per the Council's decision, upon the termination of a conciliation proceeding. Sub-section (1) of Section 18 includes a *non obstante* clause which provides that notwithstanding anything contained in any other law for the time being in force, a reference can be made to the MSME Council in respect of situations covered under Section 17. There is no contention on the issue that the present dispute is covered under

Section 17 and was referred to the Council in the first place, where both sides participated.

- 27.** Sub-section (4) of Section 18 contains a separate *non obstante* clause and provides that the Council or its nominee shall have jurisdiction to act as an Arbitrator or Conciliator under the said Section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India. Therefore, there is no doubt that exclusive jurisdiction to conduct the arbitration under the MSME Act is conferred on the Council or its nominee and no other authority. Thus, it would be acting *de hors* the specific provisions of the MSME Act if the Council or its nominee is substituted as Arbitrator and a third entity is so appointed to conduct the arbitral proceeding under the MSME Act.
- 28.** In *Gujarat State Civil Supplies (supra)*, the Supreme Court categorically found that the provisions of the MSME Act override those of the 1996 Act.
- 29.** However, at the same time, it is to be kept in mind that the question of overriding a general statute by a special statute arises only when there is a conflict between the two and not if the two can operate harmoniously.
- 30.** Coming to Section 29A of the 1996 Act, sub-section (6) thereof empowers the court to substitute one or all of the Arbitrators while extending the period of the mandate under sub-section (4) thereof.
- 31.** Again, Section 14(1) of the 1996 Act provides that the mandate of an Arbitrator shall terminate and he shall be substituted by another

Arbitrator if he becomes *de jure* or *de facto* incapable of performing his functions. Section 15(2) provides that where the mandate of an Arbitrator terminates, a substitute Arbitrator shall be appointed according to the Rules.

- 32.** Thus, the above provisions clearly envisage that any Arbitrator can be substituted if his/her mandate terminates and/or he/she becomes *de jure* or *de facto* incapable of performing his/her functions.
- 33.** Insofar as substitution of the Council or its nominee by a third Arbitrator is concerned, the same militates squarely against Section 18, sub-sections (3) and (4), which together confer exclusive jurisdiction on the Council or its nominee to conduct the arbitration. The ratio of *Gujarat State Civil Supplies (supra)* applies and, since there is a conflict to that extent, the provisions of Section 18, sub-sections (3) and (4) override the portions of Section 29A(6), Section 14(1) and Section 15(2) of the 1996 Act insofar as they pertain to substitution of the Council or its nominee by a different Arbitrator. Hence, this question is also answered in the negative. The Court under Section 2(1)(e) of the 1996 Act does not have jurisdiction under any of the provisions of the 1996 Act, be it Section 29A(6), Section 14(1) or Section 15(2) of the 1996, Act to substitute the Council or its nominee by an alien Arbitrator.

III. Whether the mandate of the Council or its nominee under Section 18(3) of the MSME Act terminates after the expiry of 90 days from the date of making the reference.

34. This issue is comprised of two sub-issues. The first of those is whether the ninety days' period under Section 18(5) is mandatory. A learned Co-ordinate Bench of this Court, in *GPT Infra Projects Limited (supra)*, categorically held that since Section 18(5) does not provide any penal consequences for failure to conclude the reference within the period of ninety days, the said period is not mandatory. With utmost respect, I subscribe to the same view. That apart, the MSME Act, as rightly held by the learned Single Judge, was enacted to facilitate the growth and development of the MSME units and its purpose could not be read in such a manner so as to frustrate the reference to arbitration after the termination of conciliation.

35. Another important factor also comes into play. It would be elicited from a comparative study of Section 29A of the 1996 Act and Section 18(5) of the MSME Act that both deal with timelines for completion of the arbitral proceeding.

36. Sub-section (1) of Section 29A of the 1996 Act, similar to sub-section (5) of Section 18 of the MSME Act, uses the expression "shall" while fixing the timelines, respectively 12 months from completion of pleadings and 90 days from the reference being entered into. However, in case of Section 29A, an additional provision is introduced in sub-section (4), which stipulates that if the award is not made within the period specified in sub-section (1) or the extended period

under sub-section (3) of Section 29A, the mandate of the Arbitrator shall terminate unless the court extends the same. Thus, an additional provision/sanction had to be introduced in sub-section (4) to ensure that the mandate, unless extended, terminates after the expiry of the stipulated period.

- 37.** Conspicuously, there is no such sanction for non-completion of the arbitral proceeding within the stipulated period of 90 days in Section 18(5) of the MSME Act or elsewhere in the said Act. Hence, on a mere comparison of the two provisions, the timelines in both cases being hedged by the expression “shall”, shows that whereas Section 29A needed a further provision to provide that in case of non-completion within the timeline the mandate shall terminate, the said additional provision is intentionally left out in Section 18 of the MSME Act. Thus, as opposed to Section 29A (3) of the 1996 Act, Section 18 (5) of the MSME Act does not carry any sanction or adverse consequence for non-adherence to such outer time-limit. This is an additional indicator that the timeline stipulated in Section 18(5) is not mandatory but directory.
- 38.** In fact, a comprehensive reading of the said provision shows that the timeline is only to nudge the Council into action and is a provision “*in terrorem*”. Similar timelines are also provided in other statutes, including matrimonial statutes and other statutes, which have also been held by courts to be directory and not mandatory in nature.
- 39.** Hence, the 90 days’ period stipulated in Section 18(5) is directory and not mandatory.

- 40.** The next question which arises is, what then is the status of the mandate of the Council as Arbitrator after expiry of 90 days. Nothing having been provided in the MSME Act in that regard, the obvious conclusion is that the said 90 days' stipulation is merely an expectation of the Legislature for the Facilitation Council to expedite the arbitral proceedings before it under the MSME Act but there is no statutory sanction to lend teeth to the provision so as to ensure the mandatory compliance of the same. Hence, even if the timeline of 90 days is exceeded, there is no sanction either to terminate the mandate or to affect the validity of the mandate even thereafter.
- 41.** The provisions of Section 29A regarding extension are not attracted, since such extension under sub-sections (3) or (4) of the said Section only pertains to the expiry of the timeline as stipulated in sub-section (1) of the self-same Section. Hence, for an extension to happen under sub-sections (3) or (4) of Section 29A, the stipulation of the time-limit must be under sub-section (1) of the self-same Section in the first place.
- 42.** A scenario under Section 18(5) of the MSME Act, however, is not covered by Section 29A and the time cannot and need not be extended under the said Section.
- 43.** Hence, in the present case, the argument of the respondent that the mandate of the Council has terminated or that the Council has become *de jure* incapable of performing its functions does not hold good and is hereby turned down.

- 44.** In fact, the present application under Section 29A is redundant, as the Council still has mandate, even without an extension being granted, to continue with the arbitral proceeding.
- 45.** In such view of the matter, AP-COM No.789 of 2024 is disposed of by holding that the prayer for extension made therein is unnecessary and academic. The Council still has mandate to complete the arbitral proceedings. However, in view of the stipulation of 90 days in Section 18(5) of the Micro, Small and Medium Enterprises Development Act, 2006 having been long exceeded, this Court expresses hope and trust that the Facilitation Council shall conclude the proceedings between the parties as expeditiously as possible, positively within three months from the date of the communication of this order to the Council .
- 46.** There will be no order as to costs.
- 47.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(**Sabyasachi Bhattacharyya, J.**)