

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 8496 OF 2019

Bajaj Auto Limited,
A Company registered under
The Companies Act, 1956 having
its registered Office at : Akurdi,
Pune, Through its Authorized Officer
Mr. Madhusudan S/o Mohanlal Mundada,
Age : 60 Yrs, Occ. :- Service,
R/o Waluj, Aurangabad .. Petitioner

Versus

1. The State of Maharashtra
Through Directorate of Industries,
Second Floor, New Administrative Bldg.,
Madam Cama Road, Opp.
Mantralaya, Mumbai.
2. Joint Director of Industries for
Development Commissioner (Industries)
Second Floor, New Administrative Bldg.,
Madam Cama Road, Opp.
Mantralaya, Mumbai.
3. M/s S. M. Solar Products Ltd.,
C-187, MIDC, Waluj,
Aurangabad – 431136
Through its Director/Authorized Signatory,
Mr. Suresh A. Fulare,
Age :- 45 yrs, Occ:- Service,
R/o Aurangabad.
4. Micro, Small & Medium Enterprises
Felicitation Council (Sukarta Parishad),
Through its Chairman and Member
Secretary (Industry Facilitation Council,
Aurangabad Division, Aurangabad),
Joint Director of Industries,
Aurangabad Region,
Vikas Bhavan, Second Floor,
Adalat Road, Aurangabad-431001. .. Respondents

Shri L. D. Vakil, Advocate for the Petitioner.
Shri K. B. Jadhavar, A.G.P. for the Respondent Nos. 1 and 2.
Shri V. D. Sapkal, Senior Advocate i/by Shri Yogesh S. Thorat,
Advocate for the Respondent No. 3.
The Respondent No. 4 is served.

CORAM : SANDEEP V. MARNE, J.

CLOSED FOR JUDGMENT ON : 17.10.2022
JUDGMENT PRONOUNCED ON : 20.10.2022

JUDGMENT :

. Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing.

2. Maintainability of writ petition challenging the award of the Micro and Small Enterprises Facilitation Council and jurisdiction of the Council to decide a dispute arising before coming into effect of the Micro, Small and Medium Enterprises Development Act, 2006 are the two issues that need to be determined in the present petition.

3. Considering the broad two legal issues to be decided in the petition, it is not necessary to narrate the entire factual background under which the dispute between the parties has arisen.

4. Petitioner is a well known automobile manufacturer having one of its manufacturing facilities at Waluj in Aurangabad. Respondent No. 3 is a manufacturer of silencers, which are supplied *inter alia* to Petitioner. The dispute pertains to outstanding payment in respect of parts supplied by the

respondent No. 3 to Petitioner during the years 2001-2002.

5. After coming into effect the Micro, Small and Medium Enterprises Development Act, 2006 (for short “MSMED Act”), the respondent No. 3 registered itself as a supplier. A claim was filed by it before the Micro and Small Enterprises Facilitation Council, Aurangabad, which was registered as Reference Proceeding No. MSMED/2/2012, which came to be dismissed by Award dated 06.08.2012 holding that respondent No. 3 had already received an amount of Rs. 1,50,000/- towards full and final settlement from Petitioner. The Award was challenged by respondent No. 3 in Writ Petition No. 9101 of 2012, which came to be dismissed for non-prosecution on 06th September, 2021.

6. Without disclosing filing and decision of earlier proceedings, the respondent No. 3 filed a fresh claim before the Facilitation Council in the year 2017 demanding amounts of Rs 8.64 Crores and Rs. 1,16,393.30 along with interest. The claim was resisted by Petitioner by filing its counter raising both the issues of suppression of earlier proceedings as well as jurisdiction of the Council to deal with the dispute relating to the period prior to coming into effect of the MSMED Act. By Award dated 28th April, 2019, the Council has proceeded to uphold the claim to the extent of Rs. 1,16,393/- along with compound interest with monthly rests at three times of the bank rate with effect from 31.03.2002. Aggrieved by the Award, the petitioner has filed present petition.

7. As the hearing commenced, I expressed a surprise as to how both the parties have routinely resorted to challenging the

Awards passed by the Facilitation Council by filing writ petitions rather challenging them under Section 34 of the Arbitration and Conciliation Act, 1996 (for short “Act of 1996”). Mr. Vakil, the learned counsel appearing for the petitioner has therefore made strenuous submissions before me to demonstrate how a writ petition challenging the Award of the Facilitation Council is maintainable in the peculiar facts and circumstances of the case. Linked with the issue of maintainability of writ petition challenging the Award of the Facilitation Council, is a question whether Facilitation Council had jurisdiction to entertain dispute pertaining to the period prior to coming into effect MSMED Act. Accordingly, I have heard both the parties extensively on both the issues, in addition to few submissions on merits of the matter.

8. Appearing for the petitioner Mr. Vakil, the learned counsel for the petitioner would submit that the Award passed by the Facilitation Council is wholly without jurisdiction and is a nullity. He would submit that, the MSMED Act came into force with effect from 18.07.2006, Respondent No. 3 was registered as a supplier under the Act after 18-07-2006 and the Facilitation Council established under the Act did not have jurisdiction to decide the dispute relating to supply made during prior period. He would submit that, since the Award of the Facilitation Council is a nullity, the writ petition filed under the provisions of Article 226 and 227 of the Constitution of India would be maintainable. He would submit that it is not necessary for the petitioner to challenge the Award under the provisions of the Section 34 of the Act of 1996, when the award itself is nullity. Mr. Vakil would then submit that despite the issue of lack of

jurisdiction of Facilitation Council been specifically raised before it, the Council has simply ignored it while passing the impugned Award.

9. Mr. Vakil would also submit that the claim of the respondent No. 3 was otherwise barred by *res-judicata*, as the same was already decided and rejected by the Facilitation Council in the year 2012. Mr. Vakil accuses the respondent No. 3 of suppressing those proceedings while filing fresh claim before the Facilitation council. He would submit that the claim is otherwise hopelessly barred by limitation and ought not to have been entertained by the Council. Lastly, Mr. Vakil would submit that the impugned award saddles the petitioner with the compound rate of interest three times that of the bank rate with effect from 31.03.2002 in respect of stale claim of the respondent No. 3.

10. In support of his contentions, Mr. Vakil has relied upon following judgments :

- I. Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai reported in (1999) 4 SCC 382.
- II. Silpi Industries Etc. Vs. Kerala State Road Transport Corporation and another reported in 2021 SCC OnLine SC 439.
- III. Order of the Supreme Court in Bajaj Auto Ltd. Vs. Ajanta Press and Mechanical Works and others in S.L.P. (Civil) No. 1743 of 2020 decided on 13.09.2022.
- IV. Judgment of Punjab and Haryana High Court in M/s. Gats Financial Reconstructors Ltd. Vs. Director of Industries

cum Chairman, Industrial Facilitation Council, Punjab and others reported in 2016 SCC OnLine P&H 13357.

- V. Judgment of the Karnataka High Court in Karnataka Power Transmission Corporation Ltd. Vs. Government of Karnataka reported in 2019 SCC OnLine Kar 2184.
- VI. Judgment of the Jharkhand High Court in Central Coalfields Ltd. Vs. Jharkhand Micro Small and Medium Enterprises Facilitation Council reported in 2015 SCC OnLine Jhar 3903.

11. Per contra, Mr. Sapkal, the learned Senior Advocate appearing on behalf of the respondent No. 3 opposes the petition on the ground of maintainability. He would submit that in view of express provisions of Section 18 of the MSME Act, the only remedy available to the petitioner is to file petition U/Sec. 34 of the Act of 1996. He questions maintainability of the present petition. Referring to provisions of Sections 24 and 32 of the MSMED Act, he would submit that the claim of Respondent No. 3 would be saved for being dealt with by the Facilitation Council. He would submit that despite order of this court to deposit the awarded sum in Court, Petitioner not deposited the same and only the principal amount has been deposited.

12. In support of his contentions, Mr. Sapkal relies upon following judgments:

- I. Principal Chief Engineer Vs. Manibhai and Brothers (Sleeper) and another reported in AIR 2012 Gujrat 44.
- II. Maharashtra State Electricity Distribution Company Ltd. and another Vs. Deltron Electronics reported in 2017(2)

Mh. L. J. 605.

- III. M/s Sterling Industries Vs. Jayprakash Associates Ltd. and others in Civil Appeal No. 7117 of 2017 decided on 10.07.2019
- IV. Krishi Utpadan Mandi Samiti, Sikandra Rao Vs. U. P. Industry Facilitation Council and others reported in AIR 2009 All

13. Rival contentions of the parties now fall for my consideration.

14. The issue of maintainability of writ petition challenging Award of Facilitation Council is interlinked with the issue of jurisdiction of the Council to decide the present dispute. It is Petitioner's contention that the dispute pertaining to year 2001-2002 cannot be adjudicated by the Facilitation Council established under the provisions of the MSMED Act, which came into effect on 18.07.2006. Since Award is without jurisdiction, it is a nullity and hence this court would be justified in entertaining writ petition under Article 226 of the Constitution of India. Therefore first, I will have to decide the issue of jurisdiction.

14. To decide the issue of jurisdiction, I straightway refer to the judgment of the Apex Court in **Silpi Industries Etc.** (supra). The Supreme Court was essentially dealing with following two issues.

- (I) Whether the provisions of Indian Limitation Act, 1963 is applicable to arbitration proceedings initiated under Section 18(3) of Micro, Small and Medium Enterprises Development Act, 2006 ?; and

- (ii) Whether, counter claim is maintainable in such arbitration proceedings?

15. The first issue was answered by the Supreme Court holding that provisions of the Indian Limitation Act, 1963 would apply to arbitration proceedings initiated under the MSMED Act. The second issue before the Supreme Court is not relevant to the present case. However, what is of significance is that the Apex Court has dealt with claim of the appellant seeking under MSMED Act in respect of supplies concluded prior to the registration of the supplier. In para No 26 of the judgment, the Apex Court has held as under:

"26. Though the appellant claims the benefit of provisions under MSMED Act, on the ground that the appellant was also supplying as on the date of making the claim, as provided under Section 8 of the MSMED Act, but same is not based on any acceptable material. The appellant, in support of its case placed reliance on a judgment of the Delhi High Court in the case of GE T&D India Ltd. v. Reliable Engineering Projects and Marketing⁵, but the said case is clearly distinguishable on facts as much as in the said case, the supplies continued even after registration of entity under Section 8 of the Act. In the present case, undisputed position is that the supplies were concluded prior to registration of supplier. The said judgment of Delhi High Court relied on by the appellant also would not render any assistance in support of the case of the appellant. In our view, to seek the benefit of provisions under MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under MSMED Act. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court, in the judgment in the case of Shanti Conductors Pvt. Ltd. & Anr. etc. v. Assam State Electricity Board & Ors. etc. has held that date of supply of goods/services can be taken as

the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act. There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of appellant as the unit under MSMED Act, 2006. By taking recourse to filing memorandum under sub-section (1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which appellant entered into contract with the respondent. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of MSMED Act 2006, by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation.

16. Thus, the Supreme Court, in **Silpi Industries Etc.** (supra), has held that registration obtained under the MSMED Act would be prospective and would apply only to the goods supplied subsequent to the registration and same cannot operate retrospectively. The issue of applicability of the provisions of the MSMED Act to goods supplied prior to the coming into effect of the Act has been squarely answered by the Supreme Court in **Silpi Industries Etc.** (supra).

17. The same issue has been considered by the Division Bench of this Court in **JSW Steel Limited Vs. Kamlakar V. Salvi and others** in Writ Petition No. 12897 of 2016 decided on 04.10.2021, in which the Division Bench of this Court has determined both

the issues of jurisdiction of MSMED Facilitation Council as well as maintainability of the writ petition. Relying on **Silpi Industries Etc.** (supra), the Division Bench of this Court has held in para No. 34.4 as under:

34.4. From the above, we find that Supreme Court has clarified that if any registration under the MSMED Act is obtained, the same will be prospective and would apply to supply of goods and services subsequent to registration but cannot operate retrospectively. According to the Supreme Court, any other interpretation of section 8 would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation.

18. Applying the above ratio to the facts of present case, the dispute before the Council undeniably pertains to supplies made prior to registration of Respondent No. 3 as a supplier under the MSMED Act. Therefore in respect of that supply, registration of Respondent No. 3 as supplier under the Act will not apply. The Facilitation Council established under the provisions of the MSMED Act would therefore not have jurisdiction to decide the disputes relating to that supply. The inescapable conclusion that needs to be drawn is that the Facilitation Council did not have jurisdiction to decide the disputes relating to supply of goods by the respondent No. 3 during 2001-2002 and the award of the Council is without jurisdiction.

19. Having held that the Facilitation Council did not have jurisdiction to decide the disputes and that the Award of the council is without jurisdiction, now I turn to the issue of maintainability of the present petition. In ***Whirlpool Corporation*** (supra), the Apex Court has held that when a writ petition is filed for enforcement of any fundamental rights or

where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged, writ petition is maintainable notwithstanding existence of an alternate remedy. In this regard para 13 of the judgment reads thus:

“13. 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 proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decision of the evolutionary era of the constitutional law as they still hold the field.”

20. Mr. Vakil has relied upon the three decisions of various High Courts, wherein writ petitions were entertained challenging awards passed by the Facilitation Council after it was found that the awards were without jurisdiction. In *M/s. Gats Financial Reconstructors Ltd.* (supra), the Punjab and Haryana High Court has held in para Nos. 9 and 10 as under :

“9. Now the question arises whether in the present case the provisions of the MSMED Act will apply for the acts done prior to coming into force of the MSMED Act and whether the benefit of provisions of the MSMED Act can be given to the petitioner for the services rendered prior to its registration ?

10. The perusal of record reveals that reference relates to October 2005 when the MSMED Act was not in force so

question of applicability of the provisions of the MSMED Act retrospectively does not arise as the Act came into force w.e.f. 18.07.2006 so question of answering the reference does not arise. Furthermore the provisions of the MSMED Act cannot be made applicable for the services done prior to the registration of the petitioner with the respondents No. 1 and 2. Otherwise also the services assigned to the petitioner service provider are not covered in the WTO list under the financial services category (Annexure R1 Colly). Respondents No. 1 and 2 have declined reference after receiving advice from the Government of India. The petitioner is required to prove by cogent evidence that it has been authorised by the concerned bank i.e. Indian Overseas Bank for providing financial consultancy services. Learned counsel for the petitioner has failed to show any document authorising the petitioner by the concerned bank for the services for which it claims interest on delayed payment, in these circumstances elaborated reasons were not required to be given for declining reference."

21. In *Karnataka Power Transmission Corporation Ltd.* (supra) the Single Judge of the Karnataka High Court was dealing with the issue where initially suits were filed challenging the award of the Facilitation Council, which were withdrawn. Later, writ petitions were filed in the High Court challenging the award. The Karnataka High Court has held in para Nos. 13, 15 and 22 as under :

13. The main ground of attack of the petitioner is that the provisions of the Act are not applicable to the present case on hand for the reason that the respondent No.2 is not a 'supplier' in terms of Section 2(n) of the Act and is not governed by the provisions of the Act. To analyse the same, it is apt to refer to Section 2(n) of the Act in terms of which, 'supplier' means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of Section 8.

15. Nextly it is beneficial to refer to the judgment Hon'ble Apex Court in the case of Shanti conductors wherein the Hon'ble Apex Court considering the provisions of the Industrial Undertakings Act 1993 which is akin to the Act

2006 has held that the incidence of applicability of the liability under the Act is supply of goods or rendering of service. In the said case, the Assam Electricity Board placed an order for supply of all conductors on 31.3.1992. The supplies were made during June and December 1992. On 13.5.1992 another order was placed by the Board for the supply of various types of conductors. On 23.09.1992 the President of India promulgated an ordinance, namely, the Interest on Delayed Payment to Small Scale Ancillary Industrial Undertakings Ordinance, 1992. Subsequently, on 02.04.1993, the interest on Delayed Payment to Small Scale and Ancillary Industrial Undertaking Arbitration Act, 1993 was enacted and it was deemed to have come into force with effect from 23.09.1992.

22. For the aforesaid reasons, it is held thus:

- (i) the Respondent Nos.2 are not suppliers in terms of section 2(n) of the Act.
- (ii) provisions of the Act, 2006 are not applicable to the supplies made by the respondent Nos.2 prior to the enforcement of the Act.
- (iii) claim/s made by the respondent Nos.2 is/are barred by limitation in terms of the provisions of the Limitation Act, 1963.
- (iv) The award impugned passed by the Council under the provisions of the Act, 2006 is being without jurisdiction, writ petition is maintainable.
- (v) Respondent No.1 not being a proper and necessary party to the proceedings, liability fastened jointly and severally on the respondent No.1 cannot be substantiated.

22. In *Central Coalfields Ltd.* (supra), a Single Judge of the Jharkhand High Court has held in para No. 9 as under :

9. In this case, admittedly, the work order issued in the year 2001 and the respondent no.2 completed the work in the year 2002. Thereafter, petitioner paid all the contractual dues to the respondent no.2 after deducting the penalty and tax etc. It is specifically stated in the writ application that the respondent no.2 received the aforesaid amount without any objection. However, it appears that the respondent no.2 raised some dispute for refund of the security amount, thus the above dispute raised before

commencement of the said Act. Therefore, in my view, said dispute can only be adjudicated by the regular forum by filing a civil suit. In that view of the matter, in my opinion, respondent no.2 has no right to file application before the Council under section 18 of the aforesaid Act and the impugned order passed by the Council is also without jurisdiction.

23. The issue of maintainability of writ petition is also considered by the Division Bench of this Court in **JSW Steel Limited** (supra). The Division Bench has held that, though this Court would not exercise its jurisdiction under Article 226 of the Constitution of India against any or every order passed by an arbitral tribunal, when the order or award passed by the statutory arbitral tribunal is a nullity, such writ petitions can be entertained. In para No. 88 of the judgment the Division Bench of this Court has held as under :

"88. The above are jurisdictional facts which were absent before respondent No.2 could assume jurisdiction. In the absence of such jurisdictional facts, respondent No.2 could not have proceeded under section 18(3) of the MSMED Act and could not have passed the impugned order (award) dated 08.05.2015. As held by the Supreme Court in *Arun Kumar* (supra), in the absence of the jurisdictional facts, respondent No.2 had rendered itself *coram non judice*. Any order or award passed by an authority which is rendered *coram non judice* is a nullity and can certainly be interfered with by the High Court under Article 226 of the Constitution of India. Therefore, reverting back to our discussions made in paragraph 37 of this judgment, from an analysis of the judgments of the Supreme Court in *Patel Engineering* (supra) and *Modern Industries* (supra) the position becomes very clear. While the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India would not entertain any and every order passed by an Arbitral Tribunal, certainly the High Court would entertain an order or award passed by a statutory Arbitral Tribunal which is a nullity or when the Tribunal had rendered itself *coram non judice*.

24. Since the award passed by the Facilitation Council is without jurisdiction and, therefore, a nullity, I am of the view that writ petition filed by Petitioner challenging award is maintainable.

25. Mr. Sapkal has relied upon the provisions of Section 32 of the MSMED Act to contend that the saving clause under Sub-Section 2 of Section 32 would protect the claim of the petitioner. He has also relied upon Section 24 of the MSMED Act in support of his contention that provisions of Section 15 to 23 would have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. I am unable to comprehend as to how reliance on Sections 24 and 25 of the MSMED Act would be of any assistance. The Facilitation Council has been established under the provisions of the MSMED Act. It is creature of the statute. It has taken birth from the date of coming into force of the Act. Unless the supplier is registered under the provisions of the Act, he cannot invoke jurisdiction of the Facilitation Council. The supplier can register himself only after coming into effect of the MSMED Act and, therefore, goods supplied and services rendered prior to coming into effect of the MSMED Act would not be covered by the provisions of the MSMED Act. This principle has been upheld by plethora of judgments discussed hereinabove. Therefore, reliance of Mr. Sapkal on provisions of Section 22 and 23 of the MSMED Act is of no avail.

26. What remains now is to deal with various judgments relied upon by Mr. Sapkal. In none of the judgments relied upon by Mr. Sapkal, the issue of goods supplied or services rendered prior to

coming into effect of the MSMED Act was involved. The decision of Single Judge of this Court in ***Maharashtra State Electricity Distribution Company Ltd. and another*** (supra) has in fact been reversed by the Division Bench of this Court in *Deltron Electronics Vs. Maharashtra State Electricity Distribution Company Ltd. and others* in Commercial Appeal No. 38 of 2017 decided on 31.08.2017. The judgment of the Gujarat High Court in ***Principal Chief Engineer*** (supra) has dealt with situation where the award is passed in favour of the registered supplier in respect of goods delivered and services rendered after coming into effect of MSMED Act. Therefore, judgment is of no assistance to the respondent No. 3. The decision of the Allahabad High Court in ***Krishi Utpadan Mandi Samiti, Sikandra Rao*** (supra) deals with provisions of Small Scale and Ancillary Industrial Undertakings Act, 1993, which contains a provision akin to Section 18 of the MSMED Act. The judgment is rendered in facts of that case where the dispute was covered by the provisions of that Act. Section 6 thereof provided for an alternate remedy of challenging award of the council U/Sec. 34 of the Act of 1996. The case did not involve issues of retrospective applicability of the Act to supplies made prior to coming into effect of the that Act. The judgment of the Apex Court in ***M/s Sterling Industries*** (supra) has been strenuously relied upon by Mr. Sapkal. In that case, a partial award was made U/Sec. 16 of the Act of 1996, which was challenged before the District Court U/Sec. 20 of the Act of 1996 and the order of the District Court was challenged by filing a writ petition. It is in the light of these facts, the Apex Court held that the writ petition was not maintainable. The facts in the case are clearly distinguishable and the judgment therefore has no application to the present

case.

27. I am therefore of the considered view that the award passed by the Facilitation Council is without jurisdiction and therefore, a nullity. The present petition is therefore maintainable. I therefore proceed to pass following order:

O R D E R

- A. The award dated 28.04.2019 passed by the Micro, Small and Medium Enterprises Facilitation Council, Aurangabad is set aside. The amount deposited by the petitioner in this Court shall be refunded to it along with accrued interest.
- B. The respondent No. 3 shall have the liberty to exercise such remedy as may be available to it under law in respect of its claim.
- C. The writ petition is accordingly allowed. Rule is made absolute in above terms. There shall be no order as to costs.

[SANDEEP V. MARNE, J.]

bsb/Oct. 22