IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

JUDGMENT RESERVED ON :17.05.2023
JUDGMENT PRONOUNCED ON : 29.05.2023

(1) **CWP-8814-2022**

GENERAL MANAGER TELECOM DISTT. BHARAT SANCHAR NIGAM LIMITED FEROZEPUR CANTT AND ANOTHER

......Petitioners

VERSUS

DISTRICT LEVEL MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL, MOGA AND ANOTHER

.......Respondents

(2) **CWP-16373-2022**

GENERAL MANAGER TELECOM DISTT. BHARAT SANCHAR NIGAM LIMITED FEROZEPUR CANTT AND ANOTHER

......Petitioners

VERSUS

DISTRICT LEVEL MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL, MOGA AND ANOTHER

.......Respondents

(3) **CWP-16521-2022**

GENERAL MANAGER TELECOM DISTT. BHARAT SANCHAR NIGAM LIMITED FEROZEPUR CANTT AND ANOTHER

......Petitioners

VERSUS

DISTRICT LEVEL MICRO AND SMALL ENTERPRISES
FACILITATION COUNCIL, MOGA AND ANOTHER

.......Respondents

(4) **CWP-16548-2022**

GENERAL MANAGER TELECOM DISTT. BHARAT SANCHAR
NIGAM LIMITED FEROZEPUR CANTT AND ANOTHER

......Petitioners

VERSUS

DISTRICT LEVEL MICRO AND SMALL ENTERPRISES
FACILITATION COUNCIL, MOGA AND ANOTHER

.......Respondents

(5) **CWP-16550-2022**

GENERAL MANAGER TELECOM DISTT. BHARAT SANCHAR
NIGAM LIMITED FEROZEPUR CANTT AND ANOTHER

......Petitioners

VERSUS

DISTRICT LEVEL MICRO AND SMALL ENTERPRISES
FACILITATION COUNCIL, MOGA AND ANOTHER

.......Respondents

(6) **CWP-16827-2022**

GENERAL MANAGER TELECOM DISTT. BHARAT SANCHAR
NIGAM LIMITED FEROZEPUR CANTT AND ANOTHER

......Petitioners

VERSUS

DISTRICT LEVEL MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL, MOGA AND ANOTHER

.......Respondents

(7) **CWP-16834-2022**

GENERAL MANAGER TELECOM BHARAT SANCHAR NIGAM LIMITED JALANDHAR PUNJAB AND ANOTHER

......Petitioners

VERSUS

DISTRICT LEVEL MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL, MOGA AND ANOTHER

.......Respondents

(8) **CWP-16901-2022**

GENERAL MANAGER TELECOM DISTT. BHARAT SANCHAR NIGAM LIMITED FEROZEPUR CANTT AND ANOTHER

......Petitioners

VERSUS

DISTRICT LEVEL MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL, MOGA AND ANOTHER

.......Respondents

(9) **CWP-18401-2022**

GENERAL MANAGER TELECOM AND ANOTHER

......Petitioners

VERSUS

DISTRICT LEVEL MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL, MOGA AND ANOTHER

.......Respondents

(10) **CWP-18426-2022**

GENERAL MANAGER TELECOM BHARAT SANCHAR NIGAM LIMITED JALANDHAR AND ANOTHER

......Petitioners

VERSUS

DISTRICT LEVEL MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL, MOGA AND ANOTHER

.......Respondents

(11) **CWP-18313-2022**

M/S STOTZ GEARS PVT. LTD. ......Petitioners

VERSUS

STATE OF PUNJAB AND OTHERS ....Respondents

(12) **CWP-14235-2022 (O &M)**

BHARAT SANCHAR NIGAM LIMITED AND OTHERS

......Petitioners

VERSUS

DISTRICT LEVEL MICRO AND SMALL ENTERPRISES
FACILITATION COUNCIL, PATIALA AND ANOTHER

.......Respondents

CORAM : HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

*****

Argued by: -Mr. Sanjeev Kaushik, Advocate with
Mr. Rohit Kumar, Advocate and
Mr. Divyansh Kaushik, Advocate
for the petitioner in CWP-8814-2022; CWP-16373-2022
CWP-16521-2022 ; CWP-16548-2022 ; CWP-16550-2022
CWP-16827-2022 ; CWP-16834-2022 ; CWP-16901-2022
CWP-18401-2022 ; CWP-18426-2022 AND CWP-14235-2022.

Mr. Vivek Sheoran, Advocate
for the petitioner in CWP-18313-2022.

Mr. Deepanjay Sharma, DAG, Punjab.

Mr. Puneet Kansal, Advocate
for respondent No.2 in CWP-8814-2022; CWP-16373-2022
CWP-16521-2022 ; CWP-16548-2022 ; CWP-16550-2022
CWP-16827-2022 ; CWP-16834-2022 ; CWP-16901-2022
CWP-18401-2022 ; CWP-18426-2022.

Mr. Ajay Sharma, Advocate &
Mr. Vilas Sharma, Advocate
for respondent No.3 in CWP-18313-2022.

Mr. Jagan Nath Bhandari, Advocate
for respondent No.2 in CWP-14235-2022.

*****

VINOD S. BHARDWAJ, J. (Oral)

The questions which arise for consideration before this Court in the present batch of petition are as to whether conduct of conciliation under Section 18 (2) of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as “the MSMED Act”) is mandatory before arbitration can be conducted and as to whether a separate notice is required to be given at the stage of referring the dispute for arbitration.

2. A batch of writ petitions is being decided by a common judgment as the parties agree that common issues arise for consideration in the present set of petitions. For facility of reference, facts are being extracted from ***CWP-14235-2022*** titled as "***Bharat Sanchar Nigam Limited and others versus District Level Micro and Small Enterprises Facilitation Council and another".***

3. The petitioner- ***Bharat Sanchar Nigam Limited (hereinafter referred to as "BSNL")*** has challenged the award dated 28.03.2022 passed by respondent No.1-District Level Micro and Small Enterprises Facilitation Council (hereinafter referred to as "Facilitation Council" whereby the respondent No.2-the supplier was held entitled for interest amounting to Rs. 10,09,222/- under the MSMED Act**.** A further prayer was sought to the effect that the respondent No.1-Facilitation Council be directed to initiate the proceedings afresh, from the stage of conciliation, in terms of Section 18(2) of the MSMED Act.

4. The petitioner-BSNL issued a Public Notice Inviting E-tenders for three different works under the Patiala, SSA vide different NIT Numbers 12/2017-18, 13/2017-18 and 14/2017-18 for infrastructure maintenance in Patiala (Group) Rajpura, RTTC and Zirakpur in Patiala SSA on 25.11.2017. According to the terms of the tender notice, a bid could be given on depositing Earnest Money Deposit (EMD) in favour of Accounts Officer, to be valid for a period of 30 days from the date of issuance of notice. There were other formalities as well that were also required to be fulfilled by the interested bidders. Certain concessions were, however, extended to the

Micro, Small and Medium Enterprises from certain Clauses of the e-tender notice. The Micro, Small and Medium Enterprises intending to bid were provided the tender document free of cost and they were also exempted from payment of bid security/performance guarantee/earnest money deposit (EMD).

5. The petitioner received as many as 12 bids from different bidders including the MSME bidders, however, the bid submitted by the respondent-claimant was found to be most competitive & responsive. The respondent-claimant had deposited a demand draft No. 900020 dated 16.12.2017 drawn on Punjab & Sind Bank towards earnest money amounting to Rs. 56273/- in addition to paying the cost of the document despite exemption. As per Column No. 3 of the general instructions attached with the e-tender, the MSME bidders were required to attach an attested copy of the valid MSE Certificate, and the respondent-claimant is stated to have responded that the same is not applicable.

6. A letter of intent was issued in favour of the respondent-claimant on 24.02.2018 and was directed to deposit the performance security of Rs. 2,20,572/-. The earnest amount already deposited was also adjusted towards the amount which was to be deposited by the respondent No.2. An agreement on a judicial paper was also executed between the parties on 23.04.2018. An arbitration clause was incorporated in the said agreement to settle any dispute arising between the parties.

7. The respondent-claimant was also awarded work for infrastructure maintenance in Mandi Gobindgarh, Samana & Sirhind in Patiala SSA for the year 2017-18 vide NIT No. 14/2017-18 and for infrastructure maintenance in Patiala Local Area in Patiala SSA for the year

2017-18 vide NIT No. 12/2017-18. Three different agreements were thus executed by the respondent-claimant. The period for completion of the tender was extended upto 22.04.2020. The said works were satisfactorily executed by the respondent. The payment qua the works is, however, alleged to be not released despite the bills having been raised. No reasons were also furnished for non-release of the due amount despite satisfactorily completion of the work. The respondent-claimant thus filed a claim before the Facilitation Council under Section 18 of the MSMED Act claiming that the wages bills for 09 months amounting to Rs. 58,19,281/- have not been paid and also claimed interest in terms of Section 16 of the MSMED Act, 2006.

8. The petitioner-BSNL filed its response on 29.11.2019, taking various preliminary objections including about the jurisdiction of the Facilitation Council in entertaining the claim as also absence of a provision of interest in the agreement executed between the parties. It was further contended that the principal amount has already been fully paid and there was no pending issue with respect to the payments.

9. An award was eventually passed by the Facilitation Council on 28.03.2022 in favour of respondent No.2 and against the petitioner holding it liable to pay Rs. 10,09,272/- towards interest for delayed payment. Hence, the present petition.

10. The challenge to the award has been raised on various grounds already noticed above and that the payment had already been released, although after some delay. The same was occasioned due to financial crunch instead of any malicious intent. Besides, the Council never carried out the conciliation proceedings which are mandatory, the power under Section 18 (3) of the MSMED Act can be invoked after conciliation under Section 18

(2) of the Act fails to resolve the dispute. Challenge was also raised to the rate of interest as awarded by the Facilitation Council.

11. A short reply by way of affidavit of Angad Singh Sohi, Member Secretary-DL-MSEFC-cum-General Manager, District Industries Centre, Patiala had been filed on behalf of respondent No.1 wherein it is objected that the petitioner has an efficacious alternative remedy under Section 34 of the Arbitration & Conciliation Act, 1996 against the award. Filing of the petition is only to avoid the mandatory pre-deposit to the extent of 75% of the awarded amount as per Section 19 of the MSMED Act, 2006. The power of the High Court to interfere with the award passed in arbitral proceedings in writ jurisdiction is only under exceptional circumstances. It was further averred that the Council had adhered to the statutory provisions and has been established as per provisions of the MSMED Act, 2006. The Council is guided by principles of objectivity, fairness and justice in its proceedings. Full opportunity was granted to the respective parties to lead their evidences, to make submissions (written as well as oral) and also to furnish verbal or written arguments in support of their claims. The award was thereafter pronounced after dealing with respective contentions. There being no illegality or procedural impropriety in the award passed, the same could not thus be challenged by way of a writ petition.

12. A separate reply has also been filed on behalf of respondent No. 2 wherein, in addition to taking an objection about the maintainability of the writ petition and the availability of alternative remedies, it was also averred that the arbitration proceedings can be conducted either by the Facilitation Council itself or on reference of the Facilitation Council, by any institution or centre providing alternative dispute resolution services. Vide Notification

dated 13.11.2017 issued by the Government of Punjab, Department of Industries & Commerce, District Level MSME Facilitation Councils have been constituted and such Councils are competent to decide the Reference Applications under Section 18 of the MSMED Act filed by the service provider/suppliers. It is contended that the challenge to the award has been raised by way of a writ petition after the reference and culmination of the proceedings, instead of approaching the Court at the first instance in case the petitioner had a valid cause and grievance, only to delay the proceedings. It was also averred that the provisions of the MSMED Act have an overriding effect and that the respondent No.2-claimant was duly registered under the MSMED Act and its Udyog Registration No. is PB17D0002322. The answering respondent had furnished all its particulars at the time of filing the reference application before the Council and has also submitted its Certificate issued under the MSMED Act during the proceedings of the Online E-tender. The status of the respondent No. 2 as MSME Unit is also not disputed or denied by the petitioner. It is further denied that conciliation proceedings in terms of Section 18 (2) of the MSMED Act have not taken place. It is further averred that even if such conciliation proceedings have not taken place, yet, the above said objection could be raised by the petitioner in an appeal that may filed against the said award.

13. Counsel for the petitioner, has referred to the factual aspects noticed above and also the following terms of the Notice Inviting Tender, during the arguments:-

> "*17.* ***CONCESSIONS TO MSE UNITS:-*** *As per the guidelines, issued by Ministry of Micro, Small & Medium Enterprise (MSME), Government of India regarding concessions for Micro& Small Enterprise Units registered with*

District Industries Centres or Khadi & Village Industries Commission or Khadi & Village Industries Board or Coir Board or National Small Industries Corporation (NSIC) or Directorate of Handicrafts & Handloom or any other body specified by Ministry of Micro, Small & Medium Enterprise, have been considered by the BSNL for the following concessions.

1) ***Supply of Tender Documents*** *The tender documents shall be issued to MSE bidders free of cost provided the tendered item is listed in the Registration Certificate of MSE.*

2) ***Exemption from payment of Bid Security /Earnest Money Deposit*** *The MSE units registered with bodies as detailed above shall be given exemption from payment of Bid Security deposit provided the tendered item is listed in the Registration*

Certificate of MSE. i) A proof regarding current registration with bodies as detailed above for the tendered items will have to be attached along with the bid. ii) The enlistment certificate issued by bodies as detailed above should be current & valid on the date of opening of bid.

3) Reservation of Quantity

(i) 20 % of the Estimated Quantity /requirement in the tender shall be earmarked to be procured from MSEs provided their quoted price is within the band of L1+15%. Out of this quantity, a sub target of 4% is earmarked to be procured from SC/ST owned eligible MSEs. In case of non availability of SC/ST owned MSEs, this 4% quantity shall be offered to other MSEs.

(ii) The participating MSEs in a tender, quoting price within the band of L1+15% are also be allowed to supply a portion of the requirement by bringing down their price to the L1 price arrived after tender evaluation. Such MSEs shall be ordered to supply up to 20% of the total tendered value. In case of more than one such eligible MSE, the supply will be shared equally.

(iii) In case a MSE happens to be L1, L2 etc, then it will be allotted tender quantity as envisaged in the tender.

NOTE:- BSNL shall follow the instructions/regulations/notifications received from Ministry of MSME Govt. of India issued from time to time.

14. By referring to the aforesaid provision, he has argued that the MSE Units had been exempted from deposit the tender cost and also deposit of bid security/EMD, however, such costs were deposited by the respondent No.2-applicant. Hence, he did not claim the status as a Micro Small & Medium Enterprise at the time of submission of the bid document. Having chosen not to approach the petitioner as MSME Unit, it waived of its status, rights and privileges as MSME Unit and that it would now be estopped from claiming such rights. It is vehemently argued that the petitioner was entitled to know the status of its suppliers and that by not informing the petitioner about the same, it cannot be fastened with the liability to pay interest under the MSME Act and that the respondent-claimant is required to take recourse to the remedy of arbitration as per the agreement signed between the parties. He further contends that the provisions of the MSMED Act mandate conciliation proceedings under Section 18 (2) between the parties before adjudication under Section 18 (3) of the MSMED Act, 2006 can be commenced. The Facilitation Council had not undertaken any conciliation between the parties and proceeded with the adjudication and an arbitral award was passed. Such award is thus in violation of the statutory scheme and when the illegality is apparent, the jurisdiction under Article 226 of the Constitution of India would not be ousted merely because an alternative remedy is available to the petitioner.

15. Counsel for the claimant-respondents, in CWP-8814-2022 & others, on the other hand has argued that the claimant was undisputedly duly registered under the MSMED Act, 2006 at the time of entering into the contract and that Clause 17 of the Notice Inviting Tender only granted certain exemptions to the MSME Units. It was not mandatory for MSME Units to avail those concessions and it could not be put to any prejudice and be denied its remedies & protection under the MSMED Act, 2006 merely because it opted to compete on a level playing field by depositing the tender cost as well as the performance guarantees and did not avail the concession. They further contends that Facilitation Council had undertaken the Conciliation proceedings under Section 18 (2) and that the arbitration under Section 18 (3) was initiated after failure of the conciliation. He further argues that except in the matter of CWP-14235-2022, the zimini orders/interim orders passed by the Facilitation Council establish that conciliation proceedings were duly initiated and that the petitioner(s) also participated in the said conciliation proceedings through their authorized representatives. The contention of the petitioner is thus wrong to the said extent. It is further argued that a mere failure to conduct a conciliation would not vitiate the award and that the petitioner has failed to substantiate as to how his rights were prejudiced on account of failure of the conciliation proceedings. Further, there is no prohibition against taking these pleas in objections under Section 34 of Arbitration and Conciliation Act, 1966 read with the applicable Rules while challenging the award. It is also argued that the petitioner never challenged the validity of the proceedings at the first available opportunity and has filed the present case after finalization and only after the award has been passed against them. The same is clearly an act

to delay the execution of the award. He further contends that the petitioner cannot be permitted to defeat the object of the MSMED Act by resorting to multiplicity of litigation.

16. Counsel for the respondents also contend that conciliation proceedings had actually taken place in all the cases but such specific reference of conciliation is missing only in the case No. CWP-14235-2022. They further contends that the authorities had associated all the stakeholders in the conciliation proceedings and that a mere absence of recording such proceeding in the zimini order in one case cannot be deemed that no conciliation ever took place. Counsel for the respondents have also relied on certain judgments that would be referred to in the later part of the judgment.

17. In rebuttal, Counsel for the petitioner did not dispute the claim made by the respondents to the effect that conciliation proceedings had taken place in all other matters except in CWP-14235-2022. Counsel for the petitioner does not dispute that in all cases other than CWP-14235-2022 conciliation proceedings are duly recorded. He, however, contends that when the council was recording about the conciliation proceedings in all other cases, it cannot be assumed that even though conciliation proceedings were undertaken in the present case, however, the same were not reflected in the zimni orders. The Facilitation Council has maintained such record in other matters and failure to record any such proceedings in CWP-14235-2022 would lead to an inference against it rather than to a presumption in favour of conciliation.

18. Learned counsel appearing on behalf of the petitioner in CWP-18313-2022 titled as ***"M/s Stotz Gears Pvt. Ltd. Versus State of Punjab and others"*** had argued that the respondent-claimant had approached the

Facilitation Council at Fatehgarh Sahib by filing a claim petition No.52 of 2020. A notice informing that in case the petitioner failed to appear on the date fixed, the matter will be decided on merits was issued on 17.06.2021. The authorized representative could not attend the proceedings on the date fixed due to COVID-19. A second notice was again sent to the petitioner for 22.07.2021 for conciliation. He contends that even though the said date was the first date fixed for conciliation, however, the conciliation proceeding were terminated on the same day without recording any reasons for such termination and without providing any further opportunity for conciliation. The respondents continued to issue notices mentioning (Conciliation/arbitration) despite the matter have been referred to the arbitration. Last opportunity was granted on 14.09.2021 and 09.11.2021 to the petitioner to file its replies, however, the said orders were never communicated and the Facilitation Council did not pass any order to proceed ex-parte against the petitioner. The Facilitation Council directed the respondent to submit its evidence/arguments vide order dated 17.12.2021 and which was not furnished to him. The award was passed in the absence of the petitioner on 11.04.2022. It was additionally contended that the procedure contemplated under the Arbitration & Conciliation Act, 1996 had not been followed during the proceedings and that the language of the notices issued to the petitioner for conciliation was not in conformity with the mandate of conciliation proceedings required to be undertaken. It is argued that the notice in fact did not propose any conciliation and rather informed that in case the petitioner did not participate or appear, further proceedings shall be undertaken. No effective proceeding for conciliation had been resorted to by the Facilitation Council and the award was passed arbitrarily. The award is thus vitiated and liable to be set aside.

19. Learned counsel for the claimant-respondent in CWP-18313-2022 titled as ***"M/s Stotz Gears Pvt. Ltd. Versus State of Punjab and others"*** contend that the company was registered Small Enterprise engaged in business of steel alloys and that the claim had been filed under Chapter V of the MSMED Act, 2006 as there was outstanding legitimate debt against the petitioner. The notice was duly served upon the petitioner under Section 18 of the MSMED Act and that a reply was submitted by the petitioner to the notice to the effect that a complaint case under Section 138 of the Negotiable Instruments Act, 1881 had earlier been filed by respondent No.3 and as such the proceedings ought to be dismissed and there is no need for conciliation. Reference is made to the communication (Annexure P-8) to contend that the petitioner specifically denied need for the conciliation and that he is not willing to appear before the authorities for the same. The respondent Council had thus directed tender of its evidence and advance arguments whereupon the award was finally passed. He argued that the object behind filing of the petition is only to delay the execution of the award. Having voluntarily opted not to participate in the proceedings and having sent a specific communication to the said effect, the petitioner cannot be permitted to contend that he is prejudiced for not being associated in the proceedings. The abstinence being voluntary and willful, the petitioner would be estopped from raising an argument of prejudice.

20. Learned State Counsel, however, reiterates his submissions noticed earlier and defended the award by relying upon object of the MSEMD Act, 2006 and that the Facilitation Council had been acted only to

further such objectives. The petitioner cannot be permitted to defeat the protection and promotional aspects of the MSMED Act, 2006.

21. I have heard learned counsel appearing for the respective parties and have gone through the pleadings as well as the documents appended alongwith the same.

22. Before proceeding further certain relevant provisions of the MSMED Ac, 2006 are reproduced hereinafter below"

"***Objective***

An Act to provide for facilitating the promotion and development and enhancing the competitiveness of mirco, small and medium enterprises and for matters connected therewith or incidental thereto

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

Xxx xxx xxx xxx xxx xxx xxx xxx xx

b) "appointed day" means the day following immediately after the expiry of the period of fifteen days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier.

Explanation. For the purposes of this clause,-

(i) "the day of acceptance" means,-

(a) the day of the actual delivery of goods or the rendering of services; or

(b) where any objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day on which such objection is removed by the is supplier;

(ii) "the day of deemed acceptance" means, where no objection made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day of the actual delivery of goods or the rendering of services;

Xx xxx xxx xxx xxx xxx xxx xxx

(d) "buyer" means whoever buys any goods or receives any services from a supplier for consideration;

Xx xxx xxx xxx xxx xxx xxx xxx

(g) "medium enterprise" means an enterprise classified as such under sub-clause (iii) of clause (a) or sub-clause (iii) of clause (b) of sub- (a) section (1) of section 7;

(h) "micro enterprise" means an enterprise classified as such under sub-clause (i) of clause (a) or sub-clause (i) of clause (b) of sub-section (1) of section 7;

Xx xxx xxx xxx xxx xxx xxx xxx

(m) "small enterprise" means an enterprise classified as such under sub- clause (ii) of clause (a) or sub-clause (ii) of clause (b) of sub-section (1) of section 7;

Xx xxx xxx xxx xxx xxx xxx xxx

15. Liability of buyer to make payment.*-Where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefore on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:*

Provided that in no case the period agreed upon between the supplier and at the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

16. Date from which and rate at which interest is payable.-*Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.*

17. Recovery of amount due.-*For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16.*

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

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council (2) shall either itself take up the dispute for arbitration of refer to it any institution Chairp or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration in the agreement referred to in sub-section (1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre statem providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.

19. Application for setting aside decree, award or order-. *No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy- five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:*

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

Xx xxx xxx xxx xxx xxx xxx xxx xxx

24. Overriding effect.-*The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."*

23. The MSMED Act was notified by the Parliament after repealing the interest on delayed payments to Small Scale & Ancillary Industrial Undertakings Act, 1993. It was felt that non-availability of the adequate working capital caused serious problems affecting the financial health of the Small, Micro and Medium Enterprises. In order to ensure that prompt payments of monies due to the suppliers/service providers is made, the above said Act was notified with a further object of facilitating the promotion; development and enhancing the competitiveness of the Micro, Small and Medium Enterprises. An entire mechanism for ensuring expeditious recovery of the outstanding dues has been provided in the statue. Section 15 of the Act holds the buyer liable to make payment for the goods supplied or services rendered on or before the date agreed. Where such payment is not made, notwithstanding anything contained in any agreement between the parties or any law for the time being inforce, the date from which and the rate at which interest is payable as prescribed under Section 16 would become applicable. Hence, the rigors of Section 16 would become applicable and the defence of referring to the terms and conditions of the

agreement, to the contrary is not available and overrides any agreement not in consonance. The party aggrieved may make a reference to the Facilitation Council under Section 18 and that on receipt of such a reference, it shall either conduct the conciliation itself or seek assistance of any other institution/centre to conduct conciliation as per provisions of Section 65 to 81 of the Arbitration & Conciliation Act, 1996. Where the conciliation initiated under sub section (2) of MSMED Act is not successful and is terminated without any settlement between the parties, the Facilitation Council may take up the dispute for arbitration or refer the same to an institution or centre. Section 19 provides for the remedy for challenging the decree, award as well as order by a mandatory pre-deposit and Section 24 gives an overriding effect to the provisions of the MSMED Act notwithstanding anything inconsistent there to contained in any other law for the time being in force.

24. A reference was made by the counsel for the petitioner in CWP-18313-2022 to the judgment of "***UCAL Fuel Systems Limited versus Micro and Small Enterprises Facilitation Council and another***" of Madras High Court reported as ***2020 SCC OnLine Madras 24345*** as well as ***"Modern Petrofils Dty Division and others versus Micro and Small Enterprises Facilitation Council and Others"*** reported as ***2019 SCC OnLine Gujarat 5245*** to contend that where the notice issued by the Facilitation Council does not envisage an invitation to the parties for conciliation, the notices are liable to be set aside and the Council is required to undertake the exercise afresh after issuing appropriate notice in conformity with Section 18 of the Act.

25. The relevant extract of the judgment in ***UCAL Fuel System (supra)*** is reproduced hereinafter below :-

20. Section 18 of the Act provides for reference to Micro and Small Enterprises Facilitation Council. As per Section 18(1) of the Act, any party to a dispute, with regard to any amount due under Section 17, can make a reference to the Micro and Small Enterprises Facilitation Council (Shortly "the Council");

21. As per sub-section (2) of Section 18 of the Act, the Council, shall either itself conduct conciliation or seek the assistance of any institution or Centre providing alternate dispute resolution services by making referenice to such institution for conducting conciliation. It is specifically mentioned that provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (Act 26 of 1996) shall apply to such a dispute, as if conciliation was initiated under Part III of that Act.

22. As per sub-section (3) of Section 18 of the Act, if the conciliation initiated is not successful and stands terminated without any settlement between the parties, the Council either itself take up the dispute, for arbitration or refer it to any institution or Centre providing alternate dispute resolution services for such arbitration under the provisions of the Arbitration and Conciliation Act, 1996.

23. As per sub-section (4) of Section 18 of the Act, the Council has jurisdiction to act as an Arbitrator or Concillator in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

24. Accordingly, the above scheme of Section 18 of the Act clearly provides for conciliation by the Council by itself or to any other institution and in case of failure, for arbitration by itself or any other institution and the seat of arbitration.

25. It has to be noted that sub-section (2) of Section 18 of the Act clearly spells out that the provisions governing the conciliation proceedings, as per Section 65 to 81 of Act, 26 of 1996 Accordingly, the process of conciliation and role and powers of the Conciliator has to be seen.

26. As per Section 65 of Arbitration and Conciliation Act, 1996, the procedure for receiving written statement from the parties is specified. Section 67 of the Arbitration and Conciliation Act, 1995, specifies the role of Conciliator. Sub-section (1) of Section 67 of the Arbitration and Conciliation Act, specifically mentions that the Conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. It means that the Conciliator plays a role in assisting the parties to arrive at an amicable settlement, to be reached by themselves, on their own. In that process, the Conciliator as per sub-section (2) of Section 67 of the Arbitration and Conciliation Act is guided by the principles of objectivity, fairness and justice, giving consideration to the rights and obligations of the parties. The Conciliator, thus, assist the parties in making proposals for settlement of dispute. Therefore, it is very clear that the first stage of reference is conciliation. The procedure of conciliation is only to assist the parties to arrive at an amicable settlement. However, the statutory force of the Act compels the buyer to appear before it and participate in the conciliation proceedings. It does not mean that the party is bound by the dictates of the Conciliator.

27. Therefore, as per sub-section (3) of Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, a provision is made for referring the matter for arbitration, if the conciliation is not *successful. It is also made clear that once the Conciliator involves in the process of conciliation, he communicates both the parties and receives confidential informations from both the parties. In that process, the Conciliator is expected to maintain confidentiality, which, as per Section 75 of the Arbitration and Conciliation Act, 1996, shall extend also to the settlement agreement, except where its disclosure is necessary for the purpose of implementation and enforcement of the settlement.*

28. Section 80 of the Arbitration and Conciliation Act, 1996, specifically mentions that unless and otherwise agreed by the parties the Conciliator shall not act as an Arbitrator or as a representative of the Council of the party in any arbitral or judicial proceedings, in respect of a dispute that is the subject of the conciliation proceedings and he shall not act as a witness in any such proceedings also.

29. If the matter is viewed from that angle, it is very clear that the conciliation is a different confidential process and a person, who acted as a Conciliator, is expected to maintain confidentiality and not to act as an Arbitrator or a representative or as a witness in the same subject matter in an arbitration or judicial proceedings. Therefore, the contention of the petitioner that Sections 15, 16 and 17 of the Act confer blanket powers in favour of the supplier and does not provide for any safeguard to the buyer is not sustainable, for the reason, that the recovery proceedings.are made in a phased manner and at the first stage, it is only "Conciliation" and in case of failure, it is referred to arbitration. The inbuilt provisions of Arbitration and Conciliation Act provides scope, for all the parties to arbitration, for getting protection orders from the Arbitral Tribunal. Therefore, the contention that *the Act does not provide for any safeguards to the buyers to not sustainable.*

30. The contents of the Impugned notices issued by the Micro Small Enterprises Facilitation Council reads as under:

> *"WHEREAS the above named petitioner has filed a Petition to this Council against the respondent for the payment of due against the materials supplied to the respondent and interest thereon, the PETITIONER as well as the RESPONDENT are hereby summoned to appear in this Council in person or by a Pleader duly authorized (Vakkalat shall be produced by the Counsel who appears before Council meeting) and able to answer all material questions relating to this Suit or who shall be accompanied by some person able to answer all such questions on 20 day of November 2018, at 10.00 A.M., at Mini Conference Hall, Office of the Industries Commissioner and Director of Industries and Commerce, 1 Floor, SIDCO Corporate Building, Guindy, Chennai-600032 to answer the claim, and you are directed to produce on that day all the documents upon which you intend to rely in support of your defense.*
>
> *Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence as ex-parte. Given under my hand and the seal of the Council this 2 day of November 2018."*

31. The notices, particularly in the penultimate paragraph, indicate that if the buyer/petitioner does not appear, the suit will be heard and determined in their *absence as ex-parte, which does not conform with the object of the conciliation proceedings.*

32. As discussed above, in the process of Conciliation, the provisions of the Arbitration and Conciliation Act, 1996, are mandatorily, to be followed by the Council. But the tenor of the notice that "if buyer does not participate in the proceedings, Council will pass orders on merits, setting the respondent exparte and determine the liability, appear like an adversarial proceedings and not as a conciliation proceedings. Perhaps, it was drafted by a semi literate copying and pasting formats of Civil Court mechanically, without applicant of mind. As such, the notices Issued under proceedings in MSEFC/CR/43/2018, MSEFC/CR/39/2018, MSEFC/CR/42/2018, MSEFC/CR/40/2018, MSEFC/CR/41/2018 and MSEFC/CR/37/2018 respectively are contrary to the procedure, contemplated under Section 18 of the MSME Act.

33. The Council is expected to invite the parties for conciliation. However, the appearance of the petitioner and second respondent is mandatory. The Council shall assist the parties to reach an amicable settlement. Only in case of failure, it can be referred to arbitration. Even in that case, the person who acted as a Conciliator in that particular matter, is not entitled to act as an Arbitrator. In that view of the matter, the impugned notices do not stand the test of scrutiny of law and are liable to be set aside.

34. In fine,

(1) the reference made under Section 18 of the Act by the second respondent herein before the Council is sustainable.

(ii) the proceedings inflated by the Micro Small Enterprises Facilitation Council is within the scope and ambit of the Act.

(iii) the impugned notices, as such, Issued by the first respondent Council are not in conformity with the object of Section 18 of the Act. Therefore, the impugned notices are set aside and a direction is given to the first respondent Council to act in accordance with Section 18 of the Act and issue notice in conformity with sub-section (1) of Section 18 of the Act and proceed further.

26. The relevant extract of the judgment in the matter of ***"Modern Petrofils (supra)*** are as under:-

4.10. Thereafter, in the 50th Meeting of the Respondent No. 1, the Petitioner No.1 could not remain represented and its officers had sought for adjournment. The Respondent No. 1, rejecting the request of the Petitioner' No. 1, declared completion of Conciliation Proceedings u/s. 18(1) and 18(2) of the MSME Act and without any further Notice, passed the impugned Award dated 22nd February, 2018, ex parte.

Xxx xxx xxx xxx xxx xxx xxx xxx xxx

9. Mr. Gandhi relying upon the provisions of Section 18 of the MSME Act, submitted that the respondent No. 1 in complete disregard to the procedure contemplated under Section 18 of the MSME Act passed the impugned order, as no conciliation proceedings as contemplated under Section 18(2) of the MSME Act was initiated nor arbitration proceedings as contemplated under Sections 18(3) of the MSME Act was initiated. It was pointed out from the impugned order passed by the respondent No. 1 that contrary to the provisions of the MSME Act, an ex parte order is passed without giving *any opportunity of hearing to the petitioners. It was further submitted by Mr. Gandhi that the respondent No. 1 Council did not comply with the provisions of Section 18(3) of the MSME Act and straightaway passed an award by the rejecting the application for adjournment made by the petitioners.*

Xx xxx xxx xxx xxx xxx xxx xxx xxx

11. Mr. Gandhi would submit that where the re-conciliation under Section 18(2) read with Section 65 to 81 of the Arbitration and Conciliation Act, 1996 (for short the "Arbitration Act") is terminated then the procedure under Section 18(3) is mandatory so as to initiate arbitration proceedings by applying the provisions of the Arbitration Act and the respondent No. 1 could not have mechanically passed the impugned order directing the petitioner No. 1 to make the payment as claimed by the respondent No. 2. It was further submitted by Mr. Gandhi that the respondent No. 1 failed to adhere to the mandatory provisions of Section 18(3) of the MSME Act and there was no authority or jurisdiction to pass the impugned order as it is a settled legal position that where the law requires particular procedure to be followed, it has to be done in that manner only and not otherwise.

12. On the other hand, Mr. Rohan A. Shah, the learned advocate appearing for the respondent No. 2 vehemently opposed this petition and raised the preliminary objection with regard to maintainability of the petition and grant of interim relief in favour of the petitioners. Mr. Shah relying upon the averinents made in the affidavit filed on behalf of the respondent No. 2, submitted that the provisions of Section 18 of the MSME Act contains a non-obstante clause which provides that notwithstanding anything contained in any other law for *the time being in force, any party to dispute may, with regard to any amount due under Section 17, make a reference to the Council. Mr. Shah would submit that once an award is passed by the respondent No. 1 and if the petitioner is aggrieved by the same, an application for setting aside the award is required to be made in accordance with Section 34 of the Arbitration Act. It was therefore, submitted by Mr. Shah that when a statute provides for an alternative efficacious remedy, such remedy cannot be avoided or bypassed. Reliance was placed on Section 19 of the MSME Act in support of the submission for alternative remedy. It was submitted by Mr. Shah that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. It was pointed out that Section 19 of the MSME Act, lays down a condition of deposit of 75% of the amount awarded or decreed, before an application for setting aside such a decree or award is entertained, however, the present petition has been filed in order to circumvent the requirement of deposit of 75% of the awarded amount, therefore, the petition is required to be dismissed.*

13. Mr. Shah further submitted that the MSME Act is a special Act and therefore, the provisions of the said Act would prevail over any other law. It was pointed out by Mr. Shah that the petitioner No. 1 was informed by letter dated 5 March 2018, after impugned award was passed by the respondent No. 1 and despite being aware of the said award, the petitioner No. 1 adopted a laid back approach and after a period of 5 to 6 months on 4th September 2018 has approached this Court by invoking writ Jurisdiction. The respondent No. 2 has already filed execution application being Special Execution Application No. 4 of 2018 before the learned Civil Judge, Karjan and therefore, once the respondent No. 2 initiated *the execution proceedings there was no option for the petitioner but to challenge the award under Section 34 of the Arbitration Act and as the petitioner has approached this Court after filing of the execution petition, such petition is required to be rejected only on that ground.*

Xxx xxx xxx xxx xxx xxx xxx xxx xxx

15. Having heard the learned advocates for the respective parties and having gone through the materials on record, the only question, which arises for consideration of this Court is whether the respondent No. 1, the Micro Small Enterprises Facilitation Council, Gujarat was justified in passing ex parte award against the petitioner under the provisions of the MSME Act or not.

Xxx xxx xxx xxx xxx xxx xxx xxx xxx

21. Considering the provisions of MSME Act, it appears that the respondent no. 1 Council has acted contrary to the provision of Section 18(3) because Section 18(3) provides for initiation of arbitration proceedings, If the respondent no. 1 Council arrives at a decision that any reconciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the respondent no. 1 Council ought to have either taken up the dispute for arbitration or to refer it to any institution or centre providing alternative dispute resolution services for such arbitration and the provisions of the Arbitration Act would 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 Arbitration Act. Therefore, the respondent No. 1-Council was required to initiate arbitration proceedings on its own or refer the matter to any institution or centre providing

> *alternative dispute resolution services for such arbitration. However, the respondent No. 1-Council has passed the impugned award without following the procedure prescribed under Section 18(3) of the MSME Act. Section 18(3) of the MSME Act clearly provides that the arbitration on failure of conciliation initiated under-Subsection (2) of Section 18, the respondent no. 1 Council is required to initiate arbitration proceedings as per the provisions of the Arbitration Act. However, in the facts of the case instead of following the procedure prescribed under the provisions of the Arbitration Act, the respondent No. 1-Council has passed the impugned ex parte award. Therefore, only conclusion which can be arrived at, is that the impugned award is passed without jurisdiction and contrary to the provisions of Section 18(3) of the MSME Act. In such circumstances, the petition is required to be allowed by quashing and setting aside the impugned award passed by the respondent No. 1-MSME Council and the matter is required to be remanded back to pass a fresh de novo order in consonance with the provisions of Section 18(3) of the MSME Act, to initiate arbitration proceedings in consonance with the provisions of Section 18(3) of the MSME Act."*

27. Reliance was also placed on the judgment of ***"Principal Chief Engineer versus Manibhai and Brothers"*** of Gujarat High Court reported as ***2012 SCC Online Gujarat 2422*** to contend that where the conciliation proceedings were recorded to have failed in the matter and the same was put up for arbitration, the council has to inform the parties of such failure and its proceedings to conduct arbitration so as to enable them to lead their evidence, if they so desire. As the council failed to follow the said procedure, the award was set aside. The relevant extract is as under:

"4. The learned Single Judge has dismissed the writ petition filed by the petitioner by which the alleged award dated 21.8.2010 has been challenged by the appellant on the ground that this is not an award but is an order passed in conciliation proceedings. The learned counsel for the respondent no. 1 on the other hand, has vehemently urged that this is an award and not conciliation order and therefore, the appellant has a statutory remedy of filing an application under Section 34 of the Arbitration and Conciliation Act, 1996 (For short "The Act"). The learned counsel for respondent no. 1 has taken us to Sections 18 and 19 of The Micro, Small and Medium Enterprises Development Act, 2006 (for short "MSMED Act") as well as the provisions of The Arbitration and Conciliation Act, 1996. On the arguments advanced by the learned counsel for the parties, It appears that in February, 2010, the appellant has filed his written arguments wherein in para-6 it was stated by him that the Micro and Small Enterprises Facilitation Council (For short "Council") has to hold and declare that conciliation proceedings have failed. In their letter No. MBSC/2009-10/163 dated 25.2.2010, in the last paragraph, it is stated that since the buyer has contended that conciliation proceedings be treated as failed, under the circumstances, the respondent requested the learned counsel to commence the next step as provided under the Act and the next step was arbitration to be conducted by the council or any institute undertaking arbitration arid request the council to conduct arbitration process.

5. We have gone through the impugned order/award dated 21.8.2010 and we do not find that anywhere it has been recorded that on what date the conciliation proceedings have been treated to have failed by the council. From the original record produced before us, we do not find any order passed by the council *wherein it has been recorded that conciliation proceedings are treated to have to be failed and have come to an end and next step of arbitration is now conducted by the council. Though notices were Issued on 20.5.2010 fixing 31.5.2010 as next date, it also does not mention that the next arbitration proceedings would be taken up or hearing on merits, would commence or parties may lead their evidence and proceed with their arguments. The council if wanted to proceed in the arbitration, then the council had to inform the parties that conciliation has falled and it is proceeding to conduct arbitration and for that purpose, the parties may lead their evidence if they so desire after fixing the date for evidence of the parties; fix the date of hearing; and thereafter conduct hearing in accordance with law and pass an award. This was not done in the present case.*

6. Further, learned counsel for the appellant has also submitted that he has filed an application under Section 8 of the Act, on 5.11.2009 on which no order has been passed by the council. Records have been shown by the learned counsel for respondent no. 2 to learned counsel for respondent no. 1 and the appellant, but they have failed to find any order deciding the application under Section 8 of the Act nor order-sheet mentions that any hearing took place on the application under Section 8 of the Act. Learned counsel for the parties agree that interest of justice would be served if the matter is sent bank to the council. Learned counsel for the parties agree that this Court may treat that conciliation proceedings have failed and the matter should be proceeded for next step for arbitration.

7. In view of this statement made by the learned counsel for the parties and in view of the submissions made before the council, in their written argument or in *the letter, wherein it is stated that conciliation proceedings have failed and the next step has to be conducted by the council. Before conducting the next step for arbitration, council has to decide the application filed by the appellant dated 5.11.2009 under section 8 of the Act and after deciding it and serving a copy of the order on the appellant, thereafter, shall proceed to fix the date for parties to lead the evidence in support of respective claims and thereafter fix the date for hearing after giving sufficient notice to the parties and thereafter proceed to pass arbitral award in accordance with law. The learned Single Judge has dismissed Special Civil Application No. 2471 of 2011 on the ground of alternative remedy. In our opinion, the order passed by the learned Single Judge cannot be maintained as the council proceeded to pronounce the award without following proper procedure and without recording à finding that conciliation proceedings have failed and come to an end and further the council failed to decide the application of the appellant under Section 8 of the Act. The learned Single Judge has committed an error in not deciding the matter on merits and in dismissing the writ petition on the ground of alternative remedy. The order passed by the learned Single Judge suffers from the error apparent on the face of the record and therefore, it cannot be maintained. Therefore, the award passed by the council dated 21.8.2010 is illegal and in violation of principles of natural justice and is liable to be set aside.*

8. In the result, this Appeal succeeds and is allowed. The order dated 21.8.2010 passed by the council is set aside. The matter is remanded back to the council to proceed with the arbitration proceedings and after serving a copy of the same on the appellant, thereafter, shall proceed to fix the date for parties to lead the evidence in support of respective claims and thereafter fix

> *the date for hearing after giving sufficient notice to the parties and thereafter proceed to pass arbitral award in accordance with law. The order dated 11.10.2011 passed by the learned Single Judge in Special Civil Application No. 1997 of 2011 is set aside. It shall be open to the parties to raise all objections which have been raised in this Appeal and the writ petition which they want to raise before the counsel. The council shall decide the application dated 5.11.2009 preferred by appellant under section 8 of the Act as expeditiously as possible. As the Appeal is allowed, Civil Application does not survive.*

28. Reliance was also placed on the judgment of this Court dated 07.10.2021 in the matter of ***"Steel Authority of India Limited versus District Level Micro and Small Enterprises Facilitation Council, Fatehgarh Sahib and another"*** in CWP No. 185290 & 15772-2021 to contend that principles of natural justice had been violated since the petitioner was not given adequate opportunity to present its case before the Council and has been burdened with substantial liability. Noticing that the petitioner was situated in West Bengal and the period was relateable to Covid Pandemic, it was not possible for it to depute its official to remain present on the date of hearing, the award was set aside and directions were given to the Facilitation Council to pass a fresh award after affording an opportunity to the parties.

29. Per contra, counsel for respondents have referred to the judgment in the matter of ***"Whirlpool Corporation versus Registrar of Trade Marks, Mumbai*** reported as 1998 (8) SCC 1 to contend that remedy of writ petition would not be maintainable when an alternative, effective and efficacious remedy is available to the petitioner. The relevant extract 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. <u>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.</u> 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.*

30. Reference was also made to the judgment of this Court passed in ***LPA No. 63 of 2022*** in the case titled as ***"Indian Drugs & Pharmaceuticals Limited versus State of Haryana and others"*** to substantiate the above.

31. Reference was also made to the judgment of the Hon'ble Supreme Court in the matter of ***"Bhaven Construction through its authorized signatory Premjibhai K. Shah versus Executive Engineer Sardar Sarovar Narmada Nigam Ltd & another"*** reported as ***2022 (1) SCC 75*** to contend that it would not be prudent for a judge to exercise discretion and allow judicial interference in an arbitral process under Articles 226/227 of the Constitution of India unless it is a circumstance of exceptional rarity, wherein one party is left remediless under the Statue or a clear bad faith has been shown by one of the parties. The relevant extract of the said judgment reads thus:-

> *"17. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a*

*Constitutional right. In **Nivedita Sharma v. Cellular Operators Association of India, (2011) 14 SCC 337**, this Court referred to several judgments and held:*

> *"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation L. Chandra Kumar v. Union of India, (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/ instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."*

(emphasis supplied)

It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.

18. In this context we may observe M/s. Deep Industries Limited v. Oil and Natural Gas Corporation Limited, (2019) SCC Online SC 1602, wherein interplay of section 5 of the Arbitration Act and Article 227 of the Constitution was analyzed as under:

> *"15. Most significant of all is the non-obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act)*
>
> *16. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent Jurisdiction."*

19. In the instant case, Respondent No. 1 has not been able to show exceptional circumstance or bad faith' on the part *of the Appellant, to invoke the remedy under Article 227 of the Constitution. No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage. It is brought to our notice that subsequent to the Impugned order of the sole arbitrator, a final award was rendered by him on merits, which is challenged by the Respondent No. 1 in a separate Section 34 application, which is pending.*

32. Reference was also made to the judgment of the Hon'ble Supreme Court in the matter of ***"Gujarat State Civil Supplies Corporation Ltd. versus Mahakali Foods Pvt. Ltd. (Unit 2) and another"*** reported as ***2022 SCC OnLine SC 1492.*** The relevant extract of the same reads as under:-

"3. The broad outline of the impugned orders in each appeal may be stated as under:-

Xx xxx xxx xxx xxx xxx xxx xxx xx

(V) CA……….. of 2022 (@SLP (C) No. 7375/2020)

The appellant Bharat Electronics Ltd. & Anr. (Original Petitioners) have challenged the Order dated 20.01.2020 passed by the High Court of Judicature at Bombay in W.P. No. 7899/2017, whereby the High Court has dismissed the said petition along with the W.P. No. 9356/2018, holding that when the Facilitation Council had conducted the arbitration proceedings and passed an award under Section 18(3) of the MSMED Act, 2006 the remedy of the aggrieved party would be to take recourse to Section 34 of the Arbitration Act. The High Court relied upon the ratio in case of SBP & Company v. Patel Engineering Ltd. which disapproved the practice of High Courts entertaining petitions under Article 226/227 of the Constitution of India challenging the orders passed by the Arbitration Tribunal.

Xx xxx xxx xxx xxx xxx xxx xxx xx

34. The upshot of the above is that:

(v) The Facilitation Council/institute/centre acting as an arbitral tribunal by virtue of Section 18(3) of the MSMED Act, 2006 would be competent to rule on its own jurisdiction as also the other issues in view of Section 16 of the Arbitration Act, 1996.

35. Though afore-stated discussions and conclusions cover all the issues involved in the appeals, it would be appropriate to deal with each of the Appeals individually.

V) C.A………….. of 2022 (@SLP (C) No. 7375 of 2020)

(i) The appeal is directed against the judgment and order dated 20.01.2020 passed by the High Court of Judicature at Bombay, whereby the High Court dismissed the writ petitions filed by the appellants (original writ petitioners) holding that the party aggrieved by the order passed by the Arbitral tribunal has to challenge the same in accordance with the provisions of the Arbitration Act, 1996. In the said case, the present respondent no. 1 IBEX Integrated Business Express Private Limited (original respondent no. 1-supplier) had approached the Facilitation Council for the recovery of its dues against the appellants. The appellants appeared before the Council and raised a preliminary objection with regard to the maintainability of the reference on the ground that there was an arbitration clause contained in the agreement executed between the parties.

(ii) The said preliminary objection was rejected by the Facilitation Council vide the Order dated 20.12.2014. The Council thereafter proceeded further with the reference in which the appellants filed their reply on merits to the claim made by the respondent IBEX, and the Facilitation Council eventually passed an award on

31.03.2017, allowing the said reference filed by the IBEX. Being aggrieved by the said award as well as the earlier order dated 20.12.2014 passed by the Facilitation Council, the appellants approached the High Court by filing two writ petitions. The High Court dismissed both the petitions vide the impugned order holding that when the Facilitation Council had conducted the arbitration proceedings and passed an award, the remedy of the party aggrieved would be to take recourse to Section 34 of the Arbitration Act, 1996.

(iii) As held earlier, the proceedings before the Facilitation Council/institute/centre acting as an arbitrator are governed by the Arbitration Act, 1996 and therefore any order passed or award made by such council/institute/centre has to be challenged as per the Arbitration Act. The Appeal therefore deserves to be dismissed and is dismissed."

33. Reference was also made to the judgment of the Hon'ble Supreme Court in the matter of ***"M/s Sterling Industries versus Jayprakash Associates Limited and others"*** reported as ***2019 (3) R.C.R. (Civil) 844*** to contend that High Court cannot set aside an arbitral award in exercise of its jurisdiction under Articles 226 & 227 of the Constitution of India.

34. Reference was also made to the judgment of Madya Pradesh High Court in the matter of ***"Jabalpur Treasure Island Pvt. Ltd. versus State of Madhya Pradesh and others"*** passed in Writ Petition No. 369 of 2020 decided on 30.12.2021 reported as 2022 (1) M.P.L.J. 347 to contend that once a notice is served on a party under Section 18 of the MSMED Act 2006, it would hold good for conciliation proceedings as also arbitration proceedings to be taken up by the Facilitation Council, after conciliation

proceedings have failed, and no separate notice is required to be served by the council for initiation of arbitration proceedings.

35. In view of the aforesaid judicial pronouncements, the position of law which thus emerges is that where a party aggrieved has an efficacious alternative remedy under the statue, a remedy of writ against such an award would not be ordinarily available. Such jurisdiction is to be exercised only in an exceptional rarity. The Hon'ble Supreme Court of India has emphasized in the matter of ***"Radha Krishan Industries versus State of Himachal Pradesh"*** reported as ***(2021) 6 SCC 771*** that when a statutory forum is created by law for redressal of a grievance, a writ petition should not be ordinarily entertained ignoring such statutory dispensation. The relevant extract of the said judgment reads thus:-

> "**27. The principles of law which emerge are that :**
>
> *(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;*
>
> *(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;*
>
> *(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;*

(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

36. There is no dispute to the proposition of law laid down by the Hon'ble Supreme Court. It is thus for the High Court to examine as to whether such circumstances exist where it should exercise its writ jurisdiction.

37. The case of the petitioners in the writ petitions is that conciliation proceedings have not been conducted as per mandate of the Act and that in the absence of conducting conciliation under Section 18 (2) of the MSMED Act 2006, arbitration of the dispute could not have been commenced.

38. A perusal of Section 18 (3) shows that arbitration is to be invoked after the conciliation initiated under Section 18 (2) is unsuccessful and is terminated without any settlement.

39. Similar procedure is also prescribed under Section 22 -C (4) of the Legal Services Authorities Act, 1987. The above said act empowers the Permanent Lok Adalat to undertake adjudication in case the conciliation proceedings failed to reach at a settlement. While interpreting the scheme, the Hon'ble Supreme Court of India held that the conciliation proceedings are mandatory before Permanent Lok Adalat (Public Utility Services) can decide a dispute on merits. Once the scheme of the statue gives a step by step procedure to be followed, the steps prescribed are required to be adhered to and the step empowering initiation of arbitration can be attained only after attempting and failing to arrive at a settlement as per the previous step. Relevant extract of the Judgment of the Hon'ble Supreme Court in the matter of ***"Canara Bank versus G.S. Jayarama"*** bearing ***Appeal No. 3872-2022 decided on 19.05.2022*** is reproduced as under:

> ***C.2 Mandatory nature of conciliation proceedings***
>
> *23 We must now address the first issue, i.e., whether the conciliation proceedings before the Permanent Lok Adalats are mandatory before it can decide a dispute on its merits.*
>
> *24. This issue is clearly resolved from a bare reading of Section 22-C. Section 22-C provides a step-by-step scheme on how a matter is to proceed before the Permanent Lok Adalat. The first step is the filing of the application which ousts the jurisdiction of other civil courts, in accordance with sub-Sections (1) and (2). The second step is the parties filing requisite submissions and documents before the Permanent Lok Adalat, in accordance with sub-Section (3). On the completion of the third step to its satisfaction, the Permanent Lok Adalat can move to the fourth step of attempting conciliation between the parties, in accordance with sub-*

Sections (4), (5) and (6). Subsequently, in the fifth step in accordance with sub-Section (7), the Permanent Lok Adalat has to draw up terms of settlement on the basis of the conciliation proceedings, and propose them to the parties. If the parties agree, the Permanent Lok Adalat has to pass an award on the basis of the agreed upon terms of settlement. Only if the parties fail to reach an agreement on the fifth step, can the Permanent Lok Adalat proceed to the final step and decide the dispute on its merits.

25 Such an interpretation is also supported by the decision of a two-Judge Bench of this Court in Bar Council of India (supra), where the constitutionality of Chapter VI-A of the LSA Act was upheld. Speaking for the Bench, Justice R M Lodha highlighted that the Permanent Lok Adalats would proceed to adjudication of a dispute on its merits only after attempting and failing to generate a settlement between the parties:

> *22. Chapter VI-A inserted by the 2002 Amendment Act in the 1987 Act, as its title suggests, provides for pre-litigation conciliation and settlement procedure...The disputes in relation to public utility service need urgent attention with focus on their resolution at the threshold by conciliation and settlement and if for any reason such effort fails, then to have such disputes adjudicated through an appropriate mechanism as early as may be possible...*
>
> *23. The Statement of Objects and Reasons itself spells out the salient features of Chapter VI-A. By bringing in this law, the litigation concerning public utility service is sought to be nipped in the bud by first affording the parties to such dispute an opportunity to settle their dispute through the*

> *endeavours of the Permanent Lok Adalat and if such effort fails then to have the dispute between the parties adjudicated through the decision of the Permanent Lok Adalat...*
>
> *[...]*
>
> *26. It is necessary to bear in mind that the disputes relating to public utility services have been entrusted to Permanent Lok Adalats only if the process of conciliation and settlement fails. The emphasis is on settlement in respect of disputes concerning public utility services through the medium of Permanent Lok Adalat. It is for this reason that sub-section (1) of Section 22-C states in no unambiguous terms that any party to a dispute may before the dispute is brought before any court make an application to the Permanent Lok Adalat for settlement of dispute. Thus, settlement of dispute between the parties in matters of public utility services is the main theme. However, where despite the endeavours and efforts of the Permanent Lok Adalat the settlement between the parties is not through and the parties are required to have their dispute determined and adjudicated, to avoid delay in adjudication of disputes relating to public utility services, Parliament has intervened and conferred power of adjudication upon the Permanent Lok Adalat.*
>
> *(emphasis supplied)*

26. The appellant's argument, however, is that if the opposite party does not appear before the Permanent Lok Adalat, it can dispense with the conciliation proceedings and straightaway adjudicate the dispute under Section 22-C(8). We are unable to accept this submission. Even if the opposite party does not appear, the Permanent Lok

Adalat is still bound to follow the step-by-step procedure laid down by Section 22-C. Under Section 22-C(3), it would require the party before it to file their submissions and documents, and make the best efforts to communicate them to the opposite party for their response. If it is satisfied that no response is forthcoming from the absent opposite party, the Permanent Lok Adalat shall still attempt to settle the dispute through settlement under Section 22-C(4). It is important to remember that Section 22-C(5) imposes a duty upon the Permanent Lok Adalat to be independent and impartial in attempting to amicably settle the dispute, while Section 22-C(6) imposes a duty upon the party present before the Permanent Lok Adalat to cooperate in good faith and assist the Permanent Lok Adalat. Thereafter, the Permanent Lok Adalat, based on the materials before it, shall propose terms of settlement and communicate them to both parties, regardless of whether they participated in the proceedings. If the party present before the Permanent Lok Adalat does not agree or if the absent party does not respond in a sufficient period of time, only then can the Permanent Lok Adalat adjudicate the dispute on its merits under Section 22-C(8). Keeping in mind the principles enshrined in Section 22-D, the Permanent Lok Adalat shall once again notify the absent party of its decision to adjudicate the dispute on its merits, in case it wishes to join the proceedings at that stage.

27 Section 22-C(8) is amply clear that it only comes into effect once an agreement under Section 22-C(7) has failed. The corollary of this is that the proposed terms of settlement under Section 22-C(7), and the conciliation proceedings preceding it, are mandatory. If Permanent Lok Adalats are allowed to bypass this step just because a party is absent, it would be tantamount to deciding *disputes on their merit ex parte and issuing awards which will be final, binding and will be deemed to be decrees of civil courts. This was simply not the intention of the Parliament when it introduced the LSA Amendment Act. Its main goal was still the conciliation and settlement of disputes in relation to public utilities, with a decision on merits always being the last resort. Therefore, we hold that conciliation proceedings under Section 22-C of the LSA Act are mandatory in nature."*

40. The scheme of the MSMED Act, 2006 also prescribes a step by step process for invoking the jurisdiction of the Facilitation Council and the steps that are required to be exhausted by the Facilitation Council before it proceeds with the process of passing a final and a binding award between the parties. The above ratio would apply also to the case in hand. The steps prescribed under the MSMED Act are required to be followed have to be complied with and that conciliation proceedings are required to be resorted to & result in failure before a reference is made for arbitration between the parties.

41. In the judgment of ***"Vijeta Construction versus Indus Smelters Ltd. and another"*** reported as ***2021 SCC OnLine SC 3436,*** the Apex Court has further made it clear that once the procedure under Section 18 (2) is followed, Arbitration proceedings will commence only thereafter and observed as under:-

"13. As per Sub-Section (3) of Section 18 after conciliation fails under Sub-Section (2) of Section 18 of the MSMED Act, and conciliation Initiated under sub-section (2) is not successful, conciliation stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for

> *arbitration or refer it to any institution or centre providing ADR 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 subsection (1) of section 7 of that Act. Therefore only after the procedure under Sub-Section (2) of Section 18 is followed and the conciliation falls and then and then only the arbitration proceedings commences and thereafter the provisions of the Arbitration Act shall then apply."*

(Emphasis Supplied)

42. It is thus held that the Facilitation Council has to first undertake the conciliation proceedings under Section 18 (2) of the MSMED Act and the reference for arbitration under Section 18 (3) can be done only after failure of the conciliation to arrive at a settlement.

43. This now leads to the second question as to whether a separate notice is to be sent to the parties at the stage of proceedings under Section 18 (3) of the MSMED Act, 2006. The arbitration proceedings under the MSMED Act are part of a composite scheme and in continuity to the conciliation. The proceedings being back to back, there seems no logic or purpose to be served in mandating serving of a fresh notice before Arbitration is initiated under Section 18 (3) of the MSMED Act. Introduction of any such requirement would cause introduction of an additional procedural requirement not prescribed in the statue. The petitioner must establish before this Court as to how the ends of justice would be defeated or the object of the Act would not be well served if a second notice at the stage of Arbitration is not issued. No such rationale has been brought before this Court. Introduction of any such procedure would invariably mean

as if the Arbitration Proceedings are independent of and un-related to conciliation proceedings under Section 18 (2) of the MSMED Act, 2006. Once this Court has already held that conduct of conciliation proceedings under Section 18 (2) is a mandatory pre-requisite to arbitration under Section 18 (3) of the MSMED Act, 2006, the proceedings become continuous, inter-dependent and inter-related, they cannot be seen independent of each other.

44. I also find support of my view from the judgment of Madhya Pradesh High Court in the matter of ***Jabalpur Treasure Island Pvt. Ltd. (supra).*** I fail to find myself in agreement with the Hon'ble Gujarat High Court in the matter of ***Principal Chief Engineer (Supra)*** for the primary reason that the statutory scheme and import of Section 18 (2) & Section 18(3) as well as their inter-dependence or continuity has not been considered by the Hon'ble Gujarat High Court. Besides, there is no consideration of the law that Section 18 (2) is a mandatory pre-requisite to Section 18 (3).

45. The other judgments referred to by the petitioner do not relate to the above issue and have been passed on merits of the proceedings and the nature of the initial notice itself. Once notice has been issued on the parties, they are deemed to know the statutory procedure and the consequences that follow at each stage. They cannot be permitted to plead ignorance of law to delay the proceedings which in turn delays achieving the statutory objective.

46. The contention of the petitioners for a fresh notice at the stage of Section 18 (3) of the MSMED Act, 2006 is accordingly rejected.

47. The same would now lead to the determination of the merits of the cases and the issue as to whether the proceedings in question were duly held or not in cases other than CWP-14235 of 2022 as well as in CWP-18313 of 2022. The case of the petitioner in other cases itself is that the

conciliation proceedings did take place and fairly conceded when confronted by the respondents. He, however, confines the above argument in CWP-14235-2022. In CWP-18313 of 2022 the petitioner submits that the conciliation proceedings took place but did not subscribe to the spirit of the MSMED Act, 2006 as adequate opportunity for conciliation had not been granted to the petitioner.

48. Since the proceedings in CWP-18313-2022 were sought to be impugned on twin aspects, firstly that the Notice of conciliation did not grant adequate opportunity and secondly that the Notice was not proper, it would be appropriate to refer to the notice sent under Section 18 of the MSMED Act. The relevant extract of the Notice reads thus:

> "*Through this notice on the above mentioned claim Petition you are hereby informed to be present in person or through authorized representative for (Conciliation/Arbitration) of above case on 05.07.2021 at 11:00AM in the office of Chairperson, Micro & Small Enterprises Facilitation Council, Administrative Block. Fatehgarh Sahib.*
>
> *In case you fail to represent your case in writing or in person, it will be presumed that you have nothing to say, and the case will be decided on merit.*"

49. Counsel for the petitioner contends that the aforesaid notice is vague and mentioned both the aspects i.e. Conciliation/Arbitration without specifying the nature of the proceeding and was more of an order instead of an invitation. Reliance was placed on the judgment of the Hon'ble Gujarat High Court to contend that the language of the notice was not conducive to an invitation and was rather in the nature of a command.

50. It not in dispute that the notice in question had been duly received by the petitioner in the above writ petition and that it had failed to appear on the initial date and thereafter an officer had been deputed by it. No conciliation was, however, arrived at whereupon the proceedings were terminated and adjudication was initiated. The counsel contends that the notice was not proper and did not afford adequate opportunity to him. He has placed heavy reliance on the judgment of Gujarat High Court.

51. Per contra, counsel for the respondent has referred to the judgment of the Madhya Pradesh High Court in the matter of ***Jabalpur Treasure Island Pvt. Ltd.(supra)*** which has held that once a notice has been served on a party under Section 18 of the Act, 2006, it would hold good for conciliation proceedings as well as arbitration proceedings to be taken up by the Facilitation Council after the conciliation has failed. The Madhya Pradesh High Court had relied on the judgment of the Hon'ble Supreme Court in the matter of ***Goodyear India Limited (Supra)*** before coming to such conclusion.

52. The statutory scheme does not provide for separate notices to be issued to the concerned parties at each stage i.e. at the stage of conciliation and thereafter at the stage of arbitration of the dispute especially when both the process/proceedings are being undertaken by the Facilitation Council itself. Once the petitioner was in receipt of the notice of conciliation and the proceedings being continuous & inter-related, I do not find any grounds as to how the right of the petitioner would be prejudiced with the language of the notice that has been extracted above. Merely because the notice mentions both i.e. Conciliation/Arbitration it does not mean that the notice is improper. The object of notice is to communicate and it has to be read in

relation to the stage at which the proceedings are pending. It is also evident from a perusal of the judgment relied by the petitioner that the notice therein was non-informative. The language of the notice herein is informative and informs about consequence of non-appearance. The same cannot be perceived as an order but as an advisory to enable the party to take a decision about joining/absenting once it is aware of the consequence. The notice can not be labeled as pre-judging merely because of intimation about proceeding ex-parte in the absence of non-appearance. The above said notice, in its plain reading does not suggest any determination of issue or an expression on merits of the case. Mere use of such an expression cannot be construed as an expression on the merit of the claim and/or be read as failure to provide a fair opportunity to participate in the conciliation. The judgment would not be applicable to the facts of the present case.

53. Even though, the petitioner contends that no effective opportunity for conciliation was extended to him which does not seem to find support from facts of the case. It is evident from a perusal of the reply that notice was duly received & a response was also filed by the petitioner. It opposed the continuation of the proceedings & jurisdiction apart from expressing non-willingness to participate in the process by referring to the proceedings under Section 138 of the Negotiable Instruments Act, 1881. The responsibility of the authority is to afford opportunity to parties to plead and establish their case. There can be no obligation on the Authority to await indefinitely till a response is filed. The consequence having been informed, it is deemed to be a conscious decision of the petitioner to not join the proceedings. He thus cannot claim prejudice and plead for equity.

54. Even in the present petition, the petitioner has not come forth with any offer seeking to resolve the dispute. It seems that the objection qua sufficient opportunity for conciliation having not been extended lacks bona fide and has been raised merely for impugning the award that has been passed against it. If the petitioner was sanguine about resolving the issue, it ought to have come up with resolution plan. No such attempt has been made either in the petition or during the course of arguments of the case. The plea of not being provided sufficient opportunity for conciliation is hence merely an eye-wash & an attempt to delay finalization of the issue.

55. The case of petitioner during the proceedings before the Council being specific & expressing unwillingness to participate, the decision of the Council to terminate conciliation & proceed with arbitration cannot be held to be bad.

56. Even otherwise, the scheme of the Act mandate the Facilitation Council to decide the reference in a time bound manner and that merely because the Facilitation Council has expedited the process in consonance with the mandate of Section 18 (5) and object of the MSMED Act of 2006, a party may not be permitted to say that it was not afforded adequate opportunity to explore conciliatory efforts for resolving the dispute.

57. There is thus no exceptional circumstances which would necessitate interference in the case in a writ jurisdiction instead of the petitioner raising a challenge to the merits of the case as per the procedures prescribed under the Act. It cannot also be held in the facts of the case that Principles of Natural Justice have been violated or the order suffers from any illegality at this stage. The same may involve certain factual aspects which

may need to be gone into, which shall be considered by the competent Court, in the event of any challenge on merits made by the petitioner.

58. Insofar as the CWP-14235-2022 is concerned, the position has remain uncontroverted that no conciliation proceedings was recorded in the zimni orders to have taken place. Even though, counsel for the respondents have emphasized that conciliation proceedings had actually taken place and such conciliation proceedings had been duly recorded in all other matters, I would rather find force in the argument raised by the counsel for the petitioner that when the Facilitation Council is duly recording about the conciliation proceedings in all other matters, there was no occasion as to why the said proceedings was not so recorded in the present case. The inference is thus against the respondents.

59. Insofar as the contention of the petitioner in the above said writ petitions as regards the claim of the respondent-claimant being bad since the respondent-claimant had not applied under the MSME Unit category is concerned and that resultantly, it cannot be permitted initiation of proceedings under the MSMED Act, 2006, the said submission fails to impress this Court.

60. A perusal of the Notice Inviting Tenders shows that certain concessions had although been definitely extended to the MSME Units, however, the said clause does not specify that MSME Unit was supposed to apply only under the said condition and that in the event of the MSME not applying after availing the said benefits, its status as MSME Unit would not be operative. The suggestive argument of the petitioner is thus based on an inference which is not supported from the plain reading of the language used in the Notice Inviting Tender itself. Merely because, the respondent-

claimant did not avail certain benefits/concessions provided under the Notice Inviting Tender cannot oust the jurisdiction of the Act of 2006 and/or the protection of the Act of 2006 provided to such units. Further, the reading of the Act of 2006 also clearly shows that the provisions of such Act are to take effect notwithstanding any other law and/or agreement to the contrary. Hence, the condition of the tender could not be interpreted so as to override the object, protection and the scheme of the Act of 2006. Hence, even on the said score, the argument advanced by the counsel for the petitioner is liable to be rejected.

61. The aim and object of the Act being to resuscitate the Micro Small and Medium Enterprises by expeditious adjudication of their financial disputes and to ensure that they are not financially strangulated by larger players, such laudable objective ought not to be permitted to be defeated by accepting any such argument. In case such a contention is accepted, the Small Scale Micro Enterprises can be strangulated easily by the larger players merely by incorporating such conditions in the tender and to wriggle out of the statutory obligation especially when Micro and Small Enterprises are largely dependant on other units for their survival.

62. Considering from either of the said perspectives, the argument advanced by the counsel for the petitioner fails to impress this Court or deserves to be upheld. The said contention is accordingly rejected. The respondent would not be stopped from resorting to MSMED Act for redressal of his grievances. For an estoppel to take effect, there has to be a conscious exercise of option and awareness of the consequences. If an action is thereafter taken and positions between the parties is altered on the basis of such assurance and action/option being aware of the consequences that

would follow, the principles of estoppel may be brought in action. No such circumstances emanate from a plain reading of the Clause 17 of the Notice Inviting Tender and that it cannot be held that a bidder shall be estopped from taking recourse to the provisions of the MSMED Act, 2006 for seeking recovery of his dues merely on account of not having sought the concessions provided in the bid document for the MSME Units. The contention is thus rejected.

63. The position of law being well settled that ordinarily the writ jurisdiction would not be applicable to cases where a statutory forum is created by law for redressal of grievance, I find that no such exceptional and overwhelming circumstance exist in the present set of cases for examining the validity of the award through writ jurisdiction of this Court especially when the parties would have their option to take recourse to remedies as per law to impugn the said award. It has been held by the Hon'ble Supreme Court of India in the judgment of ***"Radha Krishan Industries (supra)*** that exception to the rule of alternative remedy arises in a situation where the order or proceedings are wholly without jurisdiction or suffer from illegality. Since the respondents have failed to dispel that no conciliation proceedings took place in CWP-14235 of 2022, hence, the arbitral award is not compliant of the procedure mandated under Section 18 (2) of the MSMED Act, before conducting proceedings under Section 18 (3) and for passing an arbitral award. The absence of conciliation proceedings would thus vitiate the arbitral award. Even though the above ground is also available to a party to be raised in an appeal, however, considering the objective of the statute and the delay that would accrue as a result of the above only to re-iterate what has been held above, it would be an exercise in futility and merely delay the

process. The said award already falls within an exception to the rule of alternative remedy. The proceeding having been conducted without following the mandatory process. Accordingly, **CWP-14235-2022 is hereby allowed and the award dated 23.08.2022 (Annexure P-2)** in the claim petition No.PTL/MSEFC/18 in **CWP-14235-2022 is set aside**. The parties in the said case are relegated to appear before the **Facilitation Council, Patiala** on **24.07.2023** whereupon the conciliation proceedings shall be initiated between the parties and further proceedings in accordance with law shall be undertaken. All other writ petitions are, however, dismissed at this stage for the reasons given above and given availability of alternative remedies. The parties may, if so advised, take recourse to the alternative remedies available to them as per grievance redressal mechanism provided in the statute.

(VINOD S. BHARDWAJ)
JUDGE

MAY 29, 2023
Vishal Sharma

Whether speaking/reasoned	**:**	Yes/No
Whether Reportable	:	Yes/No