A.F.R.

Neutral Citation No. - 2023:AHC-LKO:82069-DB

Reserved

Court No. - 1
Case :- CIVIL MISC REVIEW APPLICATION No. - 135 of 2023
Applicant :- M/S Docket Care Systems Lko. Thru. Partner Shri Pankaj Kumar Agarwal
Opposite Party :- Union Of India Thru. Secy. Ministry Of Micro, Small And Medium Enterprises , New Delhi And 3 Others
Counsel for Applicant :- Madhusudan Srivastava,Sudeep Kumar
Counsel for Opposite Party :- Rajesh Tewari,Ritwick Rai,Vaibhav Tiwari

Hon'ble Attau Rahman Masoodi,J.
Hon'ble Om Prakash Shukla,J.

(Per Om Prakash Shukla, J.)

(1) Heard Mr. Madhusudan Srivastava, Mr. Sudeep Kumar, learned Counsel representing the review applicant and Mr. Rajesh Tewari, Mr. Vaibhav Tewari, Mr. Ritwick Rai, learned Counsel representing the respondents.

(2) The review applicant has filed the present application under Chapter-V, Rule 12 of the Allahabad High Court Rules read along with Order XLVII Rule 1 of the Civil Procedure Code, seeking review of the judgment/order dated 10th of October, 2023 passed by this Court in Writ-C No. 8012/2023 (*M/s Docket Care Systems V/s Union of India Others*), wherein this Court had passed the following order :

> *"1. Heard learned Counsel for the petitioner, Shri Rajesh Tewari, learned Counsel for respondents no.2 & 3 and Shri Vaibhav Tewari, learned Counsel for respondent no.4.*
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> *2. Shri Rajesh Tiwari, leanred Counsel for respondents no.2 and 3, on the basis of instructions, has stated that an award has already*

been rendered by the Facilitation Council on 07.10.2023, a photocopy whereof placed before us is taken on record. A certified copy of the award applied for, if any, by the petitioner may be supplied to him not later than a period of ten days from the date of application.

3. Shri Vaibhav Tiwari, learned Counsel appearing for respondent no.4 has also filed a short counter affidavit placing on record the details of arbitral proceedings transpired before the Facilitation Council and conducted under Section 18(3) of Micro, Small and Medium Enterprises Development Act, 2006 (in short, 'MSME Act').

4. Learned Counsel for the opposite parties have submitted that as against the award rendered by the Arbitral Tribunal on 07.10.2023, the petitioner has a remedy under Section 34 of the Arbitration and Conciliation Act, 1996.

5. At this stage, learned Counsel for the petitioner prays that he may be permitted to withdraw the instant petition with liberty to avail the alternative remedy, available to him, under law.

6. In view of the above, the instant petition is dismissed as withdrawn with the liberty as prayed.

7. It is made clear that the all the legal issues shall remain open to the petitioner before the competent forum. The exemption application, if any, moved under Section 19 of MSME Act shall also be considered by the forum concerned on its own merit."

(3) This Court may not be unnecessarily detained with enumerating the detailed facts of the present case, suffice to say that this Court finds that the review of the aforesaid judgment/order dated 10th of October, 2023 has been sought by the review applicant on the ground that there is an error apparent on the face of record as this Court without appreciating the judgement

passed by the Apex Court in **Jharkhand Urja Vikas Nigam Limited V/s State of Rajasthan & Ors. (2021) 4 SCC 476** has relegated the review applicant to alternative remedy as available under the provisions of Arbitration & Conciliation Act, 1996. Further ground has been urged relating to the manner in which the MSME Council has passed the award dated 7th of October, 2023 during the pendency of the Writ-C-No. 8012 of 2023 and the liberty/opportunity not having been provided to the review applicant to amend the said writ on the ground of availability of alternative remedy.

(4) The learned Counsel for the review applicant has also submitted that this Court in the judgment/order dated 10.10.2023 under review has failed to examine the infirmities committed by the MSME Council, which had the effect of making the entire proceedings under Section 18 of the MSMED Act, 2023 as well as the award dated 07.10.2023 a nullity in the eyes of law. Further, grounds of not following the provisions of Sections 20, 23, 24 and 25 of the Arbitration & Conciliation Act, 1996 in rendering the award dated 07.10.2023 has also been urged by the learned Counsel for the review applicant. Other additional ground of the respondent No.4 being not a "supplier" in terms of the provisions contained under Section 2 (n) of the MSME Act and the claim being not maintainable before the MSME Council has also been pressed by the learned Counsel for the review applicant, who has also relied on various annexures filed

along with the review application during the course of his argument.

(5) On the other hand, only respondent No.4 (M/s Hariwill Electronics India Pvt. Ltd.) has chosen to file its counter-affidavit, inter-alia raising the issue of maintainability of the present review application on the ground of its limited scope. The judgment passed by the Apex Court in **Parison Devi Vs Sumita Devi : 1998 (1) CTC 25 and Lily Thomas Vs union of India : AIR 2000 SC 1650,** has been cited to support his contention. The learned Counsel has also referred to the recent judgment passed by the Apex Court in a bunch of petitions, leading being Review Petition (Civil) No. 1620 of 2023 **(Sanjay Kumar Agarwal Vs State Tax Officer & Anr**.) decided on October 31, 2023 and has strenuously referred to paragraph 16 of the said judgment. Additionally, the learned Counsel has referred to the case of **Sarguja Transport Service Vs State Transport Appellate Tribunal, Gwalior & Ors : (1987) 1 SCC 5**, to urge that as the order passed in writ petition, for which review is being sought, came to be "dismissed as withdrawn" at the behest of the review applicant, the present review application would not be maintainable.

(6) Further, grounds relating to due participation of the review applicant as well as exchange of pleadings in both Conciliation Proceedings as well as Arbitration Proceedings before the

MSME Council has been urged by the learned Counsel for respondent No.4 on merits. The learned Counsel has taken this Court to the list of dates and events from initiation of proceeding before the MSME Council to the culmination of the award dated 07.10.2023, to submit the participation of the review applicant at each and every step. The learned Counsel in his endeavour to support that alternative remedy is available to the review applicant and has quoted Section 19 of the MSME Act, as well as a recent judgment dated 06.11.2023 passed by the Apex court in Civil Appeal No. 7491 of 2023 **(M/s India Glycols Limited and Anr. v/s Micro and Small Enterprises Facilitation Council, Medchal-Malkagiri and Ors.)** to buttress his argument that a writ petition may not be entertained against an award passed by the MSME Council.

(7) The learned Counsel for respondent No.4 has also pointed towards the fact that a review application cannot travel beyond the prayers sought in the Original Petition (say Writ Petition). According to him, the original petition had been filed for two reliefs, which as on date is infructous as (i) the first prayer for passing a speaking order on application dated 05.06.2023 has already been passed vide an order dated 24.07.2023 and (ii) the second prayer relating to not passing of any award is also infructous as the award has already been passed on 07.10.2023. The learned Counsel has refuted the other grounds urged by the review appliant and has also contended that the respondent

No.4 was a supplier within the meaning of Section 2(n) of the MSMED Act, 2006 and have filed various annexures to support his contention.

(8) This Court has carefully perused the impugned judgment/order and have gone through the records and given its thoughtful consideration to the arguments advanced by learned Counsel for the parties. The only point that arises for consideration in this review petition is '*whether the review applicant had made out a case for reviewing the judgment/order dated 10th of October, 2023 or not'*.

(9) The law on the limited scope of review power of any court is no longer *res integra*. There is available a rich treasure relating to the law developed by the Hon'ble Supreme Court on the said aspect and this Court finds itself persuaded to quote some of these judgments, which are relevant to the context. In **Col. Avatar Singh Sekhon v. Union of India and Others : 1980 Supp SCC 562 11**, the Apex Court observed that a review of an earlier order cannot be done unless the Court is satisfied that the material error which is manifest on the face of the order, would result in miscarriage of justice or undermine its soundness. The observations made are as under :-

> *"12. A review is not a routine procedure. Here we resolved to hear Shri Kapil at length to remove any feeling that the party has been hurt without being heard. But we cannot review our earlier order unless satisfied that material error, manifest*

> *on the face of the order, undermines its soundness or results in miscarriage of justice. In* ***Sow Chandra Kante and Another v. Sheikh Habib (1975) 1 SCC 674*** *this Court observed :*
>
> > *'A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. … The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality.'*

(10) In **Parsion Devi and Others v. Sumitri Devi and Others : (1997) 8 SCC 715**, stating that an error that is not self-evident and the one that has to be detected by the process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise the power of review. The Apex Court in the said judgment has held as under :-

> *"7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In* ***Thungabhadra Industries Ltd. v. Govt. of A.P, 1964 SCR (5) 174*** *this Court opined:*
>
> > *11. What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an 'error apparent on the face of the record'. The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an 'error apparent on the face of the record', for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous*

decision is reheard and corrected, but lies only for patent error.'

8. *Again, in **Meera Bhanja v. Nirmala Kumari Choudhury (1995) 1 SCC 170** while quoting with approval a passage from **Aribam Tuleshwar Sharma v. Aribam Pishak Sharma (1979)4 SCC 389** this Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.*

9. *Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of this jurisdiction under Order 47 rule 1 CPC it is not permissible for an erroneous decision to be 'reheard and corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'".*

(11) Further, in exercise of review jurisdiction, this Court cannot re-appreciate the evidence to arrive at a different conclusion even if two views are possible in a matter. In **Kerala State Electricity Board v. Hitech Electro thermics & Hydropower Ltd. and Others : (2005) 6 SCC 651**, the Apex Court observed as follows :-

"10. .... In a review petition it is not open to this Court to reappreciate the evidence and reach a different conclusion, even if that is possible. Learned counsel for the Board at best sought to impress us that the correspondence exchanged between the parties did not support the conclusion reached by this Court. We are afraid such a submission cannot be permitted to be advanced in a review petition. The appreciation of

> *evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has not been contended before us that there is any error apparent on the face of the record. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise."*

(12) The Apex Court through its various judgments has prescribed a parameter of "do's" and "don't" for exercising the power of review by a Court of law. In **Kamlesh Verma v. Mayawati and Others : (2013) 8 SCC 320**, the Apex Court observed that review proceedings have to be strictly confined to the scope and ambit of Order XLVII Rule 1, CPC. As long as the point sought to be raised in the review application has already been dealt with and answered, parties are not entitled to challenge the impugned judgment only because an alternative view is possible. The principles for exercising review jurisdiction were succinctly summarized in the aforesaid case as below:

> *"20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:*
>
> *20.1. When the review will be maintainable:*
>
> *(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;*
>
> *(ii) Mistake or error apparent on the face of the record;*
>
> *(iii) Any other sufficient reason.*

*The words "any other sufficient reason" has been interpreted in **Chajju Ram vs. Neki, AIR 1922 PC 112**, and approved by this Court in **Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors. AIR 1954 SC 526** to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in **Union of India v. Sandur Manganese & Iron Ores Ltd. & Ors. (2013)8 SCC 337**.*

20.2. When the review will not be maintainable: -

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(vii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

(13) As to the power and scope of a High Court to review its order under its Writ Jurisdiction under Article 226 of the Constitution is concerned, the Apex Court, in **Aribam Tuleshwar Sharma**

v. Aribam Pishak Sharma, (1979) 4 SCC 389 speaking through Chinnappa Reddy, J. has made the following pertinent observations :-

> *"It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court.'"*

(14) Moreover, the Apex Court reiterated that exercise of power of review under Order XLVII Rule 1 of the Civil Procedure Code (CPC) is limited and under the guise of review, the review-petitioner could not be permitted to re-agitate and reargue questions which had already been addressed and decided by the Court earlier. The Apex court in **S. Murali Sundaram v. Jothibai Kannan (2023) SCC OnLine SC 185** held that "Even if the judgment sought to be reviewed is erroneous the same cannot be a ground to review the same in exercise of powers under Order 47 Rule 1 CPC. An erroneous order may be subjected to appeal before the higher forum but cannot be a

subject matter of review under Order 47 Rule 1 CPC." Apparently, in the said matter, the issue before the Apex Court was as to whether in the facts and circumstances of the case the High Court was justified in allowing the review application filed under Order XLVII Rule 1 CPC and setting aside the order passed in main writ petition. The Apex Court noted that while the impugned order in review was passed, the High Court had considered the submission which was already dealt with by the High Court while deciding the main writ petition and as such the Apex Court held that any review of the said order was wholly impermissible. Further, the Apex Court referred to its earlier decision in the case of **Perry Kansagra vs. Smriti Madan Kansagra, (2019) 20 SCC 753** and in **Shanti Conductors (P) Ltd. Vs. Assam SEB, (2020) 2 SCC 677** and observed that "*the High Court has exceeded in its jurisdiction and has exercised the jurisdiction not vested in it while exercising the review jurisdiction under Order XLVII Rule 1 read with Section 114 CPC.*"

(15) Further, recently, when the Apex Court was poised with an issue as to whether a subsequent decision/judgment of a Co-ordinate Bench can be regarded as a ground for review of the earlier order/judgment, the Apex Court after enumerating various decisions relating to the circumstances, when a review can be entertained by a Court dismissed the said review petition vide its order dated 31.10.2023 in a bunch of review petitions,

leading petition being **R.P. (Civil) No. 1620 of 2023 (Sanjay Kumar Agarwal V/s State Tax Office & Anr.)** and laid certain guiding principles to be followed while dealing with a review petition in the following words :-

> *"16. The gist of the afore-stated decisions is that:*
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> *(i) A judgment is open to review inter alia if there is a mistake or an error apparent on the face of the record.*
>
> *(ii) A judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so.*
>
> *(iii) An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record justifying the court to exercise its power of review.*
>
> *(iv) In exercise of the jurisdiction under Order 47 Rule 1 CPC, it is not permissible for an erroneous decision to be "reheard and corrected."*
>
> *(v) A Review Petition has a limited purpose and cannot be allowed to be "an appeal in disguise."*
>
> *(vi) Under the guise of review, the petitioner cannot be permitted to reagitate and reargue the questions which have already been addressed and decided.*
>
> *(vii) An error on the face of record must be such an error which, mere looking at the record should strike and it should not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.*
>
> *(viii) Even the change in law or subsequent decision/ judgment of a co-ordinate or*

> *larger Bench by itself cannot be regarded as a ground for review."*

(16) Thus, it is clear like daylight from the above exposition of law, that the Apex Court has consistently held that the Court's jurisdiction of review, is not the same as that of an appeal. A judgment can be open to review if there is a mistake or an error apparent on the face of the record, but an error that has to be detected by a process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise its powers of review under Order XLVII Rule 1 CPC. Most importantly, in the guise of exercising powers of review, the Court can correct a mistake but not substitute the view taken earlier merely because there is a possibility of taking two views in a matter. There is a clear distinction between an erroneous decision as against an error apparent on the face of the record. An erroneous decision can be corrected by the Superior Court, however, an error apparent on the face of the record can only be corrected by exercising review jurisdiction.

(17) The learned Counsel for the review applicant placing heavy reliance on the observation made by the Apex Court in **Jharkhand Urja Vikas Nigam Limited's case** (Supra), submitted that this Court in the impugned judgment has failed to consider the said judgment in its true perspective, which according to the review applicant, is an error apparent on the record of the present case. First and foremost, non-

consideration of a judgment cannot be a ground for review as that would lead to substituting the view already taken by this Court, in as much as liberty had already been granted by this Court vide the impugned order for availing alternate remedy under Section 34 of the Arbitration & Conciliation Act, 1996 and even it had been directed that all the legal issues would remain open to the review-applicant before the competent forum. Thus, this Court is satisfied that there exists no material error on the face of the impugned order, which would result in miscarriage of justice.

(18) There is another aspect of the matter, **Jharkhand Urja Vikas Nigam Limited's case (supra)** is distinguishable on fact. In the said case, MSME Council issued notices and summons to Jharkhand Urja Vikas Nigam and its failure to respond to the notices and summons, the MSME Council decided the reference against Jharkhand Urja, and directed them to make payments, as claimed, within a period of 30 days. The decision of the MSME Council was challenged before the Rajasthan High Court by Jharkhand Urja, which challenge came to be dismissed. Aggrieved by this dismissal a further appeal was filed before the Supreme Court. In deciding the controversy, the Supreme Court struck down the decisions of the MSME Council and held that the MSMED Act provides for conciliation and it is only when the same is not successful, the MSME Council is empowered to refer the dispute to arbitration

on its own or through any other institution. In the said case, the Apex Court clarified that the MSME Council cannot club the two processes of conciliation and arbitration and pass Order for payment, during conciliation itself. The Apex Court further explained, that there is a fundamental difference between conciliation and arbitration as in conciliation proceedings, the conciliator assists parties to arrive at an amicable settlement, whereas, in arbitration, an arbitral tribunal adjudicates dispute between the parties. There being a stark difference between conciliation and adjudication. Further, the Apex Court, while interpreting Section 18 of the MSME Act, held that the MSME Council was obliged to conduct conciliation for which the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") would apply and in the event conciliation fails and stands terminated, the dispute between the parties will be referred to arbitration. In the said particular facts of the case, the Apex Court also rejected the objection, that the remedy available to Jharkhand Urja was to apply for setting aside of the decision of the MSME Council, as if, it were an arbitral award, by holding that the decision of the MSME Council was without recourse to arbitration and in disregard of the provisions of the Arbitration and Conciliation Act 1996. Thus, it was held that the decision of the MSME Council was not an arbitral award on account of which,

Jharkhand Urja was not required to institute proceedings for setting aside of the decision.

(19) Juxtaposed with the present facts of the case, it is available from records that the matter was fixed for conciliation proceedings by the MSME Council on 05.08.2022 and the pleadings were exchanged between the parties prior to the said date. Since, the matter could not be amicably settled, the conciliation proceedings came to be terminated after hearing both the parties on 05.08.2022 in terms of Section 76 of the Arbitration & Conciliation Act, 1996 and parties were informed of initiation of Arbitral Proceedings. It is also available from record that the arbitration proceeding was convened on 28.12.2022 and even the review applicant filed an application under Section 13 (2) of the Arbitration & Conciliation Act challenging the competency of the MSME council for Arbitration. Subsequently, an award dated 24.07.2023 came to be passed by the MSME Council. In Jharkhand Urja's case the Apex Court held that since MSME Council took a decision in conciliation proceedings only and apparently did not advert to the arbitration proceedings, the decision of the council was not an arbitral award and as such in the facts of the said case, the Apex Court held that Jharkhand Urja Vikas Nigam Limited was not required to file an objection to the award under Section 34 of the Arbitration & Conciliation Act, 1996. However, in the present case, without commenting on the merits of the

procedure adopted by the MSME Council for passing of the award dated 07.10.2023 as mentioned under Sections 20, 23, 24 and 25 of the Arbitration & Conciliation Act, 1996, lest it effects the merits of contention of either of parties, this Court finds that the award had been passed by the MSME Council after adverting to the arbitration proceedings. In any case, the import and scope of the Jharkhand Urja's case can be detected by the process of reasoning and thus cannot be described as an error apparent on the face of the record of the present case, so as to empower this Court to exercise its power of review under Order XLVII Rule 1 of the CPC.

(20) Be that as it may, this Court finds that the statutory mechanism of arbitration as contained in the MSME Act, despite the applicability of the 1996 Act to the same as per Section 18 of the said Act, may often give rise to certain issues where the provisions of the MSME Act may come into conflict with those of the 1996 Act as far as the conciliation/arbitration mechanism is concerned, due to the peculiarities of the MSME Act. The Apex Court in the case of **Gujarat State Civil Supplies Corporation Limited v. Mahakali Foods Private Limited :** 2022 SCC OnLine SC 1492, while deciding upon a batch of appeals relating to arbitration of MSMEs, held that Chapter V (*Delayed Payments to Micro and Small Industries*) of the MSME Act would override the provisions of the 1996 Act. The

Apex Court further observed that general laws do not prevail over special laws and that whenever there is an apparent conflict between two statutes, the provision of a general statute must yield and give way to that of a special statute. Further, Section 24 of the MSMED Act specifically provides that the provisions of Sections 15 to 23 of the said Act would have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

(21) Taking a cue from the above exposition, this Court finds that the conflict between the MSME Act and Arbitration Act can be found at several places, like the applicability of Section 80 of the 1996 Act, which provides a bar on the conciliator to act in arbitration proceedings or other judicial proceedings between the parties involved, other than such conciliation. However, from a reading of Section 18 of the MSME Act, it is apparent that the Council can act an arbitrator as well as conciliator under the MSME Act. Similarly, Section 23(2A) of the 1996 Act expressly provides for filing of counter-claim and set off in arbitration proceedings under the 1996 Act. Similarly, Section 43 of the 1996 Act states that the Limitation Act, 1963 shall be applicable to arbitration under the 1996 Act as it applies to judicial proceedings. The Orissa High Court in the case of **Shri Mahavir Ferro Alloys Private Limited v. Passary Minerals Limited :2018 SCC OnLine Ori 175**, while deciding on the issue of maintainability of counter-claims in MSME

proceedings noted that the counter-claim by the counter-party could not be adjudicated by the Council under the MSME Act since the Act was only applicable to MSME entities and unless the counter-party was also a registered MSME entity, the Council would lack jurisdiction in this regard. However, the issue seems to have been settled by the Apex Court in the case of **Silpi Industries vs. Kerala State Transport Corporation [AIR 2021 SC 548],** wherein the issue was whether the provisions of the Limitation Act, 1963 will also be applicable to arbitration proceedings under the MSME Act. The Apex Court, while relying on the judgment of **Andhra Pradesh Power Coordination Committee v. Lanco Kondapalli Power Limited : (2016) 3 SCC 468**, held that arbitration pursuant to Section 18(3) of the MSME Act would be governed by the Limitation Act, 1963, in line with arbitrations under the 1996 Act and with the issue of counterclaim, the Bench noted that a provision of counterclaim is expressly available under Section 23 (2A) of the 1996 Act. Section 18 (3) of the MSME Act specifically provides that the provisions of the 1996 Act would be applicable to the MSME Act as if the arbitration was pursuant to an arbitration agreement as defined in Section 7(1) of the 1996 Act. Therefore, the Apex Court held that counterclaim, as applicable as under the 1996 Act, would apply to any arbitrations under the MSME Act as well.

(22) Thus, this Court finds that it has been consistently held by the Hon'ble Court that by virtue of Section 18(3) of the MSME Act, all the provision of Arbitration & Conciliation Act, 1996 would be applicable to the arbitration proceedings by MSME Council, which conversely also means that any order arising and/or passed by the MSME Council has to be interdicted under the available provisions of Arbitration & Conciliation Act, 1996 only. Thus, the view taken by this Court in the impugned order is a plausible view and apparently it seems the review petition has been filed in the guise of an appeal, which is not permissible as per law.

(23) Although, we have held herein above that the present review petition was not maintainable, however, this Court as has observed earlier is also examining the aspect as to whether the impugned order is causing any miscarriage of justice or there is any other sufficient ground for allowing the present review petition. This Court finds that all the grounds urged by the review applicant, whether relating to infirmities committed by the MSME Council or the council not following the provisions of Sections 20, 23, 24 and 25 of the Arbitration & Conciliation Act or that the respondent No.4 is not a supplier within the meaning of Section 2(n) of the MSME Act, are readily available to the review applicant, while availing the alternative remedy of filing objection to the award under Section 34 of the Arbitration & Conciliation Act, 1996. It would be profitable

for this Court, to quote Section 34 (1) and 34 (2) of the Act, 1996, which inter-alia states as herein under:

> "**34 Application for setting aside arbitral award. —**
>
> (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) An arbitral award may be set aside by the Court only if—
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> (a) the party making the application furnishes proof that—
>
> (i) a party was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
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> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
>
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
>
> (b) the Court finds that—

> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
>
> (ii) the arbitral award is in conflict with the public policy of India.
> Explanation 1. —For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, —
>
> the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
>
> it is in contravention with the fundamental policy of Indian law; or
>
> it is in conflict with the most basic notions of morality or justice.
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> Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.
>
> [(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:
>
> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence."

(24) Thus, this Court is of the view that the provisions of Section 34 of the Act is a self-contained provision and the legislature in its wisdom has extensively enumerated all the eventualities for consideration and adjudication of an arbitral award on merits. As far as the present case is concerned, the said provisions sufficiently empowers the competent Court to take care of all the grounds urged by the review applicant, including the provisions of Sections 20, 23, 24 and 25 of the Arbitration & Conciliation Act, 1996.

(25) Further, recently on 06.11.2023, the Hon'ble Apex Court in the case of Civil Appeal No. 7491 of 2023 (*M/s India Glycols Limited and Anr. v/s Micro and Small Enterprises Facilitation Council, Medchal-Malkagiri and Ors.*) was considering an issue as to whether limitation aspect having not considered by the MSME Council, a petition under Article 226 of the Constitution could be entertained or not. Although a Single Bench of the High Court of Telengana allowed the writ petition against the order passed by the MSME Council, however, the Division Bench of the said Court reversed the decision and held that the writ was not maintainable. On appeal, the Apex Court in the said case, affirming the decision of the Division Bench that the writ was not maintainable, held that Section 18 of the MSMED Act, 2006 provided for recourse to a statutory remedy challenging an award under the Act of 1996, which is subject to the discipline of complying with the provisions of Section 19 of the Act. The Apex Court in as many words held that the entertaining of a petition under Article 226/227 of the Constitution, in order to obviate compliance with the requirement of pre-deposit under Section 19 of the Act, would defeat the object and purpose of the special enactment which has been legislated upon by the Parliament.

(26) This Court finds that the review applicant has basically raised the contention that since the award passed by the MSME

Council was tainted with procedural irregularity, the same would not be covered under the Arbitration Act and hence the remedy as to challenge to the award under Section 34 of the Act was not available to the writ petitioner/review applicant. This Court also finds that the said contention cannot be accepted as the proceedings so far as the writ-petitioner/review applicant is concerned, has attained finality by passing of the impugned order dated 07.10.2023 by the MSME Council in arbitration proceedings after the termination of the conciliation proceedings. The proceedings having attained finality, the only recourse available to the review applicant is to challenge the order impugned in the writ petition by availing statutory remedy provided under the provisions of the Arbitration & Conciliation Act. The contention of the review applicant that non-interference by this Court under Article 226/227 of the Consttution would render the review applicant remedy-less is not acceptable in view of the fact that this Court in the impugned judgment/order has already relegated the writ-petitioner to avail statutory remedy as provided under the Act and it is open for the writ-petitioner to challenge the same before the appropriate forum.

(27) Apparently, the review applicant is trying to seek a re-hearing of the writ petition, which is not within the scope of the review. The learned Counsel could not point out any error apparent on the face of the record and the submissions made by the learned

Counsel do not fall within the parameters of Section 114 read with Order XLVII Rule 1 C.P.C.

(28) For all the aforesaid reasons and having considered the matter at great length, there is no doubt left in the mind of this Court that no grounds of review has been made out in the present review application.

(29) As a sequel to the above, the present review application is **dismissed**. The review applicant may avail the remedy as provided under law as has already been granted by this Court in the impugned order dated 10.10.2023, if so desires.

(30) There shall be no orders as to cost.

(Om Prakash Shukla, J.) **(Attau Rahman Masoodi, J.)**

Order Date : 14th December, 2023
Ajit/-