

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 21687 of 2022

FOR APPROVAL AND SIGNATURE:
HONOURABLE MS. JUSTICE SONIA GOKANI

and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

M/S KARAN PAPER MILLS
Versus
M/S SHAH PAPER PACK INDUSTRIES

Appearance:

MR ANSIN DESAI with MR.PARTH CONTRACTOR(7150) for the
Petitioner(s) No. 1

MR NIRAV THAKKAR with MR DIGANT M POPAT(5385) for the
Respondent(s) No. 1

CORAM: **HONOURABLE MS. JUSTICE SONIA GOKANI**
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 11/11/2022
CAV JUDGMENT

(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. This is a petition preferred by the petitioner challenging the order dated 10.08.2022 passed by the learned Commercial Court at City Civil Court, Ahmedabad in Commercial Misc.

Application No. 167 of 2022 filed under Section 34 of the Arbitration and Conciliation Act, 1996 inter alia challenging the order dated 09.06.2022 passed by the learned sole arbitrator. A Former Judge, High Court of Gujarat, acting as a Sole Arbitrator rejected the application filed by the respondent under Section 16 of the Arbitration and Conciliation Act in the arbitration proceedings being Arbitration Case No. A-058 of 2019 initiated by the petitioner against the respondent.

1.1. The arbitral proceedings have been initiated under Section 18(3) of the Micro, Small and Medium Enterprise Development Act, 2006 (MSME Act hereinafter) and therefore any challenge to any order passed in such arbitral proceedings, according to the petitioner, is to be only under Section 19 of the MSME Act and not under any other provision. Again, it is decided by the plethora of the decisions that no separate challenge can be made under the provision of the Act or under Article 226/227 of the Constitution of India against the rejection of an application preferred under Section 16 of the Act. The only remedy available is that the Arbitral Proceedings ought to continue and the final award could be

subject to the challenge under Section 34 of the Act.

1.2. Section 34, as averred in the petition, does not contemplate or take within its ambit any challenge to the rejection of an application preferred under Section 16 of the Act. Moreover, it is further averred that the issue of limitation is a mixed question of facts and law and it is not an issue of jurisdiction and therefore also, an application under Section 16 could not have been preferred in the first place. Furthermore, it is urged that therefore, the Commercial Misc. Application is not maintainable and the Commercial Court does not have a jurisdiction to deal with and decide the same. Even the interim order passed is without the jurisdiction and is therefore liable to be set aside.

2. The petitioner supplied MG Craft Papers to the respondent in the year 2013 for which the petitioner raised four separate tax invoices on 30.09.2013, 19.10.2013 and 21.01.2013 and 09.11.2013 upon the respondent accumulating to total Rs. 13,10,388/- with a credit period of 60 days to enable the respondent to make payment.

2.1. The respondent since did not respond to the invoices raised and no payment had been made, the petitioner at the end of the 60th day of credit period for the last invoice dated 09.11.2013, made various requests to clear the said invoices. The last request came on 08.01.2014, however, no heed was paid. The petitioner eventually filed an application before the Micro and Small Enterprise Facilitation Council (MSEFC Council) on 29.09.2017 requesting the said MSEFC Council to refer the matter to the conciliation under Section 18(2) of the MSME Act in order to ensure that the respondent makes the payment of long outstanding dues of the petitioner to the tune of Rs. 13.10 lakhs (rounded off) along with the compounded interest at the rate of 18% p.m. totaling Rs. 23,53,750/- as on 31.03.2017. A meeting was convened by MSEFC Council upon the said application of the petitioner and a notice came to be issued upon the respondent on 26.10.2017. The respondent did not appear and various notices were issued on 20.01.2018, 24.05.2018, 24.07.2018, 30.07.2018. The respondent never appeared before the MSEFC Council and the Council was left with no option but to pass an order on 11.09.2018 referring the matter to the Gujarat Chamber of Commerce and Industry under Section 18(3) of the MSME Act.

2.2. The Gujarat Chamber of Commerce and Industry issued notice upon the parties on 19.06.2019 intimating the parties about the matter being referred to the Arbitration which was acknowledge by both the parties and in view of the said letter, a request was made by the Gujarat Chamber of Commerce and Industry to the sole arbitrator on 21.08.2021 to accept the appointment as the Arbitrator to try and resolve the matter between the parties.

2.3. The Sole Arbitrator accepted the appointment vide letter dated 27.08.2021 and entered reference on 15.09.2021 and issued notice upon the parties for fixing the preliminary meeting on 09.10.2021. The petitioner on 09.10.2021 remained present and was directed to file his statement of claim and pleadings in the arbitral proceedings. However, the respondent, despite being duly served with the notice and intimation of hearing, chose not to appear.

2.4. The petitioner, in compliance with the directions, filed statement of claim on 31.10.2021 for the principal amount of 13,10,388/- along with 18% compounded monthly interest on

the principal amount. The respondent chose to remain absent in the next arbitral proceedings held on 04.12.2021 and appeared only through his advocate on 18.12.2021 and sought time to file statement of defence. He chose not to file statement of defence and instead filed an application under Section 16 on 23.12.2021 inter alia challenging the jurisdiction of the learned Sole Arbitrator to proceed further with the arbitration proceedings in view of the claims of the petitioner being barred by limitation as per the Limitation Act, 1963.

2.5. The respondent chose not to file the statement of claim and insisted on hearing of the application preferred under Section 16 of the Act. After the parties exchanged the pleadings and filed written submissions in relation to the application filed under Section 16 of the Act, the learned Sole Arbitrator after considering the same proceeded to pass the order on 09.06.2022 rejecting the application of the respondent under Section 16 and directed the parties to proceed further with the arbitral proceedings.

2.6. The respondent, against the said order, preferred the

CMA along with the application for seeking the interim reliefs before the Commercial Court under Section 34 of the Act on 04.08.2022. It appears that without serving the notice upon the petitioner, on 10.08.2022, the Commercial Court granted ex-parte interim stay on the arbitral proceedings initiated by the petitioner vide its order dated 06.09.2022.

2.7. In this factual background, aggrieved by the impugned order of the Commercial Court, the petitioner is before this Court seeking to challenge this intervention by the Commercial court, at an interim stage in Commercial Civil Misc. Application No. 167 of 2022.

3. The prayers sought for are as follows:-

“a) This Hon'ble Court may be pleased to admit and allow the present Petition;

b) This Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction by quashing and setting-aside the Impugned Order dated 10.08.2022 passed by the Learned Commercial Court, City Civil Court at Ahmedabad in Commercial Civil Misc. Application No. 167 of 2022 preferred by the Respondent;

c) This Hon'ble Court may be pleased to issue a writ of prohibition or a writ in the nature of prohibition or any other appropriate writ, order or

direction directing the Learned Commercial Court, City Civil Court at Ahmedabad not to proceed further with the Commercial Civil Misc. Application No. 167 of 2022 preferred by the Respondent;

d) For ex-parte interim and ad-interim reliefs in terms of prayer (b) and (c) above;

e) For such other and further reliefs which this Hon'ble Court in the facts of the present case may deem fit."

4. Learned advocate Mr. Nirav Thakkar appearing with learned advocate Mr. Digant Popat on a caveat has strongly resisted this very petition urging firstly to not entertain the petition in wake of the issue raised of the maintainability. He has resisted the very issue of maintainability of the petition under Article 227 of the Constitution of India as according to him, this order which is under challenge is passed under Section 34 of the Arbitration and Conciliation Act and therefore, the same shall have to be challenged by way of an appeal and not the petition. The issue of limitation, decided under Section 16 can be said to be an interim award and such interim award can then be set aside under Section 34 of the Act. The learned Arbitrator when has decided the issue of limitation finally, the award is an interim award within the meaning of Section 2(1)(c) of the Act and being subsumed

with an expression 'arbitral award' would therefore to be challenged under Section 34 of the Act. He further has urged that the challenge made before the City Court is not over. The Court has granted the ad-interim stay while issuing the notice to the other side. Therefore, this Court may not entertain this petition under Article 226 and the parties may be relegated to the concerned Court. He also has relied on the following decisions:-

- (i) Indian Farmers Fertilizer Co-operative Limited vs. Bhadra Products [2018 (0) AIJEL-SC 61552]
- (ii) Pandurang Dhondi Chougule vs. Maruti Hari Jadhav [1965(0) GLHEL-SC 20644]; and
- (iii) Babasaheb Ambedkar Open University vs. Abhinav Knowledge Services Private Limited [Civil Application (for stay) No. 01/2019 in First Appeal No. 1632/2019, dated 08.07.2019]

4.1. The written submissions which had been tendered before the Arbitral Tribunal of the Sole Arbitrator in Arbitration Case No. A-058 of 2019 have been placed on record for the purpose of emphasizing that it was the

application under Section 16 of the Arbitration Act raising the ground of limitation where the opponent has reserved the right to challenge the very reference to the arbitration by the MSEFC Council under Section 18 of the MSME Act as the claim made before the Council was ex-facie time barred and the same has been lodged after the period of three years.

5. The petitioner represented by learned Senior Advocate Mr. Anshin Desai with learned advocate Mr. Parth Contractor has strenuously argued defending the challenge before this Court under Article 226. According to the petitioner, the CMA is not maintainable and therefore, the impugned order passed thereunder is without jurisdiction and is contrary to the settled principles of law of the least interference by Court in matter of arbitration.

5.1. The settled position of law, according to the petitioner, is that the jurisdiction under Section 34 cannot be invoked challenging the rejection of application filed under Section 16 of the Act. The only remedy available to the aggrieved party is to wait for the arbitral proceedings to be concluded and the final arbitral award to be challenged under Section 34 of the

Act. The CMA filed challenging the order dated 09.06.2022 passed under Section 16 is not maintainable since arbitral proceedings are yet to be concluded. The learned Sole Arbitrator is yet to make a final award in the arbitral proceedings. Much emphasis is laid on Section 16(5) read with Section 16(6) which, according to the petitioner, make it clear that the order passed by the learned Arbitrator rejecting the application filed by the respondent under Section 16 cannot be challenged under Section 34 of the Act and the learned Sole Arbitrator has rightly directed the parties to proceed further with the arbitral proceedings so that the learned Sole Arbitrator can pass the final arbitral award in the arbitral proceedings.

5.2. The emphasis is that the order rejecting the application under Section 16 of the Act cannot be treated to be an arbitral award as defined under Section 2(ca) of the Act. Once the arbitral proceedings is initiated under Section 18(3) of the MSME Act, then any challenge to the order passed in such arbitral proceedings ought to be by way of Section 19 of the MSME Act and under no other provisions.

5.3. It is also argued before this Court that the issue of limitation being the mixed question of law and facts, the same shall need to be decided once the evidence is led and examined by the Arbitral Tribunal. The limitation is not an issue of jurisdiction and therefore, the application under Section 16 could not have been preferred in the first place and the same was therefore rightly rejected. There is no appeal which is provided where an application under Section 16 is dismissed and therefore, the challenge to the dismissal under Section 16 must await the passing of the final arbitral award at which stage the challenge may be raised of the application filed under Section 34. The only option the respondent had was to participate in the arbitral proceedings and wait till the passing of the final arbitral award.

5.4. It is urged that at an intermediary stage, there shall be no intervention of the Court. Section 5 starts with non-obstante clause and provides that no judicial authority shall intervene except provided in part-1 of the act. The application preferred under Section 34 of the Act is not maintainable and the same is against the law and the impugned order of the Commercial Court is sought to be set aside. Reliance is placed

on list of decisions on behalf of the petitioner.

6. Having heard both the sides and also having examined the material on the record as also the factual details which may not require any elaboration, we are conscious that the Commercial Court while issuing the notice has granted the stay on the arbitral proceedings in a matter where the challenge is to the order of the learned Sole Arbitrator in Arbitration Case No. A-058 of 2019.

6.1. It is not in dispute that the parties had a commercial dispute, for which, separate tax invoices to the tune of Rs. 13.10 lakhs (rounded off) had been raised. As averred in the petition, they were not cleared and hence, the petitioner had preferred to approach the MSEFC Council on 29.09.2019 requesting the council to refer the matter for conciliation under Section 18(2) of the MSME Act. It appears that in a meeting convened by the MSEFC Council also, the respondent chose not to appear and thereafter, the reference was made to the Gujarat Chamber of Commerce and Industry under Section 18(3) of the MSME Act. When the Chamber of Commerce had issued the notice to the parties, it had

appointed the Sole Arbitrator to try and resolve the matters between the parties and accordingly, the reference was made to the learned Arbitrator who, on issuance of notice to the parties, had directed the statement of the claim and pleadings in the arbitral proceedings to be made. The petitioner accordingly had done it in compliance of the directions and the respondent appeared only on 18.12.2021 through its learned advocate. It had tendered an application under Section 16 of the Act on 23.12.2021 where the challenge had been made to the jurisdiction of the Sole Arbitrator to proceed further with the arbitral proceedings in view of the claims of the petitioner being allegedly barred by the limitation as per the Limitation Act.

7. In the decision of the Apex Court in case of **Indian Farmers Fertilizers Co-operative Limited vs. Bhadra Products [2018 (0) AIJEL-SC 61552]** the award delivered by an arbitrator decided the issue of limitation, the Court held that the same can be said to be an interim award and whether such interim award can then be set aside under Section 34, was the issue being deliberated upon. The Court held that the learned Arbitrator has disposed of one matter between the

parties that is the issue of limitation finally. The award in an interim award within the meaning of Section 2(1)(c) of the Act being subsumed within the expression 'arbitral award' and therefore have been challenged under Section 34. The Court also further held that when the question arises of the setting aside of the arbitral award and the jurisdiction under Section 34, the distinction needs to be drawn between an erroneous decision on limitation being an error of law which is within the jurisdiction of the Court and a decision where the Court acts without jurisdiction. A Court having jurisdiction over subject of suit and over the parties, may erroneously decide the issue of limitation, but, that would not mean that it has no jurisdiction to do so. The interim award which does not relate to Arbitral Tribunal's own jurisdiction under Section 16 does not have to follow the drill of Section 16(5) and 16(6) and therefore, the Court also recommended the Parliament to consider the amending Section 34 of the Act so as to consolidate all interim awards together with the final arbitral award so that one challenge under Section 34 can be made after delivery of the final arbitral award and the piecemeal challenges like piecemeal awards may not unnecessarily do any delay and additional expenses.

“7. The point at issue is a narrow one: whether an award on the issue of limitation can first be said to be an interim award and, second, as to whether a decision on a point of limitation would go to jurisdiction and, therefore, be covered by Section 16 of the Act.

12. By reading this section, it becomes clear that more than one award finally determining any particular issue before the arbitral tribunal can be made on different aspects of the matters to be determined. A preliminary issue affecting the whole claim would expressly be the subject matter of an interim award under the English Act. The English Act advisedly does not use the expression “interim” or “partial”, so as to make it clear that the award covered by Section 47 of the English Act would be a final determination of the particular issue that the arbitral tribunal has decided.

13. In Exmar BV v National Iranian Tanker Co. [1992] 1 Lloyd's Rep. 169, an interim final award was made, which contained the decision that it would not issue any such award in the claimant's favour pending determination of the respondent's counter claims. Detailed reasons were given for this decision. The Judge, therefore, characterized the aforesaid award as an award finally deciding a particular issue between the parties, and concluded that as a result thereof, he had jurisdiction to review the tribunal's decision.

15. In McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181 at page 211-212, under the heading ‘validity of the partial award’, this Court held:

“68. The 1996 Act does not use the expression “partial award”. It uses interim award or final award. An award has been defined under Section 2(c) to include an interim award. Sub-section (6) of Section 31 contemplates an interim award. An interim award

in terms of the said provision is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage.

69. The learned arbitrator evolved the aforementioned procedure so as to enable the parties to address themselves as regards certain disputes at the first instance. As would appear from the partial award of the learned arbitrator, he deferred some claims. He further expressed his hope and trust that in relation to some claims, the parties would arrive at some sort of settlement having regard to the fact that ONGC directly or indirectly was involved therein. While in relation to some of the claims, a finality was attached to the award, certain claims were deferred so as to enable the learned arbitrator to advert thereto at a later stage. If the partial award answers the definition of the award, as envisaged under Section 2(c) of the 1996 Act, for all intent and purport, it would be a final award. In fact, the validity of the said award had also been questioned by BSCL by filing an objection in relation thereto.

70. We cannot also lose sight of the fact that BSCL did not raise any objection before the arbitrator in relation to the jurisdiction of the arbitrator. A ground to that effect has also not been taken in its application under Section 34 of the Act. We, however, even otherwise do not agree with the contention of Mr Mitra that a partial award is akin to a preliminary decree. On the other hand, we are of the opinion that it is final in all respects with regard to disputes referred to the arbitrator which are subject-matters of such award. We may add that some arbitrators instead and in place of using the expression "interim award" use the expression "partial award". By reason thereof the nature and character of an award is not changed. As, for example, we may notice that in arbitral proceedings conducted under the Rules of Arbitration of the International Chamber of Commerce, the expression "partial award" is

generally used by the arbitrators in place of interim award. In any view of the matter, BSCL is not in any way prejudiced. We may state that both the partial award and the final award are subject-matter of challenge under Section 34 of the Act.” The aforesaid judgment makes it clear that an interim award or partial award is a final award on matters covered therein made at an intermediate stage of the arbitral proceedings.

19. It may be noticed that Section 16(1) to (4) are based on Article 16 of the UNCITRAL Model Law. The Kompetenz principle deals with the arbitral tribunal’s jurisdiction in the narrow sense of ruling on objections with respect to the existence or validity of the arbitration agreement. What is important to notice in the language of Section 16(1) is the fact that the arbitral tribunal may rule on its own jurisdiction, which makes it clear that it refers to whether the arbitral tribunal may embark upon an inquiry into the issues raised by parties to the dispute.

29. In our view, therefore, it is clear that the award dated 23rd July, 2015 is an interim award, which being an arbitral award, can be challenged separately and independently under Section 34 of the Act. We are of the view that such an award, which does not relate to the arbitral tribunal’s own jurisdiction under Section 16, does not have to follow the drill of Section 16(5) and (6) of the Act. Having said this, we are of the view that Parliament may consider amending Section 34 of the Act so as to consolidate all interim awards together with the final arbitral award, so that one challenge under Section 34 can be made after delivery of the final arbitral award. Piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense.”

7.1. In case of **Pandurang Dhondi Chougule vs. Maruti Hari Jadhav [1965(0) GLHEL-SC 20644]**, while considering the powers of revision under Section 115 in a proceeding involving adjustment of debt, applying Section 17 of the Bombay Agricultural Debtor Relief Act, where the District Court had allegedly wrongly interpreted certain decree, the question arose of the interference of the High Court under section 115 of CPC and it was held by the Supreme Court that the High Court cannot correct errors of facts however gross they may be or even error of law while exercising revisional jurisdiction under Section 115 of the Code.

“10. The provisions of s. 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under s. 115, it is not competent to the High Court to correct errors of fact however gross they may, or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. As clauses (a), (b) and (c) of s. 115 indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well-settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the Jurisdiction of the court which

tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of s. 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court under 115."

7.2. This Court in case of **Babasaheb Ambedkar Open University vs. Abhinav Knowledge Services Private Limited** [Civil Application (for stay) No. 01/2019 in First Appeal No. 1632/2019, dated 08.07.2019] was considering the question of staying of the further proceedings between the parties before the learned Arbitrator, to hold that application related only to the interim relief pending the first appeal, the Court had not devolved on the aspects of merits involved in the appeal and thus, the order was passed keeping in mind the observations made by this Court. Requirement of Section 34(5) and 34(6) were held to be directory and not mandatory to hold that the interim award, as defined under the Act, as concluded in respect of res-judicata is a final order. Consequently, the ad-interim relief granted had continued till the final disposal of the appeal.

8. Worthwhile would be to refer to the written submissions particularly para -17 of the same, where the respondent pressed for hearing of application under section 16 at the outset, because the respondent - original opponent also proposed to challenge the very reference by the MSME council on the ground that claim itself being ex facie, is barred by limitation. It was also contended that unless the said issue is concluded by the Arbitral tribunal by holding that this is a statutory arbitration, the issue of limitation would come in way of the arbitral tribunal to adjudicate on merits.

8.1. Record indicates that that the learned Arbitrator, after hearing the parties at length and discussing this issue, opined and held that the claim, as per the provision of law of limitation, is barred by the period of limitation as contended by the respondent, however, it is added that the finding is subject to the provisions of MSMED Act in as much as that in this case, the arbitration proceeding is pursuant to the provision of MSMED Act and in view of the judgments cited, the arbitration being a statutory arbitration in view of Section 2(4) read with Section 43 of the Arbitration Act, the period of limitation is inapplicable to the present statutory arbitration and hence, the application under Section 16 of the Arbitration

Act has been dismissed.

8.2. Our pertinent query to the learned advocate for the petitioner was whether on the issue of limitation which also relates to the jurisdiction of arbitration has left any scope to adjudicate further and answer received is that there may require a challenge to the reasoning and findings on the issue of limitation by the petitioner before the competent forum as there appears to be a finality to such findings. Learned Advocate Mr. Parth Contractor, on instructions, has further urged that the petitioner is in a process to question that limited extent of reasoning of order of the learned Arbitrator in as much as the findings on the issue of limitation is without the either side adducing any evidence.

8.3. It is also not disputed by learned counsels on both the side that so far as the question of applicability of law of limitation in statutory arbitration under the MSME Act is concerned, the same also finds its answer in the decision of the Apex Court in case of **M/S. Silpi Industries vs. Kerala State Road Transport Corporation and Another** [Civil Appeal Nos.1570-1578 of 2021] and therefore, that aspect also would need to be employed to adjudicate the legal issue between the parties by the learned Arbitrator in future. The

Apex Court in the decision of Silpi Industries (supra) held thus:-

“13. Having regard to contentions of the parties, only two issues arise for consideration before this Court, namely :

(i) Whether the provisions of Indian Limitation Act, 1963 is applicable to arbitration proceedings initiated under Section 18(3) of Micro, Small and Medium Enterprises Development Act, 2006 ?; and

(ii) Whether, counter claim is maintainable in such arbitration proceedings ?

18. With regard to first issue, namely, applicability of Limitation Act, 1963 to the arbitration proceedings initiated under provisions of Micro, Small and Medium Enterprises Development Act, 2006, we need to notice certain relevant sections of the Act. As per Section 15 of the said Act, where supplier supplies any goods or renders any services to any buyer, the buyer shall make payment on or before the agreed date between the parties in writing or where there is no agreement, before the appointed day. Section 16 deals with date from which and rate of interest payable in the event of not making the payment. The recovery mechanism for the amount due is covered by Sections 17 and 18 of the said Act. If any party has a dispute with regard to amount due under Section 17, a reference is required to be made to the Micro and Small Enterprises Facilitation Council. On such reference, the Council is empowered to conduct conciliation in the matter or seek assistance of any institution or centre providing alternate dispute resolution services by making a reference to such institution for conducting conciliation. If the conciliation is not successful, as contemplated under Section 18(2) of the said Act, same stands terminated under Section 18(3) of the said Act. Thereafter, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre

providing alternate dispute resolution services for such arbitration and the provisions of Arbitration and Conciliation Act, 1996 are made applicable as if the arbitration was in pursuance of arbitration agreement between the parties, under sub-section (1) of Section 7 of the 1996 Act. Applicability of Limitation Act, 1963 to the arbitrations is covered by Section 43 of the 1996 Act. The High Court, while referring to abovesaid provisions and the judgment of this Court in the case of Andhra Pradesh Power Coordination Committee & Ors. v. Lanco Kondapalli Power Ltd. & Ors.³ has held that the Limitation Act, 1963 is applicable (2016) 3 SCC 468 to the arbitrations covered by Section 18(3) of the 2006 Act. A reading of Section 43 itself makes it clear that the Limitation Act, 1963 shall apply to the arbitrations, as it applies to proceedings in court. When the settlement with regard to a dispute between the parties is not arrived at under Section 18 of the 2006 Act, necessarily, the Micro and Small Enterprises Facilitation Council shall take up the dispute for arbitration under Section 18(3) of the 2006 Act or it may refer to institution or centre to provide alternate dispute resolution services and provisions of Arbitration and Conciliation Act 1996 are made applicable as if there was an agreement between the parties under sub-section (1) of Section 7 of the 1996 Act. In view of the express provision applying the provisions of the Limitation Act, 1963 to arbitrations as per Section 43 of the Arbitration and Conciliation Act, 1996, we are of the view that the High Court has rightly relied on the judgment in the case of Andhra Pradesh Power Coordination Committee³ and held that Limitation Act, 1963 is applicable to the arbitration proceedings under Section 18(3) of the 2006 Act. Thus, we are of the view that no further elaboration is necessary on this issue and we hold that the provisions of Limitation Act, 1963 will apply to the arbitrations covered by Section 18(3) of the 2006 Act. We make it clear that as the judgment of the High Court is an order of remand, we need not enter into the controversy whether the claims/counter claims are within time or not. We

keep it open to the primary authority to go into such issues and record its own findings on merits.”

8.4. What can be deciphered, therefore, at this juncture is that there may require certain challenges to the findings and observations on the issue of limitation by the parties to the Arbitration and that initiative would need to come from the claimant/petitioner and yet, no challenge before the Appellate Court would be permissible much less any interference on the part of the Appellate forum as the finality is yet to be attached to the issue of limitation linked with the jurisdiction of the learned Arbitrator.

8.5. The decision of the Apex Court in case of IFFCO vs. Bhadra Products (Supra) would need to be remembered which holds that when an issue of limitation is decided by the learned Arbitrator finally, it can be said to be an interim award and then such an interim award can be set aside under Section 34 of the Act.

9. The point in issue before the Apex Court was whether an award on the issue of limitation can first be said to be an interim award and second, as to whether a decision on the

point of limitation would go to the jurisdiction and therefore, be covered by Section 16 of the Act! The detailed discussion of the various decisions led the Court to conclude that the award before the Apex Court was an interim award which being an arbitral award can be challenged separately and independently under Section 34 of the Act and such an award which does not relate to the Arbitral Tribunal's own jurisdiction under Section 16 need not have to follow the drill of Section 16(5) and 16(6) of the Act for which the Court also recommended that the Parliament may consider amending Section 34 so as to consolidate all interim awards together with final arbitral award so that one challenge under Section 34 can be made after delivery of final arbitral award. The piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense. It is also to be noted in that in a matter before the Apex Court the first award was made which finally determined one issue between the parties where it was held to be an interim award as there was no possibility of the same to be re-adjudicated all over again. In other words, interim final award which does not relate to the Arbitral Tribunal's own jurisdiction under Section 16, need not require to follow the drill of Section 16(5) and 16(6) of the

Act for being a final interim award and the same can be challenged separately and independently under Section 34.

10. Before applying this to the facts on hands, apt would be to refer to at this stage also other decisions of the Apex Court. We need to also refer to one of the judgments of this Court passed in **Special Civil Application No. 3913 of 2020 with Special Civil Application No. 4441 of 2020** delivered on 11.03.2020 by the learned Single Judge where the Court on the issue of termination of mandate of Arbitral Tribunal, the Court did not interfere with the order which was impugned before it, where the question was of constitution and authority of the respondent no.5 Tribunal. The matter travelled to the Apex Court where also the Apex Court chose not to interfere.

10.1. In yet another decision of this Court in **Special Civil Application No. 3913 of 2020**, decided on 12.02.2020, on the ground that Arbitral Tribunal has lost its mandate and therefore cannot proceed further with the arbitration, had questioned the same before this Court. The Court questioned and raised doubt about the jurisdiction of the Tribunal to arbitrate beyond the period during which the mandate is

operational holding prima facie that no amount of concession or participation of the petitioner in the arbitration proceedings can confer the jurisdiction and similarly no amount of expenditure incurred can also confer such jurisdiction, and it had issued the notice. It also had directed the Arbitral Tribunal not to proceed in the meantime with the hearings etc. This order of issuance of notice was challenged before the Apex Court in Special Leave Petition (Diary) No. 5800 of 2020. The Court after hearing both the sides directed the Arbitral Tribunal to continue with the hearing confining itself to taking of the evidence and hearing of the parties. It also directed the High Court to take up the matter on the returnable date and all parties to complete the hearing as soon as practicable.

10.2. In case of **Deep Industries Limited vs. Oil and Natural Gas Corporation Limited and Another [(2020) 15 SCC 706]**, there was a dismissal of Section 16 application by the Arbitrator. The Apex Court has held that proper remedy against is to await passing of final award under Section 34, dismissal of Section 16 application cannot be interfered with, in exercise of jurisdiction under Article 227 of the Constitution of India. It was a case where Section 16

application was dismissed by Arbitrator holding that the arbitration notice was not merely confined to termination of contract, but, was also in respect of two years ban/ blacklisting that was sought to be imposed on the appellant contractor. The Apex Court held that where Section 16 application is dismissed, no appeal is provided for and challenge to the dismissal of application under Section 16 must await the passing of a final award and at that stage, the same may be raised under Section 34 of the Arbitration Act. However, in the matter before the Apex Court, the High Court had interjected by going into exactly the same matter as was gone into by the Arbitrator in Section 16 application and decided that the two years ban/blacklisting was not part of the notice for arbitration. According to the Apex Court, recording of such finding which was directly contrary to the findings of Arbitrator while dismissing Section 16 application was not found sustainable and hence, the judgment of the High Court was set aside.

“23. We reiterate that the policy of the Act is speedy disposal of arbitration cases. The Arbitration Act is a special act and a self contained code dealing with arbitration. This Court in Fuerst Day Lawson Limited (supra), has specifically held as follows:

“89. It is, thus, to be seen that Arbitration Act, 1940, from its inception and right through to 2004 (in P.S. Sathappan v. Andha Bank Ltd., (2004) 11 SCC 672 was held to be a self-contained code. Now, if the Arbitration Act, 1940 was held to be a self-contained

code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression of Tulzapurkar J., that it carries with it "a negative import that only 'such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done'. In other words, a letters patent appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded." What becomes clear is that had the High Court itself disposed of the first appeal in the present case, no article 227 petition could possibly lie - all that could perhaps have been done was to file an LPA before a Division Bench of the same High Court. This, as we have seen, has specifically been interdicted by *Fuerst Day Lawson Limited (supra)*. Merely because, on the facts of this case, the first appeal was disposed of by a court subordinate to the High Court, an article 227 petition ought not to have been entertained.

24. Mr. Rohatgi is also correct in pointing out that the legislative policy qua the general revisional jurisdiction that is contained by the amendments made to Section 115 C.P.C. should also be kept in mind when High Courts dispose of petitions filed under article 227. The legislative policy is that no revision lies if an alternative remedy of appeal is available. Further, even when a revision does lie, it lies only against a final disposal of the entire matter and not against interlocutory orders. These amendments were considered in *Tek Singh vs. Shashi Verma and Another*, 2019 SCC OnLine SC 168 in which this Court adverted to these amendments and then stated:

7. A reading of this proviso will show that, after 1999, revision petitions filed under Section 115 CPC are not maintainable against interlocutory orders.

8. Even otherwise, it is well settled that the revisional jurisdiction under Section 115 CPC is to be exercised to correct jurisdictional errors only. This is well settled. In *D.L.F. Housing & Construction Company Private Ltd., New Delhi v. Sarup Singh and Others* (1970) 2 SCR 368 this Court held:

“The position thus seems to be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. Clauses (a) and (b) of this section on their plain reading quite clearly do not cover the present case. It was not contended, as indeed it was not possible to contend, that the learned Additional District Judge had either exercised a jurisdiction not vested in him by law or had failed to exercise a jurisdiction so vested in him, in recording the order that the proceedings under reference be stayed till the decision of the appeal by the High Court in the proceedings for specific performance of the agreement in question. Clause (c) also does not seem to apply to the case in hand. The words “illegally” and “with material irregularity” as used in this clause do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. The High Court does not seem to have adverted to the limitation imposed on its power under Section 115 of the Code. Merely because the High Court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the

question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under Section 115 of the Code when there was no illegality or material irregularity committed by the learned Additional District Judge in his manner of dealing with this question. It seems to us that in this matter the High Court treated the revision virtually as if it was an appeal.” at Pg.373”

10.3. The decision in case of **BASF Styrenics Private Limited vs. Offshore Industrial Construction Private Limited and Another [2002(2) Mh.L.J.]** wherein the power of Arbitral Tribunal to rule on its own jurisdiction was considered. The challenge to the said order was only after completion of arbitration proceedings and making of the award. It has been held that whenever, the Arbitral Tribunal holds that it has no jurisdiction, order can be challenged under Section 37(2). It has been further held in the said decision that the scheme of the Arbitration and Conciliation Act is clear that if the Arbitral Tribunal holds that it has jurisdiction, such an order cannot be questioned to be illegal or without jurisdiction at that stage in as much as the competent legislature has conferred the power on Arbitral Tribunal to rule in its own jurisdiction. Such an order can be challenged only in the manner laid down in sub-sections (5)

and (6) of Section 16 and that is after the arbitration proceedings are over and the award is made. On the other hand, when Arbitral Tribunal holds that it does not have the jurisdiction, that order can be challenged under sub-section (2) of Section 37 of the Act as elaborately held by the Apex Court in case of Babar Ali vs. Union of India and Others [(2002) 2 SCC 178].

"7. So far as the Act is concerned, Section 16 confers jurisdiction on arbitral Tribunal. Sub-section (1) specifically declares that the arbitral tribunal may rule on its own jurisdiction, including an objection with respect to the existence or validity of the arbitration agreement, etc. Sub-section (2) states that the plea that the arbitral tribunal does not have jurisdiction shall be raised at a particular stage.

8. Sub-sections (5) and (6) are relevant and they read as under :-

"(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or Sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award."

"(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."

9. Section 37 provides for appeals, and Sub-section (2) of the said Section expressly and specifically states that an appeal shall lie against an order accepting the plea referred to in sub-sections (2) and (3) of Section 16, which state that where the Arbitrator has come to the conclusion that it has no jurisdiction.

10. In our considered opinion, therefore, the scheme of the Act is clear, and it is that if the arbitral Tribunal holds that it has jurisdiction, such an order cannot be said to be illegal or without jurisdiction at that stage, inasmuch as the competent Legislature has conferred the power on arbitral Tribunal "to rule on its own jurisdiction". Hence, such an order can be challenged only in the manner laid down in sub-sections (5) and (6) of Section 16, viz., after the arbitration proceedings are over and the award is made. If, on the other hand, it holds that it has no jurisdiction, an order can be challenged under Sub-section (2) of Section 37 of the Act.

13. In our opinion , however, looking to the scheme of the Act, as also the ratio in Babar Ali, it cannot be said that by dismissing the Arbitration Petition, the learned Single Judge has committed any error of law and/or of jurisdiction. The contention, therefore, does not detain us, and deserves to be rejected."

In the said decision, it has been thus made quite clear from the scheme of the Act by the Apex Court that so long as the Tribunal holds that it has a jurisdiction, the drill of sub-sections (5) and (6) of Section 16 would be necessary. It is only when it would held that it has no jurisdiction, the challenge under Section 37(2) is made.

10.4. The Apex Court in case of **SBP & Company vs. Patel Engineering Limited and Another [(2005) 8 SCC 618]** was considering the question of challenge to the order of

Arbitrator/ Arbitral Tribunal and the jurisdiction of this Court to entertain under Articles 226 and 227 to hold that the High Court cannot interfere with the orders passed by Arbitrator/Arbitral Tribunal during the course of arbitration proceedings and the parties can approach the Court only in terms of Section 37 or Section 34. Once the matter reaches the Arbitral Tribunal or the Sole Arbitrator, the High Court would not interfere with the order passed by the Arbitrator during the course of arbitration proceedings and the parties can approach only in terms of Section 37 and 34. A person aggrieved by the rejection of his objection by the Tribunal on issue of jurisdiction or the other matters referred to in Section 16, has to wait until the award is made to challenge that decision in an appeal against the Arbitral Award itself in accordance with Section 34 of the Act, but, an acceptance of the objection to jurisdiction or authority could be challenged then and there under Section 37 of the Act.

10.5. In a recent decision, the Apex Court in case of **Bhaven Construction through authorized signatory Premjibhai K. Shah vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited and Another [(2022) 1 SCC 75]**,

was considering the issue where the appellant acted in accordance with the procedure laid down under agreement to unilaterally appoint a Sole Arbitrator and when the other side appeared before the Sole Arbitrator and challenged the jurisdiction of learned Arbitrator, in terms of Section 16(2) of the Arbitration and Conciliation Act, the party chose to challenge such order passed by the Arbitrator under Section 16(2) through the petition under Article 226 and 227 of the Constitution. In absence of exceptional circumstances or bad faith on the part of the appellant which could be shown by the other side to invoke the remedy under Article 227, the Court held that the ambit of Article 227 is though broad and pervasive, the High Court should not use its inherent power to interject arbitral process at the stage of application under Section 16.

It also held in clear terms that arbitral process is strictly conditioned upon time limitation and modeled on principle of unbreakability. If Courts are allowed to interfere with arbitral process beyond ambit of enactment, then efficiency of process will be diminished. In a case before the Apex Court, the respondent had not taken the legal recourse against the

appointment of Sole Arbitrator and in fact, had submitted before the Tribunal to adjudicate on jurisdictional issue as well as on merits and in that situation the Court held that the respondent had to endure natural consequences of submitting themselves to the jurisdiction of Sole Arbitrator which can be challenged through the application under Section 34. In absence of any exceptional circumstances which mandated the exercise of jurisdiction under Articles 226 and 227 of the Constitution, the Court chose to allow the appeal. It has been held in this decision that any party can enter into an arbitration agreement for resolving any disputes capable of being arbitrable. Parties while entering into such agreement need to fulfill such basic ingredients provided under Section 7 of the Arbitration and Conciliation Act and the arbitration being a creature of contract, gives a flexible framework for the parties to agree for their own procedure with minimalistic stipulations under Arbitration and Conciliation Act. It is prudent for a judge not to exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity wherein one party left remedyless under the statute or a clear bad faith shown by one of the parties. This high

standards set by the Supreme Court are in terms of legislative intent to make the arbitration fair and efficient.

10.6. The Delhi High Court in case of **I.T.I. Limited vs. Himachal Futuristic Communications [2008 (102) DRJ 443]** was dealing with an issue as to whether an appeal can lie from an order passed under Section 16(2) of the Arbitration and Conciliation Act to hold that only if the plea that the Arbitral Tribunal does not have jurisdiction is accepted, the appeal would lie. As in a matter before the Delhi High Court, the plea of jurisdiction was rejected by the Arbitrator, the Court held that in such eventuality, the only remedy available to the appellant would be that which is provided under Section 16(6) and that is to wait the making of the Arbitral Award and thereafter to make an application for setting aside the said award, on this ground in accordance with the provisions of Section 34 of the Act. It has been made clear that an appeal can lie from a order passed under Section 16(2) only if the plea that the Arbitral Tribunal does not have the jurisdiction is accepted. As this is apparent from the provisions of Section 37(2)(a) of the Act and as the plea of the jurisdiction raised by the appellant had been rejected, the

provision of Section 37(2)(a) would not be available to the appellant.

11. In the instant case, as is quite apparent from the base order of the learned Tribunal, it has held that the application preferred under Section 16 of the Act, so far as the jurisdiction is concerned, is rejected and in view of Sections 16(5) and 16(6) of the Act and several decisions of the Apex Court, the arbitrator can proceed further on the merit of the matter and therefore, it directed the parties to produce documentary and oral evidences in support of the claim so that the Arbitrator can proceed to adjudicate on the claims of the claimant on the merit of the matter. It would be apt to reproduce para 100 and 101 at this stage:-

“100 In view of the same, the Tribunal arrived at the following finding:

(1) The claims of the claimant as contended by them in the statement of claim are barred by period of limitation (subject to the findings of other issues).

(2) The present arbitration has been constituted in view of Section 18 of MSME Act. So, the same is statutory arbitration.

(3) In view of Section 37 and 46 of Arbitration Act, 1940 and in view of Section 43 and 2(4) of Arbitration Act, 1996 and several judgments of Hon'ble Supreme

Court that have been referred in the order, the provisions of Limitation Act do not apply to statutory arbitration.

(3.1) Though claims of the claimant are barred by limitation, but present arbitrator is a statutory arbitrator and hence the provisions of Limitation Act do not apply, the arbitrator can adjudicate the claims of the claimant in the present proceedings.

(4) So, the application filed by the respondent under section 16 of the Arbitration Act, 1996 is rejected.

Final Order

101(1) The present application under Section 16 of the Act filed by the Respondents so far as jurisdiction is concerned is rejected.

(2) In view of Section 16(5) and 16(6) of the Arbitration Act and several judgments of Supreme Court, Gujarat High Court and Delhi High Court, arbitrator can proceed further on the merits of the matter.

(3) In view of the same, today Arbitrator has passed a further order directing parties to produce documentary and oral evidence in support of their claims. So that the Arbitrator can decide the claims of the Claimant on the merits of the matter.

(4) The Arbitrator has given complete Index of the Paper book to both the parties."

12. As held herein above that the claim of the claimants as contended in the statement of claims are held to be barred by the period of limitation. It has been qualified as subject to the

finding of other issues and it further held that the arbitration is constituted in view of Section 18 of the MSME Act so that the same is statutory arbitration. Although, as held herein above, there is no challenge to some of the observations made in relation to the factual matrix on this issue of limitation which has been held to be the statutory arbitration under Section 18 of the MSME Act and that per se shall not come in the way of the petitioner so far as the finality to the issue of limitation is concerned. The Arbitral Tribunal made it clear and yet, it would not be held as giving finality to the issue of limitation to permit its challenge under section 34 without the completion of entire process at the end of the learned Arbitrator.

12.1. In that view of the matter, although, the Court is not to ordinarily interfere in its jurisdiction under Article 227 as has been clearly held from the year 2005 by the Apex Court in case of **SBP & Company vs. Patel Engineering (supra)** and other decisions, here also the learned Arbitrator has held that it has a jurisdiction therefore, the drill of Section 16(5) and 16(6) would need to be followed. In the matter before the Apex Court, it was held that the award which did not relate to

the Arbitral Tribunal's own jurisdiction under Section 16 would not need to follow the drill of Sections 16(5) and 16(6) and yet, the Court held the award before it to be an interim award which being an arbitral award was permitted to be challenged separately and independently under Section 34 of the Act. The Court cannot be oblivious of the fact that in the matter of *IFFCO (supra)*, the learned Arbitrator had already disposed of the matter between the parties on the issue of limitation finally. The award, therefore, was an interim award within the meaning of Section 2(1)(c) and being subsumed with the expression 'Arbitral Award' therefore had been permitted to be challenged under Section 34 of the Act.

12.2. In the present case, the facts are quite different and in that view of the matter, this is a case where the Arbitral Tribunal has held on its own jurisdiction holding that it has a jurisdiction and therefore, the challenge here ordinarily is not to be entertained by the Court and the respondent is required to wait till the making of the arbitral award and thereafter to make an application for setting aside the said award on the grounds available in accordance with the provision of Section 34 of the Act.

13. This Court could have relegated the parties to the Commercial Appellate Court to decide all the issues including the issue of maintainability, however, the issue raised being essentially a legal issue, it chose to decide the same as remand to the Commercial Court which would have further delayed the proceedings.

14. As a parting note, it is being observed that the parties shall be at liberty to make a request to the Arbitral Tribunal to decide the issue of limitation as a preliminary issue and if such a request is made, let the same be decided on urgent basis.

15. Resultantly, this petition is allowed quashing and setting aside the interim order passed by the Commercial Court. In wake of issue of writ of prohibition, the proceedings before the Commercial Court would not survive.

(SONIA GOKANI, J)

(NISHA M. THAKORE, J)

Bhoomi