

Bombay High Court

Shah And Parikh Engineers And ... vs Urmi Trenchless Technology Pvt. ... on 25 February, 2019

Bench: K.R. Sriram

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY AND ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL CHAMBER SUMMONS NO.997 OF 2018
WITH
COMMERCIAL NOTICE OF MOTION (L) NO.2266 OF 2018
IN
COMMERCIAL SUIT (L) NO.875 OF 2018

M/s. Shah & Parikh, Engineers & ContractorsPlaintiff

Vs.

M/s. Urmi Trenchless Technology Pvt. Ltd. & Anr. . . .Defendants

Shri M.M. Vashi, senior advocate a/w. Ms. Manisha Desai and Shri Vivek Vashi I/b. M.P. Vashi Associates for applicant/plaintiff in CHSCD/997/2018.

Shri Rohaan Cama I/b. Rajesh Kothari and Company for defendant no.1 and for applicant in NMCDL/2266/2018.

Shri Ronak Desai a/w. Ms. Maulik Nanavati for defendant no.2.

CORAM : K.R.SHRIRAM, J.

RESERVED ON : 1st FEBRUARY 2019 PRONOUNCED ON : 25th FEBRUARY 2019 P.C.:

1 Plaintiff and defendant no.1 had entered into a contract whereby plaintiff gave a work order to defendant no.1 for laying of RCC sewer pipeline by micro tunneling method. During the work process, the machine of defendant no.1 got stuck and it was plaintiff's case that the machine was defective and plaintiff itself completed the work. Thereafter, plaintiff received an invoice dated 12 th October 2017 from defendant no.1 claiming Rs.62,38,138.87/-.

2 On 13th October 2017 defendant no.1, who is a contractor registered under the provisions of the Micro, Small and Medium Gauri Gaekwad 2/27 CHSCD-997-2018.doc Enterprises Development Act, 2006 (MSME Act), also lodged a claim with defendant no.2. Defendant no.2 is a Council constituted by the State of Gujarat under the MSME Act. Defendant no.1 referred its disputes against plaintiff to defendant no.2 under Section 18 of the MSME Act. Apart from its unpaid invoice, defendant no.1 has also claimed against plaintiff a sum of Rs.65,09,739/- as damages.

Plaintiff responded to the Council through its advocate's letter dated 26th October 2017, inter alia, stating that (a) the Council has no jurisdiction and (b) the claim of plaintiff is barred by limitation. Correspondence was thereafter exchanged finally resulting in plaintiff filing the present suit.

The relief claimed in the present suit, as it stands today, read as under :

(a) That by a permanent injunction of this Hon'ble Court, the defendant no.2 be restrained by an order and injunction of this Hon'ble Court from adjudicating and deciding upon the disputes raised by the defendant no.1 vide letter dated 13th October 2017;

(b) In the alternative of prayer (a), a permanent injunction be granted against the defendant no.1 from taking any further steps for adjudicating of disputes, which are raised by the defendant no.1 before the defendant no.2 vide letter dated 13th October 2017 and/or pursue the claims before the defendant no.2;

(c) That it be declared that the alleged claim of the defendant no.1 raised vide letter dated 13 th October 2017 before the defendant no.2, s barred by law of limitation.

3 On 9th July 2018, on the application of plaintiff, the Court directed defendant no.2 not to proceed with the hearing of the claim Gauri Gaekwad 3/27 CHSCD-997-2018.doc lodged by defendant no.1. The stay has been extended from time to time and still in force. The proceeding before defendant no.2 is at the stage of conciliation.

4 The reliefs sought in the notice of motion taken out by plaintiff are identical to prayer clauses - (a) and (b) in the suit. Defendant no.1 has filed limited affidavit in reply challenging the jurisdiction of this Court. According to defendant no.1, the suit is not maintainable in view of Section 8 of the Arbitration and Conciliation Act, 1996 (Arbitration Act 1996). Plaintiff has also filed a chamber summons no.997 of 2018 seeking leave to amend the plaint, inter alia, contending that plaintiff had suffered damages and therefore, seeking to add a claim for damages in the sum of Rs.1,10,00,000/-. Defendant no.1 has opposed this chamber summons by filing an affidavit in reply. Arguments were not addressed on the chamber summons but Shri Vashi requested that if the Court does not dismiss the suit or the plaint is not rejected, the amendment sought be allowed.

Defendant no.1, after the chamber summons was taken out, took out a notice of motion seeking to refer the parties to the Facilitation Council under the MSME Act. The averments in the affidavit in support are basically similar to the affidavit in reply to the notice of motion. 5 Shri Cama, counsel for defendant no.1 submitted that defendant no.1 is a supplier as defined under the MSME Act and under Gauri Gaekwad 4/27 CHSCD-997-2018.doc Section 18 of the MSME Act, 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. Shri Cama submitted that once a reference is made, the provisions of the Arbitration 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 Arbitration Act 1996. The proceedings before defendant no.1, therefore, are proceedings under the Arbitration Act, 1996 pursuant to a deemed agreement between the parties to the dispute. With the applicability of Part I of the Arbitration Act, 1996 in all its force, the extent of judicial intervention in arbitrations is limited by the non- obstante provisions of Section 5 of the Arbitration Act, 1996. The Court could, therefore, only intervene in respect of matters expressly provided for in the Arbitration Act, 1996. The validity of the proceedings before the Arbitral Tribunal is an issue which the Council, and not

the Court, could decide under Section 16 of the Arbitration Act, 1996 because sub-section (1) of Section 16 opens with the words "The Arbitral Tribunal may rule on its jurisdiction...". Therefore, the Council can go into the question whether its authority had been wrongly invoked by defendant no.1 and it is open to the Council to hold that it had no jurisdiction to proceed with the matter. It is, however, incumbent on the Court to refer Gauri Gaekwad 5/27 CHSCD-997-2018.doc the parties to arbitration under Section 8(1) of the 1996 Act if a suit is filed in a matter which is the subject matter of an arbitration agreement. 6 Shri Cama relied upon Secur Industries Limited V/s. M/s. Godrej and Boyce Mfg. Co. Ltd. and Anr.1 Relying on the said judgment, Shri Cama submitted that (a) the Apex Court has held that even if the reference under the MSME Act is a statutory one, still Section 16 of the 1996 Act will apply to the present case; (b) the Apex Court was dealing with Section 6 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 and Section 6 of the said Act was similar to the provisions of Section 18 of the MSME Act. 7 Shri Cama further relied upon the judgment of the Apex Court in P. Anand Gajapathi Raju V/s. P.V.G. Raju (Dead) 2 to submit that the language of Section 8 of the Arbitration Act 1996 is peremptory and it is, therefore, obligatory for the Court to refer the parties to arbitration. Shri Cama also relied upon the judgment of the Division Bench of this Court in M/s. Steel Authority of India Ltd. and Anr. V/s. Micro, Small Enterprise Facilitation Council, through Joint Director of Industries, Nagpur Region, Nagpur³ to submit that Section 18(1) of the MSME Act clearly allows any party to a dispute, namely, a buyer and a supplier to make reference to the Council and if buyer, i.e., plaintiff wishes to file a counter claim it may file with defendant no.2 in the

1. AIR 2004 SC 1766

2. 2000 (4) SCC 539

3. AIR 2012 Bombay 178 Gauri Gaekwad 6/27 CHSCD-997-2018.doc arbitration proceedings. Relying upon Paper and Board Convertors V/s. U.P. State Micro and Small Enterprises Facilitation Council, Kanpur and Ors.⁴, Shri Cama submitted that under Section 18(1) of the MSME Act, a statutory reference to the Facilitation Council is stipulated on receipt of which the Council shall either conduct a conciliation in the matter itself or seek assistance of any institution or centre, etc. Thereafter, the Council may, either itself take up the dispute for arbitration or refer the dispute to an institution or centre providing alternate dispute resolution services for arbitration and thereafter, the provisions of Arbitration Act 1996 shall apply as if arbitration was in accordance with provisions of Section 7(1) of Arbitration Act 1996. Shri Cama submitted that once the jurisdiction of the Facilitation Council is invoked, the Council has exclusive jurisdiction. 8 Shri Cama also submitted that under Section 41 (b) of the Specific Relief Act, 1963 an injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a Court not subordinate to that from which injunction is sought. Shri Cama submitted that the legislature has in clear and unambiguous language expressed that an injunction can be granted to restrain any person from instituting or prosecuting any proceeding only in a Court subordinate to that from which injunction is sought. Shri Cama submitted that the

4. MANU/UP/1087/2014 Gauri Gaekwad 7/27 CHSCD-997-2018.doc Council is not subordinate to this Court and in any event, the jurisdiction of the Council is in Gujarat and if at all an injunction

can be granted, it can be only by Gujarat High Court and not this Court. For this Shri Cama relied upon the judgment of the Apex Court in Cotton Corporation of India Limited V/s. United Industrial Bank Limited⁵. 9 Shri Cama further relied upon the judgment of the Punjab and Haryana High Court in Welspun Corp. Ltd. V/s. The Micro and Small, Medium Enterprises Facilitation Council, Punjab and Ors. 6 to submit that if a seller lodges a reference with the Council, the buyer may also lodge a claim with the Council. The claim for damages, assuming the Court allows the chamber summons, sought to be raised by plaintiff, by way of the proposed amendment could be raised before the Arbitral Tribunal to be constituted under the MSME Act.

10 Shri Cama submitted that even if the Court allows the chamber summons assuming for the sake of argument, claim for damages can be, if plaintiff wants, continued here but plaintiff cannot get in any event, prayer clauses - (a), (b) and (c) in the plaint. 11 It was also submitted by Shri Cama that the suit being simply for an injunction and declaration, the same was not within the pecuniary jurisdiction of this Court, as Court fees has wrongly been paid

5. 1983 DGLS (SC) 271

6. CWP No.23016 of 2011 (O&M) dated 13.12.2011 Gauri Gaekwad 8/27 CHSCD-997-2018.doc on the value of defendant no.1's claim before the Facilitation Council. Further, defendants are not within the territorial jurisdiction of this Court and no leave under Clause XII of the Letters Patent having been taken, this Court would have no jurisdiction to entertain the above suit. 12 Shri Vashi for plaintiff submitted that under Section 18 of the MSME Act, once a party makes a reference, the Council shall conduct a conciliation in the matter either by itself or seek assistance of any institution. Only if conciliation fails, will Section 18(3) come into effect, i.e., arbitration. As even conciliation is not over, Section 8 of the Arbitration Act 1996 is yet to be triggered. Shri Vashi also submitted that defendant no.1 is not registered with defendant no.2 for the activity which was contracted. Section 15 to 18 of MSME Act can be only for goods supplied and not for damages and as the claim of defendant no.1 lodged with defendant no.2 includes a claim for damages, Section 18 is not applicable. Shri Vashi added, once the chamber summons for leave to amend is allowed, the suit for damages is maintainable. Shri Vashi also submitted that the claim of defendant no.1 before defendant no.2 is time barred and therefore, it cannot be heard by the Facilitation Council. Shri Vashi relied upon the judgment of the Single Judge of this Court in Maharashtra State Electricity Distribution Company Limited and Ors. V/s. Deltron Electronics⁷ and judgment of the Division Bench in

7. 2017(2) Mh.L.J. 605 Gauri Gaekwad 9/27 CHSCD-997-2018.doc M/s. Delton Electricals V/s. Maharashtra State Electricity Distribution Company Limited and Ors 8. Shri Vashi submitted that Courts have held that the provisions of Limitation Act are applicable to any arbitration under the MSME Act and therefore, when defendant no.1's claim is barred by limitation, defendant no.2 can have no jurisdiction. Relying upon S.B.P. and Company V/s. Patel Engineering Limited and Ors.⁹, Shri Vashi also submitted that at the hearing of the application under Section 8, the Court has to consider whether the claim filed is within limitation. Shri Vashi further submitted that once a claim is time barred, it ceases to be a claim and therefore, defendant no.2 has no jurisdiction to decide a time barred claim. Relying upon Cable Corporation of India Limited V/s. A.P. Micro and Small

Enterprises Facilitation Council, Government of Andhra Pradesh, Commissionerate of Industries, A.P., Hyderabad and Anr. 10, Shri Vashi submitted that limitation goes to the route of the jurisdiction and hence if the Court comes to a conclusion that the claim is time barred, the Council need not even go ahead with the reference.

None of the submissions of Shri Vashi are sustainable. 13 As regards the contentions of Shri Vashi that the aforesaid notice of motion (L) no.2266 of 2018 filed by defendant no.1 under Section 8 of the Arbitration Act must be rejected as there is no

8. 2017 SCC Online Bom 9000

9. MANU/SC/1787/2005

10. 2012 SCC Online AP 415 Gauri Gaekwad 10/27 CHSCD-997-2018.doc arbitration pending as on date and it is still in conciliation stage, I am unable to agree. This is because Section 8 does not distinguish between conciliation and arbitration. Section 8 only states that the judicial authority shall, once it is satisfied that there is an arbitration agreement, refer the disputes to arbitration. By the deeming fiction as held in Secur Industries (Supra), M/s. Steel Authority of India Ltd. (Supra) and Paper and Board Convertors (Supra), once MSME Act is applicable, the provisions of Arbitration Act, 1996 get activated. Under sub-section (4) of Section 18, this position is made abundantly clear because it stipulates that notwithstanding anything contained in any other law for the time being in force, the 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. 14 Moreover, this contention of Shri Vashi is also misconceived for the following reasons :

(i) The reason that arbitration has not begun is because at the conciliation stage, plaintiff approached this Court and an order dated 9th July 2018 was passed by this Court restraining defendant no.2, i.e., the Facilitation Council, from proceeding with the hearing in the matter. Plaintiff having invoked the jurisdiction of this Court cannot now take advantage of the state of affairs brought about by its own misconceived Gauri Gaekwad 11/27 CHSCD-997-2018.doc suit;

(ii) Further the arguments proceed on a misreading of Section 8 of the Arbitration Act. Section 8 of the Arbitration Act does not require an arbitral reference/proceeding to be pending. It is in fact, very often, in situations where a party has not commenced arbitration but has chosen to file proceedings in Court that the opposite party raises an objection by filing an application under Section 8 of the Arbitration Act seeking a direction that the parties be referred to arbitration. Thus, it is untenable to contend that the aforesaid application made by defendant no.1 under Section 8 of the Arbitration Act will not lie and/or that the deemed arbitration agreement between the parties under Section 18(3) of the MSME Act is not implementable merely because the arbitration has not commenced;

(iii) Further, it is trite that very often an arbitration clause will contemplate a pre-reference conciliation process. This pre-reference conciliation process does not in any manner dilute the arbitration agreement or imply that a Court entertaining a suit will continue with the suit and not

refer the parties to Arbitration under Section 8 of the Arbitration Act, merely because parties are still at the stage of conciliation.

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Section 18 of the MSME Act provides that any party to a

dispute may make a reference to the Facilitation Council, on receipt of which the Council shall either itself or through an alternate dispute resolution institution or centre, carry out conciliation between the parties and the provisions of Sections 65 to 81 of the Arbitration Act will apply to the said conciliation.

16 Sub section 3 of Section 18 makes it clear that where the conciliation fails, the Facilitation Council shall itself take up the disputes for arbitration or refer it for arbitration to any institution or centre providing alternate dispute resolution services. There is a deeming provision in Section 18(3) of the MSME Act that the Arbitration Act will apply to the disputes as if the arbitration was pursuant to an arbitration agreement in terms of Sub Section 1 of Section 7 of the Arbitration Act. 17 Thus, in light of the deeming provision under Section 18(3) of the MSME Act, there is deemed to be an arbitration agreement between defendant no.1 and plaintiff in respect of the disputes pending before the Facilitation Council. It is those very disputes which form the subject matter of the present suit and on the basis of which plaintiff seeks an injunction and declaration that the claims made by defendant no.1 before the Facilitation Council are barred by limitation. The subject matter of the present suit is thus clearly the subject matter of the Gauri Gaekwad 13/27 CHSCD-997-2018.doc proposed arbitration and therefore, the provisions of Section 8 of the Arbitration Act will apply to the present case. The action brought before this Court being the subject matter of a deemed arbitration agreement under Section 7, this Court ought to refer the parties to arbitration. It is well settled that the provisions of Section 8 are per-emptory and mandatory and the Court must refer the parties to arbitration [P. Anand Gajapathi Raju (Supra)].

18 In the light of the above, by virtue of Section 18(3) of the MSME Act, there is a deemed arbitration agreement between the parties under section 7 of the Arbitration Act, in respect of the claims made by Defendant No. 1 which are the subject matter of the present suit. This Court being a 'judicial authority' under Section 8 of the Arbitration Act, ought to refer the parties to arbitration as contemplated in Section 18(3) of the MSME Act.

19 As regards the other defence is concerned, defendant no.1 is admittedly a small enterprise registered under the MSME Act. The registration certificate is annexed at Exhibit '1' to the affidavit in support of notice of motion (L) no.2266 of 2018 filed by defendant no.1 under Section 8 of the Arbitration Act. The Registration Certificate is for "horizontal boring", which is nothing but drilling activity. Plaintiff in the course of arguments did not dispute that defendant no.1 was registered Gauri Gaekwad 14/27 CHSCD-997-2018.doc under the MSME Act, but merely sought to contend that the work forming the subject matter of the contract between the parties was not the same activity for which defendant no.1 had been registered. However, as stated above, this is misconceived as "horizontal boring" is in fact a drilling activity. Further, there is nothing in the MSME Act which provides that the registration for a particular activity will render an enterprise liable not to be regarded as a micro, small or medium enterprise for any other activity. Once registered, the status of the enterprise is that of a registered enterprise under the MSME Act and all the provisions of the MSME Act has to apply with full force.

Moreover, defendant no.2 in its letter dated 13 th July 2018 addressed to the Registrar General of this Court, with copy to advocates for plaintiff, has stated as under :

"..... Further the Council would like to bring into your notice that Council has accepted the Delayed Payment application of M/s. Urmi Trenchless Technology Pvt. Ltd. (Applicant) V/s. M/s. Shah and Parikh Contractors and Engineers (Respondent) by virtue of MSMED Act 2006. From the prima facie scrutinizing of the documents submitted by the applicant Council has jurisdiction to entertain this application. From the findings of the Council it can be concluded that applicant is falling under the definition of supplier as per the Section 2(n) of MSMED Act 2006. It is also to intimate you that as per Section 18(4) Council has jurisdiction to deal with this case where respondent is located anywhere in India. Section 24 of the said Act talk about overriding effect which states that Section 15 to 23 of this Act would have overriding effect over any law which is in force at that time...".

Therefore, this defence of plaintiff is also not sustainable.

20 As regards Shri Vashi's submissions that once the plaint is amended and a claim for damages is added, the suit is maintainable, in Gauri Gaekwad 15/27 CHSCD-997-2018.doc my view, the claim for damages sought to be raised by plaintiff by way of the proposed amendment could arguably be raised before the Arbitral Tribunal to be constituted under the MSME Act.

21 Section 18 (3) of the MSME Act contemplates a reference to arbitration and there is a deeming provision that the arbitration should be deemed to have been instituted pursuant to an arbitration agreement under Section 7 of the Arbitration Act. As held by the Hon'ble Supreme Court in the context of the predecessor Act to the MSME Act [Secur Industries Limited (supra)], there is an incorporation of the Arbitration Act into the MSME Act by virtue of Section 18 (3) of the MSME Act. Section 18 (3) of the MSME Act clearly provides that the Arbitration Act shall apply to the disputes as if the arbitration was in pursuance of an agreement referred to in Section 7 of the Arbitration Act. **22** If the Arbitration Act is held to apply, then the provisions of the Arbitration Act including Section

23, which deals with Counter Claims/set off, is incorporated in the MSME Act and plaintiff herein would be at liberty to raise its counter claim before the Facilitation Council. This would be in consonance with justice and would avoid multiplicity of proceedings as also the unsatisfactory possibility of different fora taking different views on the same subject matter.

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This Court in M/s. Steel Authority of India Limited (Supra)

has held that any party to a dispute may make reference to arbitration as contemplated under Section 18 of the MSME Act by virtue of the language of Section 18 itself. The Hon'ble Punjab and Haryana High Court in Welspun Corp. Ltd. (Supra) has considered whether a buyer could raise a counter claim against the seller before the Facilitation Council and concluded that there was no bar on a set off/counter claim being raised before the Facilitation Council, even by the buyer, which in the present case would be plaintiff.

24 Thus, even the proposed amendment for damages would not lie before this Court and would require to be referred to arbitration. 25 The suit as framed as on date is a suit seeking mainly an injunction restraining defendants from continuing with proceedings filed by defendant no.1 before the Facilitation Council. Section 18 of the MSME Act confers exclusive jurisdiction on the Facilitation Council to deal with claims arising under the MSME Act. That being the case, there is an express bar in law to any party seeking to raise issues before this Court, which ought to and can be raised by such a party before the Facilitation Council. If plaintiff has any ground to restrain the proceedings before the Facilitation Council or the Arbitral Tribunal, the same would have to be raised only before the Facilitation Council or the Gauri Gaekwad 17/27 CHSCD-997-2018.doc Arbitral Tribunal, as the case may be.

26 The Hon'ble Supreme Court in Secur Industries Limited (Supra) has considered a similar matter under the provisions (Section 6) of the predecessor statute to the MSME Act, (this Act was repealed by virtue of Section 32 of the MSME Act), which is pari materia to Section 18 of the MSME Act. That was a case where a suit had been filed seeking an injunction restraining proceedings before the Facilitation Council. The City Civil Court had rejected the injunction as prayed for, but the Hon'ble High Court at an interim stage granted an injunction restraining proceedings before the Facilitation Council. The Hon'ble Supreme Court noted that the provisions of the Arbitration Act were incorporated in Section 6 of the predecessor Act of the MSME Act [as is the case with Section 18(3)]

of the MSME Act] and it was held that the High Court erred in granting an injunction as the jurisdiction in such matters lay with the Facilitation Council. In paragraph 11, the Hon'ble Supreme Court noted that any objections as to whether the predecessor Act to the MSME Act could apply were questions of jurisdiction that could be raised under Section 16 of the Arbitration Act before the Arbitral Tribunal constituted under the statutory provision and that no such objection could be raised in the form of a civil suit. In paragraph 12, the Hon'ble Supreme Court held that it was incumbent on the Court to refer parties to arbitration under Section 8 of the Arbitration Act and the High Court Gauri Gaekwad 18/27 CHSCD-997-2018.doc could not have stayed proceedings before the Council. It was thus concluded in paragraph 15 that the High Court erred in staying the proceedings before the Council as it had no jurisdiction to do so. Paragraphs 11, 12, 13, 14 and 15 of Secur Industries Limited (Supra) read as under :

11. The "Part" referred to in this sub-section is Part I of the 1996 Act which deals with domestic arbitrations. The proceedings before the Council, therefore, are proceedings under the 1996 Act, pursuant to a deemed agreement between the parties to the dispute. With the applicability of Part I of the 1996 Act in all its force, the extent of judicial intervention in arbitrations is limited by the non-obstante provisions of Section 5 of the 1996 Act, which stipulate: "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part". The City Civil Court was right in its approach when it said that the Court could only intervene in respect of matters expressly provided for in the 1996 Act. The validity of the proceedings before the Arbitral Tribunal is an issue which the Council, and not the Court, could decide under Section 16 of the 1996 Act. Sub-section (1) of Section 16 opens with the words "The Arbitral Tribunal may rule on its jurisdiction...". It has been held by this Court that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction. (Konkan Railways Corporation Ltd. V. Rani Construction Pvt. Ltd. 2002 (2) SCC 388). Therefore, the Council can go into the question whether its authority had been wrongly invoked by the appellant and it is open to it to hold that it had no jurisdiction to proceed with the matter.

12. The arguments which have been raised before us by the learned counsel on behalf of the respondent to a large extent related to the merits of the appellant's claim before the Council. Having regard to the scope of the authority of the Arbitral Tribunal under Section 16, this is not a matter which the Court can adjudicate upon. Indeed it is incumbent on the Court to refer the parties to arbitration under Section 8(1) of the 1996 Act if a suit is filed in a matter which is the subject matter of an arbitration agreement. Furthermore, even while this question is pending decision before a Court, the Arbitral Tribunal may proceed with the arbitration under Section 8(3) and make its award. The High Court could not, therefore, have stayed the proceedings before the Council.

13. We are also unable to accept the submission of the respondent No. 1 that Section 16 of the 1996 Act does not apply to the present case because the reference is a statutory one. The decision relied upon by the respondent no.1 in support of this submission, namely, *Rohtas Industries Ltd. and Another V. Rohtas Industries Staff Union and Others* 1976 (2) SCC 82 related to a voluntary reference of an industrial dispute under Section 10A of the Industrial Disputes Act. Section 10A of the Industrial Disputes Act, 1947 permits the employer and the workmen to agree to refer the dispute to the arbitration to a Labour Court or a Tribunal for adjudication "where any industrial dispute exists or is apprehended". Therefore, if there was no such industrial dispute there could be no arbitral reference. This Court therefore held that the disputes spilt 'into areas where the arbitrator deriving authority under Section 10A has no jurisdiction'. The provisions of Section 10A are entirely different from the provisions of Section 16 of the 1996 Act. There is in this case, no question of dispute spilling into areas where the Arbitral Tribunal does not have jurisdiction. Under the 1996 Act, the Arbitral Tribunal has been given a very wide and deep area of operation and it is the Court's powers which have been statutory curtailed.

14. This brings us to the ground on which the High Court stayed the proceedings before the Council, namely, the alleged failure of the appellant to serve notice under Section 21 of the 1996 Act. The point was not raised before the High Court at all by the respondent No. 1. This was candidly stated by the learned counsel for the respondent No. 1. Our attention was not drawn to any other legal proceeding which requires a notice to be given prior to commencing proceedings apart from Section 21 of the 1996 Act. Whether the notice was a notice under Section 21 and whether the giving of notice under Section 21 is to be construed as a pre-condition to the exercise of jurisdiction by the Council are questions which the Council will have to decide. This debate could not be a ground for the High Court interfering with the Council's jurisdiction and staying proceedings before it.

15. To sum up: The High Court erred in staying proceedings before the Council. It had no jurisdiction to do so.

27 Having regard to the above legal position, this Court ought to reject the plaint which seeks an injunction restraining proceedings before the Council. As held by the Hon'ble Supreme Court, this Hon'ble Court would have no jurisdiction to pass such an order. In any event, the ground raised by plaintiff for opposing the proceedings before the Gauri Gaekwad 20/27 CHSCD-997-2018.doc Arbitral Tribunal to be constituted under Section 18 of the MSME Act, those are matters which can be raised before the Arbitral Tribunal, as held by the Hon'ble Supreme Court in *Secure Industries Limited* (Supra). The question as to limitation of defendant no.1's claim raised before the Facilitation Council is a matter that is squarely within the sole province of the Arbitral Tribunal to decide, and no order on this aspect can or ought to be passed by this Court.

28 While considering the interplay between an arbitration agreement and statutory arbitrations under Section 18 of the MSME Act, the Hon'ble Allahabad High Court in *Paper & Board Converters Ors.* (Supra) held inter alia that Section 18 of the MSME Act commences with the words "notwithstanding anything contained in any other law for the time being in force", and therefore, for disputes contemplated under Section 18 of the MSME Act, if the jurisdiction of the Facilitation Council had been validly invoked, the Facilitation Council had exclusive jurisdiction to first enter

upon conciliation and if conciliation fails, to refer the parties to arbitration.

29 Thus, the Facilitation Council having exclusive jurisdiction, this Court ought to reject the plaint as being barred by law, as it seeks reliefs which are clearly within the exclusive province of the Arbitral Tribunal and this Court has no jurisdiction to grant these reliefs.

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Further the reliefs sought for by plaintiff, both at the interim

and final stage, are in essence for an order restraining proceedings before the Facilitation Council, Gandhinagar, i.e., defendant no.2, which relief is barred under Section 41(b) of the Specific Relief Act, 1963. Accordingly, the present suit which seeks just such an injunction is also barred by law under Order VII, Rule 11 (d) of Code of Civil Procedure, 1908. It is always open to a party to raise such an objection and for the Court to dismiss a suit or reject a plaint under Order VII, Rule 11 without a formal application being filed as it is a duty cast upon the Court to do so, and this could be done at any stage. This has been held inter alia by this Court in *Rushab Ship International LLC v. The Bunkers Onboard the Ship M.V. African Eagle and others*¹¹. 31 Section 41 (b) of the Specific Relief Act, 1963, specifically bars an injunction being granted to restrain any person from instituting or prosecuting any proceeding in a Court not subordinate to that from which the injunction is sought. The Facilitation Council, Gandhinagar is certainly not within the supervisory jurisdiction of this Court and therefore, cannot be said to be subordinate to this Court. Accordingly, no injunction, temporary or final can be granted by this Court restraining defendants from proceedings before the Facilitation Council, Gandhinagar.

11. 2014 (4) Bom. C.R. 269

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Limited (Supra) has clearly held that there could be no injunction order passed by a Court, whether temporary or permanent injunction, at the interim stage or at the final hearing stage of the suit, restraining a person from instituting or prosecuting a proceeding in a Court that is not subordinate to it. In that light of the matter the final relief sought for in the present suit cannot be granted, and in any event, under no circumstances could any interim order be passed granting such an injunction; therefore, at very minimum the order dated 9 th July 2018 would require to be vacated.

33 Shri Vashi submitted that the Facilitation Council was not a 'Court' for the purpose of Section 41(b). This argument is untenable in the light of the finding of the Hon'ble Supreme Court in paragraph 8 of Cotton Corporation (supra) that "The expression Court here is used in its widest amplitude comprehending every forum where relief can be obtained in accordance with law." This wide and expansive interpretation would cover even the Facilitation Council, Gandhinagar and/or an Arbitral Tribunal appointed by it, which is a forum where a relief is sought in accordance with law. The relevance placed by plaintiff on the judgment of the Hon'ble Gujarat High Court in Principal Chief Engineer V/s. Manibhai and Brothers (Sleeper) and Ors. 12 is misconceived. Firstly,

12. AIR 2016 Guj 51 Gauri Gaekwad 23/27 CHSCD-997-2018.doc the finding in paragraph 6.2 of the judgement was that the Facilitation Council is not a "judicial authority" for the purposes of Section 8 of the Arbitration Act. However, in the context of the Specific Relief Act, 1963, it is the interpretation given in Cotton Corporation (Supra) which will prevail. The judgement of this Court in International Reinsurance and Insurance Consultancy Services (Pvt.) Ltd. V/s. Jenner Fenton Slade Limited¹³ also cited by plaintiff does not consider Cotton Corporation (Supra). In any event, the said judgment of this Court and the judgment of the Hon'ble Supreme Court in Oil and Natural Gas Commission V/s. Western Company of North America ¹⁴ also cited by plaintiff are in the context of injuncting proceedings in a foreign court and not of Courts in India to which Section 41(b) of the Specific Relief Act, 1963 will squarely apply. Hence, these judgements do not assist plaintiff. ³⁴ It bears mention that in the present case, plaintiff has relied upon certain invoices in its additional affidavit filed in the aforesaid notice of motion(L) No.2266 of 2018 filed under Section 8 of the Arbitration Act, which states that the same are subject to Vadodara jurisdiction. Admittedly, defendants are based in Gujarat and no leave of this Court was sought under Clause XII of the Letters Patent. Even on this ground of jurisdiction, the present suit is barred and the plaint ought to be rejected by this Court. It is trite that by clever drafting, a party

13. 2003 SCC Online Bom 72

14. (1987) 1 SCC 496 Gauri Gaekwad 24/27 CHSCD-997-2018.doc cannot seek to create a cause of action or vest jurisdiction in a Court which lacks jurisdiction [T. Arivandandam vs. T.V. Satyapal & Anr.¹⁵]. ³⁵ Issue of limitation is something which defendant no.2 will decide. The reliance of plaintiff in Maharashtra State Electricity Distribution Company Limited (Supra), M/s. Delton Electricals (Supra), Patel Engineering Ltd. (Supra) and Cable Corporation of India Limited (Supra) are also misplaced. The facts in those cases were totally different. In Maharashtra State Electricity Distribution Company Limited (Supra), M/s. Delton Electricals (Supra) it was a matter where an

award was challenged under Section 34 of the Arbitration Act, 1996 and Facilitation Council had come to a conclusion that Limitation Act was not applicable to the provisions under the MSME Act. The Court came to a conclusion that Limitation Act was applicable and all issues, including limitation, fall within the exclusive jurisdiction of the Arbitral Tribunal constituted under the MSME Act. Therefore, defendant no.2 while considering the reference of defendant no.1 will consider whether the claim is barred by limitation or is within limitation. 36 The judgement in Patel Engineering Limited (Supra) was relied upon by plaintiff to urge that limitation was a matter which was required to be considered by a Court under Section 11 and Section 8 of

15.(1977) 4 SCC 467 Gauri Gaekwad 25/27 CHSCD-997-2018.doc the Arbitration Act. This judgement was interpreted by the Hon'ble Supreme Court in National Insurance Co. Ltd. Boghara Polyfab Private Limited¹⁶ which notes inter alia that the question of whether a claim is a long dead claim may or may not be decided by the Court. Eventually, in the 2015 amendment to the Arbitration Act, even this limited determination has been excluded and the Court is only to examine whether there exists an arbitration agreement and nothing more under Section 11(6-A) of the Arbitration Act. Even under the amended Section 8 of the Arbitration Act, it is held that the Court must refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. Thus, it is clarified by the amended Act that the criteria to be looked at under Section 8 and Section 11 of the Arbitration Act is whether there exists an arbitration agreement and not matters such as limitation.

37 The judgement in Cable Corporation of India Limited (Supra) cited by Mr. Vashi in fact supports defendant no.1. The judgement holds that the Facilitation Council would have jurisdiction to consider the issue of limitation because by a legal fiction, Section 43 of the Arbitration Act, as also the Arbitration Act itself, are applicable to arbitrations conducted under the MSME Act (or its predecessor). Thus, the objection of limitation raised in prayer clause (c) of the Plaint of the present suit is

16.(2009) 1 SCC 267 Gauri Gaekwad 26/27 CHSCD-997-2018.doc within the exclusive jurisdiction of the Arbitral Tribunal to be constituted under the MSME Act and this Court would have no jurisdiction in such matters.

38 Therefore, plaintiff can file its objections and challenge the jurisdiction of defendant no.2 and this Court cannot decide on that issue particularly, by virtue of Section 16 of the Arbitration Act, 1996. 39 For the foregoing reasons, the aforesaid notice of motion (lodging) no.2266 of 2018 filed by defendant no.1 under Section 8 of the Arbitration Act ought to be made absolute. In any event, at the very minimum this Court ought to reject the plaint in light of the exclusive jurisdiction vested with the Facilitation Council and the bar under Section 41 (b) of the Specific Relief Act, 1963 and vacate the interim order dated 9th July, 2018.

40 In the circumstances, notice of motion (lodging) no.2266 of 2018 is allowed and accordingly disposed in terms of prayer clause - (a) which reads as under :

(a) this Hon'ble Court be pleased to refer parties to the Facilitation Council under the provisions of the Micro, Small and Medium Enterprises Development Ac, 2006.

41 Order dated 9th July 2018 is recalled. The rights of plaintiff to raise a counter claim as per the chamber summons no.997 of 2018 Gauri Gaekwad 27/27 CHSCD-997-2018.doc before defendant no.2 is kept open.

42 All interim applications disposed accordingly. Records and proceedings be also transferred to defendant no.2 to be placed and considered with the records and proceedings in the reference filed by defendant no.1.

43 Refund of court fees, if any in accordance with law. 44 All to act on authenticated copy of this order.

45

Shri Vashi seeks stay. Stay refused.

(K.R. SHRIRAM, .)

Gauri Gaekwad