

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.14962 of 2017

ORDER:

In the present writ petition, challenge is to the action of the second respondent/Telangana State Micro, Small and Medium Enterprise Facilitation Council (hereinafter called 'the Facilitation Council) in initiating the proceedings under the Micro, Small and Medium Enterprises Development Act, 2006 vide reference No.21-C/IFC/2016/22312.

2. According to the petitioner, it is a company engaged in the manufacture and supply of Boilers and the first respondent herein is a small scale industrial unit, engaged in the business of supplying bulk solid handling equipment and industrial fans. During the course of its business, petitioner herein requested the first respondent for supply of fuel feeding and ash handling system and other related equipment. In furtherance of the same, various purchase orders were issued by the petitioner to the first respondent and a number of disputes arose between the petitioner and the first respondent. Thereafter, the first respondent caused legal notice to the petitioner, who issued reply denying the claim. First respondent herein instituted a Civil Suit vide SPCS No.498/2014, on the file of the Court of the Civil Judge, Senior Division, Pune, Maharashtra State against the petitioner herein for recovery of a sum of Rs.49,30,932/- and for interest @ 24% from the date of the suit till realisation.

3. First respondent herein instituted the said suit on 24.03.2014. In the said suit, petitioner herein filed written statement denying the plaint allegations. Pending the said suit, obviously on the application made by the petitioner herein under Section 18 of the Act, petitioner received notices on

19.04.2016 and also another notice on 18.07.2016 from the second respondent Facilitation Council, fixing the date of enquiry as 30.07.2016.

4. By way notices/replies dated 27.07.2016, 09.08.2016 and 01.09.2016, petitioner herein raised objections as to the very initiation of the proceedings under the Act. On 06.02.2017, the Civil Suit bearing SPCS.No.498/201 was dismissed for non-prosecution.

5. In the above back-ground, assailing the very initiation of the proceedings under the Act, the present writ petition has been filed.

6. A counter affidavit is filed on behalf of the first respondent, denying the averments in the writ affidavit and in the direction of supporting the impugned action.

7. Heard Sri A.Venkatesh, learned counsel for the petitioner and Sri S.Ravi, learned Senior Counsel appearing for the counsel on record for the first respondent apart from perusing the material available on record.

8. Learned counsel for the petitioner contends that the impugned action is highly illegal, arbitrary, unreasonable, without jurisdiction, impermissible and opposed to the very spirit and object of the provisions of the Act. It is further contended that having approached a competent civil Court by way of filing a suit and having suffered an order of dismissal of the suit, it would not be open for the first respondent to maintain the present proceedings. Learned counsel further submits that the first respondent ought to have filed an application under Order 9 Rule 9 of the Code of Civil Procedure and ought to have taken the suit proceedings to a logical end and that there is no bar under the Act for maintaining a civil suit. It is further contended that having elected a forum i.e., the Civil Court by way of instituting a suit, it is not open for the first respondent herein to initiate proceedings before the Conciliation

Forum. It is the further submission of the learned counsel that unless there is an express bar under any law, civil Court continues to have jurisdiction under Section 9 of the Code of Civil Procedure and according to the learned counsel, the Judgment of the Hon'ble Apex Court in *DHULABHAI ETC. v. STATE OF M.P. AND ANOTHER*¹ has no application to the case on hand as in the said reported case the Hon'ble Apex Court took the said view on the ground that there was express bar under Section 17 of the Madhya Bharat Sales Tax Act. It is also the submission of the learned counsel that Section 18 (1) of the Act stipulates only the word 'may' and the same shall not be construed as 'shall'. According to the learned counsel, the proceedings initiated and impugned in the present writ petition are hit by the principle of *res judicata* under Section 11 of the Code of Civil Procedure.

To bolster his submissions and contentions, learned counsel places reliance on the judgments of the Hon'ble Apex Court in *ITL LTD. V. SIEMENS PUBLIC COMMUNICATIONS NETWORK LTD*², *POWER MACHINES INDIA LIMITED v. STATE OF MADHYA PRADESH AND OTHERS*³, *MAHALUXMI RICE MILLS AND OTHERS v. STATE OF U.P. AND OTHERS*⁴, *RAJENDER MOHAN RANA & ORS VS PREM PRAKASH CHAUDHARY & ORS*⁵, *THE OFFICIAL LIQUIDATOR v. DHARTI DHAN (P) LTD*⁶, *VIJALAKSHMI v. GUDA RAMACHANDRA SEKHARA SASTRY*⁷, *SULOCHANA v. RAJINDER SINGH*⁸, *A.P. STATE FINANCIAL CORPORATION v. M/S. GAR RE-ROLLING MILLS AND ANOTHER*⁹,

¹ AIR 1969 SC 78

² (2002) 5 SCC 510

³ (2017) 7 SCC 323

⁴ (1998) 6 SCC 590

⁵ 184 (2011) DLT 454

⁶ (1977) 2 SCC 166

⁷ (1981) 2 SCC 646

⁸ AIR 2008 SC 2611

⁹ AIR 1994 SC 2151

*NATIONAL INSURANCE COMPANY LIMITED v. MASTAN AND ANOTHER*¹⁰.

9. Per contra, it is contended by the learned Senior Counsel, appearing for the first respondent that there is no illegality nor there exists any infirmity in the impugned action and in the absence of the same, the action impugned is not amenable for any judicial review under Article 226 of the Constitution of India. It is further contended that in view of the express provisions of Section 18 of the Act, there is a bar on maintainability of the suit and that the rights of the first respondent to maintain the application under Section 18 of the Act cannot be denied in view of the provisions of Order 9 Rule 9 of the Code of Civil Procedure. It is further contended that the Act is a beneficial legislation intended for the benefit of small and medium enterprises as such no interference is warranted. It is further contended that Section 11 and Order 9 Rule 9 of the Code of Civil Procedure cannot be made applicable to non-suit the petitioner herein.

In support of his submissions and contentions, learned Senior Counsel for the first respondent takes the support of the judgements of the Hon'ble Apex Court in *DHULABHAI AND ORS* (supra 1), *THE PREMIER AUTOMOBILES LTD. v. KAMLEKAR SHANTARAM WADKE OF BOMBAY AND ORS*¹¹, *M/S. STEEL AUTHORITY OF INDIA LTD AND ANR v. MICRO, SMALL ENTERPRISE FACILITATION COUNCIL, NAGPUR*¹², *C.M.D. (EX) MPPKVVCL AND ORS v. SHARAD OSHWAL*¹³, *I.C.S.A. (INDIA LIMITED) v. SWASTIK WIRES*¹⁴, *STATE OF U.P. AND ANR v.*

¹⁰ AIR 2006 SC 577

¹¹ AIR 1975 SC 2238

¹² AIR 2012 BOMBAY 178

¹³ 2016 (2) MPLJ 384

¹⁴ WRIT PETITION (Art227)
No.699/2015, dated 25.11.2016

*JAGDISH SARAN AGRAWAL AND ORS*¹⁵, *SHAKUNTALA DEVI v. KAMLA AND ORS*¹⁶ and *CHANDRABHAI K.BHOIR & ORS v. KRISHNA ARJUN BHOIR & ORS*¹⁷ and *POWER MACHINES INDIA LIMITED* (supra 3).

10. In the above backdrop, now the issues which this Court is called upon to adjudicate are:

- 1) Whether the initiation of proceedings against the petitioner on the application of the first respondent under the Micro, Small and Medium Enterprises Development Act, 2006 is permissible and tenable?
- 2) Whether the proceedings before the Facilitation Council are barred under Section 11 and Order 9 Rule 9 of the code of Civil Procedure?
- 3) Whether there is any requirement for the first respondent to get the suit restored and whether the impugned proceedings are maintainable?

11. The Micro Small and Medium Enterprises Development Act, 2006, enacted by the Parliament, came into force with effect from 02.10.2006. The Parliament brought in the said legislation with the laudable object and with an intention to extend the policy support for the small enterprises to go into medium ones and to achieve productivity and to remain competitive. The following are the objectives sought to be achieved:

- (a) Provide for statutory definitions of "small enterprise" and "medium enterprise"

of the High Court of Chattishgarh at Bilaspur.

¹⁵ *CIVIL APPEAL Nos.6757-6758/2008, Dated 25.11.2008*

¹⁶ (2005) 5 SCC 390

¹⁷ AIR 2009 SC 1645

- (b) Provide for the establishment of a National Small and Medium Enterprises Board, a high-level forum consisting of stakeholders for participative review of and making recommendations on the policies and programmes for the development of small and medium enterprises;
- (c) Provide for classification of small and medium enterprises on the basis of investment in plant and machinery, or equipment and establishment of an Advisory Committee to recommend on the related matter;
- (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 enterprise;
- (e) Empower the State Governments to specify, by notification, that provisions of the labour laws specified in clause 9 (2) will not apply to small and medium enterprises employing upto fifty employees with a view to facilitating the graduation of small enterprises to medium enterprises;
- (f) Make provisions for ensuring timely and smooth flow of credit to small and medium enterprises to minimise 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.
- (g) Empower the Central and State Governments to notify preference policies in respect of procurement of goods and services, produced and provided by small enterprises, by the Ministries, departments and public section enterprises;
- (h) Empowering the Central Government to create a Fund or Funds for facilitating promotion and development and enhancing the competitiveness of small enterprises and medium enterprises;
- (i) Empower to prescribe harmonised, simpler and streamlined procedures for inspection of small and medium enterprises under the labour laws enumerated in clause 15, having regard to the need to promote self-regulation or self-certification by such enterprises;

- (j) Prescribe for maintenance of records and filing of returns by small and medium enterprises with a view to reduce the multiplicity or often-overlapping types of returns to be filed;
- (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.

12. It is very much evident from the above that one of the objects sought to be achieved is "timely and smooth flow of credit to small and medium enterprises to minimise 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. As per Section 2 (d) of the Act "Buyer" means whoever buys any goods or receives any services from a supplier for consideration. The term "Supplier" is defined under Section 2 (n) which reads as under:

"(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."

13. Chapter V of the Act deals with "Delayed Payments to Micro and Small Enterprises. Section 15 deals with the liability of the buyer to make payment which stipulates, in clear words, that where any supplier, supplies any goods or renders any services to any buyer the buyer shall make payment 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. It further provides that in no case, the period agreed upon between the supplier and the buyer in writing shall exceed 45 days from the day of deemed acceptance. Section 16 obligates the buyer to pay compound interest and Section 17 deals with the recovery of amount due. Section 20 of the Act obligates the State Governments to establish one or more Micro and Small Enterprises Facilitation Council and Section 21 deals with constitution of the said Council.

14. The important provision which is highly germane for resolving the dispute in the present case is Section 18 of the Act, which reads 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 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."

15. Section 24 of the Act stipulates that the provisions of Sections 15 to 23 do have overriding effect notwithstanding anything inconsistent in any other law for the time being in force. The issues in the present writ petition need examination and resolution in the light of the above provisions of law.

16. In this context, it may be appropriate to refer to Section 9 of the Code of Civil Procedure. According to the said provision of law the Civil Courts shall have jurisdiction to try all suits of a civil nature, excepting suits of which cognizance is either expressly or impliedly barred. In the instant case, admittedly for recovery of the amount, the first respondent herein filed a Civil Suit wherein the petitioner filed the written statement, denying the plaint averments. It is also an admitted reality that pending suit, the first respondent approached the Facilitation Council by way of filing an application under Section 18 of the Act and subsequently the Civil Court dismissed the civil suit for non-prosecution on 06.02.2017. According to the learned counsel for the petitioner, there is neither prohibition nor bar under the provisions of 2006 Act to maintain a civil suit under Section 9 of the Code of Civil Procedure. It is the case of the petitioner herein that having filed the Civil Suit, the first respondent herein should have taken the same to a logical end by getting the suit restored by invoking the provisions of Order 9 Rule 9 of the Code of Civil Procedure. The reality in the instant case remains that the Civil Suit instituted by the first respondent herein came to be dismissed for non-prosecution and admittedly no steps have been taken by the first respondent herein for getting the suit restored to file. The contention of the first respondent on the said objection taken by the petitioner is that in view of the language of the provisions of Sections 18 and 24 of the Act, the Civil Suit is barred and the dismissal of the suit instituted by the first respondent herein for non-prosecution is of no consequence as the Civil Court is a

coram non judice, having no jurisdiction to adjudicate the issues on merits.

17. In *ITL LTD. (supra 2)*, the Hon'ble Apex Court at Paragraphs 10 and 11, held as under:

"10. We do not agree with this submission of the learned counsel. It is true in the present Act application of the Code is not specifically provided for but what is to be noted is : Is there an express prohibition against the application of the Code to a proceeding arising out of the Act before a civil court? We find no such specific exclusion of the Code in the present Act. When there is no express exclusion, we cannot by inference hold that the Code is not applicable."

11. It has been held by this Court in more than one case that the jurisdiction of the civil court to which a right to decide a lis between the parties has been conferred can only be taken by a statute in specific terms and such exclusion of right cannot be easily inferred because there is always a strong presumption that the civil courts have the jurisdiction to decide all questions of civil nature, therefore, if at all there has to be an inference the same should be in favour of the jurisdiction of the court rather than the exclusion of such jurisdiction and there being no such exclusion of the Code in specific terms except to the extent stated in Section 37(2), we cannot draw an inference that merely because the Act has not provided the CPC to be applicable, by inference it should be held that the Code is inapplicable. This general principle apart, this issue is now settled by the judgment of a 3-Judge Bench of this Court in the case of *Bhatia International v. Bulk Trading S.A. and Anr.* MANU/SC/0185/2002 : [2002]2SCR411 in C.A. No. 6527/2001 -- decided on 13.3.2002 where in while dealing with a similar argument arising out of the present Act, this Court held : "While examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion."

18. In *POWER MACHINES INDIA LIMITED (supra 3)*, the Hon'ble Apex Court at Paragraph 11, held as follows:

"11. Section 18(1) of the Act of 2006 provides that the dispute with respect to any amount due Under Section 17 may be referred to the Facilitation Council. On reference being made, the Council can itself conduct reconciliation with the assistance of any institution or ADR Centre. In that case provisions of Sections 65 to 81 of the Act of 1996 shall apply and in case conciliation Under Section 18(2) is not successful, Council shall either itself take up the dispute for arbitration or refer it to some other Centre or institution for arbitration and thereupon the provisions of the Act of 1996 shall apply."

19. In *MAHALUXMI RICE MILLS AND OTHERS (supra 4)*, the Hon'ble Apex Court at paragraph 9, held as under:

"9. It is significant to note that the word used for the seller to realise market fee from his purchaser is "may" while the word used as for the seller to pay the market fee to the Committee is "shall". Employment of the said two monosyllables of great jurisprudential import in the same clause dealing with two rights regarding the same burden must have two different imports. The legislative intendment can easily be discerned from the frame of the sub-clause that what is conferred on the seller is only an option to collect market fee from his purchaser, but the seller has no such option and it is imperative for him to remit the fee to the Committee. In other words, the Market Committee is entitled to collect market fee from the seller irrespective of whether the seller has realised it from the purchaser or not."

20. In *RAJENDER MOHAN RANA & ORS (supra 5)*, the High Court of Delhi at paragraph 7, held as under:

"7. It is not possible to agree with the contention of the appellants that Section 55 of the Reforms Act prescribes the only mode and manner of partition of land between joint bhumidhars. Section 55

of the Reforms Act prescribes one of the ways in which the joint bhumidhars can partition the land i.e., by going for legal proceedings for partition of land. Section 55 does not bar or prohibit joint bhumidhars from entering into a settlement or compromise between themselves for partition of the land. Such an embargo is not stipulated expressly and should not be impliedly read into Section 55. Express stipulation is certainly missing. Section 55 uses the word „may sue“ which indicates a discretionary element that a joint bhumidhar may approach the Court of Revenue Assistant for partition. Normally, the word „may“ means discretion and is not mandatory. In the present case we do not see any reason why the word „may“ in Section 55, should be read as „must“ or „shall“. Courts do not interpret the word „may“ as „shall“ unless such interpretation is necessary and required to void absurdity, inconvenient consequence or is mandated by the intent of the legislature which is collected from other parts of the statute. While examining the third aspect, the courts examine the purpose, object, design and scope of the statute.”

21. In *THE OFFICIAL LIQUIDATOR (supra 6)*, the Hon'ble Apex Court at paragraph 7, held as under:

“7. Sections 442 and 446 of the Act have to be read together. It is only where the object of the two sections, when read together, is served by a stay order that the stay order could be justified. That object is to expeditiously decide and dispose of pending claims in the course of winding up proceedings. A stay is not to be granted if the object of applying for it appears to be, as it does in the case before us, merely to delay adjudication on a claim, and, thereby to defeat justice. In other words, a stay order, under section 442, cannot be made mechanically, or, as a matter of course, on showing fulfilment of some fixed and prescribed conditions. It can only be made judiciously upon an examination of the totality of the facts which vary from case to case. It follows that the order to be passed must be discretionary and the power to pass it must, therefore, be directory and not mandatory. In other words the word "used before "stay" in section 442 of the Act really means may and not "must" or "shall" in such a context. In fact it is quite accurate to say that the word "may" by itself, acquires the meaning' of "must" or "shall" sometimes. This word however,

always signifies a conferment of power. That power may, having regard to the context in which it occurs, and the requirements contemplated for its exercise, have annexed to it an obligation which compels its exercise in a certain way on facts and circumstances from which the obligation to exercise it in that way arises. In other words, it is the context which can attach the obligation to the power compelling its exercise in a certain way. The context, both legal and factual, may impart to the power that obligatoriness."

22. In *GUDA VIJALAKSHMI (supra 7)*, the Hon'ble Apex Court at paragraph 8, held as follows:

"8. In my opinion, this argument of the learned counsel for the respondent husband is without any substance. I have earlier set out section 25 of the Code of Civil Procedure and I have pointed out that an analysis of the section makes it abundantly clear that for the ends of justice, wide power and jurisdiction have been conferred on this Court in the matter of transfer of any suit, appeal or proceeding from any High Court or other Civil Court in one State to a High Court or other Civil Court in any other State. A suit or a proceeding for divorce under the Hindu Marriage Act in a Civil Court is necessarily a suit or proceeding and must on a plain reading of S. 25(1) of the Code of Civil Procedure be held to come under S. 25(1) of the Code, as the said section speaks of any suit, appeal or other proceeding. This Court must necessarily enjoy the power and jurisdiction under the said provisions of transferring such a suit or proceeding for the ends of justice, unless the power and jurisdiction of this Court are specifically taken away by any statute. If the jurisdiction clearly conferred on any Court has to be ousted, the exclusion of such jurisdiction must be made in clear and unequivocal terms. S.21 of the Hindu Marriage Act does not deal with the question of jurisdiction of any Court. As no procedure with regard to the proceedings under the Hindu Marriage Act has been laid down in the said Act, S. 21 of the Act only provides that 'all proceedings under this Act shall be regulated as far as may be by the Code of Civil Procedure.' S. 21 of the Hindu Marriage Act cannot be construed to exclude the jurisdiction conferred on this Court under S. 25 of the Code of Civil Procedure. It does not become necessary in the instant case to decide whether the

provision in relation to jurisdiction of this Court contained in S. 25 of the Code of Civil Procedure is one of substantive law or it belongs to the domain of Procedure. Even I accept the argument of the learned counsel for the respondent that S. 25 does not form any part of the procedural law and is a part of the substantive law, I am of the opinion that jurisdiction conferred on this Courts by S. 25 of the Code of Civil Procedure, is not in any way, affected by S. 21 of the Hindu Marriage Act which, as I have already noted, only provides that 'all proceedings under the Hindu Marriage Act shall be regulated as far as may be by the Code of Civil Procedure, 1908.' "

23. In *SULOCHANA (supra 8)*, the Hon'ble Apex Court at paragraphs 20 and 21, held as under:

"20. It is now well settled that the provision excluding jurisdiction of the civil court are to be strictly construed. They are not to be inferred readily. [See Swamy Atmananda and Others v. Sri Ramakrishna Tapovanam and Others (2005) 10 SCC 51]

21. The jurisdiction of civil court is also to be determined having regard to the averments contained in the plaint. Appellant did not proceed on the basis that she was a 'specified landlord' within the meaning of Section 23-J of the Act. Furthermore a composite suit for eviction was filed, i.e., not only on the ground of bona fide requirement but also on the ground of default of payment of rent as also denial of relationship of landlord and tenant."

24. In *A.P. STATE FINANCIAL CORPORATION (supra 9)*, the Hon'ble Apex Court, at paragraph 13, held thus:

"13. On a conjoint reading of Sections 29 and 31 of the Act, it appears to us that in case of default in repayment of loan or any instalment or any advance or breach of an agreement, the Corporation has two remedies available to it against the defaulting industrial concern, one under Section 29 and another under Section 31 of the Act. The choice for availing the remedy under Section 29 or Section 31 of the Act is that of the Financial Corporation alone and the defaulting concern has no say whatsoever in the matter, as to which remedy should be taken recourse to by the Corporation against it for effecting the recovery. The expression "without prejudice to the provisions of Section 29 of this Act' as appearing in Section 31 of the Act clearly

demonstrates that the Legislature did not intend to confine the Corporation to take recourse to only a particular remedy against the defaulting industrial concern for recovery of the amount due to it. It left the choice to the Corporation to act in the first instance under Section 31 of the Act and save its rights and remedies under Section 29 of the Act to be availed at a later stage, with the sole object of enabling the Corporation to recover its dues. It is not, however, obligatory on the part of the Financial Corporation to invoke the special provisions of Section 31 of the Act, it can even without taking recourse to the provisions of the said section invoke the procedure prescribed under Section 29 of the Act for realisation of its dues. Where the Corporation takes recourse to the provisions of Section 31 of the Act and obtains an order from the court, it shall ordinarily and invariably seek its enforcement in the manner provided by Section 32 of the Act, which provisions are aimed to act in aid of the orders obtained under Section 31 of the Act and it cannot simultaneously initiate and take recourse to the remedy available to it under Section 29 of the Act unless it gives up, abandons or withdraws the proceedings under Section 31 of the Act, at whatever stage those proceedings may be. The Corporation cannot simultaneously pursue two remedies at the same time. The reach and scope of the two remedies is essentially different even if somewhat similar result flows by taking recourse to either of the two provisions in certain respects."

25. In *NATIONAL INSURANCE COMPANY LIMITED (supra 9)*, the Hon'ble Apex Court, at paragraphs 24 to 30, held as follows:

"24. The 'doctrine of election' is a branch of 'rule of estoppel', in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.

25. In Nagubai Ammal and Others v. B. Shama Rao and Others [AIR 1956 SC 593], it was stated:

"It is clear from the above observations that the maxim that a person cannot 'approve and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto."

26. In C. Beepathuma and others v. Velasari Shankaranarayana Kadambolihaya and others [AIR 1965 SC 241], it was stated:

"The doctrine of election which has been applied in this case is well-settled and may be stated in the classic words of Maitland – "That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it."

(see Maitland's lectures on Equity Lecture 18)]

The same principle is stated in White and Tudor's Leading Cases in Equity Vol. 18th Edn. at p. 444 as follows:

"Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both.... That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."

[See also Prashant Ramachandra Deshpande v. Maruti Balaram Haibatti, 1995 Supp (2) SCC 539]

27. Thomas, J. in P.R. Deshpande v. Maruti Balaram Haibatti [(1998) 6 SCC 507] stated the law, thus:

"The doctrine of election is based on the rule of estoppel – the principle that one cannot approve and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

[See also Devasahayam (Dead) By LRs. v. P. Savithramma and Others, (2005) 7 SCC 653]

28. The First Respondent having chosen the forum under the 1923 Act for the purpose of obtaining compensation against his employer cannot now fall back upon the provisions of the 1988 Act therefor, inasmuch as the procedure laid down under both the Acts are different save and except those which are covered by Section 143 thereof.

29. We, therefore, with respect do not subscribe to the views of the Full Bench of the Karnataka High Court.

30. Mr. P.R. Ramasesh is not correct in contending that both the Acts should be read together. A party suffering an injury or the dependents of the deceased who has died in course of an accident arising out of use of a motor vehicle may have claims under different statutes. But when cause of action arises under different statutes and the claimant elects the forum under one Act in preference to the other, he cannot be thereafter permitted to raise a contention which is available to him only in the former."

26. Coming to the judgments relied upon by the learned counsel for the respondents in *DHULABHAI AND ORS (supra 1)*, the Hon'ble Apex Court at paragraph 32 (2) held as under:

"32. Neither of the two cases of *Firm of Illuri Subayya*, 1964-1 SCR 752 = (AIR 1964 SC 322) or *Kamla Mills*, 1966 1 SCR 64 =(AIR 1965 SC 1942) can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows :-

"(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is

necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not."

27. In *THE PREMIER AUTOMOBILES LTD (supra 11)*, the Hon'ble Apex Court at Paragraphs 21 to 23, held as under:

"21. We now proceed to consider the cases creating special liability, mostly tax liability, and providing for procedures and remedies for determination of the amount of tax and relief against the assessment of such liability. In the well-known decision of the Privy Council *Secretary of State, v. Mask and Co.* MANU/PR/0022/1940 Lord Thankerton delivering the judgment of the Board alluded to the third class of cases to be found in the judgment of Willes. J. in *Wolverhamptons' case*. (1859) 6 CB 336. The order of the Collector of Customs passed on the appeal under Section 188 of the Sea Customs Act, 1878 was held to be an order within his exclusive jurisdiction excluding the jurisdiction of the Court to challenge it. The other well-known decision of the Privy Council is the case of *Raleigh Investment Co. Ltd. v. Governor General in Council* 74 Ind App 50 : AIR 1947 PC 78. Both the decisions aforesaid were noticed by Gajendragadkar, J. as he then was, delivering the judgment on behalf of the Constitution Bench of this Court in *Firm of Illuri Subbayya Chetty and Sons v. The State of Andhra Pradesh*. MANU/SC/0211/1963 : [1963]50ITR93(SC) . At page 763 (of SCR) : at p. 326 of AIR the circumstances under which the decision of the taxing authority under the Madras General Sales Tax Act. 1939 could be challenged in a Civil Court were pointed out in these terms:

Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think. be non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of

the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void that these observations may perhaps be invoked in support of the plea that the civil court can exercise its jurisdiction notwithstanding a provision to the contrary contained in the relevant statute. In what cases such a plea would succeed it is unnecessary for us to decide in the present appeal because we have no doubt that the contention of the appellant that on the merits, the decision of the assessing authority was wrong, cannot be the subject-matter of a suit because Section 18-A clearly bars such a claim in the civil courts.

It would be noticed on appreciation of the above dicta that the issue to be tried in the suit instituted in a civil court to challenge the decision of the taxing authorities is quite distinct and different from the one which is within their exclusive jurisdiction. The issues in the two proceedings are different and exclusive in their respective spheres. Many authorities were reviewed by Subba Rao, J. as he then was in the case of *Firm Seth Radha Kishan v. The Administrator, Municipal Committee, Ludhiana* MANU/SC/0187/1963 : [1964]2SCR273 including the principles enunciated by Willes, J. in *Wolverhampton's case* (1859) 6 CB 336. The decision of the Full Bench of the Lahore High Court (*supra*) was also referred, and the final principle enunciated is to be found at page 284 in these terms:

Under Section 9 of the CPC the Court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of civil Courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil Courts. The statute may specifically provide for ousting the jurisdiction of civil Courts; even if there was no such Specific exclusion, if it creates a liability not existing before and gives a special and particular remedy

for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the said remedy could be had. Even in such cases, the Civil Court's jurisdiction is not completely ousted. A suit in a civil Court will always lie to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication, made final. if the said tribunal abuses its power or does not act under the Act but in violation of its provisions.

The principles aforesaid were reiterated in the decision of this Court in *Bharat Kala Bhandar Ltd. v. Municipal Committee, Dhamangaon* MANU/SC/0267/1965 : [1966]59ITR73(SC) albeit the learned Judges by 3: 2 differed in the application of the principle to the facts of the case.

22. The unanimous decision of a Bench of 7 Judges of this Court was given by Gajendragadkar, C.J. in the case of *Kamala Mills Ltd. v. State of Bombay* MANU/SC/0291/1965 : [1965]57ITR643(SC). The decision of the House of Lords in the case of *PYX Granite Co. Ltd.* 1960 AC 260 was referred to at page 81 after referring to the decisions of the Privy Council in the case of *Mask & Co* : MANU/PR/0022/1940 and the principles were reiterated at page 82. A doubt which was being cast in the full application of the ratio of the Privy Council in *Raleigh Investment Co.'s case* : AIR 1947 PC 78 was crystallised in the majority decision of Subba Rao, J. in the case of *K. S. Venkataraman & Co. v. State of Madras* : MANU/SC/0293/1965 : [1966]60ITR112(SC) (supra). The minority decision of Shah, J. was to the contrary. The majority view made a departure from the dicta of the Privy Council in case of a challenge to assessment of tax made under ultra vires provisions of the law. The decision of this Court in *State of Kerala v. Ramaswami Iyer & Sons* MANU/SC/0220/1966 : [1966]61ITR187(SC) is again in connection with the challenge to sales tax assessment by institution of a suit in civil Court. Mitter, J. reviewed many decisions of this Court in the case of *Pabbojan Tea Co. Ltd. etc. v. The Deputy Commissioner, Lakhimpur etc.* MANU/SC/0231/1967 : (1967)IILLJ872SC a case arising out of a challenge to the orders of the authority under the Minimum Wages Act. Sub-section (6) of Section 20 of the Act was held not to exclude the jurisdiction of the Civil Court when the order of the authority is challenged on the

ground of non-applicability of the Act to a certain class of workers. Hidayatullah, C.J. delivering the judgment on behalf of Constitution Bench of this Court took pains to discuss many authorities in the case of *Dhulabhai v. The State of Madhya Pradesh* MANU/SC/0157/1968 : [1968]3SCR662, culled out as many as 7 propositions of law at pages 682 and 683. But the principles enunciated were relevant to find out the jurisdiction of the Civil Court and its scope to challenge the assessments made under a taxing statute. Nothing contrary to what we have said above is to be found in any of the 7 principles enunciated by the learned Chief Justice. The case of *Union of India v. A. V. Narasimhalu* MANU/SC/0166/1969 : 1983(13)ELT1534(SC) was again in regard to exclusion of jurisdiction of the civil Court in a suit to challenge an order under Section 188 of the Sea Customs Act. 1878.

23. To sum up, the principles applicable to the jurisdiction of the Civil Court in relation to an industrial dispute may be stated thus:

- (1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil Court.
- (2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil Court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.
- (3) If the industrial dispute relates to the enforcement of a right or an obligation created Under the Act. then the only remedy available to the suitor is to get an adjudication under the Act.
- (4) If the right which is sought to be enforced is a right created under the Act such as Chapter VA then the remedy for its enforcement is either Section 33C or the raising of an industrial dispute. as the case may be."

28. In *M/ S. STEEL AUTHORITY OF INDIA LTD AND ANR (supra 12)*, the Bombay High Court, at paragraphs 11, 12 and 13, held as follows:

"11. Having considered the matter, we find that Section 18 (1) of the Act, in terms allows any party to a dispute relating to the amount due under Section 17 i.e. an amount due and payable by buyer to seller; to approach the facilitation Council. It is rightly contended by Mrs. Dangre, the learned Addl. Government Pleader, that there can be variety of disputes between the parties such as about the date of acceptance of the goods or the deemed day of acceptance, about schedule of supplies etc. because of which a buyer may have a strong objection to the bills raised by the supplier in which case a buyer must be considered eligible to approach the Council. We find that Section 18(1) clearly allows any party to a dispute namely a buyer and a supplier to make reference to the Council. However, the question is; what would be the next step after such a reference is made, when an arbitration agreement exists between the parties or not. We find that there is no provision in the Act, which negates or renders an arbitration agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the provisions of Section 15 to 23-including section 18, which provides for forum for resolution of the dispute under the Act-would not have the effect of negating an arbitration agreement since that section overrides only such things that are inconsistent with Section 15 to 23 including Section 18 notwithstanding anything contained in any other law for the time being in force. Section 18(3) of the Act in terms provides that where conciliation before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution and that the provisions of the Arbitration and Conciliation Act, 1996 shall thus apply to the disputes as an arbitration in pursuance of arbitration agreement referred to in Section 7 (1) of the Arbitration and Conciliation Act, 1996. This procedure for arbitration and conciliation is precisely the procedure under which all arbitration agreements are dealt with. We, thus find that it cannot be said that because Section 18 provides for a forum of arbitration an independent arbitration agreement entered into between the parties will cease to have effect. There is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996.

12. At this stage, it is necessary to deal with another contention raised on behalf of the Council by Mrs. Dangre, the learned Addl. Government Pleader. According to the learned Addl.

Government Pleader, the procedure of conciliation contemplated by Section 18 (2) of the Act is a procedure, which has been specially enacted for the purposes providing a Forum for conciliation which itself is capable of settling a dispute between the micro, small and medium enterprises and any other party. We find that the arbitration agreement in question, like most arbitration agreements, does not contain a specific provision for conciliation and, therefore, it would be necessary for the parties to submit to the conciliation process under Section 18 (2) of the Act notwithstanding the existence of an arbitration agreement. Undoubtedly, the Council may either itself conduct the conciliation in accordance with the provisions of Section 65 to 81 of the Arbitration and Conciliation Act, 1996 or as provided by Section 18 (2) of the Act refer it to any institute or centre provided for alternate dispute resolution.

13. At one stage, it was also submitted at the bar that the procedure contemplated by Section 18 of the Act for resolution of dispute is not compulsory either for the seller or the buyer and the parties are free to adopt any course including the civil suit. We, however, find that it is not possible for the parties-whether a buyer or seller-to invoke jurisdiction of a Civil Court by filing Civil Suit in respect of its claim particularly since the requirement of conciliation is mandatory and the buyer or seller must approach the Council where there is a dispute with regard to any amount due under Section 17 of the Act."

29. In *C.M.D. (EX) MPPKVVCL AND ORS (supra 13)*, the High Court of Madhya Pradesh at Paragraphs 4, 7, 10 and 11, held as under:

"4. Learned counsel for the petitioners has submitted that Section 15 of the Act provides for liability of buyer to make payment and as per said section, the supplier when supplies the goods, then the buyer shall make payment therefor on or before the date agreed upon between them. Section 16 provides for payment of interest and Section 18 provides reference to Micro and Small Enterprises Facilitation Council. He has submitted that as per Section 16 of the Act of 2006, when there is a delay in payment by the buyer, then according to Section 15, the buyer shall liable to pay compound interest with monthly rate to the supplier on that amount from the

appointed day. Section 17 provides for recovery of amount due. Section 18 provides that when there is any dispute with regard to any amount due to Section 17, then a reference shall be made to the Micro and Small Enterprises Facilitation Council. Thus, as per the said section, if there is any dispute regarding the amount due, then the matter has to be referred to the Micro and Small Enterprises Facilitation Council. He has contended that in the present case from the plaint allegation, it is clear that there is a dispute about payment of interest under the Act and, therefore, the respondent has to approach to the Micro and Small Enterprises Facilitation Council for recovery of the said amount and the Civil Court has no jurisdiction to entertain the suit. He has relied upon the judgment passed by the Apex Court in the case of Dhulabhai etc Vs. State of Madhya Pradesh and another reported in AIR 1969 SC 78 and the judgment passed by this Court in the case of R.R. Home Developers Pvt. Ltd. and others Vs. Rajendra Jain, reported in 2013(2) MPLJ 525, in which it has been held that where a statute creates a special right or liability and provides for determination of such rights or liability by any forum constituted under such statute, the maintainability of civil suit in such cases is impliedly barred. He, thus, has argued that although the civil suit is not specifically barred by the Act of 2006 but as in the present case a statute creates a special authority for determination of rights or liability, therefore, the civil suit is impliedly barred. He has further argued that the right to receive the interest on the delayed payment has been created under Sections 16 and 17 of the Act of 2006 and a complete procedure has been prescribed for recovery of the amount of interest. He also submitted that the conciliation for resolution of dispute is to be constituted under Section 18(2) of the Act of 2006 and when the conciliation is unsuccessful, the resolution of dispute as per Arbitration and Conciliation Act, 1996, then section 18 of the Act of 2006 mandatorily provides first for conciliation and then arbitration for resolution of dispute regarding interest on the delayed payment which has overriding effect as per Section 24 of the Act of 2006. For the said preposition, he has relied upon the judgment passed by the Bombay High Court in the case of M/s Steel Authority of India Ltd. and another Vs. Micro Small Enterprise Facilitation Council reported in AIR 2012 Bombay 178.

7. From perusal of these sections, it is clear that as per Section 15 of the Act of 2006, there is a liability of buyer to make payment to the supplier who supplies any goods or renders any services to any buyer and if there is any delay, then the buyer is required to pay compound interest to the supplier as provided under Section 16 of the Act. Section 17 provides for recovery of interest as provided under Section 16 of the Act of 2006. Section 18 provides that when there is any dispute with regard to any amount due under Section 17, then a reference shall be made to the Micro and Small Enterprises Facilitation Council. Sub-section (2) of Section 18 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 an institution or centre. Where conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, then the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services. Sub-section (4) of Section 18 provides for a clause stating that Micro and Small Enterprises Facilitation Council or centre providing alternate dispute resolution services shall be jurisdiction to act as an Arbitrator or Council under this section. Sub-section (5) provides that every reference made under this section shall be decided within ninety days from the date of making such reference. Thus, as per the said sections, a complete mechanism has been provided for redressal of grievance of the supplier including the payment of interest. The word 'may' used in this section qualifies the rights of the petitioners to invoke jurisdiction of Micro and Small Enterprises Facilitation Council under Section 18(1) of the Act of 2006, however, Section 24 of the Act of 2006 impliedly bars such other remedies which are inconsistent, inter-alia, with Section 18(1), therefore, the trial Court has erred in holding that it is within the jurisdiction of the plaintiff whether to invoke the jurisdiction of Micro and Small Enterprises Facilitation Council under Section 18 or any other forum by completing overlooking the provisions of Section 24 of the Micro, Small and Medium Enterprises Development Act, 2006.

10. Thus, from perusal of the above cited judgments passed by the Apex Court as well as by this Court, Bombay High Court and the

provisions of the Micro, Small and Medium Enterprises Development Act, 2006, it is clear that the respondent has an alternate remedy of referring the dispute to the Micro and Small Enterprises Facilitation Council and without availing that remedy, the respondent cannot approach to the Civil Court. Thus, the trial Court has committed an error in rejecting an application filed by the petitioner under Order 7 Rule 11 of CPC.

11. The judgment relied by learned counsel for the respondent in the case of Sulochana (*supra*) is not applicable in the present case as the facts of that case are different than the present case because the said judgment relates to the provisions of M.P. Accommodation Control Act related to Chapter-III-A of the M.P. Accommodation Control Act. Ex-consequentie, the revision is allowed. The impugned order dated 27/8/2014 passed by 10th Additional District Judge, Jabalpur in Civil Suit No.111-A/2011 is hereby set aside. The application filed by the petitioners under Order 7 Rule 11 of the Code of Civil Procedure is hereby allowed and the suit is dismissed."

30. In *I.C.S.A. (INDIA LIMITED) (supra 14)*, the High Court of Chattishgarh at Bilaspur, at Paragraph 20 held as under:

"20. The Act of 2006 is a Special Act and as per the provisions of Section 24 of the said Act, the provisions of Sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, Section 18/19 of the Act of 2006 would have overriding effect on any other law for the time being in force including the Act of 1996 and therefore if there is any dispute between the parties governed by the Act of 2006, the said dispute is to be resolved only through the procedure as provided under Section 18 of the Act of 2006."

31. In *STATE OF U.P. AND ANR (supra 15)*, the Hon'ble Apex Court at Paragraphs 10, 13, 14 and 15, held as under:

"10. In *Ram Gobinda Dawan v. Bhaktabala* MANU/SC/0586/1971 : [1971]3SCR340 it was held as follows:

21. It is interesting to note that though it was urged that the decision of the Privy Council was given in default of

appearance of B and his mortgagee C and therefore the said decision will not operate as res judicata, this Court did not hold that a decision given even in the first instance in default of appearance of a party will operate as res judicata. On the other hand, this Court categorically held that C, the mortgagee had fought out the title of mortgagor B, both before the Land Acquisition Court and the High Court and had obtained a judgment in his favour after a full contest.

22. It is the view of this Court that the mere fact that the mortgagee did not choose to appear before the Privy Council and the decision of the Privy Council was given in the absence of the mortgagee, is of no consequence as the decisions of the High Court and the District Court have been given after contest. Therefore it will be seen that the decision of this Court relied on by Mr Mukherjee is no authority for the wide proposition that even if there has been no hearing and final decision by any court, at any stage, after contest, the decision will operate as res judicata.

23. For an earlier decision to operate as res judicata it has been held by this Court in *Pulavarthi Venkata Subba Rao v. Valluri Jagannadha Rao* MANU/SC/0018/1963 : [1964]2SCR310 that the same must have been on a matter which was "heard and finally decided".

24. In *Sheodan Singh v. Daryan Kunwar* MANU/SC/0264/1966 : [1966]3SCR300 the question whether a decision given by the High Court dismissing certain appeal on the ground of limitation or on the ground that the party had not taken steps to prosecute the appeal operates as res judicata, was considered by this Court. In that case A had instituted against B two suits asserting title to certain property. B contested those claims and also instituted two other suits to establish his title to the same property as against A. A's suits were decreed and B's suits were dismissed. B filed four appeals, two appeals against the decision given in A's suits and two appeals against the dismissal of his two suits. It is seen that all the appeals were taken on the file of the High Court but the two appeals filed

by B against the decision in the suits instituted by him were dismissed by the High Court on the grounds that one was filed beyond the period of limitation and the other for non-prosecution. At the final hearing the High Court took the view that the dismissal of B's two appeals, referred to above, operated as res judicata in the two appeals filed by B against the decision in A's suits on the question of title to the property. It was urged before this Court on behalf of B that the dismissal of his appeals on the ground of limitation and non-prosecution by the High Court does not operate as res judicata as the High Court cannot be considered to have "heard and finally decided" the question of title. This contention was not accepted. This Court referred to instances where a former suit was dismissed by a trial court for want of jurisdiction or for default of plaintiff's appearance etc. and pointed out that in respect of such class of cases, the decision not being on merits, would not be res judicata in a subsequent suit. It was further pointed out that none of those considerations apply to a case where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing. It was held that such dismissal by an appellate court has the effect of confirming the decision of the trial court on merits, and that it "amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal."

13. In the present case, the suit filed by Nagar Palika was dismissed on technical ground and in any case the State was not a party. So far the suit where the state was a party and amendments were made, the same was dismissed for non-prosecution. But the same was not dismissed under Order IX Rule 8.

14. Order IX Rule 8 and Order IX Rule 9 of CPC read as follows:

Rule 8. Procedure where defendant only appears Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits

the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Rule 9. Decree against plaintiff by default bars fresh suit

(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

15. Therefore Order IX Rule 9 can not be said to be applicable. The dismissal of the suit for non-prosecution was not a decision on merit. Consequently, the said order cannot operate as res judicata,”

32. In *SHAKUNTALA DEVI (supra 16)*, the Hon'ble Apex Court at Paragraphs 20 and 22, held as under:

“20. From the above principles laid down by this Court, it is clear that if the earlier judgment which is sought to be made the basis of res judicata is delivered by a court without jurisdiction or is contrary to the existing law at the time the issue comes up for reconsideration such earlier judgment cannot be held to be res judicata in the subsequent case unless, of course, protected by any special enactment.

22. Unfortunately for the appellant the declaration obtained by her based on which she was seeking possession in the present suit

being contrary to law, the courts below correctly held that the appellant could not seek possession on the basis of such an illegal declaration. Thus, the law is clear on this point i.e. if a suit is based on an earlier decree and such decree is contrary to the law prevailing at the time of its consideration as to its legality or is a decree granted by a court which has no jurisdiction to grant such decree, principles of res judicata under Section 11 of the CPC will not be attracted and it is open to the defendant in such suits to establish that the decree relied upon by the plaintiff is not a good law or court granting such decree did not have the jurisdiction to grant such decree."

33. In *CHANDRABHAI K.BHOIR & ORS (supra 17)*, the Hon'ble Apex Court at paragraph 21, held as under:

"21. Thus, the said issue, in our opinion, did not attain finality. In any view of the matter, an order passed without jurisdiction would be a nullity. It will be a coram non iudice. It is non est in the eye of law. Principles of res judicata would not apply to such cases. [See Chief Justice of Andhra Pradesh and Others v. L.V.A. Dixitulu (1979) 2 SCC 34, Union of India v. Pramod Gupta (2005) 12 SCC 1 and National Institute of Technology and Ors. v. Niraj Kumar Singh (2007) 2 SCC 481]."

34. In *POWER MACHINES INDIA LIMITED (supra 3)*, the Hon'ble Apex Court, at paragraph 10 of the Judgment, held as follows:

"10. The Act of 2006 has been enacted for the benefit of micro, small and medium enterprises. The object of the Act is to provide for facilitating the promotion and development, enhancing the competitiveness of micro, small and medium enterprises and the matters connected therewith or incidental thereto. Section 18 of the Act of 2006 is extracted hereunder:

"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 it to 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 disputes 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.."

Section 18(1) of the Act of 2006 provides that the dispute with respect to any amount due under section 17 may be referred to the Facilitation Council. On reference being made, the Council can itself conduct reconciliation with the assistance of any institution or ADR Centre. In that case provisions of sections 65 to 81 of the Act of 1996 shall apply and in case conciliation under section 18(2) is not successful, Council shall either itself take up the dispute for arbitration or refer it to some other Centre or institution for arbitration and thereupon the provisions of the Act of 1996 shall apply."

35. As observed by the Hon'ble Supreme Court in *POWER MACHINES INDIA LIMITED (supra 3)*, Act 27/2006 has obviously been enacted for the benefit of micro, small and medium Enterprises and the object of the Act is to provide for facilitating the promotion and development, enhancing the competitiveness of micro, small and medium enterprises and the matters connected therewith or incidental thereto.

36. Having regard to the scheme and object of the Act 27/2006 and having regard to the mechanism provided under the said enactment for redressal of the grievance of the buyer and having regard to the language employed under Sections 15, 16, 17 and 24 of the Act and in view of the law laid down in the judgments referred to above and cited by the learned

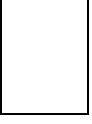
counsel for the first respondent, it can be safely concluded that the question of maintaining a civil suit for the relief does not arise and as such the initiation of the impugned proceedings under the provisions of the Act 27/2006 by any stretch of imagination cannot be said to be impermissible. The dismissal of the suit for non-prosecution, not on merits is absolutely of no consequence at all having regard to the principles laid down in the above pronouncements. This Court finds sufficient force in the submission of the learned Senior Counsel appearing for the first respondent that since the instant proceeding is not a suit, the bar as provided under Order 9 Rule 9 and Section 11 of the Code of Civil Procedure cannot be pressed into service for non-suiting the first respondent herein.

37. For the aforesaid reasons, the writ petition is dismissed. As a sequel, the miscellaneous petitions, if any, shall stand disposed of. There shall be no order as to costs.

Date: .12.2017
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A.V.SESHA SAI, J





THE HON'BLE SRI JUSTICE A.V.SESHA SAI



W.P.No.14962 of 2017

Dated: .12.2017

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