IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Before:
The Hon'ble Justice Hiranmay Bhattacharyya

C.O. 2178 of 2024
With
CAN 1 of 2025

Kommoners Club & Hospitality Pvt. Ltd.
vs.
Pecon Software Limited

For the Petitioner : Mr. Saptansu Basu, Sr. Adv.
Mr. K.N. Jana
Mr. Vishwarup Acharyya
..... advocates

For the Opposite Party : Mr. Ratnanko Banerjee, Sr. Adv.
Ms. Bani Ghosh
Mr. Jayanta Sengupta
Mr. S.K. Kanodia
...... advocates

Reserved on : 26.09.2025

Judgment on : 05.12.2025

<u>Hiranmay Bhattacharyya, J.:-</u>

1. This application under Article 227 of the Constitution of India is at the instance of the Buyer Unit praying for a declaration that the award dated December 21, 2023 passed by the West Bengal State Micro, Small Enterprise Facilitation Council (for short "the Facilitation Council") under

Section 31 of the Arbitration and Conciliation Act 1996 is nullity and for setting aside the said award.

2. By an indenture of lease dated May 22, 2018 the opposite party granted a lease in favour of the petitioner in respect of an area measuring about 3815 Sq. Ft. situated at the first floor of the building along with storage space on the mezzanine floor with two car parking spaces in the said building. The opposite party approached the Facilitation Council for realization of dues from the petitioner. Since settlement between the parties could not be arrived at in conciliation hearings, the conciliator terminated the process of conciliation and initiated the process of arbitration as per Sections 18(3) read with Section 18(4) of the MSMED Act, 2006. The opposite party filed its statement of claim and the petitioner filed its statement of objection. The Facilitation Council passed an award on December 21, 2023. Being aggrieved by such award the petitioner has approached this Court.

3. Mr. Basu learned Senior Advocate appearing for the petitioner contended that the opposite party obtained MSME registration in respect of real estate activities on January 12, 2022. He, therefore, contended that the opposite party could not claim to be a supplier within the definition of supplier under Section 2(n) of the Micro, Small and Medium Enterprise Development Act, 2006 (for short "the 2006 Act") as on the date of execution of the lease agreement dated May 22, 2018. Mr. Basu contended that registration of the opposite party unit subsequent to the lease agreement cannot give the opposite party the legal status of an enterprise under the 2006 Act for claiming the benefits under the said Act. He contended that registration of a unit will be prospective and shall apply for supply of goods and services subsequent to registration but cannot operate retrospectively. In support of such contention he placed reliance upon the decision of the Hon'ble Supreme Court in the case of **M/S Silpi Industries Industries vs. Kerala State Road Transport Corporation** reported at **(2021) 9 SCC 609**.

4. Mr. Basu contended that the opposite party could not have approached the Facilitation Council by way of a reference under Section 18 of the 2006 Act

with regard to any amount alleged to be due to the opposite party. Mr. Basu contended that the reference made under Section 18 of the 2006 Act at the instance of the opposite party as well as all subsequent steps pursuant thereto including the award dated 21.12.2023 is nullity as the MSME Council lacked jurisdiction to entertain a reference at the instance of the opposite party with regard to a dispute arising out of a lease agreement dated 22.05.2018. In support of such contention he placed reliance upon the decision of the **Anisminic Limited vs. FCC** reported **at [1969] 2 AC 147 [HL]**, **Boddington vs. British Transport Police** reported at **[1998] 2 All ER 203 HL** and in the case of **Embassy Property Developments (P) Ltd. vs. State of Karnataka** reported at **(2020) 13 SCC 308**.

5. Mr. Banerjee learned Senior Advocate for the opposite party seriously disputed the submissions made by Mr. Basu. He contended that the opposite party is a registered Macro, Small and Medium Enterprise Unit since May 31, 2011 and UDYAM registration was issued on December 22, 2015. He, thus, contended that the opposite party was a registered MSME Unit prior to the execution of the lease agreement dated May 22, 2018. Mr. Banerjee learned Senior Advocate raised an objection as to the maintainability of the instant application under Article 227 of the Constitution of India challenging an arbitral award. By referring to the provisions of Section 18 of the 2006 Act, Mr. Banerjee contended that in case of a dispute referred to arbitration the provisions of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act") shall apply. Mr. Banerjee contended that a party aggrieved against the said award passed by the Facilitation Council has to apply for setting aside the arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996. He further contended that the grounds on which the petitioner has approached this Court challenging the arbitral award squarely falls within the scope of Section 34 of the 1996 Act. He contended that since an alternative and efficacious remedy under the 1996 Act read with the 2006 Act is available, this Court should not entertain this application under Article 227 of the Constitution of India.

6. By referring to the provisions laid down under Section 19 of the 2006 Act, Mr. Banerjee contended that an application for setting aside an award of the Facilitation Council cannot be entertained by any Court unless the appellant has deposited 75% of the amount in terms of the award. Mr. Banerjee placed reliance upon the decision of the Hon'ble Supreme Court in the case of **India Glycols Limited vs. MSEFC, Telangana** reported at **(2025) 5 SCC 780** in support of his contention that entertaining an application under Article 227 of the Constitution of India in order to obviate the compliance with the requirement of pre-deposit under Section 19 would defeat the object and purpose of the 2006 Act. For the same proposition he also placed reliance upon the decision of the Hon'ble Supreme Court in the case of **Haryana Pradesh Congress Committee vs. First Newsmedia (P) Ltd.,** reported at **(2021) SCC Online 3722**.

7. Mr. Banerjee learned Senior Advocate contended that the decision in **Silpi Industries** (supra) is no longer a good law in view of the decision of the Hon'ble Supreme Court in the case of **NBCC (India) Ltd. vs. State of West Bengal and others** reported at **(2025) 3 SCC 440.** He contended that in **NBCC India Limited** (supra) the Hon'ble Supreme Court after distinguishing the decision in the case of **Silpi Industries** (supra) referred the issue to a larger bench. Mr. Banerjee contended that reference to a larger bench does not amount to destroying the binding effect of the declaration of law in **NBCC (India) Ltd.** (supra). In support of such contention he placed reliance upon the decision of the Hon'ble Supreme Court in the case of **Rajnish Kumar Rai vs. Union of India** reported at **(2023) 14 SCC 782**.

8. In reply Mr. Basu contended that existence of an alternative remedy cannot be an absolute bar in invoking the jurisdiction under Article 227 of the Constitution of India in a case where a statutory body assumes jurisdiction not vested in law. Mr. Basu contended that mere pendency of a reference to a larger bench cannot dilute the binding effect of the ratio laid down in **Silpi Industries** (supra) till such decision is overruled. In support of such

contention he placed reliance upon the constitution bench decision in the case of **National Insurance Co. Ltd. v. Pranay Sethi,** reported at **(2017) 16 SCC 680**. Mr. Basu distinguished the judgment in the case of **NBCC (India) Ltd.** (supra) and **India Glycols Ltd.** (supra) on facts by submitting that in the said reported cases MSME registration for the relevant activity was pre-existing.

9. Heard the learned advocates for the parties and perused the materials placed.

10. The bone of contention in the Civil Revision Application is whether the Facilitation Council had the jurisdiction to entertain a reference at the instance of the opposite party under Section 18 of the 2006 Act.

11. Strong reliance was placed on the decision in the case of **M/s. Silpi Industies** (supra) by Mr. Basu, learned Senior Advocate for the petitioner in support of his contention that the Facilitation Council lacked jurisdiction to make a reference at the instance of the opposite party.

12. Two issues fell for consideration before the Hon'ble Supreme Court in **Silpi Industries** (supra) –

    (i) Whether the provisions of Indian Limitation Act, 1963 is applicable to arbitration proceedings initiated under Section 18(3) of the 2006 Act and;

    (ii) Whether counter claim is maintainable in such arbitration proceedings.

13. The first issue was answered by holding that the provisions of the Limitation Act will apply to arbitration covered under Section 18(3) of the 2006 Act.

14. The second issue was answered by holding that a counter claim is maintainable before these statutory authorities under the 2006 Act. After answering these aforesaid issues the Hon'ble Supreme Court on the facts of that reported case proceeded to decide whether the appellant in the said

reported case was entitled for the relief for the reasons 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.

15. While dealing with the said issue the Hon'ble Supreme Court noted the undisputed factual position of the said reported cases that the supplies were concluded prior to registration of the supplier. On such factual background the Hon'ble Supreme Court in **Silpi Industries** (supra) held that to seek the benefit of provisions of 2006 Act, the seller should have registered under the provisions of the said Act as on the date of entering into the contract. It was further held that if any registration is obtained, the same will be prospective and supply for supplies of goods and services subsequent to registration deed cannot operate respectively.

16. In **NBCC India Limited** (supra) pursuant to the work orders, contracts were executed on 27.08.2015, 17.11.2015, 28.07.2016, 20.08.2016 and the enterprises filed the memorandum under Section 8 of the Act on 19.11.2016 as a small enterprise. Seeking resolution of disputes with regard to the aforesaid four work orders, the enterprise made reference under Section 18 of the Act for recovery of the amounts due to it to the Facilitation Council. Such Facilitation Council initiated action and with the failure of the conciliation proceedings under Section 18(2) of the Act the dispute was referred to arbitration under Section 18(3) of the 2006 Act. The appellant therein raised an objection against entertaining the reference by the Facilitation Council on the ground that the enterprise was not registered before the execution of the contracts.

17. The Hon'ble Supreme Court formulated the question of law whether an MSME cannot make a reference to the Facilitation Council for dispute resolution under Section 18 of the Act, if it is not registered under Section 8 of the Act before the execution of the contract with the buyer. The Hon'ble Supreme Court after noting the definition of expression "supplier" and also considering the classification of enterprises into Micro, Small and Medium with respect to each of which there is a separate legal regime to be

suggested by the advisory committee and notified by the Central and State Governments, and in view of the discretion specifically vested with the micro and small enterprises for filing a memorandum under Section 8 of the Act held that the Facilitation Council cannot entertain a reference under Section 18 if the enterprise is not registered under Section 8 must be rejected. After arriving at the said conclusion the Hon'ble Supreme Court discussed the cases relied upon by the parties namely **Silpi Industries** (supra), **Mahakali Foods Private Limited**, **Vaishno Enterprise** and **Nitish Estates** and made the following observation before referring the matter to a three judge bench. The Hon'ble Supreme Court held thus-

> "**52.** The order in *Nitesh Estates*, also relied on, observed that the issue involved is squarely covered against the respondents in view of the decision in *Silpi Industries* holding that filing of a memorandum is mandatory for initiation of proceedings under Section 18.
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> **53.** A decision where the issue was neither raised nor preceded by any consideration, in *State of U.P.* v. *Synthetics & Chemicals Ltd.* this Court held : (SCC p. 163, para 41)
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> > "*41.* … the Court did not feel bound by earlier decision as it was rendered without any argument, without reference to the crucial words of the rule and without any citation of the authority."
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> Further, approving the decision of this Court in *MCD* v. *Gurnam Kaur* which held that "*precedents sub silentio and without argument are of no moment*" this Court held that : (*Synthetics & Chemicals case* SCC p. 163, para 41)
>
> > "*41.* … A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141."

18. In view of the aforesaid discussion this Court finds that the decision in the case of **Silpi Industries** (supra) etc. were distinguished in **NBCC (India)** (supra) and a opinion was expressed upon interpretation of the provisions of 2006 Act. However, the appeal was referred to a larger bench.

19. Now the question arises whether the proposition of law laid down in **Silpi Industries** (supra) or the observations made in **NBCC (India) Limited** (supra) should be applied to the case on hand. The Hon'ble Supreme Court in **Rajnish Kumar Rai** (supra) held that judicial propriety do not permit ignoring the ratio laid down in an earlier judgment as no decision regarding the same had come out from the larger bench.

20. In **Pranay Sethi** (supra) the Hon'ble Supreme Court held that the pronouncement of law by a Division Bench of the Hon'ble Supreme Court is binding on a Division Bench of the same or a small number of judges and any order that such decision be binding, does not necessary that it should be a decision rendered by the full Court or constitutional bench of that Court.

21. In the light of the aforesaid discussion this Court holds that this Court cannot ignore the ratio laid down by the Hon'ble Supreme Court in **Silpi Indistries** (supra) merely because of the fact that the issue has been referred to a larger bench in **NBCC (India)** (supra).

22. Now turning back to the facts on the hand this Court finds from the materials available on record that UDYOG ADHAR registration certificate was issued in favour of the opposite party on 23.12.2015.

23. The lease agreement out of which the present dispute arose was executed on 22.05.2018 i.e., after the opposite party unit was registered as a MSME unit. In **Silpi Industries** (supra), the unit filed entrepreneur memorandum under Section 8 of the 2006 Act after the supplies were made pursuant to a contract. On such facts it was held that by taking recourse to filing memorandum under Section 8(1) of the 2006 Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under MSMED Act, 2006 as an enterprise to claim benefit retrospectively from the date on which the contract was entered into.

24. **Silpi Industries** (supra) is not an authority for the proposition that the date for incorporation of a particular service in the UDYAM AADHAR registration

of an unit already registered as MSME would be the relevant date for deciding the applicability of Section 18 of the 2006 Act.

25. For such reason this Court holds that the decision in the case of **Silpi Industries** (supra) cannot come to the aid of the petitioner as in the said reported case the undisputed factual position was that the supplies were concluded prior to the registration of the supplier.

26. It is evident from the materials on record that the registration certificate was issued in favour of the opposite party on 23.12.2015. Subsequent registration of the real estate activities on January 12, 2022 is nothing but an amendment of the registration certificate of an unit already registered as an MSME. This Court, therefore, holds that the subsequent registration of the certain class of activities in case of an unit already registered as an MSME would relate back to the date of registration of the unit as an MSME. That apart, the Hon'ble Supreme Court in **NBCC (India) Ltd.** (supra) after considering the object of the 2006 Act, the report of the Expert Committee on Micro, Small and Medium Enterprises, the definition of the expression "supplier" and the provisions laid down in Section 8 and 18 of the 2006 Act held that Section 8 grants a discretion to a micro or a small enterprise in filing a memorandum with the authority and also that an application under Section 18 cannot be rejected on the ground that the said enterprise has not registered itself in Section 8.

27. In **NBCC India Ltd.** (supra), the enterprise was not registered before the execution of the contracts. However, in the case on hand, the unit was already registered as an MSME on the date of execution of the lease agreement. The case of the opposite party herein stands on a better footing than the facts of the case in **NBCC (India) Ltd.** (supra).

28. In **M/s. Neeraj Potato Preservation** (supra), reported at **2024: AHC: 30417DB**, reliance was placed upon **Silpi Industries** (supra) while holding that once the service provided is not registered under MSMED Act, Facilitation Council established under the Act will be divested of jurisdiction

to entertain any dispute arising out of any service not registered under MSMED Act. In view of the aforesaid discussion, this Court is not inclined to follow the ratio laid down therein which has only a persuasive value.

29. This Court, therefore, holds that the Facilitation Council had the jurisdiction to make a reference under Section 18 of the 2006 Act at the instance of the opposite party.

30. This Court shall now consider whether the instant application under Article 227 of the Constitution of India should be decided on merits. For the purpose of deciding the said issue it would be beneficial to take note of the provisions laid down in Section 18 and 19 of the 2006 Act and Section 34 of the 1996 Act. The Hon'ble Supreme Court in **India Glycols Limited** (supra) after noticing the provisions of Section 18(3) of the 2006 Act reiterated the proposition of law laid down in **Gujarat State Civil Supplies Corpn. Ltd. v. Mahakali Foods (P) Ltd**., reported in **(2023) 6 SCC 401.**

31. The Hon'ble Supreme Court noted that Section 18 of the 2006 Act provides for recourse to a statutory remedy for challenging an award under the 1996 Act and recourse to the said remedy is subject to the discipline of complying with the requirement of pre-deposit under Section 19 of the 2006 Act. The Hon'ble Supreme Court held that entertaining a petition under Article 226/227 of the Constitution of India, in order to obviate compliance with the requirement of pre-deposit under Section 19, would defeat the object and purpose of the special enactment which has been legislated upon by the parliament.

32. The Hon'ble Supreme Court in **Haryana Pradesh Committee** (supra) held that an application for setting aside an award made by the Facilitation Council cannot be entertained unless the appellant not being the supplier has deposited the 75% of the amount in terms of the award in course of argument. It was also pointed out to this Court that the Hon'ble Supreme Court in **T.N. Cements Corpn. Ltd. v. Unicon Engineers**, reported in **(2025) 4 SCC 1** referred three questions framed by it to a larger bench of

five judges. The three questions framed by the Hon'ble Supreme Court are as follows-

> "**64.** In the light of the aforesaid decisions, we deem it appropriate to refer the following questions raised in the present appeal to a larger Bench of five Judges, namely:"
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> **64.1.** (*i*) Whether the ratio in *India Glycols* (2025) 5 SCC 780] that a writ petition could never be entertained against any order/award of MSEFC, completely bars or prohibits maintainability of the writ petition before the High Court?
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> **64.2.** (*ii*) If the bar/prohibition is not absolute, when and under what circumstances will the principle/restriction of adequate alternative remedy not apply?
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> **64.3.** (*iii*) Whether the members of MSEFC who undertake conciliation proceedings, upon failure, can themselves act as arbitrators of the Arbitral Tribunal in terms of Section 18 of the MSMED Act read with Section 80 of the A&C Act?
> The first and second question will subsume the question of when and in what situation a writ petition can be entertained against an order/award passed by MSEFC acting as an Arbitral Tribunal or conciliator."

33. Thus, it is evident that the issue whether a writ petition could never be entertained against an award of the Facilitation Council is pending before the larger bench. However, in view of the decision in the case of **Rajnish Kumar Rai** (supra) judicial propriety do not permit ignoring the ratio laid down in the earlier judgment that is in the case of **India Glycols Limited** (supra) as no decision has come as yet from the larger bench on the point of maintainability of an application under Article 227 of the Constitution of India.

34. To the mind of this Court the petitioner approached this Court by filing an application under Article 227 of the Constitution of India to challenge the award of the Facilitation Council only to obviate compliance with the requirement of pre-deposit under Section 19 of the 2006 Act. It is well settled that the High Court has the discretion whether to entertain an

application under Article 227 of the Constitution of India when an alternative remedy has been provided under the statute.

35. Mr. Basu, learned Senior Advocate for the petitioner in course of his argument only questioned the jurisdiction of the Facilitation Council to make a reference at the instance of the opposite party. No submission was made challenging the award on factual aspects. This Court has already observed that this application under Article 227 of the Constitution of India is not maintainable. For such reason this Court refrains from entering into the merits of the controversy which arose before the Facilitation Council.

36. There is no quarrel to the proposition of law laid down in **Radha Krishan Industries v. State of H.P.**, reported at **(2021) 6 SCC 771** that the High Court has the discretion not to entertain a writ petition and one of the restrictions placed on the power of the High Court is where an effective alternative remedy is available to the aggrieved person. Exceptions to the Rule of alternative remedy arise where order or proceedings are wholly without jurisdiction. The said decision cannot come to the aid of the petitioner as this Court has already held that the Facilitation Council had jurisdiction to make a reference under Section 18 of the 2006 Act.

37. There is no quarrel to the proposition of law laid down in **Anismatic** (supra) & **Boddingdon** (supra) that a decision made by an authority which had no power to make it is nullity. The said decision cannot come to the aid of the petitioner as this Court has already held that the Facilitation Council had the jurisdiction to make a reference.

38. There is no quarrel to the proposition of law laid down in **Uttar Pradesh Transmission Corporation Limited** (supra) that the High Court may entertain a writ petition notwithstanding the availability of an alternative remedy where the impugned orders or proceedings are wholly without jurisdiction.

39. For all the reasons as aforesaid CO No. 2178 of 2024 stands dismissed as not maintainable leaving the petitioner free to work out his remedies in

accordance with law. If recourse to any proceeding is taken by the petitioner it would be open to the opposite party to raise objections on all counts which may be available in law. CAN 1 of 2025 accordingly stands disposed of.

40. There shall be, however, no order as to costs.

41. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(HIRANMAY BHATTACHARYYA, J.)

Later **Dated: 05.12.2025**

The learned advocate appearing for the petitioner prays for stay of operation of this order.

Such prayer is opposed by the learned advocate for the opposite party.

The prayer for stay is considered and rejected by this Court.

(HIRANMAY BHATTACHARYYA, J.)