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

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Date: March 23, 2016

+ W.P.(C) 1213/2016 and CM Appl. 5337/2016 (stay)

CENTRAL ELECTRICITY SUPPLY UTILITY

OF ODISHA

..... Petitioner

Through: Mr.Raj Kumar Mehta and
Ms.Himanshi Andley, Advocates.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr. Vivek Goyal, CGSC with
Mr.Arpit Shukla, Advocate for R-1.
Ms.Prabhsahay Kaur, Advocate for R-2 & 3.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (Oral)

1. The present writ petition is filed seeking to challenge the validity of Chapter V of The Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter refer to as '2006 Act') as being ultra-vires the Constitution of India and for other consequential reliefs.
2. The petitioner is a Central Electricity Supply Utility of the State of Odisha and is said to be carrying on the functions of distribution of electricity in the Central Zone of Odisha. The petitioner floated a tender on 12.12.2013 for procurement of LT XLPE AB of different sizes. Respondent No.4 made a bid which was accepted vide communication dated 21.12.2013 of the petitioner. On 11.02.2014, a purchase order was placed on respondent

No.4. It is urged that on 12.03.2014 inspection of the material was carried out before dispatch and thereafter delivery was affected. The petitioner states that all payments have been made for supplies received. As per the petition payments have been made on 22.10.2014, 02.02.2015, 28.02.2015, 27.03.2015, 08.05.2015 and 09.07.2015. It is urged that while receiving payments, respondent No. 4 never made any claim for interest.

3. On 05.08.2015, respondent No.4 is said to have filed a reference under Section 18 of the 2006 Act against the petitioner before the Micro, Small and Medium Enterprises Facilitation Council, Delhi. As per respondent No.4, there has been a delay of 12 months by the petitioner in release of payments on account of which respondent No.4 alleges that it had suffered losses. In terms of the 2006 Act, respondent No. 4 has claimed a sum of Rs.1,96,22,860.95/- on account of interest on delayed payments.

4. The reference is said to be pending before the Facilitation Council. The petitioner has now filed the present writ petition seeking to challenge the constitutional validity of Chapter V of the 2006 Act. It is urged that the 2006 Act is arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution of India and hence, unconstitutional.

5. We have heard the learned counsel for the parties. Learned counsel appearing for the petitioner has made the following submissions to support the challenge to the vires of the 2006 Act. He has submitted as follows:-

- (i) He stated that under Section 15 of the 2006 Act, a buyer is obliged to make payment to the supplier (supplier being defined to be a micro or small enterprises as elaborated in Section 2(n) of the 2006 Act) within such period as may be agreed upon between the parties provided that in no case, the period shall exceed 45 days from the date

of acceptance of the goods/receipt of services. It is further stated that Section 16 of the said 2006 Act further states that in case of delay in making the payment by the buyer as required under Section 15 of the 2006 Act, the buyer shall be liable to pay compound interest with monthly rests to the supplier from the appointed date at three times of the bank rate notified by the Reserve Bank. It is urged that the 2006 Act gives no discretion to the parties to enter into an agreement stipulating a longer period for payment other than what is stated under Section 15 or a lesser rate of interest for delayed payment other than what is stated under Section 16 of the 2006 Act.

(ii) It is urged that the rate of interest provided for delayed payment under Section 16 of the Act, namely, compound interest with monthly rests at three times of the bank rate notified by Reserve Bank is wholly arbitrary and illegal.

(iii) The Object of the 2006 Act is promotion and development of small scale industries. However, these sections are counterproductive and will in fact scuttle/kill small scale industries.

(iv) Even if for some reason, the goods supplied or services rendered by the supplier are ineffective/defective, there would be no justification for the buyer inasmuch as he would continue to be liable to pay interest on the delayed payment.

(v) There is no justification for imposing such onerous and harsh conditions on the buyers.

(vi) The provisions of the 2006 Act would normally take the buyer by surprise as no such stipulation is to be provided in the agreement that is entered into by the parties.

6. Learned counsel has also clarified that the Division Bench of the Odisha High Court in the case of ***Steel Authority of India vs. Director of Industries, 2008 SCC online Odisha 290*** has upheld the validity of the old statutory provision, namely, the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993. He however, submits that under the old Act the minimum period for payment of goods supplied by the buyer was 120 days whereas under the new Statute i.e. 2006 Act it has been drastically reduced to 45 days. Similarly, under the old Act the interest on the delayed payments by the buyer was at “one-and-half time of Prime Lending Rate charged by the State Bank of India” which was payable with compound interest with monthly rests. This has been enhanced in the new Statute i.e. 2006 Act to three times the bank rate notified by Reserve Bank. Hence, he submits that the judgment of the Odisha High Court would not apply to the present Statute.

7. Learned counsel appearing for respondents No. 1 to 3 has submitted that the Supreme Court in ***A.P.Transco vs. Bala Conductors Pvt. Ltd. in Civil Appeal No.5937/2002*** has upheld the constitutional validity of the old Statute i.e. Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993. The said Act was repealed and replaced by the 2006 Act. The old Act was upheld by the Supreme Court holding that the challenge to the said Act under Article 14 of the Constitution is misplaced. It is urged that the said Act of 1993 being more or less akin to the present 2006 Act, the said judgment of the Supreme Court would apply here.

8. Although the entire Chapter V of the 2006 Act is sought to be challenged in the writ petition, the learned counsel for the petitioner in the

course of arguments has restricted his submissions essentially to constitutional validity of Sections 15 and 16 of the 2006 Act.

9. We may see the relevant provisions of the 2006 Act. Section 2(n) of the 2006 Act defines a supplier as follows:-

“2(n) “supplier” means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes,

(i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956;

(ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956;

(iii) any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises;”

10. Sections 15 to 18 read as follows:

“Section 15. Liability of buyer to make payment.-

Where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefore on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:

Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

Section 16. Date from which and rate at which interest is payable.-

Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

Section 17. Recovery of amount due.-

For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16.

Section 18. Reference to micro and small enterprises facilitation council.-

1. Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.
2. On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.
3. Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 shall then apply to the dispute as if the

arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

4. Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

5. Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.”

11. A challenge to the constitutional validity of a statute can be on limited grounds. In the said context reference may be had to the judgment of the Supreme Court in *Namit Sharma vs. Union of India* (2013) 1 SCC 745 wherein the Hon’ble Supreme Court held as under:-

11. An enacted law may be constitutional or unconstitutional. Traditionally, this Court had provided very limited grounds on which an enacted law could be declared unconstitutional. They were legislative competence, violation of Part III of the Constitution and reasonableness of the law. The first two were definite in their scope and application while the cases falling in the third category remained in a state of uncertainty. With the passage of time, the law developed and the grounds for unconstitutionality also widened. D.D. Basu in the '*Shorter Constitution of India*' (Fourteenth Edition, 2009) has detailed, with reference to various judgments of this Court, the grounds on which the law could be invalidated or could not be invalidated. Reference to them can be made as follows:

“Grounds of unconstitutionality. - A law may be unconstitutional on a number of grounds:

- i. Contravention of any fundamental right, specified in Part III of the Constitution. (Ref. Under Article 143: Special Reference No.1 of 1964 in AIR 1965 SC 745)
- ii. Legislating on a subject which is not assigned to the relevant legislature by the distribution of powers made by the Seventh Schedule, Special Reference No.1 of 1964 in AIR 1965 SC 745)
- iii. Contravention of any of the mandatory provisions of the Constitution which impose limitations upon the powers of a Legislature, e.g., Article 301. (Ref. Atiabari Tea Co. v. State of Assam, AIR 1961 SC 232)
- iv. In the case of a State law, it will be invalid in so far as it seeks to operate beyond the boundaries of the State. (State of Bombay v. Chamarbaughwala R.M.D., AIR 1957 SC 699)
- v. That the Legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has made an excessive delegation of that power to some other body. (Hamdard Dawakhana Wakf v. Union of India, AIR 1960 SC 554 [568])”

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16. Article 14 forbids class legislation but does not forbid reasonable classification which means:

16.1 It must be based on reasonable and intelligible differentia; and

16.2 Such differentia must be on a rational basis.

16.3 It must have nexus to the object of the Act.

17. The basis of judging whether the institutional reservation, fulfils the above-mentioned criteria, should be

17.1 There is a presumption of constitutionality;

17.2 The burden of proof is upon the writ Petitioners, the person questioning the constitutionality of the provisions;

17.3 There is a presumption as regard the States' power on the extent of its legislative competence;

17.4 Hardship of few cannot be the basis of determining the validity of any statute.”

12. In order to examine the constitutionality or otherwise of a statute, one of the most relevant considerations is the object and reasons and the legislative history of the statute. It would be necessary to examine the reasons of the enactment of a particular provision so as to find out its ultimate impact vis-à-vis the constitutional provisions.

13. We may see the Statement of Objects and Reasons of the 2006 Act which reads as follows:-

“.... Added to this, a growing need is being felt to extend policy support for the small enterprises so that they are enabled to grow into medium ones, adopt better and higher levels of technology and achieve higher productivity to remain competitive in a fast globalisation area. Thus, as in most developed and many developing countries, it is necessary that in India too, the concerns of the entire small and medium enterprises sector are addressed and the sector is provided with a single legal frame work. As of now, the medium industry or enterprise is not even defined in any law.

2. In view of the above-mentioned circumstances, the Bill aims at facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises and seeks to-

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(d) empower the Central Government to notify programmes, guidelines or instructions for facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises;

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(f) Make provisions for ensuring timely and smooth flow of credit to small and medium enterprises to minimize the incidence of sickness among and enhancing the competitiveness of such enterprises, in accordance with the guidelines or instructions of the Reserve Bank of India;

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(k) Make further improvements in the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 and making that enactment a part of the proposed legislation and to repeal that enactment.”

14. The assailed provisions in question, namely, Sections 15 and 16 of the 2006 Act have been enacted to promote and strengthen small and medium enterprises. The said Sections ensure that small or medium enterprises are not exploited by the big entities on account of their strong economic strength. The provisions help to strengthen the small and medium enterprises and meet the objectives of the Act. They come into play only if a buyer defaults and does not make payment to the supplier within 45 days of acceptance of the goods or rendering of services, as elaborated in Section 2(b). The provisions are reasonable and cannot be said to be illegal or unconstitutional.

15. The main argument that has been advanced by the petitioner is essentially of hardship. As already noted above the Supreme Court in the aforesaid judgment of *Namit Sharma vs. Union of India (supra)* has held

that mere hardship of a few cannot be the basis for determining the validity of any statute [Reference may also be had to the judgment of the Supreme Court in the case of *Ahmedabad Municipal Corp. and Anr. vs. Ahmedabad Green Beld Khedut Mandal and ors.* (AIR 2014 SC 2377)].

16. Reference may also be had to the judgment of the Andhra Pradesh High Court in the case of *A.P.Transco vs. Sri Gowri Sankar Cable Industries and Ors.*, 2002(3)ALT134/MANU/AP/1395/2001. The said judgment pertained to a challenge to the constitutional validity of the earlier statutory provision, namely, The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (*hereinafter referred to as the '1993 Act'*). The Division Bench of the Andhra Pradesh High Court in that case on a somewhat similar challenge to the said act of 1993 had held as follows:-

“44. Provision was made in the Act for payment of interest by the buyers to the small industrial units, on account of nonpayment of their dues by the suppliers led to the aforementioned enactment is evident from the policy statement of Small Scale Industries made by the Government. By reason of the said Act, benefits are conferred upon the small scale and ancillary units. Ancillary units are those units upon which the large scale industries, medium scale industries survive. Small Scale Industries to a large extent also cater to the need of a large scale industry.

45. The Act seeks to regulate interest on delayed payment. Payment of interest ordinarily is a matter of contract. We may notice that provisions for payment of interest has also been made by the Parliament under the several statutes, as for examine (sic. example), Code of Civil Procedure, Interest Act 1978, Usurious Loans Act, Sale of Goods Act, Debt Relief Laws etc. Whenever Courts and tribunals are

constituted in terms of Entry 11-A of the List III of Seventh Schedule of the Constitution powers are conferred upon such courts and tribunals to grant interest, the rate of which may be fixed by Parliament under such laws, keeping in view the aforementioned aspects.

46. Provisions for payment of interest have also been made in the Land Acquisition Act, 1894, which again is a central statute. It is interesting to note that a constitution bench of the Apex Court in *Sunder v. Union of India* 2001 (4) ICC 1 (SC) has held that interest can be paid also on solatium.

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70. Article 14 of the Constitution although proclaims equality before law and equal protection of law it does not forbid reasonable classification. Equality clause cannot be enforced in abstract. All laws cannot have universal application. Varying needs of different classes of people require different treatment. A benefit granted to a particular class of industries having regard to the capital they may invest if treated to be forming a separate class or category no exception thereto can be taken.

71. By reason of the provisions of 1951 Act, the Parliament exercises legislative control. While exercising such power, it is for the Legislature only to decide as to what benefits should be granted to a particular class of industries. The small scale and ancillary industries having regard to the policy decision of the Central Government as stated in the Parliament stand on a separate footing. If certain protections had been granted for the purpose of realization of the dues, the same can neither be said to be unreasonable nor discriminatory. Small scale and ancillary industries form a class by themselves

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74.Interest is required to be paid only when the buyer does not make payment. Ensuring payment for the

goods supplied, it is accepted, is the object of the Act. The Apex Court observed that it is always referable to substantive law. If there is a stipulation for rate of interest, the same can be granted. As noticed in the decision Central Bank (24 supra), sometimes accounting may have to be taken where compounding interest has been made inasmuch as the interest accrued on the principal sum with periodical rests would become the part of the principal sum only. The bank rate of interest in the trading world is known and widely published. For a big industrialist like the petitioner, it will not be difficult for it to find out the rate of interest which is paid by the Bank to its best borrower. The rate of interest in terms of the impugned Act may be a bit higher than the banking rate. In any event, once the rate of interest is known, having regard to the provisions of the Act, it can always be worked out. Mere hardship as is well known cannot be a ground to strike down an otherwise valid Act. The said provisions, therefore, are not ultra vires Article 14 of the Constitution of India.

17. The Supreme Court in the case of *A.P. Transco vs. Sri Gowri Sankar Cable Industries and Ors. (supra)* upheld the aforesaid judgment of the High Court of Andhra Pradesh and dismissed the appeal.

18. The only change relevant to the present case that the present 2006 Act has done is that unlike the 1993 Act, section 15 of the present Act provides a maximum period of 45 days to the buyer to make payment to the supplier unlike the 1993 Act which provided for a maximum period of 120 days. Similarly, the rate of interest in the present Act of 2006 is presently three times the bank rate notified by Reserve Bank whereas in the 1993 Act, the same was 1½ time prime lending rate followed by the State Bank of India. In our opinion these differences, though make the Act more stringent on the

buyer, would only help to achieve the objective of the act by strengthening small and micro industries. The extra hardship that is caused to some of the individuals would not be a ground to declare the statutory provisions as unconstitutional. The judgment of the Supreme Court would cover the challenge being made by the petitioner to the 2006 Act which replaced the 1993 Act.

19. Coming to the next submission of the learned counsel for the petitioner that the said provisions, namely, Sections 15 and 16 of the 2006 Act would be counterproductive and kill the small scale industries, we are not impressed by the contention. None of the small or medium industries for whose protection the Act has been enacted have come forward to complain that the Act is oppressive and has prejudicially affected their business. The contention of the petitioner, which is an undertaking controlled by the State of Odisha, made after a claim for such interest was made by respondent No. 4 is misplaced and without any merits.

20. In view of the above, there is no merit in the contentions of the petitioner.

21. The writ petition is accordingly dismissed.

JAYANT NATH, J.

MARCH 23, 2016/rb/n

CHIEF JUSTICE