IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 2825 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE DR. JUSTICE A. P. THAKER

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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ANUPAM INDUSTRIES LTD.

Versus

THE STATE LEVEL INDUSTRY FACILITATION COUNCIL

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Appearance:
MR. NAVEEN PAHWA, SR. ADVOCATE WITH MR KAMLESH P VAIDANKAR(10135) for the Petitioner(s) No. 1
NILU K VAIDANKAR(8382) for the Petitioner(s) No. 1
DS AFF.NOT FILED (N) for the Respondent(s) No. 1,2
MR. DHAVAL DAVE, SR. ADVOCATE WITH ROHAN A SHAH(7497) for the Respondent(s) No. 3
RUSHABH H SHAH(7594) for the Respondent(s) No. 3

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CORAM:**HONOURABLE DR. JUSTICE A. P. THAKER**

Date : 16/12/2022
CAV JUDGMENT

1. The present petition is filed under Article 227 of the Constitution of India to quash and set aside the impugned

award dated 3.5.2019 passed by the Learned Sole Arbitrator in Arbitration Matter titled M/s. Vishal Carriers v. Anupam Industries Ltd.

2. The brief facts of present petition is that the petitioner is a Company incorporated under the provisions of the Companies Act engaged in the business of manufacturing Gantry and EOT Cranes and is one of the largest Company in the field of design, engineering and manufacturing of heavy duty cranes.

2.1 It is contended that as per the claim of respondent No.3, it has filed before MSME Facilitation Council and it is a proprietorship concern engaged in the business of providing transport services. It is the claim of the respondent No.3 that it has provided transport service to the petitioner pursuant to different Purchase Orders, for which the Respondent No.3 had raised separate distinct invoices during the period from 17.5.2013 to 15.7.2015, which fell due from 15.8.2013 to 13.10.2015. Respondent No.3 approached the Micro, Small and Medium Enterprises Facilitation Council (respondent No.1) for invoking the provisions of Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "the MSMED Act") somewhere in the month of July- August, 2017.

2.2 It is contended that as per record produced by the respondent No.3 before the respondent No.1, respondent No.3 Firm was registered in “E" category i.e. "Small" enterprise category incorporated with effect from 31.12.2016, which is reflected from the Certificate of Registration issued by the concerned District Industries Centre, Anand. It is contended that respondent No.3 was registered under the MSMED Act, subsequent to the dates of alleged transactions and had apparently got itself registered under the MSMED Act only with a view to get the benefit of all the provisions relating to Delayed Payment under the MSMED Act.

2.3 It is contended that conciliation efforts exerted by the learned MSME Facilitation Council, Gandhinagar did not yield the result and, therefore, the matter was referred to GCCI for conducting the Arbitral proceedings as per the provisions of Arbitration and Conciliation Act, 1996. it is contended that since the petitioner was not even informed about having of the alleged Arbitration, it was impossible for him to know about actual pendency of the arbitral proceedings and to attend it. That due to that eventuality, the entire arbitral proceedings were conducted ex-facie in absence of the petitioner and the impugned award came to be passed by the sole Arbitrator.

2.4 The same has been challenged by the petitioner by way of

filing the petition on the grounds that the claim filed by the respondent No.3 is not maintainable as it was not registered under the MSMED Act at the time of transaction. It is also contended that Arbitrator has also not appreciated the true and correct facts in absence of the petitioner and, therefore, it has prayed to quash and set aside the impugned award of the sole arbitrator.

3. Respondent No.3 has filed its affidavit-in-reply and has raised many contentions. By way of relevant facts, it has contended that on 7.7.2017, respondent filed application under Section 18 of the MSMED Act, 2006 before the Facilitation Council along with all necessary documents. It is contended that on such application the Counsel on 29.9.2017 issued notice to the petitioner, which was served upon the petitioner through email on 3.10.2017. It is contended that pursuant to such notice, the petitioner did not appear, therefore, the Council on 3-6/11/2017 issued a reminder notice to the petitioner informing them to submit all the relevant details within 7 days.

3.1 It is contended that the Council under Section 18(2) undertook conciliation proceedings and conducted meeting on 24.1.2018, 14.2.2018, 14.3.2018 and 25.4.2018 and intimation to that meetings were made to the petitioner. It is contended that despite giving last opportunity to appear on 25.4.2018, the petitioner did not appear in any of the

aforesaid meetings. It is contended that however, advocate Mr. Nilu Vaidankar once appeared on behalf of the petitioner in the meeting on 14.3.2018 and even showed inclination to settle the matter on behalf of the petitioner. It is contended that since thereafter no communication was received by the respondent, it addressed a email dated 20.3.2018 and 28.3.2018 to the advocate who appeared for the petitioner. According to respondent, the said email was not replied. It is contended that despite repeated notices and reminders, the petitioner chose not to appear in the conciliation proceedings and, therefore, the Facilitation Council, on 24.5.2018, passed an order closing conciliation proceedings under Section 18(2) and further referred the matter to GCCI for arbitral proceedings under Section 18(3) of MSMED Act, 2006. It is contended that the aforesaid order was sent by Registered Post to the petitioner as well as the respondent. Thereafter, the Council on 13.6.2018 addressed a letter to GCCI- ADRC referring the matter for arbitration. That, thereafter the GCCI- ADRC on 25.6.2018 addressed a communication to both the parties informing about procedure and the fees for conducting arbitration. That, on 21.7.2018, the GCCI- ADRC addressed a communication to Mr. Mahendra Anand for giving consent for his appoint as a Sole Arbitrator. Upon such consent being received, the GCCI- ADRC on 3.8.2018, addressed a letter to Chairman, SLIFS, Industrial Commissionarate, informing about the appointment of the Sole Arbitrator.

That thereafter a letter was addressed by GCCI- ADRC dated 16.8.2018 to the parties and the Sole Arbitrator for fixing first meeting on 5.9.2018 at 12 p.m. and Gujarat Chamber of Commerce and Industry, Shri Ambica Mills, Gujarat Chamber Building, Ashram Road, Ahmedabad.

3.2 It is also contended that several arbitration meetings were held by Sole Arbitrator and prior to that he had sent intimation to the petitioner as well as respondents. It is contended that, however, the petitioner did not remain present on any od the dates. It is also contended that the Arbitrator even sent Minutes of Meeting through email to the petitioner as well as respondent. It is contended that the respondent has, during the arbitral proceedings, served claim statement, additional list of documents and writtens submissions by Registered Post to the registered address of the petitioner Company and yet neither the petitioner has chosen to appear nor the petitioner has raised any objections during the time. It is contended that since the petitioner was not appearing for arbitral proceedings, the Arbitrator decided to proceed with the matter and passed an Award to that effect on 3.5.2019 and allowed the claim of the respondent. It is also contended that a copy of the award was sent to the petitioner by Registered Post which was delivered to the registered addressed of the petitioner Company on 6.6.2019. It is contended that despite having knowledge about arbitral award dated 3.5.2019, the

petitioner slept over its right and did not challenge the same by way of filing statutory Appeal under Section 34 of the 1996 Act within stipulated time and, therefore, the Award dated 3.5.2019 attained finality.

3.3 It is also contended that thereafter on 10.10.2019, the respondent issued a demand notice under the provisions of the Insolvency and Bankruptcy Code. That the petitioner on 19.10.2019 replied to the same, making averment that they were not aware about such on-going arbitration proceedings and award dated 3.5.2019. It is contended that subsequent thereof, the respondent on about 6.11.2019 preferred an Application under Section 9 of the Insolvency and Bankruptcy Code before the National Company Law Tribunal, Ahmedabad Branch against the petitioner. According to the respondents, the present petition is filed with malafide intention to derail and linger the insolvency proceedings.

3.4 By referring to the aforesaid factual matrix, the respondent has denied the contention of the plaintiff raised in the petition and has submitted that alternative remedy of Appeal is available to the petitioner, and therefore, the present petition is not maintainable under the facts of the present case. It is also contended that the present petition is not bonafide one and filed only to derail the insolvency proceedings.

4. Heard Mr. Naveen Pahwa, learned Senior Counsel assisted by Ms. Neelu Vaidankar and Mr. Kamlesh Vaidankar, learned advocates for the petitioner and Mr. Dhaval Dave, learned Senior Counsel assisted by Mr. Rohan Shah and Mr. Rushabh Shah, learned advocates for the respodnent No.3 at length. Perused the materials placed on record and the decisions cited at bar.

5. Mr. Naveen Pahwa, learned Senior Counsel for the petitioner, while referring to the averment made in the Memo of Petition and the documentary evidence produced along with petition, has vehemently submitted that to claim any relief under the MSMED Act, one must be registered prior to any business transaction entered into between the parties. Mr. Pahwa has submitted that in the present case, the transaction between the petitioner and private respondents was from 1.5.2013 to 31.7.2015. He has submitted that however at that stage, the private respondent was not registered under the MSMED Act. He has submitted that the respondent No.3 came to be registered as Medium, Small and Medium Enterprises on 31.12.2016. According to Mr. Pahwa, therefore, the provisions of the MSMED Act would not be applicable in respect of transaction between the parties. Mr. Pahwa, learned Senior Counsel has also submitted that when the MSMED Act itself was not applicable to the transaction

between the parties, the proceedings under the MSMED Act, which includes conciliation as well as arbitration proceedings, would be *non est* in the eyes of law.

5.1 Mr. Pahwa, learned Senior counsel has also submitted that admittedly, the respondent No.3 has moved the MSME Council in July- August, 2017 for transaction in question. Mr. Pahwa has submitted that there was no proper hearing conducted and the petitioner was not informed. Mr. Pahwa, learned Senior Counsel has submitted that even during arbitral proceedings at the instance of the MSME Council, no opportunity of being heard was given to the petitioner and ex-parte order came to be passed on 12.10.2019. Mr. Pahwa learned Senior Counsel, while referring to the documentary evidence produced on record, submitted that the letter dated 1.6.2019 (Page-40) was never sent to the petitioner and it was accepted by the advocate for the private respondent who is claimant before the MSME Council. Mr. Pahwa has referred to Page-40 and drew the attention of the Court on the endorsement made on Page-40 by the advocate of the claimant of receipt of the same for both the parties and has submitted that this itself suggest that this communication was never received by the petitioner herein.

5.2 Mr. Pahwa, learned Senior Counsel has also submitted that merely because lawyer of the petitioner was present in the

conciliation, cannot be deemed to be authorized to appear before the arbitral proceedings. Mr. Pahwa, learned Senior Counsel, while referring to the affidavit-in-reply of the respondent No.3 and the e-mail addressed relied upon by respondent No.3 regarding the petitioner-company, he has submitted that the said email address is of the other Company and not of the petitioner, and therefore, there is no proper communication regarding the arbitral proceedings and the award passed therein. Mr. Pahwa has vehemently submitted that since there was no opportunity of being heard given to the present petitioner, the entire proceedings is also liable to be quashed and set-aside.

5.3 Mr. Pahwa, learned Senior Counsel has also submitted that when the MSMED Act itself was not applicable to the transaction in question, even if any award is passed by the Sole-Arbitrator, there is no need of filing any Appeal under the provisions of the said Act as well as Arbitration and Conciliation Act, as the initiation of proceedings under the MSMED Act itself is not sustainable in the eyes of law. He has submitted that, therefore, considering the facts of the present case, the petitioner has every legal right to approach this Court by filing petition under the provisions of the Constitution for quashment of the arbitral award. Mr. Pahwa, learned Senior Counsel has submitted to allow the present petition. He has relied upon the following decisions in support of his submissions:

1. Judgment dated 27.12.2019 passed in LPA No. 619 of 2019 in case of M/s. Nik San Engineering Co. Ltd v. M/s. Easun Reyroller Limited:

> *"3.2 Having regard to the fact that section 17 of the MSMED Act which provides for recovery of amount due, lays down that 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, the learned counsel referred to clause (n) of section 2 of the MSMED Act which defines "supplier" and reads as under:-*
>
> > *"(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;"*

It was submitted that while the first part of the clause (n) of section 2 of the MSMED Act lays down that supplier means a micro or small enterprise which has filed a memorandum with the authority referred to in sub-section (1) of section 8, the inclusive part of the definition as contained in sub-clause (iii) thereof does not qualify micro and small enterprises by filing of memorandum. It was submitted that in the facts of the present case, the goods were supplied from the State of Gujarat which is within the jurisdiction of the Facilitation Council and hence the reference under section 18 of the MSMED Act had rightly been made before the third respondent - Facilitation Council. To bolster such submission, the learned counsel placed reliance upon the decision of the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in The Indur District Co-operative Marketing Society Ltd. v. Microplex (India), Hyderabad and Ors., MANU/AP/0785/2015, wherein the court has held that a micro or small enterprise is not mandatorily required to file a memorandum with the authorities specified by the State Government or the Central Government as the case may be and discretion is given to it in this regard. However, section 2(n), insofar it defines a supplier to mean a micro or small enterprise is followed with the qualification that it should have filed a memorandum with the authority referred to in subsection (1) of section 8. However, the inclusive part of the definition under section 2(n)(iii) states that any company, cooperative society, trust or body, by whatever name called, and engaged in selling goods produced by micro or small enterprises and rendering services which are

provided by such enterprises, would also qualify as a supplier. In the context of this inclusive part of the definition, there is no requirement that the micro or small enterprise, whose goods are being sold or whose services are being rendered by the company, cooperative society, trust or body, should have filed a memorandum under section 8(1) of the MSMED Act of 2006. The court held that it would be anomalous to interpret the definition to mean that for a micro or small enterprise to be a supplier, it must be mandatory to file a memorandum under section 8(1), but any company, co-operative society, trust or body, which either sells goods or renders services of a micro or small enterprise, would automatically qualify as a supplier, irrespective of whether or not such micro or small enterprise has itself filed a memorandum under section 8(1). The court accepted the submission that the phrase "which has filed a memorandum with the authority" in section 2(n) is only qualifying and does not curtail the scope of the definition. The court also held that what is required is only that the supplier should be located within the jurisdiction of the Facilitation Council and not that they should be registered or have their registered office within such jurisdiction.

4.8 Next, it was submitted that the word used in section 18 of the MSMED Act is "party" as against "supplier". Nothing prevented the legislature from using the word "supplier" in section 18 of the MSMED Act. Hence, the appellant as well as the intervener are covered by the plain language of the MSMED Act and in the absence of any ambiguity, the interpretation cannot deviate from such language. It was submitted that it is a settled

principle that literal interpretation is the preferred method of interpretation where the language used is clear, as held by the Supreme Court in the case of Union of India Through Director of Income Tax vs. M/s. Tata Chemicals Ltd., (2014)6 SCC 335, wherein the court has held thus:

> *"It is cardinal principle of interpretation of Statutes that the words of a Statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning unless such construction leads to some absurdity or unless there is something in the context or in the object of the Statute to the contrary. The golden rule is that the words of a Statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of a Statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning irrespective of the consequences. It is said that the words themselves best declare the intention of the law giver. The Courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a Statute as being inapposite surpluses, if they can have proper application in circumstances conceivable within the contemplation of the Statute."*

11. Section 18 of the MSMED Act provides for making reference to the Facilitation Council by a party to a

dispute with regard to any amount due under section 17 of that Act. Section 17 of the MSMED Act postulates that for any goods supplied or services rendered by the supplier, the buyer is liable to pay the amount of interest thereon as provided in section 16. Section 16 of the MSMED Act says that where a buyer fails to make payment of the amount due to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or 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. Section 15 of the MSMED Act provides for "liability of buyer to make payment" and provides that 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. The proviso thereto says that in no case the period agreed between the supplier and the buyer in writing shall exceed forty five days from the day of acceptance or the day of deemed acceptance.

14. On a conjoint reading of section 15 and section 2(b) of the MSMED Act, it is discernible that section 15 casts an obligation upon the buyer to make payment to the supplier within the period agreed upon or within fifteen days of acceptance or deemed acceptance of the goods or services. In case the buyer fails to do so, by virtue of

section 16 of the MSMED Act, he is saddled with the liability to pay compound interest with monthly rests at three times of the bank rate notified by the Reserve Bank. Section 17 of the MSMED Act casts upon the buyer the liability to pay the supplier interest in terms of section 16; and section 18 of the MSMED Act enables a party to make a reference with regard to any amount due under section 17.

15. A common thread which runs through sections 15 to 17 of the MSMED Act is that goods must be supplied or services must have been rendered by a "supplier". Therefore, to invoke section 18 of the MSMED Act, it is a sine qua non that the liability has to be with regard to goods supplied or services rendered by a "supplier".

16. The moot question that therefore arises is whether the appellant is a "supplier" as contemplated under section 2(n) of the MSMED Act.

50. The next question that then arises for consideration is as to at which point of time the memorandum should have been filed by a micro or small enterprise to be eligible to make a reference under section 18 of the MSMED Act, namely whether such memorandum should have been filed before the supply is made or at any point of time even after the contract is executed. In this regard, the scheme of Chapter V of the MSMED Act may be revisited.

51. Section 15 of the MSMED Act provides that the buyer shall make payment for any supply of goods or services rendered by a supplier on or before the date agreed upon

between them in writing and in absence of an agreement before the appointed day. "Appointed day" is defined under clause (b) of section 2 of the MSMED Act to mean 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. The Explanation thereto provides that for the purposes of the clause, -T

(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;

52. The proviso to section 15 of the MSMED Act provides 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. Where the status of the enterprise, viz. whether it is a micro enterprise or small enterprise is determined by filing of a memorandum by such enterprise with the authority referred to in sub-section (1) of section

8 of the MSMED Act, the parties would be aware that the provisions of section 15 of that Act have to be complied with and payment has to be made to the supplier within the time provided thereunder. However, in the absence of the status of the enterprise being determined, the agreement between the parties would not be in terms of section 15 of the MSMED Act.

53. Adverting to section 16 of the MSMED Act, it is an onerous provision which casts an obligation upon a buyer who purchases goods from a supplier, in case of nonpayment of the amount as required under section 15 to the supplier, to pay compound interest with monthly rests to the supplier on the amount from the appointed date or the date immediately following the date agreed upon at three times of the bank rate notified by the Reserve Bank. Therefore, before a buyer purchases goods or avails services from a micro or small enterprise, he should be aware about the status of the enterprise, so that he knows that nonpayment of the amount within the time provided under section 15 of that Act will entail payment of compound interest at three times of the bank rate notified by the Reserve Bank. Moreover, section 22 of the MSMED Act casts an obligation upon a buyer who is required to get his annual accounts audited under any law for the time being in force to furnish additional information as stipulated therein, failure of which would be visited by penalty under section 27 thereof. Moreover, in view of the provisions of section 23 of the MSMED Act, the buyer would not be entitled to claim deduction of the amount payable or paid by way of interest under section 16 for the purposes of computation of income under the

Income Tax Act, 1961. Therefore, when such onerous obligations are cast upon the buyer under the above provisions of the MSMED Act, the buyer should be aware of the status of the enterprise from which he is purchasing the goods or availing services, viz. whether it is a micro or small enterprise. It, therefore, appears that the legislature has intentionally provided that for the purposes availing the benefit of the provisions of Chapter V of the MSMED Act, a micro or small enterprise should have filed a memorandum as contemplated under sub-section (1) of section 8 of the MSMED Act and accordingly has employed the expression "supplier" in sections 15, 16, 17 and 22 of the MSMED Act.

54. Another significant aspect of the matter is that for invoking section 18 of the MSMED Act, the dispute must relate to any amount due under section 17, which in turn says that for any goods supplied or services rendered by the supplier, the buyer shall be liable to interest thereon as provided under section 16. Therefore, a sine qua non for invoking section 18 of the MSMED Act is that the goods must have supplied or services must have been rendered by a supplier; therefore, unless the micro or small enterprise satisfies the requirements of "supplier" as defined under section 2(n) of the MSMED Act at the time when the goods were supplied, the provisions of section 18 of the MSMED Act would not be attracted.

55. Since the liability under section 15, 16 and 17 of Chapter V of the MSMED Act arises only in case where the goods were supplied or services provided or rendered by a "supplier", as a necessary corollary it follows that the

micro or small enterprise should have filed the memorandum before the goods were supplied or services provided or rendered. A micro or small enterprise which files a memorandum at a subsequent date after the goods are supplied or services provided or rendered, would not be eligible to invoke section 18 of the MSMED Act as the said section envisages reference by any party to a dispute with regard to any amount due under section 17, and the amount due under section 17 would be in relation to goods supplied or services rendered by a supplier, which requirement would not be satisfied in such a case. The contention that a micro or small enterprise can file a memorandum at any point of time even after the goods are supplied and services are rendered and still invoke section 18 of the MSMED Act because on the date when section 18 is invoked, it falls within the ambit of supplier as defined under section 2(n) of that Act, therefore, does not merit acceptance. Considering the scheme of Chapter V of the MSMED Act, this court is of the considered view that it is only a micro or small enterprise which falls within the purview of the expression "supplier" as contemplated in section 2(n) as discussed hereinabove, and which has supplied goods or rendered services after filing a memorandum as contemplated under section 8(1) of the MSMED Act,which would be entitled to invoke section 18 of the MSMED Act in respect of any dispute regarding any amount due in relation to goods supplied or services rendered. Therefore, the contention that a micro or small enterprise can file a memorandum even after the goods are supplied and services are rendered and invoke section 18 of the MSMED Act, must necessarily fail.

2. M/s. Easun Reyrolle Limited v. Nik San Engineering Co. Ltd., reported in 2019 SCC Online Gujarat 2474:

> *"15. To meet with the stand taken by learned senior counsel for the petitioners, Mr.Jaimin R. Dave learned advocate for the respondent No.1 submitted that there is an alternative efficacious remedy available to the petitioners and the arbitrator by virtue of Section 16 of the Arbitration Act, 1996 can decide these issues, the Hon'ble Court may not exercise jurisdiction under Article 226 of the Constitution of India. It has further been contended that the petitioners have never raised such contention of jurisdiction before the State level facilitation council despite opportunities having been granted, and therefore, now the petitioners cannot raise such issue of jurisdiction as has acquiescence his right of agitating the same even petitioners did not bother to remain present before the authority to raise the issue related to jurisdiction, and therefore once, the petitioners have submitted to the jurisdiction of respondent authority, the petition may not be entertained and only idea behind bringing this petition is just to delay the proceedings.*
>
> *28. So far as the contention with regard to the maintainability of petition raised by respondent No.1 by asserting that it can be gone in to by the learned Arbitrator but in view of the scheme of the Act and in view of this peculiar set of circumstances since reference itself is not tenable for want of jurisdiction and authority it is always open for the petitioner to invoke extraordinary jurisdiction of this Court. As a result of this, the petition is*

maintainable and it is settled position of law that challenge to the reference itself is amenable to the writ jurisdiction if it is without the authority of law made by the concerned authority and here is the case in which the authority has made an attempt to allow respondent No.1 to invoke such jurisdiction by respondent Nos. 2 and 3 to raise such a huge claim though not entitled to seek benefit of the provisions of the Act in question. The contentions raised by the learned counsel for the petitioner have got its own impact and the Court is therefore, inclined to accept the petition by granting relief as prayed for.

3. Silpi Industries Etc. v. Kerala State Road Transport Corporation and Another, reported in 2021 SCC OnLine 439;

"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 Y&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 benefit of provisions

under MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under MSMED Act. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court, in the judgment in the case of Shanti Conductors Pvt. Ltd. & Anr. etc. v. Assam State Electricity Board & Ors. etc.6 has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act. There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of appellant as the unit under MSMED Act, 2006. By taking recourse to filing memorandum under sub-section (1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which appellant entered into contract with the respondent. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of MSMED Act 2006, by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and applies for supply of goods and services

subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation.

27. It is also not in dispute that the appellant approached the District Industrial Centre and filed entrepreneur memorandum under Section 8 of the MSMED Act 2006 only on 25.03.2015 and later has approached the Council invoking the provisions of MSMED Act by filing application under Section 18 of the Act. It is the specific case of the respondent that the appellant has abandoned the incomplete work having made deficient and defective supplies in the month of February/March 2015. In that view of the matter, we are of the firm view that the appellant is not entitled to invoke the provisions of Chapter V and seek reference to arbitration under Section 18 of the MSMED Act, 2006. Further, as it is also not in dispute that there is an agreement for arbitration between the parties for resolution of disputes pursuant to their contract, as such, we are of the view that the High Court has rightly allowed the application filed by the respondent under Section 11(6) of the 1996 Act."

4. Judgment of the Hon'ble Apex Court rendered on 15.12.2021 in Civil Appeal No. 2899 of 2021 in the case of Jharkhand Urja Vikas Nigam Limited v. The State of Rajasthan & Ors.:

"7. In the writ petition the appellant has challenged the order/award dated 06.08.2012 passed by the 2nd respondent-Council constituted under provisions of

MSMED Act. The 3rd respondent has approached the Council seeking directions against the appellant for payment of delayed bill amount along with interest under provisions of MSMED Act. Immediately after filing application by initiating conciliation proceedings, Council has issued notices and as the appellant has not appeared summons were issued to the appellant on 18.07.2012 for appearance on 06.08.2012. The relevant portion of the summons dated 18.07.2012 issued by the Council reads as under :

> *"Now, therefore, notice is hereby given to you to appear in person or through authorized representative before the Council on 6th August, 2012 at 3.30 P.M. or on such day as may be fixed by the Council to submit in support of the claim/dispute and you are directed to produce on that day all the documents upon which you intend to rely in support of your defense.*
>
> *Take note that in default of your response within the period mentioned above, the dispute shall stand terminated. Otherwise the dispute shall be heard and reconciled with a view to the settlement of dispute and in case settlement is not arrived at, the Council shall either itself act as an arbitrator for final settlement of dispute or refer it to an institute for such settlement as per provisions of the Act."*

8. Only on the ground that even after receipt of summons the appellant has not appeared the Council has passed order/award on 06.08.2012. As per Section 18(3) of the MSMED Act, if conciliation is not successful, the said proceedings stand terminated and thereafter Council is

empowered to take up the dispute for arbitration on its own or refer to any other institution. The said Section itself makes it clear that when the arbitration is initiated all the provisions of the Arbitration and Conciliation Act, 1996 will apply, as if arbitration was in pursuance of an arbitration agreement referred under sub-section (1) of Section 7 of the said Act.

Section 18 of the MSMED Act reads as under :

"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. C.A. No.2899 of 2021

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

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council 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 dispute as if the arbitration was in pursuance of an arbitration agreement referred to in subsection (1) of section 7 of that Act.

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

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

9. From a reading of Section 18(2) and 18(3) of the MSMED Act it is clear that the Council is obliged to conduct conciliation for which the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 would apply, as if the conciliation was initiated under Part III of the said Act. Under Section 18(3), when conciliation fails and stands terminated, the dispute between the parties can be resolved by arbitration. The Council is empowered either to take up arbitration on its own or to refer the arbitration proceedings to any institution as specified in the said Section. It is open to the Council to arbitrate and pass an award, after following the procedure under the relevant provisions of the Arbitration

and Conciliation Act, 1996, particularly Sections 20, 23, 24, 25.

10. There is a fundamental difference between conciliation and arbitration. In conciliation the conciliator assists the parties to arrive at an amicable settlement, in an impartial and independent manner. In arbitration, the Arbitral Tribunal/ arbitrator adjudicates the disputes between the parties. The claim has to be proved before the arbitrator, if necessary, by adducing evidence, even though the rules of the Civil Procedure Code or the Indian Evidence Act may not apply. Unless otherwise agreed, oral hearings are to be held.

13. The order dated 06.08.2012 is a nullity and runs contrary not only to the provisions of MSMED Act but contrary to various mandatory provisions of Arbitration and Conciliation Act, 1996. The order dated 06.08.2012 is patently illegal. There is no arbitral award in the eye of law. It is true that under the scheme of the Arbitration and Conciliation Act, 1996 an arbitral award can only be questioned by way of application under Section 34 of the Arbitration and Conciliation Act, 1996. At the same time when an order is passed without recourse to arbitration and in utter disregard to the provisions of Arbitration and Conciliation Act, 1996, Section 34 of the said Act will not apply. We cannot reject this appeal only on the ground that appellant has not availed the remedy under Section 34 of the Arbitration and Conciliation Act, 1996. The submission of the learned senior counsel appearing for the 3rd respondent that there was delay and laches in filing writ petition also cannot be accepted. After 06.08.2012 order, the appellant after verification of the records has

paid an amount of Rs.64,43,488/- on 22.01.2013 and the said amount was received by the 3rd respondent without any protest. Three years thereafter it made an attempt to execute the order in Execution Case No.69 of 2016 before the Civil Judge, Ranchi, which ultimately ended in dismissal for want of territorial jurisdiction, vide order dated 31.01.2017. Thereafter S.B.Civil Writ Petition No.11657 of 2017 was filed questioning the order dated 06.08.2012 before the Rajasthan High Court. In that view of the matter it cannot be said that there was abnormal delay and laches on the part of the appellant in approaching the High Court. As much as the 3rd respondent has already received an amount of Rs.63,43,488/- paid by the appellant, without any protest and demur, it cannot be said that the appellant lost its right to question the order dated 06.08.2012. Though the learned counsel appearing for the respondents have placed reliance on certain judgments to support their case, but as the order of 06.08.2012 was passed contrary to Section 18(3) of the MSMED Act and the mandatory provisions of the Arbitration and Conciliation Act, 1996, we are of the view that such judgments would not render any assistance to support their case.

5. In the case of JSW Steel Ltd. v. Kamlakar V. Salvi and Others, reported in 2021 SCC OnLine Bom 3113,

"8. It is stated that the Micro, Small and Medium Enterprises Development Act, 2006 (briefly "the MSMED Act" hereinafter) came into effect on and from 02.10.2006. "Supplier" has been defined under section 2(n) of the MSMED Act which basically means a micro or small

enterprise which has filed a memorandum with the authority referred to in sub section (1) of section 8. Section 8 provides for registration of a micro or small or medium enterprise which is intended to be set up. As per the proviso, such an existing enterprise may also register under the MSMED Act within 180 days from the date of commencement of the said statute.

10. Respondent No. 1 had commenced production on or about 01.03.1996 and had applied for registration under the MSMED Act sometime in the year 2010 which was much beyond the period of 180 days as provided by the proviso to section 8. Upon such application, registration certificate under section 8 of the MSMED Act was issued to respondent No. 1 on 14.12.2010.

11. Respondent No. 1 made a reference to respondent No. 2 under the MSMED Act on 13.09.2011 claiming an amount of Rs. 54,16,462.00/- as principal on account of alleged non-payment of contractual dues and interest of Rs. 97,49,629.00/-, aggregating Rs. 1,51,66,091.00/-, from the petitioner. The said reference was registered as Application No. 39 of 2011.

13. After a lapse of about two years, petitioner was informed about the hearing scheduled on 15.11.2014 before respondent No. 2. Though petitioner was represented, there was no representation on behalf of respondent No. 1. Thereafter the matter was adjourned on a couple of occasions. Throughout petitioner took the stand that respondent No. 2 had no jurisdiction and that Application No. 39 of 2011 of respondent No. 1 was not maintainable.

14. On 08.05.2015 respondent No. 2 passed the order (award) directing the petitioner to pay principal amount of Rs. 54,16,462.00/- and interest as per section 16 within one month.

17. Petitioner has alleged that it was not furnished with a copy of the order dated 05.09.2015. However, based on the impugned order dated 05.09.2015, respondent No. 1 lodged Darkhast No. 188 of 2016 in the Court of the District Judge at Alibaug. Upon notice, petitioner had entered appearance and filed its objection.

22. Respondent No. 1 in its reply affidavit has taken a preliminary objection that the writ petition should not be entertained in view of the decision of the Supreme Court in SBP & Company v. Patel Engineering Ltd., (2005) 8 SCC 618 that an order passed by an Arbitral Tribunal is incapable of being corrected by the High Court under Articles 226 and 227 of the Constitution of India. Referring to section 34(1) of the Arbitration and Conciliation Act, 1996, it is stated that petitioner has remedy of filing application against the award passed by the Council which is an Arbitral Tribunal but instead of availing the statutory remedy, petitioner has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, because the statutory remedy has become time barred. Reference has also been made to section 19 of the MSMED Act which says that no application for setting aside any decree, award or order made by the Council or by any institution to which reference is made by the Council shall be entertained unless the appellant (not being supplier) deposits 75% of the amount in terms of the award. It is stated that 75%

would be from out of the amount awarded plus interest as per section 16 till the date of deposit.

29. Reverting back to Shilpi Industries (supra), Mr. Janak Dwarkadas submits that as per decision of the Supreme Court benefits of the MSMED Act are available only to a registered supplier. In other words, the seller should have registered under the provisions of the MSMED Act as on the date of entering into the contract. For supplies pursuant to a contract made before registration under the MSMED Act, no benefit can be sought by such entity.

30. Learned senior counsel argues with great emphasis that provisions of the MSMED Act are prospective. Those cannot be applied retrospectively. The contracts and supplies and claims based thereon are all prior to coming into force of the MSMED Act as well as registration by respondent No. 1 under section 8(1) of the MSMED Act. There being no retrospective operation of the MSMED Act, no benefit under the MSMED Act can be availed of by respondent No. 1. That apart, these are jurisdictional facts which go to the root of the matter. Since these jurisdictional facts were absent, Micro and Small Enterprises Facilitation Council (Council) was rendered coram non judice. Thus any order passed by such Council would be a nullity. In this connection reliance has been placed on a decision of the Supreme Court in Arun Kumar v. Union of India, (2007) 1 SCC 732.

31. Referring from the list of dates, learned senior counsel for the petitioner submits that respondent No. 1 had filed application before the Council i.e. respondent No. 2 on 13.09.2011 seeking benefit of the MSMED Act by claiming amounts of Rs. 54,16,462.00/- and Rs. 97,49,629.00/-

respectively as principal and interest, totaling Rs. 1,51,66,091.00/-, for works carried out and completed as of 31.08.2001 which would be evident from the fact that respondent No. 1 had calculated interest from 01.09.2001. In the circumstances, he submits that not only the claim is barred by limitation, respondent No. 1 is not entitled to claim benefit under the MSMED Act for goods supplied before coming into force of the said act and before registration of respondent No. 1 under section 8(1).

33. Learned senior counsel submits that since the Council i.e. respondent No. 2 acted without jurisdiction, impugned orders passed by it would be nullity having been passed by an authority which is rendered coram non judice. Reference has been made amongst others to the following decisions:—

i) Kiran Sing v. Chaman Paswan, AIR 1954 SC 340.

ii) Embassy Property Development Pvt. Ltd. v. State of Karnataka, (2020) 13 SCC 308.

34. Finally on the question of maintainability of the writ petition, Mr. Janak Dwarkadas submits that petitioner's challenge is not only to the award passed by the Council but to the very applicability of the MSMED Act to the claim of the petitioner as well as other related issues. In any event, power of judicial review under Article 226 is always available in a case where the order complained of is inherently lacking in jurisdiction. In this connection, he has placed reliance on a decision of the Supreme Court in

Whirlpool Corporation v. Registrar of Trademarks, (1998) 8 SCC 1.

54. Before we enter into the rival contentions, it would be apposite to highlight the relevant statutory provisions.

66. Let us now deal with the last of the three enactments i.e. the Arbitration and Conciliation Act, 1996 which we have already referred to as the 1996 Act. The other provisions of the 1996 Act may not have much relevance to the present dispute; therefore, we may confine our deliberation to sections 34, 37 and 43 of the 1996 Act. As per sub section (1) of section 34 recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub section (2) and sub section (3). While sub section (2) sets out the grounds for which an arbitral award may be set aside by the court, sub section (3) provides for the timeline within which such an application for setting aside an arbitral award may be made.

67. Section 37 provides for appeal. As per sub section (1), an appeal shall lie to the competent court amongst others against an order setting aside or refusing to set aside an arbitral award under section 34.

68. As per sub section (1) of section 43 of the 1996 Act, the Limitations Act, 1963 applies to arbitrations as it applies to proceedings in court.

70. In Shilpi Industries (supra) decided recently on 29.06.2021 two issues were raised for consideration before the Supreme Court. The issues were:—

> *(i) Whether provisions of the Indian Limitation Act, 1963 are applicable to*

arbitration proceedings initiated under section 18(3) of the MSMED Act?

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

73. However, what is of significance is that Supreme Court had also dealt with the claim of the appellant in the said case seeking benefit of the provisions of the MSMED Act on the ground that the appellant was also supplying as on the date of making the claim. In that case the undisputed position was that the supplies were concluded prior to registration of the supplier. Supreme Court held that to seek the benefit of the provisions under the MSMED Act, the seller should have registered under the MSMED Act as on the date of entering into the contract. For supplies pursuant to the contract made before registration under the MSMED Act, no benefit under the MSMED Act would be available. By taking recourse to filing memorandum under sub section (1) of section 8 subsequent to entering into contract and supply of goods and services one cannot assume the legal status of being classified under the MSMED Act to claim the benefit retrospectively. It was clearly held that the appellant cannot become micro or small enterprise or supplier to claim the benefits within the meaning of the MSMED Act by submitting a memorandum to obtain registration subsequent to entering into contract and supply of goods and services. Paragraph 26 of Shilpi Industries (supra) is relevant and the same is extracted hereunder:—

> *"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, 2017 SCC OnLine Del 6978 but the said case is clearly distinguishable on facts as much as in the said case, the supplies continued even after registration of entity under Section 8 of the Act. In the present case, undisputed position is that the supplies were concluded prior to registration of supplier. The said judgment of Delhi High Court relied on by the appellant also would not render any assistance in support of the case of the appellant. In our view, to seek the benefit of provisions under MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under MSMED Act. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court, in the judgment in the case of Shanti Conductors Pvt. Ltd. v. Assam State Electricity Board, (2019) 19 SCC 529 has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also,

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

74. From the above, we find that Supreme Court has clarified that if any registration under the MSMED Act is obtained, the same will be prospective and would apply to supply of goods and services subsequent to registration but cannot operate retrospectively. According to the Supreme Court, any other interpretation of section 8

would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation.

75. There is no dispute to the proposition laid down in Patel Engineering (supra). Primarily, the question before the seven judge bench of the Supreme Court was about the nature of function of the Chief Justice or his designate under section 11 of the 1996 Act. Earlier a three judge bench of the Supreme Court had taken the view that it was purely an administrative function, being neither judicial nor quasi-judicial; Chief Justice or his nominee performing functions under section 11(6) of the 1996 Act could not decide any contentious issue between the parties. The said view was approved subsequently by a constitution bench. Correctness of such view was under consideration in Patel Engineering (supra). In that case the seven judge bench held that the power exercised by the Chief Justice of a High Court or the Chief Justice of India under section 11(6) of the 1996 Act is not an administrative power; it is a judicial power. Before summing up the conclusions, Supreme Court noted that some High Courts had proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration would be capable of being challenged under Articles 226 or 227 of the Constitution of India. Adverting to section 37 of the 1996 Act, which makes certain orders of the Arbitral Tribunal appealable and to section 34 whereby the aggrieved party has an avenue for ventilating his grievance against an award, Supreme Court disapproved of such stand and held that such an intervention by the High Courts is not permissible. Explaining further, Supreme Court held that the object of minimizing judicial

intervention while dispute is being arbitrated upon will be defeated, if the High Courts could be approached under the Article 227 or under Article 226 of the Constitution against every order made by the Tribunal.

76. This position has been reiterated by the Supreme Court in Modern Industries (supra). That was a case under the 1993 Act. In the facts of that case, Supreme Court observed that though the 1993 Act provides a statutory remedy of appeal against an award passed by the Industry Facilitation Council but the buyer did not avail the statutory remedy of appeal against the award and instead challenged the award passed by the Council before the High Court under Article 226 of the Constitution of India bypassing the statutory remedy which was viewed as not justified.

77. From a careful analysis of the above two judgments of the Supreme Court in Patel Engineering (supra) and in Modern Industries (supra), we find that view of the Supreme Court is that any and every order (emphasis is ours) made by an Arbitral Tribunal would not be open to challenge or being corrected by the High Court under Articles 226 or 227 of the Constitution of India. Ordinarily, an order or award passed by the Industry Facilitation Council under the 1993 Act or by the Micro and Small Enterprises Facilitation Council (Council) is to be challenged under section 34 of the 1996 Act or appealed against under section 37 of the said Act.

78. In Arun Kumar (supra), Supreme Court discussed what is a jurisdictional fact and held that a jurisdictional fact is a fact which must exist before a court, tribunal or an

authority assumes jurisdiction over a particular matter. It was held as under:—

> *"74. A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess."*

79. Explaining further, Supreme Court held that a jurisdictional fact is one on the existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. By erroneously assuming existence of a jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise doesn't possess. Thus, existence of jurisdictional fact is the sine qua non or the condition precedent for exercise of power by a court having limited jurisdiction. It was held as under:—

> *"76. The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction."*

80. After referring to several decisions, Supreme Court reiterated that existence of jurisdictional fact is sine qua non for the exercise of power and held as follows:

> *"84. From the above decisions, it is clear that existence of 'jurisdictional fact' is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of 'jurisdictional fact', it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present."*

81. The concept of jurisdictional fact was as a matter of fact addressed by the Supreme Court way back in the year 1955 in the case of Kiran Singh (supra). It was held that a defect of jurisdiction whether it is pecuniary or territorial or whether it is in respect of subject matter of the action, strikes at the every authority of the court. It was held that a decree passed by a court without jurisdiction is a nullity and that its invalidity can be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution or even in collateral proceedings. A court without jurisdiction would be coram non judice. It was held as under:—

> *"6. The answer to these contentions must depend on what the position in law is when a court entertains a suit or an appeal over which it has no*

jurisdiction, and what the effect of Section 11 of the Suits Valuation Act is on that position. 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, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits Valuation Act on this position."

82. Insofar the question of exhaustion of alternative remedy is concerned, again way back in the year 1958 in the case of Mohammad Nooh (supra) Supreme Court held that the rule requiring exhaustion of statutory remedies before the writ is granted is a rule of policy, convenience and discretion rather than a rule of law.

83. This principle continues to hold good despite the passage of time. It has been reiterated by the Supreme Court in Whirlpool Corporation (supra), in the following manner:—

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

84. After surveying various decisions, Supreme Court summed up the position as under:—

> *"20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a Writ Petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no*

jurisdiction or had purported to usurp jurisdiction without any legal foundation."

85. In Embassy Property Developments Pvt. Ltd. (supra) one of the questions before the Supreme Court was whether the High Court ought to interfere under Articles 226/227 of the Constitution with an order passed by the National Company Law Tribunal in a proceeding under the Insolvency and Bankruptcy Code, 2016, ignoring the availability of the statutory remedy of appeal to the National Company Law Appellate Tribunal. Supreme Court observed that the distinction between lack of jurisdiction and wrongful exercise of available jurisdiction should certainly be taken account by the High Courts when Article 226 is sought to be invoked bypassing the statutory alternative remedy provided by a special statute. In the facts of that case, it was held that National Company Law Tribunal did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute supplemental lease-deeds for extension of mining lease. Since the National Company Law Tribunal chose to exercise a jurisdiction not vested in it in law, the High Court was justified in entertaining the writ petition on the ground that National Company Law Tribunal was coram non judice.

86. On the basis of the above analysis and legal provisions, we may now advert to the facts of the present case. As noticed above, the contracts were awarded by petitioner's predecessor in interest to respondent No. 1 on 06.11.1999. The principal amounts as per statement of delayed payment were upto 31.08.2001. MSMED Act came into force on 02.10.2006. Respondent No. 1 received

registration under section 8 (1) of the MSMED Act on 14.12.2010. Reference was made by respondent No. 1 to respondent No. 2 under section 18 of the MSMED Act on 13.09.2011 claiming principal not received for last ten years and therefore claimed interest. There is no averment in the affidavit of respondent No. 1 or any document placed on record that it was registered as a supplier under section 2(f) of the 1993 Act or under section 2(n) of the MSMED Act. The word "supplier" used in both the enactments can only mean a "supplier" as defined under the two enactments. That means it ought to have had a permanent registration certificate issued by the Directorate of Industries as an ancillary industrial undertaking or as a small scale industrial undertaking under the 1993 Act or as a micro or as a small enterprise which had filed a memorandum with the authority referred to in sub section (1) of section 8 of the MSMED Act. In the absence of any material on record, respondent No. 1 cannot justify its claim to be a supplier under the 1993 Act to bring the contracts entered into with the petitioner and the resultant dues under the saving clause of section 32(2) of the MSMED Act. To bring anything done or any action taken under the 1993 Act within the ambit of the savings clause under sub section (2) of section 32 of the MSMED Act, it is axiomatic that such thing or action must have been done in accordance with the 1993 Act, otherwise it will lead to an absurd situation as expressed by the Supreme Court in Shilpi Industries (supra).

6. Judgment of the Division Bench of this Court rendered on 30.7.2020 in LPA No. 308/2020 in the case of Narmada Clean-Tech & 1 Other v. Indian Council of Arbitration & 2 Others:

> *"9. We quote the relevant observations made by the learned Single Judge declining to entertain the writ application as under:*
>
> > *"9. Having heard the learned advocates for the respective parties and having gone through the materials on record, the short question which arises for consideration is whether the impugned order dated 1 st October, 2017 passed by respondent no.2 arbitrator can be challenged by way of certiorari under Articles 226 and 227 of the Constitution of India or not?*
> >
> > *10.The issue is no more res integra as in case of GTPL Hathway Ltd. v. Strategic Marketing Pvt. Ltd in Special Civil Application No.4524/2019 rendered on 20.04.2020 this Court has held as under :*
> >
> > > *"14. In view of aforesaid conspectus of law, and considering the provisions of the Act, 1996, the order passed by the Arbitration Tribunal during the course of Arbitration cannot be challenged by the petitioner under Articles 226 and/or 227 of the Constitution of India when the constitution bench of the Apex Court in case of M/s. S.B.P. And Co. v. M/s. Patel Engineering Ltd. And Anr. (supra) has disapproved the stand that any order passed by the Arbitral Tribunal is capable of*

being corrected by the High Court under Articles 226 and 227 of the Constitution of India and has categorically held that such intervention by the High Court is not permissible. The Apex Court in case of M/s. Deep Industries Limited v. Oil and Natural Gas Corporation (supra) has held that it is also importan t to notice that the seven Judge Bench has referred to the object of the Act being that of minimizing judicial intervention and that this important object should always be kept in the forefront when a 227 petition is being disposed of against proceedings that are decided under the Act,1996 and that the policy of the Act is speedy disposal of arbitration cases as the Act,1996 is 'self contained' Code and deals with all the cases.

15. In view of aforesaid settled legal proposition, considering the policy, object and the provisions of the Act,1996, an order passed during arbitration proceedings by the Arbitration Tribunal cannot be challenged under Articles 226 and 227 of the Constitution of India as the Act,1996 is a special act and a self contained code dealing with arbitration. Therefore, the impugned order of the Arbitration Tribunal deciding the preliminary objection raised by the petitioner cannot be challenged under

Article 226 or 227 of the Constitution of India.

16. In view of foregoing reasons, the petition fails and is accordingly dismissed. It is, however, made clear that the petition is dismissed without entering into merits of the matter, only on the ground that the order passed during course of arbitration cannot be challenged under Articles 226 and/or 227 of the constitution of India and it would be open for both the sides to raise all the contentions on merits before the appropriate forum in appropriate proceeding at appropriate time in accordance with law. Interim relief, if any stands vacated. Rule is discharged with no order as to costs."

11. In view of aforesaid discernment of law, the decisions relied upon by both the sides are not required to be discussed at length as impugned order dated 1 st October, 2017 passed by respondent no.2 arbitrator during the arbitration proceedings cannot be challenged by way of certiorari by invoking extra ordinary jurisdiction under Articles 226 and/or 227 of the Constitution of India.

12. In view of the foregoing reasons, the petitions fail and are accordingly dismissed. It is, however, made clear that the petitions are dismissed without entering into merits of the matter, only on the ground that the order passed during course of arbitration proceedings cannot be challenged under

Articles 226 and/or 227 of the constitution of India and it would be open for both the sides to raise all the contentions on merits before the appropriate forum in appropriate proceeding at appropriate time in accordance with law. Interim relief, if any stands vacated. Rule is discharged with no order as to costs."

26. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question of law that falls for our consideration is as under:

"Whether the High Court can exercise its writ jurisdiction under Article 226 or the power of superintendence vested in it under Article 227 of the Constitution of India over the Arbitral Tribunals constituted under the provisions of the Arbitration and Conciliation Act, 1996?"

36. The scope of powers of superintendence vested in the High Court under Article 227 of the Constitution of India again came up for consideration in Shalini Shyam Shetty and another vs. Rajendra Shankar Patil reported in (2010) 8 SCC 329. The Apex Court, after detailed exposition of the entire law on the subject, held as follows:

"47. The jurisdiction under Article 227 on the other hand is not original nor is it appellate. This jurisdiction of superintendence under Article 227 is for both administrative and judicial superintendence. Therefore, the powers conferred under Articles 226 and 227 are separate and distinct and operate in different fields. Another

distinction between these two jurisdictions is that under Article 226, High Court normally annuls or quashes an order or proceeding but in exercise of its jurisdiction under Article 227, the High Court, apart from annulling the proceeding, can also substitute the impugned order by the order which the inferior tribunal should have made. {See Surya Dev Rai, SCC page 690, para 25 and also the decision of the Constitution Bench of this Court in Hari Vishnu Kamath vs. Ahmad Ishaque and others - [AIR 1955 SC 233, para 20 page 243]}.

48. The jurisdiction under Article 226 normally is exercised where a party is affected but power under Article 227 can be exercised by the High Court suo motu as a custodian of justice. In fact, the power under Article 226 is exercised in favour of persons or citizens for vindication of their fundamental rights or other statutory rights. The jurisdiction under Article 227 is exercised by the High Court for vindication of its position as the highest judicial authority in the State. In certain cases where there is infringement of fundamental right, the relief under Article 226 of the Constitution can be claimed ex-debito justicia or as a matter of right. But in cases where the High Court exercises its jurisdiction under Article 227, such exercise is entirely discretionary and no person can claim it as a matter of right. From an order of a Single Judge passed under Article 226, a Letters Patent Appeal or an intra Court Appeal is maintainable. But no such appeal is maintainable

from an order passed by a Single Judge of a High Court in exercise of power under Article 227. In almost all High Courts, rules have been framed for regulating the exercise of jurisdiction under Article 226. No such rule appears to have been framed for exercise of High Court's power under Article 227 possibly to keep such exercise entirely in the domain of the discretion of High Court.

49. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

> *(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.*
>
> *(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.*
>
> *(c) High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the*

orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of their power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, `within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there

has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) The High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of L. Chandra Kumar vs. Union of India & others, and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High

Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article

226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality."

"40. There is a fine distinction between the maintainability and entertainability of a writ petition under Article 226 of the Constitution or a petition under Article 227 of the Constitution in arbitration matters. Maintainability is not synonymous to entertainability. This position of law has been well explained by the Supreme Court in Hari Vishnu Kamath vs. Ahmed Ishaque reported in 1955 AIR 233. In the said case, the question that arose before the Supreme Court was, as to whether the High Court had the jurisdiction to entertain a Writ Petition for the issue of a Writ of Certiorari against the order of Election Tribunal constituted under the Representation of People's Act, 1951, as it stood in 1955, deciding an election dispute. Placing reliance on Article 329 of the Constitution, it was contended before the Supreme Court that as an election to the Parliament or State Legislature could be challenged only by means of an Election Petition, petition under Article 226 of the Constitution would not lie before the High Court for the issue of a Writ of Certiorari against the decision of the Election Tribunal also. The Supreme Court negatived the contention. In doing so, the Supreme Court pointed out that the bar created under Article 329 of the

Constitution was against interfering in election matters and the said Article did not curtail the power of the High Court under Article 226 of the Constitution to issue Writ of Certiorari to any Tribunal and the Election Tribunal was no exception. The relevant portion of the Judgment reads:

> *"6. The first question that arises for decision in this appeal is whether High Courts have jurisdiction under Article 226 to issue Writs against decisions of Election Tribunals. That Article confers on High Courts power to issue appropriate writs to any person or authority within their territorial jurisdiction, in terms absolute and unqualified, and Election Tribunals functioning within the territorial jurisdiction of the High Courts would fall within the sweep of that power. If we are to recognise or admit any limitation on this power, that must be founded on some provision in the Constitution itself."*

"43. The aforesaid observations of the Supreme Court have been quoted with approval in a recent pronouncement of the Supreme Court in the case of M/s. ICOMM Tele Ltd. vs. Punjab State Water Supply and Sewarage Board and another [Civil Appeal No.2713 of 2019 decided on 11th March 2019].

46 In M/s. Deep Industries Limited (supra), the Supreme Court observed as under:

> *“At the same time, we cannot forget that Article 227 is a constitution provision which remains untouched by the nonobstane clause of section 5 of*

the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against the judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."

47 The bare reading of the aforesaid observations of the Supreme Court makes it clear that it was a case which had travelled right upto the stage of Section 37 of the Act. It is suggestive of the fact that an appeal was filed before the High Court against the order passed by the District Court under Section 34 of the Act. In such circumstances, a petition under Article 227 of the Constitution of India would definitely be maintainable with a rider that the High Court should be extremely circumspect in interfering with the same. In other words, the interference should be restricted to orders that are passed, which are patently lacking any inherent jurisdiction. However, the ratio, as propounded in M/s. Deep Industries (supra) does not, in any manner, dilute the principles propounded by the Supreme Court in the SBP and company (supra). This decision, in our opinion, is not in any manner helpful to Mr. Trivedi, the learned senior counsel appearing for the appellant.

48 In Punjab Agro Industries Corporation (supra), the appellant had entered into a collaboration agreement

with the respondent for setting up of a project through a company to be jointly promoted by them. Certain disputes arose between the parties and the appellant by notice appointed its Arbitrator and called upon the respondent to appoint his Arbitrator. As the respondent failed to comply, the appellant filed a petition under Section 11(4) of the Act, 1996 in the Court of the Civil Judge, Senior Division, Chandigarh (a designate of the Chief Justice of Punjab and Haryana High Court). The said designate, by order dated 16th February 2002, dismissed the petition holding that the appointment of Arbitrator was not called for, as the matter had already been decided by the Board for Industrial and Financial Reconstruction (for short, "BIFR"). Being aggrieved, the appellant approached the High Court for quashing the order of the designate and for appointment of an Arbitrator in terms of the agreement. A Division Bench of the High Court disposed of the said writ petition by the following short order:

> *"The Petitioner is aggrieved by rejection of application for appointment of arbitrator under Section 11(4) of Arbitration and Conciliation Act, 1996. Learned Counsel for the Respondent raises a preliminary objection that Writ Petition is not maintainable in view of judgment of Seven Judges of the Hon'ble Supreme Court in S.B.P. & Co. Vs. Patel Engineering Ltd. - 2005 (8) SCC 618 wherein it has been held that power of deciding an application for appointment of an arbitrator is judicial power and is not amenable to writ jurisdiction. After hearing learned counsel for the parties, we uphold the preliminary objection and dismiss the Writ*

Petition. It is made clear that this will not debar the Petitioner from taking such other remedy as may be available under the law."

49. The aforequoted order of the High Court was challenged in appeal by special leave, on the following grounds:

"(a) The order of the High Court is a non speaking order and it upholds the preliminary objection of the respondent without assigning any reason.

(b) A writ petition under Article 227 was maintainable against the order of the Civil Judge, Senior Division (designate of the Chief Justice) and the High Court was wrong in assuming that the writ petition was not maintainable in view of the decision of this Court in SBP."

50 .The Supreme Court, while allowing the appeal, held as under:

"8. We have already noticed that though the order under section 11(4) is a judicial order, having regard to section 11(7) relating to finality of such orders, and the absence of any provision for appeal, the order of the Civil Judge was open to challenge in a writ petition under Article 227 of the Constitution. The decision in SBP does not bar such a writ petition. The observations of this Court in SBP that against an order under section 11 of the Act, only an appeal under Article 136 of the Constitution would lie, is with reference to orders made by the Chief Justice of a High Court or by the designate

Judge of that High Court. The said observations do not apply to a subordinate court functioning as Designate of the Chief Justice. This Court has repeatedly stressed that Article 136 is not intended to permit direct access to this Court where other equally efficacious remedy is available and the question involved is not of any public importance; and that this Court will not ordinarily exercise its jurisdiction under Article 136, unless the appellant has exhausted all other remedies open to him. Therefore the contention that the order of the Civil Judge, Sr. Division rejecting a petition under section 11 of the Act could only be challenged, by recourse to Article 136 is untenable. The decision in SBP did not affect the maintainability of the writ petition filed by Appellant before the High Court.

9. We therefore allow this appeal and set aside the order of the High Court. As a consequence, Civil Writ Petition No.9889 of 2002 shall stand restored to the file, and the High Court is requested to dispose it of in accordance with law."

51 The aforesaid decision, in the case of Punjab Agro Industries (supra) has laid down the same principle of law as explained in the case of M/s. Deep Industries (supra).

52 KKR India Financial Services Limited (supra) is a Division Bench decision of this High Court to which one of us (J.B. Pardiwala, J.) is a party. In the said case, the subject matter of challenge was an interim consent order passed by the Small Causes Court at Ahmedabad in a Commercial Civil Suit instituted by the Axis Bank Limited against Sintex Company Limited. KKR India Financial Services Limited

was not impleaded as one of the defendants in the suit. The consent order obtained by the parties to the suit was hurting the KKR India Financial Services Limited. KKR had two options available to it for the purpose of questioning the legality and validity of the consent order passed by the Small Causes Court at Ahmedabad. The first option was to seek leave of the High Court to appeal against the consent order and the second option was to question the legality and validity of the consent order by coming to the High Court invoking its supervisory jurisdiction under Article 227 of the Constitution of India. Having regard to the gross facts of the case, the Division Bench of the High Court thought fit to entertain the application filed by the KKR India Financial Services Limited under Article 227 of the Constitution of India by overruling the preliminary objection raised on behalf of the Axis Bank as regards the alternative remedy available with the KKR India Financial Services Limited of filing an appeal after seeking leave from the High Court. While deciding the matter, the Division Bench of this High Court considered various provisions of the law, more particularly, Article 227 of the Constitution of India. This Court took the view that a petition under Article 227 of the Constitution of India was maintainable although the petitioner was not a party in the suit proceedings. The Division Bench took the view that to prevent serious miscarriage of justice, it was necessary to interfere with the consent order in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India.

54. It is apparent on plain reading of the para 12 quoted above that the learned Single Judge rejected the petition

without entering into the merits of the matter only on the ground that the order passed during the course of the arbitration proceedings cannot be challenged under Articles 226 and/or 227 of the Constitution of India and it would be open for both the sides to raise all the contentions on merits before appropriate forum in appropriate proceedings at an appropriate time in accordance with law. The learned Single Judge saying so held that the petitions were not maintainable in law.

55 To the aforesaid extent, we find it difficult to agree with the learned Single Judge. It would have been altogether a different matter if the learned Single Judge would have said that having regard to the nature of the order passed by the Arbitral Tribunal, no case is made out for interference. The learned Single Judge is very clear in his mind. The learned Single Judge says that His Lordship has not gone into the merits of the order passed by the Arbitral Tribunal as no order passed by the Arbitral Tribunal can be questioned before the High Court either under Article 226 or 227 of the Constitution as the petition itself is not maintainable.

56 Having taken the view that the writ application could be said to be maintainable against the order passed by the Arbitral Tribunal, we could have quashed the order passed by the learned Single Judge and remitted the matter to the learned Single Judge. However, instead of remitting the matter, this Court itself would like to hear the learned Senior Counsel appearing for the appellant on the merits of the impugned order passed by the Arbitral Tribunal."

7. Hari Vishnu Kamath v. Syed Ahmad Ishaqu and Others, reported in AIR 1955 SC 233;

> *"21. Then the question is whether there are proper grounds for the issue of certiorari in the present case. There was considerable argument before us as to the character and scope of the writ of certiorari and the conditions under which it could be issued. The question has been considered by this Court in Parry & Co. v. Commercial Employees' Association, Madras, Veerappa Pillai v. Raman and Raman Ltd. and Others, Ibrahim Aboobaker v. Custodian General and quite recently in T. C. Basappa v. T. Nagappa. On these authorities, the following propositions may be taken as established: (1) Certiorari will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it. (2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice. (3) The Court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to de- cide wrong as well as right, and when the Legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior Court were to re-hear the case on the evidence, and substitute its own findings in certiorari. These propositions -are well settled*

and are not in dispute. (4) The further question on which there has been some controversy is whether a writ can be issued, when the decision of the inferior Court or Tribunal is erroneous in law. This question came up for consideration in Rex v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw, and it was held that when a Tribunal made a "speaking order" and the reasons given in that order in support of the decision were bad in law, certiorari could be granted. It was pointed out by Lord Goddard, C. J. that had always been understood to be the true scope of the power. Walsall Overseers v. London and North Western Ry. Co.(1) and Rex v. Nat Bell Liquors Ld. were quoted in support of this view. In Walsall Overseers v. London and North Western Ry. Co., Lord Cairns, L.C. observed as follows:

> *"If there was upon the face of the order of the court of quarter sessions anything which showed that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and if the court found error upon the face of it, to put an end to its existence by quashing it".*

In Rex v. Nat Bell Liquors Ld. (2) Lord Sumner said:

> *"That supervision goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise".*

The decision in Rex v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw(3) was taken in appeal, and was affirmed by the Court of Appeal in Rex v.

Northumberland Compensation Appeal Tribunal; Ex parte Shaw. In laying down that an error of law was a ground for granting certiorari, the learned Judges emphasised that it must be apparent on the face of the record. Denning, L.J. who stated the power in broad and general terms observed:

> *"It will have been seen that throughout all the cases there is one governing rule: certiorari is only available to quash a decision for error of law if the error appears on the face of the record".*

The position was thus summed up by Morris, L.J.

> *"It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision, or irregularity, or absence of, or excess of, jurisdiction where shown".*

In Veerappa Pillai v. Raman & Raman Ltd. and Others(1), it was observed by this court that under article 226 the writ should be issued "in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record". In T. C. Basappa v. T. Nagappa(2) the law was thus stated:

> *"An error in the decision or determination itself may also be amenable to a writ of 'certiorari' but it must be a manifest error apparent on the face of the*

proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by 'certiorari' but not a mere wrong decision".

"22. It may therefore be taken as settled that a writ of certiorari could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned Counsel on either side were unable to suggest any clear-cut rule by which, the boundary between the two classes of errors could be demarcated. Mr. Pathak for the first respondent contended on the strength of certain observations of Chagla, C. J. in Batuk K. Vyas v. Surat Municipality that no error could be said to be apparent on the face of the record if it was not self-evident, and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case.

8. In the case of T.C. Basappa v. Nagappa and Another, reported in AIR 1954 SC 440;

> *7. One of the fundamental principles in regard to the issuing of a writ of certiorari is, that the. writ can be (I [1953] S.C.R. 1114 at 1150, of judicial acts. The expression " judicial acts " includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts. Atkin L. J. thus summed up the law on this point in Rex v. Electricity Commissioners:*
>
> > *"Whenever any body or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling Jurisdiction of the King's Bench Division exercised in these writs."*
>
> *The second essential feature of a writ of certiorari is that the control which is exercised through it over judicial or quasi-judicial Tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of certiorari the superior Court does not exercise the powers of an appellate Tribunal. It does not review or reweigh the evidence upon which the determination of the inferior Tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior Tribunal. The offending order or proceeding*

so to say is put out of the way as one which should not be used to the detriment of any person(2).

8. The supervision of the superior Court exercised through writs of certiorari goes on two points, as has been expressed by Lord Sumner in King v. Nat. Bell Liquors Limited. One is the area of inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of certiorari could be demanded. In fact there is little difficulty in the enunciation of the principles; the difficulty really arises in applying the principles to the facts of a particular case.

9. Certiorari may lie and is generally granted when a Court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceeding or from the absence of some preliminary proceeding or the Court itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances(1). When the jurisdiction of the Court depends upon the existence of some collateral fact, it is well settled that the Court cannot by a wrong decision of the fact give it jurisdiction which it would not otherwise possess (2).

10. A Tribunal may be competent to enter upon an enquiry but in making the enquiry it may act in flagrant disregard of the rules of procedure or where no particular procedure is prescribed, it may violate the principles of natural justice. A writ of certiorari may be available in such cases. An error in the decision or determination itself may also be amenable to a writ of certiorari but it must be

amanifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision. The essential features of the remedy by way of certiorari have been stated with remarkable brevity and clearness by Morris L. J. in the recent case of Rex v. Northumberland Compensation Appellate Tribunal(3). The Lord Justice says:

> *"It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for re-hearing of the issue raised in the proceedings. It exists to correct error of law when revealed on the, face of an order or decision or irregularity or absence of or excess of jurisdiction when shown."*

11. In dealing with the powers of the High Court under article 226 of the Constitution this Court has expressed itself in almost similar terms and said:

> *"Such writs as are referred to in article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate Tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction ,vested in them, or there is an error apparent on the face of the, record, and such act, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court*

of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made."

These passages indicate with sufficient fullness the general principles that govern the exercise of jurisdiction in the matter of granting writs of certiorari under aSrticle 226 the Constitution."

9. In the case of Syed Yakoob v. K.S. Radhakrishnan and Others, reported in AIR 1964 SC 477;

"1. The short question which this appeal raises for our decision relates to the limits of the jurisdiction of the High Court in issuing a writ of certiorari while dealing with. orders passed by the appropriate authorities granting or refusing to grant permits under the provisions of the Motor Vehicles Act, 1939 (hereinafter called 'the Act').

2. The State Transport Authority, Madras, (hereinafter referred to as Authority)issued a notification on the 4th July, 1956, under section 57(2) of the Act calling for applications for the grant of two stage carriage permits to run as an express service on the route Madras to Chidambaram. 107 applications were received in response to the said notification; some of these were rejected as time- barred or otherwise defective, and the others which were in order were examined by the Authority.

8. It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; but it must be such an error of law as can be regarded as one which is apparent on the face of the

record. Where it is manliest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious mis-interpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly rounded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases. the impugned error of law may not be obvious or patent on the face of the record as such and the Court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened."

10. In the case of Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others, reported in (1998) 8 SCC 1;

> *"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limite by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part-III of the Constitution, but also for "any other purpose.*
>
> *15. Under Article 226 of the Constituion, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently hel by this Court not to operate as a bar in at least three contingencies, namely, where the Writ Petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of fornices whirlpool we would rely or some old decisions of the evolutionary era of the constitutional law as they still hold the field.*

16. Rashid Ahmad vs. Municipal Board, kairana, AIR 1960 SC 163, laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting Writs. This was followed by another Rashid case, namely, K.S.Rashid & Son Vs. The Income Tax Investigation Commissioner AIR 1954 SC 207 which reiterated the above proposition and held that where alternative remedy esisted, it would be a sound exercise of discreation to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that Writ Petition under Article 226 could still be entertained in exceptional circumstances.

17. Specific and clear rule was laid down in State of U.P. vs. Mohd. Nooh 1958 SCR 595 = AIR 1958 SC 86, as under :

> *"But this rule requiring the exhaustion of statutory remedies before the Writ will be granted is a rule of policy convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."*

18. This proposition was considered by a Constitution Bench of this Court in A.V.Venkateswaran, Collector of Customs. Bombay vs Ramchand Sobhraj Wadhwani & Anr. AIR 1961 SC 1506 and was affirmed and followed in the following words

"The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus per-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court".

19. Another Constitution Bench decision in Calcutta Discount co.Ltd. vs Income Tax Officer Companies Distt. I AIR 1961 SC 372 laid down :

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy

proceedings and unnecessary harassment. the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting without jurisdiction under 8.34 I.T.Act".

20. Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a Writ Petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the Writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

21. That being so, the High Court was not justified in dismissing the Writ Petition at the initial stage without examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the "Tribunal".

11. Decision of the Apex Court dated 21.9.2012, in the case of Benarsi Krishna Committee & Ors v. Karmayogi Shelters Pvt. Ltd., passed in Special Leave Petition (Civil) No. 23860 of 2010:

15. Having taken note of the submissions advanced on behalf of the respective parties and having particular regard to the expression "party" as defined in Section 2(h)

of the 1996 Act read with the provisions of Sections 31(5) and 34(3) of the 1996 Act, we are not inclined to interfere with the decision of the Division Bench of the Delhi High Court impugned in these proceedings. The expression "party" has been amply dealt with in Tecco Trechy Engineers's case (supra) and also in ARK Builders Pvt. Ltd.'s case (supra), referred to hereinabove. It is one thing for an Advocate to act and plead on behalf of a party in a proceeding and it is another for an Advocate to act as the party himself. The expression "party", as defined in Section 2(h) of the 1996 Act, clearly indicates a person who is a party to an arbitration agreement. The said definition is not qualified in any way so as to include the agent of the party to such agreement. Any reference, therefore, made in Section 31(5) and Section 34(2) of the 1996 Act can only mean the party himself and not his or her agent, or Advocate empowered to act on the basis of a Vakalatnama. In such circumstances, proper compliance with Section 31(5) would mean delivery of a signed copy of the Arbitral Award on the party himself and not on his Advocate, which gives the party concerned the right to proceed under Section 34(3) of the aforesaid Act.

16. The view taken in Pushpa Devi Bhagat's case (supra) is in relation to the authority given to an Advocate to act on behalf of a party to a proceeding in the proceedings itself, which cannot stand satisfied where a provision such as Section 31(5) of the 1996 Act is concerned. The said provision clearly indicates that a signed copy of the Award has to be delivered to the party. Accordingly, when a copy of the signed Award is not delivered to the party himself, it would not amount to compliance with the provisions of

Section 31(5) of the Act. The other decision cited by Mr. Ranjit Kumar in Nilakantha Sidramappa Ningshetti's case (supra) was rendered under the provisions of the Arbitration Act, 1940, which did not have a provision similar to the provisions of Section 31(5) of the 1996 Act. The said decision would, therefore, not be applicable to the facts of this case also.

17. In the instant case, since a signed copy of the Award had not been delivered to the party itself and the party obtained the same on 15th December, 2004, and the Petition under Section 34 of the Act was filed on 3rd February, 2005, it has to be held that the said petition was filed within the stipulated period of three months as contemplated under Section 34(3) of the aforesaid Act. Consequently, the objection taken on behalf of the Petitioner herein cannot be sustained and, in our view, was rightly rejected by the Division Bench of the Delhi High Court.

12. In the case of Vaishno Enterprises v. Hamilton Medical AG and Another, reported in 2022 SCC OnLine SC 355;

"10. It is further submitted by Shri Divan, learned Senior Advocate for Respondent No.1 that even otherwise considering the relevant provisions of the Arbitration Agreement the parties to the Agreement shall not be governed by the MSME Act. It is submitted that in the present case the date of contract was 24.08.2020. The appellant herein is registered as MSME on 28.08.2020 i.e. after the execution of the contract on 24.08.2020. It is submitted that as per the Arbitration Agreement the

parties shall be governed by the law applicable in India which shall be the law prevailing at the time of the execution of the contract. It is submitted that for that reason also the parties shall not be governed by the MSME Act and therefore the Council would have no jurisdiction to entertain the dispute between the appellant and the Respondent No.1.

13. The short question which is posed for consideration before this Court is the jurisdiction of the Council under the MSME Act with respect to the dispute between the appellant and the respondent.

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 no jurisdiction with respect to Respondent No.1 is not required to be interfered with.

6. Per contra, Mr. Dhaval Dave, learned Senior Counsel for the private respondent has vehemently submitted that the petition itself is not maintainable since it challenges the award passed under the Arbitration and Conciliation Act, 1996. He has also submitted that even if it is held to be maintainable, the petitioner is liable to be rejected as it is abuse of process of law. Mr. Dhaval Dave, learned Senior Counsel has also submitted that the petitioner has tried to achieve something which could not be achievable under the Arbitration & Conciliation Act, 1996. He has submitted that the petitioner has suppressed the material facts in his petition, which has been highlighted by the private respondent No.3 in its affidavit-in-reply. Mr. Dave, learned Senior Counsel has also submitted that the contention put

forward by the respondent No.3 in his affidavit-in-reply regarding knowledge of the arbitral proceedings and sending by mail to the registered address and informing the advocate of the petitioner, have not been controverted by the petitioner by filing rejoinder affidavit. According to him, thus, the contention of the respondent No.3 that the petitioner has suppressed the material facts in the petition, needs to be accepted and accordingly the petition may be dismissed.

6.1 Mr. Dhaval Dave, learned Senior Counsel has also submitted tht admittedly in the present matter the petitioner has not challenged the award within the prescribed time limit provided in the Arbitration and Conciliation Act, 1996 and, therefore, the award has attained finality. According to him, the proper course for the petitioner is to challenged the award under the provisions of the Arbitration and Conciliation Act. Mr. Dave has submitted that as there is a provision of depositing a certain amount of the awards, before filing the Appeal, the petitioner has not chosen to refer the appeal against the award under the Arbitration and Conciliation Act by suppressing the material facts has approached this Court by filing the present petition.

6.2 Mr. Dhaval Dave, learned Senior Counsel, while referring to the various provisions of MSMED Act as well as Arbitration

and Conciliation Act, has submitted that the proceedings is conducted under the provisions of the MSMED Act would be government by the provisions of the Arbitration and Conciliation Act and, therefore, the provision relating to filing of Appeal and finality of the award would be under the provisions of Arbitration and Conciliation Act, 1996. He has also submitted that as per Section 4 of the Arbitration and Conciliation Act since the petitioner did not chose to remain before the Sole - Arbitrator appointed under the provisions of MSMED Act, it could be deemed that the petitioner has waived his right to object the proceedings under the MSMED Act. Mr. Dave learned Senior Counsel, while referring to Sections 5, 16, 34 of the Arbitration and Conciliation Act has submitted that only judicial authority contemplated in the Arbitration and Conciliation Act has jurisdiction to entertain the dispute between the parties. He has also submitted that Section 34 of the said Act, there is no other avenue available to the challenge the award except under Section 34 of the Act. He has also submitted the in view of sub-section (3) of Section 34, period for challenging the award is prescribed for 3 months, which may be extended only for one month thereafter. Mr. Dave, learned Senior Counsel has also submitted that even the remedy cannot be availed under Articles 226 and 227 of the Constitution of India against any award governed under the provisions of the Arbitration and Conciliation Act.

6.3 Mr. Dave, learned Senior Counsel, while referring to the documentary evidence produced on record by respondent No.3 along with its affidavit-in-reply, has submitted that, even the Arbitrator has sent the same to the petitioner as per Page-141 & 142 of the paper-book. He has also submitted that even email addressed of the petitioner has been obtained from the website of the Company and accordingly that address the communication regarding arbitration proceedings were sent. He has also submitted that there is no denial on the part of the petitioner that the email address stated therein is not of the Company. He has also submitted that not taking participation in arbitral proceedings, the petitioner has waived its right of raising objection as to jurisdiction of the arbitral proceedings. He has also submitted there is no averment as to how remedy under Section 34 of the Arbitration & Conciliation Act, 1996 would be ineffective to the petitioner. Mr. Dave, learned Senior Counsel has also submitted that the petitioner even has not mentioned as to not exhausting of alternative remedy.

6.4 Mr. Dave, learned Senior Counsel has also submitted that to avoid the implication of Section 19 of the MSMED Act, the petitioner keeps quiet till the respondent No.3 moved the Company Law Board under the Insolvency & Bankruptcy Code. He has also submitted that as there is a provision of depositing of 25% of the award for challenging the award

passed by the Arbitrator under the provisions of MSMED Act, the petitioner has not chosen to challenge the award in the period of limitation and filed the present petition with a ulterior motive and that too by suppressing material fact.

6.5 Mr. Dave, learned Senior Counsel has submitted that there are dispute involved in the present matter as to receipt of the communication from the Arbitrator by the petitioner as well as award and documentary thereof, and therefore, the present petition is not maintainable and may be rejected on this ground also.

6.6 Regarding the various decision relied upon by Mr. Pahwa, learned Senior Counsel, Mr. Dave, learned Senior Counsel has made the following submission in respect of each decisions:

(i) Regarding M/s. Easun Reyrolle Limited v. Nik San Engineering Co. Ltd. (Supra), it is submitted that it was a case of pre-award stage and there was no dispute raised under the provisions of Section 18(1) of the MSMED Act, with the provision of Arbitration and Conciliation Act, 1996.

(ii) Regarding Judgment dated 27.12.2019 passed in LPA No. 619 of 2019 (Supra), it is submitted that it was a case of pre-award stage and there was no question or

plea raised of the Arbitration and Conciliation Act and SLP against this judgment is still pending.

(iii) Regarding the case reported in 2021 SCC OnLine 439 (Supra), it is submitted that it is also case of the pre-reference stage and does not pertain to fact of after passing of award.

(iv) Regarding Judgment of the Hon'ble Apex Court rendered on 15.12.2021 in Civil Appeal No. 2899 of 2021 (Supra), it is submitted that in this case, there was no recourse to the Arbitration and it only pertains at the stage of re-conciliation and order under Section 18 of the MSMED Act was passed during conciliation proceedings and the provisions of arbitration was bypassed. It is also submitted that the facts of the case is also different from the present one.

(v) Regarding the case 2021 SCC OnLine Bom 3113 (Supra), it is submitted that this judgment of the Bomaby High Court is per-incuriram as the judgment of the Supreme Court has not been considered and the earlier judgment of the Division Bench was also not considered.

(vi) Regarding Judgment of the Division Bench of this Court rendered on 30.7.2020 in LPA No. 308/2020 (Supra) it is submitted that the fact of that case is different from the present one and the issues involved there is different from the present one. He

has also submitted that it was also state of pre-award stage and as there was no appeal provided against the interlocutory order passed in arbitral proceedings, this Court took a view of maintainability of the writ-petition.

(vii) Regarding the decision reported in AIR 1954 SC 440: AIR 1955 SC 223 (Supra), it is submitted that this judgments are not applicable to the facts of the present case.

6.7 Regarding the other judgments, it has been submitted by learned Senior Counsel Mr. Dave that the facts of those judgments are different from the present one and in the present case, the petitioner has received the award and there is suppression of material facts by the petitioner and, therefore, those judgments are not applicable to the facts of the case.

6.8 Mr. Dave, learned Senior Counsel for the respondent has vehemently submitted to dismiss the petition with costs. Mr. Dave has relied upon the following decisison in support of his submissions:

(1) National Highways Authority of India v. Ganga Enterprises and another, reported in (2003) 7 SCC 410;

"6.The Respondent then filed a Writ Petition in the High Court, for refund of the amount. On the pleadings before it, the High Court raised two questions viz. (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act and (b) whether the writ petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered question (a) and then chose not to answer question (b). In our view, the answer to question (b) is clear. It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of Kerala State Electricity Board v. Kurien E. Kalathil reported in [2000] 6 SCC 293, State of U.P. v. Bridge & Roof Co. (India) Ltd. reported in (1996) 6 SCC 22 and B.D.A. v. Ajai Pal Singh reported in (1989) 2 SCC 116. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a Writ Court was not the proper forum. Mr. Dave however relied upon the cases of Verigamto Naveen v. Government of A.P. reported in [2001] 8 SCC 344 and Harminder Singh Arora v. Union of India reported in [1986] 3 SCC 247. These however are cases where the Writ Court was enforcing a statutory right or duty. These cases do not lay down that a Writ Court can interfere in a matter of contract only. Thus on the ground of maintainability the Petition should have been dismissed."

(2) SBP and Company v. Patel Engineering Ltd and Another, reported in (2005) 8 SCC 618; (pAGE-45 TO 47)

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.

46. The object of minimizing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 of the Constitution of India or under Article 226 of the Constitution of India against every order made by the arbitral tribunal. Therefore, it is

necessary to indicate that once the arbitration has commenced in the arbitral tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

47. We, therefore, sum up our conclusions as follows:

i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.

(iii) In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of

nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.

(v) Designation of a district judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act."

(3) Devi Enterprise Limited v. State Level Industry Facilitation Council, Through Member and Others, reported in 2015 SCC OnLine Guj 6277: AIR 2015 Guj 114,

"4. Section 19 of the Act is extracted below: "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."

5. The constitutional validity of Section 19 of the Act was

challenged before the High Court of Madras in the case of Eden Exports Company Vs. Union of India and others, reported in (2013) 1 MLJ 445 = (2012)0 Supreme (Madras) 4654 [Writ Application Nos. 2461, 2475 and others of 2011 and Writ Petition Nos. 27319, 27888 and others of 2011, which was decided on 20.11.2012] wherein in paragraph 14, the Court has considered the validity of condition of 75% pre-deposit as contemplated in Section 19 of the Act. Paragraph-14 of the aforesaid decision is extracted below:

> *"14. Coming to the challenge in respect of 75% predeposit contemplated under Section 19 of the MSMED Act, we have no hesitation in confirming the conclusion arrived at by the learned Single Judge in this regard, in view of the decisions of the Supreme Court and this Court. The Hon'ble Supreme Court in Snehadeep Structures Private Limited v. Maharashtra Small Scale Industries Development Corporation Limited has categorically held that the introduction of pre-deposit clause is a disincentive to prevent dilatory tactics employed by the buyers against whom the small-scale industry might have procured an award. The aforesaid decision has been followed by the Kerala High Court in K.S.R.T.C. v. Union of India and Others (2010) 1 KLT 65 and this Court in Goodyear India Limited, rep. By its Zonal Manager v. Nortan Intech Rubbers (P) Ltd. and Another 2011-3-L.W. 626.*

Therefore, the appellants/writ petitioners no more cannot contend that the condition of pre-deposit imposed in Section 19 of the MSMED Act is arbitrary."

"11. For the aforesaid reasons, we uphold the constitutional validity of Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006. So far as the relief prayed by the learned counsel for the petitioner is concerned, the relief cannot be granted by this Court as the petitioner has an adequate statutory remedy under Section 19 of the Act for challenging the order dated 17.09.20012 by making a pre-deposit of 75% amount and getting condonation of delay if the law permits. The writ petition, accordingly stands dismissed. Notice stands discharged. No costs."

(4) Bhaven Construction Through Authorised Signatore Premjibhai K. Shah v. Executive Engineer, Sardar Sarovar Narmada Nigam Limited and Another, reported in (2022) 1 SCC 75;

"12. We need to note that the Arbitration Act is a code in itself. This phrase is not merely perfunctory, but has definite legal consequences. One such consequence is spelled out under Section 5 of the Arbitration Act, which reads as under

"5. Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

The non-obstante clause is provided to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act.

13. The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions.

14. Any party can enter into an arbitration agreement for resolving any disputes capable of being arbitrable. Parties, while entering into such agreements, need to fulfill the basic ingredients provided under Section 7 of the Arbitration Act. Arbitration being a creature of contract, gives a flexible framework for the parties to agree for their own procedure with minimalistic stipulations under the Arbitration Act.

15. If parties fail to refer a matter to arbitration or to appoint an arbitrator in accordance with the procedure agreed by them, then a party can take recourse for court assistance under Section 8 or 11 of the Arbitration Act.

16. In this context, we may state that the Appellant acted in accordance with the procedure laid down under the agreement to unilaterally appoint a sole arbitrator, without Respondent No. 1 mounting a judicial challenge at that stage. Respondent No. 1 then appeared before the

sole arbitrator and challenged the jurisdiction of the sole arbitrator, in terms of Section 16(2) of the Arbitration Act.

17. Thereafter, Respondent No. 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Article 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as

> *'Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)'.*

The use of term 'only' as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.

18. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In Nivedita Sharma v. Cellular Operators Association of India, (2011) 14 SCC 337, this Court referred to several judgments and held:

> *"11. We have considered the respective arguments/ submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - L. Chandra Kumar v. Union of India, (1997) 3 SCC 261.*

> *However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/ instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation".(emphasis supplied)*

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

19. In this context we may observe M/s. Deep Industries Limited v. Oil and Natural Gas Corporation Limited, wherein interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analyzed as under: 9SCC p. 714, paras 16-17)

“15. Most significant of all is the non- obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act)"

"23. Respondent No. 1 did not take legal recourse against the appointment of the sole arbitrator, and rather submitted themselves before the tribunal to adjudicate on the jurisdiction issue as well as on the merits. In this situation, the Respondent No. 1 has to endure the natural consequences of submitting themselves to the jurisdiction of the sole arbitrator, which can be challenged, through an application under Section 34. It may be noted that in the present case, the award has already been passed during the pendency of this appeal, and the Respondent No. 1 has already preferred a challenge under Section 34 to the same. Respondent No. 1 has not been able to show any exceptional circumstance, which mandates the exercise of jurisdiction under Articles 226 and 227 of the Constitution."

"26. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal,

before the Court examines the same under Section 34. Respondent No. 1 is therefore not left remediless, and has statutorily been provided a chance of appeal. In Deep Industries case (supra), this Court observed as follows:

> *"22. One other feature of this case is of some importance. As stated herein above, on 09.05.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34." (emphasis supplied)*

(5) Kelkar & Kelkar v. Hotel Pride Executive Pvt. Ltd., reported in 2022 SCC OnLine SC 542;

> *"5. Having heard learned counsel appearing on behalf of the respective parties and considering the impugned judgment and order passed by the High Court, we are of the opinion that against the award made by the learned Arbitrator made under the Act and against an order passed by the learned trial Court making the award a decree and without availing the alternative statutory remedy available by way of appeal under the provisions of the Act, the High Court ought not to have entertained the writ petition under Articles 226 and 227 of the Constitution of*

India. When the statute provides a further remedy by way of appeal against the award and even against the order passed by the learned trial Court making the award a decree of the court, the High Court ought not to have entertained the writ petition and ought not to have set aside the award, in a writ petition under Articles 226 and 227 of the Constitution of India. In that view of the matter the impugned judgment and order passed by the High Court is unsustainable and the same deserves to be quashed and set aside."

(6) P. Radha Bai and Others v. P. Shok Kumar and Another, reported in (2019) 13 SCC 445;

"32. Section 34(3) deserves careful scrutiny and its characteristics must be highlighted:

32.1 Section 34 is the only remedy for challenging an award passed under Part I of the Arbitration Act. Section 34(3) is a limitation provision, which is an inbuilt into the remedy provision. One does not have to look at the Limitation Act or any other provision for identifying the limitation period for challenging an Award passed under Part I of the Arbitration Act.

32.2 The time limit for commencement of limitation period is also provided in Section 34(3) i.e. the time from which a party making an application "had received the Arbitral Award" or disposal of a request under Section 33 for corrections and interpretation of the Award.

32.3 Section 34(3) prohibits the filing of an application for setting aside of an Award after

three months have elapsed from the date of receipt of Award or disposal of a request under Section 33. Section 34(3) uses the phrase "an application for setting aside may not be made after three months have elapsed". The phrase "may not be made" is from the UNCITRAL Model Law and has been 1 " An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal". understood to mean "cannot be made". The High Court of Singapore in ABC Co. Ltd v. XYZ Co. Ltd, held:

> *"The starting point of this discussion must be the Model Law itself. On the aspect of time, Article 34(3) is brief. All it says is that the application may not be made after the lapse of three months from a specified date. Although the words used are 'may not' these must be interpreted as 'cannot' as it is clear that the intention is to limit the time during which an award may be challenged. This interpretation is supported by material relating to the discussions amongst the drafters of the Model Law. It appears to me that the court would not be able to entertain any application lodged after the expiry of the three months period as Article 34 has been drafted as the all encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and, as the court derives its jurisdiction to*

hear the application from the Article alone, the absence of such a provision means the court has not been conferred with the power to extend time".

32.4 The limitation provision in Section 34(3) also provides for condonation of delay. Unlike Section 5 of Limitation Act, the delay can only be condoned for 30 days on showing sufficient cause. The crucial phrase "but not thereafter" reveals the legislative intent to fix an outer boundary period for challenging an Award.

32.5 Once the time limit or extended time limit for challenging the arbitral award expires, the period for enforcing the award under Section 36 of the Arbitration Act commences. This is evident from the phrase "where the time for making an application to set aside the arbitral award under Section 34 has expired".2 There is an integral nexus between the period prescribed under Section 34(3) to challenge the Award and the commencement of the enforcement period under Section 36 to execute the Award.

33. If Section 17 of the Limitation Act were to be applied to determining the limitation period under Section 34(3), it would have the following consequences:

33.1 In Section 34(3), the commencement period for computing limitation is the date of receipt of award or the date of disposal of request under Section 33 (i.e correction/additional award). If Section 17 were to be applied for computing the limitation period under Section 34(3), the starting period of limitation

would be the date of discovery of the alleged fraud or mistake. The starting point for limitation under Section 34(3) would be different from the Limitation Act.

33.2 The proviso to Section 34(3) enables a Court to entertain an application to challenge an Award after the three months period is expired, but only within an additional period of thirty dates, "but not thereafter". The use of the phrase "but not thereafter" shows that the 120 days period is the outer boundary for challenging an Award. If Section 17 were to be applied, the outer boundary for challenging an Award could go beyond 120 days. The phrase "but not thereafter" would be rendered redundant and otiose. This Court has consistently taken this view that the words "but not thereafter" in the proviso of Section 34 (3) of the Arbitration Act are of a mandatory nature, and couched in negative terms, which leaves no room for doubt. (State of Himachal Pradesh v. Himachal Techno Engineers & Anr., (2010) 12 SCC 210, Assam Urban Water Supply & Sewerage Board v. Subash Projects & Marketing Ltd., (2012) 2 SCC 624 and Anilkumar Jinabhai Patel (D) through LRs v. Pravinchandra Jinabhai Patel & Ors., (2018) SCC Online SC 276)

34. In our view, the aforesaid inconsistencies with the language of Section 34(3) of Arbitration Act tantamount to an "express exclusion" of Section 17 of Limitation Act."

"44. In view of the above, we hold that once the party has received the Award, the limitation period under Section 34(3) of the Arbitration Act commences. Section 17 of the Limitation Act would not come to the rescue of such objecting party."

(7) Union of India v. Pam Development Private Limited, reported in (2014) 11 SCC 366;

"15. As noticed above, by order dated 10th July, 1998, the High Court appointed Mr. Justice Satyabrata Mitra as the sole arbitrator. It is important to notice that this order dated 10th July, 1998 was not challenged by the appellant and, therefore, the same became final and binding. This apart, the appellant failed to raise any objection to the lack of jurisdiction of the Arbitral Tribunal before the learned arbitrator.

16. As noticed above, the appellant not only filed the statement of defence but also rasied a counter claim against the respondent. Since the appellant has not raised the objection with regard to competence/jurisdiction of the Arbitral Tribunal before the learned arbitrator, the same is deemed to have been waived in view of the provisions contained in Section 4 read with Section 16 of the Arbitration Act, 1996.

17. Section 16 of the Arbitration Act, 1996 provides that the Arbitral Tribunal may rule on its own jurisdiction. Section 16 clearly recognizes the principle of kompetenz-kompetenz. Section 16(2) mandates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section 4 provides that a party who knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object.

18. In our opinion, the High Court has correctly come to the conclusion that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the Court. Earlier also, this Court had occasion to consider a similar objection in Bharat Sanchar Nigam Limited and another versus Motorola India Private Limited [(2009) 2 SCC 337]. Upon consideration of the provisions contained in Section 4 of the Arbitration Act, 1996, it has been held as follows:

> *"39. Pursuant to section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellants (sic respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived."*

19. In our opinion, the obligations are fully applicable to the facts of this case. The appellant is deemed to have waived the right to object with regard to the lack of the jurisdiction of the Arbitral Tribunal."

(8) State of Karnataka v. Laxuman, reported in (2005) 8 SCC 709;

> *"10. A statute can, even while conferring a right, provide also for a repose. The Limitation Act is not an equitable piece of legislation but is a statute of repose. The right undoubtedly available to a litigant becomes unenforceable if the litigant does not approach the court within the time prescribed. It is in this context that it has been said that the law is for the diligent. The law expects a litigant to seek the enforcement of a right available to him within a reasonable time of the arising of the cause of action and that reasonable time is reflected by the various articles of the Limitation Act."*

(9) State of Madhya Pradesh and Another v. Bhailal Bhai & Otheres, reported in (1964) 6 SCR 261: AIR 1964 SC 1006;

> *"15. We see no reason to think that the High Courts have not got this power. If a right has been infringed-whether a fundamental right or a statutory right-and the aggrieved party comes to the court for enforcement of the right it will not be giving complete relief if the court merely declares the existence of such right or the fact that that existing right has been infringed. Where there has been only a threat to infringe the right, an order commanding the Government or other statutory authority not to take the action contemplated would be sufficient. It has been held by this Court that where there has been a threat only and the right has not been actually infringed*

an application under Art. 226 would lie and the courts would give necessary relief by making an order in the nature of injunction. It will hardly be reasonable to say that while the court will grant relief by such command in the nature of an order of injunction where the invasion of a right has been merely threatened the court must still refuse, where the right has been actually invaded, to give the consequential relief and content itself with merely a declaration that the right exists and has been invaded or with merely quashing the illegal order made"

"17. At the same time we cannot lose sight of the fact that the special remedy provided in Art. 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Art. 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may have to be decided as regards the availability of consequential relief. Thus, where, as in these cases, a person comes to the Court for relief under Art. 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion

directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any rule for universal application. It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise in his favour the extraordinary remedy under Art. 226 of the Constitution."

"21. The learned Judges appear to have failed to notice that the delay in these petitions was more than the delay in the petition made in Bhailal Bhai's case out of which Civil Appeal No. 362 of 1962 has arisen. On behalf of the res- pondents-petitioners in these appeals (C.A. Nos. 861 to 867 of 1962) Mr. Andley has argued that the delay in these cases even is not such as would justify refusal of the order for refund. He argued that assuming that the remedy of recovery by action in a civil court stood barred on the date these applications were made that would be no reason to refuse relief under Art. 226 of the Constitution. Learned counsel is right in his submission that the provisions of the Limitation Act do not as such apply to the granting of

relief under Art. 226. It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought 134--159 S.C. 18 may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured. The Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy. but where the delay is more than this period, it will almost always be proper for the court to hold that it is unreasonable. The period of limitation prescribed for recovery of money paid by mistake under the Limitation Act is three years from the date when the mistake is known. If the mistake was known in these cases on or shortly after January 17, 1956 the delay in making these applications should be considered unreasonable. If, on the other hand, as Mr. Andley seems to argue, the mistake was discovered much later, this would be a controversial fact which cannot conveniently be decided in writ proceedings. In either view of the matter we are of opinion the orders for refund made by the High Court in these seven cases cannot be sustained."

(10) Assistant Commissioner (CT) Ltu. Kakinada and Others v. Glaxo Smith Kline Consumer Health Care, reported in (2020) 19 SCC 681;

"1. Leave granted. The moot question in this appeal emanating from the judgment and order dated 19.11.2018 in Glaxo Smith Kline Consumer Healthcare ltd. v. CCT passed by the High Court of Judicature at Hyderabad for the State of Telangana and the State of

Andhra Pradesh (for short "the High Court") is: Whether the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India ought Signature Not Verified Digitally signed by to entertain a challenge to the assessment order on the sole ground that the statutory remedy of appeal against that order stood foreclosed by the law of limitation?"

"13. The High Court finally allowed the writ petition vide the impugned judgment and order on the ground that the statutory remedy had become ineffective for the respondent (writ petitioner) due to expiry of 60 days from the date of service of the assessment order. Inasmuch as, the appellate authority had no jurisdiction to condone the delay after expiry of 60 days, despite the reason mentioned by the respondent of an extraordinary situation due to the act of commission and omission of its employee who was in charge of the tax matters, forcing the management to suspend him and initiate disciplinary proceedings against him. Soon after becoming aware about the assessment order, the respondent had filed the appeal, but that was after expiry of 60 days' period. The High Court was also impressed by the contention pressed into service by the respondent that it ought to be given one opportunity to explain to the authority (Assistant Commissioner) about the discrepancies between the value reported in the CST returns and the amount indicated in Form "F" relating to the turnover. The additional reason as can be discerned from the impugned order is that the respondent had already deposited an additional amount equivalent to 12.5% of the disputed tax amount in terms

of the earlier order. We deem it apposite to reproduce the impugned order of the High Court. The same reads thus: (Glaxo Smith case, SCC OnLine Hyd paras 3-9)

> *"3. The impugned order of assessment is dated 21.6.2017. As against the said order the petitioner filed an appeal with a delay. Since the delay was beyond the period after which it can be condoned, the same was not entertained. Therefore, the petitioner has come up with the above writ petition."*
>
> *4. The reason stated by the petitioner is that one of the employees who was in charge, indulged in malpractices forcing the management to suspend him and initiate disciplinary proceedings. The petitioner claims that they were not aware of these orders. Therefore, the petitioner seeks one opportunity.*
>
> *5. The reason why the petitioner seeks one opportunity is that 'F' forms submitted by the petitioner were rejected by the Assessing Officer, on the ground that the value of the goods transferred to branch office have not been disclosed in 'F' forms. But the claim of the petitioner is that the value was wrongly reported in the CST returns and that the amount indicated in the 'F' forms was more than the turnover. Therefore, they seek one opportunity to explain this discrepancy.*
>
> *6. In view of the peculiar circumstances, even while granting an opportunity to the petitioner, we wanted to put them on condition. Therefore, on*

8.11.2018 we passed an interim order to the following effect,

> *"It is represented by Mr. S. Dwarakanath, learned counsel for the petitioner that the petitioner has already paid 12.5% of the disputed tax, for the purpose of filing an appeal. But, the employee, who was incharge and who was subsequently, suspended in contemplation of disciplinary proceedings, failed to file the appeal. The contention of the learned counsel for the petitioner is that the issue lies in a narrow campus.*
>
> *Since the petitioner has already paid 12.5% of the disputed tax, the request of the petitioner for granting one more opportunity would be considered favourably, if the petitioner pays an additional amount equivalent to 12.5% of the disputed tax. The petitioner shall make such payment within a period of one week.*
>
> *Post on 19.11.2018 for orders."*

7. Pursuant to the aforesaid order, the petitioner made payment of Rs.9,59,190/, representing 12.5% of the taxes for the year 2013-2014 (CST). The amount was paid on 13.11.2018.

8. Therefore, the writ petition is ordered, the impugned order is set aside and the matter is remanded back to the 1st respondent. The petitioner shall appear before the 1 st respondent

on 10.12.2018 and explain the discrepancies. After such personal hearing, the 1st respondent may pass orders afresh.

9. As a sequel, pending miscellaneous petitions, if any, shall stand closed. No costs."

14. In the backdrop of these facts, the central question is: whether the High Court ought to have entertained the writ petition filed by the respondent? As regards the power of the High Court to issue directions, orders or writs in exercise of its jurisdiction under Article 226 of the Constitution of India, the same is no more res integra. Even though the High Court can entertain a writ petition against any order or direction passed/action taken by the State under Article 226 of the Constitution, it ought not to do so as a matter of course when the aggrieved person could have availed of an effective alternative remedy in the manner prescribed by law (see Baburam Prakash Chandra Maheshwari vs. Antarim Zila Parishad and also Nivedita Sharma vs. COAI). In Thansingh Nathmal & Ors. vs. Superintendent of Taxes, Dhubri & Ors., the Constitution Bench of this Court made it amply clear that although the power of the High Court under Article 226 of the Constitution is very wide, the Court must exercise self-imposed restraint and not entertain the writ petition, if an alternative effective remedy is available to the aggrieved person. In paragraph 7, the Court observed thus: Thansingh Nathmal case, AIR p. 423)-

"7. Against the order of the Commissioner an order for reference could have been claimed if the appellants satisfied the Commissioner or the High Court that a question of law arose out of the order.

But the procedure provided by the Act to invoke the jurisdiction of the High Court was bypassed, the appellants moved the High Court challenging the competence of the Provincial Legislature to extend the concept of sale, and invoked the extraordinary jurisdiction of the High Court under Article 226 and sought to reopen the decision of the Taxing Authorities on question of fact. The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226

trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up." (emphasis supplied)

"15. We may usefully refer to the exposition of this Court in Titaghur Paper Mills Co. Ltd. & Anr. Vs. State of Orissa & Ors., wherein it is observed that where a right or liability is created by a statute, which gives a special remedy for enforcing it, the remedy provided by that statute must only be availed of. In paragraph 11, the Court observed thus:- (SCC pp.440-41)

"11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an

order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford [(1859) 6 CBNS 336, 356] in the following passage:

> *'There are three classes of cases in which a liability may be established founded upon statute. . . . But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.'*

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. and has been reaffirmed by the Privy Council in Attorney- General of Trinidad and Tobago v. Gordon Grant & Co. Ltd. (1935 AC 532) and Secretary of State v. Mask & Co. (AIR 1940 PC 105). It has also been held to be equally applicable to enforcement of rights, and has been followed by

this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine." (emphasis supplied)

In the subsequent decision in Mafatlal Industries Ltd. & Ors. vs. Union of India & Ors.12, this Court went on to observe that an Act cannot bar and curtail remedy under Article 226 or 32 of the Constitution. The Court, however, added a word of caution and expounded that the constitutional Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise its jurisdiction consistent with the provisions of the enactment. To put it differently, the fact that the High Court has wide jurisdiction under Article 226 of the Constitution, does not mean that it can disregard the substantive provisions of a statute and pass orders which can be settled only through a mechanism prescribed by the statute."

16. Indubitably, the powers of the High Court under Article 226 of the Constitution are wide, but certainly not wider than the plenary powers bestowed on this Court under Article 142 of the Constitution. Article 142 is a conglomeration and repository of the entire judicial powers under the Constitution, to do complete justice to the parties. Even while exercising that power, this Court is required to bear in mind the legislative intent and not to 12 (1997) 5 SCC 536 render the statutory provision otiose. In a recent decision of a three- Judge Bench of this Court in Oil and Natural Gas Corporation Limited vs. Gujarat Energy Transmission Corporation Limited & Ors. (2017 5

SCC 42, the statutory appeal filed before this Court was barred by 71 days and the maximum time limit for condoning the delay in terms of Section 125 of the Electricity Act, 2003 was only 60 days. In other words, the appeal was presented beyond the condonable period of 60 days. As a result, this Court could not have condoned the delay of 71 days. Notably, while admitting the appeal, the Court had condoned the delay in filing the appeal. However, at the final hearing of the appeal, an objection regarding appeal being barred by limitation was allowed to be raised being a jurisdictional issue and while dealing with the said objection, the Court referred to the decisions in Singh Enterprises vs. Commissioner of Central Excise, Jamshedpur & Ors., (2008) 3 SCC 70, Commissioner of CCE vs. Hongo (India) (P) Limited & Anr.(2009) 5 SCC 791, Chhattisgarh State Electricity Board vs. CERC (2010) 5 SCC 23, and Suryachakra Power Corporation Limited vs. Electricity Department (2016) 16 SCC 152 and concluded that Section 5 of the Limitation Act, 1963 cannot be invoked by the Court for maintaining an appeal beyond maximum prescribed period in Section 125 of the Electricity Act.

17. The principle underlying the dictum in this decision would apply proprio vigore to Section 31 of the 2005 Act including to the powers of the High Court under Article 226 of the Constitution. Notably, in this decision, a submission was canvassed by the assessee that in the peculiar facts of that case (as urged in the present case), the Court may exercise its jurisdiction under Article 142 of the Constitution, so that complete justice can be done.

This argument has been considered and plainly rejected in the following words:-

> *"12. In A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602, while explicating and elaborating the principles under Article 142, Sabyasachi Mukharji, J. (as his Lordship then was) opined thus: (SCC p. 656, para 50)*
>
> > *"50. … The fact that the rule was discretionary did not alter the position. Though Article 142(1) empowers the Supreme Court to pass any order to do complete justice between the parties, the 16 (2010) 5 SCC 23 17 (2016) 16 SCC 152 court cannot make an order inconsistent with the fundamental rights guaranteed by Part III of the Constitution. No question of inconsistency between Article 142(1) and Article 32 arose. Gajendragadkar, J., speaking [Prem Chand Garg v. Excise Commr., AIR 1963 SC 996] for the majority of the Judges of this Court said that Article 142(1) did not confer any power on this Court to contravene the provisions of Article 32 of the Constitution. Nor did Article 145 confer power upon this Court to make rules, empowering it to contravene the provisions of the fundamental right. At AIR pp. 1002-03, para 12 : SCR p. 899 of the Report, Gajendragadkar, J., reiterated that the powers of this Court are no doubt very wide and they are intended and "will always be*

> *exercised in the interests of justice". But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. It was emphasised that an order which this Court could make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws. The court therefore, held that it was not possible to hold that Article 142(1) conferred upon this Court powers which could contravene the provisions of Article 32.".*

13. The said decision has been clarified by a Constitution Bench in Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584, wherein M.N. Venkatachaliah, J. (as his Lordship then was) speaking for the majority, ruled that: (SCC pp. 634-35, para 83)

> *"83. It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of the Constitution. These issues are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the*

Apex Court under Article 142(1) is unsound and erroneous. In both Prem Chand Garg v. Excise Commr., AIR 1963 SC 996, as well as A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602, cases the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 insofar as quashing of criminal proceedings are concerned is not exhausted by Section 320 or 321 or 482 CrPC or all of them put together. The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers — limited in some appropriate way — is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Shri Sorabjee, learned Attorney General,

referring to Garg case [Prem Chand Garg v. Excise Commr., AIR 1963 SC 996], said that limitation on the powers under Article 142 arising from "inconsistency with express statutory provisions of substantive law" must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression "prohibition" is read in place of "provision" that would perhaps convey the appropriate idea. But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the Apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the Court under Article 142, but only to what is or is not

"complete justice" of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise."

14. In this regard, another Constitution Bench in Supreme Court Bar Assn. v. Union of India, (1998) 4 SCC 409] opined: (SCC pp. 437-38, para 56)

"56. As a matter of fact, the observations on which emphasis has been placed by us from the Union Carbide case [Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584], A.R. Antulay case [A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602] and Delhi Judicial Service Assn. v. State of Gujarat, (1991) 4 SCC 406, go to show that they do not strictly speaking come into any conflict with the observations of the majority made in Prem Chand Garg case [Prem Chand Garg v. Excise Commr., AIR 1963 SC 996]. It is one thing to say that "prohibitions or limitations in a statute" cannot come in the way of exercise of jurisdiction under Article 142 to do complete justice between the parties in the pending "cause or matter" arising out of that statute, but quite a different thing to say that while exercising jurisdiction under Article 142, this Court can altogether ignore the substantive provisions of a statute, dealing with the subject and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute.

This Court did not say so in Union Carbide case [Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584] either expressly or by implication and on the contrary it has been held that the Apex Court will take note of the express provisions of any substantive statutory law and regulate the exercise of its power and discretion accordingly. …"

15. From the aforesaid decisions, it is clear as crystal that the Constitution Bench in Supreme Court Bar Assn. v. Union of India, (1998) 4 SCC 409, has ruled that there is no conflict of opinion in Antulay case [A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602] or in Union Carbide Corpn. case [Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584] with the principle set down in Prem Chand Garg v. Excise Commr., AIR 1963 SC 996. Be it noted, when there is a statutory command by the legislation as regards limitation and there is the postulate that delay can be condoned for a further period not exceeding sixty days, needless to say, it is based on certain underlined, fundamental, general issues of public policy as has been held in Union Carbide Corpn. case [Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584]. As the pronouncement in Chhattisgarh SEB v. Central Electricity Regulatory Commission, (2010) 5 SCC 23, lays down quite clearly that the policy behind the Act emphasising on the constitution of a special adjudicatory forum, is meant to expeditiously decide the grievances of a person who may be aggrieved by an order of the

adjudicatory officer or by an appropriate Commission. The Act is a special legislation within the meaning of Section 29(2) of the Limitation Act and, therefore, the prescription with regard to the limitation has to be the binding effect and the same has to be followed regard being had to its mandatory nature. To put it in a different way, the prescription of limitation in a case of present nature, when the statute commands that this Court may condone the further delay not beyond 60 days, it would come within the ambit and sweep of the provisions and policy of legislation. It is equivalent to Section 3 of the Limitation Act. Therefore, it is uncondonable and it cannot be condoned taking recourse to Article 142 of the Constitution.

16. We had stated earlier that we will be adverting to the passage in Suryachakra Power Corpn. Ltd. v. Electricity Deptt., (2016) 16 SCC 152. There, the Court had referred to Section 14 of the Limitation Act. It fundamentally relied on M.P. Steel Corpn. v. CCE, (2015) 7 SCC 58, wherein the Court after referring to certain authorities, analysed thus: (M.P. Steel Corpn. Case), SCC p. 91, para 43)

> *"43. … when a certain period is excluded by applying the principles contained in Section 14, there is no delay to be attributed to the appellant and the limitation period provided by the statute concerned continues to be the stated period and not more than the stated period. We conclude, therefore, that the principle of Section 14 which is a principle*

based on advancing the cause of justice would certainly apply to exclude time taken in prosecuting proceedings which are bona fide and with due diligence pursued, which ultimately end without a decision on the merits of the case."" (emphasis in italics – in original, and in bold – supplied)

Similarly, in State vs. Mushtaq Ahmad & Ors.18, this Court opined that where minimum sentence is provided for an offence then no Court can impose lesser punishment on ground of mitigating factors.

18. A priori, we have no hesitation in taking the view that what this Court cannot do in exercise of its plenary powers under Article 142 of the Constitution, it is unfathomable as to how the High Court can take a different approach in the matter in 18 (2016) 1 SCC 315 reference to Article 226 of the Constitution. The principle underlying the rejection of such argument by this Court would apply on all fours to the exercise of power by the High Court under Article 226 of the Constitution."

(11) Judgment of the Bombay High Court dated 27.10.2020 passed in Writ Petition (L) No. 4049 of 2020 in the case of Union of India, through Chief Administrative Officer (construction) V. Maharashtra Steel Fabricators & Erectors:

"7. Two main topics arise for consideration. First, the law on challenge to an arbitral award under Article 226 and 227 of the Constitution of India generally. Second, the law on the challenge to an arbitral award under article 226

and 227 of the Constitution of India after the limitation period under the Act is over.

8. The Supreme Court in the case of M/s. Deep Industries Limited, considered the exercise of jurisdiction by the High Court under Article 227 of the Constitution of India in the context of the Act of 1996. This case arose from a contract between appellant therein and the respondent Oil and Natural Gas Corporation Limited. A sole arbitrator was appointed to decide disputes between the parties. After the claim petition was filed the appellant was black listed. An application was moved by the appellant to amend the petition and to challenge the order of black listing. The amendment was granted. The application under section 16 of the Act of 1996 was moved before the arbitrator stating that aspect of the black listing would be outside the arbitrator's mandate. The application under Section 16 of the Act of 1996 was dismissed by the arbitrator. So also the application under Section 17 was also disposed of staying the order of black listing. The appeal against the order under Section 17 was rejected by the City Civil Court under Section 37 of the Act of 1996. An application was filed under Article 227 of the Constitution of India in the High Court of Gujarat. A preliminary objection was raised that the petition under Article 227 should be dismissed at threshold. The High Court, however, without answering this question went into the merits and allowed the petition. Supreme Court noted that the matter arose before High Court from the order of the subordinate court. The Supreme Court observed that the statutory policy of the Act is set down for time limits disposal of the arbitral proceedings and Section 34 references. The court observed

that this being the case, if petitions were to be filed under Articles 226 and 227 of the Constitution against orders passed in appeals under Section 37, the arbitral process would not concluded for many years. The Supreme court also commented on the plenary nature of Article 227 which remains untouched by the non-obstante clause of Section 5 of the Act. The Supreme Court however cautioned that the High Court would be extremely circumspect in interfering under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act and ensure that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction. Having expounded the legislative policy thus, the appeal was allowed by the Supreme Court. In the case of Punjab State Power Corporation Pvt. Ltd., the applicant had directly challenged an order passed by the Arbitral Tribunal against under Section 16 of the Act of 1996 under Article 227 of the Constitution of India in the High Court. The Supreme Court observed that the reference in M/s. Deep Industries Ltd that Article 227 is a Constitutional provision does not mean that High Courts can indiscriminately exercise the power under Article 227 entertaining challenges to the judgments allowing or dismissing the appeals under Section 37 of the Act. Similar is the position the case of the decision of Division Bench of this Court in Dowell Leasing & Financing Ltd. Therefore these decisions do not assist the Petitioner. Petitioner has not challenged the order passed in appeal under Section 37 of the Act of 1996 by a Court subordinate to the High Court as was the case before the Supreme Court but is directly challenging the award by a Petition under Article 226 and 227 of the

Constitution of India. The Supreme Court in SBP & Co. disapproved the stand adopted by some of the High Courts that any order passed by the arbitral tribunal can be corrected by the High Court under Article 226 or 227 of the Constitution. The decision in SBP & Co. is rendered by the bench of seven learned Judges and it lays down the position of law such an intervention by the High Courts is not permissible".

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

11. The Act of 1996 is a self-contained machinery for dispute resolution. It lays down a simplified procedure. The arbitrator is appointed by consensus, if not, by the Court. The remedies for challenging the award under the Act 1996 are not limitless. Categories of challenge are limited. They are enumerated in Section 34 (2) of the Act. The legislative intent of speedy disposal of arbitral proceeding is woven through the entire scheme of the Act. A time limit is stipulated under Section 34 (3) of the Act. An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, had a request been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal. The Court may entertain the application within thirty days, if it is satisfied that the applicant was

prevented by sufficient cause from making the application within the said period of three months it, but not thereafter.

12. Whether the Court could extend the period under section 34 (3) of the Act by recourse to Section 5 of the Limitation Act, 1963 was considered the Supreme Court in the case of Union of India Vs. Popular Construction Co. 9 The Supreme Court observed that the words 'but not thereafter' used in the proviso section 34 (3) are crucial which bar the application of Section 5 of the Limitation Act. Supreme Court laid down the law that Court cannot entertain an application to set aside the Award beyond the extended period under the proviso.

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

14. The question therefore is whether the High Court can exercise powers under article 226 and 227 of the Constitution of India overriding the time limit placed on the challenge to arbitral awards under the Act of 1996. An identical question arose before the Supreme Court in the case of Assistant Commissioner (CT) LTU, Kakinada & Ors. Vs. M/s. Glaxo Smith Kline Consumer Health Care Ltd. under the Andhra Pradesh Value Added Tax Act, 2005 Act as to whether the High Court in exercise of its writ jurisdiction could entertain the challenge because

statutory remedy of appeal against the order stood foreclosed by law of limitation. Here, the respondent, a trader, filed an appeal against the order passed by the Commissioner of Commercial Taxes which was dismissed as barred by limitation by the Appellate Authority because of expiry of the maximum limitation period of 60 days prescribed under the Andhra Pradesh Value Added Tax Act, 2005 Act. The respondent filed a writ petition to challenge the assessment order. The writ petition was entertained by the High Court and the order passed by the Assistant Commissioner was quashed and set aside. The Revenue filed appeal in the Supreme Court contending that once the respondent failed to avail statutory remedy within time, the High Court ought not have entertained the writ petition. The respondent urged that the High Court had ample power to grant relief under Article 226 of the Constitution of India. The Supreme Court rejected the contention and laid down the following position of law. The powers of the High Court under Article 226 of the Constitution are no doubt wide, but not wider than the powers under Article 142 of the Constitution. There is a distinction between the powers of the High Court under Article 226 and of the power of the Supreme Court under Article 142 of the Constitution of India to do complete justice between the parties. If the Supreme Court may not issue certain directions in exercise of powers under Article 142 of the Constitution, it cannot be that the High Court can take a different approach under Article 226 of the Constitution. The High Court cannot not disregard the statutory period. The High Court should not issue a writ inconsistent with the legislative intent. Doing so would frustrate the legislative scheme and intention behind the

statutory provisions. The law laid down Assistant Commissioner (CT) LTU, Kakinada squarely applies to the present case. If the legislative intent is to close the challenge to an arbitral Award after a particular period of time, then it must be adhered to. Therefore this writ petition filed under Article 226 and 227 of the Constitution of India challenging arbitral award after the stipulated time limit under the section 34 of the Act is over, cannot be entertained.

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

(12) Pranjan v. State of Maharashtra and Others, reported in 2021 SCC OnLine Bom 4284;

"3. The Apex Court in the case of Assistant Commissioner (CT) LTU, Kakinada v. Glaxo Smith Kline Consumer Health Care Limited has held that if a statutory remedy is barred by limitation, same cannot be extended by exercising writ jurisdiction under Article 226 of the Constitution of India. Therefore, relief sought for by the petitioner cannot be granted."

(13) Radha Krishan Industries v. State of Himachal Pradesh and Others, reported in (2021) 6 SCC 771;

"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; (2003) 2 SCC 107 PART C

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 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; and

27.6 In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the

view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

(14) R&P of Apex Court dated 8.1.2021 of the Special Leave to Appeal (C) No. 15244/2020 in case of M/S. Nik San Engineering Co. Ltd. v. M/s. Easun Reyrolle Limited & Ors,

(15) Gujarat State Disaster Management Authority v. Aska Equipments Limited, reported in (2022) 1 SCC 61;

"15. In view of the above and considering the language used in Section 19 of the MSME Act, 2006 and the object and purpose of providing deposit of 75% of the awarded amount as a pre-deposit while preferring the application/appeal for setting aside the award, it has to be held that the requirement of deposit of 75% of the awarded amount as a pre- deposit is mandatory. Therefore, as such, both the High Court as well as the learned Additional District Judge (Commercial), Dehradun were justified in directing the appellant to deposit 75% of the awarded amount as a pre-deposit."

"17. With the aforesaid, the question posed is answered against the appellant in terms of the above and we dispose of the appeal laying down the law in terms of the above, however, as observed hereinabove, continue with the interim arrangement as per order dated 23.10.2019 till final disposal of the appeal/application under Section 34 of the Arbitration & Conciliation Act, 1996 read with Section 19 of the MSME Act, 2006, which shall not be treated as a precedent."

(16) General Manager, Haryana Roadways v. Jai Bhagwan and Another, reported in (2008) 4 SCC 127;

"7. The special leave petition was filed before the Court on 13.9.2004 with an application for condonation of 153 days' delay. In the List of Dates filed with the SLP, the fact that the first respondent had been reinstated in service or that his services had been regularized had not been disclosed. To crown all, a prayer for interim relief was made to the following effect :

> *"It is, therefore, respectfully prayed that Your Lordships may graciously be pleased to grant ad interim ex parte stay of the operation of the final judgment and Order dated 23.9.2002 of the High Court of Punjab and Haryana at Chandigarh in CWP No.15317 of 2002."*

13. Suppression of material fact is viewed seriously by the Superior Courts exercising their discretionary jurisdiction. In S.J.S. Business Enterprises (P) Ltd. v. State of Bihar and Ors. [(2004)7SCC166], this court on suppression of fact held :

> *"As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the Courts to deter a litigant from abusing the process of Court by deceiving it. But the suppressed fact must be a material one in the sense that had it not bean suppressed it would have had an effect on the merits of the case."*

The said observation was quoted with approval by one of us in Arunima Baruah v. Union of India (UOI) and Ors.

[(2007) 6 SCC 120], wherein the question which was raised was: How far and to what extent suppression of fact by way of non- disclosure would affect a person's right of access to justice? The court notices that so as to enable it to refuse to exercise its discretionary jurisdiction, the suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the Appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case.

14. Recently, in Prestige Lights Ltd. v. State Bank of India [(2007) 8 SCC 449], this court held :

> *"The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a Court of Law is also a Court of Equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the Writ Court may refuse to entertain the petition and dismiss it without entering into merits of the matter."*

15. Had the aforementioned facts been brought to the notice of this Court, the Special Leave Petition might have been dismissed summarily. Even delay in filing the same might not have been condoned. The Court was not required to waste so much of time when the State itself had, for all intent and purport, accepted the award."

(17) Vaishno Enterprises v. Hamiltion Medical AG and Another, reported in 2022 SCC OnLIne SC 355;

> *"However, at the same time, the larger question/issue whether in a case where the buyer is located outside India but has availed the services in India and/or done the business in India with the Indian supplier and the contract was executed in India the MSME Act would be applicable or not and/or another larger issue that in case the supplier is subsequently registered as MSME the Council would still have jurisdiction are kept open to be considered in an appropriate case bearing in mind Section 18 as well as Section 8 of the MSME Act and the judgments of this Court in the case of M/s Shilpi Industries vs. Kerala State Road Transport Corporation, C.A. No.1570-78 of 2021 [2021 SCC Online SC 439] arising under the provisions of MSME Act and Shanti Conductors Pvt. Ltd. Vs. Assam State Electricity Board, (2019) 19 SCC 529 in which case a similar provision under the Small Scale and Ancillary Industries Undertakings, Act, 1993 came up for consideration before this Court."*

7. In rejoinder, learned Senior Counsel for the petitioner has submitted that since firm of the private respondent was not registered under the provisions of the MSMED Act at the time of transaction between the parties, the entire provisions of the MSMED Act would not be applicable and, therefore, the entire proceedings of conciliation as well as passing of ex-parte arbitral award by the Arbitrator concerned is *non est* from the very beginning. He has

submitted that as the entire proceedings under the MSMED Act of passing award is non est in the eyes of law, there is no question of applicability of the MSMED Act itself to the transaction in question, the provisions of even Section 19 of the MSMED Act would not be applicable. He has submitted that the present petition is maintainable and, therefore, considering the peculiar facts of this case, the petition may be allowed.

7.1 Regarding various decisions relied upon by Mr. Dhaval Dave, learned Senior Counsel, Mr. Pahwa has made following submissions:

(1) Regarding the decision of Division Bench in case of M/S. Nik San Engineering Co. Ltd. v. M/s. Easun Reyrolle Limited & Ors, it is submitted that there it is not stayed by the Apex court, and therefore, the decision of the Division Bench of this Court holds the field.

(2) Regarding decision reported in 2022 SCC OnLIne SC 355, he has submitted that the petitioner is also relying upon the same in various paras referred to herein above.

(3) Regarding decision reported in (2005) 8 SCC 618, it is contended that this judgment has been considered by the Division Bench of this Court.

(4) Regarding decisions reported in (2003) 7 SCC 410, 2022 SCC OnLine SC 542, AIR 2015 Guj 114, (2008) 4 SCC 127 the facts were different.

(5) Regarding decision reported in (2019) 13 SCC 445, in this case, the issues were different.

(6) Regarding decisions reported in Writ Petition (L) No. 4049 of 2020 in the case of Union of India, through Chief Administrative Officer (construction) V. Maharashtra Steel Fabricators & Erectors of the Bombay High Court, it is submitted that the issue, as to lack of jurisdiction, was raised.

(7) Regarding decision reported in (2022) 1 SCC 61, it is submitted that the matter was filed under Section 19 of the MSMED Act and the issues were different from the present one.

(8) Regarding decision reported in (2014) 11 SCC 366, it is submitted that its factually different and in that matter the award itself was challenged and it was subsequent stage of the proceedings. There was no question regarding lack of jurisdiction.

7.2 Regarding other decisions, Mr. Pahwa, learned Senior Counsel has submitted that in those decisions, the facts are different and in those decisions, there was no question raised regarding non-applicability of provisions of MSMED Act whereas in the present case, at the time of transaction between the parties, respondent No.3 was not registered

as MSME under the MSMED Act and it was subsequently registered. Therefore, according to him, the decision relied upon by the other side are not applicable to the facts of the present case.

8. Having considered the submissions made on behalf of both the sides coupled with the material placed on record and the decisions cited at bar, it reveals that there is no dispute regarding the transaction between the parties. It also reveals that the respondent No.3 is registered under the "E" Category i.e. "Small" Enterprise category with effec from 31.12.2016 under the MSMED Act, 2006. It also reveals that due to non-payment for the services provided by the respondent No.3, it has approached the mechanism established under the MSMED Act, 2006 in shape of Conciliation which ultimately failed and thereafter the matter came to be referred to the Arbitrator and the Arbitrator has passed the impugned award. It also appears from the record that the petitioner herein has not participated in the arbitral proceedings. It also reveals that against the said award, no proceedings under the Arbitration and Conciliation Act, 1996 or under Section 19 of the MSMED Act, 2006 has been initiated by the petitioner herein. The petitioner has approached this Court only on the ground that the proceedings under the MSMED Act was legally not tenable as at the time of transaction in question, respondent No.3 was not registered under the

MSMED Act, 2006. At this juncture it is worthwhile to refer to certain provisions of the MSMED Act, 2006 as well as the Arbitration and Conciliation Act, 1996.

8.1 Under the MSMED Act, the term "supplier" has been defined in Section 2(n) as follows:

> "Section 2(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;

8.2 The Scheme of the MSMED Act pertaining to the recovery of the dues, especially Sections 17, 18 and 19, needs to be referred to herein, which provides as under:

> **"Section 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."
>
> **"Section 18: Reference to Micro and small Enterprises Facilitation Council.**
>
> (1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.
>
> (2) On receipt of a reference under sub-section *(1)*, the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.
>
> (3) Where the conciliation initiated under sub-section *(2)* is not successful and stands terminated without

any settlement between the parties, the Council 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 dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section*(1)* of section 7 of that Act.

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

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

"Section 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."

8.3 Thus, according to the aforesaid provisions, when there is an arbitral proceedings, the provisions of the Arbitration and Conciliation Act, 1996 would be applicable.

9. The provisions of Arbitration and Conciliation Act, 1996 especially Section 5, 16 and 34 needs to be referred to, which provides as under:

"5.Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

"16. Competence of arbitral tribunal to rule on its jurisdiction.-(1) The arbitral tribunal may rule on its

own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea,

continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

"34. Application for setting aside arbitral award.—

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application 1 [establishes on the basis of the record of the arbitral tribunal that]—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the

arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the

arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.

10. In view of the aforesaid definition clause, a Micro, Small Enterprise can be treated as supplier only when it has filed Memorandum with the Authority as per Section 8 of the Act. Unless and until, the firm or establishment is treated as Micro, Small or Medium Enterprise and registered under Section 8, the provisions of the Act would not be applicable. Therefore, if any enterprise is not registered as a "small" or "medium" or "micro" enterprise at the time of transaction then for the said transaction, such establishment has no right to take shelter under the various provisions of the MSMED Act, 2006. It is necessary for initiation of proceedings like Conciliation and Arbitration under MSMED

Act that such establishment i.e. supplier must be registered one. Now, admittedly in the present case, the period of transaction between the parties is from 17.5.2013 to 15.7.2015 and 15.8.2013 to 13.10.2015. In view of the material placed on record, during this period, respondent No.3 supplier was not registered under the MSMED Act. As per the records, it has been registered as Small Enterprise category with effect from 31.12.2016. At this juncture, it is pertinent to note that the Hon'ble Apex Court has also observed in the case of Silpi Industries Etc. v. Kerala State Road Transport Corporation and Another (Supra), that to seek the benefit under the provisions of MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. It is also observed that for the supplies pursuant to the contract made before the registration under provisions of the MSMED Act, no benefit under the MSMED Act would be available. In view of the observation of the Supreme Court, if any registration under the MSMED Act is obtained, the same will be prospective and will apply supply of service subsequent to registration, but cannot operate retrospectively. Considering these observation of the Apex Court, if we consider the facts of the present case, it clearly reveals that in the present case also, the respondent No.3 has initiated the proceedings under the MSMED Act after its registration, for the services provided before the date of registration. Therefore, the entire proceedings undertaken

by the Council under the provisions of the MSMED Act, would be without jurisdiction.

11. It is pertinent to note that it is imperative for every Tribunal or Court that there should be existence of jurisdiction for entertaining any disputes between the parties. If the concerned Tribunal or the Court has no inherent jurisdiction to entertain and decide the dispute between the parties and yet such Court or Tribunal passes any order or award, then it is nothing but a nullity in the eyes of law. It is well settled principles of law that if any action is null and void from very beginning then such question of nullity can be raised at any stage of the proceedings by any party even at the stage of execution of the decree. In such cases, whether the parties have participated in such proceedings or not, is not material one. Participation in a proceedings in a Forum which has no jurisdiction, does not give jurisdiction to such Forum. The lack of jurisdiction goes to the roots of the entire proceedings. Therefore, considering the facts of the present case, even if the petitioner had knowledge regarding the arbitral proceedings conducted under the MSMED Act and it has purposefully did not participated in the proceedings, and ultimately the Award came to be passed, does not give any jurisdiction to the mechanism under the MSMED Act.

12. It is pertinent to note that when the provisions of MSMED Act itself is not applicable to the transaction in question, there would not be any question of applicability of the provisions of the Arbitration and Conciliation Act, 1996.

13. Further, it is settled law that the Writ Petition is maintainable in the following circumstances:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of their power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, `within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) The High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of L. Chandra Kumar vs. Union of India & others, and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality."

14. Now, admittedly, in the present case, the exercise of the jurisdiction of the Arbitral Tribunal under the MSMED Act is under challenge and, therefore, the present petition is maintainable.

15. Therefore, considering the facts and circumstances of the case, it is crystal clear that the exercise of the jurisdiction by the Arbitrator under the MSMED Act, 2006 was without jurisdiction and, therefore, the impugned award is not sustainable in the eyes of law and the same deserves to be set aside and the present petition is liable to be allowed.

16. The present petition is allowed. The impugned award dated 3.5.2019 passed by the Sole Arbitrator in Arbitration Matter titled M/s. Vishal Carriers v. Anupam Industries Ltd. is hereby quashed and set-aside.

Considering the facts and circumstances of the case, no order as to costs.

Civil Application, if any, stands disposed of accordingly.

(DR. A. P. THAKER, J)

FURTHER ORDER

At this stage, learned advocate for the respondent requested to stay this Order.

Considering the observations made in the judgment, the request is declined.

(DR. A. P. THAKER, J)

SAJ GEORGE