

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.14884 of 2016

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Reliance Communications Limited, having its registered office at H Block, 1st Floor, Dhirubhai Ambani Knowledge City, Navi Mumbai-400 071, through its authorised signatory Mr. Mukesh Kumar, Deputy Manager Legal) Son of Gopal Sharan Singh Gandhinagar, Aashiana Nagar, Sector-4, Police Station-Rajiv Nagar, Patna-800025 (Bihar)

.... Petitioner

Versus

1. The State of Bihar through the Secretary, Department of Industries, Secretariat, Bailey Road, Patna
2. The Director, Department of Industries, Secretariat, Bailey Road, Patna
3. The Micro and Small Industries Facilitation Council, through its Chairman, Patna
4. The Best Towers Private Limited, 9/2 BIADA Industrial Estate, Patliputra, Patna through its Managing Director.

.... Respondents

WITH

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Civil Writ Jurisdiction Case No. 15044 of 2016

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Reliance Communications Limited, having its registered office at H Block, 1st Floor, Dhirubhai Ambani Knowledge City, Navi Mumbai- 400 071, through its authorised signatory Mr. Mukesh Kumar, Deputy Manager (Legal), Son of Gopal Sharan Singh, Gandhinagar, Aashiana Nagar, Sector-4, Police Station- Rajiv Nagar, Patna- 800025 (Bihar)

.... Petitioner

Versus

1. The State of Bihar through the Secretary, Department of Industries, Secretariat, Bailey Road, Patna.
2. The Director, Department of Industries, Secretariat, Bailey Road, Patna.
3. The Micro and Small Industries Facilitation Council, through its Chairman, Patna.
4. The Best Towers Private Limited, 9/2 BIADA Industrial Estate, Patliputra,



Patna, through its Managing Director.

.... Respondents

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Appearance:

(In CWJC No. 14884 of 2016)

For the Petitioner/s : Mr. Rajendra Narain, Senior Adv.
Mr. Rakesh Kumar Sinha, Adv.
Mr. Anuj Prakash, Adv.
For the State : Mr. Kinkar Kumar-S.C.- 9
For the Private respondent: Mr. Kishore Sharma, Adv.
Mr. Ranjit Kumar, Adv.

(In CWJC No. 15044 of 2016)

For the Petitioner/s : Mr. Rajendra Narain, Senior Adv.
Mr. Rakesh Kumar Sinha, Adv.
Mr. Anuj Prakash, Adv.
For the State : Mr. Yogendra pd. Sinha- AAG7
For the Private respondent : Mr. Kishore Sharma, Adv.
Mr. Ranjit Kumar, Adv

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
C.A.V. JUDGMENT
Date: 11-04-2017

1. As the issue involved in these writ applications is identical, they are being disposed of by this common judgment.

For convenience, the facts mentioned in C.W.J.C. No.14884 of 2016 are taken into consideration by this Court.

2. In these cases, the petitioner is challenging the order dated 30.06.2016 passed by the Micro, Small and Medium Facilitation Council, Patna (hereinafter referred to as "*Facilitation Council*"), thereby the petitioner has been directed to make payment of Rs.4,85,26,676/- with interest and for issuance of a writ in the nature of prohibition, restraining the Facilitation Council from passing any further orders in the said matter.



3. The petitioner is a Company incorporated under the Companies Act, 1956, providing telecommunication services in various States in India to its subscribers under U.A.S.L. licence issued by the Department of Telecommunications, Government of India. From time to time, it used to engage contractors by issuing Work Orders for creation of the infrastructure. The petitioner-Company has issued numerous Work Orders in favour of The Best Towers Private limited (hereinafter referred to as “*the Tower Company*”), respondent No.4 for carrying out the fabrication and construction work for tower and ancillary work of creation of infrastructure for mobile service. The petitioner-Company awarded the work each time by issuing the Work Order, stipulating method of payment and final payment would be made after completion of the Work Order. The Tower Company from time to time placed the demand bill and the petitioner-Company used to make payment.

4. The present dispute has been raised by the Tower Company that it had worked for the petitioner-Company from April, 2007 to 31.03.2008, raised the grievance that as per terms and conditions of the Work Orders, in spite of various representations from time to time, payments have not been made



to the tune of Rs.4,85,26,676/- as on 31.03.2008, which has become due upon the petitioner-Company. The Tower Company in the event of non-payment approached the Facilitation Council, making complain that they have carried out the work in terms of the Work Order, but the payment has not been made. The Facilitation Council issued notice for appearance of the petitioner-Company. The meeting of the Facilitation Council was scheduled to be held on 15.09.2015, which was duly communicated to the petitioner-Company vide letter No.3504 dated 01.09.2015 but opted to remain absent, but the meeting was conducted on the due date. The proceeding of the meeting was communicated to the petitioner-Company vide letter No.4297 dated 03.11.2015 even then the petitioner-Company did not appear. Again vide registration letter No.4785 dated 21.12.2015 the petitioner was asked to furnish the detailed response within 15 days, otherwise, the case will be heard *ex-parte*. Whereupon, the petitioner-company submitted his response on 30.12.2015, mentioned therein that the Tower Company has been paid Rs.81 crore during 2002 to 2012. It has also been said that the claim of the Tower Company that payment of some invoices remained unpaid, the petitioner-Company required supporting documents for unpaid invoices. It has further been stated that as per the policy of the



Company the work is assigned to any contractor only through valid purchase order/agreement. The contractor has to complete work in accordance with terms and conditions mentioned in the purchase order and after completion of the work to the satisfaction of the concerned department of the Company, the process of payment of invoices is to be initiated. For payment of invoices, it must be accompanied with valid purchase order and successful completion certificate. In the said letter, it has been specifically mentioned that in the present matter the invoices of M/s. The Best Tower Company Limited lack, both essential and supporting document and in absence of such supporting document, the genuineness of invoice cannot be ascertained, therefore, no payment can be made.

5. The Facilitation Council held its meeting on 30.06.2016, where it has been recorded that The Best Tower Company was directed to serve its reply to the Reliance Company. It has further been recoded that conciliation proceeding has already been started, but its outcome was not communicated. It has further been recorded that the representative of the Reliance Communication Limited was not conversant with facts, was unable to give the exact answers to the queries, directed to make



payment of the claim amount along with interest, on failure, it would be recovered as land revenue through the District Magistrate. On perusal, it is evident that the Item Nos. 3 and 4 of the proceeding pertains to the present petitioner.

6. During the pendency of this writ application, the petitioner-Company has filed Interlocutory Application No.752 of 2017 and challenged the Memo No.3898 dated 27.10.2016 where it has been recorded that notice be given to petitioner and get response, on the question of payment to The Best Tower Company, it was decided by the Facilitation Council to grant 30 days' time to place its claim for Arbitration before the Facilitation Council and by the order dated 28.10.2016 of the Facilitation Council, directed the petitioner-Company to produce the stay order. However, the Facilitation Council granted 30 days' time, by way of last chance, for arbitration, if the petitioner was to give any response in the matter, it might send a detailed response to the reference within 15 days on receipt of this order, further no adjournment would be granted.

7. Learned counsel for the petitioner-Company has challenged the order of the Facilitation Council dated 30.06.2016, whereby the Facilitation Council has straightway directed for the



payment of the said amount and further said that there was no occasion for the Council to again revert the matter for conciliation created anomalous situation to its own proceeding. It has been submitted by the learned counsel for the petitioner-Company that the Facilitation Council has acted completely *de hors* to the procedure provided under the Micro, Small and Medium Enterprises Development Act, 2006, (hereinafter mentioned as “the Small Enterprises Act”) wherein the legislature has provided detailed and complete procedure for settling and adjudicating the dispute. As per learned counsel for the petitioner-Company the first stage would be reconciliation, in failure, the matter will be arbitrated by the Council as an arbitrator either itself or it can appoint an arbitrator for adjudication. In stead of following the procedure provided under the statute has followed the strange procedure, not compatible to the provisions of the statute.

8. Learned counsel for the petitioner-Company further submits that in view of the amendment effected in Section 12 of the Arbitration and Conciliation Act, 1996 only independent person can be appointed as an arbitrator, whereas the Facilitation Council has already applied its mind, appointing itself as an arbitrator to arbitrate the dispute, is not in consonance with the



amended provision of Section 12 of the Arbitration and Conciliation Act, as the Facilitation Council will not be treated to be an independent person. It has further been stated that when particular procedure has been provided under the Act then the Facilitation Council should have followed that particular procedure alone and the Facilitation Council cannot adopt a procedure *de hors* to the procedure prescribed under the Act.

9. Learned counsel for the Tower Company has vehemently argued and opposed the writ applications on different grounds including the maintainability of the writ applications, claiming that the writ petitions are not maintainable, as the petitioner-Company should have challenged the order of the Facilitation Council before the appropriate forum, further submitted that writ petition, without exhausting the alternative remedy, is only maintainable on three grounds; first, in the matter of violation of fundamental right; second, the order has been passed against the natural justice and third, the order has been passed, the authority has no jurisdiction in law. It has been submitted that the order may be wrong and illegal, but not without jurisdiction inasmuch as the amount claimed is an admitted amount, may there be procedural error, but does not require



interference by this Court in the writ jurisdiction.

10. In support of his submission, he has placed reliance on the following decisions of the Hon'ble Supreme Court:-

- (i) *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Others*, reported in *1998 (8) S.C.C. page-1*.
- (ii) *Modern Steel Industries vs. State of U.P. and Others*, reported in *(2001) 10 S.C.C. 491*.
- (iii) *Harbanslal Sahnia vs. Indian Oil Corporation Limited* reported in *2003(2) SCC page- 107*
- (iv) *National Sample Survey Organization Limited and Another vs. Champa Properties Limited and Another* reported in *(2009) 14, SCC page 451*
- (v) *Hindustan Petroleum Corporation Limited and Others vs. Super Highway Services and Others* reported in *(2010) 3 SCC 321*.

11. He further submits that in the present case the order of the Facilitation Council may be suffering from error of law, but not suffering from any jurisdictional error. The writ will only be maintainable when there is a jurisdictional error. In case of error



of law or fact, the parties should impugn the order before the prescribed authority by resorting the procedure prescribed under the Act.

12. As per the claim of the Tower Company there is a provision of appeal under Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 which provides that no application for setting aside any decree, award or other order made either by Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any Court unless the appellant has deposited with it 75% of the amount in terms of the decree, award or, as the case may be.

13. It has been submitted that the matter relates to error of law or fact can only be challenged by the petitioner-Company in the manner prescribed under Section 19 of the aforesaid Act. He has further submitted that there is difference between jurisdictional error and error of law, only in the event of order passed by the authority is without jurisdiction, the High Court may, in fit case, may interfere, but not otherwise, placed reliance on the following decisions of the Hon'ble Supreme Court:-

(i) *H.V. Nirmala vs. Karnataka State Financial*



Corporation and Others, reported in (2008) 7 S.C.C. 639.

(ii) *T. N. Electricity Board vs. Bridge Tunnel Constructions and Others*, reported in (1997) 4 SCC page 121.

(iii) *Shri M.L. Sethi vs. Shri R.P. Kapur*, reported in (1972) 2, SCC page- 427.

(iv) *Premier Fabricators, Allahabad vs. Heavy Engineering Corporation Limited, Ranchi*, reported in (1997) 4 S.C.C. page- 319.

14. Learned counsel for the Tower Company has further submitted that in a similar circumstance, the Hon'ble Supreme Court has opined that the High Court instead of entertaining the writ application should have asked the parties to avail the alternate remedy. He placed reliance on the decisions of the Hon'ble Supreme Court in the case of *Punjab National Bank vs. O.C. Krishnan and Others*, reported in (2001) 6 S.C.C. 569, *G.P.T. Infraprojects Limited vs. State of Jharkhand*, 2016 SCC online Jharkhand page-1004 and the order passed in *W.P. No.871 of 2011*, which relates to the judgment of the Calcutta High Court.

15. He further submits that every time 'shall' is not always



intended to be mandatory and every time 'may' may not be treated to be directory or optional. In support of his submission, he has placed reliance on the decision of the Hon'ble Supreme Court in the case of *Dinkar Anna Patil and Another vs. State of Maharastra and others*, reported in (1999) 1 SCC 354 and *Sukumar Mukherjee vs. State of W.B. and Another*, reported in (1993) 3 SCC page-723.

16. Having considered the rival contentions of the parties, it is well known principle of law that when the statute provides a particular thing to be done in a particular manner that act should be done in that manner alone. Reference is made to the decision of the Hon'ble Supreme Court in the case of *Pune Municipal Corporation and another vs. Harakchand Misrimal Solanki and Others*, reported in (2014) 3 S.C.C. 183.

17. Before advertng to the merit of the case, it will be prudent to examine deeply the intention and the formulation of statutory provision. To discern the purpose of Small Enterprise Act, it will be proper to examine the Statement of Object and Reason of the Act. The Aims of the Act is to facilitate the promotion and development of Micro, Small and Medium enterprises as well as ensuring their competitiveness. It also aims



for ensuring timely and smooth flow of credit to such enterprises as well as minimizing instances of sickness. The basic object is over all development of Micro, Small and Medium enterprises. The Small Scale Industries defined under the Industries (Development and Regulation) Act, 1951 requires need for a comprehensive Central enactment to provide an appropriate legal framework for the sector to facilitate the growth and development and enhancing the competitiveness. Emergence of a large services sector assisting the small scale industries in the last two decades also warrants a composite view of the sector, encompassing both industrial units and relates service entities. Added to this, a growing need is being felt to extend policy support for small enterprises so that they are made enable to grow into medium ones, adopt better and higher levels of technology and achieve higher productivity to remain competitive in the era of globalization. Thus, as in most developed and many developing countries special attention has been given to Micro, Small and Medium Enterprises. It is necessary that in India too in order create proper atmosphere for the growth and address their concerns of the entire small and medium enterprises provided single legal framework.



18. In order to achieve the aims and objects, the Micro Development Act has been enacted to facilitate the promotion, development and enhancement of the competitiveness of small and medium enterprises. One of the aims and objects was to expedite delayed payment to small and ancillary industries undertakings apart from other area of concern.

19. Section 2(e) of the Micro, Small and Medium Enterprises Development Act, 2006 defines 'enterprise' means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regularities) Act, 1951 or engaged in providing or rendering of any of service and services. Section 2(g) defines 'medium enterprise' means an enterprise classified as such under sub-clause (iii) of Clause (a) or sub-clause (iii) of clause (b) of sub-section (1) of Section 7. Section 2(h) defines 'micro enterprise' means an enterprise classified as such under sub-clause (i) of clause (a) or sub clause (i) of clause (b) of sub-section (1) of section 7. 'Small enterprise' has been defined in Section 2(m), means an enterprise classified as such under sub-



clause (ii) of clause (a) or sub-clause (ii) of clause (b) of sub-section (1) of section 7.

20. For the purposes of adjudicating the present dispute, the examination of relevant provision of Chapter V of the aforesaid Act would be necessary, which relates to delayed payments to Micro and small Enterprises. Section 15 deals with liability of buyer to make payment, which is as follows:-

*“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 therefor 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.”

21. Section 16 deals with date from which and rate at which interest is payable. Section-17 stipulates recovery of amount due, which is as follows:-

*“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.”*



22. The most important Section for the purposes of this case is Section 18, which provides the procedure and method for reconciliation and adjudication of disputes relates to Micro and Small Enterprises, which is as follows:-

“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 (26 of 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 (26 of 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.”

23. Section 18, sub-section 1 provides that any party to a dispute may, with regard to any amount due under section 17, may make a reference to the Micro and Small Enterprises Facilitation Council. Sub-section 2 provides that 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 institution or centre, for conducting



the conciliation and the provisions of sections 65 to 81 of the Arbitration and conciliation Act, 1996 would be applicable. Sub-Section 3 of Section 18 provides in the event of failure of the conciliation, 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, the provisions of Arbitration and Conciliation Act, 1996 would apply to the dispute as if the arbitration was in pursuance of an arbitration agreement in terms of sub section-1 of Section -7 of the Act. Sub section -4 of section 18 stipulates the Micro and Small Facilitation Council or the centre providing alternate dispute resolution having jurisdiction to act as an arbitrator or the conciliator under this section in a dispute between the supplier located within the jurisdiction and a buyer located anywhere in India.

24. Section 19 provides application for setting aside decree, award or order. It will be relevant to quote to quote Section 19, which reads as under:-

“19. Application for setting aside decree, award or order.—No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute



resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:

Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose.”

25. On deep analysis of Section 18, it is very much clear the Micro and Small Enterprises Act provides detailed procedure for resolution of the dispute. The dispute has to be resolved in two stages; first the Facilitation Council itself or may take assistance of any institution will call both the parties for conciliation, try to resolve the dispute. If the Facilitation Council fails to achieve in resolution of the dispute, in that circumstance, the Facilitation Council either itself will take the responsibility on its shoulder for arbitration or would refer the dispute to any centre or institution for adjudication of the dispute for arbitration under the Arbitration Act, 1996. The wording of Section 18 is very much clear and there is no any ambiguity to take different view.



THE PRINCIPLE AND INTERPRETATION OF STATUTE

26. The Hon'ble Supreme Court in the case of *J.K. Industries Limited and others vs. Chief Inspector of Factories and Boilers and others*, reported in *1996(6) S.C.C. 665*, has elucidated in what manner the Court will interpret the provision of the Statute placing reliance on the judgment of the *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. & Others [1987 (1) SCC, 424]*, where it has been mentioned that the interpretation of the statute must depend on the text and the context. They are the basis of interpretation, if the text is the texture, context is what gives the colour. Neither can be ignored. The interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read first as a whole and then section by section, clause by clause, phrase by phrase and word by word.

27. It will be relevant to quote paragraph No.30 of the aforesaid judgment, which reads as under:-

“30. In Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. dealing with the principles for interpretation of statutes this Court observed: (S.C.C. p. 450, para 33)



"Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section. Each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is its place."
(emphasis supplied)

28. In what manner the statute has to be interpreted came for consideration before the Hon'ble Supreme Court in the case of ***M/S. Unique Butyle Tube Industries Private Limited vs. U.P. Financial Corporation & Ors.***, reported in **2003(2) SCC 455**. In paragraph Nos. 11, 12 and 13 of the aforesaid judgment, it has



been held that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. The statutes should be construed not as theorems of Euclid but must be construed with some imagination of the purposes which is lying behind them. The basic principle of interpretation of statute is that the Court should interpret the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary.

29. It will be relevant to quote paragraph Nos. 11, 12, 13 of the said judgment, which read as under:-

“11. It is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be



supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid". Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See Lenigh Valley Coal Co. v. Yensavage). The view was re-iterated in Union of India and Ors. v. Filip Tiago De Gama of Vedem Vasco De Gama (SCC p. 284.para 16).

12. *In D.R Venkatchalam vs. Dy. Transport Commissioner it was observed that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the guise of interpretation.*

13. *While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See Rishabh Agro Industries Ltd. vs. P.N.B. Capital Services Ltd.). The legislative casus omissus cannot be supplied by judicial interpretative process. Language of Section 6(1) is plain and unambiguous. There is no scope for reading something into it, as was done in N. Narasimhaiah v. State of Karnataka. In State of Karnataka v. D.C. Nanjudaiah the period was further stretched to have the time period run from date of service of High Court's order. Such a view cannot be reconciled with the language of Section 6(1). If the view is accepted it*



would mean that a case can be covered by not only clauses (i) and/or (ii) of the proviso to Section 6(1), but also by a non-prescribed period. Same can never be the legislative intent.”

30. In the case of *Meghal Homes Pvt. Ltd vs. Shree Niwas Girni K.K. Samiti & Ors*, reported in **2007 (7) S.C.C. 753**, the Hon’ble Supreme Court held that it is a well settled rule of interpretation that provision in an enactment must be read as a whole before ascertaining the scope of any particular provision.

31. In the case of *Life Insurance Corporation of India and Others vs. Retired L.I.C. Officers Association and Others*, reported in **2008 (3) S.C.C., page-321**, where the Hon’ble Supreme Court has held that each word employed in a statute must take colour from the purport and object for which it is used. The principle of purposive interpretation, therefore, should be taken recourse to.

32. The judgment of the Hon’ble Supreme Court passed in the case of *B. Premanand & Ors vs. Mohan Koikal & Others* reported in **2011(4) SCC 266**, postulates that in construing a statutory provision the first and foremost rule of construction is the literary construction. All the Court has to see at the very outset



is what does the provision say. If the provision is unambiguous and if from that provision the legislative intent is clear, the Court need not call into aid the other rules of construction of statutes. The other rules of construction are called into aid only when the legislative intent is not clear. The first and foremost principle of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation is the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute.

33. It will be relevant to quote paragraph Nos. 8 to 21 of the said judgment, which elaborately delineated in what manner the principle of interpretation of status has to be followed, which read as under:-

8. In Hiralal Ratanlal vs. State of U.P., this court observed: (S.C.C. p.224 para 22)

22. ... In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that the Court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of



statutes. The other rules of construction are called into aid only when the legislative intent is not clear." (AIR p.1035) (emphasis supplied)

9. It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide Swedish Match AB v. SEBI.

10. As held in Prakash Nath Khanna vs. C.I.T., the language employed in a statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intended to say what it has said. Assuming there is a defect or an omission in the words used by the legislature, the Court cannot correct or make up the deficiency, vide Delhi Financial Corpn. vs. Rajiv Anand. Where the legislative intent is clear from the language, the Court should give effect to it, vide Govt. of A.P. vs. Road Rollers Owners Welfare Assn., and the Court should not seek to amend the law in the garb of interpretation.

11. As stated by Justice Frankfurter of the U.S. Supreme Court (see 'Of Law & Men : Papers and Addresses of



Felix Frankfurter') :

"Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction."

12. As observed by Lord Cranworth in *Grundy v. Pinniger*, (ER p. 648):

" ... to adhere as closely as possible to the literal meaning of the words used, is a cardinal rule from which if we depart we launch into a sea of difficulties which it is not easy to fathom."

13. In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each Judge having a free play to put his own interpretation as he likes. This would be



destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see G.P. Singh's Principles of Statutory Interpretations, 9th Edn. pp 45-49). Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection.

14. As the Privy Council observed (per Viscount Simonds, L.C.):

"... Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used." (see King Emperor v. Benoarilal Sarma, IA p.71 AIR p. 53).

15. As observed by this Court in CIT (Ag) v. Keshab Chandra Mandal,(AIR p. 270, para 20):

"20. ... Hardship or inconvenience cannot alter the meaning of the language employed by the Legislature if such meaning is clear on the face of the statute...".

16. Where the words are unequivocal, there is no scope for importing any rule of interpretation (vide Pandian Chemicals Ltd. v. CIT). It is only where the provisions of a statute are ambiguous that the Court can depart from a literal or strict construction (vide Narsiruddin v. Sita Ram Agarwal). Where the words of a statute are plain and unambiguous effect must be given to them



(vide Bhaiji v. SDO).

17. No doubt in some exceptional cases departure can be made from the literal rule of the interpretation, e.g. by adopting a purposive construction, Heydon mischief rule, etc. but that should only be done in very exceptional cases. Ordinarily, it is not proper for the Court to depart from the literal rule as that would really be amending the law in the garb of interpretation, which is not permissible (vide J.P. Bansal v. State of Rajasthan & State of Jharkhand v. Govind Singh). It is for the legislature to amend the law and not the Court (vide State of Jharkhand. v. Govind Singh).

18. In Jinia Keotin vs. Kumar Sitaram Manjhi (SCC p.733, para 5), this Court observed :

" 48. ...The Court cannot legislate under the garb of interpretation.". Hence, there should be judicial restraint in this connection, and the temptation to do judicial legislation should be eschewed by the Courts. In fact, judicial legislation is an oxymoron.

19. In Shiv Shakti Coop. Housing Society v. Swaraj Developers, this Court observed: (S.C.C. p.669, para 19)

" 19. It is a well-settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent."

20. Where the language is clear, the intention of the legislature has to be gathered from the language used (vide Grasim Industries Limited v. Collector of Customs



and Union of India v. Hamsoli Devi)

21. In Union of India v. Hansoli Devi , this Court observed :

"It is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act."

34. In the case of ***Principal Chief Conservator of Forest and Another vs. J.K. Johnson & Others***, reported in **2011(10) S.C.C. 794**, the Hon'ble Supreme Court placed reliance on the judgment of the *Central Bank of India vs. Their Workman* (AIR 1960 SC 12), which provides the statement of Objects and Reasons is not admissible to invoke while construing provisions of statute, far less can it control the interpretation of provisions of the Act when words used in statutory provisions are clear, plain and unambiguous.

35. It will be relevant to quote paragraph No. 39 of the said judgment, which reads as under:-

"39. Way back in 1960, this Court in Central Bank of India v. Workmen said that the Statement of Objects and



Reasons is not admissible for construing the section, far less can it control the actual words used. It has been reiterated by this Court time and again that the reference to the Statement of Objects and Reasons is for understanding the enactment and the purpose is to ascertain the conditions prevailing at the time the Bill was introduced and the objects sought to be achieved by the proposed amendment; the Statement of Objects and Reasons is not ordinarily used to determine the true meaning of the substantive provisions of the statute. As an aid to the construction of a statute, the Statement of Objects and Reasons appended to the Bill, ordinarily must be avoided.”

36. In the case of ***KSL & Industries Ltd vs Arihant Threads Ltd. & Others.*** reported in ***2015(1) SCC 166***, the Hon’ble Supreme Court placing reliance on the decision of the ***Reserve Bank of India vs. Peerless General Finance And Investment Co. Ltd. & Others (supra)*** has held that while interpreting the statute the intention of the legislature cannot be over looked.

37. It will be relevant to quote paragraph No.51 of the said judgment, which reads as under:-

“51. We might add that this conclusion has been guided by what is considered to be one of the most crucial principles of interpretation viz. giving effect to



the intention of the Legislature. The difficulty arose in this case mainly due to the absence of specific words denoting the intention of Parliament to cover applications for recovery of debts under the RDDB Act while enacting Section 22 of SICA. As observed earlier, the obvious reason for this absence is the fact that SICA was enacted earlier. It is the duty of this Court to consider SICA, after the enactment of the RDDB Act to ascertain the true intent and purpose of providing that no proceedings for execution or distrains or suits shall lie or be proceeded with. Undoubtedly, in the narrower sense an application for recovery of debt can be giving a restricted meaning i.e. a proceeding which commences on filing and terminates at the judgment. However, there is no need to give such a restricted meaning, since the true purpose of an application for recovery is to proceed to the logical end of execution and recovery itself, that is by way of execution and distraint. We thus have no hesitation in coming to the conclusion that Section 22 clearly covers and interdicts such an application for recovery made under the provisions of the RDDB Act. We might remind ourselves of the oft quoted statement of the principles of contextual construction laid down by this Court in Reserve Bank of India Versus Peerless General Finance and Investment Co. Ltd., wherein this Court has observed: (SCC p.450 para 33)-

“33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are



important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.”

38. In view of the authoritative pronouncement of the Hon’ble Supreme Court, it is very much clear that the aims and objects shown the intention of the legislation, but for the interpretation of a statute unless there is ambiguity, the interpretation has to be made on the basis of formulation of provision and words stipulated in the statutory provision. On a microscopic analysis of Section 18 of the Act, it is very much clear that the dispute has to be resolved in two stages; first



through conciliation and second through arbitration. The Facilitation Council may take responsibility of conciliation as well as of the arbitration, as the provisions is very much clear, the legislature has been authorized to take the dual responsibility of conciliation and adjudication. In the event, any person feels aggrieved he may approach the Court of the City Civil Court for redressal of his grievance, but that will be subject to deposit of 75% of the awarded amount.

39. In the present case, the respondent has raised grievance that as the Facilitation Council after adjudication has given the award, there is a forum of appeal to challenge the same, in such circumstance, in stead of approaching the petitioner-Company under the writ jurisdiction, they should be asked to approach the forum as provided under the Micro Development Act, 2006. It has further been stated that they have approached this Court under writ jurisdiction only with a view to avoid depositing 75% of the awarded amount.

NOT MAINTAINABLE ON THE GROUND OF ALTERNATIVE FORUM

40. It has further been stated by learned counsel for the Tower Company that these writ applications are not maintainable as the writ petition would only maintainable on three grounds;



first violation of fundamental right; second, order against the natural justice and third, the order without jurisdiction. In support of his submission, he has placed reliance on number of decisions. It will be appropriate to deal with the objection raised by the Tower Company about the maintainability of the writ applications.

41. In the case of *Whirlpool Corporation (supra)*, the Hon'ble Supreme Court has held that power to issue prerogative writs under Article 226 of the constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the fundamental right contained in Part-III of the Constitution, but also for any other purpose. The Court has held that under the Constitution, the High Court has a jurisdiction to entertain or not to entertain a writ petition, but the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by the Apex Court not operate as a bar



atleast in 3 contingencies, mentioned above.

42. It will be relevant to quote paragraph Nos. 14, 15 to 20 of the said judgment, which reads as under:-

“14. The power to issue prerogative writs under Article 226 of the constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part- III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic



whirlpool, we would rely on some old decisions of the evolutionary era of the Constitutional law as they still hold the field.

16. Rashid Ahmad vs. Municipal Board, kairana laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, K.S. Rashid & Son v. Income Tax Investigation Commissioner which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

17. Specific and clear rule was laid down in State of U.P. v. Mohd. Nooh as under :

"But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

18. This proposition was considered by a Constitution Bench of this Court in A.V.Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani and was affirmed and followed in the following words:



"The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus per-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court".

19. Another Constitution Bench decision in Calcutta Discount co. Ltd. v. ITO. Companies Distt. laid down :

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and



prohibition can issue against Income Tax Officer acting without jurisdiction under section 34, Income Tax Act".

20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

Ultimately, the Hon'ble Supreme Court has held that the High Court instead of asking to invoke the resolution of the dispute through arbitration was required to engage itself for adjudication of the dispute when the question of vires of statute is under scrutiny or the order to be tested on the anvil of Article 14, suffers from defect of arbitrariness.

43. In the case of *Harbanslal Sahnia and another (supra)* the Hon'ble Supreme Court has held that rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not a compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still



exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged.

44. It will be relevant to quote paragraph No.7 of the said judgment, which reads as under:-

“7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged (See Whirlpool Corpn. v. Registrar of Trade Marks). The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that



the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.”

45. In the case of *National Sample Survey Organization and another (supra)*, the Hon’ble Supreme Court has held that the arbitration clause in the lease agreement discloses that what is referable to arbitration, is any dispute or difference concerning the subject matter of said lease agreements or any clauses thereof or any matter arising out of the said lease agreements. But the writ petition was not related in respect of any of the said contingencies arising from lease agreements or any of the term thereof and held that the arbitration clause will not come in the way of adjudication of dispute under Article-226 of the Constitution of India.

46. In the case of *Hindustan Petroleum Corporation Limited and Others (supra)*, which has also dealt with the question of alternative remedy, has been placed reliance by the learned counsel for the Tower Company. In that case also, the question was raised about resolution of disputes through arbitration in view of arbitration clause in the agreement, in stead of approaching the writ Court, the appellants should have embarked the arbitration, but the Hon’ble Supreme Court did not accept the suggestion for sending the matter to the Alternative



Redressal Forum as was found that the Corporation has failed to give prior notice regarding the test so that he or his representative could also remain present when the test was conducted and held that this violates the principles of natural justice and the need for fairness in the matter of terminating the dealership and it cannot be made an empty formality. The Hon'ble Supreme Court exercised the power and set aside the termination of dealership.

47. The issue of alternative remedy has been dealt with by the Hon'ble Supreme Court in paragraph Nos. 15 to 20 of the said judgment, the principles of earlier judgments were placed reliance, held that it is essential rule of policy, convenience and discretion never a rule of law. Despite the existence of an alternative remedy it is within the discretion of the High Court to grant relief under Article 226 of the Constitution, though, it should not interfere if an adequate efficacious alternative remedy was available.

48. In this regard, it will be appropriate to place reliance on the judgment of the Hon'ble Supreme Court in the case of *Joshi Technologies International Inc. vs. Union of India & Other, reported* in (2015) 7 S.C.C 728. It will be relevant to quote paragraph Nos. 69 & 70, which are as follows:-



“69. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, 'normally', the Court would not exercise such a discretion:

(69.1) the Court may not examine the issue unless the action has some public law character attached to it.

(69.2) Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

(69.3) If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

(69.4) Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further legal position which emerges from various



judgments of this Court dealing with different situations/aspects relating to the contracts entered into by the State/public Authority with private parties, can be summarized as under:

(70.1) At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

(70.2) State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discrimination.

(70.3) Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the court can direct the aggrieved party to resort to alternate remedy of civil suit etc.

(70.4) Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.

(70.5) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance



of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so; and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

(70.6) Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

(70.7) Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

(70.8) If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.



(70.9) The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

(70.10) Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

(70.11) The scope of judicial review in respect of disputes falling within the domain of contractual



obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.”

49. There is no quarrel on the proposition that has been raised by the petitioner-Company, but it has to be seen in the present case whether it is a fit case where the petitioner-Company can be asked to avail alternative remedy or it is a fit case where this Court should exercise the power under Article 226 of the constitution leaving aside the objection raised by the petitioner-Company to exercise the alternative remedy.

50. It has further been argued that the awarded which has been passed by the Facilitation Council can be said to be an error of law but not error of jurisdiction. It has further been stated that the error of law can be settled by the alternative forum available to the parties. Certainly, in the matter of error of jurisdiction, the Court can exercise the power under Article 226 of the Constitution of India.

51. In this case, the Tower Company has submitted that Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 where the concept of settling the dispute



through conciliation and arbitration has been provided, the word 'shall' should not be read as mandatory, rather it should be directory. Even though the conciliation has not been done for resolution of the dispute and directly the matter has been arbitrated, in such circumstance, it cannot be said to be any procedural violation or refusal to go for conciliation will not vitiate the outcome of the arbitration. But, the formulation of Section 18(3) makes explicitly clear that the resolution of dispute will be done in two stages; first by conciliation i.e. the word has been used "shall either itself conduct arbitration or to seek assistance of any institution or centre". Further mentions, for conducting conciliation the provision of Section 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply. So the intention of legislature will very much clear as consciously it has been mandated at the initial stage, the Facilitation Council would embark to resolve the dispute by calling upon the parties through conciliation and also it makes clear that in what manner conciliation has to be done. In the event of failure, next stage has been provided, disputes will be resolved through the arbitration. It is not in dispute that the use of word 'shall' and 'may' will be interpreted looking to subject and the context of the statutory provisions.



52. In the case of *Dinakar Anna Patil and Another (supra)* the question arose in what manner the word 'may' would be interpreted looking to the subject and context and the formulation of the statutory provision. It has been held that the word 'may' must mean mandatory, which is obvious from the correspondence between the State Government and MPSC as considering the word 'may' used in this rule if it is read directory would render the very object of consultation with the MPSC wherever necessary, nugatory.

53. It will be relevant to quote paragraph No.26 of the said judgment, which reads as under:-

"26. Coming to the interpretation of rule 4A, it is no doubt true that the language used therein indicates that the said rule is made applicable retrospectively from the date when the Rules were made applicable w.e.f, 10-10-1982 (sic 15-10-1982). Rule 4-A opens with non-obstante clause and provides that if in the opinion of the State Government, the exigencies of service so require, the government may in consultation with the MPSC wherever necessary make appointments to the post in relaxation of the percentage prescribed in rule 4 of the Rules by promotion and nomination. The Tribunal held that the word "may" used in this rule is directory but in our considered view to give such a meaning would render the very object of consultation with the MPSC



wherever necessary nugatory. It would give unbridle power to the government to dispense with the consultation with MPSC which may result into arbitrary exercise of the powers by the Authority. This could never be the object of rule 4A. In our considered view, the word "may" must mean "shall" and this is also obvious from the correspondence between the State Government and MPSC. The Government of Maharashtra wanted to relax quota rule but MPSC was not agreeable and ultimately it relented to the request of the Government of Maharashtra and suggested amended rule 4A. This suggestion was accepted and accordingly the amendment was inserted in the Rules. We also find support to our view from the decision of this Court in Keshav Chandra Joshi v. Union of India. This Court was dealing with the interpretation of rule 27 of U.P. Forest Service Rules, 1952 and the said rule is similar to rule 4A, While construing the word "may" used in rule 27, this Court held that the word "may" has to be read as "shall" and, therefore, consultation is mandatory. It must, therefore, follow that the MPSC gave its approval to the relaxation vide its letter dated March 28, 1989 but by that time, several appointments of the departmental candidates on similar terms in the cadre of Sales Tax Officers Class-I were made exceeding quota rule; As far as the regularization process is concerned, it is quite clear from the letter dated March 28, 1989 by the MPSC to the Secretary, Finance Department calling upon the latter to furnish the details about the availability of posts yearwise with confidential records thereof in order to enable the Commission to take the decision on the pending select list and to regularise the promotions of



the Sales Tax Officers Class-I from 1982 to 31-12-1986. As stated earlier, the respondents did not produce any order regularising these private respondents. The appellants were appointed by nomination on or after September, 1988 and therefore, their placement in the seniority vis-a-vis the promotees will have to be determined on the basis of date of regular appointment in the cadre excluding the period of fortuitous appointment. Consequently, the impugned seniority lists as on 1991, 1993 and 1994 shall be modified suitably. In our considered view, rule 4A will have to be construed as indicated above and any other construction to the said rule would violate the very object of quota rule.”

54. In the case of *L. Hirday Narain vs. Income Tax Officer, Bareilly* reported in *A.I.R. 1971 SC page- 33* where it has been held that the jurisdiction of the Income-tax Officer is mandatory. If the statutory provision stipulates that the Income-tax Officer has discretion to exercise or not to exercise the power to rectify confess discretion that view is erroneous. If the statute invests a public officer or authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in an appropriate manner. Even if the words used in statute are enabling, attached with the duty, the Court would infer, a duty to exercise the power which has been invested for enforcement.



55. It will be useful to quote relevant parts of paragraph No.12 of the said judgment, which read as under:-

“12. ... The High Court observed that under Sec.35 of the Indian Income-tax Act, 1922, the jurisdiction of the Income-tax Officer is discretionary. If thereby it is intended that the Income-tax Officer has discretion to exercise or not to exercise the power to rectify, that view in our judgment erroneous. Section 35 enacts that the Commissioner or Appellate Assistant Commissioner or the Income-tax Officer may rectify any mistake apparent from the record. If a statute invests a public Officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are 'shown to exist. Even if the words used in the statute are prima facie enabling the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right -public or private-of a citizen.” (emphasis supplied)

56. In the case of *Shri Rangaswami, The Textile commissioner and Others vs. The Sagar Textile Mills (P) Ltd. and another*, reported in *AIR 1977 SC 1516*, there the Hon'ble supreme Court has an occasion to deal with in what manner the word 'may' or 'shall' would be interpreted looking to the subject



and context of enactment. The Court postulated that it is well settled the word 'may' is capable of meaning 'must' or 'shall' in the light of the context and where a discretion is conferred upon a public authority coupled with an obligation, the word 'may' which denotes discretion should be construed to mean a command.

57. It will be relevant to quote paragraph No.2 of the said judgment.

“The question for our determination in these appeals is whether, if the Textile Commissioner decides to issue appropriate directions to any manufacturer or class of manufacturers, it is obligatory upon him to specify therein the period for which the directions will remain in operation. As hold by this Court in State of Uttar Pradesh v. Jogendra Singh, it is well settled that the word "may" is capable of meaning "must" or "shall" in the light of the context and that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command. Considering the purpose of the relevant empowerment and its impact on those who are likely to be affected by the exercise of the power, we are clear that the power conferred on the Textile Commissioner to issue directions is coupled with the duty to specify the particular period for which the directions shall be operative. Directions of the kind envisaged by clause 20 are influenced and justified by



exigencies which render it imperative that the directions be reviewed from time to time. That becomes feasible only if the directions are limited expressly to a determinate period of time at the end of which a fresh review of facts and circumstances becomes obligatory. There is a fear that a direction not limited in point of time may continue to operate even after it has outlived its utility for the reason merely that the need to review it is not clearly perceived. Besides, the manufacturers must know, in order that they may organize their business in their own interest as well as in the interest of the community at large, as to how long any particular embargo is going to be operative. Accordingly, we affirm the judgment of the High Court though on the ground only that the impugned Notification in so far as it prohibits the printing of any border or heading on sarees etc. for an indefinite period is ultra vires clause 20 of the Cotton Textiles (Control) Order, 1948, since the aforesaid clause casts an obligation or a duty upon the Textile Commissioner to specify the period during which the prohibition shall remain in force. We express no opinion on the other points, including Point No. 6 urged before the High Court for its consideration. The appeals are accordingly dismissed. The appellants will pay one set of costs of these appeals to the respondents.”

58. In view of aforesaid discussion, every time the word ‘may’ may not be interpreted as directory *vice-versa* the word ‘shall’ may not be given the colour of mandatory, but both the words will take its own colour on the basis of formulation of the



statutory provision and its subject and context.

59. In the present case, this Court is of the view that the word 'shall' has been used in the statutory provision attached with obligation for conciliation in terms of Section 65 to 81 of the Arbitration Act, 2006 as the provision is attached with an obligation to discharge function of conciliation, if it is otherwise interpreted, the object and purpose of the statutory provision would be defeated. This Court is of the view that the word 'shall' has been used for the mandatorily to be followed and as such before adjudication, conciliation is the must.

60. In *H.V. Nirmala vs. Karnataka State Financial Corporation and others (supra)*, which has been pressed in service by the learned counsel for the Tower Company, the Court has held that it is established view of law that where the party despite the knowledge of the defect in the jurisdiction or bias or malice of an arbitrator participated in the proceedings without any kind of objection, by his conduct, it disentitles itself from raising such a question in the subsequent proceeding. The Court has held that an authority may lack inherent jurisdiction in which case the order passed would be a nullity but it may commit a jurisdictional error while exercising the authority. The legal right conferred



upon the employees in this behalf may be different under different statutes. In relation to applicability of principles of natural justice, breach whereof would ordinarily render the decision, nullity, the Courts have been applying the prejudice doctrine to uphold the validity of action. In the present case, there is no issue of inherent lack of jurisdiction, but the manner in which the Facilitation Council has acted is under consideration also whether it violates the principle of natural justice.

61. In the case of *T.N. Electricity Board vs. Bridge Tunnel Construction and Others (supra)* there the question arose; whether the arbitrator was not obliged to decide the non-arbitrability of some of the items claimed by the respondents while passing the non-speaking award and whether such decision would attract credence. This judgment has dealt with respect to the jurisdiction of arbitrator not the jurisdiction of exercise of power under Article 226 of the Constitution of India, there it has been held that the scope, ambit, width and the construction of the arbitration clause so as to define its parameters and contours with a view to ascertaining whether the claim advanced by the appellant and disputed by the respondent would be covered by the arbitration clause and whether upon its true construction of the



arbitration clause would include within its compass the dispute thus raised between the parties was specifically put in issue because parties were at variance about the issue. Here, the question was, with regard to the error of jurisdiction with respect to the arbitration dispute not related to the power under Article 226 of the Constitution of India.

62. In the case of *Premier Fabricator, Allahabad vs. Heavy Engineering Gorpn. Ltd., Ranchi (supra)* there it has been held that the parties have agreed, the arbitrator is not required to give reasons in support of his award. The Court pointed out the distinction between private award and the award touching the coffers of the public exchequer and observed that in the case contracts were entered into by and between the Government or instrumentality of the State on one hand and private party on the other, they should incorporate in the contract that the arbitrator should give reasons in support of the award. But in other cases, it may not be incumbent upon the arbitrator to give reason in support of the award.

63. This matter relates to the Arbitration Act, 1940 so the judgment that has been placed reliance to show the jurisdiction error and error of law having nothing to say in the present case,



but when this Court finds that they have committed inherent mistake in following the procedure, and followed strange procedure, in such circumstance, the issue of maintainability of the writ application will not be a bar to adjudicate the writ petition.

64. In the case of *Punjab National Bank (supra)* it has been held that when the forum of appeal is available then the writ Court should not interfere in the matter.

65. The two judgments; first, the judgment of Calcutta High Court passed in W.P. No. 871 of 2011 and another of Jharkhand High Court passed in *G.P.T. Infraprojects Limited vs. State of Jharkhand (2016 SCC Online Jharkhand page-1006)* have also been pressed in service by the learned counsel for the Tower Company. In W.P. No.871 of 2011, the question was not raised that the Council inherently committed mistake in following the procedure in the dismissal of the case. In the case of G.P.T. Infraprojects Limited case, there also the procedure was followed, but the question was raised about the composition of Tribunal and lack of true procedure laid down to be followed by the Tribunal in arriving at such adjudication. This is not the issue in the present case, but the question has been raised that the Facilitation Council



has distracted in destructive manner, has not followed the provision of Section 18 of the Act as in first stage the Facilitation Council was required to make an effort for conciliation, in failure, the second stage would come for arbitration, but what the Facilitation Council has done on receipt of the complaint, notices were issued to the petitioner-Company, the petitioner appeared and raised its objection, where it has been mentioned that lack, both essential and supporting documents and in absence of such supporting documents, the genuineness of invoices cannot be ascertained, therefore, no payment can be made. So, the petitioner-Company has completely denied the payment of the amount, but the Facilitation Council in its proceeding dated 30.06.2016 has directed to make payment of outstanding dues within 30 days otherwise, it will be recovered as land revenue through the District Magistrate. So, on the first day, straightway the Facilitation Council gave direction for payment, itself indicates, there was no conciliation, no adjudication and was not given chance to place his case. Again the Facilitation Council granted 30 days' time to inform as to whether the payment has been made and to place his objection for arbitration before the Council. The procedure followed indicated above, is completely strange and destructive to fairness and propriety.



66. It will be useful to quote relevant portion of the proceeding dated 27.10.2016, which read as under:-

“I. दिनांक 20.06.2016 को सम्पन्न फैसिलिटेशन कौंसिल की बैठक में समिति के द्वारा मे0 द बेस्ट टावर्स प्रा0 लि0, 9/2, औद्योगिक क्षेत्र, पटना बनाम **Reliance Communication Ltd.** के मामलों में निर्णय लिया गया कि **Reliance Communication Ltd.** ईकाई के बकाए राशि का भुगतान 30 दिनों के अंदर ब्याज सहित करें और कौंसिल को सूचित करें। अन्यथा इसके बाद डिक्री/निर्णय के कार्यान्वयन हेतु अग्रेतर कार्रवाई की जाएगी।

उक्त निर्णय के विरुद्ध **Reliance Communication Ltd.** के द्वारा अपने पत्र दिनांक 30.07.2016 द्वारा रिट दायर करने की कार्रवाई किए जाने की सूचना कौंसिल को दी गई। कौंसिल के द्वारा उक्त पत्र दिनांक 30.07.2016 पर विचार किया गया।

कौंसिल सचिवालय द्वारा कौंसिल को अवगत कराया गया कि **Reliance Communication Ltd.** के द्वारा रिट CWJC No. 14884/ 2016 तथा 15044 / 2016 दायर किया जा चुका है।

कौंसिल के द्वारा विचारोंपरांत पाया गया कि **Reliance Communication Ltd.** को MSMED Act-2006 की धारा 19 के आलोक में सक्षम न्यायालय में अपील करने का अधिकार है। समिति के द्वारा निर्णय लिया गया कि **Reliance Communication Ltd.** को पूरे घटनाक्रम के संबंध में विस्तार से अवगत कराते हुए कि आवेदक मे0 द बेस्ट टावर्स प्रा0 लि0 द्वारा कब आवेदन दिया, उसके बाद कब-कब विपक्षी/क्रेता को सूचना भेजी गई, विपक्षी / क्रेता का रीसर्पोस क्या रहा आदि के संबंध में प्रतिवेन अंकित करते हुए सूचित किया जाय तथा पूछा जाय कि उन्होंने कौंसिल के आदेश के आलोक में ईकाई को राशि का भुगतान किया अथवा नहीं? समिति के द्वारा यह भी निर्णय लिया गया है कि **Reliance Communication Ltd.** को एक मौका



दिया जाय कि वे 30 दिनों के अंदर Arbitration के लिए कौंसिल में अपना पक्ष रखें। इस संबंध में अलग से विस्तृत आदेश निर्गत किया जाय।”

67. Finally, the order has been passed by the Facilitation Council on 28.10.2016 and directed the petitioner-Company to produce the stay order on the operation of the order of the Council, however, 30 days' time by way of last chance for arbitration has been granted. If the petitioner-Company has to say anything in this regard he may send his detailed response to the reference within 15 days of receipt of the order and thereafter, no adjournment will be allowed.

68. It will be useful to quote relevant part of order dated 28.10.2016, which reads as under:-

“The next meeting of the Council was held on 21.06.2016, in which two representatives of the Respondent were present but they were found to be totally ignorant about the facts & circumstances of the case, and therefore, they were unable to explain the facts/ matters pertaining to the instant case.

Section 18(5) of the MSMED Act, 2006 mandates the Council to decide the reference made to it by the MSE unit within a period of 90 days. The instance case is almost One year old. Sufficient time has been awarded to the Respondent but they have



shown delaying attitude in disposal of the instant case. Vide The Arbitration and Conciliation (Amendment) Act, 2015, clause (b) of Section 25 of the original Act, 1996 has been amended and thus it has been provisioned that ; “ the respondent fails to communicate his statement of defence in accordance with sub-section (1) of Section 23, the arbitral tribunal shall continue the proceeding without treating that failure in itself as an admission of the allegations by the claimant, shall have the discretion to treat the right of the respondent to file such, statement of defence as having been forfeited”.

Council after careful consideration on the representation dated 30.07.2016 has taken decision that the respondent be asked to produce stay order on the operation of the order of the Council. However, the respondent is given a time of 30 days, as last chance, for arbitration. If the Respondent has anything to say in this regard he may send his detailed response to the reference within fifteen days of receipt of this order and thereafter no adjournment will be allowed.

Further it is ordered that copy of this Order along with claim of the applicant, certified by the Chartered Accountant be sent to the Respondent, M/s. RELIANCE COMMUNICATIONS Ltd. under registered Speed post and also on their email address. A copy of this order be also made available to the Complainant, M/s. The Best tower (Pvt.) Ltd.



through registered/Speed Post and also on their email address”.

69. So, on analysis of the aforesaid provisions, it is very much clear that the Facilitation Council has miserably failed to follow the procedure provided under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 Act, but it appears that on the first day the Facilitation Council decided to *lis* itself, directed payment and when the objection was raised, then it thought fit to send the matter for arbitration, but the procedure followed is strange procedure, not compatible to the provisions of the Act and not known to the law. If the Facilitation Council has already directed for payment, the question of again sending the matter to the arbitrator is misplaced procedure, instead it should first tried to conciliate the dispute, in failure to adjudicate the same, either the Facilitation Council itself conducted conciliation or refer the matter to the third party, then arbitration stage had come to adjudication the dispute in terms of Section Arbitration and Conciliation Act, 1996.

70. The petitioner-Company has raised the grievance that in view of new amendment of Section 12 of the Arbitration and Conciliation Act, 1996, which provides that the dispute can only



be decided by independent forum, in view of the action taken by the Facilitation Council to decide dispute first without embarking the conciliation itself creates a grave doubt as provision of the Act postulates, *lis* should be adjudicated through an independent arbitrator.

71. It is a misplaced apprehension. If the Facilitation Council is an independent body and it satisfies all the conditions mentioned in the provisions of Section 12 of the Arbitration and Conciliation Act, 1996, then it cannot be said that the Facilitation Council is not in an independent body having interest with any of the parties. As this Court has found that the Facilitation Council fails to follow the basic procedure of Section 18 of the Act, in such circumstance, this Court does not find favour with the objection of the Tower Company that the petitioner-Company should be asked to approach the alternate forum. It is one thing to say that proper procedure has not been followed, but does not mean the Facilitation Council is not an independent body, any other view frustrated the purpose and object of the Act.

72. Learned counsel for the Tower Company submits that in the present matters, there is no dispute of the amount and the Facilitation Council has rightly directed for payment, but the



submission of the Tower Company is misplaced in view of the objection raised by the petitioner-Company, there the petitioner-Company has specifically stated that they are not liable to pay the amount as the Tower Company could not substantiate his claim by producing the relevant record, so the contention of admitted amount is hereby rejected.

73. Before parting with the judgment as Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006, provides that the dispute will be resolved under the Arbitration and Conciliation Act, 1996, it will be relevant to quote Section 19 of the Arbitration and Conciliation (Amendment) Act, 2015, which provides the applicability of C.P.C. in a limited manner, which reads as under:-

“19. Substitution of new section for section 36. - For section 36 of the principal Act, the following section shall be substituted, namely:—

“36.Enforcement. - (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award



has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.”

74. So from the above quotations and discussions, it is apparently clear that either the Facilitation Council will take the burden on its shoulder for arbitration or it relegates the matter to anybody. Either the Facilitation Council or anybody while making arbitration will follow the certain provision of Code of Civil Procedure as mention in Section 19 of the Act for the arrival to a fair and proper conclusion.

75. For the foregoing reasons, the impugned order



containing memo No.3898 dated 27.10.2016 and the order containing memo No.3913 dated 28.10.2016 passed by the Facilitation Council are hereby quashed. But, it is not end of the matter, this Court directs both the parties to appear before the Facilitation Council within 15 days from the date of passing the order of this Court. They should present themselves, the Facilitation Council will make effort to resolve the dispute, in failure, either the Facilitation Council itself will take responsibility of arbitrator or refer the matter to third party, according to the provisions of the Act, for arbitration.

76. With the aforesaid observations and directions, these writ applications are allowed.

(Shivaji Pandey, J)

pawan/-

AFR/NAFR	A.F.R.
CAV DATE	17.03.2017
Uploading Date	13.04.2017
Transmission Date	N/A.

