**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

284(1)

CWP-12338-2019(O&M)

Reserved on:04.05.2023

Date of Decision:01.08.2023

Indian Oil Corporation Limited .....Petitioner

Versus

Haryana Micro and Small Enterprise Facilitation Council, Chandigarh, Haryana and another .....Respondents

284(2) CWP-15849-2019

Indian Oil Corporation Limited .....Petitioner

Versus

Union of India and others .....Respondents

284(3) CWP-22029-2019

Indian Oil Corporation Limited .....Petitioner

Versus

Union of India and others .....Respondents

284(4) CWP-22103-2019

Indian Oil Corporation Limited .....Petitioner

Versus

Union of India and others .....Respondents

284(5) CWP-26602-2019

Sukhbir Singh .....Petitioner

Versus

Union of India and others .....Respondents

284(6) CWP-28300-2019(O&M)

M/s Bird Clothing and another **.....Petitioners**

Versus

Union of India and others **.....Respondents**

284(7) **CWP-3984-2020(O&M)**

Rites Limited **.....Petitioner**

Versus

Haryana MSMEFC and another **.....Respondents**

284(8) **CWP-8086-2020**

M/s Global Steel Company **.....Petitioner**

Versus

Union of India and others **.....Respondents**

284(9) **CWP-169-2020**

M/s Piccadily Agro Industries **.....Petitioner**

Versus

State of Haryana and others **.....Respondents**

284(10) **CWP-173-2020**

M/s Piccadily Agro Industries **.....Petitioner**

Versus

State of Haryana and others **.....Respondents**

284(11) **CWP-25897-2021**

M/s Geo Api Solution Pvt. Ltd. **.....Petitioner**

Versus

Union of India and others **.....Respondents**

284(12) **CWP-5607-2023**

Shadowfax Technologies Pvt. Ltd. **.....Petitioner**

Versus

Haryana MSME and others **.....Respondents**

284(13) **CWP-5615-2023**

Shadowfax Technologies Pvt. Ltd. **.....Petitioner**

Versus

Haryana MSME and others **.....Respondents**

285 **CWP-15506-2020**

Hindustan Petroleum **.....Petitioner**

Versus

MSME Haryana and others **.....Respondents**

286 **CWP-18246-2021**

M/s Pioneer Urban Land and Infrastructure Ltd. **.....Petitioner**

Versus

Haryana MSME and others **.....Respondents**

287 **CWP-20917-2021**

Union of India **.....Petitioner**

Versus

MSME, Haryana and others **.....Respondents**

288(1) **CWP-1172-2022**

Jaichittra Inc. **.....Petitioner**

Versus

Haryana MSME and others **.....Respondents**

288(2) **CWP-3679-2021**

Bio-Med Health Care Products **.....Petitioner**

Versus

State of Haryana and others **.....Respondents**

288(3) **CWP-22560-2021(O&M)**

M/s Xionn Services Pvt. Ltd. **.....Petitioner**

Versus

Union of India and others .....Respondents

289(1) CWP-6991-2022(O&M)

The Northern Railways .....Petitioner

Versus

MSME Haryana and others .....Respondents

289(2) CWP-10294-2022(O&M)

Omkar Reatlers and Developers .....Petitioner

Versus

MSME Haryana and others .....Respondents

289(3) CWP-10286-2022(O&M)

Era Realtors Pvt. Ltd. .....Petitioner

Versus

MSME Haryana and others .....Respondents

290 CWP-14053-2022

Reacon Engineers (India) Pvt. Ltd. .....Petitioner

Versus

MSME Haryana and others .....Respondents

291 CWP-22013-2022

M/s Fatehpuria Transformers .....Petitioner

Versus

MSME, Haryana and others .....Respondents

292 CWP-8863-2023

M/s Lifestyle International Pvt. Ltd. .....Petitioner

Versus

MSME, Haryana and others .....Respondents

126 CWP-3870-2023

M/s Tirupati Plywood .....Petitioner

Versus

MSME Haryana and others .....Respondents

127 CWP-5495-2023(O&M)

M/s Bansal Enterprises .....Petitioner

Versus

MSME Haryana and others .....Respondents

128 CWP-7410-2023(O&M)

M/s Gem Edible Oils Pvt. Ltd. .....Petitioner

Versus

State of Haryana and others .....Respondents

129 CWP-9235-2023

Northern Railways .....Petitioner

Versus

District Level MSME .....Respondent

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

Present**:** Mr. Anand Chhibbar, Senior Advocate with
Ms. Ateevraj Sandhu and Mr. Vaibhav Saini, Advocates,
for the petitioners in CWP-12338-2019;
CWP-15849-2019; CWP-22103-2019;
CWP-22029-2019; CWP-169-2020 and CWP-173-2020.

Mr. Ivan Khosa, Advocate with
Mr. Jashan Sekhon, Advocate,
for the petitioner in CWP-7410-2023.

Mr. Chandan Deep Singh, Advocate,
for the petitioner in CWP-8863-2023.

Mr. Rajat Khanna, Advocate with
Mr. Vijay Pratap Singh and
Mr. Vishal Saini, Advocates,
for the petitioner in CWP-18246-2021.

Ms. Roja Agnihotri, Advocate,
for the petitioner in CWP-22013-2022.

Mr. Jagan Nath Bhandari, Advocate,
for the petitioner in CWP-3870-2023.

Mr. Sumeet Goel, Sr. Advocate with
Mr. Rohan Mittal and Mr. Arush Neeraj Vaid, Advocate
for the petitioner in CWP-5607-2023 and
CWP-5615-2023.

Mr. Prateek Rathee, Advocate with
Mr. Amit Meharia and
Mr. Abhinash Agarwal, Advocates,
for the petitioner in CWP-12338-2019 and CWP-3984-2020.

Ms. Anjali, Advocate for
Mr. Nipun Vashist, Advocate, for the petitioner
in CWP-22560-2021, CWP-8086-2020,
CWP-25897-2021 and CWP-22029-2019.

Mr. Ankush Chaudhary, Advocate with
Mr. Satyaveer Singh, Advocate,
for the petitioner in CWP-10294-2022.
and CWP-10286-2022.

Mr. Akshit Aggarwal, Advocate,
for the petitioner in CWP-5495-2023.

Mr. Atul Nehra, Advocate,
for the petitioner in CWP-15506-2020.

Mr. Vivek Aggarwal, Advocate for Ms. Tina Garg, Advocate,
for the petitioner in CWP-14053-2022

Mr. Shubham Mehta, Advocate

for the petitioner in CWP-1172-2022.
Mr. Ravish Malhotra (in person)
authorized representative for respondent No.2
in CWP-10286-2022 and CWP-10294-2022.

Mr. Ashutosh Kumar Sharma, Legal Consultant with
Mr. Pankaj Mulwani, DAG, Haryana and
Mr. Vivek Chauhan, Addl. A.G. Haryana.

Mr. Ankur Bali, Advocate,
for respondent No.2 in CWP-12338-2019.

Mr. Sunil Kumar Sahore, Advocate, for respondent No.2.

Mr. Kunwar Rajan, Advocate,
for respondent No.2 in CWP-14053-2022

Mr. Puneet Bali, Sr. Advocate with Mr. Surjeet Badhu and
Mr. Vivek Sharma, Advocates,
for respondent No.2 in CWP-5607-2023;
CWP-5615-2023.

Mr. Munish Kumar Garg, Advocate &
Mr. Rohtash Solanki, Advocate &
Mr. Vikas Mehra, Advocate,
for respondent No.2 in CWP-6991-2021.

Mr. Rajeev Kawatra, Senior Panel Counsel
for respondent No.1-Union of India
in CWP-12338-2019 & CWP-15849-2019.

Mr. Arvind Seth, Advocate, for the petitioner
in CWP-9235-2023 & CWP-20917-2021 and
for respondent No.4 in CWP-22013-2022 &
for respondent No.1 in CWP-25897-2021.

Ms. Gehna Vaishnavi, Advocate,
for respondent No.5-Union of India in CWP-18246-2021.

Mr. Somesh Gupta, Sr. Panel Counsel,
for respondent-Union of India

in CWP-8086-2020.
Mr. Ajay Kalra, Central Govt. Counsel,
for respondent- No.1-Union of India in CWP-22103-2019,
CWP-22029-2019 and CWP-28300-2019.

Mr. Anil K. Sokal, Advocate for
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Mr. M.K. Sood, Advocate,
for respondent No.2 in CWP-22013-2022.

Mr. Ajay Jain, Advocate,
for respondent No.2 in CWP-3984-2020.

Mr. Rishav Soni, Advocate for
Mr. Surender Gupta, Advocate,
for the petitioner in CWP-3679-2021.

Mr. Shobit Phutela, Advocate,
for the petitioner in CWP-6991-2022 and

Mr. Ajay Sharma, Advocate with
Ms. Kritika Sharma, Advocate,
for respondent No.2 in CWP-3984-2020.

Mr. Manpreet, Advocate for
Mrs. Alisha Arora, Advocate,
for respondent No.1- CWP-26602-2019.

Mr. Suresh Sharma, Advocate with
Ms. Khushika Setia, Advocate,
for respondent No.3 in CWP-26602-2019.

Mr. Pankaj Bali, Advocate and
Mr. Sikandh Mehta, Advocate,
for respondent No.3 in CWP-173-2020.

Mr. Vilas Sharma, Advocate with
Ms. Trisha Gosain, Advocate,
for respondent No.3 in CWP-28300-2019.

Mr. Mukul Singla, Advocate,
for respondent No.3 in CWP-3679-2021.

Ms. Deepali Verma, Advocate,
for respondent No.4 in CWP-8863-2023.

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VINOD S. BHARDWAJ , J.

A batch of writ petitions involving similar questions are being decided by this common judgment. Facts of the respective bunch of cases are being extracted as under:-

FACTS:

284. CWP-12338-2019 & 12 OTHER CONNECTED CASES

The petitioners seek quashing of the order dated 29.03.2019 (Annexure P-1A) whereby the Haryana Micro and Small Enterprises Facilitation Council (herein after referred to as Facilitation Council) decided to refer the case to the sole Arbitrator empaneled by the Government vide its order No.02.05.2013-IIB-II-2006 dated 24.10.2013, 08.08.2014 and 23.06.2015 post failure to arrive at a settlement during conciliation and that the disputed questions are required to be adjudicated under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 (herein after referred to as the Act of 2006).

The petitioner-Indian Oil Corporation has averred that respondent No.2 i.e. Paltech Cooling Towers and Equipments Limited, registered under Act of 2006, is a Company engaged in the business of manufacture, sale, supply and installation of Cooling Towers and Chilling Plants and Water Treatment System. On 18.09.2014, a tender was floated by petitioner-Indian Oil Corporation for design, detail engineering, supply, procurement, fabrication, construction, erection, inspection, testing and painting of 3000 m3/hr. i.e. the "Subject Work" at Haldia Refinery of the petitioner. Respondent No.2 submitted its bid and finding it to be most responsive, a letter of acceptance for work order bearing No.24370529 was issued by the petitioner-IOC to respondent No.2 for a contract value of Rs.10,02,02,514.01 only. The subject work was to be completed within a period of 13 months inclusive of one month for commissioning from the date of handing over of work site or any part thereof. A contract bearing No.110 of 2014-15 was executed between the parties on 16.07.2015. An application/representation was submitted to the Facilitation Council by the respondent No.2 under Section 18(1) of the Act of 2006. It is averred that a defective notice dated 10.12.2018 was sent by the Facilitation Council, which carried only the application and not the Annexures, calling upon the petitioner to make the payment of Rs.3,38,01,259/-. A response was thereafter filed by the petitioner on 22.12.2018, with a request to provide complete copies of the petition alongwith Annexures, followed by a reminder dated 22.01.2019. However, respondent No.1-Facilitation Council sent a notice dated 27.02.2019 to the petitioner wherein it was informed that the petition was listed for hearing on 13.03.2019 and that an effort shall be made by the Facilitation Council for settlement of dispute between the parties. It is contended that the above auto-generated email dated 27.02.2019 was received by the petitioner giving details of the claim amount, date of filing and date of hearing etc. The petitioner approached the office of the respondents to procure the copy of the petition and to accurately verify the stage of the proceedings. It was alleged that the proceedings before the respondent Facilitation Council are in breach of the statute and the law as laid down through various precedents.

Short reply by way of an affidavit has been filed on behalf of respondent No.1-Facilitation Council wherein it is stated that no order was passed by the Facilitation Council on 29.03.2019 which is rather a communication sent by the Council about the claim lodged before it by respondent No.2 pertaining to delayed payment. Since the attempts at amicable resolution through conciliation had failed between the parties. It was forwarded to a retired Judicial Officer, appointed by the Government, for his report. It was contended on merits that respondent No.2 had filed a claim petition against the petitioner-Indian Oil Corporation along with its Udyog Aadhaar Memorandum on web portal of Ministry of MSME, Government of India and is located in District Gurgaon, State of Haryana. It is thus a Small Enterprise under the provisions of the Act of 2006. It is averred that the petitioner has relied on the Arbitration Agreement between the parties, as per the contract, that has not been taken into consideration by the Council but such objection is not sustainable since Section 18(4) of the Act of 2006 empowers the Council to act as a Conciliator and/or Arbitrator for resolution of a dispute. Section 24 of the Act of 2006 gives an overriding effect to the provisions under Sections 15 to 23 of the above Act over any other law. The Facilitation Council would thus have jurisdiction to entertain and adjudicate the dispute between the parties. It was also averred that referring the said matter to the empaneled Facilitator is only to expedite disposal of the arbitration cases and the empaneled Arbitrators are acting purely on behalf of the Facilitation Council. It is further averred that there is no violation of the provisions under Section 18(3) of the Act of 2006.

All the other aspects and contentions have been dealt with in the later part of the judgment and the same are not being repeated for the sake of brevity.

285. **CWP-15506-2020**

The petitioner challenges the notice dated 28.08.2020 as referred to in the notice dated 31.08.2020 (Annexure P-6) whereby the dispute had been referred to the Arbitrator/Facilitator in a claim filed by M/s Creative Consortium bearing Case No.1615 of 2020 pertaining to the delayed payment. As per the case, the respondent No.2 had been awarded a purchase order dated 20.01.2016 for providing architectural consultancy service for renovation of its corporate office. The project awarded included the work from conceptualization stage to completion stage. The schedule for completion of the project was eight months. The first design was submitted by respondent No.2 on 18.02.2016 wherein certain modifications were advised. The revised design was thereafter re-submitted after a delay of five months i.e. on 08.07.2016 which was not approved and respondent No.2 was advised to submit fresh designs. Notwithstanding that the project was still at the initial stages, respondent No.2 submitted a bill of Rs.5,98,000/- on 17.03.2017 towards fee and compensation and refused to submit any further revised drawings. He rather got issued a legal notice dated 02.01.2020 demanding the said amount along with the compensation.

The petitioner-Corporation did not accept the said bill amount as the designs submitted by respondent No.2 had not been approved and fresh designed were required. Without attempting to resolve the issue, respondent No.2 approached the Facilitation Council by filing a claim petition and demanding the said amount. Notices in question were not despatched and/or received and the proceedings were initiated. It is contended that no effective opportunity of hearing was given and reference was made to the Arbitrator.

Separate written statement had been filed by respondent No.2 wherein it was averred that presentation had been submitted by respondent No.2 as required by the petitioner. Various telephone calls/emails/letters were sent for expeditious approval and finalization of the drawing so that the work may be commenced. However, the matter was delayed on the part of the petitioner and the project was delayed without any fault of the consultant. Respondent No.2 demanded the compensation of Rs.40,000/- per month as per terms & conditions mentioned in page No.1 of the purchase orders and instead of paying the same, the matter is being delayed on some or the other pretext. The answering respondent has worked extensively without any payment and is willing to complete the work as per terms & conditions of the contract. He has already incurred huge expenses and the dues ought to be settled. The other issues raised do not require to be repeated.

286. **<u>CWP-18246-2021</u>**

Challenge is to the notice dated 12.01.2021 (Annexure P-4), order dated 14.07.2021 (Annexure P-9) and order/notice dated 21.08.2021 (Annexure P-8) as per which the reference has been made of the claim petition filed by respondent No.2 and the matter has been taken up for arbitration.

The petitioner claims to be engaged in the business of Real Estate for the last two decades in Gurugram and had entered into a contract with respondent No.2 for providing security services on 01.09.2015. It is averred that the abovesaid agreement was valid for a period of one year w.e.f. 16.08.2015 to 15.08.2016 and the contract could be renewed on mutually agreed terms as per "Article 7.1" thereof. The abovesaid agreement also contained an arbitration/dispute resolution clause as well as the governing clause in jurisdiction. The said agreement was thereafter extended for a further period of one year. It was renewed from time to time and the relationship eventually came to an end on 30.11.2019 when the respondent No.2 stopped providing services to the petitioner-company after 01.12.2019. The petitioner-company received an intimation dated 12.01.2021 from the Council, wherein they were informed of having received an application from respondent No.2-contractor against the company under the MSME Act. It was averred that the said respondent had been registered on 25.08.2020 and since the services in question were provided from September, 2014 to November 2019, hence, the registration being later in point of time, the proceedings could not have been initiated by the authorities. It was observed that resolution of dispute was to take place in accordance with the agreement amongst the parties in light of the party autonomy. It is averred that notwithstanding the objections as regards maintainability of the claim, the Council has proceeded to make a reference of the dispute disregarding the statutory provisions. Other objections are not being repeated.

Written statement on behalf of respondent No.4 i.e. Facilitation Council had been filed wherein similar objections had been raised.

A separate reply by contesting respondent No.2 had been filed reiterating that respondent No.2 had migrated from the Udyog Aadhaar Memorandum to Udyam Registration on 25.08.2020 and the date of filing of its Udyog Aadhaar Memorandum is 06.09.2016 which is also mentioned in the Udyam Registration Certificate and as such, the claim in question has rightly been pressed before the Facilitation Council. It was also averred that the petitioner is raising frivolous objections to delay the payment of legitimate dues to the respondent and the present petition deserves to be dismissed.

287. **<u>CWP-20917-2021</u>**

Petitioner-Union of India has preferred the instant petition challenging the reference made by the Facilitation Council to the Arbitrator in Case No.2450 of 2021 on a claim filed by respondent No.2-M/s Ashok Timber Industries. Apart from the legal issues pertaining to the legitimacy of the said proceedings under Section 18, it is averred that respondent No.2 is a manufacturer and supplier of Ammunition boxes to Government and Private Organizations and claims itself to be registered entity under the MSMED Act.

Respondent No.2 had submitted its bids for the Storage Chest Assy. whereupon quotation dated 22.09.2008 submitted by respondent No.2 was accepted. The supply order was awarded in favour of respondent No.2-M/s Ashok Timber Industries vide order dated 03.01.2009. A security deposit equal to 5% of the value of the supply order was to be deposited. However, the delivery schedule as prescribed in the supply order was not forwarded by respondent No.2 due to which the factory suffered losses. The contractual breach was on part of the supplier. The breach of the warranty clause had also been detailed out in the petition. It was also submitted that the defective goods/rejected stores(goods) had to be replaced, however, the supplier did not replenish the defective goods and insisted that the petitioner receives the defective goods first and to thereafter deliver the replacement. Despite his own lapses, respondent No.2 filed the claim before the Facilitation Council in February 2021 whereupon the proceedings were initiated in violation of the statutory provisions.

Since the issues were legal and similar factual disputes were already raised in other connected petitions, no reply was required to be filed and arguments were heard.

288(1) **CWP-1172-2022**

Challenge in the present petition is to the reference letter dated 29.10.2021 (Annexure P-1) and the subsequent proceedings arising therefrom wherein the claim petition filed by respondent No.2-M/s Fibrex Construction Chemicals Private Limited has been referred for arbitration by the Facilitation Council. It has been averred that the petitioner is a partnership concern established in the year 1996 and is the leading distributor, trader and exporter of Lexan-Polycarbonate Embossed Sheets etc. Various proceedings have been initiated against the petitioner in the State of Haryana including the reference/order dated 29.10.2021 impugned herein. Reference is made to the sole empaneled Arbitrator without the consent of the petitioner which is alleged to be in violation of not only the principle of nature justice but also the procedure contemplated under Section 18 of the Act of 2006. It is averred that respondent No.2-company used to supply their products which would thereafter be sold by the petitioner to a final purchaser for a commission. The invoices were always made in the name of the final purchaser and role of the petitioner was limited to store the product of respondent No.2. On 06.07.2019, respondent No.2 provided an order "Epoxy FIBFLOOR SL" which was to be despatched from the respondent No.2 to the Bangalore address of the petitioner. Subsequently, the salesman of the petitioner-firm left the company and the management of respondent no.2 company came to an agreement with the petitioner to take back the said goods and to sell the same directly by itself. However, same could not fructify due to COVID-19 and the lockdown norms imposed. Respondent No.2 thereafter submitted a claim before the Facilitation Council instead of taking the goods back and raised a claim dated 12.11.2020 bearing No.2281 of 2021 for a sum of Rs.9,88,245/-. The petitioner claims that without issuing notice or summons in the proceedings, the matter was referred to the Sole Arbitrator even though there was no arbitration clause between the parties. Various other legal arguments regarding the maintainability of the proceedings before the Facilitation Council were also raised.

Short reply on behalf of respondent No.1 had been filed in the present petition wherein it was alleged that the true and correct facts have not been disclosed by the petitioner. While defending the action of the Council in referring the matter to the Facilitator, it is submitted that the Council had initiated conciliation and provided sufficient opportunities to reconcile the matter on 28.07.2021 as well as on 20.08.2021. The petitioner was duly served through email on the address "<u>bangalore@jaichittra-com</u>", however, the petitioner failed to participate in the conciliation proceedings. Since it was impossible to reconcile the dispute in the absence of the petitioner, the Council decided to terminate the conciliation proceedings and forwarded the reference for arbitration.

288(2) **<u>CWP-3679-2021</u>**

The present petition had been filed challenging the reference dated 29.10.2021 (Annexure P-5) whereby case No.2802/21/2611 preferred by M/s Balaji Manpower Recruitment Private Limited was forwarded to the empaneled Arbitrator/Facilitator by the Facilitation Council. It has been averred that the Facilitation Council-respondent No.2 has unilaterally referred the matter by appointing a sole empaneled Arbitrator under the provisions of the Act of 2006 and against the principles of natural justice. It was averred that the petitioner is engaged in the manufacturing of medical devices such as syringes, insulin syringes, infusion set, blood administration set and various other medical disposables. The petitioner had entered into a contract dated 17.04.2019 with respondent No.3 for supply of manpower for the period from 01.05.2019 to 31.03.2020. The said contract was renewed between the parties vide contract dated 09.03.2020 wherein the terms & conditions were more or less the same. The Facilitation Council intimated the petitioner vide notice dated 29.05.2021 about the receipt of application under Section 18(1) of the Act of 2006 which had been submitted by respondent No.3 for a sum of Rs.1,35,87,164/- against invoice No.00581 dated 01.03.2021. The petitioner was advised to make the payment. It is also averred that the abovesaid invoice was issued by respondent No.3 for a sum of Rs.40,62,047/- only as per the ledger maintained by respondent No.3. Challenge was raised to the proceedings on the grounds that are similar and have already been noticed.

Written statement on behalf of respondent No.3 has also been filed wherein the said respondent has averred that the petitioner had entered into a contract with respondent No.3 for the abovesaid period and the amount in question as claimed is outstanding against the petitioner. A sum of Rs.22,97,458/- was outstanding as principal amount whereas Rs.85,70,953/- was payable as over-time amount and there was a payment towards termination of contract without notice and also the interest of Rs.25,61,620/- as per provisions of the Act of 2006. The respondent had issued last invoice on 21.03.2021 for payment of supply to the petitioner which was refused by him.

Feeling aggrieved, the respondent filed the claim before the Facilitation Council. The pleadings between the parties to the dispute were completed and the arguments have commenced before respondent No.4. The petitioner never objected to the jurisdiction or appointment of respondent No.4 and it was only when the matter reached at the stage of final arguments, the present petition has been filed raising a challenge to the reference. Other submissions and legal aspects are raised, however, the same have not been extracted to avoid repetition.

288(3) **<u>CWP-22560-2021</u>**

The petitioner is challenging the proceedings dated 28.07.2021 by the Facilitation Council in its 239th meeting whereby the Council decided to send the matter pertaining to the claim filed by respondent No.3-M/s Fibrex Construction Chemicals Private Limited to the empaneled Arbitrator for seeking his report/recommendations. The petitioner has averred that respondent No.3 had served a legal notice dated 11.08.2020 calling upon the petitioner to pay a sum of Rs.18,43,253/- which was replied on 15.09.2020 denying the liability and submitting that the payments have been made and that no details qua the account and grounds to claim the abovesaid amount had been given. Respondent No.3 has submitted a claim whereupon a notice was sent to the petitioner on 07.04.2021 pointing out the date of hearing is 22.04.2021. When the petitioner put appearance before the Facilitation Council and thereafter filed its reply, without appreciating the response, the dispute in question has been referred to the sole Arbitrator requesting him to decide the issue and to submit its report/recommendation within a period of 12 weeks from the date of receipt of the case. It is alleged that the proceedings are in violation of the provisions of the Act of 2006.

Separate reply had been filed on behalf of respondent No.3 who disputed the contention raised by the petitioner and submitted that the true and correct genesis of the occurrence had not been disclosed by the petitioner. It has been pointed out that the proceedings were as per the statutory mandate and that the liability in question remained undisputed.

Separate reply had also been filed by the Facilitation Council which affirms its action to be within the domain of the Act of 2006 and there was no breach or violation.

289(1) **<u>CWP-6991-2022</u>**

This petition is against impugned notice dated 28.06.2021 (Annexure P-5) whereby the Facilitation Council has sought response from the petitioner, in a reference filed by respondent No.2-M/s Shree Sai Facilities under Section 18(1) of the Act of 2006. Further, quashing of Arbitration proceedings referred to the Sole Arbitrator by the Council was also sought. It has been averred that respondent No.2- M/s Shree Sai Facilities, a partnership firm and registered under MSME on 30.03.2021, is engaged in various kinds of mechanised cleaning of Railway Station Coaches, Railway buildings and outsourcing of manpower supply along with catering works etc. A contractual agreement was executed between the petitioner and respondent No.2 for providing comprehensive cleaning and sanitation work during the years 2016 to 2018. 17 different contracts/agreements for comprehensive cleaning and sanitation work had been executed between the parties from 2016 to 2018 with similar terms & conditions. One such contract bearing No.27-Comml/CC/CTG/2017 dated 24.07.2018 has been appended with the petition. Respondent No.2 raised certain invoices to the petitioner but was involved in a monetary fraud at Ferozepur Division of the Northern Railways, thereby causing huge loss to the Indian Railways. The Ambala Division of the Northern Railways was accordingly apprised by the Ferozepur Division about the involvement of respondent No.2 in the monetary fraud and a vigilance inquiry against the said firm was pending. The Ambala Division thus stopped clearances of the bills/payments.

Respondent No.2 approached this High Court by filing Civil Writ Petition No.15948 of 2018, titled as "M/s Shree Sai Facilities and another Versus Union of India and others" seeking directions to the respondents to release the payment for the outstanding bills for the work executed. The said petition was dismissed vide order/judgment dated 26.04.2019 holding that the respondent No.2 had an alternative remedy of arbitration for seeking redressal of its disputes. Notwithstanding the alternative remedy of an Arbitration prescribed in the contract, respondent No.2 did not invoke arbitration under the agreement and rather approached the Facilitation Council in 2021 claiming an amount of Rs.6,14,17,495/- along with interest. It was also stated that the firm got itself registered under the Act of 2006 only on 30.03.2021 and has claimed benefit for the services rendered during the years 2016 to 2018. The petitioner thereafter submitted its response raising objections regarding the maintainability of the said reference by the firm before the Facilitation Council. However, notwithstanding the said objections, the Facilitation Council proceeded with the matter and forwarded the case to the empaneled Arbitrator appointed by the State vide memo dated 07.03.2022. The sole Arbitrator so appointed by the Facilitation Council also proceeded with the matter. Aggrieved whereof, the present petition has been filed.

A separate written statement had been filed by respondent No.2 wherein it was averred that the reference in question has been sent to respondent No.3 for *adhoc* arbitration. It was further averred that the challenge to the proceedings has been raised on the ground that Section 18(3) of the Act of 2006 has not been complied with whereas the said Section empowers the Council to exercise an option amongst various alternatives including taking up the arbitration by itself. It has also been pointed out that it was in exercise of the power vested in the Facilitation Council that the dispute has been referred to the empaneled Arbitrator as per provisions of Rule 4(16) of the Facilitation Council Rules, 2007 (hereinafter to be referred as the "Rules of 2007") as per which, when the conciliation between the parties fails to reach to a settlement, the Council shall either itself act as an Arbitrator or refer it to an institute for such arbitration to be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 read along with Rule 4(17) and (18) of the "Rules of 2007". Reference was also made to the new Rules i.e. The Facilitation Council Rules, 2021 (hereinafter to be referred as the "Rules of 2021") that have been notified on 09.11.2021 which provides for a detailed procedure for making the reference under Rule 6 to contend that respondent No.1-Facilitation Council has been working within the ambit of the statute and that even though the Udyam Registration Certificate is of 30.03.2021 and the agreement in question pertains to the years 2016 to 2018, however, the units in question were initially required to be registered in terms of the Notification dated 29.09.2006 which was superseded vide Notification dated 18.09.2015 issued by the Government of India, Ministry of Micro, Small and Medium Enterprises providing a different procedure for registration of a Micro, Small and Medium Enterprise Unit. The respondent had got itself registered and obtained the Udyog Aadhar Registration Certificate under respective Notifications. The Udyam Registration Certificate issued last under the subsequent Notification dated 26.06.2020 is only in continuation of the earlier registration and as such, the claim had rightly been lodged with the authorities.

Short separate reply had also been filed by the Facilitation Council emphasizing to be acting within the aegis of the Act of 2006 and the Rules notified by the State of Haryana in the year 2007 and subsequently replaced by the Rules of 2021. Reference was also made to the Rules of 2021 for justifying the proceedings initiated by them.

Separate rejoinder to the reply filed on behalf of the contesting respondent was also filed by the petitioner denying the averments contained and reiterating his submissions raised in the writ petition. It is averred that the name mentioned in the new Registration Certificate is "Shree Sai Facilityies" which is not the same as "Shree Sai Facilities", as such, the firm in question is distinct/separate entity, thereby doubting the claim made by the respondent.

A rejoinder was thereafter also filed by respondent No.2 wherein it was pointed out that the spelling of the name being different was not sustainable as the Registration Certificate dated 30.03.2021 refers to the old entity itself and it is only a typographical error and would not preclude the claim of respondent No.2 under the Act of 2006. It is also pointed out that the abovesaid error has also been rectified while re-submitting the details at the time of getting the Enterprise registered in compliance to the Notification dated 17.07.2019 as well as the Office Memorandum issued by the Ministry of MSME dated 06.08.2020. He further contends that the respondents had also allotted various works to the petitioner during the said period and on the same Certificate.

289(2) <u>CWP-10294-2022</u>

Challenge is to the order/letter bearing Memo No.MSME/HFacilitation Council/Case No.2389/21/5486 dated 07.04.2022 (Annexure P-2) whereby case of M/s Rajiv Malhotra Engineering Consultants Private Limited, Gurgaon had been forwarded to the empaneled Arbitrator. The petitioner has alleged that respondent No.2 is a Private Limited Company and is engaged in the business of providing technical management consultancy services and its Udyam Registration Certificate is dated 18.03.2021 while the date of incorporation/registration of Enterprises is of 30.11.2011. The services of respondent No.2 had been engaged by the petitioner in the year, 2016 vide Technical Management Consultancy Services Agreement dated 01.01.2016. The scope of services to be rendered by respondent No.2 included *inter alia* management and review of architectural plans/designs and drawings, overseeing technical specifications of construction related works and optimizing on the available space, cost and quality of the final constructed work. The real estate sector crashed in the year, 2017 affecting the entire real estate industry including the petitioner-company. Additionally, the petitioner-company had also to deal with unforeseen circumstances including delay in getting statutory approvals from the authorities, litigations filed by slum dwellers as well as on account of the COVID-19 pandemic etc. which resulted in issues pertaining to funds and liquidity. The company had to also seek financial assistance from Indiabulls. Respondent No.2, however, submitted an application bearing No.2389/2021 with the Facilitation Council for repayment of the outstanding amount, whereupon the petitioner-company was called by the Facilitation Council on 26.08.2021. It was also pointed out that the petitioner-company repeatedly attempted to settle the matter, however, the offer was rejected by respondent No.2. Notwithstanding the statutory mandate, reference has been made by the Facilitation Council to the Sole Arbitrator for passing an award leading to the present petition being filed.

Separate written statement on behalf of respondent No.2 was filed wherein while defending the action of the Facilitation Council, it was submitted that the petitioner does not intend to resolve the issue in question and wants to only delay the resolution on some pretext. It was also averred that the petition is based on misconceived understanding and appreciation of the provisions of the Act of 2006 and that the impugned memo clearly states that respondent No.3 had only been appointed to facilitate the Arbitral proceedings related to the case that was being taken up by the Council only and respondent No.3 has been appointed by the State Government to facilitate the Arbitral proceedings. Arbitration in question is not being conducted by any outside agency and is concluded and final award is passed only by the Facilitation Council. Other factual aspects have not been disputed or denied, hence, the same are not being adverted to.

289(3) **<u>CWP-10286-2022</u>**

Challenge in the present petition has been raised to the Memo dated 07.04.2022(Annexure P-2) whereby the Facilitation Council referred the case of respondent No.2-M/s Rajiv Malhotra Engineering Consultants Private Limited to the Arbitrator. The petitioner-ERA Realtors Private Limited is a sister concern of Omkar Realtors & Developers Private Limited(petitioner in CWP-10294-2022) and the parties had raised the same issues as have already been noticed above. The pleadings being identical, are not being reiterated for the sake of brevity and to avoid unnecessary repetition. As legal questions arose for adjudication, response on facts was not necessary.

290. **CWP-14053-2022**

The petitioner raised a challenge to the reference/orders dated 25.08.2021 (Annexure P-5), 29.09.2021 (Annexure P-8) and 17.11.2021 (Annexure P-11) whereby the Facilitation Council has initiated the proceedings under the Act of 2006 on the complaint filed by M/s Gopal RMC on the ground that the supply/purchase of ready-mix concrete(RMC) is not covered under the Public Procurement Policy for Micro and Small Enterprises Order, 2012 in view of the precedent judgments. It has been averred that the petitioner is a company that has been awarded works contract by Telecommunications Consultants India Limited (TCIL) for execution of the work of renovation/expansion of the existing ESI Hospital at Okhla, New Delhi which included the works of design, engineering, construction, building and equipping as well as completion of the hospital in all respects. Respondent No.2-Gopal RMC was to supply ready-mix concrete (RMC) with different grades in the above work from 09.02.2018 to 10.09.2019 with specific terms & conditions pertaining to loading, unloading and replacement of material in case of any defect or shortfall. The payment is claimed to have been made to respondent No.2 pursuant to the work order. In November 2018, an inspection of the project was conducted by the Chief Technical Examiner of the Central Vigilance Commission, Government of India wherein it was indicated that the quality of concrete which was supplied by respondent No.2 and used in the work of RCC water tanks(Block B), Block C retaining wall was of poor quality and samples were taken by the CVC team.

On receipt of the inquiry report issued by the Chief Technical Examiner, it was concluded that the RMC-concrete supplied by respondent No.2-M/s Gopal RMC was of poor quality and in the event of any defect in quality, the material supplied was to be replaced/supplied at its own cost as per Clause 7 of the work orders. Respondent No.2 was thus liable to pay damages to the petitioner for the losses suffered on account of supply of poor quality of RMC. Despite pendency of the vigilance inquiry and notwithstanding the payment having been received by respondent No.2 from TCIL upto 30.06.2021, respondent No.2 approached the Facilitation Council alleging that a sum of Rs.30,35,176/- had been wrongly withheld. He contends that as per settled law, the works contract is not amenable to the jurisdiction of the Act of 2006 and the Facilitation Council, without taking into consideration the fact that the supply of ready-mix concrete (RMC) is not covered under the Public Procurement Policy for Micro and Small Enterprises Order, 2012, still issued the letter/order dated 25.08.2021 directing the petitioner to pay the due amount to respondent No.2 within a period of 15 days from the receipt of notice. The petitioner submitted its reply on 09.09.2021. Even against the abovesaid objections, without taking into consideration the replies, reference in question was made. The same being contrary to the statute and the precedent judgments, proceedings are bad and liable to be set aside.

Short reply had been filed on behalf of respondent No.1 wherein it defended its action and contended that the petitioner did not submit any response and raised only one issue i.e. poor quality of the material and both the parties submitted that there were no chances of conciliation. It was accordingly on the abovesaid statement made by Sh. Ram Narayan, who was working as an Accountant of the petitioner that the matter was referred to the Arbitration. It is contended that the matter is still pending and all issue regarding maintainability, jurisdiction and the merits of the claim can be duly raised and shall be taken into consideration. It was also pointed out that the abovesaid statement of Ram Narayan was duly recorded in the proceedings on 25.11.2021. The issues that have been raised were thus stated to be raised for the first time in the High Court alone.

291. **<u>CWP-22013-2022</u>**

Challenge in the present petition is to the communication dated 07.06.2022 (Annexure P-7) whereby Case No.2613 of 2021 filed by M/s SJ Wire Industries, Palwal has been forwarded to the empaneled Arbitrator appointed by the State Government to conduct arbitration proceedings under the MSME Act, 2006.

The petitioner-company is engaged in the supply of Transformers for the last two decades in Jaipur, Rajasthan. Petitioner has raised a challenge to the reference made by the Facilitation Council on the application submitted by respondent No.2 which is engaged in the business of providing raw material. The petitioner as well as respondent No.2 have been working as business associates since 2018. The petitioner-company procured raw material from respondent No.2 which alleged delayed payment on the part of the petitioner which claimed that respondent No.2-company delayed providing the raw material for which the penalty of half per cent per week (maximum 5%) has been imposed. Additionally, there was also debit balances against respondent No.2 which were not accounted for. The petitioner was required by the Facilitation Council to appear in the case on 18.11.2021. The petitioner had appeared during the conciliation proceedings but notwithstanding the defence raised by the petitioner, the matter was forwarded by the Facilitation Council to the Arbitrator. The petitioner moved an application before the Sole Arbitrator for dropping the arbitration proceedings and no decision has been taken thereupon.

Written statement on behalf of respondent No.2 had been filed wherein it was averred that the institution of the petition by concealment of true facts is that the petitioner was in default for releasing the payment due to respondent No.2 and that the proceedings have been rightly initiated.

Separate written statement had also been filed by the counsel for respondent No.4 wherein they have raised similar objections/defence, that need not be repeated for brevity.

292. **CWP-8863-2023**

Challenge in the present petition is to the order dated 14.11.2022 (Annexure P-4) whereby the Facilitation Council had passed an order in its 282nd meeting held on 10.08.2022 resolving for taking up the matter for arbitration and to seek the expert legal assistance from the experts notified by the State Government under the Rules 6(8) and (11) of the Facilitation Council Rules, 2021.

The petitioner also challenged the notice issued by the empaneled Facilitator calling upon the petitioner to appear in the proceedings before respondent No.3 fixed on 28.01.2023 and advised to deposit the fee/charge. The petitioner claimed that it had entered into contract with respondent No.4 prior to 2020 for supply of goods i.e. on 20.11.2017 under the SOR(Sale of Return Basis) Model and another agreement dated 06.02.2013 under OR (Outright purchase) Model, respectively. Under the SOR Model, the title to the products passes to the petitioner only upon invoicing to the customers and respondent No.4 is obligated to take back the unsold products in terms of the said agreement. Under the paid SOR/OR model, respondent No.4 has no obligation to take back the unsold products as the title to the products will pass to the petitioner upon delivery in terms of the said agreement. Both the said agreements were for supply of footwear/goods. As per the SOR arrangement, respondent No.4 was to replenish the stocks once in every six months. Over the time, as the stocks were not moving, they had to be necessarily liquidated and the petitioner requested respondent No.4 to offer discounts in line with other competitive brands to boost the sales of the products of respondent No.4. He was, however, not willing to offer discounts as a result whereof the products were not being sold out as expected. The petitioner thus requested respondent No.4 to take back the remaining/unsold stocks and to pay the dues of the petitioner as per their ledger and terminated the agreements. An email dated 29.11.2018 was sent by the petitioner to respondent No.4 containing the details of unsold stocks of both the agreements and the amount payable by respondent No.4 to the petitioner. Another reminder through email was sent on 10.01.2019 calling upon respondent No.4 to offer more discount for the sales. However, he was reluctant to offer more discounts and even failed to take back their unsold stock back and insisted for payments in lieu of those unsold stocks. The disputes thus broke out amongst the parties and the petitioner was left with no other option but to liquidate the unsold stocks of respondent No.4 by increasing the discount on the stocks. Due to which, the petitioner-company had incurred huge losses.

Respondent No.4, however, claimed that the petitioner owed them Rs.91,22,367/-. However, as on date of the agreements, respondent No.4 was not registered as an MSME. The registration in question took place on 08.07.2020. Respondent No.4 filed the claim applications on 22.09.2021 claiming the principal amount along with interest as per the provisions. A notice was thereafter received by the petitioner pertaining to Case No.3530/2021. He contends that the petitioner was not informed about any other subsequent proceedings and even the records could not be traced. The petitioner made detailed submissions regarding maintainability of the claim in light of the legal positions, however, the Facilitation Council made a reference to the Arbitrator. No decision has been taken on the maintainability of the proceedings and the petitioner has not been granted any opportunity to place the submissions before the authorities. The proceedings are thus sought to be challenged on the ground that respondent No.4 was not an MSME entity on the date of contract and therefore, the Act has no application. Besides, the proceedings were in violation of the principles of natural justice as well as in violation of Section 18 of the Act of 2006.

Since the questions involved were only legal, the matter was heard along with other batch of petitions wherein similar controversies as regards the scope of Section 18 of the Act of 2006 were raised.

126. **<u>CWP-3870-2023</u>**

Challenge in the present petition is to the claim application dated 25.01.2022 as well as reference No.3826/2022 being in conflict with the law laid down in the precedent judgments. It is averred that respondent No.2 used to supply raw materials to the petitioner and on 03.10.2021, petitioner made full and final payment to respondent No.2. There was nothing due between the parties and no material was ever supplied by respondent No.2 thereafter. The invoices in question pertain to the year 2019 i.e. before the full and final settlement between the parties. It is also pointed out that at the time when the business transactions took place between the parties, respondent No.2 was not registered as a MSME entity and its registration took place only on 27.08.2021. Respondent No.2 remained silent for the period from the year 2019 till January 2022 and no demand was raised. Notices were submitted only on 13.01.2022 and the same were duly responded to. However, notwithstanding the response, the reference was made for arbitration. The said Arbitrator also issued notices to the petitioner for conducting the arbitration proceedings notwithstanding that the petitioner has no liability to make any payment.

127. **<u>CWP-5495-2023</u>**

Challenge in the present petition is to the submission of claim before the Facilitation Council and its subsequent reference to the Arbitrator and issuance of notice to the Arbitrator. The petitioner claims that the respondent No.2 had supplied raw material to the petitioner-firm upto

11.03.2020 and has made payment of the purchased raw material to respondent No.2 through cheque or by account transfer. However, respondent No.2 was adamant to receive the payment in cash. Various amounts were received by respondent No.2 in cash on different dates that have been set out in the petition. However, respondent No.2 has not given due credit of the amount already received by him in cash and instead wants to capitalize absence of banking record of the said transactions. An illegal demand was thereafter raised and that only an amount of Rs.1,00,000/- is due towards the petitioner as per statement of accounts. It is also submitted that prior to registration of the petitioner as an MSME unit, he had filed a civil suit before the Civil Judge (Senior Division), Yamuna Nagar for the recovery as well and all the aforesaid facts have not been noticed by the Facilitation Council before making a reference for arbitration.

128. **<u>CWP-7410-2023</u>**

The issues raised in the present petition are identical to the issues raised in CWP-12338-2019. Notice in the present case happens to be issued on 06.09.2022 on a reference filed by M/s Sarthak Engineering. The petitioner claims to be in the business of manufacturing edible oil and mainly operates in South India. Respondent No.4 approached the petitioner for supply of a machine i.e. (Oil Refinery Separator) in the year 2018. The quotation was accepted on 05.01.2018 resulting in finalization of a contract. The purchase order was thereafter placed. An advance payment was also released in favour of respondent No.4. However, the machinery so supplied never worked as a result whereof, the petitioner suffered heavy losses. Various communications were exchanged between the parties about the machine not being upto the standards and seeking replacement/repairs therein. The petitioner suffered tremendous loss as a result of sub-standard machine supplied by respondent No.4. It was also pointed out that respondent No.4 got its Udyam Registration Certificate on 13.10.2020 whereas a claim petition was filed on 18.08.2022. It is thus contended that the agreement in question had been entered much prior to the registration of the respondent as MSME unit and resultantly, the claim in question is not maintainable.

129. <u>CWP-9235-2023</u>

Challenge in the present petition is to the notice dated 17.03.2023 (Annexure P-1) passed by respondent No.2. The issues raised by the petitioner in the present writ petition are identical to the issues raised in **CWP-20917-2021**, the same are not being reiterated accordingly. It has been contended that an issue has been raised as regards the respondent not being an MSME unit as on the date the parties entered into the business relationship.

<u>QUESTIONS:</u>

The questions which primarily arise for adjudication in the present batch of petitions are:-

(1) Whether the conduct of conciliation under Section 18(2) of the Act of 2006 is mandatory pre-requisite for commencement of adjudication by way of arbitration under Section 18(3) of the Act of 2006.

(2) Whether the MSME/Facilitation Council could appoint a Facilitator/Sole Arbitrator/Expert under Section 18(3) of the Act of 2006 and as to whether the award passed by such Sole Arbitrator is a valid award in terms of the Act of 2006.

(3) Whether the Facilitation Council could have engaged a Facilitator to submit a report and as to whether an award based on such report would be in conformity with the object of the Act of 2006.

(4) Whether the Facilitation Council would have jurisdiction to entertain the disputes instituted before it for a period prior to registration of the claimant as a Micro, Small and Medium Enterprise under the Act of 2006 even though the invoice may have been raised after the registration.

(5) Whether the entire process of conciliation and arbitral award has to be passed within the time period specified under Section 18(5) of the Act of 2006 failing which the award would be vitiated.

(6) Whether the Facilitation Council would be competent to examine the counter-claims during the course of conciliation/adjudication brought before it.

(7) Whether the proceedings before the Facilitation Council in relation to a work's contract would be not maintainable.

(8) Whether an award that has been passed in violation of law can be set aside under writ jurisdiction despite alternative remedy(ies).

STATUTORY PROVISIONS

Before proceeding further into the matter, certain essential statutory provisions are being extracted here-in-after-below:-

Micro, Small and Medium Enterprises Development Act, 2006

*"Section-2(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 supplier;

(ii) "the day of deemed acceptance" means, where no 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 of the actual delivery of goods or the rendering of services;

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

(e) ***"enterprise"*** *means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951) or engaged in providing or rendering of any service or services;*

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

(k) ***"prescribed"*** *means prescribed by rules made under this Act;*

(n) ***"supplier"*** *means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes,—*

(i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956);

(ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956);

(iii) any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises."

Chapter V

Delayed payments to Micro and Small Enterprises

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

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

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

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.

20.Establishment of Micro and Small Enterprises Facilitation Council.*—The State Government shall, by notification, establish one or more Micro and Small Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification.*

21. Composition of Micro and Small Enterprises Facilitation Council.*—(1) The Micro and Small Enterprise Facilitation Council shall consist of not less than three but not more than five members to be appointed from amongst the following categories, namely:—*

(i) Director of Industries, by whatever name called, or any other officer not below the rank of such Director, in the Department of the State Government having administrative control of the small scale industries or, as the case may be, micro, small and medium enterprises; and

(ii) one or more office-bearers or representatives of associations of micro or small industry or
enterprises in the State; and
(iii) one or more representatives of banks and financial institutions lending to micro or small enterprises; or
(iv) one or more persons having special knowledge in the field of industry, finance, law, trade or commerce.
(2) The person appointed under clause (i) of sub-section (1) shall be the Chairperson of the Micro and Small Enterprises Facilitation Council.
(3) The composition of the Micro and Small Enterprises Facilitation Council, the manner of filling vacancies of its members and the procedure to be followed in the discharge of their functions by the members shall be such as may be prescribed by the State Government.
22.Requirement to specify unpaid amount with interest in the annual statement of accounts.*—Where any buyer is required to get his annual accounts audited under any law for the time being in force, such buyer shall furnish the following additional information in his annual statement of accounts, namely:—*
(i)the principal amount and the interest due thereon (to be shown separately) remaining unpaid to any supplier as at the end of each accounting year;
(ii) the amount of interest paid by the buyer in terms of Section 16, along with the amount of the payment made to the supplier beyond the appointed day during each accounting year;
(iii) the amount of interest due and payable for the period of delay in making payment (which have been paid but beyond the appointed day during the year) but without adding the interest specified under this Act;
(iv) the amount of interest accrued and remaining unpaid at the end of each accounting year; and
(v) the amount of further interest remaining due and payable even in the succeeding years, until such date when the interest

dues as above are actually paid to the small enterprise, for the purpose of disallowance as a deductible expenditure under Section 23.

23.Interest not to be allowed as deduction from income.*—Notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), the amount of interest payable or paid by any buyer, under or in accordance with the provisions of this Act, shall not, for the purposes of computation of income under the Income-tax Act, 1961, be allowed as deduction.*

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.*

Chapter VI:: Miscellaneous

26.Appointment of Officers and other employees. *(1) The Central Government or the State Government may appoint such officers with such designations and such other employees as it thinks fit for the purposes of this Act and may entrust to them such of the powers and functions under this Act as it may deem fit.*

(2). The Officers appointed under sub section (1) may, for the purposes of this Act, by order require any person to furnish such information, in such form, as may be prescribed.

(Emphasis supplied)

HARYANA MICRO SMALL ENTERPRISES FACILITATION COUNCIL RULES, 2007

"*2. In these rules, unless the context otherwise requires,-*

(d) ***"Council"*** *means the Haryana Micro and Small Enterprises Facilitation Council, established by the Government under section 20 of the Act;*

(g) ***"institute"*** *means any institute or centre providing alternate dispute resolution services referred to in sub-sections (2) and (3) of section 18;*

3. (a) The Council shall consist of the following members namely:-

(1) The Director of Industries and Commerce, Haryana. : Chairperson

(2) The General Manager, Haryana Financial Corporation or his representative not below the rank of Assistant General Manager. : Member

(3) The Company Secretary, Haryana State Industrial and Infrastructure Development Corporation. :Member

(4) The President or his representative not below the rank of General Secretary of a prominent Industrial Association in the State. : Member

(5) Technical Expert (Mechanical Engineer), Department of Industries and Commerce, Haryana.

xx xx xx xx

4. (3) <u>The Council may appoint/or engage the services of one or more experts in terms of section 26 of the Arbitration and Conciliation Act, 1996 (26 of 1996)</u>.

xx xx xx xx

(6) The reference/application in Form 1 of the aggrieved micro or small enterprise supplier shall contain full particulars of the petitioner supplier and its status, supplied goods or services, terms of payment, if any, agreed to between the supplier and buyer, actual payment received with date, amount due and the interest duly calculated under section 16, supported by an affidavit, with necessary court fee stamp affixed thereon alongwith initial deposit towards costs of an amount of rupees one thousand by way of demand draft in the name of the Council. The Chairperson may require any petitioner to provide further particulars of the claim or any relevant documents in support of the claim as he may consider necessary for the purpose of the proceedings. If the petitioner fails or omits to do so within fifteen days of receipt of such communication or within such further times as the Chairperson may, for sufficient

cause, allow, the Council may terminate the proceedings without prejudice to the right of the petitioner to make fresh reference if he is otherwise entitled so to do. The petitioner shall also simultaneously send a copy of the reference to the buyers or buyers against whom the reference is directed.

(7) The reference/application shall be acknowledged forthwith if it is delivered at the office of the Council. Where the reference/application is received by registered post, its receipt shall be acknowledged on the same day. The Council may require any petitioner supplier to provide any better statement or particulars of claim or any further documents in support of the claim as it may consider necessary for the purpose of the proceedings and if the petitioner supplier fails or omits to do so within thirty days of receipt of any such communication or within such further time as the Council may, for sufficient cause, allow, the Council may terminate the proceedings without prejudice to the right of the petitioner to make any fresh reference if he is otherwise entitled so to do. The Chairperson shall cause the buyer in Form 2 to furnish his detailed response to the reference.

(8) On receipt of a reference under section 18, the Chairperson shall cause the reference and the buyers response thereto to be examined and, on being satisfied with the reference making a prima-facie case of delayed payment, cause the reference to be placed before the Council at its next immediate meeting for consideration. The Chairperson shall also ensure that each reference received within two weeks of the date of the last preceding meeting of the Council is examined and, if found in order, is placed for consideration of the Council at its next immediate meeting. The Council shall if it is satisfied that, on the facts stated therein, it has jurisdiction to proceed with the reference and that the petitioner is entitled under the Act to make a reference, cause a copy of the statement of claim to be sent by registered post to the respondent along with copies of

the attached documents and issue notice in Form 2 to the respondent asking him to furnish within fifteen days of receipt of the reference by the buyer or within such further time not exceeding fifteen days, as he may, for sufficient cause allow, a response to the reference in Form 3 with such documents and facts in support of his defense or having a bearing on the matter under reference together with his half share of deposit for costs in such manner as may be specified therein and within the time allowed to the respondent for furnishing his response to the reference.

(9) A copy of the notice in Form 2 shall also be sent by registered post to the petitioner along with a notice in Form 4 calling upon the petitioner to pay a further amount after adjusting the initial deposit made by him towards his half share of deposit for costs in such manner as may be specified therein and within the time allowed to the respondent for furnishing his response to the reference.

(10) The Council may, on an application made by the respondent showing sufficient cause, allow such further time for the response to the reference as it may consider fit but not exceeding thirty days form the date of dispatch of notice to the respondent of the notice under sub-rule(1).

(11) On receipt of the response to the reference and if the amount of deposits has been paid by the parties, the Council it shall send a copy of the response to the reference to the petitioner and fix a date for appearance and hearing of the parties and issue notice by registered post in Form 5.

(12) If the respondent fails or omits to send a response to the reference within the time allowed to him, the Council shall proceed to fix a date for appearance and hearing of the parties and issue notice by registered post in Form 5.

Provided that if the respondent has failed or omitted to pay his share of the deposit, the council shall call upon the *petitioner to pay the share also within fifteen days of receipt of the notice.*

Provided further that if the petitioner has not paid the aforesaid share, the Council may suspend or terminate the proceedings.

(13) At the first hearing, the Council shall not proceed to enter upon the merits of the subject matter in dispute, till it has decided on any challenge to jurisdiction or any challenge to any of its member.

(14) The Council shall either itself conduct conciliation in each reference placed before it or seek the assistance of any institute or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation. The provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996), shall apply to such a reference as if the conciliation was initiated under Part III of that Act.

(15) The Council or the institute to which the dispute has been referred for conciliation, shall require the petitioner supplier and the respondent buyers concerned to appear before it by issuing notices to both parties in this behalf. On appearance of both parties, the Council or the institute shall first make efforts to bring about conciliation between the buyer and the supplier. The institute shall submit its report to the Council within fifteen days of reference from the Council or within such period as the Council may specify.

(16) When such conciliation does not lead to settlement of the dispute, the council shall either itself act an arbitrator for final settlement of the dispute or refer it to an institute for such arbitration, in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996). The supplier or the buyer may, either in person or through his lawyer registered with any court, present his case before the Council or the institute during the arbitration proceedings. The institute shall

submit its report to the Council within such time as the Council may stipulate.

(17) Any decision of the Council shall be made by a majority of its members present at the meeting of the Council.

(18) Copy of proceedings of the Council shall be made available to the petitioner and respondent on written request.

(19) The Council shall make an arbitral award In accordance with section 31 of the Arbitration and Conciliation Act 1996, (26 of 1996) and within the time specified in sub- section (5) of section 18 of the Act. The award shall be stamped in accordance with the relevant law in force. Copies of the award shall be stamped in accordance with the relevant law in force. Copies of the award shall be made available within seven days of filing of an application."

HARYANA MICRO SMALL ENTERPRISES FACILITATION COUNCIL RULES, 2021

"3. (1) The Council shall consist of the following members, namely :-

(a) An officer from the Micro, Small and Medium Enterprises Department, Haryana, not below the rank of Director; Chairperson

(b) An officer from the office of Financial Advisor, Haryana Bureau of Public Enterprises, not below the rank of Group-A officer; Member

(c) An officer from the Administration of Justice Department, Haryana, not below the rank of Deputy District Attorney; Member

(d) The President or his representative not below the rank of General Secretary of Micro and Small Industries Association in the State of Haryana appointed by the State Government; Non-official Member

(e) An officer from the Micro, Small and Medium Enterprises Department, Haryana, not below the rank of Joint Director. Member Secretary.

xx xx xx xx

6. (1) An aggrieved Micro and Small Enterprise supplier registered within the State of Haryana, may move reference to the Council in Form-I with interest calculation in Form-II alongwith supportive documents and soft copy of the reference. The reference shall be accompanied with fees of rupees three thousand five hundred i.e. one thousand rupees towards application fee and two thousand five hundred rupees towards administrative expenses by way of demand draft/ Cheque/ NEFT in favour of the Chairperson of the Council. An aggrieved Micro and Small Enterprise supplier shall also submit an undertaking in Form-III to the extent that he has not moved a reference before any Civil Court on the same dispute. The aggrieved Micro and Small Enterprise supplier shall also simultaneously send a copy of the reference along with complete set of documents to the buyer or buyers against whom the reference is made.

(2) Upon receipt of reference from the Micro and Small Enterprise supplier, the Council shall enter the data in the official web portal created for this purpose.

(3) After entering the data, acknowledgement of the receipt of reference shall be issued by the Council to the Micro and Small Enterprise supplier through digital mode of communication.

(4) <u>The Council shall examine the reference at preliminary stage to check regarding fee or competency of Micro and Small Enterprise supplier to file the reference. In case the particulars entered in the reference are not found as per provisions of the Act or rules made thereunder, the Council shall give an opportunity to the said supplier with the request to supply the requisite information/documents within such period as specified in the notice. If the supplier fails to supply the above</u>

said information/documents within specified period to the Council then the reference shall be returned in original without taking further necessary action.

(5) The Council shall, if satisfied with the facts stated in the reference that the Micro and Small Enterprise supplier is entitled to make a reference under the provisions of the Act or rules made thereunder, shall issue a notice to the respondent alongwith a copy of the statement of claim and other documents attached to the reference by registered post or any digital mode of communication, asking him to furnish a response to the said reference within fifteen days of receipt of the said notice alongwith fees of two thousand five hundred rupees towards the administrative expenses by way of demand draft/ Cheque/ NEFT in favour of Chairperson of the Council.

(6) The Council shall take action in the reference as per provisions specified in subsection (2) of section 18 of the Act. The notice shall be issued to the parties through speed post or any digital mode of communication.

(7) If the reference is sent by the Council to any institution, the said institution shall make efforts to bring about conciliation and shall submit its report to the Council within fifteen days of sending the reference by the Council or within such period as the Council may specify.

(8) Where conciliation initiated under sub-rule (7) is not successful and stands terminated without any settlement between the parties, the Council shall take-up the dispute for arbitration as per the provisions specified in sub-section (3) of section 18 of the Act. The notice shall be issued to the parties through speed post or any digital mode of communication.

(9) If the matter is referred to the institution, the institution shall arbitrate the issue as per provisions of the Arbitration and Conciliation Act, 1996 (Central Act 26 of 1996) and refer the award to the Council.

(10) The Council shall conduct its proceedings through physical appearance or video conferencing as deemed fit.

(11) The Council shall consider the arbitral findings/reports and recommendations and pass appropriate final award/order in the matter.

(12) The Council may appoint/or engage the services of one or more experts in terms of section 26 of the Arbitration and Conciliation Act, 1996 (Central Act 26 of 1996) for taking assistance while conducting the proceedings."

(Emphasis supplied)

CONSIDERATION:

QUESTION NO.1

Whether the conduct of conciliation under Section 18(2) of the Act of 2006 is a mandatory pre-requisite for commencement of adjudication by way of arbitration under Section 18(3) of the Act of 2006?

ARGUMENT OF THE PETITIONERS

An argument has been raised by the petitioners that the conciliation proceedings stipulated under Section 18(2) of the Act of 2006 has to be mandatorily resorted to before a reference under Section 18(3) can be made and that in the absence thereof, initiation of the arbitration proceedings by the respondent-Facilitation Council/Sole Arbitrators would be vitiated and liable to be set aside in a challenge before the High Court notwithstanding that the petitioners may have an alternative remedy under Section 19 of the Act of 2006. It is further contended that the adjudication of the dispute by way of an arbitration can commence under the statutory scheme only after the conciliation has failed. They further argue that when statute requires a thing to be done in a particular manner, the same has to be done accordingly and a breach thereof would render the proceedings liable to be set aside.

ARGUMENT BY THE RESPONDENTS

Counsel for the respondents contend that the scheme of the Act does not mandate that a reference to the Arbitration, without following the conciliation would be vitiated. If the legislative intent would have been such, it would have prescribed the above consequences. Hence, notwithstanding the expression used in the statute for reference for arbitration under section 18(3) of the Act of 2006, however, the same was not intended to be mandatory. The procedural requirement has to be interpreted for furtherance of the statutory objective and not as a means to scuttle an early adjudication of the disputes pertaining to the micro and small enterprises.

ANALYSIS AND CONCLUSION:

I have heard the learned counsel for the respective parties and have gone through the impugned record of the file.

The Statutory scheme uses a specific expression "Where the conciliation initiated under sub section(2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration........." and lays down the procedural stage at which the adjudication by way of arbitration is to be conducted. Conciliation is thus the first endeavour to be made by the Facilitation Council on registration of the claim and adjudication by way of arbitration is to be initiated after failure of conciliation.

It is a basic rule of interpretation that the words have to be first assigned their plain and simple meaning unless such meaning is not in consonance with the scheme or object of the Statute or is likely to lead an absurd final outcome. Once a statute prescribes a way for certain things to be done, the same have to be done in the said manner, is again a settled cardinal legal principle. The stages having been prescribed by the statute are required to be given effect to and the legislative intent cannot be diluted or be rendered meaningless by assigning an interpretation that the steps and stages can be skipped notwithstanding the letter of the statute.

The issue in question has been examined by the Hon'ble Supreme Court in the matter of ***M/s Silpi Industries Versus Kerala State Road Transport Corporation, 2021 SCC OnLine SC 439*** as per which the conciliation proceeding under Section 18(2) of the Act of 2006 has been held as mandatory for commencement of arbitration under Section 18(3) of the Act of 2006. Failure of the conciliation being a pre-requisite, the requirement becomes mandatory before reference for arbitration is made. Such conciliation proceedings may however be undertaken by the Council itself or through any other agency providing Alternative Dispute Resolution as per the provisions of the Act of 2006.

In view of the judgment of the Hon'ble Supreme Court referred to above, it is well-settled that the Facilitation Council must take recourse to the process of conciliation before reference for arbitration under section 18(3) can be proceeded with.

QUESTION NOS. 2 and 3

2. Whether the MSME/Facilitation Council could appoint a Facilitator/Sole Arbitrator/Expert under Section 18(3) of the Act of 2006 and as to whether the award passed by such Sole Arbitrator is a valid award in terms of the Act of 2006?

3. Whether the Facilitation Council could have engaged a Facilitator to submit a report and as to whether an award based on such report would be in conformity with the object of the Act of 2006?

ARGUMENT OF PETITIONERS

Both these issues being inter-connected, the same are being dealt with together. Learned counsel for the petitioners have vehemently argued that the respondent-Facilitation Council has been conducting proceedings in violation of the provisions of the Act of 2006 and has been making references to the Sole Arbitrators to pass an award which is impermissible. It is for the Facilitation Council to conduct the arbitration proceedings either by itself or through any institution or centre providing alternative disputes resolution services. They contend that engagement of the Sole Arbitrators not being a reference of arbitration to an institution or centre providing alternative dispute resolution, the references made by the Facilitation Council to Sole Arbitrators are *per se* in conflict with the statute. Proceedings thus suffer from an illegality and are hence liable to be set aside by the High Court in exercise of its powers of judicial review under Articles 226/227 of the Constitution of India despite alternative remedy(ies) available under the statute to challenge the final award. It would be a travesty of justice to direct that the aggrieved petitioners should first exhaust their remedy(ies) as per the Act of 2006 and be subjected to aggravated hardship of mandatory pre-deposit of 75% to challenge an award when the proceedings suffer from procedural impropriety, lack of authority and are not in consonance with the statutory scheme. When the procedure for challenge is stringent, it is all the more essential for the Council to conduct its proceedings as per procedure prescribed by law.

Reference is also made to notices/information sent by the Haryana Micro, and Small Enterprises Facilitation Council and the notices sent by the Arbitrators/Facilitators to the parties. An illustrative extract of Memo No.TS/Facilitation Council/Case no. 921/19/7566-A dated 29.03.2019 in Civil Writ Petition No.12338 of 2019 is reproduced below. Similar notices have also been issued in other cases by the Facilitation Council.

"From

Chairman Facilitation Council -cum-
Director General of Industries & Commerce, Haryana
30-Bays Building, Sector-17,
Chandigarh.

To

Sh. C.B. Jaglan,
District & Sessions Judge (Retd.),
Flat no. D-503, Alaknanda Society,
Sector-56, Gurgaon.
Memo No. TS/Facilitation Council/Case no. 921/19/7566-A
Dated, Chandigarh, the 29.03.2019

Subject: In the matter of M/s. Paltech Cooling Towers & Equipments Ltd. Gurgaon Vs. M/s. Indian Oil Corporation Ltd., West Bengal (Case No. 921/19)- delayed payments.

Kindly refer to the subject cited above.

2. It is Informed that the Facilitation Council in its 153th meeting held on 13.03.2019 has decided to refer the case to the Arbitrator empaneled by the Government order no. 2/5/13-IIB-II-2006 dated 24.10.2013, 08.08.2014 & 23.06.2015 as the buyer/supplier failed to come to any kind of conciliation. As per provisions contained under section 18 (5) of Act of 2006 the dispute regarding the delayed payment is required to be decided with in a period of 90 days by way of conciliation/arbitration.

3. As such, the case no. 921/19 is being sent to you for arbitration preferably within a period of 12 weeks under Chapter V of Micro Small & Medium Enterprises Development Act, 2006 and the Facilitation Council Rules, 2007 made there under.

4. It is further submitted that under section 16 of the Act of 2006, where any buyer fails to make payment of the amount of 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.

5. The file containing page no. 1 to 293 noting page 1 to 4 are enclosed herewith."

Reference is also made to the communication sent by the Sole Arbitrator/Facilitator to the respective parties and copy of one such notice sent by the Arbitrator/Facilitator in CWP No.12338 of 2019 reads thus:-

"Arbitration Case No. 921 of 2019.
Before Sh. C B JAGLAN, Distt & Sessions Judge (Retd.), Sole Arbitrator

To M/s. Indian Oil Corporation Limited through CEO
Haldia Refinery, Purba Medinipur, West Bengal 721606

Subject In the matter of M/S Paltech Cooling Towers & Equipments Limited Gurgaon versus M/s Indian Oil Corporation Limited West Bengal (Case of delayed payment)

Please take notice I have been appointed sole Arbitrator by the Chairman HMSEFC Director of Industries and

Commerce, Haryana, in the dispute between the subject cited parties per clause of Chapter V of Micro, Small and Medium Enterprises Development Act, 2006

So you are called upon to appear before the undersigned on 19-4-2019 at 3:00 PM at the address given below in person or through pleader or a duly authorised person able to answer and reply question/reply/points relating to arbitration in support of your case.

Please take notice that in case of your non appearance on the date fixed action in accordance with law, would be taken in the matter without any further intimation/notice to you."

Referring to the aforesaid, counsel contend that the communication sent by the Facilitation Council itself shows that the matter in question has been referred to the Arbitrator empaneled by the Government for passing of the award and that even at the stage of making the reference, the Facilitation Council has pre-determined the liability to pay compound interest with monthly rest. The Facilitation Council having recorded an expression about outstanding amount and the liability of the petitioner, has suggested the Arbitrator/Facilitator to submit his award/report against the buyer.

They further draw attention to the communication received from the Arbitrator and contend that the notices issued to them establish that such Arbitrators conduct proceedings in such capacity even though they do not fall under the definition of an 'Institute' or ' any other Centre Providing Alternative Dispute Resolution Services '. All proceedings undertaken by the Sole Arbitrator are thus *non-est*, without jurisdiction, in conflict with law and hence are liable to be set aside.

Counsel also argued that the respondents have justified making of a reference to the Sole Arbitrator/empaneled Facilitator by relying on the

Rules notified by the State of Haryana and that in the absence of any such enabling provisions in the statute, the Rule would be in conflict with the statute.

They claim that the Arbitration and Conciliation Act, 1996 is a complete code unto itself and that the procedure prescribed thereunder is required to be followed by the Facilitation Council. Even though the provisions of the Arbitration and Conciliation Act, 1996 do not prohibit engagement of any expert for assisting the Arbitration, however, authority of the expert is limited to a reference to be made for his opinion. The reference to the expert has not been prescribed due to which the experts are passing the award instead of submitting any report on the issue.

Counsel for the petitioners have placed reliance on the following judgments to substantiate their arguments on the issue as to whether arbitration proceedings have to be conducted by the Facilitation Council itself or/can be referred to an institution or council and cannot be referred to a Sole Arbitrator. A reference is made to the judgment in the matter of ***M/s Silpi Industries etc. Versus Kerala State Road Transport Corporation and another etc.*(supra):-**

> *"**18.** .... The recovery mechanism for the amount due is covered by Sections 17 and 18 of the said Act. If any party has a dispute with regard to amount due under Section 17, a reference is required to be made to the Micro and Small Enterprises Facilitation Council. On such reference, the Council is empowered to conduct conciliation in the matter or seek assistance of any institution or centre providing alternate dispute resolution services by making a reference to such institution for conducting conciliation. If the conciliation is not successful, as contemplated under Section 18(2) of the said Act,*

same stands terminated under Section 18(3) of the said Act. <u>Thereafter, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of Arbitration and Conciliation Act, 1996</u> are made applicable as if the arbitration was in pursuance of arbitration agreement between the parties, under sub-section (1) of Section 7 of the 1996 Act. ....When the settlement with regard to a dispute between the parties is not arrived at under Section 18 of the 2006 Act, necessarily, the Micro and Small Enterprises Facilitation Council shall take up the dispute for arbitration under Section 18(3) of the 2006 Act or it may refer to institution or centre to provide alternate dispute resolution services and provisions of Arbitration and Conciliation Act 1996 are made applicable as if there was an agreement between the parties under sub -section (1) of Section 7 of the 1996 Act. ....

****

20. *<u>From a reading of Section 18(3) of the 2006 Act it is clear that when the conciliation initiated under sub-section (2) of Section 18 of the said Act is not successful, the Council shall either itself take up the dispute for arbitration or refer to any institution for arbitration.</u> Further Section 18(3) of the said Act also makes it clear that the provisions of 1996 Act are made applicable as if there is an agreement between the parties under sub-section (1) of Section 7 of the 1996 Act. ....”*

While advancing arguments that the provisions of Section 18(3) do not permit any non-institutional Arbitration, they have placed reliance on the judgment of Delhi High Court in the matter of ***<u>Bharat Heavy Electricals Limited Versus The Micro and Small Enterprises Facilitations Centre and another, 2017 SCC OnLine Del 10604</u>***:-

*"**17.** It is at once clear that the provision of Section 18(3) of the Act do not leave any scope for a non-institutional arbitration. In terms of Section 18 (3) of the Act, it is necessary that the arbitration be conducted under aegis of an institution either by MSEFC or under the aegis of any "Institution or Centre providing alternate dispute resolution services for such arbitration.*

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***28.** This Court - for the reasons as stated hereinbefore - is unable to subscribe to the view that there is no inconsistency between the arbitration agreement and section 18(3) of the Act; Section 18(3) contemplates only an institutional arbitration and not an ad hoc arbitration. In the present case, the provision that only BHEL would appoint the arbitrator, plainly, runs contrary to the mechanism under section 18(3) of the Act. Further, in terms of Section 19 of the Act, the award rendered pursuant to an arbitration under Section 18(3) of the Act cannot be assailed by the party (other than the supplier), without depositing seventy-five percent of the amount awarded. Concededly, Section 19 would be inapplicable to an award, which is rendered pursuant to an arbitration that is not conducted in terms of Section 18(3) of the Act."*

Counsel also referred to the judgment of a Division Bench of Allahabad High Court in the matter of ***Paper and Board Convertors Versus U.P. State Micro and Small Enterprises and others, 2014 SCC OnLine All 5825:-***

"14. Under sub-section (4) of Section 18, this position is made abundantly clear because it stipulates that notwithstanding anything contained in any other law for the time being in force, the Facilitation Council or the Centre providing alternate dispute resolution services shall have jurisdiction to act as an arbitrator or Conciliator under this section in a dispute

between a supplier located within its jurisdiction and a buyer located anywhere in India.

15. The petitioner invoked the provisions of the 2006 Act by filing a reference to the Facilitation Council on 3 October 2011. There was undoubtedly a dispute between the petitioner and the respondents in regard to the claim of the petitioner arising out of non payment of its bills. The respondents appointed a sole arbitrator on 5 October 2011 after the petitioner had invoked the intervention of the Facilitation Council on 3 October 2011 under Section 18 of the 2006 Act. Once the jurisdiction of the Facilitation Council has been validly invoked, the Council has exclusive jurisdiction to enter upon conciliation in the first instance and after conciliation has ended in failure, to refer the parties to arbitration. <u>The Facilitation Council could either have conducted the arbitration itself or could have referred the parties to a centre or institution providing alternate dispute resolution services. The Facilitation Council was clearly in error in entertaining the objection filed the respondents and referring the petitioner to the sole arbitrator so designated by the respondents.</u>

16. The non-obstante provision contained in sub-section (1) of Section 18 and again in sub-section (4) of Section 18 operates to ensure that it is a Facilitation Council which has jurisdiction to act as an arbitrator or Conciliator in a dispute between a supplier located within its jurisdiction and a buyer located anywhere in India. The Facilitation Council had only one of the two courses of action open to it: either to conduct an arbitration itself or to refer the parties to a centre or institution providing alternate dispute resolution services stipulated in sub-section (3) of Section 18.

17. In this view of the matter, the impugned order of the <u>Facilitation Council directing the parties to a reference before the sole arbitrator appointed by the respondents was manifestly illegal</u>. We would, accordingly, have to allow the petition and

> *set aside the impugned order dated 13 February 2014. We order accordingly."*

ARGUMENTS BY RESPONDENTS

Learned State Counsel has, on the other hand, argued that the Act of 2006 had been introduced with an object to provide for facilitating promotion, development and enhancing competitiveness of the Micro and Small Enterprises and the matter connected therewith or incidental thereto. The State Government had constituted the Facilitation Council in the year 2007 as per provisions of the Act of 2006 and to facilitate expeditious recovery of delayed payments of the Micro and Small Enterprises. The Facilitation Council Rules of 2007 were repealed by the Facilitation Council Rules of 2021. He contends that as per the procedure, the Facilitation Council receives the references on its portal whereafter hard-copies are required to be submitted. Once the defects, if any, are removed, the claim is listed before the Facilitation Council. It issues notices for conciliation proceedings as per Section 18(2) of the Act of 2006. Given the time-lines prescribed under the Act and also the rate of interest provided in the Act, the process is required to be completed expeditiously. Hence, two/three opportunities are given to the parties during conciliation proceedings to resolve the issue amicably. In case there is a settlement amongst the parties during the conciliation, the case is closed. However, where the parties fail to settle the dispute in conciliation, the matters are forwarded for the arbitration proceedings to be conducted by the Council itself. In discharge of its functions, the Facilitation Council seeks assistance of empaneled Arbitrators/experts/facilitators (the expression used in the communication sent by the Council to the empanelists) appointed by the State Government. A report/recommendation is submitted to the Council by the empaneled Arbitrators/legal experts/facilitators and the said report is examined by the Facilitation Council. Parties are afforded opportunities to submit their arguments/objections against the aforesaid report and thereafter a final award is passed by the Council on the reference.

It is further pointed out that the Facilitation Council has been working as an effective and efficient Forum for timely disposal of the disputes and has been awarded the second best performing Council in terms of absolute number of cases disposed of, by the Chairman of Indian Micro, Small and Medium Enterprises. It also received the award of outstanding Council by the Minister, MSME. Currently, it is at number 3 all over the country in terms of the number of references. Around 11,000 references have been received by it so far and more than 4,000 such cases have been decided by the Council.

He further contends that the Government of Haryana vide order bearing No.2/5/13/II/B/11/2006 dated 24.10.2013 had decided to empanel retired Judicial Officers for appointment as Arbitrators. Other empanelment were also vide similar orders issued by the Government of Haryana in the Department of Industries and Commerce. It is contended that the private respondents who are experts/facilitators/arbitrators have been appointed by the State Government with an object to render assistance to the Facilitation Council to take decisions.

He further submits that the Facilitator/Expert/Arbitrator so appointed by the Council does not pass the final award and that he only submits his report after following the principles of natural justice and after affording an opportunity of hearing to the respective parties to submit their claims/responses as well as the evidence in support thereof. All the principles of natural justice including transparency, fairness and the equality of opportunity are taken care of by the Facilitator/Experts. Upon receipt of the abovesaid report from the Facilitator/Expert, the Arbitration Council ensures that copy of the aforesaid report is handed over to the respective contesting parties to enable them to examine the same and to furnish their objections/comments thereupon. The matter is thereafter heard by the Facilitation Council before a final award is passed as to whether the report of the Facilitator is to be accepted, modified or is to be set aside. The final award is thus passed by the Council itself. Hence, it cannot be suggested that the Council has not undertaken the arbitration proceedings by itself after failure of conciliation proceedings under Section 18(2) and that a mere engagement of a Facilitator/Expert would not vitiate the final award or be alleged to have been passed by some person other than the Council.

He also contends that even though the nomenclature 'Arbitrator/Sole Arbitrator' has been used in the memo communicating engagement of such Facilitator and that they also resort to the usage of the above expression 'Sole Arbitrator' while conducting the proceedings, however, any such mistaken nomenclature and/or expression used by them would not determine the nature of the proceedings especially when the Facilitation Council is the authority which passes and authors the final award. The mere nomenclature/expression thus cannot be interpreted to be as if the said engaged person has passed the final award or is competent to do so. The arguments of the petitioners are thus bad, unsustainable, misconceived and without considering the above procedure and nature of engagement.

He further contends that the provisions of The Arbitration and Conciliation Act, 1996 cannot override the provisions of the Act of 2006 and since the Act of 2006 is a special statute, it has to be governed by the procedure stipulated therein in view of Section 24 of the Act of 2006 which contains a *"non-obstante"* clause and gives an overriding effect to the provisions of Sections 15 to 23 notwithstanding anything contained in any other law for the time being time in force. Hence, the process as has been stipulated in the aforesaid provisions above alone is to be examined and the order passed as per the abovesaid procedure cannot be tested for its legitimacy and validity on the parameters/touchstone of any other statute. It is also contended by the State Counsel that the condition of mandatory pre-deposit under Section 19 of the Act of 2006 has to be given effect to by the petitioners, more so, when no challenge has been raised to the statute. Hence, the petitioners cannot be permitted to contend that they suffer any prejudice on account of a statutory mandate of compulsory pre-deposit.

It has also been argued that the empaneled facilitator/experts are former Judicial Officers of the rank of District Judge and above and that the petitioners have failed to point out any prejudice, bias or irreparable loss or injury that may have so occasioned. He submits that in all cases, conciliation proceedings were initiated and arbitration was conducted only after the conciliation failed to arrive at an amicable resolution of the dispute.

It has also been argued that the issue of engagement of the Arbitrators/Experts was before a Division Bench of this High Court in ***Welspun Corp. Ltd. Vs. The Micro and Small, Medium Enterprises Facilitation Council, Punjab and others, 2011 SCC OnLine P&H 16956*** wherein it was directed that the Facilitation Council should consider the desirability of referring the arbitration disputes to an independent umpire as a substitute of "Alternate Dispute Resolution Services" within the meaning of sub-section 3 of Section 18. The empaneled Arbitrators were required to conduct the proceedings in a time bound manner. The engagement of the Sole Arbitrators/Experts was hence undertaken pursuant to the above order dated 13.12.2011. There is no illegality or impropriety in such engagements after the order had been passed by a Division Bench on consideration of Sections 18(2) and 18(3) of the Act of 2006 as a substitute of ADR Services.

He further submits that a petition under Section 14 of The Arbitration and Conciliation Act, 1996 in Arbitration Case No.86 of 2020, titled as ***M/s SGM Packaging Industries Versus M/s Goyal Plywood LLP*** decided on 10.06.2022 had been filed for seeking termination of the mandate of Sole Arbitrator. The respondent therein had filed the claim before the Facilitation Council and that the matter was referred to the Sole Arbitrator. The petitioner moved an application under Section 12 of The Arbitration and Conciliation Act, 1996 seeking valid disclosure and also raised objections that as there was no clause for arbitration in the supply agreement and in the absence of any arbitration agreement as stipulated under Section 7 of The Arbitration and Conciliation Act, 1996, the matter could not have been referred by the Facilitation Council for arbitration. Upon considering various objections including the provisions of the Act of 2006, this Court specifically held that Act of 2006 is a special Act and shall prevail over The Arbitration and Conciliation Act, 1996. It was held that the statutory provisions would override any specific arbitration clause even if it is so contained in the agreement amongst the parties. The writ petition was dismissed and the petitioner was directed to await the final outcome of the proceedings and to avail the remedy(ies) thereafter.

Counsel appearing on behalf of the private respondents have additionally argued that the Act of 2006 confers exclusive jurisdiction with the Facilitation Council to decide the issues pertaining to the Micro, Small and Medium Enterprises. It is argued that once the provisions of the Act of 2006 are invoked, recourse to an *ad hoc* arbitration is not available and that to the said extent as well, the provisions of the Act of 2006 would override any clause of the agreement between the parties or The Arbitration and Conciliation Act, 1996. However, once the disputes are referred to Arbitration under sub-section 3 of Section 18 of the Act of 2006, the arbitration would proceed in the same manner as it would have pursuant to an agreement under Section 7 of The Arbitration and Conciliation Act, 1996. They contend that it is a settled principle of statutory construction that provisions of statutes have to be construed harmoniously and should be consistent with the scheme of the statute. It is the duty of the Court to avoid "a head-on clash" between two sections/provisions and endeavour must be made to construct the provisions, which appear to be in conflict, in a manner that they harmonize. The provisions are required to be read as an integral whole considering their mutual interdependence and to reconcile them avoiding repugnancy.

They further contend that the Division Bench of this Court had directed the Facilitation Council to engage sole Arbitrators as a substitute for Centre Providing Alternative Dispute Resolution Services and that the engagement of sole Arbitrators is thus supported and protected by orders of the High Court and that the proceedings cannot thus be held to be bad, illegal, improper, *non-est* and/or liable to be set aside. They also referred to the judgment in the matter of ***Gujarat State Civil Supplies Corporation Limited Versus Mahakali Foods Private Limited (Unit 2) and another, 2022 SCC Online SC 1492*** to contend that the Act of 2006 has an over-riding effect and that the Facilitation Council shall have an exclusive jurisdiction in the matter.

Reference is also made to the judgment in the matter of M/s ***Sew Infrastructure Limited Versus Micro & Small Enterprises Facilitation Council and others*** of the Chhattisgarh High Court dated 14.01.2022 passed in WPC No.4235 of 2021 as well. Reference to the other judgments by different High Courts including the Bombay High Court in the matter bearing Arbitration Application No.02 of 2022 titled as ***Bajaj Electricals Limited Versus Chanda S. Khetawat and another***, and decided on 16.01.2023 are however not being made to avoid repetition.

They further contend that the Hon'ble Supreme Court has already upheld the statutory vires of Section 19 of the Act of 2006 in the judgment of ***M/s Tirupati Steels Versus M/s Shubh Industrial Component and another, 2022 SCC OnLine SC 462*** and as such the said issue of pre-deposit cannot be raised to plead victimization and/or deprivation of any right especially when the Clause has already been upheld by the Hon'ble Supreme Court. No one can be permitted to plead hardship and prejudice by pleading that their rights to constitutional remedies are being taken away after the legality of the said Clause has been upheld. Reference is also made to the judgment of this Court bearing CWP No.24306 of 2015 dated 30.08.2016 in the matter of ***Haryana Power Generation Corporation Limited Versus Haryana State Micro and Small Enterprises Facilitation***

Council and another, wherein the Facilitation Council had referred the matter to an empaneled Arbitrator notified by the Government by seeking aid of Rule 4(16) of the Rules of 2007. It was held by this Court that technicalities must not outweigh the cause of justice and judicial intervention is required to be minimized in such proceedings. The Courts would keep in view the legislative intent and objects of the statute and interpret them in a manner as are likely to advance the same and not to create hurdles. Relevant extract of the same is reproduced here-in-under:-

> *"7. As per the agreement between the parties, petitioner purchased and 2nd respondent supplied the goods. Dispute arose between the parties regarding the payment of goods, received by the petitioner and supplied by 2nd respondent. When the petitioner failed to make the payment to the supplier-2nd respondent in time, 2nd respondent-supplier approached the Council- 1st respondent by a reference petition, invoking the jurisdiction of the respondent-Council under the Act of 2006. Respondent-council found the supplier-respondent No.2 as a small scale enterprise, who had made the supply under the contract, for which the buyer-petitioner was under legal obligation to make the payment. Thus, the Council had the jurisdiction in the matter.*
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> *12. Giving due respect to the legislative intent, it is held that the provisions contained in Chapter V of the Act of 2006 would have overriding effect and are also mandatory in nature. Any other interpretation would run counter to the true intention of the legislature and shall defeat the above said objects of the Act of 2006. The provisions of law, as and when fall for consideration of the courts, for the purpose of interpretation, the courts would always keep in view the legislative intent and*

objects of the Statute, so as to interpret in a manner that the aims and objects of the Statute are not defeated but achieved.

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17. The Division Bench of Madras High Court had a detailed deliberation on the ambit and scope of the provisions of law, contained in Section 18 of the Act of 2006 and observed as under in para 21 of its judgment :-

"21. A cursory reading of the aforesaid provision makes it clear that a conciliator could not act as an arbitrator. It is no doubt true that Sections 18(2), 18(3) and 18(4) have given dual role for the Facilitation Council to act both as Conciliators and Arbitrators. According to the learned counsel for the appellants, the Facilitation Council should not be allowed to act both as Conciliators and Arbitrators. This contention, though prima facie appears to be attractive, it is liable to be rejected on a closer scrutiny. Though the learned counsel would vehemently contend that the Conciliators could not act as Arbitrators, they could not place their hands on any of the decisions of upper forums of law in support of their contentions. As rightly pointed out by the learned single Judge, Section 18(2) of MSMED Act has borrowed the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act for the purpose of conducting conciliation and, therefore, Section 80 could not be a bar for the Facilitation Council to conciliate and thereafter arbitrate on the matter. Further, the decision of the Supreme Court in Institute of Chartered Accountants of India v. L.K. Ratna, (1986) 4 SCC 537, on this line has to be borne in mind. One should not forget that the decision of the Facilitation Council is not final and it is always subject to review under Article 226 of the Constitution of India and, therefore, the appellants are not left helpless."

In fact, the Division Bench was hearing the writ petition as well as writ appeals against the judgment rendered by the *learned Single Judge of Madras High Court. The Division Bench also considered the scope of judicial intervention in the arbitration proceedings and held that it should be minimal.*

20. Case of the petitioner has been found based on technicalities and super-technicalities alone. It is the settled proposition of law that technicalities must not weigh with the Court, while doing complete and substantial justice between the parties. As noticed herein above, facts of the case, including liability of the petitioner to make payment to the 2nd respondent, had never been in dispute. Even during the course of the hearing, learned counsel for the petitioner could not deny the liability of the petitioner. In such a situation, neither the contentions raised by the learned counsel for the petitioner have been found in consonance with the provisions of the Act of 2006 nor the same appeal to reason.

23. Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that since the respondent-Council committed no error of law, while passing the impugned order, the same deserves to be upheld. Instant writ petition is wholly misconceived, bereft of merit and without any substance, thus, it must fail. No case for interference has been made out."

Emphasis is also laid on the judgment of this Court in the matter of ***The Chief Administrative Officer, COFMOW Versus The Micro & Small Enterprises Facilitation Council of Haryana and others*, 2015 SCC OnLine P&H 755** wherein the reference to an Arbitrator was upheld after noticing that there is no prejudice at all that may be suffered by the petitioners as there is no issue of bias. The provisions of the Act are sufficient to make it possible to raise challenge to any part or issue which has not been properly examined/assessed. The relevant extract of this judgment reads thus:-

"2. The grievance is that the Council could not have directed an arbitration to be carried out by an arbitrator appointed by it without reference to the provision under clause 3 that contemplates to such reference only on the failure of the Council to resolve the dispute by itself under clause (2). I have seen through the order and when the Director makes a reference on behalf of the Council to an Arbitrator, It must be taken that it was not possible to conciliate and resolve the dispute itself and therefore, the reference was made. It would make no difference that the reference is made to an institution or centre which will provide for alternative dispute resolution services or a direct reference to the arbitrator itself. There can be really no prejudice at all for the petitioner, for, there is no issue of bias. The provisions of Arbitration Act are sufficient to make possible for any party who is not satisfied with the Arbitrator to take such an issue before him and invite a decision thereon which is still capable of being assailed in higher forums in the manner contemplated under the Arbitration and Conciliation Act.

3. The counsel says that there is an independent arbitration agreement under the contract and that must allow for the parties to choose the arbitrator in the manner contemplated under the contract. It must be taken only as an additional method of appointment of an arbitrator and cannot exclude the application of the provisions of this Act. This is so in view of the non obstante clause that is set forth under Section 18 which begins with these expressions "notwithstanding anything contained in any other law for the time being in force". A contract that provides for appointment of an arbitrator must be seen as a contract as recognized by law and that provision will stand eclipsed by the non obstante clause that Section 18 provides for."

Counsel for the respondents have also argued that in certain cases, the buyers have approached this Court despite the award having already been passed and the limitation period prescribed for raising a challenge to the award having expired. The proceedings are at the stage of execution of the said award and the petitioners have filed the present petitions challenging the initial reference and are thus seeking annulment of the award that have already attained finality and where the aggrieved party has already lost its remedy of raising a challenge as per law. Institution of a writ petition as a means to bypass statutory remedy needs to be curtailed so as to give finality to a procedure and that such persons cannot be permitted to contend that the initial reference itself being bad, the award ought to be set aside at this belated stage. The *lis* having already attained finality amongst the parties, the same cannot be reopened. The law being well-settled that what cannot be done directly cannot also be permitted to be done indirectly.

Learned counsel appearing on behalf of the respondents have also submitted that the petitioners are deliberately misreading the notice issued by the Facilitation Council and/or reference made by it to the Sole Arbitrator to contend that there is an expression on the merits of the claim. They submit that a reading of the said notice/reference clearly shows that there is no expression on the merit of the claim raised and it is only an intimation about the statutory provisions. Hence, the argument advanced by the petitioners that there is an expression on the entitlement of the supplier even before a reference is made, is clearly misconceived and is not borne out from a plain reading of the reference itself.

They also contend that the Facilitation Council is not approving/stamping the reports submitted by the Arbitrator in a mechanical manner and as a matter of practice, the Council grants opportunity to the respective parties to make submissions on the report after the same has already been furnished to the respective parties before a final award is passed by the Council. Hence, the procedure is being followed, in a fair, impartial and transparent manner after affording complete opportunity to the stake holders.

Query:

A specific query was also raised to the petitioners as to the prejudice that has so occasioned by engaging services of Facilitators/Sole Arbitrators and/or the irreparable loss or injury that may have occasioned resultantly.

Counsel for the petitioners have responded to the same by averring that the illegality in the proceedings is a prejudice unto itself and that if the proceedings do not have the backing of law, they cannot derive any force from consent or because of the petitioners submitting to the same. An award derives its legality and strength from the power vested in an authority by the statute and in the absence thereof, such award or orders cannot be approved or be stamped as having authority of law.

ANALYSIS AND CONCLUSION:

I have heard the learned counsel for the respective parties and have gone through the impugned record of the file.

Section 18(2) of the Act of 2006 provides that the Council may conduct conciliation itself or may seek assistance of any Institution or Centre Providing Alternative Dispute Resolution Services. Section 18(3) of the Act of 2006 specifies that the Council shall either itself take up the dispute for arbitration or refer it to any Institution or Centre Providing Alternative Dispute Resolution Services for such arbitration. Hence, the Act stipulates that the Facilitation Council is empowered to conduct the arbitration proceedings itself or to get the arbitration conducted through any other agency.

Counsel for the petitioners have placed reliance on para 20 of the judgment in the matter of **Silpi Industries case(supra)**, to substantiate that the proceedings of arbitration are to be conducted by the Facilitation Council by itself or by any Institution or Centre providing for arbitration and by no one else.

A perusal of the same shows that the above para does not support the argument of the petitioners that the facilitation council cannot take any external aid for passing of the final award and conducting arbitration. No finding has been recorded by the Hon’ble Supreme Court on the scope, limitations, sphere or domain of Section 18(3) of the Act of 2006 or about the outcome in a circumstance where the Facilitation Council engages any expert and/or Facilitator for carrying out the objective of the Act of 2006. Reference to Section 18(3) in the paragraphs relied by the petitioners is only in the context of reproduction of the statutory schemes and not as laying down any interpretation as suggested.

A judgment has to be read in the context in which it has been rendered. A reference to the provision is not to be constructed as an interpretation thereof. The issue involved in the present case was not under consideration before the Hon'ble Supreme Court in the above case and no ratio was laid in this regard. The abovesaid judgment definitely does reflect on the interpretation of the Hon'ble Supreme Court about the intent and object of the statute and the rules of interpretation that have been applied while examining the provisions of the Act of 2006. The reading of the aforesaid judgment shows that a purposive rule of interpretation has been applied by the Hon’ble Supreme Court to further the object of the statute rather than creating any impediment in expeditious disposal of the cases relating to dues of the Micro, Small and Medium Enterprises.

It was held in the judgment of ***Edukanti Kistamma (Dead) through L.Rs. Versus S. Venkatareddy (Dead) through L.R.s.***, ***2009 SCC OnLine SC 1872*** that the purport and object of the Act must be given its full effect by applying the principles of purposive construction and therefore the provisions of the Act of 2006 are required to prevail in light of Section 24 of the Act as against any other rule of law.

In so far as the reference made to the judgment of the Delhi High Court titled as ***Bharat Heavy Electricals Limited Versus The Micro and Small Enterprises Facilitation Centre and another(supra)*** is concerned, the High Court of Delhi in its abovesaid judgment has held that the provisions of Section 18(3) of the Act of 2006 do not leave any scope for non-institutional arbitration and that the arbitration ought to be conducted under the 'aegis' of the Facilitation Council or any Institution or Centre Providing Alternative Dispute Resolution Services for such arbitration. The relevant extract reads thus:-

> *“17. It is at once clear that the provision of Section 18(3) of the Act do not leave any scope for a non-institutional arbitration. In terms of Section 18 (3) of the Act, it is necessary that the arbitration be conducted under **aegis** of an institution either by Facilitation Council or under the **aegis** of any "Institution or Centre providing alternate dispute resolution services for such arbitration".*

Paragraph 28 of the aforesaid judgment provides that Section 18(3) contemplates only an Institutional arbitration and not an *adhoc* arbitration. The same is extracted as under:-

> *"28. This Court - for the reasons as stated hereinbefore - is unable to subscribe to the view that there is no inconsistency between the arbitration agreement and section 18(3) of the Act; Section 18(3) contemplates only an institutional arbitration and not an ad hoc arbitration. In the present case, the provision that only BHEL would appoint the arbitrator, plainly, runs contrary to the mechanism under section 18(3) of the Act. Further, in terms of Section 19 of the Act, the award rendered pursuant to an arbitration under Section 18(3) of the Act cannot be assailed by the party (other than the supplier), without depositing seventy-five percent of the amount awarded. Concededly, Section 19 would be inapplicable to an award, which is rendered pursuant to an arbitration that is not conducted in terms of Section 18(3) of the Act."*

A perusal of the aforesaid paragraphs of the said judgment also do not substantiate the argument proposed to be advanced by the petitioners. The High Court of Delhi rather holds that such arbitration can be conducted under the 'aegis' of an institution/either by the Facilitation Council or any other Institution or Centre and hence accepts the engagement of some persons/institution for discharging the duties under the Act. The said judgment thus upholds the arbitration which is conducted under the 'aegis' of the Facilitation Council as well and does not rule that the Facilitation Council alone or any other Institution or a Centre are the Sole Repository of the powers under Section 18(3) of the Act of 2006. The said interpretation is derived from the principles of purposive construction of the statute and intended to advance the object of the Act.

The Division Bench of Allahabad High Court in the matter of ***Paper and Board Convertors Versus U.P. State Micro and Small Enterprises and others(supra)*** has, on the other hand, ruled that the reference by the Facilitation Council to a Sole Arbitrator to conduct the arbitration was impermissible in the statute and that reference before the Arbitrator was manifestly illegal. The proceedings were thus restored before the Micro and Small Enterprises Facilitation Council to conduct the proceedings as per the statutory mandate. The facts of the said case however show that the respondents had appointed the sole arbitrator who had been stipulated as per the agreement and thus sending them back to arbitration stipulated in the agreement, which is not the factual aspect here. Besides, there is no discussion as regards the statutory rules and the manner or mode of such engagement and also whether the final award was to be passed by the Arbitrator or the Council. Hence, in the absence of the same, it cannot be safely presumed that the above judgment of the Allahabad High Court ruled on the scope, limitations or mandate of section 18(3) of the Act of 2006.

Further, it is evident from the Rules notified by the State of Haryana initially in the year 2007 and thereafter in the year 2021 that the said Rules provide for appointment/engagement of service of one or more experts. Further, Section 26 of the Act of 2006 empowers the State Government to appoint such officers with such designations and to entrust them of such powers and functions under the Act as it may deem fit.

The High Court of Punjab and Haryana in the matter of ***The Chief Administrative Officer, COFMOW Versus The Micro & Small Enterprises Facilitation Council of Haryana and others(supra)*** had upheld the award passed by an Arbitrator appointed by the Facilitation Council for the reason that it would not make any difference whether the reference is made to Institution or Centre which provides an Alternative Dispute Resolution Service or a direct reference is made to the Arbitrator itself and there can fairly be no prejudice at all for the petitioners as there is no issue of bias.

Similarly, challenge to the order passed by the Sole Arbitrator on an application under Sections 12 and 13 of The Arbitration and Conciliation Act, 1996 was dismissed by this Court in Case titled as ***M/s SGM Packaging Industries Versus M/s Goyal Plywood LLP(supra)***. Further, this Court in the matter of ***Haryana Power Generation Corporation Limited Versus Haryana Small and Medium Enterprises Facilitation Council(supra)*** held that the Facilitation Council had power to refer the matter to an empaneled Arbitrator notified by the Government under Rule 3(16) of the Rules of 2007. It was ruled that technicalities do not outweigh the interest of justice and judicial intervention should be reduced to minimum in such cases. Rule3(16) of the Rules of 2007 empowers the Facilitation Council to refer the dispute to an Institute for such arbitration and that a report was to be submitted by such Institute to the Council within the time so specified whereafter the Council was to make an award. The said rule is similar to sub-rule 12 of Rule 6 of the Rules of 2021. It is, however, further seen that a Division Bench of this Court in ***Wellspun Versus Micro and Small and Medium Enterprises Facilitation Council, Punjab(supra)*** had directed the Facilitation Council to consider desirability of referring the arbitration dispute to an independent umpire as a substitute to Alternative Dispute Resolution Services within the meaning of section 18(3) and that the empaneled Arbitrator may pass such an award under the

MSMED Act for all intents and purposes. It has also come-forth that the engagement of empaneled Arbitrators has been done by the Government of Haryana for discharging functions under the Micro, Small and Medium Enterprises Development Act, 2006.

Other than the Division Bench judgment of Allahabad High Court which held, in the facts of that case which are distinct, that the Facilitation Council cannot make a reference to a Sole Arbitrator and is required to pass an award by itself or any other Institution or Centre, the Division Bench of the Delhi High Court has held that the arbitration proceedings are required to be conducted by the Institution under the aegis of the Facilitation Council or under the aegis of any other Institute or Centre Providing such services.

'Aegis' means 'control or guidance or under controlling or conditioning influence'. The abovesaid word having Greek and Latin roots entered the English language in the 15th Century as a Noun referring to the shield or protective garment and by the late 19th Century it had acquired the extended senses of "auspices" and "sponsorship". Thus a proceeding, which is carried out under the control, guidance or protection of an Institution would be construed as a proceeding under the aegis of such Institution.

It is the specific case of the respondents that the Facilitation Council has been itself passing the final award and the Arbitrator/ facilitator/ expert, as the case may be, are only entrusted to submit the report to the Council. The facilitator not being competent to pass an award, there proceedings are thus in accordance with the statute and there is no violation of the Statute.

Section 18(3) of the MSMED Act 2006 even though uses the expression “shall” for conduct of arbitration by the Council or by an Institution or Centre, however, it does not provide any consequences in the event of failure to do it entirely as per the letter of law. Hence, the meaning and scope of the aforesaid expression needs to be ascertained as to whether the same is mandatory or directory.

The issue as to when a mandatory expression is directory and vice versa has been under judicial scrutiny in various precedent judgments. The Hon'ble Supreme Court has, through its judgments laid down some guiding principles for ascertaining the true legislative import of such expression. Reference is hence required to be made to the precedent judgments. The relevant extract of the same is reproduced herein-after-below:-

Sharif-Ud-Din vs Abdul Gani Lone – (1980) 1 SCC 403

Para 9- The question whether a provision of law is mandatory or not, depends upon its language, the context in which it is enacted and its object. The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus:

The fact that the statute uses the word 'shall' while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is to sub-serve *and its design and the context in which it is enacted. If the object of a law is to be defeated by non- compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.*

(Emphasis supplied)

The issue was again examined by the Hon'ble Supreme Court in the matter as under:-

State of Haryana and Anr. v. Raghubir Dayal - (1995) 1 SCC 133

Para 5 - The use of the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment or consequences to flow from such construction would not so demand. Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the Court to

> *ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word 'shall', therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be described to the word `shall; as mandatory or as directory accordingly. Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or the general public, without very much furthering the object of the Act, the same would be construed as directory.*

Similarly, it was held by the Hon'ble Supreme court in the matter of ***Sarla Goel vs. Kishan Chand – (2009) 7 SCC 658*** that whether the word 'may' shall be used as 'shall' would depend upon the intention of the legislature and it is not to be taken that once the word 'may' is used, it per se would be directory. In other words, it is not merely the use of a particular expression that would render a provision directory or mandatory. It would have to be interpreted in the light of the settled principles, and while ensuring that intent of the Rule is not frustrated.

Hence, an expression used has to be seen from the context of the statute, the object of the statute, the consequence of the expression and also as to whether the construction would further the object. The doctrine of workability mandates a constitutional court to harmoniously construct the provisions so as to make them workable and not to give rise to a roadblock. Applying the above tests, the suggestion of the petitioner that no external aid can be sought by the council, if conducting the arbitration itself, tends to fail the object of the statute, if accepted. The petitioners have failed to point out how the statutory objective would be defeated or any right would be prejudiced by seeking a report from an independent third party more so when none of the petitioners have alleged or suggested any bias, malice or prejudice. Besides, the act of the facilitation council in seeking a report is more in the nature of the completion of the procedural requirement while the substantive power to pass the award is retained by the Facilitation Council and the final award under section 18(3) of the Act of 2006 is passed by it. Barring a few awards, there is no award under challenge that has been authored by the Sole arbitrator. Hence, there is no reason for this court to assume that the awards are in fact being passed by the sole arbitrator(s) and not by the Council itself.

At the same time, in so far as the Institute of Arbitration, as stipulated in the Act of 2006 is concerned, so far there is no Arbitration institute that has been recognized or graded in the States of Punjab and Haryana. Hence, even though the act contemplates conduct of arbitration by such institute, however, in reality, the same are required to be conducted by the Council itself.

The Act was promulgated with an object of providing an expeditious adjudication of the disputes pertaining to the small and micro enterprise and there is only one Facilitation Council in the State of Haryana. With more than 11,000 cases having been filed, the object of the statute would be defeated if the Facilitation Council is burdened with the entire task and not to seek any external aid under its aegis. The arbitrators would thus be actually working under the aegis of the Facilitation Council and are just facilitators for ensuring attainment of the statutory object.

The petitioners are rather swayed in their arguments more by the use of expression Arbitrator(s) in the appointment and also in section 18(3) of the Act of 2006. A mere use of such an expression cannot automatically bring in the rigors of the Arbitration and Conciliation Act, 1996. It is well settled that when there is a general reference in the Act in question to some earlier Act, but there is no specific mention of the provisions of the former Act, then it is a case of legislation by reference and even the amending laws of the former Act may become applicable. However, where the provisions of the Act are specifically referred to and incorporated in the latter statute, then those provisions alone are applicable. This is the principle of legislation by incorporation. Thus even though certain provisions of the Arbitration and Conciliation Act, 1996 may be applicable by reference, however, the reference should not result in defeating the object and purpose of the Act of 2006. The procedural provisions of the Act of 1996 are thus to come to the aid of the Act of 2006 and not over shadow the same to occupy the field despite the Act of 2006 being a special statute. Hence, notwithstanding the nomenclature used as Arbitrator/ sole arbitrator, he continues to remain as a facilitator in view of the letter of engagement and cannot travel beyond the terms of his appointment.

To illustrate the manner of appointment, one such order published in the Haryana Government Gazette dated 08.08.2014 is extracted as under:-

"Haryana Government
Industries and Commerce Department
Order

The 8th August, 2014

No.2/5/13-IIB-II-2006:-

Subject: Panel for appointment of Arbitrators in respect of cases filed under the provisions of the Micro, Small and Medium Enterprises Development Act, 2006, before the Haryana Micro and Small Enterprises Facilitation Council.

In pursuance to order No.2/5/13-IIB-II-2006 dated 24.10.2013, the Government has decided to appoint following more retired Judicial Officers as Arbitrators in accordance with the provisions under Section 18(3) of Micro, Small and Medium Enterprises the Act, 2006 and Rule 16 of Facilitation Council Rules, 2007 after obtaining their consent, to adjudicate the payment disputes of small scale industrial units under the provisions of chapter V of the Micro, Small and Medium Enterprises Development Act, 2006:-

Sr. No.	Name	Address
(i)	Sh. C.B. Jaglan, District and Sessions Judge (Retired)	House No.19, Sector 16-A, Near Magpie, Faridabad.
(ii)	Sh. Mohinder Kumar Bansal, District and Sessions Judge (Retired)	Flat No.175, HOPE Apartment, Sector-15, Part-II, Gurgaon.
(iii)	Sh. J.S. Jangra, Additional District and Sessions Judge (Retired)	House No.1387, Sector 23-A. Gurgaon
(iv)	Sh. Prem Parkash Chhabra, Additional District and Sessions Judge (Retired)	House No.369, Sector-14, Faridabad.

Further, the Government has also decided to revise the structure of the arbitration fee for these matters as under:-

Sr. No.	Claim amount on the day of making reference to Arbitrator	Arbitration fee
(i)	Up to Rs.10.00 Lakh	Rs.25,000/-
(ii)	Rs.10.00 Lakh to Rs.25.00 Lakh	Rs.30,000/-

(iii)	Rs.25.00 Lakh to Rs.50.00 Lakh	Rs.40,000/-
(iv)	Above Rs.50.00 Lakh	Rs.50,000/-

Any matter regarding apportionment of the fees between the parties shall be decided by the Arbitrator.

Y.S. MALIK
Additional Chief Secretary to Government Haryana
Industries and Commerce Department."

A perusal of the above order clearly shows that the appointment/engagement of the Judicial Officers has been done under Section 18(3) of the Act read with Rule 4(16) (wrongly mentioned as Rule 16) of the Facilitation Council Rules, 2007. Rule 4(3) of the Rules of 2007 stipulates engagement of services of one or more experts in terms of Section 26 of The Arbitration and Conciliation Act, 1996. The engagement of the Arbitrators/Facilitators (expression used in the Gazette is Arbitrators) is not done as an expert under Rule 4(3) which is akin to appointment of an expert under Section 26 of The Arbitration and Conciliation Act, 1996 and is rather done under Rule 4(16) of the Facilitation Council Rules, 2007 which flows from section 26 of the Act of 2006. Such engagement thus has to be read in confirmity with Section 26 of the Micro, Small and Medium Enterprises Development Act, 2006 which empowers the Government to appoint such officer, with such designation and such other employees, as it thinks fit for the purposes of this Act and may entrust to them such of the powers and functions under this Act as it may deem fit.

Even though the expression used in Rule 4(16) of the Rules of 2007 is "Arbitrator", the said expression has to be read in consonance with Section 26 of the Act of 2006 and is only a 'designation as may be so prescribed'. The Government also being competent to entrust such powers and functions as it deems fit, hence, the designation "Arbitrator/Facilitator/Expert", as the case may be, cannot be interpreted in terms of the definition as provided under The Arbitration and Conciliation Act, 1996. Any such extension of definition and/or meaning from The Arbitration and Conciliation Act, 1996 would amount to importing the provisions of The Arbitration and Conciliation Act, 1996 and super-imposing the same and reading them into the Micro, Small and Medium Enterprises Development Act, 2006. The suggested reading of the petitioner is thus not based on the correct principles of law. As the Hon'ble Supreme Court has already held that the Act of 2006 is a special statute and The Arbitration and Conciliation Act, 1996 is the general statute, hence, the provisions of the Act of 2006 have to prevail over and above the provisions of The Arbitration and Conciliation Act, 1996.

The expression "Arbitrator" as used in the Rules of 2007 which stands substituted by the expression "Experts" in Rule 6(12) of the Rules of 2021 thus remains a designation only for the defined object and purpose and does not confer authority to pass an award under the Arbitration and Conciliation Act, 1996. The role of the facilitator in the present case being restricted to submit a comprehensive report on the totality of claims, such person engaged/appointed thus has not been given the adjudicatory power to pass an award as per Section 18(5) of the Act of 2006. Rather Rule 4(19) mandated the Facilitation Council to pass the award. Similarly, Rule 6(11) of the Rules of 2021 also stipulate that the Council shall consider the arbitral finding/report/recommendations and thereafter pass the final award/order in the manner. Hence, the power and authority to pass the final award has always been vested with and is being exercised by the Facilitation Council itself. The initial confusion brought about by use of the expression Facilitator in the Rules of 2021 and such expression can be used as an external aid to interpretation of the erstwhile provision as well. The strenuous attempt made by petitioners to read the provisions of The Arbitration and Conciliation Act, 1996 into the Act of 2006 and to contend that the same are inherently imbibed in the Act of 2006 is clearly a mis-adventure.

The petitioners have not challenged any provision of the statute or the Rules framed thereunder and as such, they have accepted the said provisions. There is thus no occasion to examine legality or vires thereof. The court is thus called upon only to reconcile the provisions and to ensure their workability. A provision in the Rule is required to be read down only where it is in conflict with the substantive Act or Constitution of India and not where an interpretation sought to be projected is not conforming to the statute. A confusion sought to be created by misapplying different statutes cannot be perceived as a conflict of the Rules.

The counsel for the petitioners contend that the experts engaged by the Facilitation Council do not fall under the definition of Section 26 of the Act of 2006 since they cannot be construed as appointed by the State Government since their salaries are not paid by the Government and the fee is to be paid by the parties themselves. Section 26 contemplates an 'appointment' and that in the absence of the service jurisprudence based nuances of an appointment, engagement of the Facilitators cannot be perceived as an appointment within the meaning of Section 26. The said argument may appear logical but has to be rejected since the nature of engagement/appointment has to be examined in the backdrop of the statutory scheme. The traditional test of appointment and creation of an employee-employer relationship may not be the requirement prescribed under the Act of 2006. The nature of appointment contemplated under Section 26 has not been qualified. Hence, the suggestive interpretation of the petitioners, if accepted, would require the provisions to be read as “Regular Appointment” and thus mandate a pre-fix “Regular” to the expression appoint/appointment as stipulated under Section 26. Rule 6(12) of the MSME Rules, 2021 also uses the expression appoint or engage.

As per the meaning in Oxford Dictionary, 'appointment' refers to a 'job or requisition of responsibility and may be temporary/permanent'. It is 'an act of choosing somebody to discharge some responsibilities/duties'. Hence, such engagement cannot be qualified or made subjective by any suggestive interpretation which is likely to restrict the expression which has been left wide by the Parliament itself. If the Legislature wanted the engagement to be in any specific manner/status, there would be no impediment for the Legislature to have specifically prescribed the mode and manner in which such appointment of officers shall be made just as it has provided for the Establishment of the Facilitation Council; the Advisory Committee as well as the Facilitation Council in the statutory scheme itself. It is evident that the Parliament wanted to leave the nature of such appointment/engagement to the discretion of the respective State Government. It would indeed be a curtailment of the rights of the State Government to hold that even though the Parliament intended to confer a discretion with the State Legislature for the appointment/engagement of any such officer for the purposes of this Act, however, the nature of such appointment had to be in any specific manner only. It has remained undisputed that the Arbitrators engaged by the Facilitation Council are amongst those who have been appointed by the State Government.

In view of the above, there is no prohibition in the engagement of an arbitrator/ expert/ facilitator, as the case may be, under the Act of 2006 or the Rules framed thereunder, for submission of a report to the Facilitation Council. The Arbitrator so appointed is however not competent to pass an enforceable award as no such power has been conferred upon him under the Rules or the statutory scheme and only the Council is competent to pass the final award. Since the arbitrator/ expert/ facilitator is only acting under the aegis of the Council, which is in fact the Arbitrator, the adjudication has to be done by it. If any such award has actually been passed by the Sole Arbitrator, the same is thus beyond the terms of engagement even as per the respondents themselves.

QUESTION NO.4

Whether the Facilitation Council would have jurisdiction to entertain the disputes instituted before it for a period prior to registration of the claimant as a Micro, Small and Medium Enterprise under the Act of 2006 even though the invoice may have been raised after the registration?

ARGUMENT OF THE PETITIONERS

The petitioners have argued that in various cases, the suppliers were not registered as Micro, Medium or Small Enterprises and that their claims have been received by the respondent-Facilitation Council despite the claim not being entertainable. The suppliers/claimants have relied on the date of raising of invoice to be the relevant date for invoking the jurisdiction of the Facilitation Council, which is contrary to law as per which the supplier is required to be registered as on the date when the agreement is executed between the parties.

In support of their arguments that if any registration is obtained under the Act of 2006, the same will be prospective and applies for supply of goods and services subsequent to the registration and cannot operate qua the supplies made prior to the registration, they place reliance on the judgment in the matter of ***M/s Silpi Industries etc. Versus Kerala State Road Transport Corporation and another etc.(supra)***, wherein the Hon'ble Supreme Court has held as under:-

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

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

The Hon'ble Supreme Court, in the matter of ***Gujarat State Civil Supplies Corporation Limited Versus Mahakali Foods Private Limited (Unit 2) and another(supra),*** *has also held as under:-*

"51. Following the above-stated ratio, it is held that a party who was not the "supplier" as per Section 2 (n) of the Act of 2006 on the date of entering into the contract, could not seek any benefit as a supplier under the Act of 2006. A party cannot become a micro or small enterprise or a supplier to claim the

benefit under the Act of 2006 by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods or rendering services. If any registration, is obtained subsequently, the same would have the effect prospectively and would apply for the supply of goods and rendering services subsequent to the registration. The same cannot operate retrospectively. However, such issue being jurisdictional issue, if raised could also be decided by the Facilitation Council/Institute/Centre acting as an arbitral tribunal under the Act of 2006."

The Hon'ble Supreme Court in the matter of ***M/s Nitesh Estates Limited Versus Micro and Small Enterprises Facilitation Council of Haryana and others, 2022 SCC OnLine SC 1198*** held as under :-

4. Having heard learned counsel appearing on behalf of the respective parties, the question which is posed for consideration of this Court is whether the proceedings initiated by respondent no.2 under MSMED Act would be maintainable and/or permissible as at the time of entering into the brokerage agreement, respondent no.2 was not registered as micro enterprise. The issue involved is squarely covered against the respondents in view of the decision of this Court in Silpi Industries Etc. Vs. Kerala State Road Transport Corporation and Another 2021 SCC Online SC 439 as well as the subsequent decision of this Court in Vaishno Enterprises Vs. Hamilton Medical AG and Another 2022 SCC OnLine SC 355, taking the view that for initiation of proceedings under the MSMED Act, the registration of the complainant/application as micro enterprise shall be must. The subsequent registration of respondent no.2 with retrospective effect from 10 years back will not be of any assistance and/or help to respondent no.2.

5. In view of the above, the impugned judgment and order passed by the High Court is unsustainable and the same is hereby quashed and set aside. Consequently, the notices issued *by the Council and the notice issued by the Arbitrator, appointed by the Council, are hereby quashed and set aside. However, it will be open for respondent no.2 to take recourse to law, may be to revive the proceedings before NCLT, if permissible under the law and as and when such proceedings are initiated, the same be considered in accordance with law and on its own merits."*

They also place reliance on the judgments of the Hon'ble Supreme Court in the matter of ***Gujarat State Civil Supplies Corporation Limited Versus Mahakali Foods Private Limited (Unit 2) and another(supra)*** *and* ***M/s Vaishno Enterprises Versus Hamilton Medical AG and another, 2022 SCC Online SC 355*** wherein it was observed as under:-

"15. It is not in dispute that the contract/agreement between the appellant and the respondent has been executed on 24.08.2020. Therefore, the laws of India applicable at the time of contract/agreement shall be applicable and therefore the parties shall be governed by the laws of India prevailing/applicable at the time when the contract was executed. It is admitted position that the date on which a contract/agreement was executed i.e. on 24.08.2020 the appellant was not registered MSME. Considering the relevant provisions of the MSME Act more particularly Section 2(n) read with Section 8 of the MSME Act, the provisions of the MSME Act shall be applicable in case of supplier who has filed a memorandum with the authority referred to in sub-section (1) of Section 8. Therefore, the supplier has to be a micro or small enterprise registered as MSME, registered with any of the authority mentioned in sub-section (1) of Section 8 and Section 2(n) of the MSME Act. It is admitted position that in the present case the appellant is registered as MSME only on 28.08.2020. Therefore, when the contract was entered into the appellant was not MSME and therefore the parties would not be governed by the MSME Act and the parties shall be governed by the laws of

India applicable and/or prevailing at the time of execution of the contract. If that be so the Council would have no jurisdiction to entertain the dispute between the appellant and the Respondent no.1, in exercise of powers under Section 18 of the MSME Act. Therefore, in the aforesaid peculiar facts and circumstances of the case, more particularly the terms of the Agreement, the order passed by the learned Single Judge confirmed by the Division Bench holding the Council would have not jurisdiction with respect to Respondent No.1 is not required to be interfered with."

ARGUMENT BY THE RESPONDENTS

The respondents further submit that there is no dispute to the proposition that the date of registration of the claimant/supplier is the prime consideration for vesting of the jurisdiction and that benefit of Chapter V of the Act of 2006 is being extended only where the supplies or services were obtained post-registration and not for any period prior thereto.

Counsel also contend that the contentions of the petitioners regarding the suppliers not being registered under the Act of 2006 are misleading inasmuch as the Micro, Small and Medium Enterprises used to be registered under the Entrepreneurship Memorandum-II which came into move upon implementation of the Act of 2006. Thereafter, the Ministry of MSME notified a one-page Udyog Aadhaar Memorandum(UAM) to replace the Entrepreneurship Memorandum-II through a Gazette of India Notification SO(E) 2576(E) dated 18.09.2015. As per the Notification No.SO 85(E) issued on 10.01.2017 by the Ministry of Micro, Small and Medium Enterprises, any Micro, Small and Medium Enterprise could file Udyog Aadhaar Memorandum in Form-I through online process only and it also mentioned that existing Enterprises which had the EM-II or the holder of Small Scale Industrial Registration prior to the coming into force of MSME Act, 2006 shall not be required to file Udyog Aadhaar Memorandum but may do so if they so desire. The practice of Entrepreneurship Memorandum-I Registration was thereafter discontinued. Subsequently, the Advisory Committee of Ministry of Micro, Small and Medium Enterprises notified revised criteria for classifying the Enterprises as Micro, Small and Medium and specified the Forum and procedure for filing the Memorandum i.e. Udyam Registration Certificate w.e.f. 01.07.2020 as per Notification No.SO 2119(E) dated 26.06.2020. Hence, the Udyam Registration replaced the Udyog Aadhaar Memorandum introduced vide Gazette Notification dated 18.09.2015 as well as Entrepreneurship Memorandum Part-I and II. As per clause 7 of the aforesaid Notification dated 26.06.2020, all existing Enterprises were required to get themselves registered again on the Udyam Registration Portal on or after 01.07.2020. The office Memorandum No.5/II/I/2020/P&G policy was issued on 17.07.2020 by the Government of India, Ministry of Micro, Small and Medium Enterprises directing replacement of Udyam Aadhaar Memorandum with Udyam Registration Certificate and an office Memorandum was subsequently issued on 06.08.2020 by the Ministry holding validity of the registration issued earlier till 30.06.2020 shall continue to be valid only on 31.03.2021.

Resultantly, the existing Registrations as EM Part-II or UAM remained valid upto 31.03.2021. A Notification No.SO 1296(e) dated 20.03.2023 was issued again by the Ministry specifying that the Certificate issued on the Udyam platform would be treated at par with Udyam Registration Certificate for availing priority. It is thus contended that a mere objection that the Udyam Registration Certificate was issued later in point of time would not be sufficient by itself to hold that the claim in question cannot be considered for want of Udyam Registration Certificate especially when the suppliers may hold valid registrations as per the applicable Notifications issued under the Act of 2006 and which were valid as on the date of institution of the claim before the Facilitation Council. A mere revision of the form and/or mandate of seeking re-registration/a fresh registration cannot be construed that the supplier did not enjoy the status as a micro or a small enterprise despite having a valid registration.

ANALYSIS AND CONCLUSION:

I have heard the learned counsel for the respective parties and have gone through the impugned record of the file.

So far as the issue No.4 regarding the Facilitation Council having jurisdiction to entertain the dispute instituted before it which relate to the period prior to the registration of the claimant as a Micro, Small and Medium Enterprise under the Act of 2006 or the dispute having been brought before it in relation to the date of invoice/claim being after getting the registration is concerned, the said issues do not require any further examination. The Hon'ble Supreme Court has already laid down in the matter of **Silpi Industries case(supra),** as well as the judgments referred to above that date of registration as Micro, Small and Medium Enterprises is the cardinal date for assuming jurisdiction qua a dispute brought before the Council. The date of the invoice is thus inconsequential. If the supplier was not registered with the competent authority as a Micro, Small and Medium Enterprise on the date when the contract was entered into, merely because it was registered as on the date when invoice was raised, would not confer jurisdiction of the Facilitation Council to adjudicate the payment dispute under the Act of 2006.

The position in law being well settled, it cannot still be held that the application cannot be received at all. There can be no judicial scrutiny or examination at the stage of submission of an application since adjudicatory process is not set in motion until the conciliation fails. The process prior thereto is either ministerial or pertains to exploring amicable resolution of the dispute and the same does not stipulate adjudication. Whether a claim deserves dismissal or there is a continuity of registration is a question of fact which has to be established by producing documentary evidence. Hence, a claim cannot be rejected outrightly and opportunities have to be granted to the respective parties to establish their case. The Council may, if so advised, devise an appropriate procedure for obtaining any such report and take a decision as per law on such objections as to the maintainability of the claims.

QUESTION NO.5

Whether the entire process of conciliation and arbitral award has to be passed within the time period of 90 days specified under Section 18(5) of the Act of 2006 failing which the award would be vitiated?

ARGUMENT OF THE PETITIONERS

It has been argued that Section 18(5) of the Act of 2006 prescribes a time span within which the award is to be passed. Once the period of 90 days prescribed under Section 18(5) comes to an end, the Facilitation Council would have no further jurisdiction to proceed in the matter and/or to pass any award. The orders/awards passed thereafter are a nullity and have to be so declared.

ARGUMENT BY THE RESPONDENTS

The respondents however submit that merely because the award is not passed within a period of 03 months as specified under Section 18(5) of the Act of 2006, the mandate would not terminate and the proceedings before the Council would not vitiate. The requirement to pass the award within the prescribed time period, although uses the expression "shall", however, such expression is only directory and not mandatory and is intended to convey an expeditious adjudication of the disputes/issues brought before this Court. It is not intend to entail a consequence of termination of the mandate on failure in meeting the timelines. Reliance in this regard is also placed on the judgment of High Court of Delhi in the matter of ***Indian Highways Management Company Limited Versus Mukesh & Associates,*** ***2021 SCC OnLine Del 2868:-***

> ***"32****. As observed above, Sub-section (5) of Section 18 of the MSME Act does not provide for any consequences for not deciding the reference within the stipulated period of ninety days. Further, it is held that failure to decide the reference within the period of ninety days would result in termination of the mandate and the parties would be relegated to other remedies and, would not further the objective of Section 18 of the MSME Act which is to provide expeditious resolution of disputes either by conciliation or by arbitration. Surely, the timelines as set out in Sub-section (5) of Section 18 of the MSME Act must be substantially adhered to. However, the same does not mean that in case the time lines get exceeded for some reason, the proceedings itself stand frustrated. This militates against the scheme of Section 18 of the MSME Act."*

The legislative intent under Section 18(5) of the Act of 2006 is to be seen while determining whether the provision was desired to be mandatory or directory and also from the context and the scheme. The provisions of the statute do not provide for any consequences for non-compliance of the aforesaid end-line and under such circumstances, the judicial pronouncements have leaned in favour of holding that such provisions, even though couched in a mandatory form, are still directory in their import and effect. Section 18(5) of the Act of 2006 does not provide any consequences that fall on failure of the reference being decided within the stipulated period and as such, the same ought to be construed to be directory in nature.

ANALYSIS AND CONCLUSION:

I have heard the learned counsel for the respective parties and have gone through the impugned record of the file.

I am of the opinion that the time limit prescribed under Section 18(5) of the Act of 2006 cannot be construed as mandatory notwithstanding the use of expression "shall". I find support from the judgment of the High Court of Delhi in the matter of ***Indian Highways Management Company Limited Versus Mukesh & Associates(supra)*** that Section 18(5) of the Act of 2006 does not provide for any consequences for not deciding the reference within the stipulated period of 90 days and that acceptance of any such argument as would result in termination of the mandate and the parties being compelled to avail other remedy(ies) would not further the object of Section 18 of the Act of 2006 aimed to provide expeditious resolution of the dispute. I would find myself in agreement with the aforesaid point of view not only for the reasoning recorded by the Hon'ble Delhi High Court but also for an additional reason that wherever the legislature intended to terminate the mandate, it has expressed such intention. The Arbitration and

Conciliation Act, 1996 can be referred to for understanding the said aspect. Section 29A of the Arbitration and Conciliation Act, 1996 provides for time limit for an arbitral award to be passed. It also specifically provides that where the award is not made within the period specified under Section 29A(1) of the Arbitration and Conciliation Act, 1996 and/or within the further extended period, the mandate of the Arbitrator shall stand terminated. Hence, the Legislature has been conscious and specific about its intent, wherever it so desired, about the consequence to follow on failure to complete the proceedings within the prescribed time. No such similar provision has been incorporated under the Act of 2006. It would thus flow that the Legislature did not intend the aforesaid consequence to spring from inaction or crossing the timeline. The issues with respect to the purposive interpretation of the statutes, the doctrine of workability and harmonious construction would also be applicable to the above issue. Testing on any of the said parameters, the argument of the petitioners that the arbitration would lapse for failure to pass an award in 90 days does not subserve the legislative intent.

Resultantly, it is held that an award cannot be said to be vitiated or terminated merely on account of the proceedings having been continued or the arbitral award having been passed beyond a period of 90 days of making of the reference.

QUESTION NO.6

Whether the Facilitation Council would be competent to examine the counter-claim during the course of conciliation/adjudication brought before it?

ARGUMENT OF THE PETITIONERS

While supporting the submissions that even a counter-claim has to be examined by the Facilitation Council, reference is made to the judgment of the Hon'ble Supreme Court in the matter of ***M/s Silpi Industries etc. Versus Kerala State Road Transport Corporation and another etc.(supra)*****:-**

> ***"23.*** *The obligations of the buyer to make payment, and award of Interest at three times of the bank rate notified by Reserve Bank in the event of delay by the buyer and the mechanism for recovery and reference to Micro and Small Enterprises Facilitation Council and further remedies under the 2006 Act for the party aggrieved by the awards, are covered by Chapter V of the 2006 Act. The provisions of Section 15 to 23 of the Act are given overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. From the Statement of Objects and Reasons also it is clear that it is a beneficial legislation to the small, medium and micro sector. The Arbitration and Conciliation Act, 1996 is a general law whereas the Micro, Small and Medium Enterprises Development Act, 2006 is a special beneficial legislation which is intended to benefit micro, small and medium enterprises covered by the said Act. The Act of 2006 contemplates a statutory arbitration when conciliation fails. A party which is covered by the provisions of 2006 Act allows a party to apply to the Council constituted under the Act to first conciliate and then arbitrate on the dispute between it and other parties. There are fundamental differences in the settlement mechanism under the 2006 Act and the 1996 Act. The first difference is, the Council constituted under the 2006 Act to undertake mandatory conciliation before the arbitration which is not so under the 1996 Act. Secondly, In the event of failure of conciliation under the 2006 Act, the Council or the*

centre or institution is identified by it for arbitration. The 1996 Act allows resolution of disputes by agreed forum. The third difference is that, in the event of award In favour of seller and if the same is to be challenged, there is a condition for pre-deposit of 75% of the amount awarded. Such is not the case in the 1996 Act. When such beneficial provisions are there in the special enactment, such benefits cannot be denied on the ground that counter-claim is not maintainable before the Council. In any case, whenever buyer wish to avoid the jurisdiction of the Council, the buyer can do on the spacious plea of counter-claim, without responding to the claims of the seller. When the provisions of Sections 15 to 23 are given overriding effect under Section 24 of the Act and further the 2006 Act is a beneficial legislation, we are of the view that even the buyer, if any claim is there, can very well subject to the jurisdiction before the Council and make its claim/counter claim as otherwise it will defeat the very objects of the Act which is a beneficial legislation to micro, small and medium enterprises. Even in cases where there is no agreement for resolution of disputes by way of arbitration, if the seller is a party covered by Micro, Small and Medium Enterprises Development Act, 2006, if such party approaches the Council for resolution of dispute, other party may approach the civil court or any other forum making claims on the same issue. If two parallel proceedings are allowed, it may result in conflicting findings. At this stage, it is relevant to notice the judgment of this Court in the case of Edukanti Kistamma (Dead) through LRS. v. S. Venkatareddy (Dead) through LRS, where this Court has held that a special Statute would be preferred over general one where it is beneficial one. It was explained that the purport and object of the Act must be given its full effect by applying the principles of purposive construction. Thus, it is clear that out of the two legislations, the provisions of MSMED Act will prevail, especially when it *has overriding provision under Section 24 thereof. Thus, we hold that MSMED Act, being a special Statute, will have an overriding effect vis-à-vis Arbitration and Conciliation Act, 1996, which is a general Act. Even if there is an agreement between the parties for resolution of disputes by arbitration, if a seller is covered by Micro, Small and Medium Enterprises Development Act, 2006, the seller can certainly approach the competent authority to make its claim. If any agreement between the parties is there, same is to be ignored In view of the statutory obligations and mechanism provided under the 2006 Act. Further, apart from the provision under Section 23(2A) of the 1996 Act, it is to be noticed that if counter-claim is not permitted, buyer can get over the legal obligation of compound interest at 3 times of the bank rate and the "75% pre-deposit" contemplated under Sections 16 and 19 of the MSMED Act.*

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***25.** In C.A. Nos. 1620-1622 of 2021, the High Court, while negating the plea of the appellant, on the maintainability of counter-claim, has allowed the application filed by the respondent under Section 11(6) of the 1996 Act and appointed the second arbitrator. Though, we are of the view that counter-claim and set-off is maintainable before the statutory authorities under MSMED Act, appellant in this set of appeals is not entitled for the relief, for the reason that on the date of supply of goods and services the appellant did not have the registration by submitting the memorandum as per Section 8 of the Act. The bids were invited on 23.02.2010, appellant submitted its bid on 17.05.2010, respondent awarded contract to the appellant on 24.09.2010 and the parties signed the contract documents for supply of material, installation/commissioning of the power plant on 29.07.2011. Thereafter, supplies were made and the appellant has raised first invoice on 02.11.2011 for supply contract and also raised* *the first invoice pursuant to contract for Installation on 07.07.2012 and the appellant has raised the last invoice in furtherance of contract for supply of material, on 29.03.2014. The appellant also claims to have raised last invoice on 29.03.2015 in furtherance of contract for installation. It is to be noticed that appellant approached the District Industrial Centre for grant of entrepreneur memorandum only on 25.03.2015."*

ARGUMENT BY THE RESPONDENTS

Counsel for the respondents have also supported that the jurisdiction of the Facilitation Council cannot be ousted merely on account of raising of a counter-claim. Any other suggestion would make it easy to defeat the object of the statute. Every buyer would thus set-up a counter-claim for seeking to ouster of the jurisdiction merely by lodging of claim before other forum. The possibility of contradictory findings thus would increase manifold.

ANALYSIS AND CONCLUSION:

I have heard the learned counsel for the respective parties and have gone through the impugned record of the file.

The said aspect has been examined by the Hon'ble Supreme Court in the judgment of **Silpi Industries case(supra)**. Scheme of the Act of 2006 specifically entitles the supplier to approach the Facilitation Council for recovery of the outstanding payments. Section 18(1) of the Act of 2006 uses the expression "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". Hence, the emphasis is on use of expression "any party to a dispute" for making a reference to the Micro and Small Enterprises Facilitation Council. Consequently, even the counter-claim by a party to a dispute can be examined by the Facilitation Council even though such party is not a Micro, Small and Medium Enterprise.

The Hon'ble Supreme Court rejected the contention that the Act of 2006 is a beneficial legislation solely for the Micro and Small Enterprises and the scope of the Act cannot be expanded to allow counter-claims by the buyer. It was held that the seller cannot be denied jurisdiction of the Facilitation Council merely on a plea of a counter-claim by the buyer. If such a contention is accepted, the remedy of the supplier/seller to approach the Facilitation Council, in the event of providing goods/services to a large Enterprise, would be rendered otiose. Any buyer would thus be in a situation to get over the legal obligation of payment of compound interest and oust the jurisdiction of the Facilitation Council by lodging a counter-claim. The expression "any party" referred to Section 18 cannot be narrowly construed to refer to the supplier alone. It was also noticed that Section 18(3) of the Act of 2006 makes it clear that the provision of The Arbitration and Conciliation Act, 1996 are made applicable as if there is an agreement between the parties under Section 1 sub-section 7 of the Arbitration and Conciliation Act, 1996. Section 23 of The Arbitration and Conciliation Act, 1996 deals with the statement of claim in defence while Section 23(2A) gives a right to the respondent to submit a counter-claim or plead a set-off with regard to the claim within the scope of the arbitration agreement by virtue of amending Act 3 of 2006. Furthermore, the object of the amending Act was to provide speedy disposal of cases relating to arbitration -- with minimal Court intervention, sub-section 2A of Section 23 was intended to give an opportunity to the respondent to submit his counter-claim or to plead a set-off within the scope of the arbitration agreement. Since Section 18(3) of the Act of 2006 makes it clear that the procedure of The Arbitration and Conciliation Act, 1996 would be applicable to such proceedings, there is no reason for curtailing the right of the respondent for making a counter-claim or set-off in proceedings before the Facilitation Council. When such provision for filing of counter-claim and/or to plead set-off is expressly inserted in Section 23 of the Act of 1996. It was also observed that denial of the right to plead set-off and/or file a counter-claim may lead to parallel proceedings before various Fora and may result in conflicting findings by different Fora. Hence, the issue having been already answered by the Hon'ble Supreme Court, it requires no further determination and the Facilitation Council would be competent to examine the counter-claim and the plea of set-off during the course of adjudication by way of arbitration brought before it.

QUESTION NO.7

Whether the proceedings before the Facilitation Council in relation to a work's contract would be not maintainable?

ARGUMENT OF THE PETITIONERS

Counsel have argued that in certain matters, the Facilitation Council has taken cognizance even though the tender/work is a work's contract and that it would not fall within the definition of supply of goods or rendering any service. However, notwithstanding the nature of the contract amongst the parties, the Facilitation Council has taken cognizance of the dispute and proceeded further in the matter instead of declining to proceed further.

While substantiating the submission that the provisions of the Act of 2006 are not applicable to the works' contract, reliance is placed upon the following judgments i.e. **M/s Shree Gee Enterprises vs. Union of India and Anr. - 2015 SCC OnLine Del 13169; Sterling and Wilson Private Limited vs. Union of India – 2017 SCC OnLine Bom 6829; Surya International vs. Union of India & Ors. - 2014 SCC OnLine All 15192** and **M/s Rahul Singh vs. Union of India & 5 Ors. - 2017 SCC OnLine All 3949** .

ARGUMENT OF THE RESPONDENTS

While countering the argument advanced by the counsel for the petitioners that the provisions of the Act of 2006 not being applicable on the works' contract, reference was made to the judgment of the Bombay High Court in the matter of ***National Textile Corporation Ltd. and others Versus Elixir Engineering Pvt. Ltd. and another, 2023 SCC OnLine Bom 653*** to contend that the question as to whether the contract would be said to be a works contract would depend on the facts and circumstances of each case and that unless the issue is examined by the MSME Facilitation Council, it cannot be ruled outrightly that a contract is a works' contract. They contend that even though the provisions of the MSMED Act have been held to be not applicable to a works' contract, which is essentially an indivisible contract that may involve not just the supply of goods but also the provisions of labour and services, however, such a finding cannot be returned without allowing the parties to bring their evidence in support of their respective claim. Since the process of adjudication commences only after the reference under section 18(3) of the Act of 2006, hence, there is no scope for ruling on the same any time prior thereto.

Reference was also made to the judgment of Calcutta High Court in the case of ***Hindustan Petroleum Corp. Ltd. & Anr. Versus West***

***Bengal State MSME & Ors.*, 2023 SCC OnLine Cal 1700** to contend that such question can only be decided after the parties enter appearance before the Facilitation Council and raised their objections and establish the nature of the contract as to whether it is a contract for supply of goods and services or it is in the nature of a works' contract or a composite contract.

ANALYSIS AND CONCLUSION:

I have heard the learned counsel for the respective parties and have gone through the impugned record of the file.

The plea as to whether the contract is a works contract or a composite contract or a contract in relation to supply of goods and service or may be back to back agreement are questions that require an adjudication. The process of MSMED Act, 2006 does not empower adjudication before reference under section 18(3), hence, an application for seeking rejection of claim on the ground that the contract is a works contract, being a plea of defence and question of law and fact, cannot be rejected at the threshold. The ouster of jurisdiction to deny opportunities to the buyer without affording him opportunities to prove his case is likely to defeat the object of the statute. There can be no presumption that the Council would not consider the settled law while deciding the claims. The argument is more apprehensive rather than substantive and has to be rejected. The statutory presumption in law is that the authorities discharge their duties as per law and not to the contrary. Hence, the petitioner cannot claim that he is aggrieved merely because the matter is referred to arbitration on failure of the conciliation proceedings. He is at liberty to establish his claim during the arbitration proceedings and seek dismissal of the application as per law. There is no such case brought before this court in the batch of petitions where a final award has been passed in a works contract. Hence, the apprehensions are not corroborated by any valid cause or concern.

No person can claim that he is prejudiced merely on account of an application/claim having been filed before the Facilitation Council and decide not to appear before such Council at all. The illegality or impropriety in an award would come into existence, if any, only after the said contention is rejected wrongly and erroneously and not at any time prior thereto. Such objections and grounds for raising a challenge to the award and/or proceedings by means of approaching the High Court under writ jurisdiction at the outset are thus unsustainable and the proceedings are liable to be set aside.

The Facilitation Council may however, if so advised, examine the possibility of determination of preliminary objections so that the disputes do not get prolonged for such reasons.

QUESTION NO.8

Whether an award that has been passed in violation of law can be set aside under writ jurisdiction despite alternative remedy(ies)?

ARGUMENT OF THE PETITIONERS

To substantiate the argument that where the orders/awards are illegal; incorrect; irregular or not being in accordance with law, such violation/breach cannot be overlooked or ignored. When the authority lacks inherent jurisdiction for passing an order, such order would be non-est and *void ab initio.* A defect of jurisdiction would go to the root of the matter and strike at the very authority of the Court/authority to pass such an order. The said defect is always to be treated as basic and fundamental, and a decree or order by such Court or in rendering such proceedings has to be treated as a nullity.

Reliance is placed on the judgment of the Hon'ble Supreme Court in the matter of ***Balvant N. Viswamitra and others Versus Yadav Sadashiv Mule (Dead) through LRs and others,*** ***2004 SCC OnLine SC 881***:-

> *" 9. The main question which arises for our consideration is whether the decree passed by the trial court can be said to be "null" and "void", In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in, accordance with law cannot be overlooked or ignored. Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, non est and void ab initio. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and, a decree or order passed by a court or an authority having no jurisdiction is a nullity. Validity of such decree or order can be challenged it any stage, even in execution or collateral proceedings.*
>
> *10. Five decades ago, in Kiran Singh v. Chaman Paswan this Court declared: (SCR p. 121) "It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."*
>
> *(Emphasis supplied)*

11. The said principle was reiterated by this Court in Hiralal Patni v. Kali Nath. The Court said: (SCR pp 75152) "Competence of a court to try a case goes to the very root of the jurisdiction, and where it is licking, it is a case of inherent lack of jurisdiction."

14. Suffice it to say that recently a Bench of two Judges of this Court has considered the distinction between null and void decree and illegal decree in a Rafique Bibi v. Sayed Waliuddin. One of us (R.C. Lahoti, J., as His Lordship then was), quoting with approval the law laid down in Vasudev Dhanjibhai Modi[3] stated: (SCC pp. 291-92, paras 6-8)

To substantiate their argument that the High Court would have the power to entertain a writ petition notwithstanding an alternative remedy, reference is made to the judgment of the Hon'ble Supreme Court in the matter of ***Radha Krishan Industries Versus State of Himachal Pradesh and others*, 2021 SCC OnLine SC 334:-**

"27. The principles of law which emerge are that:

27.1. 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.

27.2. 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.

27.3. 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.

27.4. An alternate remedy by itself does not divest the High Court of its a 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.*

27.5. 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.

27.6. In cases where there are disputed 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.

(emphasis supplied)

It is further argued that when law prescribes a thing to be done in a particular manner, the same has to be done in that manner. The Hon'ble Supreme Court, in the matter of ***State of Uttar Pradesh Versus Singhara Singh and others, AIR 1964 SC 358*****,** has held as under:-

"7. In Nazir Ahmed case the Judicial Committee observed that the principle applied in Taylor v. Taylor to a court, namely, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, applied to judicial officers making a record under Section 164 and, therefore, held that the Magistrate could not give oral evidence of the confession made to him which he had purported to record under Section 164 of the Code. It was said that otherwise all the precautions and safeguards laid down in Sections 164 and 364, both of which had to be read together, would become of such trifling value as to be almost idle and that "it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves".

8. The rule adopted in Taylor v. Taylor is well recognised and is founded on sound principle. Its result is that <u>if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.</u> A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on Magistrates the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him."

The Hon'ble Apex Court, in the matter of ***<u>J. Jayalalithaa and others Versus State of Karnataka and others</u>*, *2013 SCC OnLine SC 901,*** has observed as under:-

"34. There is yet an uncontroverted legal principle that when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the Statute. In other words, where a statute requires to do a certain thing in a certain way, the thing must be done in that way and not contrary to it at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim expressid unius est exclusio alterius, meaning thereby that if a statute provides for a thing to be done in a particular way, then it has to be done in that manner and in no

other manner and following any other course is not permissible.

The Hon'ble Apex Court, in the matter of ***Badrinath Versus Government of Tamil Nadu and others*, 2000 SCC OnLine SC 1401,** has observed as under:-

> *"27. This flows from the general principle applicable to "consequential orders". Once the basis of a proceeding is gone, may be at a later point of time by order of a superior authority, any intermediate action taken in the meantime like the recommendation of the State and by the UPSC and the action taken thereon would fall to the ground. This of consequential orders which is applicable to judicial and quasi-judicial proceedings is equally applicable to administrative orders. In other words, where an is passed by an authority and its validity is being reconsidered by a superior authority (like the Governor in this case) and if before the superior authority has given its decision, some further action has been taken on the basis of the initial order of the primary authority, then such further action will fall to the ground the moment the superior authority has set aside the primary order."*

The Hon'ble Supreme Court, in the matter of ***Chairman-cum-Managing Director, Coal India Limited and others Versus Ananta Saha and others*, 2011 SCC OnLine SC 586,** has held as under:-

> *"32. It is a settled legal proposition that if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In such a fact situation, the legal maxim sublato fundamento cadit opus is applicable, meaning thereby, in case a foundation is removed, the superstructure falls.*
>
> *33. In Badrinath v. Govt. of TN this Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle of consequential order which is applicable to judicial*

and quasi-judicial proceedings is equally applicable to administrative orders. (See also State of Kerala v. Puthenkavu N.S.S. Karayogam and Kalabharati Advertising v. Hemant Vimalnath Narichania.)

34. As in the instant case, there had been no proper initiation of disciplinary proceedings after the first round of litigation, all other consequential proceedings stood vitiated and on that count no fault can be found with the impugned judgment and order of the High Court."

ARGUMENT BY THE RESPONDENTS

The respondents contend that in so far as the issues with respect to the maintainability of the claim petition on any consideration vis-a-vis. the cause of limitation, the date of registration, and/or whether the jurisdiction of the Council would be barred or not cannot be gone into at the stage of institution of the claim itself or at the stage of conciliation and that the Council can examine the said aspects only after it takes cognizance of the dispute for adjudication. There is no mechanism before the Council to refuse submission/filing of a claim by a Micro and Small Enterprises under Chapter V of the Act of 2006.

It is further argued by the respondents that the petitioners have an efficacious alternative remedy(ies) to impugn the orders as per procedure known to law and by filing objections and/appeal thereafter. Filing of the present writ petitions is an abuse of the process of law. Since the petitioners have an alternative efficacious remedy, there is no occasion why a writ Court should examine the issues and step in when the grievances being espoused by the petitioners are not real but are only intended to delay finalization of the proceedings that have been initiated before the Facilitation Council. The object of the petitioners-buyers being to defeat the rights of the Micro and

Small Enterprises and to compel them to surrender into settlements which are to their detriment, would amount to abusing the process of law for causing prejudice and harm to the Micro and Small Enterprises having small financial resources and liquidity. Delay in finalization of their claims as well as release of payments to them is likely to force them to forego their rights and settle for less. The object of statute would be defeated in case the buyers are allowed to bleed the Micro and Small Enterprises to death knowing that liquidity and capital are the lifeline of such industry. Running them dry or denying them an early flow of their money is likely to cascade into a devastating effect. Same would defeat the object and legislative intent of the Act of 2006.

ANALYSIS AND CONCLUSION:

I have heard the learned counsel for the respective parties and have gone through the impugned record of the file.

While counsel for the petitioners have vehemently argued that the proceedings being in conflict with law, the same can be agitated at any stage by invoking the writ jurisdiction of the High Court, the stand of the respondents is that the petitioners have recourse to alternative efficacious remedy(ies) under the statutory scheme and that they should not be permitted to bypass the statutory procedure and rigors of the applicable law by filing the writ petition. It has further been argued by the counsel that in a large number of cases, the awards had already attained finality and that the same were never challenged by the petitioners and that the institution of the present writ petitions is only a means to bypass an award that has already attained finality amongst the parties and that the writ petitions deserve to be dismissed on account of delay and laches itself.

A perusal of the judgment in the matter of ***Radha Krishan Industries Versus State of Himachal Pradesh and others(supra),*** shows that an aggrieved party may approach the High Court by means of filing a writ petition in circumstances where the impugned order is void and/or is violative of the principles of natural justice or in complete disregard to the applicable laws. Where the defect is legal and is evident ex-facie, the writ jurisdiction of High Court would not be barred.

The Hon'ble Supreme Court, in the judgment of ***Balvant N. Viswamitra and others Versus Yadav Sadashiv Mule (Dead) through LRs and others(supra)***, has observed as under:

> *"9. The main question which arises for our consideration is whether the decree passed by the trial Court can be said to be 'null' and 'void'. In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in accordance with law cannot be overlooked or ignored. Where a Court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such Court would be without jurisdiction, non est and void ab initio. A defect of jurisdiction of the Court goes to the root of the matter and strikes at the very authority of the Court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a Court or an authority having no jurisdiction is nullity. Validity of such decree or order can be challenged to any stage, even in execution or collateral proceedings."*

Apart therefrom, the Hon'ble Supreme Court had held in the matter of ***M/s Deep Industries Limited Versus Oil and Natural Gas Corporation Limited and another***, **2019 SCC OnLine SC 1602** that the jurisdiction under Articles 226/227 of the Constitution of India cannot be invoked when adjudication is under the Arbitration and Conciliation Act and not in relation to a matter which is decided under any other statute even though the provisions/procedure of the Arbitration and Conciliation Act, 1996 may have been adopted for expeditious adjudication of the *lis* brought before it. Such an order/award cannot be said to have been passed under the Arbitration and Conciliation Act, 1996 and would remain an award passed under Section 18(3) of the Act of 2006 which is challenged by way of an appeal under section 19 of the Act of 2006 instead of objections under section 34 of the Arbitration and conciliation Act, 1996. So much so, it has already been held that the provisions of Limitation Act, 1963 are applicable to the awards/proceedings initiated under the Act of 2006 whereas the Arbitration and Conciliation Act, 1996, being a complete code unto itself, the Hon'ble Supreme Court has specifically held that Section 5 of the Limitation Act, 1963 cannot be invoked over and above the specific provision enshrined in the Arbitration and Conciliation Act, 1996.

Hence, I am of the opinion that a writ may be entertained by the High Court notwithstanding an efficacious and alternative remedy available to the respective parties, in exceptional and exigent circumstances when glaring illegality is evident and a pure question of law arises and where delaying the matter through the process of statute is more likely to prejudice the interest of the Micro and small enterprise. The defect of jurisdiction having been held basic and going to the root, such an issue can be examined under a writ jurisdiction.

The filing of a writ petition solely for the purpose of avoiding a pre-deposit should not be promoted or be allowed to take recourse to as a routine. The contention of the petitioners that some of the disputes are not arbitrable being in the nature of work's contract and would not fall within the domain of the Act of 2006 or that the award in question was passed in an *ex parte* proceedings or that no effective opportunity was granted to the respective parties to plead their case etc. are grounds of challenge to an award on merits and the same would not *per se* be sufficient to invoke the writ jurisdiction. The person aggrieved is required under such circumstance to raise a challenge to such an award/proceeding as per the procedure prescribed in the Statute.

Hence, where the challenge has been made to the reference which has already culminated in passing of a final award by the facilitation council , there is no expedient urgency as to why a challenge to the award should be considered under the writ petition when the petitioners have an efficacious remedy(ies) available to them in accordance with law and such remedy(ies) have not been availed. However, where the award has been passed by the sole arbitrator instead of the facilitation council, the stand of the respondent itself being that the sole arbitrator is not competent to pass the award, the same would be unsustainable for want of jurisdiction.

Taking into consideration the statutory provisions and the stand of the respondents along with the object of the Act and findings recorded above, all these writ petitions are disposed of with the following directions.

DIRECTIONS:

(i) The provisions of the Micro, Small and Medium Enterprises Development Act, 2006 being a special Act shall override the provisions of The Arbitration and Conciliation Act, 1996.

(ii) The application for claim may be preferred before the Facilitation Council by the Micro and Small Enterprises Facilitation Council for recovery of the due amount for any goods supplied or services rendered by the supplier.

(iii) The Facilitation Council may on receipt of such reference under Section 18(1) of the Act of 2006 either conduct the conciliation itself or seek assistance of any institution or centre providing alternative dispute resolution services by making a reference to such institute or centre.

(iv) The conduct of the conciliation proceedings under Section 18(2) of the Act of 2006, is a mandatory procedural requirement.

(v) In the event of failure of the conciliation initiated under Section 18(2) of the Act of 2006, the dispute may be taken up for arbitration by the Council itself or may be referred to any institution or centre providing alternate dispute resolution services for such arbitration.

(vi) The counter-claim filed by the other party can also be examined and adjudicated by the Facilitation Council.

(vii) Even though a period of 90 days is prescribed under Section 18(5) of the Act of 2006 for deciding the reference, however, the said time period is only desirable and directory in nature and would not vitiate the award that is finally passed merely on account of delay in passing of such an award.

(viii) The State Government may appoint any such officer, with such designation, as it thinks fit for the purposes of this Act and entrust to them such powers and functions under the said Act as may deem fit.

(ix) The designation of "Arbitrator/Expert/Facilitator" for the persons appointed under Section 26 of the MSMED Act, 2006 with the aid of Rule 4(16) of the Facilitation Council Rules of 2007/under Rule 6(12) of the Facilitation Council Rules of 2021 has to be construed in terms of

Section 26 alone and does not confer upon such appointee the status of an Arbitrator under The Arbitration and Conciliation Act, 1996 notwithstanding any expression used in the communications impugned in the present petitions.

(x) The power of the State Government to appoint is not qualified by any specific nature or terms and conditions of appointment and is not to be construed as an appointment which may be fulfilling the test and requirements of the Services Rules.

(xi) As the discretion with respect to the appointment, the powers and functions have been vested entirely with the State Government, hence, exercise of such power cannot be held to be bad and vitiated merely because the appointment and the terms of payment do not confirm to the hyper-technical understanding of appointment as per service law considering that the fee which is charged is prescribed by the government.

(xii) The scheme of the Act, as followed by the State of Haryana in its statutory Rules, confers the power to pass the award with the Facilitation Council itself and the person engaged using the expression/designation as "Arbitrator/Expert/Facilitator" is not competent to pass a final award as the respondent-State has also admitted that only the Facilitation Council has been passing the final award and that no such power to pass a final award has been conferred on the person engaged by them notwithstanding the nomenclature used in the term of engagement and/or reference made to him.

(xiii) Even though the report may have been termed as an award, a final award can only be passed by the Facilitation Council, as per rules, after consideration and affording an opportunity of hearing to the respective parties.

(xiv) The petitions noticed above and where the award has been passed by the Arbitrator/Expert/Facilitator engaged by the Facilitation Council in exercise of the powers conferred under Section 26 of the Act of 2006 cannot be held to be an enforceable award. The same can at best be construed only as a report for consideration by the Facilitation Council to pass the final award after granting an opportunity of hearing to the respective parties. Such awards as may have been passed by the Sole Arbitrator are thus set aside, along with all consequential proceedings, at this stage, and are declared to be only a report for consideration by the Facilitation Council.

(xv) The respective parties shall appear before the Facilitation Council within a period of **four weeks** from the date of receipt of a certified copy of the judgment and the Facilitation Council shall thereafter proceed with the matter in accordance with law and pass a final award as per law.

(xvi) Where the challenge has been made to an award passed by the Facilitation Council along with the reference made to the Arbitrator/Facilitator/Expert, for grounds that are a matter of defence and mixed questions of law and fact, there is no reason for this Court to entertain a writ petition directly as efficacious alternative remedy has been prescribed under Section 19 of the Act of 2006. The said writ petitions are accordingly disposed off at this stage, without commenting on merits, with liberty to the respective parties to prefer an appeal as per the Act before the competent Forum, if so advised.

(xvii) Where the challenge has been made to the award and/or the proceedings of the Facilitation Council on the ground that they have been wrongly proceeded against *ex parte* and/or without considering their defence/merit, the said writ petitions are also disposed off, at this stage, without commenting on merits, with liberty to the petitioners to challenge the award/the proceedings as per the remedy provided under the statute and in accordance with law.

(xviii) The remedy(ies) being efficacious, there is no reason why the writ jurisdiction should be invoked solely to bypass the operation of the provisions of the Act of 2006.

(xix) The condition of pre-deposit is not a subject matter of challenge and any argument to the effect that the condition is onerous and takes away the right of the petitioners to take recourse to constitutional remedy(ies) is rejected. The abovesaid clause and its constitutionality has already been upheld by the Hon'ble Supreme Court.

The parties are thus relegated to take recourse to their remedy(ies) as may be available to them in accordance with law and approach the competent Court/Facilitation Council which shall then proceed to pass appropriate orders in accordance with law. The period during which the proceedings remained pending before this Court shall be reckoned by the competent Court while dealing with the issue of delay and laches/limitation.

All the pending miscellaneous applications, if any, are disposed of, in view of the aforesaid judgment.

August 01, 2023 **(VINOD S. BHARDWAJ)**
seema **JUDGE**

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No