

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10764 OF 2015

Dhule Municipal Corporation,
Through its Commissioner,
C/o. Dhule Municipal Corporation
Dhule, Taluka and District Dhule

...Petitioner
(Ori. Respondent)

versus

1. Microvision Technologies
Through its Proprietor
Shri Atul Nemichand Dhadiwal,
Age 39 years, Occ. Business
R/o. 9, Suraj Enclave, B/h Thomas
Cook, Near ABB Circle,
Mahatma Nagar, Nashik
District Nashik

(Ori. Applicant)

2. The State of Maharashtra
Through the Secretary,
Commerce, Energy and Labour
Department, Mantralaya
Mumbai.

(Copies to be served on the
Government Pleader,
High Court at Aurangabad)

...Respondents

.....
Mr. Amol S. Sawant, advocate for the petitioner
Mr. A. S. Bajaj, advocate for respondent No.1
Mr. S. B. Pulkundwar, A.G.P. for respondent No.2-State
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Judgment :29.04.2021**

**Date of pronouncing
the Judgment : 18.08.2021**

JUDGMENT :-

1. Rule. Rule returnable forthwith. By consent of the parties,

heard finally at admission stage.

2. By this writ petition, the petitioner Dhule Municipal Corporation (hereinafter for the sake of brevity referred to as the "Corporation") is challenging the legality, validity and propriety of the judgment and award dated 13.2.2015 passed by the Micro and Small Enterprise Facilitation Council in petition No. 8 of 2011 whereby the petitioner is directed to pay Rs.3,40,804/- alongwith compound interest towards 59th bill for operation period 7.4.2011 till the realization of the decretal amount and Rs.3,60,034/- alongwith compound interest towards 60th bill for operation period 1.6.2011 till the realization of the decretal amount to the present respondent No.1-Microvision Technologies (hereinafter for the sake of brevity referred to as the "Enterprise").

3. Brief facts giving rise to the present writ petition are as follows:-

a) Respondent No.1-Enterprise claims to be the registered micro enterprise name and style as Microvision Technologies and it provides various engineering services in electronics and electrical field. The petitioner Corporation had invited tender for installation and operation of the energy saving units within the limits of Dhule city from the point of view of saving energy, maximum utility of the resources and for maintenance of ecological balance. It

was also with a view to save the Government exchequer by minimizing electricity bill of the streetlights.

b) On 11.10.2005, the petitioner Corporation and respondent No.1 Enterprise entered into an agreement. In terms of the said agreement, respondent No.1 Enterprise was to install solar panels/energy saving units (89 in numbers) in the city of Dhule. The said contract was to operate for a period of five years. In terms of the said contract, the profit earned by the Corporation due to saving of electricity was to be distributed in the ratio of 48% to respondent No.1 Enterprise and 52% to the petitioner Corporation. In terms of the said agreement, respondent No.1 Enterprise was allotted the work of installation of energy saving panels on Built, Own, Operate and Transfer (BOT) basis for a period of five years i.e. 60 months from the date of contract agreement i.e. from 11.10.2005. Pursuant to the said agreement, respondent No.1 Enterprise was allotted 48% share while the petitioner Corporation was entitled to retain 52% share in the total amount of saving in consumption of electrical units. In terms of the said agreement dated 11.10.2005, respondent No.1 Enterprise was required to provide/install the energy saving units for the street lights in Dhule Municipal Corporation area. The cost of 48% share of respondent

No.1 Enterprise was agreed to be commenced immediately after completion of the work, on month-to-month basis. The respondent No.1 Enterprise was entitled to receive the payment w.e.f. April, 2006.

c) It is the case of respondent No.1 Enterprise that though bills were submitted with the petitioner Corporation for release of amount on month to month basis, the petitioner allegedly did not release the said payment. According to the petitioner Corporation, respondent No.1 Enterprise had committed breach of the terms and conditions of the agreement. The petitioner Corporation received number of complaints about non working of the said panels/energy saving units and as a result of the said deficiencies, the petitioner Corporation could not earn any profit whatsoever.

d) In consequence of which respondent No.1 Enterprise had instituted R.C.S. No. 160 of 2007 before Civil Judge, Junior Division, Dhule seeking relief of injunction restraining the petitioner Corporation to act in violation of the terms of the contract agreement. However, the said suit was disposed of by order dated 29.6.2012 passed by the 8th Joint C.J.J.D. Dhule as withdrawn.

e) Further, respondent No.1 Enterprise had also filed writ petition No. 3516 of 2007 before the Division Bench of this Court seeking directions against the petitioner to pay the amount together with interest at the rate of 15% p.a. in respect of the work done by respondent No.1 Enterprise for installation and operation of energy saving units pursuant to the agreement dated 11.10.2005. In the said writ petition, since the petitioner Corporation accepted its liability to the extent of Rs.16,00,000/-, respondent No.1 Enterprise sought permission to withdraw the writ petition with liberty to avail alternate remedy of filing a civil suit for recovery of the amount. By order dated 11.8.2008 the Division Bench of this Court granted leave to withdraw the writ petition with liberty as prayed for by respondent No.1 Enterprise and dismissed the writ petition as withdrawn.

f) Respondent No.1 Enterprise had thereafter instituted Special Civil Suit No. 127 of 2008 for settlement of accounts. The learned Civil Judge, Senior Division, Dhule, by judgment and decree dated 3.4.2010 decreed the said suit with costs and thereby directed the petitioner Corporation to settle the account in respect of the profit earned due to installation of energy saving units by respondent No.1 Enterprise as per the work order allotted and also directed that Court Commissioner shall be

appointed to take and settle the account.

g) Respondent No.1 Enterprise had filed final decree application No. 2 of 2010 before Civil Judge, Senior Division, Dhule in terms of the decree passed in Special Civil Suit No. 127 of 2008. Learned Civil Judge, Senior Division, Dhule, by judgment and decree dated 22.7.2011 allowed the said application and directed the petitioner Corporation to pay Rs.84,15,444.06 (Rupees eighty four lakh fifteen thousand four hundred forty four and paise six only) to respondent No.1 Enterprise alongwith interest from the date of suit till realization of the decretal amount alongwith interest @ 11% p.a. on the said amount. The final decree was directed to be drawn after the payment of proper court fees.

h) The petitioner Corporation, being aggrieved by the same, has preferred First Appeal No. 3611 of 2011 before this Court challenging the aforesaid judgment and decree passed in the said suit and the said appeal is pending for final hearing. During pendency of the said appeal, the Division Bench of this Court has directed the petitioner Corporation to deposit certain amount. The Division Bench of this Court has also recorded that the parties agreed that the energy saving panels shall be installed within a period

of eight week under the supervision and control of two experts and accordingly gave directions to that effect.

i) Further, during pendency of the said Special Civil Suit No. 127 of 2008, respondent No.1 Enterprise had filed application No. 8 of 2011 under the provisions of The Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter for the sake of brevity referred to as the “MSMED Act, 2006”) before the Micro and Small Enterprises Facilitation Council, Nasik (hereinafter for the sake of brevity referred to as the “Facilitation Council”) alleging therein that the petitioner Corporation has not paid the bill for the month of February 2011 (59th bill) and also the bill for the month of March, 2011 (60th bill) and accordingly claimed the amount of Rs.7,88,481.66 with interest. The petitioner Corporation appeared before the Facilitation Council and resisted the application by filing written statement raising various issues. It was contended that the Facilitation Council has no jurisdiction to try and decide the dispute. It was also contended that the original suit of respondent No.1 Enterprise is for rendition of account and therefore, it is improper to say that the dispute was restricted only to the extent of 59th bill. It was also contended that the agreement had taken place between the parties and the same is not governed by the provisions

of the MSMED Act, 2006.

j) By judgment and order dated 30.02.2015, the Facilitation Council has allowed the said application No. 8 of 2011 with costs and directed the petitioner Corporation to pay Rs.3,40,804/- alongwith compound interest with monthly rests to respondent No.1 Enterprise from 24.3.2011 at three times of the bank rate notified by the Reserve Bank towards 59th bill for operation period 7.4.2011 till the realization of the decretal amount. In addition to the 59th bill, the petitioner Corporation is also directed to pay Rs.3,60,034/- alongwith compound interest with monthly rests to the respondent No.1 Enterprise from 18.4.2011 at three times of the bank rate notified by the Reserve Bank towards 60th bill for operation period 1.6.2011 till the realization of the decretal amount. It is also directed that the petitioner Corporation to pay the full decretal amount within four weeks. Being aggrieved by the same, the petitioner Corporation has preferred this writ petition on various grounds.

4. Learned counsel for the petitioner Corporation submits that the petitioner has filed preliminary objection on 25.6.2012 in petition No. 8 of 2011 before the Facilitation Council about maintainability of the petition due to lack of jurisdiction. Respondent No.1 Enterprise has

filed memorandum of enterprise as per Section 8 of MSMED Act, 2006 before the authority notified by the State Government on 3.7.2014. In terms of the provisions of MSMED Act, 2006, the supplier is entitled to invoke the provisions if the memorandum is filed with the authorities referred to in sub-section (1) of Section 8 of MSMED Act, 2006. Learned counsel submits that in terms of Section 8 of MSMED Act, 2006, the small scale industry is required to file memorandum of enterprise within stipulated period in accordance with the provisions of the MSMED Act, 2006. Further, in terms of the provisions of Maharashtra Micro and Small Enterprises Facilitation Council Rules, 2007, the application filed by the aggrieved enterprise supplier shall contain the particulars of transaction as well as an authentic copy of acknowledged receipt of Entrepreneurs Memorandum (part-II) is also required to be submitted. Learned counsel for the petitioner submits that the agreement between the Corporation and respondent No.1 Enterprise was executed on 11.10.2005 for the period commencing from April, 2006 to March, 2011. On the date of agreement, respondent No.1 Enterprise did not file memorandum as per Section 8 of MSMED Act, 2006. Respondent No.1 Enterprise is not the supplier as per the provisions of MSMED Act, 2006 and accordingly is not entitled to invoke the provisions of MSMED Act, 2006. Respondent No.1 Enterprise has filed petition in the month of August, 2011 before the Facilitation Council and submitted memorandum before the competent authority on 3.7.2014. Thus, on the date of agreement and on the date of

filing petition before Facilitation Council, respondent No.1 Enterprise was not a supplier within the meaning of Section 2(n) of MSMED Act, 2006. Respondent No.1 Enterprise is not entitled to invoke the provisions of MSMED Act, 2006 by filing memorandum subsequently with the authorities. Learned counsel submits that in view of the same, the Facilitation Council has no jurisdiction to entertain the reference petition filed under Section 18 of MSMED Act, 2006.

5. Learned counsel for the petitioner Corporation, in order to substantiate his contentions, placed reliance on the judgment in the case of ***Scigen Biopharma Pvt. Ltd. vs. Jagtap Horticultuer Pvt. Ltd.***, reported in ***AIR Online 2019 BOM 2080***. Learned counsel submits that considering the same, the impugned judgment and award passed by the Facilitation Council is without jurisdiction and as such, the writ petition filed before this Court is also maintainable. Learned counsel submits that if the writ petition is being filed, where the order or proceedings are wholly without jurisdiction, the writ petition is maintainable in spite of alternate statutory remedy.

6. Learned counsel for the petitioner submits that as per the terms of agreement dated 11.10.2005 between the petitioner Corporation and respondent Enterprise, it is an agreement of partnership for sharing the profit. It is not disputed that the share of respondent No.1 Enterprise is 48% in the profit in terms of the agreement. Thus, respondent No.1 Enterprise claims to be a

partner. Even it cannot claim to be a supplier. The concepts of partner and supplier are mutually exclusive.

7. Learned counsel for the petitioner Corporation submits that the impugned order/award dated 13.2.2015 is signed by only four arbitrators out of five and signature of one arbitrator is missing. In terms of provisions of Arbitration and Conciliation Act, 1996, the award is required to be signed by all members of the Arbitral Tribunal. If the award is not signed by any of the members, then the reason for such omission is required to be stated in the award. In the present case, no reasons have been mentioned in the award for the omission of signature of one member of the Facilitation Council (Tribunal). Thus, the impugned award is not enforceable in law.

8. Learned counsel for the petitioner Corporation submits that respondent No.1 Enterprise is claiming to be a registered SSI Unit with D.I.C. and therefore, it is not required to file memorandum as per the MSMED Act, 2006. Learned counsel submits that factually the certificate of registration of respondent No.1-Enterprise is as a tiny enterprise and valid up to 05.05.2008. Therefore, after 05.05.2008, there is no valid registration certificate in favour of respondent No.1 Enterprise. Learned counsel submits that apart from this, after filing of memorandum on 3.7.2014 for the first time, respondent No.1 Enterprise is classified as small enterprise considering the investment in plant and machinery. Prior to 3.7.2014, respondent

No.1 Enterprise was never classified as small enterprise. Thus, the provisions of MSMED Act 2006 could not have been made applicable retrospectively after filing of the memorandum by respondent No.1 Enterprise. Learned counsel submits that in terms of clause Nos. 4 and 11 of the agreement, no additional payment will be given to respondent No.1 Enterprise and the entitlement of respondent No.1 Enterprise is only restricted for sharing of profit. The petitioner Corporation is supplier of the electric polls and respondent No.1 Enterprise is supplier of energy saving units. Therefore, there is no subsisting relationship of buyer and supplier. In terms of clauses 4 and 5 of the agreement, the share in the profit is also quantified. Learned counsel submits that as per the pleadings of respondent No.1 Enterprise in para 2 of injunction suit No. 160 of 2007, it is mentioned that share of respondent No.1 Enterprise out of profit is to the extent of 48%. In para 3 it is stated that the work of installation of energy saving units is at the cost of respondent No.1 Enterprise. Thus, considering the same, it is crystal clear that no consideration was parted with by the petitioner Corporation for installation. In terms of provisions of Section 2(d) of the MSMED Act 2006, the buyer means who receives services from a supplier for consideration. In the present case, no consideration was paid for installation of energy saving units. Hence, the petitioner Corporation is not a buyer as per the said definition. Learned counsel submits that the judgment and order passed in final decree application No. 2 of 2010 dated 22.7.2011 is already objected by the petitioner Corporation by

preferring first appeal No. 3611 of 2011 and the said first appeal is still pending before this Court. The petitioner Corporation has raised various substantial grounds in the first appeal.

9. Learned counsel for the petitioner Corporation, in order to substantiate his submissions, placed reliance on the following cases:-

- i) Whirlpool Corporation vs Registrar of Trademarks, Mumbai and others, reported in (1998) 8 SCC 1,
- ii) Harbanslal Sahnia and another vs. Indian Oil Corporation Ltd. and others, reported in 2003 (2) SCC 107.
- iii) Chief Engineer, Hydel Project and others vs. Ravinder Nath and others, reported in (2008) 2 SCC 350
- iv) Union of India vs. Popular Construction Co. reported in (2001) 8 SCC 470
- v) Maharashtra State Electricity Distribution Company Ltd. and others vs. Deltron Electronics, reported in 2017 (2) Mh.L.J. 605.
- vi) Scigen Biopharma Pvt. Ltd. Vs Jagtap Horticultuer Pvt. Ltd. Reported in AIR Online 2019 Bom 2080.
- vii) Judgment of Gujarat High Court in the case of M/s. Easun Reyrolle Limited vs. M/s. Nik San Engineering Co. Ltd. In Special Civil application No. 6265 of 2018 dated 18.1.2019.

- viii) Principal Chief Engineer vs. Manibhai and Brothers (Sleeper) and Anr. reported in AIR 2012 Gujarat 44.

10. Learned counsel for respondent No.1 Enterprise submits that the petitioner Corporation has directly challenged the award passed by the Facilitation Council by filing the present writ petition. Learned counsel submits that in terms of the provisions of Section 18 of the MSMED Act, 2006, the Facilitation Council can itself conduct conciliation. In terms of the provisions of sub-Section (3) of Section 18, if the conciliation initiated is not successful and stands terminated without any settlement between the parties, the Facilitation Council shall either itself take up the dispute for arbitration or refer it to any institution or center 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. Learned counsel submits that the Facilitation Council has been statutorily conferred the power to act as an arbitrator. Learned counsel submits that in terms of section 2(4) of the Arbitration and Conciliation Act, 1996, the manner in which arbitration under various statutes is prescribed. Learned counsel for respondent No.1 Enterprise submits that Section 34(3) of the Act of 1996 mandates that the application for setting aside an award is to be filed within a period of 90 days from the date of passing of award

and the power to condone delay is restricted to further period of 30 days and not thereafter. Learned counsel submits that in the present case, the award was passed on 13.2.2015 and the present writ petition was filed on 12.10.2015 i.e. after 241 days. Learned counsel submits that the only recourse that can be had against the award is as per Section 34 of the Arbitration and Conciliation Act, 1996. Learned counsel submits that remedy which has been directly barred under Section 34 of the Arbitration and Conciliation Act cannot be permitted to be indirectly raised by presentation of writ petition. In view of the same, as the award has attained finality in terms of Section 35 of the Arbitration and Conciliation Act 1996, present writ petition questioning correctness of the same is not maintainable.

11. Learned counsel for respondent No.1 Enterprise submits that respondent No.1 Enterprise was already registered under the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 on 6.5.2003 and in view of the provisions of Section 32(2) of MSMED Act, 2006, such registration is deemed to have been valid. Learned counsel submits that since registration requirement arises out of the manual of departmental functions and procedure, such requirement is not statutory. Further, the objection regarding registration was not raised before the Facilitation Council at any point of time. As a matter of fact, petitioner Corporation was aware of such registration and therefore, objection regarding the same was not raised prior to filing

of the present writ petition. Learned counsel submits that the registration certificate was also submitted alongwith the tender. Learned counsel for respondent No.1 Enterprise submits that in terms of the provisions of Section 8 of MSMED Act 2006, the memorandum is mandatory only for the persons, who intend to establish a micro, small or medium enterprise and not for already registered entities before coming into force the MSMED Act, 2006.

12. Learned counsel for respondent No.1 Enterprise submits that in terms of the provisions of Section 4 of the Arbitration and Conciliation Act, the objection as to the jurisdiction is required to be raised on the first date of hearing. In the instant case, said objection was raised later than the first date of hearing i.e. on 25.6.2012, though the petitioner Corporation has appeared before the Facilitation Council on 22.11.2011. Learned counsel submits that the petitioner Corporation has filed an application Exh.27 before the executing court praying therein for installments to satisfy the award. As such, the request made by the petitioner Corporation clearly indicates that the petitioner Corporation has accepted the award and decided not to challenge the same. In view of its own conduct, the petitioner Corporation cannot turn back and question the legality of the award in writ jurisdiction of this Court. Further, in view of the lapse of period of limitation in terms of Section 34(3) of the Arbitration and conciliation Act, 1996, the petitioner Corporation is now estopped from questioning legality of the award. The petitioner

Corporation has never raised any proper objection to the locus of respondent No.1 as micro enterprise and supplier.

13. Learned counsel for respondent No.1 Enterprise submits that the Arbitration and Conciliation Act, 1996 is a complete Code in itself and judicial intervention in the said proceeding is not permissible in view of the provisions of Section 5 of said Act. The petitioner Corporation has made omnibus arguments on the issues which could not be raised in the arbitration proceeding. Thus, the forum prescribed by the Arbitration and Conciliation Act, 1996 cannot be altered by filing writ petition. The petitioner Corporation has raised various disputed questions of facts regarding registration, territorial jurisdiction etc. which require appreciation of evidence and for that purpose writ petition is not maintainable.

14. Learned counsel for respondent No.1 Enterprise submits that as per the website of Government of India, Ministry of Micro, Small and Medium Enterprise, respondent No.1 Enterprise is registered w.e.f. 28.10.2002 and a certificate to that effect is produced at page 192 of the compilation on behalf of the respondent. Learned counsel submits that so far as the issue of signatures of all five members on the award in terms of Section 21 of MSMED Act, 2006, the Facilitation Council shall consist not less three but not more than five members. Therefore, any order passed and signed by quorum would be considered as valid order passed under Section 18 of the MSMED

Act, 2006. The impugned award has been signed by four members which comply with the statutory requirements. Additionally, as per Section 24 of the MSMED Act 2006, the said Act has overriding effect even on Section 31 of the Arbitration and Conciliation Act, 1996.

15. Learned counsel for respondent No.1 Enterprise submits that the agreement between the parties is to be read as a whole. The very first page of the agreement states that the bid was for BOT (Built, Operate and Transfer) basis. Para 2 of the agreement states about issuing of work order. Respondent No.1 Enterprise is termed only as a contractor in the said agreement. The said agreement is in respect of supply of energy saver units and of providing services for maintaining those units. Learned counsel for respondent No.1 Enterprise submits that the consideration, which the petitioner Corporation is required to pay to respondent No.1 Enterprise for the work done is calculated in terms of saving in the energy bill required to pay to the MSEDCL. The mentioning of word "share" is only a formula adopted for defining the consideration to be paid towards the supply of units and services to be rendered to the petitioner Corporation. Learned counsel submits that if the agreement is read as a whole, the status of respondent No.1 Enterprise was always as a supplier. The petitioner Corporation has already charged and paid the Sales Tax/work contract Tax/VAT etc. which has also been referred to in the judgment and award passed in final decree

application No. 2 of 2010.

16. Learned counsel for respondent No.1 Enterprise has elaborately made submissions as to how the judgments relied upon by learned counsel for the petitioner Corporation are not applicable and those submissions will be dealt with at the appropriate stage.

17. Learned counsel for respondent No.1 Enterprise in order to substantiate his contentions, placed reliance on the following cases:-

- i) Order dated 27.10.2020 passed by the Division Bench of this Court (Principal Seat at Bombay) in Writ petition (L) No. 4049 of 2020;
- ii) Bhavan Construction vs. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. and Another, reported in 2021 SCC Online SC 8.
- iii) Judgment of Supreme Court dated 18.09.2020 in SLP (C) No. 8482 of 2020 (Punjab State Power Corporation Ltd. vs. Emta Coal Ltd. And Another,);
- iv) Judgment of Supreme Court in Civil Appeal No. 9106 of 2019 (Deep Industries Ltd. Vs Oil and Natural Gas Corporation Limited and Another)
- v) Union of India v. Popular construction Co., reported in (2001) 8 SCC 470;

- vi) Oil and Natural Gas Corporation Ltd. vs. Gujarat Energy Transmission Corporation Ltd. and Ors. reported in (2017) 5 SCC 42;
- vii) Tharsingh Nathmal and Others vs. Superintendent of Taxes, Dhubri and Others, reported in AIR 1964 SC 1419;
- viii) Karnataka State Pollution Control Board vs B. Heera Naik and Ors. Etc., reported in AIR 2020 SC 200;
- ix) Judgment of this Court dated 21.12.2020 in Civil Writ Petition (St.) No. 8056 of 2019 (Airports Authority of India v. M/s. Reliance Electronics & Anr.);
- x) Modern Industries vs. Steel Authority of India Ltd. and others reported in (2010) 4 MLJ 416 (SC);
- xi) Judgment of this Court in civil writ petition (St) No. 8056 of 2019 dated 19.10.2020 (Airports Authority of India vs. M/s Reliance Electronics and Anr);
- xii) Sterling Industries vs. Jayprakash Associates Ltd. and others, reported in AIR 2019 SC 3558;
- xiii) Nivedita Sharma vs. Cellular Operators Association of India and others, reported in (2011) 14 SCC 337;
- xiv) SBP and Co. vs. Patel Engineering Ltd. and Anr, reported in (2005) 8 SCC 618

18. I have carefully considered the submissions advanced by learned counsel for the respective parties. With their able assistance,

I have perused the pleadings, grounds taken in the petition, annexures thereto and reply filed by the concerned respondents.

19. The case of the petitioner Corporation can be summarised as below:-

- i) The petitioner corporation has raised preliminary objection on 25.6.2012 in petition No. 8 of 2011 before the Facilitation Council about maintainability of the petition due to lack of jurisdiction. According to the petitioner Corporation, respondent No.1 Enterprise has filed memorandum of enterprise as per the provisions Section 8 of MSMED Act, 2006 before the authority notified by the State Government on 3.7.2014. In terms of the provisions of Section 8 of MSMED Act, 2006, the small scale industry is required to file memorandum of enterprise within stipulated period. The agreement between the petitioner Corporation and respondent No.1 Enterprise was executed on 11.10.2005 for the period commencing from April, 2006 to March, 2011. On the date of agreement, respondent No.1 Enterprise did not file memorandum as per Section 8 of MSMED Act, 2006. Respondent No.1 Enterprise is not the supplier as per the provisions of MSMED Act, 2006 and accordingly is not entitled to invoke the provisions of MSMED Act, 2006. Respondent No.1 Enterprise has filed petition in the month of August, 2011 before the Facilitation Council and submitted memorandum before the competent authority on 3.7.2014. Thus, on the date of agreement and on the date of filing petition before Facilitation Council, respondent No.1 Enterprise was not the supplier within the meaning of Section 2(n) of MSMED Act, 2006. Respondent No.1 Enterprise is not

entitled to invoke the provisions of MSMED Act, 2006 by filing memorandum subsequently with the authorities. Thus, the Facilitation Council has no jurisdiction to entertain the reference petition filed under Section 18 of MSMED Act, 2006.

- ii) According to the petitioner Corporation, as per the terms of agreement dated 11.10.2005 executed between the petitioner Corporation and respondent Enterprise, it is an agreement of partnership for sharing the profit. It is not disputed that the share of respondent No.1 Enterprise is 48% in the profit in terms of the agreement. Thus, respondent No.1 Enterprise cannot claim to be the supplier.
- iii) The impugned order/award dated 13.2.2015 is signed by only four arbitrators out of five and signature of one arbitrator is missing. Thus, the impugned award is not enforceable in law.

20. The case of respondent No.1 Enterprise can be summarised as below:-

- i) In terms of provisions of Section 18 of the MSMED Act, 2006, the Facilitation Council can itself conduct conciliation. In terms of provisions of sub-Section (3) of Section 18, if the conciliation initiated is not successful and stands terminated without any settlement between the parties, the Facilitation Council shall either itself take up the dispute for arbitration or refer it to any institution or center providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 shall then apply to the

dispute. In terms of provisions of Section 34(3) of Arbitration and Conciliation Act, 1996 the application for setting aside an award is to be filed within a period of 90 days from the date of passing of award and the power to condone the delay is restricted to further period of 30 days and not thereafter. The impugned award has attained finality in terms of Section 35 of the Arbitration and Conciliation Act 1996. Thus, the writ petition questioning correctness of the same is not maintainable.

- ii) Respondent No.1 Enterprise was already registered under the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 on 6.5.2003 and in view of the provisions of Section 32(2) of MSMED Act, 2006, such registration is deemed to have been valid. Further, the objection regarding registration was not raised before the Facilitation Council at any point of time. In terms of the provisions of Section 8 of MSMED Act 2006, the memorandum is mandatory only for the persons, who intend to establish a micro, small or medium Enterprise and not for already registered entities before coming into force the MSMED Act, 2006.
- iii) In terms of the provisions of Section 4 of the Arbitration and Conciliation Act, the objection as to the jurisdiction is required to be raised on the first date of hearing.
- iv) The Arbitration and Conciliation Act, 1996 is a complete Code in itself and judicial intervention in the said proceeding is not permissible in view of the provisions of Section 5 of said Act. Thus, the forum prescribed by the Arbitration and Conciliation Act, 1996 cannot be altered by filing writ petition. The Facilitation Council shall consist not less three but not more

than five members. Therefore, any order passed and signed by quorum would be considered as valid order passed under Section 18 of the MSMED Act, 2006. The impugned award has been signed by four members which comply with the statutory requirements. Additionally, as per Section 24 of the MSMED Act 2006, the said Act has overriding effect even on Section 31 of the Arbitration and Conciliation Act, 1996.

- v) Respondent No.1 Enterprise is a supplier within the meaning of Section 2 of MSMED Act, 2006. The mentioning of word “share” is only a formula adopted for defining the consideration to be paid towards the supply of units and services to be rendered to the petitioner Corporation.

21. In terms of provisions of Section 2(n) of MSMED Act, 2006, the “*supplier*” means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-sections (1) of Section 8 of MSMED Act, 2006. The provisions of Section 8 of MSMED Act, 2006 reads as under:-

“8. Memorandum of micro, small and medium enterprises.--

(1) Any person who intends to establish,--

(a) a micro or small enterprise, may, at his discretion; or

(b) a medium enterprise engaged in providing or rendering of services may, at his discretion; or

(c) a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951,

shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):

Provided that any person who, before the commencement of this Act, established-

(a) a small scale industry and obtained a registration certificate, may, at his discretion; and

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951, having investment in plant and machinery of more than one Crore rupees but not exceeding ten Crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O. 477(E), dated the 25th July, 1991 filed an Industrial Entrepreneur's Memorandum,

shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.

(2) The form of the memorandum, the procedure of its filing and other matters incidental thereto shall be such as may be notified by the Central Government after obtaining the recommendations of the Advisory Committee in this behalf.

(3) The authority with which the memorandum shall be filed by

a medium enterprise shall be such as may be specified, by notification, by the Central Government.

(4) The State Government shall, by notification, specify the authority with which a micro or small enterprise may file the memorandum.

(5) The authorities specified under sub-sections (3) and (4) shall follow, for the purposes of this section, the procedure notified by the Central Government under sub-section (2).

22. In terms of sub-section (1) of Section 8 of the MSMED Act, 2006, any person who intends to establish the enterprise as detailed in clause (a) and (b), may, at his discretion; shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3): In terms of the proviso if any person who, before commencement of the Act, established (a) a small scale industry and obtained a registration certificate, may, at his discretion; file memorandum in accordance with the provisions of this Act. So far as clause (b) of the proviso which contemplates filing of memorandum is mandatory within 180 days from the commencement of this Act, for the industries as detailed in the said clause (b).

23. In view of the provisions of Section 32(2) of the MSMED Act, 2006, such registration also deemed to have been valid. Section 32

of the MSMED Act, 2006 is reproduced herein below:-

"32. Repeal of Act 32 of 1993.

(1) The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Act so repealed under sub-section (1), shall be deemed to have been done or taken under the corresponding provisions of this Act."

24. Learned counsel for respondent No.1 Enterprise submits that respondent No.1 Enterprise was already registered under the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 on 6.5.2003. Thus, in view of the provisions of Section 32(2) anything done or any action taken under repealed Act under sub-section (1) of Section 32 of the MSMED Act, 2006 shall be deemed to have been done or taken under the corresponding provisions of this Act.

25. Learned counsel for the petitioner Corporation has pointed out certain dates, which are as follows:-

Sr. No.	Date	Particulars
1	11.10.2005	Agreement entered into between the petitioner Corporation and respondent No.1 Enterprise.

- 2 August, 2011 Petition filed before the Facilitation Council.
- 3 03.07.2014 Respondent No.1 has filed memorandum in terms of Section 8 of the MSMED Act, 2006.

It is therefore, contended that as on the date of agreement, entered into, respondent No.1 Enterprise is not supplier due to non filing of memorandum with the authority.

26. Learned counsel for the petitioner Corporation further submitted that till completion of the period of agreement, no memorandum of enterprise came to be filed, hence, subsequent filing of the memorandum would not confer the status of the supplier relating back when the parties entered into the contract. Learned counsel submitted that the said issue is no more res-integra and in terms of the judgment delivered by this Court in the case of **Scigen Biopharma Pvt. Ltd. vs. Jagtap Horticultuer Pvt. Ltd, (supra)**, subsequent filing of memorandum under Section 8 of the MSMED Act, 2006 would not confer the status merely the enterprise retrospectively relating back to the date when the parties entered into the contract in question. This Court (Coram: G.S. Kulkarni, J.) at Principal Seat in para 33 has made the following observations:-

“33. I am thus of the clear opinion that the respondent was

not entitled to invoke the provisions of Chapter V and seek reference to arbitration under Section 18 of the MSMED Act as on the day on which the contract was entered into on 18 January 2008, the respondent was not a supplier within the meaning of MSMED Act and subsequent filing of memorandum under Section 8 on 25 October 2012, would not confer status of small enterprise retrospectively relating back to 18 January 2008 when the parties entered into the contract in question. The Arbitral Tribunal as constituted under Section 18 of the Act has clearly held that the date on which the contract was entered into between the parties, the respondent had not filed the memorandum as per the provisions of Section 8 of the Act and hence the respondent would not be entitled to benefits under Chapter V of the MSMED Act and accordingly, rejected the arbitration reference petition as filed by the respondent. In my opinion, the arbitral tribunal was correct in coming to this conclusion. The learned District Judge, in my opinion, was not correct in interfering with the award of the arbitral tribunal in the absence of any legal perversity. The provisions of the Act are also not applied in their correct perspective.”

27. In the facts of the case cited above, the appellant approached the respondent some time in the year 2008 for providing services of landscaping. On 18.01.2008 the appellant placed order on the respondent for the said work. As the payment remained outstanding, on 28.9.2011 the respondent issued legal notice to the appellant demanding outstanding payment. Respondent thereafter took steps to approach the District Industries Center on 25.10.2012, by filing an entrepreneur memorandum stated to be filed under Section 8 of the MSMED Act, 2006 which specified that the initial date of production

of the business of applicant was on 8.4.3006. By virtue of the respondent filing the memorandum, the respondent considered itself eligible to avail benefits under the MSMED Act, 2006. The respondent accordingly by invoking the provisions of the Act read with the Maharashtra Micro and Small Enterprises Facilitation Council Rules 2007, filed an application before the Facilitation Council making the claim of outstanding amount. This court set aside the impugned judgment and award passed by the District Judge in the arbitration application preferred against the award passed by the Facilitation Council.

28. Learned counsel for respondent No.1 Enterprise submits that in the case cited above, the provisions of MSMED Act, 2006 in relation to the industry established after commencement of the MSMED Act, 2006 are considered. In the instant case, respondent No.1 Enterprise is existing from the year 2002 and also registered under the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, on 6.5.2003. Photo copy of said certificate of registration which is valid up to 5.5.2008 as a tiny enterprise is placed on record without there being any application for production of document. The said certificate of registration was also not filed before the Facilitation Council. It is not clear from the said certificate of registration that the same has been issued to respondent No.1 Enterprise. Further, the original is also not

produced before this court. Even assuming for the sake of discussion that respondent No.1 Enterprise was registered as tiny enterprise, however, there is no provision in the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 for registration of any industrial undertaking as tiny enterprise.

29. Respondent No.1 Enterprise was registered as tiny enterprise valid up to 5.5.2008. After filing of the memorandum on 3.7.2014, for the first time, respondent No.1 Enterprise is classified as small enterprise considering the investment in the plant and machinery and prior to it, respondent No.1 Enterprise was not classified as small enterprise. I find much substance in the contentions raised by the petitioner Corporation that at the time of agreement dated 11.10.2005, respondent enterprise was not supplier and the petitioner Corporation was not buyer.

30. In terms of the provisions of Section 2(e) of the Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, a "small scale industrial undertaking" has the meaning assigned to it by clause (j) of Section 3 of the Industries (Development and Regulations) Act, 1951 (hereinafter for the sake of brevity referred to as the "Act of 1951"). In Section 3(j) of the Act of 1951, the "small scale industrial undertaking" is defined. The provisions of Section 2(e) of the Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 and Section 3(j) of

the Act of 1951 are reproduced herein-below:-

Section 2(e) of Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993

“2. Definitions.- In this Act, unless the context otherwise requires.-

(a) to (d) -----

(e) “small scale industrial undertaking” has the meaning assigned to it by clause (j) of section 3 of the Industrial (Development and Regulation) Act, 1951.”

Section 3(j) of the Act of 1951.

“3. Definitions.- In this Act, unless the context otherwise require.-

(a) to (i).-----

(j) “small scale industrial undertaking” means an industrial undertaking which, in accordance with the requirements specified under sub-section (1) of Section 11B, is entitled to be regarded as a small scale industrial undertaking for the purposes of this Act;”

Section 11B of the Act of 1951 empowers the Central Government to specify the requirements which shall be complied with by the small scale industrial undertaking. It appears that respondent No.1 Enterprise has given temporary registration as a tiny enterprise

valid upto 5.5.2008. Respondent No.1 Enterprise is not a small scale industrial undertaking in accordance with the requirements as specified under Section 11B of the Act of 1951.

31. I find no substance in the submissions made on behalf of respondent No.1 Enterprise that in terms of the provisions Section 8 of the MSMED Act, 2006 filing of memorandum is mandatory only for the person who intend to establish a micro, small or medium Enterprise and not for already registered entities before coming into force the MSMED Act, 2006. Thus, on the date on which the contract was entered into between the parties, respondent No.1 Enterprise had not filed memorandum as per the provisions of Section 8 of the MSMED Act, 2006 and hence, respondent No.1 Enterprise would not be entitled for the benefit under Chapter V of the MSMED Act, 2006.

32. On 11.10.2005, the petitioner Corporation and respondent No.1 Enterprise have entered into an agreement. As per the terms of the said agreement, respondent No.1 Enterprise was to install solar panels/energy saving units in the city of Dhule. The purpose of installation of the said panel was to save the electricity bills of the Corporation. It was therefore agreed that 48% of the amount of bill saved by the Corporation as a result of installation of said panels would be the share of respondent No.1 Enterprise. The period of service was for five years i.e. upto 60 months. The expenses about

cables, foundation panel, labour to be incurred by respondent No.1 Enterprise without paying any additional amount. For the said period of 60 months, as per the agreed terms, it was incumbent upon respondent No.1 Enterprise to cause repairs and maintain the units without any charges. It has been specifically referred in the said agreement that it is a build, operate and transfer agreement (BOT). After completion of the said period of 60 months, it was obligatory on the part of the respondent No.1 Enterprise to hand over the energy saver panels to the petitioner Corporation in good condition. The said copy of agreement dated 11.10.2005 is annexed with the petitioner at Exhibit "A". Respondent No.1 Enterprise has not disputed the same including the clause that it is an agreement based upon the build, operate and transfer (BOT).

33. In a BOT project, a private company is given a concession to build and operate a facility that would normally be built and operated by the Government. The facility might be a power plant, airport, toll road, tunnel, water treatment plant etc. The private company is also responsible for financing and designing the project. At the end of the concession period, the private company returns ownership of the project to the Government. The public private partnership (PPP) and build, operate and transfer (BOT) model is extensively used on the development of public infrastructure project. The concepts of public/private partnership (PPP) and build operate and transfer (BOT) is a contractual relations between the private and Government entities.

The BOT is an innovated approach by earning direct private sector investment in large scale infrastructure project. The BOT model is defined as the cooperation between government and the private entities to provide public infrastructure products and services.

34. The law relating to build, operate and transfer (BOT) in India has continuously amended several laws for the successful procurement of the infrastructure projects. For example the law of Land Acquisition, Rehabilitation and Resettlement (LARA) Act, 2013 was passed to enable the private developers to construct, operate and maintain the new infrastructure systems and to collect tolls and to recover the investment cost. Similarly, the National Highways Development Programme was launched in 1997 to develop the large road network in a relatively short period of time. This act enabled the private sectors to construct, operate and maintain the new road systems and thereafter recover the costs through the collection of tolls. In the road sector, the National Highway Act, 1956 and the National Highways Authority of India (NHAI) Act, 1988, was enacted to allow the government to grant private developers the right to participate to collect tolls on public roads. Subsequently, the Electricity Act, 2003 started the participation of private sectors in open access in the generation and distribution of electricity. In the current context, several international and national private investors are engaged under BOT guidelines to submit their competitive bids for various purposes on revenue sharing basis.

35. In the instant case, the nature of contract clearly demonstrates that it is a contract for installation of energy saver panels where the labour and service elements are involved. The purpose of installation of said panels was to save the electricity bills of the petitioner Corporation. The period of services was for five years i.e. upto 60 months and after completion of the said period, it is obligatory on the part of respondent enterprise to hand over the energy saver panels to the petitioner corporation in good condition. It is also agreed in the agreement that share of respondent No.1 Enterprise out of profit is to the extent of 48% as a result of the installation of the said panel. It would be thus inappropriate to term it as contract of sale. It is also difficult to accept that the supply of labour for installation and services shall only incidental to the supply of energy saver panels. Thus, the characteristics of the works contract are satisfied. The intended project work may indicate the factor for supply of goods and services but it also includes the use of material and skill in order to execute the project.

36. In Arbitration Appeal (St.) No. 30508 of 2019 in Arbitration Application (Commercial) No. 7 of 2019 this Court (Coram: A.K. Menon, J.) at principal seat, Bombay, has dealt with the identical issue i.e. where in the face of general and special conditions and the work order, the respondent Corporation can be subjected to the provisions of MSMED Act, 2006. This Court in para 22 onwards by

referring the various cases i.e. (i) *Shree Gee Enterprises vs. Union of India Anr. (Writ petition (C) 7201 of 2015 (Delhi High Court)*, (ii) *Rahul Singh vs. Union of India and others, (ARA (st.) No. 30508-19 (AS)-Division Bench of Allahabad High Court)*, (iii) *CCE and Customs vs. Larsen & Toubro Ltd. (2016) 1 SCC 170*, (iv) *M/s. Kone Elevators India Pvt. Ltd. vs. State of Tamil Nadu and othes (2014) 7 SCC 1* has held that MSMED Act, 2006 could not have been invoked in the case of Works Contract such as the one in hand. It is also observed that the contract is of a nature which required continuous supervision. There are multifarious activities to be carried out. In para 32, of the said order, this court observed as follows:-

32. *In the facts at hand, it will be seen that the contract is of a nature which required continuous supervision. There are multifarious activities to be carried out. The MSME Act contemplates supply of goods, purchase of goods, and rendering an acceptance of services. In the present case, having coming to the conclusion that it is a works contract and being indivisible and absent the need to deconstruct the contract into its components of sale supply and performance of labour related work it is evident that the MSME Act cannot be made applicable. For this very reason, expert determination is contemplated under the auspices of the Member Secretary or Secretary UDD-2."*

37. In the instant matter, considering the nature of the contract, which is composite in nature, not only involvement, installation and services but multifarious activities to be rendered, which requires

skill, continuous supervision and further return of the installed energy saver panels to the petitioner Corporation on good condition. It is specifically referred to that the contract is on BOT basis for which the share to the extent of 48% in the energy saver bills as agreed to be paid to respondent No.1 Enterprise. By any stretch of imagination, it cannot be termed as a contract for supply of goods, purchase of goods and rendering an acceptance of services.

38. It is vehemently submitted by learned counsel appearing for respondent No.1 Enterprise that the petitioner Corporation is remediless by its own conduct. Learned counsel for respondent No.1 Enterprise has referred the judgment dated 27.10.2020 in the case of ***Union of India vs. Maharashtra Steel Fabricators & Erectors***, rendered by the Division Bench of this Court (Principal Seat at Bombay) in Writ petition (L) No. 4049 of 2020; wherein in para 10, 13 and 15 the Division Bench of this court has made the following observations:-

“10. The Petitioner, having not applied under Section 34 of the Act in time, is seeking to challenge the award by filing a writ petition under Article 226 and 227 of the Constitution of India. Second issue therefore is whether the challenge to an Arbitral Award under article 226 and 227 of the Constitution of India could be entertained after the limitation period under the Act is over.

13. Thus, had the Petitioner filed this petition as an

application under Section 34 of the Act of 1996, admittedly it would have been beyond the permissible period and the Court under the Act would be powerless to entertain it. The Petitioner however contends that the powers of the High Court are not fettered by the limitation section 34 (3) of the Act and the High Court is not powerless to grant relief under its writ jurisdiction.

15. There is no merit in the submission of the Petitioner that it is rendered remediless which contrary to the Rule of Law. There is a distinction between nonexistence of remedies in law and not availing the remedy within limitation period. The Petitioner falls in the second category. Petitioner is remediless by its own conduct.”

39. Learned counsel for respondent No.1 Enterprise has further places his reliance on the judgment of the Supreme Court in the case of ***Modern Industries vs. Steel Authority of India Ltd. and others (supra)***; wherein in para 42, the Supreme court has made the following observations:-

“42. Lastly, it was submitted by learned senior counsel for the respondents that IFC's award was delivered ex-parte and no reasons have been given in support thereof; the award does not reflect any application of mind. He would submit that if appeals are allowed and award is sustained that would cause grave prejudice to the buyer inasmuch as the original contract was for a sum of Rs. 8.19 lakhs, out of which Rs. 6.07 lakhs have already been paid in July, 1997 and goods worth balance amount were given to the supplier and yet buyer is saddled with the liability for an amount of Rs. 24,86,998/- with interest at the rate of 18 per cent compounded with monthly

rests from 24.9.1997 which may run into crores of rupees. The situation in which the buyer has been placed is their own creation. They chose not to contest the claim of the supplier before IFC on merits. No written statement was filed despite opportunity granted by IFC. The buyer did not challenge nor disputed diverse claims made by the supplier (including additional work) before IFC. Even before the High Court, no submission seems to have been made on merits of the award at all. In the circumstances, the buyer does not deserve any indulgence from this Court. Pertinently, though 1993 Act provides a statutory remedy of appeal against the award but the buyer did not avail of the statutory remedy and instead challenged the award passed by IFC before High Court in extraordinary jurisdiction under Article 226 of the Constitution bypassing statutory remedy which, in our view, was not justified.”

40. Learned counsel for respondent No.1 Enterprise has vehemently submitted that the Facilitation Council has been statutorily conferred the power to act as an arbitrator. Furthermore, the provisions of Arbitration and Conciliation Act, 1996 apply to the arbitration proceeding. Section 24 of Arbitration and Conciliation Act, 1996, deals with the manner in which arbitrations under various statutes are required to be conducted. Furthermore, Section 34(3) of the Arbitration and Conciliation Act, 1996 mandates that the application for setting aside the award is to be filed within a period of 90 days from the date of passing of the award and power to condone the delay is restricted to further period of 30 days and not after that. Learned counsel for the respondent enterprise submitted that the only recourse that can be available is as per the provisions of Section

34 of the Arbitration and Conciliation Act 1996.

41. Learned counsel for respondent No.1 Enterprise thus placed his reliance on the judgment of the Supreme Court in the case of ***Oil and Natural Gas Corporation Ltd. vs. Gujarat Energy Transmission Corporation Ltd. and Ors.*** (supra). In para 15 of the said judgment, the Supreme court has made following observations;-

“15. From the aforesaid decisions, it is clear as crystal that the Constitution Bench in Supreme Court Bar Association (supra) has ruled that there is no conflict of opinion in Antulays case or in Union Carbide Corporations case with the principle set down in Prem Chand Garg v. Excise Commissioner. Be it noted, when there is a statutory command by the legislation as regards limitation and there is the postulate that delay can be condoned for a further period not exceeding sixty days, needless to say, it is based on certain underlined, fundamental, general issues of public policy as has been held in Union Carbide Corporations case. As the pronouncement in Chhattisgarh State Electricity Board (supra) lays down quite clearly that the policy behind the Act emphasizing on the constitution of a special adjudicatory forum, is meant to expeditiously decide the grievances of a person who may be aggrieved by an order of the adjudicatory officer or by an appropriate Commission. The Act is a special legislation within the meaning of Section 29(2) of the Limitation Act and, therefore, the prescription with regard to the limitation has to be the binding effect and the same has to be followed regard being had to its mandatory nature. To put it in a different way, the prescription of limitation in a case of present nature, when the statute commands that this Court

may condone the further delay not beyond 60 days, it would come within the ambit and sweep of the provisions and policy of legislation. It is equivalent to Section 3 of the Limitation Act. Therefore, it is uncondonable and it cannot be condoned taking recourse to Article 142 of the Constitution.

42. Learned counsel has also placed his reliance on the Judgment of Supreme Court dated 18.09.2020 in SLP (C) No. 8482 of 2020 **(Punjab State Power Corporation Ltd. vs. Emta Coal Ltd. and Another) (supra)** wherein the Supreme court has referred its earlier decision in the case of **Deep Industries Ltd. v. Oil and Natural Gas Corporation Ltd. & Anr. (2019) SCC Online SC 1602** and by referring the same, the Supreme Court has made the following observations:

“We are of the view that a foray to the writ Court from a section 16 application being dismissed by the Arbitrator can only be if the order passed is so perverse that the only possible conclusion is that there is a patent lack in inherent jurisdiction. A patent lack of inherent jurisdiction requires no argument whatsoever – it must be the perversity of the order that must stare one in the face.

Unfortunately, parties are using this expression which is in our judgment in Deep Industries Ltd., to go to the 227 Court in matters which do not suffer from a patent lack of inherent jurisdiction. This is one of them. Instead of dismissing the writ petition on the ground stated, the High Court would have done well to have referred to our judgment in Deep Industries Ltd.

and dismiss the 227 petition on the ground that there is no such perversity in the order which leads to a patent lack of inherent jurisdiction. The High Court ought to have discouraged similar litigation by imposing heavy costs. The High Court did not choose to do either of these two things. In any case, now that Shri Vishwanathan has argued this matter and it is clear that this is not a case which falls under the extremely exceptional category, we dismiss this special leave petition with costs of Rs.50,000/- to be paid to the Supreme Court Legal Services Committee within two weeks.”

43. Learned counsel for respondent No.1 Enterprise has relied upon various cases as referred in the foregoing paras on the similar issue as discussed above.

44. Learned counsel for the petitioner Corporation on this point has placed reliance on the judgment in the case of ***Whirlpool Corporation vs Registrar of Trademarks, Mumbai and others, (supra)***, wherein in para 14 and 15, the Supreme court has made the following observations:-

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

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

45. Learned counsel for the petitioner Corporation has placed his reliance in the case of **Harbanslal Sahnia and another vs. Indian Oil Corporation Ltd. and others**, (supra), wherein the Supreme court in para 4 and 7 held that alternate remedy as per arbitration clause was available and in spite of availability of alternate remedy, the High Court has jurisdiction if the orders in the proceeding are wholly without jurisdiction. Para 4 and 7 of the said judgment are reproduced herein below:-

"4. The appellants filed a writ petition laying challenge to the order of termination. The petition has been dismissed by the High Court on the ground that the relationship between the parties is contractual and the dealership agreement

contains an arbitration clause and therefore the appropriate remedy available to the appellants was to have recourse to arbitration rather invoking the writ jurisdiction of the High Court. The appellants sought for a review of the order of the High Court which prayer has been refused. The appellants have filed these appeals by special leave.

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

46. Learned counsel for the petitioner Corporation has also placed reliance on the judgment of Supreme court in the case of **Chief Engineer, Hydel Project and others vs. Ravinder Nath and others (supra)**, wherein in para 25, 26 and 28, the Supreme court

held that the doctrine of *coram non judice* applied and held that the order passed is null and void and therefore, issue of jurisdiction can be agitated at any point of time before the court.

47. In the instant case, I am of the considered opinion that the proceedings before the Facilitation Council are wholly without jurisdiction. The respondent No.1 Enterprise cannot be termed as supplier. Furthermore, the composite work of installation, services and maintenance for considerable period has been awarded to respondent No.1 Enterprise after successful bidding process and admittedly the agreement has been entered into between the parties on BOT basis. In consequence thereof, respondent No.1 Enterprise has given share in energy saver bills to the extent of 48%. In view of the above, this court can exercise writ jurisdiction, as the proceeding before the Facilitation Council and the impugned order passed in the said proceedings are wholly without jurisdiction. Thus, in my considered opinion, further reference to the provisions of Arbitration and Conciliation Act, 1996 on the point of delay and alternate remedy as available in terms of the provisions of the said Act may not be relevant, when the Facilitation Council has entertained the proceeding and passed order without jurisdiction.

48. In view of the above discussion and the decisions rendered by the Supreme Court and the High Courts in various cases, as relied upon by the counsel for the respective parties, I proceed to

pass the following order:-

O R D E R

- I. Writ petition is hereby allowed.
- II. The judgment and award dated 13.02.2015 passed by Micro, Small Enterprises Facilitation Council (MSEFC), Nashik Division, Nashik in petition No. 08 of 2011 (M/s. Microvision Technologies, Nashik v/s Commissioner, Dhule Municipal Corporation, Dhule) is hereby quashed and set aside.
- III. The petition No. 08 of 2011 (M/s. Microvision Technologies, Nashik v/s Commissioner, Dhule Municipal Corporation, Dhule) is hereby dismissed.
- IV. The writ petition is accordingly disposed of.
- V. Rule is made absolute in the above terms.

(V. K. JADHAV, J.)

rlj/