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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Reserved on: 9th May, 2023**Date of decision: 5th July, 2023*

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W.P.(C) 11233/2021 and CM APPL. 34581**UNISEVEN ENGINEERING AND INFRASTRUCTURE PVT. LTD**

..... Petitioner

Through: Mr. Anirudh Bakhru, Mr. Ayush Puri,
Mr. Umang Tyagi, Mr. Kanav Madnani,
Mr. Vijay Laxmi Rathi & Mr. Pragya
Choudhary, Advocates. (M: 9958029634)

Versus

**MICRO AND SMALL ENTERPRISES FACILITATION (MSEF)
COUNCIL DISTRICT (SOUTH) AND ANR.**

Respondents

Through: Ms. Arushi Gupta on behalf of Mr.
Jawahar Raja, ASC, GNCTD for R-1. (M:
9811462308) Dr Amit George & Mr
Sahil Garg, Advocate for R-2. (M:
9560690036)

CORAM:**JUSTICE PRATHIBA M. SINGH****JUDGMENT****Prathiba M. Singh, J.**

1. This hearing has been done through hybrid mode.
2. This petition raises important issues arising out of the Micro Small and Medium Enterprises Development Act, 2006 (*hereinafter 'MSMED Act, 2006'*) and has been from heard time to time by this Court.
3. The question raised in the present petition is –



Under the MSMED Act, 2006 whether an independent claim can be entertained by the MSEFC at the instance of the BUYER?

4. The issue is to be adjudicated in the background facts wherein, the Respondent no.2 who is the buyer sought a reference under Section 18 of the MSMED Act of its claims against the Supplier, as an independent claim. No claim was filed by the Supplier against the Buyer and thus the Buyer's claim was not filed as a counter-claim.

Brief Facts

5. The Petitioner – Uniseven Engineering and Infrastructure Pvt. Ltd. seeks quashing/ setting aside of the impugned order dated 14th September, 2021 passed by Respondent No.1 - Micro and Small Enterprises Facilitation Council District (South), GNCTD (*hereinafter, 'MSEFC'*) under the MSMED Act, 2006 advising the Petitioner to pay a sum of Rs. 9,59,66,352/- to Respondent No. 2 – Harji Engineering Works Pvt. Ltd. as per the agreement dated 17th October, 2019.

6. The said agreement dated 17th October, 2019 was issued to the Petitioner by Respondent No. 2 for providing Combined Station Works (CSW) including Civil, Mechanical, Electrical and Instrumentation works at Paradip and Balasore Stations in Odisha. A second agreement dated 18th October, 2019 was also placed. As per the said agreement, the Petitioner was to supply goods and services including labor, material tools etc., as also engineers and supervisors for monitoring services. Thus, the Petitioner was the 'Supplier' and Respondent No.2 was the 'Buyer'.

7. Certain disputes arose between the Petitioner and the Respondent No.2 regarding the payments under the agreements. On 10th July, 2021 a legal notice



was issued by the Respondent No.2 to the Petitioner. Thereafter, on 12th July, 2021 the bank guarantee issued by the Petitioner under the agreement was encashed by the Respondent No.2. No dispute was raised by the Petitioner however, the Respondent, the buyer relying upon the non-performance of the Petitioner invoked the termination clause of the agreement.

8. The Respondent No.2 filed a reference petition application under Section 18 of the MSMED Act, 2006 for delayed payment. Thereafter, vide the impugned order dated 14th September 2021 passed by MSEFC, the Petitioner was advised to pay the sum of Rs. 9,59,66,352/- to the Respondent No.2. The said impugned order states that the said amount is as per the legal notice dated 30th June, 2021 issued by the Respondent No.2 to the Petitioner.

9. In the present petition vide order dated 1st October, 2021 passed by this Court, notice was issued and the impugned dated 14th September, 2021 was stayed. Consequently, the MSEFC was directed to not proceed with the claim made by Respondent No.2 based on which the impugned order was issued.

Submissions

10. Mr. Ayush, Id. Counsel for the Petitioner submits as under:
- (i) that the Petitioner has not received any legal notice dated 30th June, 2021 from Respondent No. 2 and the same is incorrectly stated in the impugned order;
 - (ii) that the MSEFC has failed to appreciate that in terms of the agreement dated 17th October 2019, the Respondent No.2 was the Buyer and not the Supplier and therefore, the Respondent No.2's



claim would not fall within the ambit of Sections 17 and 18 of the MSMED Act, 2006;

- (iii) that the Petitioner has not raised any claims against Respondent No.2 in terms of the two agreements;
- (iv) that Respondent No.2 being the Buyer cannot invoke the jurisdiction of the MSEFC. Reliance is placed upon the provisions of the Act i.e., Sections 15 to 18 to argue that the jurisdiction of the MSEFC would not exist where there is no amount due;
- (v) that as per the decisions in *M/s Ramky Infrastructure Pvt. Ltd. v. Micro and Small Enterprises Facilitation Council & Anr*, WP(C) 5004/2017; *Porwal Sales v. Flame Control Industries*, 2019 SCC Online Bom 1628 and, *M/s Frick India Ltd. v. Madhya Pradesh Micro and Small Enterprises Facilitation Council & Ors.*, WP(C) 19319/2014 an amount is due under the Act, only when the buyer fails to make payment and not the other way round. The scheme of the MSMED Act, 2006 does not envisage a buyer approaching the MSEFC for recovering any monies from the sellers. The same is not contemplated under the MSMED Act, 2006;
- (vi) that the Respondent No.2 is a medium enterprise and is not entitled to invoke the jurisdiction of MSEFC;
- (vii) that as per Section 23(2)(a) of the Arbitration and Conciliation Act, 1996 (*hereinafter*, A&C Act, 1996), a counter claim would only be entertainable in case where a claim has been raised;



- (viii) that the judgment in *M/s. Silpi Industries v. Kerala State Road Transport Corporation & Anr., C.A.Nos.1570-1578 of* was only rendered in the context of entertaining of a counter claim.
11. Dr. George, Id. Counsel, appearing for Respondent No.2 submits as under:
- (i) that the judgments relied upon by the Petitioner are prior to the judgment of the Hon'ble Supreme Court in *M/s. Shilpi Industries (Supra)*. The said judgment lays down categorically that claims and counter claims are maintainable before the MSEFC;
 - (ii) that as per the decision of the Hon'ble Bombay High Court in *M/s Steel Authority of India Ltd. & Anr. v. Micro, Small Enterprise Facilitation Council, through Joint Director of Industries, Nagpur Region, Nagpur, AIR 2012 Bom 178* a Buyer can also approach the MSEFC;
 - (iii) that the MSME ecosystem provides quick adjudication and higher payment of interest and, therefore, the jurisdiction of the MSEFC cannot be held to be barred;
 - (iv) that as per Section 2(9) of the MSMED Act, 2006 claims and counter claim are placed at the same pedestal and therefore, the distinction sought to be made by the Petitioner would not be tenable in law;
 - (v) that in the reply to the legal notice the Petitioner clearly reserved its rights to raise claims;
 - (vi) that Respondent No.2 was a small enterprise at the relevant point of time;



- (vii) that as per notification dated 18th October, 2022 issued by the Ministry of Micro, Small and Medium Enterprise even a medium enterprise can continue invoking the jurisdiction of the MSEFC for a period of three years after its re-classification.

Analysis and Findings

12. The Respondent No. 2 - Buyer, and the Petitioner entered into an agreement for providing Combined Station Works (CSW) including Civil, Mechanical, Electrical and Instrumentation works at Paradip and Balasore stations in Odisha on the Petitioner. The said agreement was placed on 17th October, 2019. The Petitioner was to provide various services including supply of labor requirement, material, tools, tackles, supervisors, engineers etc. for carrying out the work as also for supervision and monitoring of the work. Thus, in the present case, M/s. Harji Engineering Works Pvt. Ltd was the Buyer and the Petitioner - M/s. Uniseven Engineering and Infrastructure Pvt. Ltd. was the Supplier. The termination clause in the contract/ work order i.e., clause 13 reads as under:

“13. TERMINATION OF CONTRACT

In the event of unsatisfactory performance of work, HEWPL reserves its right to withdraw part of the works or full works and get the same done through alternate means at your risk and cost.

If you do not commence the work in the manner described or do not comply to our Site

In charge notices/following events/contingencies namely:-



- i) Fail to carry out the works in conformity to the drawings, specifications and contract agreement.*
- ii) Fail to carry out the work in accordance with the time schedule*
- iii) Fail to carry out the work to the satisfaction of HEWPL/IOCL.”*

13. The scope of work was amended on 18th October 2019. The work order placed by the Buyer upon the Supplier was a back-to-back agreement, pursuant to work which the Buyer had received from Indian Oil Corporation Limited (IOCL). The IOCL, vide its communication dated 3rd November, 2020, informed the Buyer that its work had been found poor and unsatisfactory and accordingly, the Respondent No.2/ Buyer was placed on a watchlist for six months by IOCL. The Respondent No.2/ Buyer is stated to have lost some contracts owing to this action of IOCL.

14. Thereafter, the Respondent No.2/ Buyer issued a legal notice alleging that the work of the Petitioner /Supplier was not satisfactory and was, in fact abandoned due to which it suffered huge damage to its reputation with IOCL. It is further claimed that various sub-contractors engaged by the Petitioner /Supplier its own risk and costs, demanded their unpaid dues from the Respondent No.2/ Buyer. It is submitted on behalf of the Respondent No.2/ Buyer that it suffered a loss of more than Rs. 8 crores due to the aforesaid defaults. Allegations and counter allegations were made by the parties. Despite repeated meetings being held, the issues could not be resolved. In view of the



same, finally, the Respondent No.2/ Buyer invoked the jurisdiction of the MSEFC.

15. The MSEFC, vide the impugned order dated 14th September 2021, called upon the Petitioner /Supplier to pay the due amount of Rs. 9,59,66,352/-. The said impugned order is of relevance and is extracted below:

INTIMATION

Application No. : UDYAM-DL-08-0002516/S/00002

RAVINDERJIT SINGH Flat No- 7 ARAVALI, Building- SHOPPING AND OFFICE COMPLEX, Road/Street- Saheed Suryasen Marg, Village/Town- ALAKNANDA, Block- ARAVALI APARTMENT, City- NEW DELHI SOUTH DELHI
Email:-hewpl@yahoo.com Ph:-9910396721

Petitioner

Vrs

UNISEVEN ENGINEERING & INFRASTRUCTURE PRIVATE LIMITED
Ecospace Business Park, Block 3A, Unit 401A, Plot No. 2F11, New Town, Rajarhat, Kolkata, 700160 KOLKATA WEST BENGAL
Email:- jpk@uniseven.in Ph:- 9831722408

Opposite Party

Whereas, the MSEFC has received an application from M/s RAVINDERJIT SINGH of MS HARJI ENGINEERING WORKS PVT LTD (herein after referred to as supplier) against the Buyer M/s UNISEVEN ENGINEERING & INFRASTRUCTURE PRIVATE LIMITED (herein after referred to as Buyer) under the provisions of section 18(1) of Delayed Payment to MSE of The Micro, Small and Medium Enterprises Development Act, 2006

Whereas, the supplier i.e. M/s RAVINDERJIT SINGH has mentioned that he has supplied the goods/services rendered to M/s UNISEVEN ENGINEERING & INFRASTRUCTURE PRIVATE LIMITED as per their Work Order/Agreement HEW/PHBPL/UEIPL/2019/237 dated 17/10/2019 and that the goods/services rendered by M/s RAVINDERJIT SINGH to UNISEVEN ENGINEERING & INFRASTRUCTURE PRIVATE LIMITED and Invoice No. LEGAL NOTICE dated 30/06/2021 generated and made available by the supplier to the buyer.

Whereas, the supplier has claimed from the buyer an amount of Rs. 95966352 (Amount payable). This amount is due to the supplier from buyer against invoice no LEGAL NOTICE dated 30/06/2021 .

Whereas, the buyer has failed to make payment to the supplier within 45 days from the day of acceptance or the day of deemed acceptance as per provisions of section 15 of The Micro, Small and Medium Enterprises Development Act, 2006.

There is a beneficial provision in MSMED Act, empowering the Hon'ble Council to advise the parties to conciliate and settle the disputes to their mutual benefit and satisfaction before proceeding any further.

Now, the MSEF Council District (South) hereby advises M/S UNISEVEN ENGINEERING & INFRASTRUCTURE PRIVATE LIMITED (Buyer) to pay the due amount as mentioned above to M/s MS HARJI ENGINEERING WORKS PVT LTD (Supplier) immediately and in no case, later than 15 days from the receipt of the notice failing which case will be registered by the MSEF Council District (South). The supplier of goods is hereby advised to intimate the receipt of payment from the buyer of goods/services immediately to this Council. The Buyer has certified that the information supplied by him and now included in this notice is true to the best of his knowledge and belief.

Date: 14/09/2021

16. Copy of the above impugned order would show that the same mis-describes the Respondent No.2/Buyer as the Supplier and the Petitioner/ Supplier as the Buyer. The MSEFC, in fact, calls upon the Supplier i.e., Petitioner herein to pay the sum of Rs.9,59,66,352/- within 15 days.



17. In the present petition, vide order dated 1st October, 2021, an interim stay was granted in the following terms:

“6. Till the next date, the operation of the impugned communication dated 14.09.2021 issued by respondent no.1 will remain stayed and consequently, the respondent no.1 will not proceed to deal with the claim made by respondent no.2, based on which the impugned communication was issued.”

18. Insofar as the status of the Petitioner is concerned, it was registered as a Medium Enterprise on 25th May, 2007 under the MSMED Act, 2006.

19. The legal issue that arises in this case is as to whether the jurisdiction of the MSEFC can be invoked by a Buyer against a Supplier registered under the MSMED Act, 2006.

20. The MSMED Act, 2006 has been enacted for the purpose of facilitating the promotion and development of Micro, Small and Medium Enterprises. It is also meant to enhance the competitiveness of such enterprises.

21. A perusal of the Statement of Objects and Reasons (SOAR) of the MSMED Act, 2006 would reveal that the purpose of bringing out this enactment as set out in the Objects and Reasons is as under:

“STATEMENT OF OBJECTS AND REASONS

Small scale industry is at present defined by notification under section 11B of the Industries (Development and Regulation) Act, 1951. Section 29B of the Act provides for notifying reservation of items for exclusive manufacture in the small-scale industry sector. Except for these two provisions, there exists no



legal framework for this dynamic and vibrant sector of the country's economy. Many Expert Groups or Committees appointed by the Government from time to time as well as the small-scale industry sector itself have emphasised the need for a comprehensive Central enactment to provide an appropriate legal framework for the sector to facilitate its growth and development. Emergence of a large services sector assisting the small-scale industry in the last two decades also warrants a composite view of the sector, encompassing both industrial units and related service entities. The world over, the emphasis has now been shifted from "industries" to "enterprises". Added to this, a growing need is being felt to extend policy support for the small enterprises so that they are enabled to grow into medium ones, adopt better and higher levels of technology and achieve higher productivity to remain competitive in a fast globalisation area. Thus, as in most developed and many developing countries, it is necessary that in India too, the concerns of the entire small and medium enterprises sector are addressed, and the sector is provided with a single legal framework. As of now, the medium industry or enterprise is not even defined in any law.

2. In view of the above-mentioned circumstances, the Bill aims at facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises and seeks to—

(a) provide for statutory definitions of "small enterprise" and "medium enterprise".

(b) provide for the establishment of a National Small and Medium Enterprises Board, a high-level forum consisting of stakeholders for participative review of and making recommendations on the policies and



programmes for the development of small and medium enterprises.

(c) provide for classification of small and medium enterprises on the basis of investment in plant and machinery, or equipment and establishment of an Advisory Committee to recommend on the related matter.

(d) empower the Central Government to notify programmes, guidelines or instructions for facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises.

(e) empower the State Governments to specify, by notification, that provisions of the labour laws specified in clause 9(2) will not apply to small and medium enterprises employing up to fifty employees with a view to facilitating the graduation of small enterprises to medium enterprises;

(f) make provisions for ensuring timely and smooth flow of credit to small and medium enterprises to minimise the incidence of sickness among and enhancing the competitiveness of such enterprises, in accordance with the guidelines or instructions of the Reserve Bank of India.

(g) empower the Central and State Governments to notify preference policies in respect of procurement of goods and services, produced and provided by small enterprises, by the Ministries, departments and public sector enterprises.

(h) empowering the Central Government to create a Fund or Funds for facilitating promotion and development and enhancing the competitiveness of small enterprises and medium enterprises.

(i) empower to prescribe harmonised, simpler and streamlined procedures for inspection of small and medium enterprises under the labour laws enumerated



in clause 15, having regard to the need to promote self-regulation or self-certification by such enterprises.

(j) prescribe for maintenance of records and filing of returns by small and medium enterprises with a view to reduce the multiplicity of often-overlapping types of returns to be filed;

(k) Make further improvements in the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 and making that enactment a part of the proposed legislation and to repeal that enactment.

3. The Bill seeks to achieve the above objects.”

22. A perusal of the above SOAR would show that the entire focus of the legislation was a law to support small-scale industries, engaged in the manufacturing and extending the said support in a comprehensive manner to the Services sector. It is of specific relevance to point out that insofar as the chapter V of the MSMED Act, 2006 relating to the delayed payments is concerned, the same was based on the provisions of the Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (*hereinafter, 'Delayed Payments Act, 1993'*).

23. The Delayed Payments Act, 1993 was meant to create a statutory liability upon the Buyers to make payments to Suppliers under the said Act. The Delayed Payments Act, 1993 was considered in the decision of the Hon'ble Supreme Court in *Shanti Conductors Pvt. Ltd. & Anr. etc. v. Assam State Electricity Board & Ors. etc. (2019) 19 SCC 529*. The said judgment deals with the incidence of payments, however, in the process it discusses the provisions of



Delayed Payments Act, 1993. The relevant portion of the judgment is set out below:

“28. Before we consider the issues which have arisen in these appeals it is necessary to notice the provisions of the Act, 1993. In the Parliament, the Government of India made a policy statement on small scale industries. It was also announced that suitable legislation would be brought to ensure prompt payment of money by buyers to the small industrial units. An Ordinance, namely, the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Ordinance, 1992 was promulgated by the President on 23.09.1993. To replace the Ordinance, The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 was introduced in the Parliament. The Statement of Objects and Reasons of the Act throws considerable light on the prevalent situation and the remedially measures which was sought in the legislation. In the Statement of Objects and reasons following was observed:

“2. Inadequate working capital in a small scale or an ancillary industrial undertakings causes serious and endemic problems affecting the health of such undertaking. Industries in this sector have also been demanding that adequate measures be taken in this regard. The Small Scale Industries Board, which is an apex advisory body on policies relating to small scale industrial units with representatives from all the States, governmental bodies and the industrial sector, also expressed this view. It was, therefore, felt that prompt payments of money by buyers should be statutorily ensured and mandatory provisions for payments of interest on the outstanding money, in case



of default, should be made. The buyers, if required under law to pay interest, would refrain from withholding payments to small scale and ancillary industrial undertakings.”

.....

30. Sections 3 to 6 of the Act, 1993 are as follows:

“Section 3. Liability of buyer to make payment.- Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:

Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed one hundred and twenty days from the day of acceptance or the day of deemed acceptance.

Section 4. Date from which and rate at which interest is payable.- Where any buyer fails to make payment of the amount to the supplier, as required under section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay interest 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 one and half time of prime Lending Rate charged by the State Bank of India.

Explanation.- For the purposes of this section, " Prime Lending Rate" means the Prime Lending Rate of the State Bank of India which is available to the best borrowers of the bank.

Section 5. Liability of buyer to pay compound interest.- Notwithstanding anything contained in any agreement between a supplier and a buyer or in any law for the time being in force, the buyer shall be



liable to pay compound interest (with monthly interests) at the rate mentioned in section 4 on the amount due to the supplier.

Section 6. Recovery of amount due.-

(1) The amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of sections 4 and 5, shall be recoverable by the supplier from the buyer by way of a suit or other proceeding under any law for the time being in force.

(2) Notwithstanding anything contained in sub-section (1), any party to a dispute may make a reference to the Industry Faciliation Council for acting as an arbitrator or conciliator in respect of the matters referred to in that sub- section and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such dispute as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub- section (1) of section 7 of that Act.

31. Section 3 creates a statutory liability of buyer to make payment. The statutory liability is to the effect that where any supplier supplies any goods 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 statutory liability has been fastened on the buyer to make payment in the following manner:

(i) on or before the date agreed upon between him and on the supplier in writing, or

(ii) where there is no agreement in this behalf before the appointed day.

32. 'Appointed day' as defined in Section 2(b) means the day following immediately after the expiry of the period of thirty days from the day of acceptance or the



day of deemed acceptance of any goods or any services by a buyer from a supplier. Thus, statutory liability to make payment accrues to buyer as per Section 3, it is relevant to notice the event contemplated under Section 3 is "where any supplier supplies any goods or renders any services to any buyer". The incidence of liability is supply of goods or rendering any service. The Act is clearly prospective in nature and shall govern the incidence of supply and rendering service which happens after enforcement of the Act i.e. 23.09.1992.

33. The second part of Section 3 is "buyer shall make payment". Obviously, question of payment shall arise only after supply of goods or rendering any service. Thus, by virtue of Section 3, both the incidents i.e. supply or service on the one hand and payment on the other has to be after the enforcement of Act, 1993. Statutory provision of Section 3 further creates statutory liability to make payment on the agreed day in writing between the buyers and the supplier and if there is no agreement then before appointed day. The fact that agreement in writing between buyer and supplier for supply and payment is prior to the enforcement of the Act is neither relevant nor material, what is material is that supply and services had to be after the enforcement of the Act, only then the liability of payment shall accrue.

34. We have already noticed that the purpose and object of legislation was prompt payments of money by buyer which has been statutorily ensured in Act, 1993 by containing mandatory provisions of payment of interest.

35. Section 4 which deals with date from which and rate at which interest is payable. The liability to make payment of the amount to the supplier only arises



when any buyer fails to make payment as required under Section 3.”

Thus, even under the Delayed Payments Act, 1993 the provisions were for the benefit of Suppliers and Buyers were expected to make prompt payments, failing which, notwithstanding any agreement, Buyers were saddled with the liability of higher rates of interest.

24. Coming to the MSMED Act, 2006, Chapter V of the Act is clear in its title which reads as under:

CHAPTER V: DELAYED PAYMENTS TO MICRO AND SMALL ENTERPRISES

25. The Act consists of various chapters. Chapter V of the MSMED Act, 2006 specifically deals with delayed payments *to Suppliers* who are Micro and Small Enterprises. Sections 15 to 18 deal with payments including the liability to pay higher interest as discussed below.

26. Section 15 of the MSMED Act, 2006 provides that if any supplier i.e., a Micro or Small Enterprise supplies any goods or renders services to a Buyer the payment for the same shall be made as agreed between the parties. As per the said section the maximum period for payment to the Supplier, which is a Micro or Small Enterprise, cannot exceed 45 days, as stipulated therein. In case of delay in payments, Section 16 the MSMED Act, 2006 provides for interest at a rate much higher than that provided by banks. Further, Section 17 of the MSMED Act, 2006 stipulates that the buyer would be liable to pay the interest in terms of Section 16. The said provisions read as under:

“Section 15: Liability of buyer to make payment.



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

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

“Section 16: Date from which and rate at which interest is payable.

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

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.”

27. A perusal of Section 16 of the MSMED Act, 2006 makes it clear that the provision contemplates the following:

- (i) payment of compound interest;



- (ii) with monthly rests;
- (iii) at three times the bank rate.

The benefit of interest under Section 16 to Suppliers which are Micro/Small Enterprises under Section 16, is substantial. Further, as per Section 16 and 17 of the MSMED Act, 2006 the liability thereto is upon the Buyer to release payments to the Supplier as also to pay interest in case of failure to make timely payment.

28. In case of disputes regarding the payments arising out of the agreement between the parties, the MSMED Act, 2006 also provides for a reference to the MSEFC under Section 18. The same reads as under:

“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.”

29. A reading of the aforesaid provisions makes it clear that under Section 18 any party to a dispute can make a reference to the MSEFC in respect of any amount due under Section 17. Section 17 in turn refers to Section 16 and Section 16 in turn refers to Section 15. Thus, Sections 15 to 18 of the MSMED Act, 2006 are inter-linked with each other and are also linked to the title of the chapter i.e., Chapter V: Delayed Payments to Micro and Small Enterprises. Thus, the entire Chapter V applies only in respect of delayed payments to Micro and Small Enterprises. Chapter V excludes Medium Enterprises under Section 2(g) of the



MSMED Act, 2006. Sections 15 to 17 also make it clear that the obligation is on the Buyer to make the payment promptly in terms of Section 15, failing which an increased rate of interest would be liable to be paid by the Buyer to the Supplier. Section 17 also clarifies this position abundantly. These provisions do not deal with a situation where a Buyer raises claims against the Supplier, under the MSMED Act, 2006. The plain reading of the statute makes it categorically applicable only in respect of claims recoverable by Suppliers, who are registered under the Act as Micro or Small Enterprises. Since the MSMED Act, 2006 itself has been enacted for the purpose of extending benefits to Suppliers, who are registered under the Act as Micro or Small Enterprises, it does not contemplate the reverse obligation i.e. claims relating to the amount recoverable from the Suppliers under the MSMED Act, 2006. Thus, a literal reading of the various provisions shows that a Buyer cannot maintain an independent claim against the Supplier under the MSMED Act, 2006.

30. Dr. George, Id. Counsel for the Respondent No.2/ Buyer has placed vehement reliance on the decision of the Hon'ble Supreme Court in *M/s. Silpi Industries (Supra)* and decision of the Hon'ble Bombay High Court in *M/s Steel Authority of India Ltd. (Supra)*.

31. A perusal of the decision in *M/s. Silpi Industries (Supra)* would show that it relates to a case where the Supplier had lodged a claim against the Buyer before the MSEFC and the Buyer had then filed a counter claim. The same was permitted by the Hon'ble Supreme Court. The relevant part of the said judgement is as under:



“13. Having regard to contentions of the parties, only two issues arise for consideration before this Court, namely :

- (i) Whether the provisions of Indian Limitation Act, 1963 is applicable to arbitration proceedings initiated under Section 18(3) of Micro, Small and Medium Enterprises Development Act, 2006 ?; and*
*(ii) **Whether, counter claim is maintainable in such arbitration proceedings ?**”*

“23. The obligations of the buyer to make payment, and award of interest at three times of the bank rate notified by Reserve Bank in the event of delay by the buyer and the mechanism for recovery and reference to Micro and Small Enterprises Facilitation Council and further remedies under the 2006 Act for the party aggrieved by the awards, are covered by Chapter V of the 2006 Act. The provisions of Section 15 to 23 of the Act are given overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. From the Statement of Objects and Reasons also it is clear that it is a beneficial legislation to the small, medium and micro sector. The Arbitration and Conciliation Act, 1996 is a general law whereas the Micro, Small and Medium Enterprises Development Act, 2006 is a special beneficial legislation which is intended to benefit micro, small and medium enterprises covered by the said Act. The Act of 2006 contemplates a statutory arbitration when conciliation fails. A party which is covered by the provisions of 2006 Act allows a party to apply to the Council constituted under the Act to first conciliate and then arbitrate on the dispute between it and other parties. There are fundamental differences in the settlement mechanism



*under the 2006 Act and the 1996 Act. The first difference is, the Council constituted under the 2006 Act to undertake mandatory conciliation before the arbitration which is not so under the 1996 Act. Secondly, in the event of failure of conciliation under the 2006 Act, the Council or the centre or institution is identified by it for arbitration. The 1996 Act allows resolution of disputes by agreed forum. The third difference is that, in the event of award in favour of seller and if the same is to be challenged, there is a condition for pre-deposit of 75% of the amount awarded. Such is not the case in the 1996 Act. When such beneficial provisions are there in the special enactment, such benefits cannot be denied on the ground that counter-claim is not maintainable before the Council. In any case, whenever buyer wish to avoid the jurisdiction of the Council, the buyer can do on the spacious plea of counter-claim, without responding to the claims of the seller. When the provisions of Sections 15 to 23 are given overriding effect under Section 24 of the Act and further the 2006 Act is a beneficial legislation, **we are of the view that even the buyer, if any claim is there, can very well subject to the jurisdiction before the Council and make its claim/ counter claim as otherwise it will defeat the very objects of the Act which is a beneficial legislation to micro, small and medium enterprises.** Even in cases where there is no agreement for resolution of disputes by way of arbitration, if the seller is a party covered by Micro, Small and Medium Enterprises Development Act, 2006, if such party approaches the Council for resolution of dispute, other party may approach the civil court or any other forum making claims on the same issue. If two parallel proceedings are allowed,*



it may result in conflicting findings. At this stage, it is relevant to notice the judgment of this Court in the case of Edukanti Kistamma (Dead) through LRs. v. S. Venkatareddy (Dead) through LRs. & Ors.4 where this Court has held that a special Statute would be preferred over general one where it is beneficial one. It was explained that the purport and object of the Act must be given its full effect by applying the principles of purposive construction. Thus, it is clear that out of the two legislations, the provisions of MSMED Act will prevail, especially when it has overriding provision under Section 24 thereof. Thus, we hold that MSMED Act, being a special Statute, will have an overriding effect vis-à-vis Arbitration and Conciliation Act, 1996, which is a general Act. Even if there is an agreement between the parties for resolution of disputes by arbitration, if a seller is covered by Micro, Small and Medium Enterprises Development Act, 2006, the seller can certainly approach the competent authority to make its claim. If any agreement between the parties is there, same is to be ignored in view of the statutory obligations and mechanism provided under the 2006 Act. Further, apart from the provision under Section 23(2A) of the 1996 Act, it is to be noticed that if counter-claim is not permitted, buyer can get over the legal obligation of compound interest at 3 times of the bank rate and the —75% pre-deposit contemplated under Sections 16 and 19 of the MSMED Act.”

32. A perusal of the decision in *M/s. Silpi Industries (Supra)* would show that the Supreme Court took into consideration the following factors:
- (i) that the MSMED Act, 2006 is a beneficial legislation for Micro, Small and Medium sector;



- (ii) that the MSMED Act contemplates statutory arbitration;
- (iii) that the scheme of the Act requires the MSEFC to first conciliate and then arbitrate;
- (iv) that the MSMED Act, 2006 is a special legislation as compared to the A&C Act, 1996 and that there are differences in the mechanism provided in these two Acts ;
- (v) the obligation of the Buyer is to make prompt payment;
- (vi) that in case of delay, the liability is to pay interest to the Supplier at three times of the bank rate;
- (vii) that once a Supplier avails the jurisdiction of MSEFC, the Buyer cannot avoid the said jurisdiction on the plea that the MSEFC cannot entertain a counter claim by the Buyer. A counter claim can, therefore, be filed by the Buyer before the MSEFC to avoid parallel proceedings, which may lead to conflicting findings.

33. The decision of the Supreme Court in *M/s Shilpi Industries (Supra)* is rendered only in the context of a counter claim by the Buyer and not an independent proceeding by the Buyer as in the present case. The use of the word claim/counter claim in the said judgment would relate only to circumstances where a Supplier has already approached the MSEFC and the Buyer wishes to raise claims against the Supplier thereafter. Thus, the decision in *M/s Shilpi Industries (Supra)* does not deal with the question as to whether an independent claim by the Buyer against the Supplier which is registered under the MSMED Act, 2006 can be maintained or not. In view of the same, the said judgement of the Supreme Court would not be applicable to the present case.



34. Further, the judgement of the Hon'ble Bombay High Court in *M/s Steel Authority of India Ltd. (Supra)* is also distinguishable on facts as in the said case the Hon'ble Bombay High Court was dealing with a case in the same context as in *M/s Shilpi Industries (Supra)* i.e., in the context of counter claim filed by Buyer when the Supplier has already invoked the jurisdiction of the MSEFC.

35. Thus, neither of these judgments can be read by the Respondent No.2/ Supplier as supporting the proposition that an independent claim can be filed by a Buyer before the MSEFC against the Supplier registered under the MSMED Act, 2006. If such a claim is permitted to be entertained by the MSEFC, it would be contrary to the express wordings of the statute itself.

36. At the cost of repetition, the following language in the statute is highlighted:

(i) The heading of Chapter V of the MSMED Act – “*Delayed Payments to Micro And Small Enterprises*”

(ii) Section 15 of the MSMED Act, 2006:

15. *Liability of buyer to make payment.*

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

.....

(iii) Section 16 of the MSMED Act, 2006:

16. *Date from which and rate at which interest is payable. **Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the***



buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, ***be liable to pay*** compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

(iv) Section 17 of the MSMED Act, 2006:

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.

(v) Section 18 of the MSMED Act, 2006:

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.

37. The amount due under Section 17 can only be an amount liable to be paid by the Buyer to the Supplier and not the other way round. Thus, it is clarified that the language in Section 18 i.e., “any party to a dispute” cannot be extended to a claim by a Buyer against the supplier as the same is qualified as being only in respect of the amount due under Section 17.

38. Coming to the facts of the present case, Respondent No.2/ Buyer has filed an independent claim against the Petitioner/ Supplier. Moreover, the claim of the



Respondent No.2/ Buyer also appears to be in the form of a damages claim for compensation and is not in the nature of amount payable for goods supplied or services rendered. The Respondent No.1/ MSEFC does not appreciate the fact that in the present case, the claim is by a Buyer against a Supplier. The same is also evident from the impugned order itself, which appears to be a standard format order where only claims of Supplier are entertained by the Buyers. The MSEFC has failed to appreciate the fact that the said impugned order has been given at the instance of the Buyer, which its own form does not contemplate. It is evident that even basic application of mind has not been made by the MSEFC while issuing the impugned order.

39. The Respondent No.1/ MSEFC has also failed to consider the provisions of the MSMED Act, 2006 which provide that the MSEFC can only entertain claims from the Suppliers against the Buyers and counter claim by the Buyers against Suppliers and that it cannot entertain the independent claim by the Buyer against the Supplier under the MSMED Act, 2006.

40. The impugned order dated 14th September 2021 passed by the MSEFC is, therefore not sustainable and is accordingly set aside.

41. The issue of Respondent No.2/Buyer being a Medium Enterprise has not been gone into as the same is not relevant to the present case.

42. The present order would not, in any manner, effect the rights of the Respondent No.2/ Buyer to avail of its remedies in accordance with law including filing of a suit seeking recovery. Insofar as the issue of limitation is concerned, since a legal issue had come up for adjudication in the present case, the period during which the present case remained pending initially before



MSEFC and thereafter before this Court would be liable to be excluded by the appropriate forum. Nothing said in this order would have any bearing on the merits of the said dispute between the parties.

43. In view of the above discussion, the writ petition is allowed with no order to cost.

44. The present petition along with all pending applications is disposed of.

**PRATHIBA M. SINGH
JUDGE**

JULY 05, 2023

mr/kt

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