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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on: *15.05.2026*
Judgment delivered on: *01.07.2026*
Judgment uploaded on: *02.07.2026*

\+ **FAO(OS) (COMM) 97/2024 CM APPL. 30515/2024 CM APPL. 9694/2026 CM APPL. 15561/2026**

WAPCOS LIMITED .....Appellant

versus

VIRGO AQUA .....Respondent

Advocates who appeared in this case

For the Appellant	:	Ms. Malvika Trivedi, Sr. Advocate with Mr. Tushar Sannu, Mr. Priyanakr Tiwary, Mr. Mohit Bhardwaj, Mr. Shailendra Slaria and Mr. Fajallu Rehman, Advocates alongwith Mr. Arjun (addtional Chief Engineer)
For the Respondents	:	Dr. Amit George, Mr. Saurabh Bhargavan, Mr. Dushyant Kishan Kaul and Mr. Bhrigu A. Pamidighantam, Advocates

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMEET PRITAM SINGH ARORA, J.

1. The Appellant has preferred the present appeal under Section 13(1A) of the Commercial Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 ['Act of 1996'], assailing the orders dated

20.03.2024 and 22.08.2024 passed by the learned Single Judge in OMP (Comm.) No.132 of 2023.

By impugned order dated 20.03.2024, learned Single Judge directed the Appellant to deposit 75% of the awarded amount as a pre-condition for entertaining the petition filed by Appellant under Section 34 of the Act of 1996 [‘Section 34 petition’] challenging the ex-parte arbitral award dated 02.12.2022 [‘impugned award’] passed by the Micro and Small Enterprises Facilitation Council, Kerala [‘Facilitation Council’] in terms of Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 [‘MSMED Act’].

By subsequent impugned order dated 22.08.2024, the learned Single Judge dismissed OMP (Comm.) No. 132 of 2023 on account of the Appellant’s failure to comply with the said direction of pre-deposit.

2. Before the learned Single Judge, Section 34 petition was filed by the Appellant assailing the impugned award passed the Facilitation Council under Section 18(3) of the MSMED Act.

3. The Facilitation Council *vide* the impugned award held that the appellant is liable to pay principal amount of Rs. 5.33 crores, w.r.t., three work orders under O.A. 32/2021 and principal amount of Rs. 43.31 crores w.r.t two work orders *vide* O.A, 33/2021, along with compound interest on monthly rests calculated at three times of bank rate notified by the Reserve Bank of India [‘RBI’].

<u>FACTS</u>

4. Facts narrated by the Appellant in the present appeal are as under: -

4.1 The dispute arises out of various Memorandum of Understanding [‘MOUs’] (dated 29.02.2016, 07.09.2018, 10.01.2019 respectively) and agreements executed between the Department of Fisheries, Government of Andhra Pradesh, and the Appellant, pursuant to which five work orders were awarded to the Respondent for consultancy services. The details of the work orders issued in favour of the Respondent are:

a) Work Order No. WAP/P&H/AP-Fish/2016/1 dated 28.03.2016
b) Work Order No. WAP/P&H/AP-Fish-2017/1 dated 09.12.2017
c) Work Order No. WAP/PH&IW/AP/EDDU/2019/1 dated 26.02.2019
d) Work Order No. WAP/PH&IW/AP/AQF/2018-19/01 dated 18.09.18
e) Work Order No. WAP/P&H/OD/ODFISH/2018-19/01 dated 25.10.18

4.2 Alleging non-payment of its dues, the Respondent invoked Section 18 of the MSMED Act by filing two separate applications before the Facilitation Council in September 2020, in respect of different work orders executed under the contractual arrangement. The first application, bearing No. KL02D0005169/M/00001, pertained to the work orders dated 28.03.2016 and 09.12.2017. The second application, bearing No. KL02D0005169/M/00002, pertained to the work orders dated 18.09.2018, 25.10.2018, and 26.02.2019.

4.3 The said applications were registered as O.A. Nos. 32 of 2021 and 33 of 2021. According to the Appellant, it received first notice for participating in the said proceedings for hearing dated 30.06.2022. As per the Appellant, it understood that the proceedings before the Facilitation Council on 30.06.2022 were at the stage of conciliation, as contemplated under Section 18(2) of the MSMED Act; notice was issued for conciliation proceedings to be held on 30.06.2022. It contends that no formal order recording failure of conciliation was ever passed by the Facilitation Council, nor was any formal order of initiating arbitration under Section 18(3) of the MSMED Act issued by the Facilitation Council or communicated to the Appellant.

4.4 Thereafter, the Facilitation Council issued a notice fixing the hearing on 26.10.2022. The Appellant asserts that it failed to attend the hearing dated 26.10.2022, however, by an email dated 31.10.2022 addressed to the Facilitation Council explained the reasons for its absence and sought an opportunity to participate in the proceedings. It states that no response was received to the said request dated 31.10.2022.

4.5 However, on 29.12.2022, the Appellant received the Facilitation Council's impugned award directing payment of Rs. 5.33 crores and Rs. 43.31 crores (towards principal amount) in favour of the Respondent plus compound interest. The Appellant alleges that the impugned award was passed by the Facilitation Council without affording an effective opportunity of hearing and without following the statutory procedure of Section 18(2) and 18(3) mandated under the MSMED Act and the Act of 1996.

4.6 The Appellant contends that the Facilitation Council has illegally rendered an arbitral award, at the stage of conciliation mandated under Section 18(2) of the MSMED Act. It contends that the Facilitation Council without first terminating conciliation proceeding, illegally commenced arbitration proceedings under Section 18(3). It contends that it had no notice of the commencement of the arbitration proceedings before the Facilitation Council.

4.7 The Appellant also contended that the proceedings before the High Court of Kerala in W.P.(C) No. 25686/2022 filed by Respondent were disposed of without notice to it. It contends that the directions issued by the High Court of Kerala in the order dated 16.09.2022 led to the undue haste by the Facilitation Council to pass the impugned award, without affording an effective opportunity to the Appellant to participate in the said proceedings.

4.8 The Appellant filed the Section 34 petition before the learned Single Judge on the aforesaid grounds and asserted that the resultant award was a nullity in law and could not be treated as a valid arbitral award.

4.9 Although the impugned award was initially set aside by the learned Single Judge and the matter remanded to the Facilitation Council by order dated 21.04.2023, the said order was subsequently recalled in review proceedings filed by the Respondent, and the Section 34 petition heard afresh.

4.10 At the outset before the learned Single Judge, the Respondent raised a preliminary objection contending that the Section 34 petition cannot be entertained without compliance with the mandatory pre-deposit requirement under Section 19 of the MSMED Act.

4.11 In these facts, learned Single Judge by the impugned order dated 20.03.2024, considered the submission of the Appellant and on examination of the record filed before it concluded that conciliation proceedings took place and Appellant had due notice of the same as recorded by the Facilitation Council in its order dated 30.06.2022. Learned Single Judge also observed that post High Court of Kerala's order dated 16.09.2022, Appellant failed to appear before the Facilitation Council at the hearing dated 26.10.2022 and did not show any inclination to appear in the proceedings. In view of these conclusions, the learned Single Judge held that Appellant had been notified with respect to the proceedings repeatedly and the impugned award constituted a valid award for the purposes of the MSMED Act. Learned Single Judge directed Appellant to comply with Section 19 of the

MSMED Act and deposit 75% of the awarded amount within eight (8) weeks, failing which the Section 34 petition would be liable to be dismissed.

4.12 The Appellant has, preferred the present appeal impugning the order dated 20.03.2024, principally contending that the impugned award was passed during conciliation proceedings, without any statutory transition to arbitration, and consequently constitutes a jurisdictionally defective and non est award, rendering the requirement of pre-deposit under Section 19 of the MSMED Act inapplicable, in adjudicating the Section 34 petition.

4.13 During the pendency of the appeal, the Section 34 petition was dismissed by the learned Single Judge vide subsequent order dated 22.08.2024 for non-compliance of the direction of deposit. The present appeal was amended to impugn the said order dated 22.08.2024, as well.

SUBMISSIONS BY THE APPELLANT

5. Ms. Malvika Trivedi, learned Senior Counsel for the Appellant submitted that the impugned award passed by the Facilitation Council is a nullity in law, having been rendered in complete violation of the mandatory procedure prescribed under Sections 18(2) and 18(3) of the MSMED Act. She contended that Section 18 of the MSMED Act envisages a two-stage mechanism, namely, conciliation under Section 18(2) of the MSMED Act followed, upon failure of conciliation, by arbitration under Section 18(3) of the MSMED Act; the impugned award itself records that the conciliation proceedings allegedly failed on 11.12.2021 before District Legal Services Authority, Thiruvananthapuram[1]; however, the Appellant was never served with any notice of the purported conciliation proceedings conducted under the aegis of DLSA before the National Lok Adalat on 11.12.2021. She

[1] DLSA

submitted that moreover, there exists no order of the Facilitation Council recording termination of conciliation proceedings or commencement of arbitration proceedings. She submitted that in the absence of such statutory transition of the proceedings from conciliation to arbitration, the Facilitation Council impermissibly clubbed both stages and proceeded directly to adjudicate the dispute under arbitration, without entering reference, thereby rendering the award without jurisdiction and non-est in law as it is in violation of the statutory mandate of Section 18(2) and 18(3) of the MSMED Act.

5.1 She further contended that the learned Single Judge erred in returning findings regarding compliance with Section 18(2) of the MSMED Act while simultaneously holding that the Section 34 petition could not be entertained without compliance with Section 19 of the MSMED Act. Reliance is placed upon the decisions of the Supreme Court in **Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan**[2] and **Vijeta Construction v. Indus Smelters Ltd.**[3], as well as the decisions in **GPT Infraprojects Ltd. v. State of Jharkhand**[4] and **Unicorn Engineers v. Jindal Steel & Power Ltd.**[5], to contend that where the mandatory conciliation-arbitration sequence under Section 18 of the MSMED Act is not followed by the Council, the resultant award is a nullity and the requirement of pre-deposit does not arise.

5.2 She submitted that the award is liable to be set aside under Sections 34(2)(a)(iii) and 34(2)(b)(ii) of the Act of 1996, as the Appellant was denied a fair and effective opportunity to present its case, thus violating its right of natural justice. She stated that after receiving the first notice from the

[2] (2021) 19 SCC 206
[3] 2021 SCC Online SC 3436
[4] 2024 SCC Online Jhar 184
[5] 2022 SCC Online Del 2215

Facilitation Council in June 2022, it duly appeared before the Facilitation Council on 30.06.2022 and was directed to file its reply; thereafter, following the order of the Kerala High Court dated 16.09.2022 directing expeditious disposal of the proceedings, only one notice dated 16.10.2022 was issued fixing the matter for hearing on 26.10.2022. She submits that Appellant had no notice that the proceedings before the Facilitation Council was for arbitration and also it had no notice of the order of the Kerala High Court. She submitted that the Facilitation Council proceeded ex-parte against the Appellant on 26.10.2022, on the first date of non-appearance, and reserved the matter for orders. However, immediately thereafter, the Appellant addressed a e-communication dated 31.10.2022 to the Facilitation Council seeking an opportunity to file its reply and explained the reasons for its inability to appear on 26.10.2022, but despite such request, the Facilitation Council proceeded to pass the impugned award on 02.12.2022. She submitted that it was effectively denied an opportunity of hearing and Appellant was prevented from presenting its defence. Reliance is placed on the judgment of the Supreme Court in **Narinder Singh and Sons v. Union of India**[6], wherein an ex-parte award was set aside on similar grounds.

5.3 On the issue of maintainability of the present appeal against the impugned orders leading to dismissal of the Section 34 petition, she also relied upon the judgement of the Supreme Court in **Chintels India Limited v. Bhayana Builders Private Limited**[7] wherein the Supreme Court clarified its judgment **BGS SGS Soma JV v. NHPC Ltd.**[8] stating that it was material fact that the impugned order did not result in attaching the finality

[6] (2022) 18 SCC 690
[7] (2021) 4 SCC 602
[8] (2020) 4 SCC 234

to the award.

5.4 Without prejudice to its submissions on the nullity of the award, learned senior counsel submitted that the Appellant has, in any event, complied with the requirement of Section 19 of the MSMED Act by depositing approximately Rs. 36 crores, constituting 75% of the principal awarded amount. She contended that the Respondent's reliance on **Indian Oil Corporation Ltd. v. FEPL Engineering (P) Ltd.**[9] to argue that interest must also be included in computing the mandatory deposit is misplaced, particularly in view of subsequent judicial pronouncements holding that award passed in violation of Section 18 of the MSMED Act, is a nullity. She further relied upon various judgments of the Supreme Court, including **Gujarat State Disaster Management Authority v. Aska Equipments Ltd.**[10] to demonstrate that Courts have entertained challenges to MSME awards without insisting upon strict compliance with the full pre-deposit requirement and, in appropriate cases, have directed deposits of lesser amounts.

SUBMISSIONS BY THE RESPONDENT

6. Dr Amit George, learned counsel appearing for the Respondents submitted that the present appeal is directed against two orders passed by the learned Single Judge in proceedings under Section 34 petition, the first order dated 20.03.2024 required the Appellant to comply with the mandatory pre-deposit requirement under Section 19 of the MSMED Act while the subsequent order dated 22.08.2024 dismissed the Section 34 petition on account of non-compliance with that requirement; he stated that both orders are legally sustainable and do not warrant interference.

[9] 2020 SCC Online Del 2799, at paragraph nos. 38, 39, 44 and 46.
[10] (2022) 1 SCC 61, at paragraph no. 15.

6.1 He submitted that Respondent is a registered Micro Enterprise engaged in engineering and consultancy services and had successfully executed five work orders awarded by the Appellant, who is a Government of India undertaking under the Ministry of Jal Shakti, in connection with the development and modernization of fishery infrastructure in Andhra Pradesh and Odisha. He submitted that despite satisfactory completion of the contracted work and repeated demands for payment, substantial amounts remained unpaid; consequently, the Respondent invoked Section 18 of the MSMED Act and filed two references before the Facilitation Council, seeking recovery of its outstanding dues aggregating to approximately Rs. 48.64 crores.

6.2 He submitted that the Appellant initially participated in the proceedings before the Facilitation Council but thereafter failed to file objections and stopped appearing despite repeated opportunities. He submitted that, conciliation proceedings under Section 18(2) of the MSMED Act were undertaken by DLSA, Thiruvananthapuram and ultimately failed due to the Appellant's non-cooperation. He stated that pursuant to the Kerala High Court's order dated 16.09.2022 directing the Facilitation Council to decide the dispute within ten days, a fresh notice was issued to the Appellant. However, even thereafter the Appellant failed to participate in the proceedings, compelling the Facilitation Council to proceed and render the impugned award dated 02.12.2022.

6.3 He contended that the impugned award was not passed merely because of the Appellant's absence but was based on a substantive consideration of the material on record; the Facilitation Council specifically relied upon documentary evidence, including correspondence issued by the

Appellant acknowledging the outstanding dues payable to the Respondent; the impugned award records that despite service of notices and service of copies of the claims, the Appellant failed to raise any objections and its silence was treated as an admission of the claims. He therefore submits that the impugned award represents a reasoned adjudication on merits and that the Appellant is, in substance, seeking a re-appreciation of factual findings, which is impermissible in proceedings under Section 34 of the Act of 1996.

6.4 His principal submission was that the present appeal itself is not maintainable under Section 37 of the Act of 1996. He argued that Section 37 permits appeals only against orders setting aside or refusing to set aside an arbitral award under Section 34 of the Act of 1996, however, in the present case, neither of the impugned orders adjudicated the merits of the challenge to the award; the learned Single Judge merely held that the Section 34 petition could not be entertained in the absence of compliance with the mandatory pre-deposit requirement under Section 19 of the MSMED Act. He stated that such orders do not constitute orders refusing to set aside an award under Section 34 of the Act of 1996 and therefore fall outside the scope of Section 37 of the Act of 1996.

6.5 He further submitted that Section 19 of the MSMED Act embodies a mandatory statutory condition precedent to the maintainability of any challenge to an award rendered under the said Act. He argued that the MSMED Act is a special beneficial legislation intended to secure expeditious recovery of dues owed to micro and small enterprises and that the requirement of depositing 75% of the awarded amount is an integral component of that legislative framework. Reliance is placed upon decisions of the Supreme Court and various High Courts holding that a challenge under Section 34 of the Act of 1996 cannot be entertained unless the mandatory pre-deposit has been made. He contended that the MSMED Act, being a special statute, overrides the general provisions of the Act of 1996 wherever there is any inconsistency.

6.6 He also disputed the Appellant's reliance on **Chintels India Ltd.** (supra) to establish maintainability of the present appeal. It was submitted that **Chintels** concerned dismissal of a Section 34 petition on account of refusal to condone delay under Section 34(3) of the Act of 1996, which constituted an exercise of jurisdiction under the Act of 1996 itself; in contrast, the present case concerns a jurisdictional bar arising under Section 19 of the MSMED Act; according to the Respondent, the ratio of **BGS SGS Soma JV v. NHPC Ltd**.[11] squarely applies, as the impugned orders merely declined to entertain the Section 34 petition in the absence of fulfilment of a statutory prerequisite and did not adjudicate the challenge on merits.

6.7 Without prejudice to the objection on maintainability, he submitted that the impugned orders are otherwise correct because the Appellant admittedly failed to make the statutory deposit despite repeated opportunities granted by the learned Single Judge. He submitted that the subsequent deposit of Rs. 36 crores before this Court is said to be legally insufficient and incapable of curing the defect, as the amount required to be deposited under Section 19 of the MSMED Act includes not only the principal sum awarded but also the accrued statutory interest, and on a proper computation, including compound interest payable under the MSMED Act, the total liability has substantially increased and the amount deposited by the Appellant represents only a fraction of the amount required

[11] At paragraph nos. 13 to 19.

under law.

6.8 He also opposed the Appellant's attempt to rely upon decisions where constitutional Courts exercised writ jurisdiction or powers under Article 142 of the Constitution to grant relief to the buyer who suffered the award, notwithstanding non-compliance with Section 19 of the MSMED Act. He submitted that such decisions arose in entirely different jurisdictions and cannot dilute the mandatory statutory scheme applicable to a challenge under Section 34 of Act of 1996; Appellant having consciously elected to pursue the statutory remedy under Section 34 of the Act of 1996, and the Appellant cannot seek to import principles applicable in writ proceedings in order to circumvent the requirement of pre-deposit.

6.9 He lastly submitted that the present appeal is an attempt to avoid the legislative mandate embodied in Section 19 of the MSMED Act and to delay payment of amounts that have been found due by the Facilitation Council. He contended that permitting challenges without strict adherence to the statutory pre-deposit requirement would defeat the very object of the MSMED Act.

FINDINGS AND ANALYSIS

7. This Court has heard the learned counsel for the parties and perused the record.

8. The present appeal has been filed under Section 37 of the Act of 1996, challenging the order dated 20.03.2024, whereby the learned Single Judge directed the Appellant to deposit 75% of the awarded amount within eight (8) weeks as per Section 19 of the MSMED Act before hearing Section 34 petition on merits, and the consequential order dated 22.08.2024, passed by the learned Single Judge dismissing the Appellant's Section 34 petition for

failure to comply with the said direction of deposit.

9. In the present appeal, the Appellant seeks setting aside of the impugned orders on the ground that since the impugned award is a nullity, it should be exempted from the condition of the pre-deposit and seeks a consequential direction for adjudication of its Section 34 petition on merits.

10. The Section 34 petition challenged the ex-parte impugned award passed by the Facilitation Council, whereby the Appellant has been directed to pay a principal sum of Rs. 48,64,50,365/- (comprising Rs. 5,33,03,981/- and Rs. 43,31,46,384/-), together with compound interest with monthly rests calculated at three times the bank rate as per Section 16 of the MSMED Act, from 12.04.2020 until the date of payment.

11. In the Section 34 petition proceedings, since the impugned award was ex-parte, the Respondent *initially* consented to its setting aside and re-hearing on merits. Accordingly, by order dated 21.04.2023, the impugned award was *initially* set aside by the learned Single Judge, and the parties were directed to appear before the Facilitation Council on 19.05.2023.

Subsequently, the Respondent filed a review petition seeking recall of the order dated 21.04.2023 on the ground that its counsel had no authority to consent to the setting aside of the ex-parte impugned award. In these circumstances, the learned Single Judge *vide* order dated 08.05.2023 recalled the earlier order dated 21.04.2023 and proceeded to adjudicate the Section 34 petition.

12. The Respondent objected to hearing of the Section 34 petition on merits, without the Appellant depositing 75% of the awarded amount and this led to the passing of the impugned orders dated 20.03.2024 and 22.08.2024.

13. The present appeal was heard at length on 10.04.2026, when the Respondent raised a preliminary objection to its maintainability on the ground that since the Appellant had not complied with the mandatory pre-deposit requirement under Section 19 of the MSMED Act, there was no order on the merits of the Section 34 petition and therefore, the present appeal was not maintainable under Section 37 of the Act of 1996.

During the course of hearing on 10.04.2026, the Appellant submitted that it was today in a position to deposit Rs. 36 crores, being 75% of the principal amount awarded, and prayed that, upon such deposit, the impugned orders be set aside and it be permitted to prosecute its Section 34 petition on merits. The Appellant was accordingly granted liberty by this Court to deposit Rs. 36 crores, which has since been deposited with the Registry of this Court and is presently lying in a fixed deposit.

However, when the matter was taken up for hearing on 15.05.2026, the Respondent contended that the sum of Rs. 48 crores represented only the principal amount awarded and that, after inclusion of interest, the decretal liability had exceeded Rs. 131 crores, as on date. On that basis, it was argued that the Appellant could not be heard on merits in Section 34 petition unless it deposited Rs. 98.86 crores, being 75% of the alleged outstanding amount of Rs. 131 crores.

14. At the outset, it is pertinent to note that the Respondent's representative was personally present in Court when the order dated 10.04.2026 was passed, and no objection was raised to the direction of deposit of Rs. 36 crores towards 75% of the awarded amount as Rs. 48 crores, in paragraph 4 thereof. The proceedings on that date proceeded on the common understanding of the parties that the requirement of depositing

75% of the awarded amount would stand satisfied upon the Appellant depositing Rs. 36 crores, being 75% of the principal sum of Rs. 48 crores. The reservation of rights of the Respondent at paragraph 6 of the order dated 10.04.2026 was to the effect as to whether the fact that the deposit was being made by the Appellant in 2026 would entitle it to be heard in a Section 34 petition filed in the year 2022 and no more. The figure of Rs. 48 crores as the awarded amount and Rs. 36 crores as the requisite deposit were not disputed at that stage. The order dated 10.04.2026 is set out hereunder: -

"

1. This appeal has been filed with the following prayers: -

(a) set aside the order/judgment dated 20.03.2024 passed by the Ld. Single Judge in OMP (Comm) No.132 of 2023;

(b) May pass such other and further order(s) as this Hon'ble Court deems fit and proper in the premises of this case.

2. In effect, the appellant herein is challenging the order dated 23.02.2024 and also order dated 22.08.2024, whereby the learned Single Judge has directed the appellant to deposit the 75% of the awarded amount within a period of eight weeks, failing which, the petition filed by the appellant would liable to be dismissed and also order dated 22.08.2024, whereby on failure on the part of the appellant to deposit the amount as directed, the petition under Section 34 was rejected.

3. We have heard Ms. Malvika Trivedi, learned senior counsel for the appellant and also Dr. Amit George appearing for the respondent, at length.

4. <u>At this stage, Ms. Trivedi on instructions from the counsel submits that the appellant shall deposit an amount of Rs. 36 crores, which shall be 75% of the awarded amount of Rs. 48 crores with the Registrar General of this Court. If that be so, appropriate shall be that the appellant shall deposit the amount within four weeks from today</u>.

5. <u>If such an amount is deposited, the Registrar General shall invest the amount in an interest-bearing FDR of a nationalized bank with periodical renewals till further orders</u>.

6. Suffice to state that the amount to be deposited by the appellant

is without prejudice to the rights and contentions of the respondent.

7. Renotify on 15.05.2026.

8. Interim orders, if any, shall continue till the next date of hearing."

[Emphasis Supplied]

Pertinently, the impugned award only determines the principal awarded amount and does not compute the award of interest. In these peculiar facts where the Appellant is challenging the award as a nullity for non-compliance of Section 18(2) and 18(3) of the MSMED Act and on the plea of violation of natural justice, at the hearing dated 10.04.2026, it appeared equitable to the Court that subject to Appellant showing its bona fide by depositing 75% of the principal awarded amount it should be granted an opportunity to be heard in the Section 34 petition. In our opinion, by depositing Rs. 36 crores, Appellant had established that it was not undertaking dilatory tactics to avoid its liability but indeed seeking a fair opportunity to be heard on merits of the validity and illegality of the award.

15. The conduct of the Respondent in opposing examination of the Section 34 petition on merits is writ large on the record of the proceedings, including the orders dated 21.04.2023 and 08.05.2023 passed by the learned Single Judge, as well as the hearings in the present appeal held on 10.04.2026 and 15.05.2026.

I. <u>Maintainability of this Appeal</u>

16. Learned Single Judge *vide* impugned order dated 22.08.2024 has dismissed the Section 34 petition and refused to set aside the impugned award due to the Appellant's non-compliance of the direction of pre-deposit issued *vide* impugned order dated 20.03.2024. In our considered opinion, the impugned order dated 20.03.2024 merged into the impugned order

22.08.2024, as the effect of its non-compliance resulted in the dismissal of the Section 34 petition.

The effect of the dismissal of Section 34 petition is that the award has attained finality, it can be executed at the instance of the Respondent like a Court decree under Section 36 of the Act of 1996.

In our considered opinion, the impugned orders of the learned Single Judge in these proceedings refusing to set aside the impugned arbitral award under Section 34 of the Act of 1996 are final in nature and have the effect of extinguishing the Appellant's remedy of filing objections against the impugned award and therefore this final order dated 22.08.2024 is amenable to appeal under Section 37(1) (c) of the Act of 1996. The correctness of the impugned orders passed by the learned Single Judge can only be examined in the appeal filed under Section 37(1) (c) of the Act of 1996 and there is no other forum available to the Appellant.

17. The Respondent has relied upon the judgment of the Supreme Court in **BGS SGS Soma** (supra) and specifically paras 13-19 therein to contend that since the challenge to the impugned award has not been evaluated by the learned Single Judge on the grounds set forth in Section 34 of the Act of 1996, there was no judicial application as to the substance of the dispute and therefore no appeal under Section 37(1)(c) of the Act of 1996 is maintainable. In the judgment of **BGS SGS Soma** (supra), the Special Commercial Court, Gurugram hearing the Section 34 petition had ordered the petition to be returned on principles of Order VII Rule 10 CPC to be presented before the appropriate Court of requisite jurisdiction at Delhi. The High Court however entertained an appeal against the said order of the Special Commercial Court under Section 37 of the Act of 1996, and in this

background Supreme Court held that the order of the Special Commercial Court directing return of the petition was not an order passed refusing to set aside an arbitral award under Section 34 and therefore no appeal was maintainable under Section 37(1)(c) of the Act of 1996. The Supreme Court noted with approval a judgment of High Court of Delhi in **Harmanprit Singh Sidhu v. Arcadia Shares & Stockbrokers (P) Ltd.**[12] and upheld the reasoning therein which held that preliminary orders passed by the Court hearing Section 34 petition, which do not impact the arbitral award cannot be a subject matter of challenge under Section 37(1)(c) of the Act of 1996.

18. As is evident from the judgment of **BGS SGS Soma** (supra), the Supreme Court was of the view that the order of the Special Commercial Court did not express any opinion on the legality of the arbitral award and the petitioner therein had the remedy of approaching the competent Court at Delhi for filing a Section 34 petition and consequently a Section 37 appeal on the merits of its challenge to the award adjudicated. The Supreme Court thus considered the order directing return of a Section 34 petition under Order VII Rule 10 CPC to be an order akin to a preliminary order which does not have any effect on the finality of the award.

However, in the facts of the present case the effect of the impugned orders dated 20.03.2026 and 22.08.2026, resulting in dismissal of Section 34 petition, is that the award has attained finality and the Appellant has no other remedy except preferring an appeal under Section 37(1)(c) of the Act of 1996 to challenge the said orders on merits. The effect of the impugned orders is that the learned Single Judge has refused to entertain the Section 34 petition, even though it is the Court of competent jurisdiction. As noted

[12] 2016 SCC OnLine Del 5383

above the only remedy available to the Appellant against the impugned orders is to prefer this appeal, failing which the award will attain finality. We therefore hold that the present appeal against the impugned orders dismissing the Section 34 petition is maintainable.

19. In our considered opinion, learned senior counsel for the Appellant has rightly placed reliance upon the subsequent judgment of the Supreme Court in **Chintels India Limited** (supra) where the Supreme Court has clarified its judgment **BGS SGS Soma** (supra) and at para 32 therein held that the pronouncement in BGS SGS Soma turned on the material fact that the impugned order of the Special Commercial Court Gurgaon therein did not result in attaching finality to the award. The judgment of the Supreme Court in **Chintels India Limited** (supra) therefore further fortifies our conclusion that this appeal is maintainable.

II. <u>For examination of the plea of nullity of the impugned award, a Court under Section 34 and Section 37 of the Act of 1996 can examine this plea if it is discernible from the record even prior to the pre-deposit</u>

20. The Appellant has contended that the impugned award is a nullity as it has been passed by the Facilitation Council in violation of the mandate of Section 18(2) and 18(3) of the MSMED Act as well as without complying with the principles of natural justice and, therefore, liable to be set aside in view of Section 34(2)(a)(iii) and Section 34(2)(b)(ii) of the Act of 1996. In our considered opinion, the Appellant has succeeded in demonstrating, from a bare perusal of the record, the existence of the aforesaid grounds which merit setting aside of the impugned award and remitting the matter to the Facilitation Council for fresh consideration, as discussed hereinafter.

21. The Respondent, however, submits that since the Appellant has failed to deposit Rs. 98.96 crores i.e., 75% of the decretal amount as per Section 19

of the MSMED Act, therefore, its pleas of nullity of award or violation of principles of natural justice cannot be examined under Section 34 or Section 37 of the Act of 1996.

22. We note that the Appellant's right to allege nullity of the impugned award is available to it even in the execution proceedings and the dismissal of the Section 34 petition would have no impact on the plea of nullity. It is trite law that if the impugned award is vitiated due to nullity, it cannot even be implemented by the Executing Court even if the judgment debtor has not filed a Section 34 petition or having filed one, fails to prosecute the same due to non-deposit as per Section 19 of the MSMED Act. It is also a fundamental principle of law, that a plea of nullity of the award or decree can be set up, whenever and wherever the impugned award is sought to be enforced or relied upon, including at any stage of execution or even in collateral proceedings because a null award has no legal existence from the start, and a Court or executing authority does not technically 'go behind' the award, it simply recognizes that there is no valid legal award or decree to enforce. (**Re: Sunder Dass v Ram Prakash**[13] and **Heeralal Patni v. Shri Kali Nath**[14]).

23. The contentions of the Appellant on the plea of nullity of the impugned award are discernible on the face of the record, as discussed hereinafter. Since, nullity of the award can be examined even by the Executing Court as well as a Court in collateral proceedings, in our considered opinion this aspect can be examined by the Court hearing Section 34 petition as well as an appeal under Section 37 of the Act of 1996 where the subject impugned award is alleged to be a nullity.

[13] 1977 SCC OnLine SC 99, at paragraph 3
[14] AIR 1962 SC 199, at paragraph 4

24. The distinction between an arbitral award that is merely illegal and one that is a nullity, is tangible and real.

An award rendered by an Arbitral Tribunal having jurisdiction over the subject matter and the dispute may nonetheless be vulnerable to challenge on account of errors of law, or other defects recognised under Section 34 of the Act of 1996. Such an award is not nullity; it continues to possess legal efficacy and remains enforceable unless and until it is set aside by a competent Court in proceedings under Section 34 of the Act of 1996 on the grounds of illegality. For instance, where the arbitrator awards a rate of interest in excess of the rate of interest permissible under the contract, such an award of the interest of higher rate is illegal but not a nullity. The only remedy available to the judgment debtor is to challenge the award under Section 34 for correction of the award of higher rate of interest. However, the alleged illegality of such an award of interest cannot be raised as a defence in execution proceedings, since an Executing Court is not permitted to sit in appeal over the correctness of the award.

A fundamentally different position arises where the impugned award is vitiated due to existence of facts, which deprive the arbitral tribunal from exercising jurisdiction over the disputes. For instance, an arbitral proceeding presided over by an Arbitrator in violation of Section 12(5) of the Act of 1996 has been held to be a nullity and such an award has been set aside by the Executing Court even where the petition under Section 34 stood dismissed on merits. [Re: **Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat**[15]] In another instance, where a party who is not a micro or small industry on the date of its entering into the contract with the buyer for

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[15] 2023 SCC OnLine Del 3148, at paragraph 13

supply of goods, it cannot maintain a reference under Section 18 before the Facilitation Council for recovery of dues for the goods supplied under the said contract before its registration [**Re: Silpi Industries and Others v. Kerala State Road Transport Corporation and Another**[16]]. Where the existing facts and law do not permit the arbitral tribunal to enter reference without compliance of the condition precedent for exercise of its jurisdiction, the erroneous assumption of jurisdiction by the arbitral tribunal shall result in a award which is a nullity. An award which is a nullity derives no legal force from its inception and is incapable of creating, extinguishing, or determining any rights in favour of the successful party.

Viewed in this light, the requirement of pre-deposit under Section 19 of the MSMED Act necessarily presupposes the existence of a valid award, which is capable of legal recognition as an award under law. Section 19 of the MSMED Act is intended to regulate challenges to valid awards rendered under the statutory framework of the MSMED Act. The provision cannot be construed as compelling a party to first comply with the pre-deposit requirement before it is permitted to contend that the very instrument sought to be enforced is non-est and devoid of legal existence. Where a credible and ex-facie case of nullity is made out on the perusal of the face of the record of the Facilitation Council, the Court under Section 34 or Section 37 of the Act of 1996 is not denuded of its jurisdiction to examine the issue of nullity of the award merely because the requirement of pre-deposit has not been fulfilled.

25. The learned Single Judge in the impugned order dated 20.03.2024 concluded that the Appellant was duly served and had full notice of the

[16] (2021) 18 SCC 790, at paragraph 44

conciliation proceedings as well as arbitral proceedings and consciously abstained from participating in the proceedings before the Facilitation Council. This led to the learned Single Judge to form an opinion that the impugned award is valid, and it issued directions of pre-deposit of 75% of the awarded amount.

We have, however, in this judgment, hereinafter, on perusing the record of the Facilitation Council noted our findings to the effect, that as per the record, the Appellant had no notice of the initiation of conciliation proceedings before the DLSA, termination of the conciliation proceedings and initiation of arbitral proceedings before the Facilitation Council. The Facilitation Council passed the ex-parte impugned award without formally entering reference on arbitration with notice to the Appellant, rendering the award to be a nullity. We therefore find that in the facts of this case the directions for pre-deposit by the learned Single Judge were not made out as the award itself was a nullity.

26. The Appellant is a public sector undertaking and has pleaded financial hardship in making a deposit of 75% of the decretal amount i.e., deposit of Rs. 98.86 crores. Instead, it has offered to deposit 75% of the principal awarded amount i.e., Rs. 36 crores to seek examination of its plea of nullity, violation of principles of natural justice and a consequent remand to the Facilitation Council for hearing on merits. The inability of the Appellant to deposit Rs. 98.86 crores has not been contested by the Respondent.

27. In our considered opinion, by depositing a sum of Rs. 36 crores as per order dated 10.04.2026, which is equal to 75% of the principal awarded amount the Appellant has demonstrated its bona fides and is therefore entitled to a hearing and examination of its plea of award being a nullity and

the same having been passed in violation of principles of natural justice.

28. In the facts and circumstances of the present case where we are persuaded to set aside the impugned award a nullity and remand the matter to Facilitation Council for a fresh hearing, instead of remanding the matter to the learned Single Judge for adjudication of the Section 34 petition, in the interest of expeditious determination of the disputes, we have considered it appropriate to ourselves examine the record of the Facilitation Council ourselves in order to evaluate the correctness of Appellant's contention that the impugned award has been passed without complying with Section 18(2) of the MSMED Act and without giving any notice to the Appellant with respect to the commencement of the arbitration proceedings under Section 18(3) by the Facilitation Council.

III. Issue: Non-compliance of Section 18(2) and 18(3) of the MSMED Act renders the impugned award a nullity

29. It is stated that Respondent submitted an application dated 01.09.2020 under Section 18(2) of the MSMED Act, *vide* KL02D0005169/M/00001 before the Facilitation Council for its dues towards 'consultancy services' related to work order dated 28.03.2016 and 09.12.2017, for the principal amount of Rs. 43,31,46,384/-. The statement of claim was filed in the year 2021 and the aforesaid application was numbered as O.A. 33/2021.

It is stated that Respondent submitted a separate application dated 02.09.2020 also under Section 18(2) of the MSMED Act, *vide* KL02D0005169/M/00002 for its dues towards 'consultancy services' related to the work orders dated 26.02.2019, 18.09.2018 and 25.10.2018, for the principal amount of Rs. 5,33,03,981/-. The statement of claim was filed in the year 2021 and the aforesaid application was numbered as O.A. 32/2021.

30. The Appellant states that the *first* time it received notice for appearance in the proceedings initiated before the Facilitation Council was for hearing dated 30.06.2022, scheduled at 11 A.M. The Appellant concedes that it duly appeared before the Facilitation Council on 30.06.2022, however, it contends that the Appellant understood that the hearing had been fixed for conciliation of the disputes as per mandate of Section 18(2) of the MSMED Act. It states that the Appellant was, however, not aware that at the hearing dated 30.06.2022 the Facilitation Council was entering reference for arbitration so as to adjudicate upon the claims of the Respondent as per the provisions of Act of 1996.

31. The Appellant states that, it is a matter of record that no next date of hearing was fixed on 30.06.2022 and the order of the said date also does not record that the Facilitation Council has entered reference for arbitration.

32. It admits that it received another notice of hearing before the Facilitation Council for hearing dated 26.10.2022, however, states that since there was a Diwali vacation at its office, the said notice was inadvertently overlooked and came to the attention of the Appellant only on 31.10.2022. It is stated that thereafter the Appellant on 31.10.2022 immediately addressed an e-mail to the Facilitation Council explaining the cause of its absence at the hearing dated 26.10.2022 and requested for a further opportunity to present the case. The e-mail dated 31.10.2022 was addressed to the official ID of the Facilitation Council from which the notice for hearing had been received.

33. The Appellant states that it received no further response to the said e-mail dated 31.10.2022 and, instead, on 29.12.2022 was served with the impugned ex-parte award dated 02.12.2022 directing the Appellant to make

payment of Rs. 48,64,50,365/- (5,33,03,981/- plus 43,31,46,384/-) i.e., Rs. 48.64 crores plus interest.

34. It is stated that in these facts the Appellant filed a Section 34 petition impugning the award dated 29.12.2022 as the Facilitation Council wrongly proceeded to arbitration under Section 18(3) of the MSMED Act without undertaking conciliation as per the mandate of Section 18(2) of the MSMED Act.

35. In reply, the Respondent stated that the mandate of conciliation as per Section 18(2) of the MSMED Act had been fulfilled as the matter was referred by the Facilitation Council to DLSA[17] in the year 2021 under Lok Adalat for settlement of disputes, and the conciliation proceedings failed due to the non-participation of the Appellant before the DLSA.

In reply, the Appellant contends that it had received no notice from DLSA for conciliation or Lok Adalat in the year 2021 and the only notice received by it was from the Facilitation Council for the *first* hearing dated 30.06.2022, and thus the Appellant verily believed that the hearing before the Facilitation Council on 30.06.2022 was for conciliation as per Section 18(2) of the MSMED Act.

36. The Appellant has placed reliance upon the decision of the Supreme Court in **Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan** (supra) and **Vijeta Construction v. Indus Smelters Ltd. and Anr[18]**, to contend that the scheme of Section 18 of the MSMED Act contemplates a mandatory two-stage process, namely, conciliation under Section 18(2) and upon failure of conciliation, followed by determination of disputes through arbitration under Section 18(3). It is submitted that compliance with the conciliation

[17] District Legal Services Authority, Thiruvananthapuram
[18] 2021 SCC Online SC 3436

requirement is not a mere formality but a jurisdictional precondition before the Facilitation Council can assume the role of an arbitral tribunal and adjudicate the dispute.

The Appellant contends that, since it was never served with any notice of the conciliation proceedings allegedly conducted before the DLSA Lok Adalat on 11.12.2021, it bona fide understood the notices received from Facilitation Council for the hearings on 30.06.2022 and 26.10.2022 were related to conciliation proceedings. On this basis, it is urged that the impugned award having been rendered without adherence to the mandatory procedure prescribed under Section 18(2) of the MSMED Act is a nullity in the eyes of law.

It reiterates its reliance on the e-mail dated 31.10.2022 to explain its absence at the second hearing dated 26.10.2022.

37. In this background *vide* order dated 29.01.2026, we had summoned the record of the Facilitation Council to verify the submission of the parties with respect to conciliation proceedings. A perusal of the record shows that 58 distinct cases were referred to DLSA for conciliation in its Lok Adalat scheduled on 11.12.2021, wherein the two cases between these parties were enlisted at Sr. No. 40 and 41. However, we find that it does not contain any record of issuance of notice to the Appellant herein either by the Facilitation Council or the DLSA for participating in the conciliation proceedings. The report of DLSA, dated 24.01.2022, records that none of the 58 cases were settled in the Lok Adalat held on 11.12.2021. Though, the Respondent has contended that conciliation was held by DLSA and the Appellant did not participate in the same, the Respondent has also not filed with its reply any notice received by it from the DLSA or the Facilitation Council calling it for

conciliation on 11.12.2021.

38. Having perused the record, we are persuaded to accept the Appellant's submission that it had no notice of the conciliation proceedings conducted by DLSA before the Lok Adalat on 11.12.2021. The material placed on record does not disclose service of any notice upon the Appellant informing it of the proposed conciliation proceedings or requiring its participation therein.

In the record, there is no order of Facilitation Council referring the matter to DLSA for conciliation, with notice to the Appellant, available in the record

39. Also, after receiving the report of the DLSA dated 24.01.2022, further, there is no order of the Facilitation Council recording that the conciliation proceedings have failed, and the matter should proceed to determination through arbitration as per Section 18(3) of the MSMED Act.

40. Though, the record of the Facilitation Council shows that these cases were referred to DLSA for conciliation, however, the record does not show that the Appellant had been put to notice of the conciliation proceedings. In addition, there is no order of the Facilitation Council referring the matter to conciliation with the notice to the parties and a separate order of the Facilitation Council recording failure of the conciliation proceedings, with notice to the parties. To prove compliance of Section 18(2) of the MSMED Act, Facilitation Council must possess record documenting reference to conciliation with notice to parties and termination of the conciliation proceedings. Reference to conciliation without notice to the buyer cannot fulfil the mandate of Section 18(2) of the MSMED Act. In these facts, non-compliance of Section 18(2) of the MSMED Act as contended by the

Appellant also stands proved. The submission of the Appellant that the impugned ex-parte award has been passed without complying with Section 18(2) of the MSMED Act would, therefore, have to be accepted.

41. Also, in these circumstances, the Appellant's contention that, upon receiving the first notice issued by the Facilitation Council for the hearing scheduled on 30.06.2022, it understood the same to be a notice relating to conciliation proceedings in terms of Section 18(2) of the MSMED Act appears to be bona fide and merits acceptance.

42. The Supreme Court has held in **Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan and Ors.**[19] (supra) that an award passed by the Council in violation of Section 18 of MSMED Act is a nullity. As discussed hereinabove, in the facts of this case the aforesaid mandate of Section 18(2) and 18(3) of MSMED Act have not been complied with. Relevant part of the judgment reads as under: -

> "**14.** From a reading of Sections 18(2) and 18(3) of the MSMED Act it is clear that the Council is **obliged** to conduct conciliation for which the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 would apply, as if the conciliation was initiated under Part III of the said Act. Under Section 18(3), when conciliation fails and stands terminated, the dispute between the parties can be resolved by arbitration. The Council is empowered either to take up arbitration on its own or to refer the arbitration proceedings to any institution as specified in the said section. It is open to the Council to arbitrate and pass an award, after following the procedure under the relevant provisions of the Arbitration and Conciliation Act, 1996, particularly Sections 20, 23, 24 and 25.
>
> **15.** There is a fundamental difference between conciliation and arbitration. In conciliation, the conciliator assists the parties to arrive at an amicable settlement, in an impartial and independent manner. In arbitration, the Arbitral Tribunal/arbitrator adjudicates the disputes between the parties. The claim has to be proved before the arbitrator, if necessary, by adducing evidence, even though the rules of the Civil Procedure Code or the Evidence Act may not apply. Unless otherwise

[19] (2021) 19 SCC 206

agreed, oral hearings are to be held.

16. If the appellant had not submitted its reply at the conciliation stage, and failed to appear, the Facilitation Council could, at best, have recorded the failure of conciliation and proceeded to initiate arbitration proceedings in accordance with the relevant provisions of the Arbitration and Conciliation Act, 1996, to adjudicate the dispute and make an award. Proceedings for conciliation and arbitration cannot be clubbed.

17. In this case, only on the ground that the appellant had not appeared in the proceedings for conciliation, on the very first date of appearance, that is, 6-8-2012, an order was passed directing the appellant and/or its predecessor Jharkhand State Electricity Board to pay Rs 78,74,041 towards the principal claim and Rs 91,59,705 odd towards interest. As it is clear from the records of the impugned proceedings that the Facilitation Council did not initiate arbitration proceedings in accordance with the relevant provisions of the Arbitration and Conciliation Act, 1996.

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

[Emphasis Supplied]

43. In view of our findings on lack of notice to the Appellant qua conciliation and initiation of arbitration as well as the law on Section 18 of the MSMED Act laid down above, we hold that the mandatory procedure prescribed under Sections 18(2) and 18(3) of the MSMED Act was not complied with in this case, as the Appellant was neither served with notice of the conciliation proceedings nor was there any order recording failure of conciliation before the Facilitation Council assumed the role of an arbitral

tribunal and proceedings which culminated in the ex-parte impugned award. Consequently, the ex-parte impugned award is a nullity.

IV. Issue: Violation of principles of natural justice making the impugned award vulnerable to challenge under Section 34(2)(a)(ii) and Section 34(2)(b)(ii) of the Act of 1996 and on proof of violation rendering the award a nullity

44. The record of the Facilitation Council indicates that the *first* notice served upon the Appellant was in respect of the hearing scheduled for 30.06.2022. The record contains an e-mail[20] communication addressed to the Appellant for hearing dated 30.06.2022, and the Appellant has also placed on record the physical notice[21] received by it for hearing dated 30.06.2022. Upon perusal of the contents of the notice, it is evident that, apart from requiring the Appellant to appear on 30.06.2022, the notice does not specify whether the proceedings were being conducted are in the nature of conciliation under Section 18(2) of the MSMED Act or as arbitral proceedings under Section 18(3) of the MSMED Act. It is an admitted position that the Appellant duly appeared before the Facilitation Council on 30.06.2022 and sought time to file its objections to the claim. Significantly, the order passed on 30.06.2022 neither records any decision on the nature of the proceedings held i.e., arbitration or conciliation nor specifies the next date of hearing.

45. The record of the Facilitation Council further reflects that a second notice was issued to the Appellant in respect of the hearing scheduled on 26.10.2022. The record contains an e-mail dated 15.10.2022[22] addressed to the Appellant regarding the said hearing, and the Appellant has also placed

[20] E-mail dated 17.06.2022 at pdf page 742 of the appeal.
[21] At pages 467 and 468 of Section 34 petition.
[22] Pdf page 930 of the Appeal

on record a physical copy of the notice received by it. Upon examining the contents of the notice, it is apparent that, similar to the earlier notice, it does not specify whether the proceedings are being conducted for the purposes of conciliation or arbitration. It is undisputed that the Appellant did not appear on 26.10.2022. The order passed by the Facilitation Council on that date records that, in view of the directions issued by the High Court of Kerala in W.P.(C) No. 25686/2022 *vide* order dated 16.09.2022, the Facilitation Council proceeded ex-parte against the Appellant and reserved the matter for passing appropriate orders.

46. The notice issued to Appellant for the hearing dated 26.10.2022 did not put the Appellant to notice that, in the event of its non-appearance, the Facilitation Council would proceed to hear and decide the matter ex-parte. It is an admitted position that 26.10.2022 was the first occasion on which the Appellant remained absent and that it was only the second hearing before the Council. This case, therefore, was not one of repeated or deliberate default on the part of the Appellant to participate in the proceedings. In such circumstances, it would have been fair and reasonable for the Facilitation Council to adjourn the matter by one more date of hearing to await the participation of the Appellant. However, the Facilitation Council on 26.10.2022 itself proceeded ex-parte against the Appellant and determined to decide the matter on merits.

47. Pertinently, before the Facilitation Council could decide the matter on merits, the Appellant, by its e-mail dated 31.10.2022, promptly sought to rectify its default of non-appearance on 26.10.2022 by addressing a communication to the Facilitation Council on the same e-mail address from which it had received the notice for hearing dated 26.10.2022, explaining the

reasons for its absence and requesting an opportunity to present its case.

Admittedly, no award had been passed as on 31.10.2022.

48. In our considered opinion, the Facilitation Council ought to, therefore, have considered the said request dated 31.10.2022 and afforded the Appellant an opportunity of hearing before adjudicating the dispute in the claim petitions on merits.

49. However, the Facilitation Council, without taking cognisance of the e-mail dated 31.10.2022, proceeded to pass the impugned ex-parte award dated 02.12.2022 in favour of the Respondent. The impugned award relies upon the absence of written objections to the claim statement as an admission and is the primary basis of passing the award. The impugned award fails to refer to the Appellant's e-mail dated 31.10.2022.

The Supreme Court held in the case of **Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan (**supra) that where an arbitral award is passed by the Council without complying with the provisions of the Act of 1996 with respect to grant of sufficient opportunity to the buyer in the arbitral proceedings will result in the award becoming a nullity.

50. In these circumstances, we are of the considered view that the impugned award stands vitiated on account of the Appellant having been denied a reasonable opportunity to present its case and is consequently liable to be set aside under Section 34(2)(a)(iii) and Section 34(2)(b)(ii) of the Act of 1996, being in violation of the principles of natural justice rendering it a nullity, as compliance of principles of natural justice is the foundation of the arbitration process. The reliance placed by the Appellant on the decision of the Supreme Court in **Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan** (supra) is, therefore, apposite.

51. We find merit in the submission of the Appellant that the notices issued for the hearings dated 30.06.2022 and 26.10.2022 do not indicate that the Facilitation Council had commenced arbitral proceedings under Section 18(3) of the MSMED Act. Equally, the notice dated 26.10.2022 did not put the Appellant to notice that, in the event of its non-appearance, the Council would proceed ex-parte and adjudicate the claims. This assumes significance particularly as the Appellant was not shown to have been aware of the directions issued by the High Court of Kerala requiring expeditious disposal of the proceedings within a stipulated period. In these circumstances, the Appellant's understanding that the proceedings were still at the stage of conciliation cannot be said to be lacking in bona fides.

52. There is also an issue arising from the proceedings before the High Court of Kerala in W.P.(C) No. 25686 of 2022, which culminated in the order dated 16.09.2022. The said writ petition was instituted by the Respondent seeking a direction for expeditious disposal of its applications pending before the Facilitation Council. In the said proceedings, the Facilitation Council was impleaded as respondent no. 1 and the Appellant herein was arrayed as respondent no. 2. The writ petition was disposed of on 16.09.2022 upon recording the submission of the Facilitation Council that it would proceed to decide the pending applications, whereupon the High Court directed that the proceedings be concluded within ten days. The Appellant has specifically asserted that no notice of the said writ proceedings was served upon it and that it was not afforded an opportunity to be heard before the aforesaid direction was issued. Significantly, this assertion has not been disputed by the Respondent. In such circumstances, the Appellant cannot be faulted for being unaware of the directions issued

by the High Court of Kerala or the consequential urgency with which the Facilitation Council thereafter proceeded with the matter.

53. The record therefore shows that the Appellant herein had no notice of the Conciliation proceedings before the DLSA and the proceedings before the High Court of Kerala.

54. In the facts of the present case, the record of the Facilitation Council does not disclose that any notice of the conciliation proceedings before the DLSA/Lok Adalat was served upon the Appellant. Further, there is no formal order of the Facilitation Council recording the failure of conciliation and its decision to commence arbitral proceedings in terms of Section 18(3) of the MSMED Act. In the absence of any communication formally notifying the Appellant of the termination of conciliation and the commencement of arbitration, the Appellant's understanding that the proceedings continued to remain at the stage of conciliation cannot be said to be unreasonable or lacking in bona fides.

55. The Appellant has also alleged that the impugned ex-parte award dated 02.12.2022 was passed in haste by the Facilitation Council, notwithstanding that its absence was confined to a single hearing date, namely 26.10.2022, and despite the Appellant having promptly sought, by its communication dated 31.10.2022, an opportunity to participate in the proceedings and present its case, thus, resulting in violation of principles of natural justice. Perusal of the record substantiates this submission of the Appellant that the Facilitation Council, in order to comply with the directions of the High Court of Kerala, passed the award in haste without affording the Appellant an equal opportunity to be heard [Re: **Narinder**

Singh v. Union of India[23] (supra)].

56. Learned Single Judge, in the impugned order dated 20.03.2024, observed in paragraphs 16 to 19 that the Appellant had failed to place its stand before the Facilitation Council, had stopped participating in the proceedings, had failed to appear on 26.10.2022 despite the directions issued by the High Court of Kerala on 16.09.2022, and had not sought any adjournment. On that basis, the learned Single Judge concluded that the Appellant had chosen to remain absent from the proceedings at its own peril.

However, it appears that the learned Single Judge did not have the benefit of examining the complete record of the Facilitation Council and was not adequately assisted on the factual aspects by the parties. Upon perusal of the record, we find that the Appellant was served with only two notices, namely, for the hearings scheduled on 30.06.2022 and 26.10.2022. The Appellant duly appeared on the first date i.e., 30.06.2022 and sought time to file its response. The record, therefore, does not support a finding that the Appellant had persistently defaulted in appearance or had exhibited a pattern of negligence in prosecuting its case. Further, the Appellant's e-mail dated 31.10.2022, addressed prior to the passing of the award, specifically sought an opportunity of hearing and explained the circumstances leading to its absence on 26.10.2022. In these circumstances, the Facilitation Council ought to have afforded the Appellant an opportunity to present its case on merits before proceeding to render the ex-parte impugned award. The premise underlying the impugned order dated 20.03.2024, namely that the Appellant had been repeatedly served with notices and had wilfully abstained from participating in the proceedings, is not borne out from the

[23] At paragraph nos.9 and 10.

record. In any event, the Appellant has since deposited a sum of Rs. 36 crores pursuant to the order dated 10.04.2026, thereby demonstrating its bona fides and willingness to comply with the directions of the Court. The impugned order dated 20.03.2024 is therefore premised on incorrect factual basis and cannot be upheld, and consequently the order dated 22.08.2024 also cannot be sustained as these orders have the effect of upholding the impugned award dated 02.12.2022, which is a nullity.

57. In the facts of this case, the record of the Facilitation Council fails to show that any conciliation proceedings were held as per the mandate of Section 18(2) of the MSMED Act with due notice to the Appellant. In addition, there is no order of the Facilitation Council formally recording failure of the conciliation proceedings mandated as per Section 18(2) of the MSMED Act and formally recording that it is entering reference in arbitration for deciding the disputes as per Section 18(3) of the MSMED Act.

58. The Appellant has raised several grounds in its petition under Section 34 of Act of 1996, challenging the merits of the Respondent's claims, including, inter alia, the grounds set out in paragraph 'W' thereof. The Appellant states that the claims filed by the Respondent were premature and not maintainable on the date of filing of the claims before the Facilitation Council. It is stated that payments had not been received by it from the State of Andhra Pradesh and it is only after payments are received that the basis of the payments to the Respondent can be determined. We also note that the impugned award is based on appreciation of invoices issued by the Respondent on the Appellant. However, the invoices are not supported by any reports or documents evidencing consultancy services actually rendered

by the Respondent to the Appellant, to justify the invoices. The impugned award is also based on the confirmation letter issued by Appellant in June 2022. The impugned award is based on invoices and the confirmation letter only and not on an independent assessment by the Facilitation Council of the work carried out by the Respondent. The impugned award is therefore akin to an award passed on default.

However, in view of our conclusion that the impugned award is liable to be set aside on account of the Appellant having been denied a reasonable opportunity to present its case, we do not consider it appropriate to examine the merits of the rival claims or the validity of the findings returned by the Facilitation Council. Any such examination at this stage may prejudice the rights and contentions of the parties in the proceedings to be conducted afresh.

59. In view of the foregoing discussion, we are satisfied that the Appellant has demonstrated sufficient cause for its non-appearance on the hearing dated 26.10.2022. The ex-parte impugned award, having been rendered without considering the Appellant's request dated 31.10.2022 for participation, without affording it a reasonable opportunity to present its case, and without adhering to the mandate of Section 18 of the MSMED Act, is a nullity and cannot therefore be sustained.

60. We are equally of the view that no prejudice would be caused to the Respondent by setting aside the impugned award and directing a fresh adjudication on merits after considering the defence of the Appellant. The Respondent shall retain the claims raised by it in its applications. If the Respondent is successful in its claims, the interest awarded under Section 17 of the MSMED Act will sufficiently compensate the Respondent. On the

other hand, all that the Appellant is being granted by this order is an opportunity to answer the claim of the Respondent on merits.

61. Accordingly, we deem it appropriate to set aside the impugned award and remit the matter to the Facilitation Council for a fresh adjudication on merits in accordance with law. [Re: **Bombay Slum Redevelopment Corpn. (P) Ltd. v. Samir Narain Bhojwani**[24]]. We clarify that the proceedings before the Facilitation Council will be for arbitration under Section 18(3) of the MSMED Act.

62. The Appellant is directed to file its statement of objections before the Facilitation Council within a period of four (4) weeks from today, failing which its right to file objections shall stand forfeited. The Respondent shall be at liberty to file its rejoinder, if any, within four (4) weeks thereafter. The Facilitation Council shall thereafter fix a date of hearing within ten (10) weeks from today and endeavour to finally adjudicate the proceedings within a period of four (4) months.

To secure the interest of the Respondent, in the interregnum, the sum of Rs. 36 crores deposited by the Appellant with the Registry of this Court shall continue to remain deposited and shall abide by the final outcome of the proceedings before the Facilitation Council, subject to such further orders as may be passed by the Facilitation Council.

63. With the aforesaid directions, the appeal stands allowed and the impugned award dated 02.12.2022 is hereby set aside. Pending applications, stands disposed of.

64. The Appellant is directed to serve a copy of this judgment on the Facilitation Council within one (1) week.

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[24] (2024) 7 SCC 218, at paragraph no. 28.

65. The registry is directed to send a copy of this order to the Facilitation Council through e-mail on industriesdirectorate@gmail.com and msefctcdirectorate@gmail.com, within one (1) week, for its information and compliance.

MANMEET PRITAM SINGH ARORA, J

V. KAMESWAR RAO, J

JULY 01, 2026/mt/AM