



IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.22514 of 2022

*(An application under Articles 226 and 227 of the
Constitution of India)*

*Rajdhani Coir, Bhubaneswar, a
Proprietorship concern, represented
through Shri Pratap Kumar Panda,
having its Office at Plot No.61,
Giridurga Market Complex, Unit- III,
Janpath, Bhubaneswar*

.... **Petitioner**

-versus-

*1. Micro, Small Enterprises
Facilitation Council, Nagpur,
Maharashtra, having its address at
office of Joint Director of Industries
(Nagpur Region), Udyog Bhavan, 2nd
Floor, Civil Lines, Nagpur-444001,*

*2. M/s Aerocom Cushions Private
Limited, represented through its
Director, Mr.Kuldip Mohanlal Gupta,,
having its office at F-14/2, MIDC,
Hingna Road, Nagpur, Maharashtra,
having its factory AT/PO: Satasankh,
Via: Sakhigopal, Dist: Puri, Odisha,
PIN-752046*

.... **Opp. Parties**

Advocate for the parties

For Petitioner : Mr.Rama Chandra Panigrahy, Advocate

For Opposite Parties: Mr. Shib Shankar Mahanty, Advocate
(For Opposite Party No.2)

CORAM:

MR. JUSTICE K.R. MOHAPATRA

Heard and disposed of on 17.01.2025

JUDGMENT



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1. This matter is taken up through hybrid mode.
2. Petitioner, in this writ petition, seeks to assail the award/order dated 25th November, 2020 (Annexure-1) passed by the Micro, Small Enterprises Facilitation Council, Nagpur, Maharashtra (for brevity, 'the Council') in Reference No.MH/20/S/NGR/572 to 575 of 2018.
3. Mr. Panigrahy, learned counsel submits that the Petitioner is a Dealer of coir mattresses operating in the State of Odisha having its Head office at Bhubaneswar, Odisha. Opposite Party No.2, namely, M/s Aerocom Cushions Private Limited with an intention of selling its mattresses approached the Petitioner with various lucrative offers/schemes. Accordingly, Opposite Party No.2 supplied its product to the Petitioner on agreed terms and conditions and raised invoices at different points of time. A dispute arose in course of business with regard to assurances made by Opposite Party No.2 for achieving sales target. On mutual discussion, both parties agreed to resolve their disputes and differences, if any, within the jurisdiction of Bhubaneswar. Thus, the parties submitted themselves to the exclusive jurisdiction of Bhubaneswar for resolution of their dispute, if any. However, the Opposite Party No.2, allegedly made a reference under Section 18(1) of the Micro, Small and Medium Enterprises Development Act, 2006 (for brevity 'MSMED Act') on 13th March, 2018 before the Council at Nagpur in the State of



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Maharashtra, which had no jurisdiction to entertain and arbitrate the alleged dispute under the said Act. The Petitioner received notices through auto-generated emails on various dates ranging from 15th December, 2018 to 24th September, 2020 without any option to reply. Thus, the said communications cannot be treated to be notices under the MSMED Act, as reply to the said auto-generated emails was restricted. Again, on 14th March, 2018, the Opposite Party No.2 demanded the disputed amount from the Petitioner. The same also cannot be treated to be a notice to refer the matter to Arbitrator as per Section 21 of the Arbitration and Conciliation Act, 1996 (for brevity 'Arbitration Act'). In the said demand, Opposite Party No.2 did not disclose pendency of the Reference No.MH/20/S/NGR/572 to 575 of 2018 before the Council at Nagpur. However, the Petitioner in its reply dated 27th March, 2018, disputed the same. In the process, Opposite Party No.2 obtained an *ex-parte* award/order under Annexure-1. The auto-generated emails did not accompany the statement of claim and documents filed by Opposite Party No.2 before the Council at Nagapur. As such, the same is in violation of Section 24 (3) of the Arbitration Act. No conciliation as contemplated under Section 18(2) of the MSMED Act was made by the Council before proceeding for purported arbitration under Section 18 (3) of the MSMED Act.

3.1 Subsequently, Opposite Party No.2 filed Execution Petition No.31 of 2021 before learned Civil Judge (Senior Division), Commercial Court, Khurda at Bhubaneswar, which is



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pending for adjudication. Upon receipt of notice in the Execution Case, the Petitioner became aware of the impugned *ex-parte* order/award under Annexure-1 passed by the Council at Nagpur. On its appearance, the Petitioner filed a petition under Section 47 CPC. In the said application, the Petitioner specifically stated that so-called *ex-parte* award put to execution is a nullity, as it was passed without following mandatory provision of law, i.e., the MSMED Act and Arbitration Act. In the meantime, said application under Section 47 CPC has already been dismissed.

3.2 It is further submitted that provisions of Sections 65 to 81 of the Arbitration Act are applicable to the disputes raised before the Council as if conciliation was initiated under Part-III of the Arbitration Act. Further, the provision under Section 21 of the Arbitration Act provides that arbitral proceeding in respect of a particular dispute shall commence on the date on which a request is made to refer the dispute for arbitration is received by the disputant. Thus, the Council before proceeding to arbitrate the dispute ought to have followed the provisions under Sections 23 and 24 of the Arbitration Act. In the instant case, no conciliation whatsoever was conducted in terms of Section 18(2) of the MSMED Act. Thus, a proceeding under Section 18 (3) of the MSMED Act does not arise at all. Hence, the order/award under Annexure-1 is a nullity in the eye of law.

3.3 In support of his submission, Mr. Panigrahi, learned counsel for the Petitioner placing reliance upon the case law in the case of ***Kusum Ingots and Alloys Limited Vs. Union of***



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India and another; (2004) 6 SCC 254 submits that this Court has jurisdiction to entertain the writ petition filed under Article 227 of the Constitution against the impugned order/award, although the same was passed by the Council at Nagpur in the State of Maharashtra, as cause of action for the disputed claim arose within the jurisdiction of this Court and the parties have mutually submitted to the jurisdiction of Bhubaneswar in the State of Odisha to resolve their disputes, if any. He further submits that order under Annexure-1 cannot be said to be an arbitral award. As such, the provision of Section 34 of the Arbitration Act read with Section 19 of the MSMED Act has no application to the instant case. A bare perusal of the order under Annexure-1 would make it clear that it lacks the characteristic of an arbitral award. Hence, he prays for setting aside the order /award under Annexure-1 as well as other consequential actions/proceedings in pursuance thereof.

4. Mr. Mohanty, learned counsel for Opposite Party No.2 by filing counter affidavit submits that the Petitioner itself admitted in the writ petition that notices were sent in its email-id by the Council at Nagpur on different dates. The Petitioner, upon receipt of such notices neither entered appearance nor participated in the conciliation proceeding initiated under Section 18(2) of the MSMED Act. Thus, recording culmination of the conciliation proceeding, the Council proceeded to arbitrate the dispute under Section 18 (3) of the MSMED Act. Notices of arbitration were also received by the Petitioner through emails, but for the reasons



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best known it did not respond to the same. As such, the Council had no other option than to pass the award under Annexure-1. Perusal of the award would make it clear that notices on different dates both before conciliation and arbitration were sent to the Petitioner, but it failed to appear before the Council and participate in the proceeding. Further, there was paper publication of the notice of arbitration where the Petitioner ordinarily carries on its business, i.e., at Bhubaneswar. In spite of sincere efforts by the Council when the Petitioner did not participate and cooperate, the impugned award was passed. As such, the only remedy available to the Petitioner is under Section 34 of the Arbitration Act read with Section 19 of the MSMED Act for redressal of its grievances. The writ petition under Article 227 of the Constitution would not be maintainable before this Court.

4.1 In support of his submission, Mr. Mohanty, learned counsel for Opposite Party No.2 placed reliance upon the case law in the case of *Sterling Industries Vs. Jayaprakash Associates Limited and others; (2021) 18 SCC 367*, wherein, the Hon'ble Supreme Court relying upon the case law in the case of *SBP and Company Vs. Patel Engineering Limited and another; (2005) 8 SCC 618*, disapproved maintainability of a petition under Articles 226 and 227 of the Constitution and held that violation of any provision of the Arbitration Act can also be decided by a competent Court in an application under Section 34 of the Arbitration Act. It is also submitted that the grounds taken



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in the present writ petition were also taken in the application under Section 47 CPC, which is already dismissed. Thus, the present writ petition is not maintainable and is liable to be dismissed.

5. Heard learned counsel for the parties. Perused the case record and the case laws relied upon by learned counsel for the parties. Primary question that arises for consideration is *whether the present writ petition should be entertained against the order/award under Annexure-1?* Before delving into the aforesaid technical aspect, this Court perused the impugned order/award under Annexure-1. Para-03 (*sic* '02') of Annexure-1 reads as under:-

“03. On-going through documents placed on record, verifying the status of the applicant under the said Act (sic ‘act’), as the location of the applicant enterprise is within council jurisdiction, notice for acceptance of reference & appearance was sent to NA. The proof of service of notice to NA is on record, however, NA did not appear. Notice u/s 18(2) for conciliation under the said Act was issued on 15.05.2018, however, NA did not appear during the hearing on 09.01.2019 & 15.04.2019, the service of notice is on record, however, NA neither appeared nor has given any intimation for their absence. Conciliation was terminated & notice u/s 18 (3) for arbitration was issued on 30.04.2019, the proof of service to NA is on record. The matter was listed for Arbitration on 27.11.2019, 22.01.2020, 26.02.2020 & 19.08.2020, here again NA did not turn up. Council directed the applicant to publish final notice in Daily Newspaper published from (sic ‘form’) normal place of business of the NA. Applicant placed on record the Paper named “Sarbasadharan dated 15.10.2020” published from Bhuvaneswar, the normal place of business of the NA, in which the notice to NA for appearing before the council on 25.11.2020 was published. The notice was also delivered on the What’s upon of the NA also. As NA has not appeared in spite of



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proper service, Council decided to close the matter for Final orders,”

The Petitioner has been described as ‘None-Applicant’ (NA) in the impugned order/award. On perusal of the relevant portion of the impugned order/award, it is manifest that notice for acceptance of the Reference and appearance was sent to the Petitioner. The proof of service of notice on the Petitioner was also available in the record of the Council. Notice under Section 18 (2) of the MSMED Act for conciliation under the said Act was issued on 15th May, 2018, but the Petitioner did not appear during the conciliation proceeding on 19th January, 2019 and 15th April, 2019. The Petitioner in the present writ petition also admitted to have received the auto-generated emails of the proceeding before the Council. In spite of notice, Petitioner did not appear before the Council; thus the conciliation proceeding was terminated by the Council and notices under Section 18(3) of the MSMED Act was issued on 30th April, 2019 for arbitration. But the Petitioner did not appear before the Council at Nagpur. Arbitration was taken up on 27th November, 2019, 22nd January, 2020, 26th February, 2020 and 19th August, 2020, but the Petitioner did not participate in spite of valid service of notice. It also appears from the award that the Council directed the Applicant to publish the final notice of arbitration in daily newspaper published from the place where the Petitioner ordinarily carries on its business. Accordingly, paper publication was made in newspaper ‘Sarbasadharan’ on 15th October, 2020



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at Bhubaneswar. Notice was also delivered to the Petitioner on its WhatsApp number. Service of notice on the Petitioner is also admitted to have received from the Council through auto-generated emails in between 15th December, 2018 to 24th September, 2020. Admittedly, the Petitioner did not appear before the Council. The issue raised in the present writ petition with regard to the inherent jurisdiction of the Council as well as compliance of mandatory provisions of MSMED Act could have been raised by the Petitioner by participating in the proceeding before the Council.

6. There cannot be any quarrel on the ratio decided in the case laws relied upon by the Petitioner. Exercising discretionary power under Article 227 of the Constitution as an alternative to the efficacious remedy under Section 34 of the Arbitration Act read with Section 19 of the MSMED Act is an exception and not a rule. In the case of ***Kusum Ingots and Alloys Limited (supra)***, the Hon'ble Supreme Court held as under:-

“Forum Conveniens We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.....”

6.1 In the instant case, although it is submitted by Mr. Panigrahy, learned counsel for the Petitioner that a part of cause of action arose within the local jurisdiction of this Court, but that itself does not compel this Court to decide the matter on



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merit. In the instant case, more particularly when the question with regard to opportunity to the Petitioner before the Council has been raised, this Court feels it appropriate not to exercise its extraordinary jurisdiction by invoking doctrine of “*Forum Conveniens*”. In the case of ***M/s Gulf Oil Corporation (New GOCL), Hyderabad Vs. the Andhra Pradesh Micro and Small Enterprises Facilitation Council, Vijayawada; 2020 SCC OnLine AP 9***, it is held as under:-

“.....Though the contention of the learned counsel for the petitioner that the order passed by the Council is contrary to the provisions of procedure prescribed under Arbitration and Conciliation Act, such issue can be decided by the statutory authority provided under Section 19 of MSMED Act or under Section 34 of the Arbitration and Conciliation Act. Hence, the contention of the learned counsel for the petitioner is rejected, while upholding the contention of the learned counsel for the respondent, giving liberty to raise issue before the competent statutory authority under Section 19 of MSMED Act or under Section 34 of Arbitration and Conciliation Act.

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As per the law declared in long line of perspective pronouncements, the jurisdiction of this Court under Article 226 of Constitution of India, after commencement of arbitration proceedings, is limited and more particularly against an award passed under the Act, as such the Court cannot exercise power under Article 226 of Constitution of India to issue any order in this writ petition. (2004) 10 SCC 656 AIR 1999 SC 463 MSM, J In view of my foregoing discussion, I find no merit in the writ petition and the writ petition deserves to be dismissed, as not maintainable.”

In the case of ***M/s India Glycols Limited and another Vs. Micro and Small Enterprises Facilitation Council Medchal Malkajgiri***



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and others; 2023 SCC OnLine SC 1852, Hon'ble Supreme Court took a similar view.

6.2 Further, violation of any provisions of the Arbitration Act and/or the MSMED Act can be effectively adjudicated by competent Court in an application under Section 34 of the Arbitration Act read with Section 19 of the MSMED Act.

7. It would not be out of context to record that the matter was listed on 19th December, 2024 when Mr. Panigrahy, learned counsel for the Petitioner prayed for adjournment to take instruction as to whether any application under Section 47 CPC raising the grounds stated in the writ petition was filed in the Execution Case or not. Today, Mr. Panigrahy, learned counsel for the Petitioner submits that in the meantime application under Section 47 CPC has already been dismissed. It is, however, submitted that the grounds taken in the writ petition was not raised before the Executing Court in the application under Section 47 CPC. But, Mr. Mohanty, learned counsel for the Opposite Party No. 2 seriously disputes the same and submits that it is on the grounds taken in the writ petition, the petition under Section 47 CPC was filed. Be that as it may, the application under Section 47 CPC was not placed before this Court for its perusal to appreciate the aforesaid submission. However, it can safely be said that the Petitioner could have raised the grounds taken in this writ petition before the Executing Court in the application under Section 47 CPC.



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8. In view of the foregoing discussions, this Court is of the firm opinion that factual adjudication of the disputed questions of fact is involved in the present writ petition. But, the Petitioner, without availing the efficacious statutory remedy, has approached this Court under Articles 226 and 227 of the Constitution for which this Court is not inclined to exercise its discretionary power under Article 227 to entertain the instant writ petition.

9. Accordingly, the writ petition stands dismissed. However, dismissal of the writ petition shall not be a bar for the Petitioner to avail the statutory remedy in accordance with law. In the facts and circumstances of the case, there shall be no order as to costs.

10. Interim order dated 14th September, 2022 passed in IA No.11992 of 2022 stands vacated.

(K.R. Mohapatra)
Judge

High Court of Orissa, Cuttack
Dated the 17th day of January, 2025/s.s.satapathy