

***THE HONOURABLE SRI JUSTICE P.NAVEEN RAO**

+W.P. No. NO.24112 of 2016

% 12.11.2019

#M/s. Indu Projects Limited,
1009, 13th Phase, KPHB Colony,
Hyderabad, rep.by its Chief Operating
Officer, Mr. B.V. Bhaskar Reddy.

.... Petitioner

Vs.

\$Telangana Micro & Small Enterprises
Facilitation Council, rep.by its
Chairman, Commissionerate of Industries,
Chirag Ali Lane, Hyderabad and another.

.... Respondents

!Counsel for the petitioner : Sri Vedula Srinivas

Counsel for the Respondent No.1: Govt Pleader for Industries &
Commerce

Counsel for respondent NO.2 : Sri P Vishnuvardhana Reddy

<Gist :

>Head Note:

? Cases referred:

2016 (3) ALD 588
(2019) 4 SCC 357
(2012) 2 SCC 108
2018 (4) ALD 322 (DB)
2017 SCC Online Del 6978
2013 SCC Online All 9058
(2012) 7 SCC 462
2013 (5) CTC 25
W.P.No.6690 of 2010
W.P.No.15228 of 2015
W.P.No.15282 of 2015
O.S.A.No.246 of 2015 and M.P.No.1 of 2015
WP (C) 5004/2017 and CM No.21615 of 2017
Letters Patent Appeal No.1035 of 2018
WP No.4076 of 2017
2014(3) SCC 502

**IN THE HIGH COURT FOR THE STATE OF
TELANGANA**

WRIT PETITION NO. 24112 of 2016

Between :

M/s. Indu Projects Limited,
1009, 13th Phase, KPHB Colony,
Hyderabad, rep.by its Chief Operating
Officer, Mr. B.V. Bhaskar Reddy.

.... Petitioner

And

Telangana Micro & Small Enterprises
Facilitation Council, rep.by its
Chairman, Commissionerate of Industries,
Chirag Ali Lane, Hyderabad and another.

.... Respondents

JUDGMENT PRONOUNCED ON : 12.11.2019

THE HON'BLE SRI JUSTICE P.NAVEEN RAO

1. Whether Reporters of Local Newspapers may :
Be allowed to see the Judgments ? : YES
2. Whether the copies of judgment may be marked :
To Law Reporters/Journals : YES
3. Whether Their Ladyship/Lordship wish to : NO
See fair Copy of the Judgment ? :

HON'BLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.24112 of 2016

Date: 12.11.2019

Between:

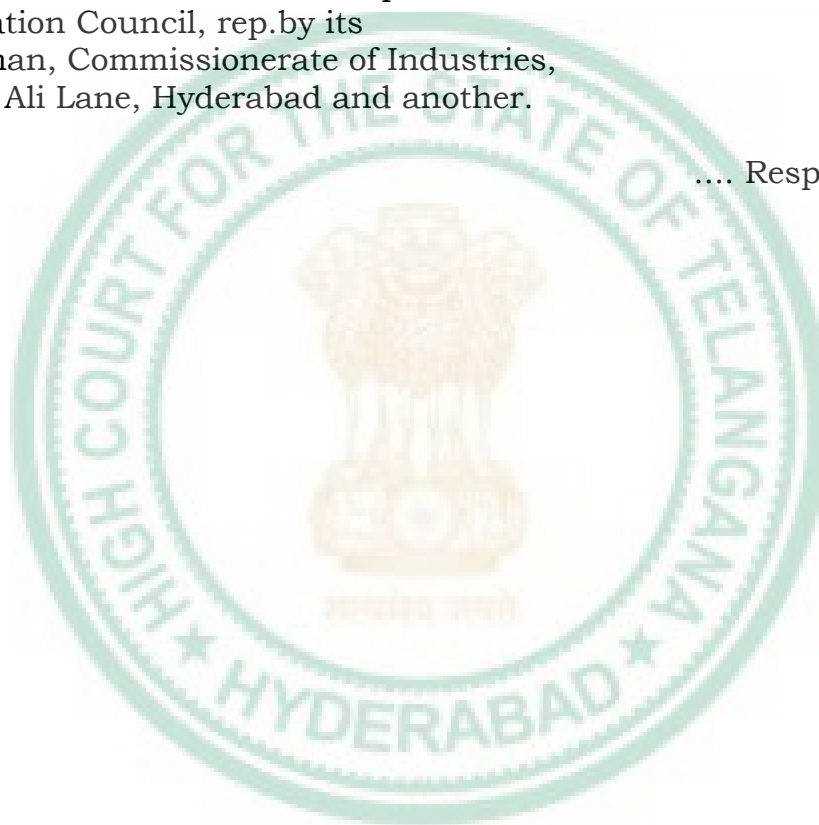
M/s. Indu Projects Limited,
1009, 13th Phase, KPHB Colony,
Hyderabad, rep.by its Chief Operating
Officer, Mr. B.V. Bhaskar Reddy.

.... Petitioner

and

Telangana Micro & Small Enterprises
Facilitation Council, rep.by its
Chairman, Commissionerate of Industries,
Chirag Ali Lane, Hyderabad and another.

.... Respondents



This Court made the following :

HON'BLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NO.24112 of 2016

ORDER:

Heard Sri Vedula Srinivas learned counsel for petitioner, learned Government Pleader for Industries and Commerce for respondent no.1, and Sri P.Vishnuvardhana Reddy learned counsel for 2nd respondent.

2. Facts on record as averred in the affidavit filed in support of the writ petition and in the counter affidavit filed by the 2nd respondent disclose respective stands as under:

3. Petitioner claims to be the infrastructure conglomerate working in the field of building construction, pipeline works, power plants, mining, etc. GMR awarded the contract for civil and structural works for establishing 15MW Solar Power Plant in Charanaka village of Patan District in the State of Gujarat. The value of the contract was 9,59,05,479/-. Consequently, petitioner issued letter of intent dated 04.06.2011 in favour of 2nd respondent for supply, fabrication and erection of cold rolled structures including transportation and installation of modules along with necessary civil and structural works for foundation and support structures for 15 MW Solar Power Plant. The letter of intent binds both parties. Clause-15 provides for dispute resolution mechanism. It requires the parties to refer a dispute to a panel of three arbitrators and should be decided under the provisions of the Arbitration and Conciliation Act, 1996 (Act, 1996). Petitioner alleges that 2nd respondent was negligent in performing his responsibilities under the letter of intent dated

04.06.2011 resulting in his failure to comply with the obligations with his Principal and the Principal was threatened to cancel the work order. Petitioner alleges that due to the negligent attitude, delay in execution of work and poor quality of work of the 2nd respondent, petitioner suffered huge damages and incurred huge loss, which may be around 14.00 crores.

4. On the contrary, 2nd respondent claims that he executed the work in accordance with the contract entered with the petitioner. In terms of the contract, 2nd respondent is entitled to receive an amount of 17,10,22,992/-, whereas petitioner paid only 13,84,91,146/-. Remaining outstanding is 3,35,31,846/- and despite the repeated requests and follow up action, petitioner failed to release the amount within a reasonable time. In the peculiar circumstances, 2nd respondent availed the remedy provided by the Micro, Small and Medium Enterprises Development Act, 2006 (for brevity, 'Act, 2006'), submitting the claim petition before The Micro and Small Enterprises Council (for brevity hereinafter referred to as the Council) claiming that 2nd respondent is entitled to payment of balance amount and interest computing total due as 7,78,93,992/-.

5. The first respondent Council by order dated 20.02.2016 directed the petitioner to pay the balance amount due as claimed by the 2nd respondent and 6,64,68,829/- as interest, and total amount quantified as 10,16,40,931/-. It also ordered interest with monthly rests at three times bank rate prevailing as on the date of award as notified by the RBI on the amount adjudicated by

the Council. Aggrieved thereby and challenging the said decision, this writ petition is filed.

6. Sri Vedula Srinivas made the following submissions:

- i) The remedy provided under the Act, 2006 is available only if claimant answers the description of Micro enterprises Small enterprise/medium enterprise/suppliers and duty is casts upon the claimant to disclose his status. The primary requirement to avail the remedies provided by the Act, 2006 is that claimant must satisfy the Council that it is micro/small/medium/supplier, whereas the 2nd respondent failed to establish before the Council and in fact, claim petition is totally silent on the status of the 2nd respondent.
- ii) He would submit that the contract was entered on 04.06.2011, whereas 2nd respondent registered itself as Small Scale Industry (SSI) with the District Industrial Centre at Balanagar, Hyderabad on 23.04.2012 and, therefore, the 2nd respondent cannot avail the remedies provided by the Act, 2006 to enforce the terms of said contract. Such registration cannot have retrospective operation to bind earlier contracts. He would therefore submit that Council does not have the jurisdiction to entertain the claim petition and the order impugned is liable to be set aside on that ground alone.
- iii) He would submit that the letter of intent dated 04.06.2011 governs the relationship between the

petitioner and the 2nd respondent. Clause-15 of the letter of intent specifically incorporates resolution of dispute by way of arbitration proceedings by referring the dispute to three arbitrators and the arbitration proceedings are strictly governed by the provisions of the Act, 1996. Since a specific mechanism is provided in the terms of contract, 2nd respondent cannot avail the remedy under the Act, 2006 and, therefore, on that ground also the claim petition filed before the Council is not maintainable.

- iv) He would further submit that assuming that Council has jurisdiction and 2nd respondent has validly availed the remedy provided under the Act, specific mechanism is provided under Section 18 of the Act, 2006. In terms thereof, first the Council has to explore the possibility of conciliation and only on failure of conciliation, it can take up arbitration proceedings, whereas the Council has not resorted to conciliation proceedings and straightaway undertaken the arbitration proceedings and, therefore, on that ground also the order is *ex facie* illegal and liable to be set aside.
- v) He would further submit that Council being quasi-judicial authority requires to adjudicate the dispute and record its findings. The order must contain reasons in support of decision, whereas no reasons are assigned how the liability is fixed on the petitioner. The defence taken by the petitioner and the various

objections raised by the petitioner are not even considered and no decision is recorded before fixing the liability on the petitioner. On that ground alone the order is liable to be set aside.

- vi) He would lastly submit that having regard to the fact that the order is vitiated on several counts and that being *ex facie* illegal order, though Section 19 of the Act provides remedy in terms of the Act, 1996, petitioner can not be compelled to avail the said remedy. Petitioner is entitled to invoke extraordinary jurisdiction of this Court under Article 226 of the Constitution of India as the Council inherently lacks jurisdiction, order is without reasons and is vitiated *ex facie* and therefore writ petition is maintainable.
- vii) In support of said contentions, learned counsel placed reliance on the following decisions:

Indur District Co-operative Marketing Society Ltd., Nizamabad v. Microplex (India), Hyderabad and another¹; State of Orissa and others v Chandra Nandi²; Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) and another Vs. Sri Seetaram Rice Mill³; and Venshiv Pharma Chem (P) Ltd., Hyderabad and another v. State Bank of India and others⁴.

¹ 2016 (3) ALD 588

² (2019) 4 SCC 357

³ (2012) 2 SCC 108

⁴ 2018 (4) ALD 322 (DB)

7. *Per contra*, Sri P.Vishnuvardhana Reddy made following submissions:

i) According to learned counsel, 2nd respondent is registered it as Small Scale Industry in the year 2012. The dispute arose after the 2nd respondent registered as Small Scale Industry and once the 2nd respondent is registered as Small Scale Industry, it answers the description of 'small enterprise' as defined in Section 2(m) read with Section 2(e) of the Act, 2006 and, therefore, remedies provided under the Act to recover the amounts due to the 2nd respondent are validly availed by the 2nd respondent.

ii) He would further submit that once a decision is made by the Council, remedy as provided by the Act, 2006 read with Act 1996 alone has to be availed and writ petition is not maintainable. When statutorily engrafted redressal mechanism is provided and which is an effective and efficacious remedy, writ petition is not maintainable under Article 226 of the Constitution of India. Deceitful mechanism is evolved to invoke jurisdiction of this Court under Article 226 of the Constitution of India only to avoid depositing 75% of the amount quantified by the Council as required whenever an appeal is to be preferred against the decision of the Council. Such kind of practice by the big company, like petitioner, would only frustrate the very objective of the Act, 2006. He would therefore submit that writ petition is liable to be dismissed on the ground of not availing remedy provided by the Act, 2006 read with Act 1996.

iii) With reference to the contention of the learned counsel that conciliation mechanism was not resorted to by the Council before proceeding to arbitrate the matter. Paragraph-17 of the statement of defence filed before the Council by the petitioner, petitioner admits that conciliation proceedings failed. Therefore, the Council has rightly proceeded to hold arbitration proceedings and, therefore, the decision of the Council is not vitiated on this ground.

iv) He would further submit that petitioner does not deny the amount of liability to the 2nd respondent. He is only trying to make a counter-claim. Since the amount is not in dispute, the liability fixed on the petitioner by the Council is strictly in accordance with the provisions of the Act and no exception can be called to the view taken by the Council.

v) He would further submit that the respective contentions were noted by the Council and on taking due note of the respective contentions and as the amount is not disputed by the petitioner, the Council has held that petitioner is liable to pay balance amount due and interest thereon in terms of the provisions of the Act, and, therefore, the decision of the Council cannot be called as non-speaking order as sought to be contended by the learned counsel for petitioner.

vi) In support of his contentions, learned counsel placed reliance on the following decisions:

GE T & D India Limited v. Reliable Engineering Projects and Marketing⁵; M/s. Hameed Leather Finishers v. M/s. Associated Chemical Industries Kanpur Pvt Ltd. and another⁶; Purbanchal Cables and conductors Private Limited v. Assam State Electricity Board and another⁷; The Indur District Cooperative Marketing Society Ltd., Nizamabad v. M/s. Microplex (India), Hyderabad and another (supra), Judgement of Supreme Court in Modern Industries v. M/s.Steel Authority of India Ltd., and others (CA Nos.3305-3306 of 2010); Goodyear India Ltd., rep.by its Zonal Manager, A.Baburaj v. Nortan Intec Rubber (P) Ltd., and another⁸; This court judgment in Ballapur Industries Limited, Chanderpur district, v. Andhra Pradesh Micro, Small Enterprises Facilitation Council, Hyderabad⁹; Division Bench judgement of this Court in M/s.Prithvi Information Solutions Private Limited v. Union of India¹⁰; Division Bench judgement of this Court in VMC v. Union of India¹¹; Division Bench judgment of Madras High Court in Prime Technologies Vs Hamsa Watch Glass Pvt. Ltd.¹²; Delhi High Court Judgment in M/s.Ramky Infrastructure Private Limited v Micro and Small Enterprises Facilitation Council and another¹³ ; and Patna High Court judgment in The Best Towers Private Limited v. Reliance Communication

⁵ 2017 SCC Online Del 6978

⁶ 2013 SCC Online All 9058

⁷ (2012) 7 SCC 462

⁸ 2013 (5) CTC 25

⁹ W.P.No.6690 of 2010

¹⁰ W.P.No.15228 of 2015

¹¹ W.P.No.15282 of 2015

¹² O.S.A.No.246 of 2015 and M.P.No.1 of 2015

¹³ WP (C) 5004/2017 and CM No.21615 of 2017

Limited¹⁴ and decision of this Court in **Orient Cement Limited v. Unicon Engineers¹⁵**.

8. I have carefully considered respective submissions and the decisions cited at the bar. The following issues arise for consideration:

- 1) On a decision made by the Council whether writ petition is maintainable under Article 226 of the Constitution of India when the Act, 2006 provides particular mode of resolution of disputes ?
- 2) Whether decision of Micro and Small Enterprises Facilitation Council is sustainable in law ?
- 3) Whether the subsequent registration as Small Scale Industry would enable the 2nd respondent to avail remedy provided by the Act, 2006 in disregard to the terms of contract entered earlier to the registration as Small Scale Industry ? and
- 4) When the contract, which was entered into prior to the 2nd respondent registered as Small Scale Industry, provides a particular mechanism for redressal in the form of an arbitration by three arbitrators, whether the remedy under the Act, 2006 is still available ?

9. Before considering these issues, it is necessary to not the statutory scheme and provisions, viz, objectives of the Act, 2006,

¹⁴ Letters Patent Appeal No.1035 of 2018

¹⁵ WP No.4076 of 2017

provisions of Act, 2006, and Act, 1996. To the extent relevant, they read as under:

I. OBJECTIVES OF THE ACT, 2006:

“ The Micro, Small and Medium Enterprises Development Act, 2006

Two important objectives spelt out in the statement of objects and reasons, read as under:

..... Added to this, a growing need is being felt to extend policy support for the small enterprises so that they are enabled to grow higher productivity to remain competitive in a fast globalisation area.....

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

.....
.....

(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.

II. RELEVANT PROVISIONS OF THE ACT, 2006 :

Section 18 - Reference to Micro and Small Enterprises Facilitation Council:-

(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or center providing alternate dispute resolution services by making a reference to such an institution or center, 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 center 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 center 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 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 center 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.

Section 24 - Overriding effect :- 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.

III. RELEVANT PROVISIONS OF THE ARBITRATION AND CONCILIATION ACT, 1996:

"Section 7 - Arbitration agreement:-

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication ¹[including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

.....
.....

Section 37 - Appealable orders:-

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

[(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.]

(2) [Notwithstanding anything contained in any other law for the time being in force, an appeal] shall also lie to a court from an order of the arbitral tribunal-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or taken away any right to appeal to the Supreme Court.”

ISSUE NOS.1 & 2 :

10. The writ jurisdiction is discretionary and equitable jurisdiction and no fetters imposed on the High Court in entertaining writ petition under Article 226 of the Constitution of India on any grievance. However, over a period of time, law has crystallised and broad contours of parameters of judicial review and entertaining writ petitions under Article 226 of the Constitution of India are laid down. Broadly speaking, ordinarily the writ court does not entertain the writ petition if the litigant has effective and efficacious alternative remedy, more so when there is a statutorily engrafted remedy or when statute prescribes a particular mode of resolution of disputes and relegates the person

to avail remedy/redressal provided by the statute before knocking the doors of the writ Court under Article 226 of the Constitution of India.

11. There are exceptions carved out to this principle. Few of them are noted hereunder:

11.1. When the authority who passed the order has no competence or jurisdiction and, therefore, *ex facie* exercise of power is vitiated on that ground; the decision by the adjudicating authority is vitiated on the ground of non-consideration of relevant parameters for adjudication/procedure of adjudication; has not afforded opportunity of hearing; has not supplied material relied on to hold against a person; does not take into consideration relevant material and/or considers irrelevant/ unrelated material to come to an adverse decision.

11.2. A Tribunal which decides dispute between two persons must assign reasons in support of the decision; more so when decision affects right of a person and for such person to avail appellate or other remedy, he must know the reasons on which an adverse order is passed against him. That is an essential requirement of deciding a dispute. Non-speaking order is anti-thesis to adjudication mechanism. That being elementary principle, if an order of a Tribunal does not contain reasons, the order gets vitiated on that count alone. In such an event no useful purpose would be served in relegating a party to resort to statutory redressal mechanism, which may also be subject to fulfilment of certain conditions. If the order is found to be *ex facie* illegal, writ Court can entertain writ petition instituted directly without

relegating the party to avail alternative redressal mechanism/ remedy and undertake judicial review of such decision within the well laid down parameters.

11.3. Further, if the statute prescribes particular procedure to be followed for resolution of dispute raised before the Tribunal, in this case the Council, but the Tribunal does not follow the procedure envisaged, this would be amounting to improper exercise of jurisdiction vitiating the very order, going to the root of the order on jurisdictional aspect, and in such an event the High Court need not compel the party to avail statutorily engrafted redressal mechanism.

12. There are plethora of precedents on contours of Article 226 of the Constitution of India. Without unnecessarily burdening the judgment, from the treasure trove of those precedents suffice to note following two decisions.

12.1 In **Executive Engineer** (supra), one of the questions considered by Hon'ble Supreme Court was maintainability of writ petition under Article 226 of the Constitution of India when statutorily engrafted remedial mechanism is available. The said case arose under the Electricity Act, 2003. Dealing with this issue, Supreme Court held as under:

“80. It is a settled canon of law that the High Court would not normally interfere in exercise of its jurisdiction under Article 226 of the Constitution of India where statutory alternative remedy is available. It is equally settled that this canon of law is not free of exceptions. The courts, including this Court, have taken the view that the statutory remedy, if provided under a specific law, would impliedly oust the jurisdiction of the civil courts. The High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India can entertain writ or appropriate proceedings despite availability of an alternative remedy. This jurisdiction, the High Court

would exercise with some circumspection in exceptional cases, particularly, where the cases involve a pure question of law or vires of an Act are challenged. This class of cases we are mentioning by way of illustration and should not be understood to be an exhaustive exposition of law which, in our opinion, is neither practical nor possible to state with precision. ***The availability of alternative statutory or other remedy by itself may not operate as an absolute bar for exercise of jurisdiction by the courts. It will normally depend upon the facts and circumstances of a given case.*** The further question that would inevitably come up for consideration before the Court even in such cases would be as to what extent the jurisdiction has to be exercised.

81. Should the courts determine on merits of the case or should they preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. ***We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where they involve primary questions of jurisdiction or the matters which go to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act. However, it should only be for the specialised tribunal or the appellate authorities to examine the merits of assessment or even the factual matrix of the case.***

82. It is argued and to some extent correctly that the High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the abovestated class of cases. It is a settled principle that the courts/tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, *lex nil frustra facit*, nor to enforce one which would be frivolous—*lex neminem cogit ad vana seu inutilia*—the law will not force anyone to do a thing vain and fruitless. ***In other words, if exercise of jurisdiction by the tribunal ex facie appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction.*** This issue is no longer *res integra* and has been settled by a catena of judgments of this Court, which we find entirely unnecessary to refer to in detail. Suffice it to make a reference to the judgment of this Court in *Whirlpool Corpn. v. Registrar of Trade Marks* [(1998) 8 SCC 1] where this Court was concerned with the powers of the Registrar of Trade Marks and the Tribunal under the Trade and Merchandise Marks Act, 1958 and exercise of jurisdiction by the High Court in the face of availability of a remedy under the Act.”

(emphasis supplied)

12.2. Supreme Court in **Maharashtra Chess Association Vs. Union of India & Ors (Civil Appeal No. 5654 of 2019 & Special Leave Petition (C) No 29040 of 2018)** held as under:

12. ***The powers of the High Court in exercise of its writ jurisdiction cannot be circumscribed by strict legal principles so as to hobble the High Court in fulfilling its mandate to uphold the rule of law.***

13. While the powers the High Court may exercise under its writ jurisdiction are not subject to strict legal principles, two clear principles emerge with respect to when a High Court's writ jurisdiction may be engaged. First, the decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary. Secondly, limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self imposed. ***It is a well settled principle that the writ jurisdiction of a High Court cannot be completely excluded by statute. If a High Court is tasked with being the final recourse to upholding the rule of law within its territorial jurisdiction, it must necessarily have the power to examine any case before it and make a determination of whether or not its writ jurisdiction is engaged. Judicial review under Article 226 is an intrinsic feature of the basic structure of the Constitution.***

14. to 17. xxxx

18. This argument of the second Respondent is misconceived. ***The existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case.***

.....

13. In the backdrop of scope of judicial review against a decision of statutory Tribunal, it is pertinent to note statutory scheme.

14. Having regard to huge pendency of cases in Courts and speedy and economical resolution of dispute with finality attached to it, Government and Courts are encouraging parties to resort to arbitration/conciliation as a means of resolution of dispute. Arbitration is settlement of a dispute out side the Court between parties to a contract by a neutral third party. Ordinarily, arbitration of a dispute would arise when there is a written contract between two parties and the contract should provide for

resolution of dispute by arbitration. If arbitration claim is incorporated in the contract, the parties are free to determine number of arbitrators and procedure for appointing arbitrator(s). In other words, resolution of dispute by means of arbitration is voluntary. But, once arbitration clause is provided, arbitration has to be resorted and decision of arbitral tribunal is binding on the parties.

15. To streamline the arbitration and conciliation proceedings, duly taking note of United Nations Commission on International Trade Law (UNCITRAL) and Conciliation Rules adopted by United Nations General Assembly and in supersession of earlier enactments dealing with Arbitration, the Act, 1996 was made.

16. As noted above, the primary objective of Act, 2006 is to ensure that Micro/Small/ Medium enterprise should not become unviable due to financial constraints arising out of delay in repayments by buyer or a dispute arises on payments between the parties to the contract, where supplier to the contract is a Micro/Small/Medium enterprise. The Council is established under Section 20. It is vested with power to resolve the dispute between supplier and buyer. To give effect to alternative dispute resolution mechanism to resolve disputes between supplier and buyer, where supplier is a Micro/Small/Medium enterprise/supplier, a specific mechanism is put in place in the Act, 2006.

17. Section 18 (2) requires the Council to first explore possibility of conciliation by itself or by taking assistance of any institution or centre by making a reference. While conducting conciliation,

Sections 65 to 81 of Act, 1996 are applicable. These sections are included in Part-III of the Act, 1996. Part-III deals with conciliation mechanism. Thus, under the Act, 2006, process of conciliation should start by asking the parties to the dispute to submit brief written statement describing general nature of the dispute and the points at issue (Section 65). There upon conciliation process would proceed and would terminate, resolving the dispute or otherwise. Termination of conciliation process can be at the instance of the conciliator(s) or the parties (Section 76).

18. If conciliation process fails to yield result, the Council can arbitrate the dispute. The provisions of Act, 1996 are applicable to conduct arbitration proceedings. Act, 2006 makes a departure from consent to resolve dispute by arbitration to compulsory arbitration mechanism to resolve the dispute. This is clear from Section 18(3) of the Act, 2006. On failure of conciliation process the Council can set in motion Arbitration proceedings and consent of parties is not required. However, before resorting to compulsory arbitration and subject the parties to arbitration, the Council must explore the possibility of conciliation mechanism.

19. Only when conciliation process is not successful and was terminated without any settlement, the Council acquires jurisdiction to assume the role of arbitrator. These two steps are to be followed sequentially and no power is vested in the Council to side step and directly jump to the stage of holding arbitration proceedings. Again at this stage, it can conduct arbitration proceedings on its own or refer to any institution or centre. Thus, to reach stage of Sub-section 3, Sub-section 2 of Section 18 has to

be complied. It is a well thought out scheme of the Act. In order to resolve the dispute amicably conciliation must be held and only if conciliation fails, the council should move to next stage. That being the statutory scheme, in the case on hand, on receipt of claim petition, Conciliation proceedings were not conducted by the council, but straightaway proceeded to arbitration stage.

20. The Council is creature of the statute and it has to work within the framework of the statute. When Section 18 of the Act, 2006 prescribes particular mode to resolve a dispute raised before it, the Council is duty bound to follow the procedure prescribed and cannot circumvent. No discretion is vested in the Council to circumvent the procedure, evolve its own procedure and adopt a particular mode of attending to the dispute. Further, the objective of Section 18 is very clear i.e., high priority is assigned to resolution of dispute by conciliation. Thus, holding conciliation is an essential element of the scheme and can not be circumvented. The Council comprises experts and they are supposed to have special skill to hold conciliation and persuade parties to resolve the dispute. Duty is cast on the Council to first attempt to resolve dispute by conciliation and only if it has failed, it should move to the next stage.

21. Learned counsel for 2nd respondent sought to contend that petitioner admitted in his statement of defence that conciliation proceedings failed between the petitioner and the 2nd respondent. In view thereof, there is no need for the council to conduct conciliation proceedings and, therefore, council has not erred in conducting arbitration proceedings.

22. Said contention is stated to be rejected. A plain reading of Sub-section (2) of Section 18 of the Act, 2006 makes very clear that it is mandatory for the council to conduct conciliation and only on termination of conciliation proceedings without settlement, it can proceed to the next stage. The failure of conciliation between the parties before the institution of claim petition has no relevance to apply the provisions of sub-sections (2) and (3) of Section 18 of the Act, 2006. The Council must record reasons on steps taken by it for resolution of dispute by conciliation and failure thereof and then only should proceed to hold arbitration proceedings. Further, even assuming what is stated by Sri Vishnuvardhan Reddy, is true, the Council ought to have atleast recorded reasons as to why it was resorting to Arbitration straight away, though Act, 2006 read with Act, 1996 does not vest such discretion in the Council. From the reading of the decision of the Council, it is seen that there is no whisper on even the alleged failures of earlier conciliation process, assuming it can take note of such process.

23. It is settled principle of law that when a statute provides for a thing to be done in a particular manner the Tribunal established under that statute must do in that manner and in no other manner (**Deepak Babaria and another vs. State of Gujarat and others¹⁶**). Thus, the Council clearly erred in directly proceeding to hold the arbitration proceedings. The council further erred in not advertng to the objection raised by the petitioner on this aspect and recording reasons why said objection is not valid.

¹⁶ 2014(3) SCC 502

24. Further, the Council has not assigned reasons in support of its decision. Deciding a dispute between two parties, unless resolved by conciliation, would affect one of the parties to the dispute. The affected party is entitled to contest such decision albeit within the limited parameters. It is his substantive right. Any such decision affecting a person should contain reasons in support of the decision.

25. Though lengthy proceedings, on a reading, it is apparent that upto paragraph-21 the council recorded the submissions of the claimant, reply of the respondent therein and the re-joinder and thereafter its decision.

26. At this stage, it is useful to extract the relevant paragraphs of the decision:

“22. The case was placed in the council meeting held on 20.02.2016 wherein claimant and respondent were present.

After examining the documentary evidences and the submissions of the claimant, the council hereby pass the following.

The respondent is directed to pay as follows:

A) 3,51,72,101/- (Rupees three crore fifty one lakhs seventy two thousand one hundred and one only) towards principle & 6,64,68,829/- (Rupees six crore sixty four lakh sixty eight thousand eight hundred and twenty nine only) towards interest totalling to 10,16,40,931/- (Rupees ten crore sixteen lakh forty thousand nine hundred and thirty one only).

B) Further interest with monthly rests at three times bank rate prevailing as on date of this award as notified by RBI on the amount adjudicated in terms of Section 16 of APMSMED Act 2006 till such date the respondent make full & final payment.”

27. It is apparent from the above extract that there is no discussion on submissions and no conclusions are recorded by the Council on the objections made by the petitioner and straightaway

amount is quantified and directed to pay the same. Further, petitioner has also made counter claim. Such claim requires consideration and record findings on to whether such claim is valid/maintainable but the decision is blissfully silent. Thus, it cannot be said that the decision is made in valid exercise of power by the Council under the Act 2006.

28. The procedure adopted by council would amount to circumventing the statutory scheme of dispute settlement mechanism and would thus amount to jurisdictional error.

29. As the order is vitiated on the above two counts, the petitioner need not be compelled to avail remedy provided by the Act, 2006 read with the Act, 1996 and writ petition is maintainable.

30. The issues 1 and 2 are answered accordingly.

ISSUE NOS: 3 & 4:

31. When agreement was entered, 2nd respondent was not registered as Small Scale Industry. However, in the year 2012, it was registered as Small Scale Industry. Learned counsel for petitioner sought to contend that as contract was entered into before it registered as Small Scale Industry, the terms of contract cannot be enforced by invoking remedy under the Act, 2006 and person has to avail common law remedy or avail arbitration proceedings as envisaged in Clause-15 of the Contract.

32. The Micro, Small and Medium Enterprises and Suppliers are established with own funds and/or by obtaining loans from

financial institutions. They have to operate within their small budgets. The Act, 2006 recognises the concerns expressed by the entrepreneurs and expert groups in the field on various aspects and particularly on delay in payments by buyers on supplies/ services provided by Micro/Small/Medium Enterprise/Supplier. Delay in payment of amounts due to them, would cause severe financial hardship, impose heavy burden on running costs and may also result in unit becoming unviable. Act, 2006 is a beneficial legislation made with primary objective of giving boost to Small Scale Industry and make them viable. The Act, 2006 puts in place various measures and safe guards. In order to encourage the Micro, Small and Medium enterprises and the suppliers, to establish such units and operate them successfully Act, 2006 also provides mechanism to ensure speedy recovery of dues.

33. In the instant case, letter of intent was issued on 4.6.2011 for supply, fabrication and erection of cold roller structures. The 2nd respondent registered as SSI on 23.4.2012. According to 2nd respondent, subsequently detailed orders for certain supplies and sources related to the Solar PV Plants of GMR's Project, Charanaka and TATA's project, Mitapur were given. He alleges that agreed payments terms were not complied and by the time claim petition was filed with Council, huge amount was due from petitioner. The averments in the affidavit filed in support of the writ petition and the counter affidavit of 2nd respondent are not clear on when contract terms were complied. However, it appears from writ petition record that the letter of intent dated 4.6.2011 is not the only supply contract but there are other orders also issued after that date. Therefore, in the facts of this, the 2nd respondent is

entitled to avail the remedy provided by Act, 2006 to recover the dues allegedly due to him from petitioner.

34. Chapter V of the Act, 2006 deals with delayed payments. As per Section 15, it mandates the buyer to make payments within 45 days of acceptance of goods and services. As per Section 16 on delayed payment enterprise/supplier is entitled to charge interest. Section 17 fixes liability on buyer to pay the amount with interest. Under Section 18, the supplier is entitled to file claim petition before the council on the dispute regarding amounts due as per Section 17. Section 18 opens with non obstante clause. Thus, the scheme of the Act leaves no ambiguity regarding rights of a supplier to recover amount due by filing a claim under Section 18 and terms of contract do not oust statutory right to recover the amounts if such claimant answers the description of Micro/Small/Medium enterprise/Supplier.

35. Having regard to the objectives of the Act and it being a beneficial legislation and the scheme envisaged in chapter-V of the Act, 2006, I am inclined to hold that 2nd respondent is entitled to avail the remedy provided by the Act to recover the amounts allegedly due from petitioner, and therefore the claim petition filed by the 2nd respondent under the Act, 2006 is maintainable.

36. The issues 3 and 4 are answered accordingly.

37. I have carefully considered the decisions relied by learned counsel Sri Vishnuvardhana Reddy. The decisions, in brief, are as under:

37.1. In **Goodyear India Ltd. v. Norton Intech Rubbers (P) Ltd.**, (supra), the Madras High Court held that as per Section 19 of the Act of 2006, pre-deposit of 75% of the award amount is mandatory for entertaining any Appeal/petition against the award passed by the Council.

37.2. In **Ballarpur Industries Limited** (supra), conciliation proceedings were initiated and after its failure arbitration proceedings were taken up and an award granted on its conclusion. This Court held that if the petitioner has any grievance against an arbitral award the only remedy available is under Section 34 of the Arbitration Act and cannot file a writ under Article 226 with the intention of avoiding the pre-condition of depositing 75% of the awarded amount, which is mandatory as per Section 19. The Court followed **Modern Industries** and **Goodyear India** (supra). This decision was reiterated and followed by this Court in **Orient Cement Limited** (supra).

37.3. In **Prithvi Solutions v. Union of India** (W.P. No. 15228 of 2015) and **VMC Vs. Union of India** (W.P. 15282 of 2015) the Division Bench of this Court dealt with the challenge to the constitutional validity of Sections 18 and 21 of the Act of 2006 and upheld the validity.

37.4. The Patna High Court in **The Best Towers Pvt. Ltd. v. Reliance Communication** ((Letters Patent Appeal No. 1935 of 2018) considered the dual role of the Facilitation Council stating that after the conciliation efforts have failed the Council is not debarred from adopting the role of an arbitrator under Section 18(3) of the Act of 2006.

37.5. In **Purbanchal Cables** (supra), Supreme Court considered whether the Act, 2006 would apply to those contracts which were entered prior to commencement of the Act, but supplies were effected after the Act came into force. The Supreme Court said Act, 1993 is prospective to claim higher rates of interest under the Act, 1992 and such claim is valid only for sale agreements after the date of commencement of the Act.

38.6. The decision in **Indur District Co-operative Marketing Society Ltd., Nizamabad** (supra) is set aside by the Division Bench in W.A.No.138 of 2016.

39.7. In **GE T&D India Limited** (supra), the question considered by the Delhi High Court was whether enterprise registered under Section 8 after the commencement of Act, 2006 take advantage of the Act, 2006. The Delhi High Court held that provisions of the Act, 2006 are applicable to the supplier and waiver of deposit of 75 % can not be granted.

39.8. In **Hameed Leather Finishers** (supra), the Allahabad High Court held that in execution proceedings validity of award, which attained finality, cannot be challenged.

39.9. In **Prime Technologies** (supra) at the stage of execution, plea was taken that award is not executable being a nullity. The Division Bench held entertaining objections at the stage of execution of decree would amount to going behind the decree in execution proceedings.

39.10. In **Modern Industries** (supra) Supreme Court declined to interfere with *ex parte* award made by Industry Facilitation Council (IFC) as buyer did not contest the claim of supplier on merits before IFC, did not dispute diverse claims of supplier and did not avail the statutory remedy available under the 1993 Act.

39.11. Before Delhi High Court in **Ramky** (supra), it was contended that dispute has arisen in respect of transactions entered into in the year 2010, when GCIL was not registered under the Act and therefore does not answer the description of 'Supplier' and therefore Council has no jurisdiction and reference was made without affording sufficient opportunity. Both contentions were rejected.

40. In the peculiar facts of the case, none of the decisions cited by learned counsel come to the aid of 2nd respondent.

41. As the council erred in not conducting conciliation proceedings before proceeding to hold arbitration proceedings defeating the very objective of the scheme of the Act as codified in Section 18 of the Act, 2006 and is bereft of reasons in support of the decision, it is *ex facie* illegal and liable to be set aside. Accordingly, it is set aside.

42. The Writ Petition is allowed. Matter is remitted to the Council to consider the claim petition filed by 2nd respondent. The Council shall first explore conciliation on *inter se* dispute strictly in accordance with Section 18 of the Act, 2006 read with Sections 65 to 81 of the Act, 1996. On failure to resolve the dispute by conciliation, it may resort to Arbitration, conduct arbitration

proceedings as envisaged in Section 18 of the Act, 2006 read with Act, 1996. As the claim is of the year 2015, Council is directed to expedite the issue and finalise within 90 days from the date of receipt of copy of this order. Its decision must be supported by reasons on due consideration of respective submissions. Parties are at liberty to make submission as available in law. Pending miscellaneous petitions, if any, stand closed.

JUSTICE P.NAVEEN RAO

Date: 12.11.2019
Kkm/tvk



HON'BLE SRI JUSTICE P.NAVEEN RAO



WRIT PETITION NO.24112 of 2016

Date: 12.11.2019

kkm/tvk