

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.1570-1578 OF 2021

M/s. Silpi Industries etc.Appellants

Versus

Kerala State Road Transport Corporation
& Anr. etc.Respondents

W I T H

CIVIL APPEAL NOS.1620-1622 OF 2021

M/s. Khyaati EngineeringAppellant

Versus

Prodigy Hydro Power Pvt. Ltd.Respondent

J U D G M E N T

R. Subhash Reddy, J.

1. In view of the common issues which arise for consideration, these appeals are heard together and disposed of by this common judgment.

2. Civil Appeal Nos.1570-1578 of 2021 are filed, aggrieved by the common judgment dated 11.08.2017 passed in Arbitration

Appeal Nos.69, 70, 72, 73, 77, 78, 79, 80 and 81 of 2014. By the aforesaid judgment, High Court has allowed the Arbitration Appeals filed by the respondent no.1-Kerala State Road Transport Corporation, by setting aside the common order dated 05.08.2014 passed in O.P.(Arb.) Nos.258 of 2007 etc. and the awards passed by the arbitrator. The High Court has remanded the matters to the arbitrator for disposal *de novo* in the light of the observations made in the judgment.

3. Civil Appeal Nos.1620-1622 of 2021 are filed, aggrieved by the order dated 06.09.2017 in O.P.No.617 of 2017, passed by the High Court of Madras, allowing the Original Petition filed by the respondent under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act') and the orders dated 31.10.2017 and 12.12.2017 passed in applications seeking interim directions.

4. Necessary facts in brief in the first batch of appeals referred above are as under :

The respondent no.1-Kerala State Road Transport Corporation (for short 'KSRTC'), invited tenders for supply of thread rubber for tyre rebuilding. The appellants herein who

were the claimants before the arbitrator were given purchase orders. As per the terms of the purchase order, 90% of the total purchase price was payable to the appellants/claimants on supply of materials and the balance 10% was to be paid subject to final performance report. This was so, since it was the condition that the thread rubber supplied by the appellants was to run a minimum number of kilometers. When the 10% balance amount was not paid as per the purchase order, the appellants/claimants herein have approached the Industrial Facilitation Council [previously constituted under the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (for short, 'IDPASC Act')] presently under the Micro and Small Enterprises Facilitation Council constituted under Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'the MSMED Act'). The earlier IDPASC Act was replaced by MSMED Act and earlier Act was repealed. As the conciliation failed, the claims made by the appellants herein were referred to arbitration under provisions of the 1996 Act. The awards were passed in favour of the claimants and such awards were challenged by way of applications for

setting aside the same under Section 34 of the 1996 Act. When their applications were dismissed, respondents have carried the matter by way of appeals under Section 37 of the 1996 Act before the High Court of Kerala at Ernakulam. The issues, which were formulated in paragraph 5 of the judgment and answered by the High Court, read as under:

- “(a) Whether the Limitation Act, 1963 applies to arbitration proceedings held under the IDPASC and MSMED Acts?
- (b) Which is the starting point of limitation to raise claim for the 10% unpaid purchase price?
- (c) Whether counter claim is entertainable in the arbitration proceedings held pursuant to the provisions of the IDPASC and MSMED Acts?”

5. In the impugned judgment, the High Court, while considering the submissions of the parties and by referring to various provisions of the Arbitration and Conciliation Act, 1996 and the provisions of the Limitation Act, 1963, has answered the issue of limitation and held that Limitation Act, 1963 is applicable to the proceedings under the 1996 Act arising out of MSMED Act. While answering the third question with regard to maintainability of counter claim, the High Court has held that in

view of Section 23(2A) of the 1996 Act, the ‘counter claim’ and ‘set off’ are maintainable. While holding that counter claim is maintainable, the High Court has agreed with the view taken by the learned Single Judge of Allahabad High Court in the case of **M/s. B.H.P. Engineers Pvt. Ltd. v. Director, Industries, U.P. (Facilitation Centre), Kanpur & Ors.**¹ and the Division Bench judgment of the High Court of Bombay at Nagpur in the case of **M/s. Steel Authority of India Ltd. & Anr. v. Micro, Small Enterprise Facilitation Council**². Primarily aggrieved by the findings recorded by the High Court on the applicability of Limitation Act, 1963 and maintainability of counter claim, the claimants have filed these appeals on various grounds.

6. Necessary facts in Civil Appeal Nos.1620-1622 of 2021 are as under :

The appellant and respondent herein have entered into a contract for supply and installation of hydro-mechanical equipments for 2 x 3 MW Baner-II SHP. The parties have signed an agreement on 27.03.2011, containing various clauses. It is the case of the appellant that it has completely executed the

¹ 2009 SCC OnLine All 565

² 2010 SCC OnLine Bom 2208

contract and project was commissioned on 27.06.2015. The appellant herein alleging that, though it has fulfilled all its obligations under the contract, the respondent has refused to make payments as per the contract, has filed a Claim Petition, before the Micro and Small Enterprises Facilitation Council constituted under the provisions of MSMED Act, on 20.03.2017. The claim was filed in respect of supply of goods and services rendered to the respondent-company. It is the case of the appellant that pursuant to notice issued by Facilitation Council, the respondent appeared before the Council. Thereafter the respondent has filed O.P.No.617 of 2017 before the High Court of Judicature at Madras. The said application was filed under Section 11(6) of the 1996 Act praying for appointment of a second arbitrator to decide upon disputes that have arisen between the parties pursuant to the breach of terms and conditions of contract for supply of hydro-mechanical equipments.

7. The said application filed by the respondent herein, is opposed by the appellant mainly on the ground that it has already moved the Micro and Small Enterprises Facilitation

Council for resolution of disputes, as such, the respondent as well participate in the proceedings before the Council, prayed for dismissal of application filed under Section 11(6) of the 1996 Act.

8. Before the High Court, it was the case of the respondent that the Facilitation Council has been constituted primarily to deal with the disputes that are raised by the supplier and does not envisage the laying of counter claim by other party to a contract, as such it can seek appointment of arbitrator under Section 11(6) of the 1996 Act.

9. The High Court, while considering the definition of 'supplier' under Section 2(n) of MSMED Act and also by placing reliance on Section 17 and 18 of MSMED Act, has allowed the application and appointed Mr. Justice K. Gnanaprakasam, former Judge of Madras High Court as 2nd arbitrator.

10. When the said order is challenged before this Court, by order dated 29.01.2018, while issuing notice this Court has ordered the Special Leave Petition be tagged with S.L.P.(C)Nos.33745-33753 of 2017 (C.A.Nos.1570-1578 of 2021).

11. In S.L.P.(C)Nos.33745-33753 of 2017 (C.A.Nos.1570-1578 of 2021), vide order dated 25.01.2018, this Court issued

notice limited to the issue as to whether the counter claim of the respondent could be entertained by the Arbitral Tribunal.

12. We have heard Sri V. Giri, learned senior counsel appearing for the appellants and Ms. Aishwarya Bhati, learned Additional Solicitor General appearing for the Kerala State Road Transport Corporation in Civil Appeal Nos.1570-1578 of 2021 and Sri P.B. Suresh, learned counsel appearing for the appellant and Sri Basava Prabhu Patil, learned senior counsel appearing for the respondent, in Civil Appeal Nos.1620-1622 of 2021.

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 ?

14. Before we deal with the above issues, we need to refer certain background aspects of the Micro, Small and Medium Enterprises Development Act, 2006 and the earlier Act, namely,

Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 which was repealed by virtue of Section 32 of the MSMED Act.

15. The Act 32 of 1993 was an outcome pursuant to a policy statement on small scale industries made by the Government in Parliament. It was felt that, inadequate working capital in small scale or an ancillary industrial undertaking causes serious and endemic problems affecting the health of such undertaking. The Small Scale Industries Board, which was an apex advisory body on policies relating to small scale industrial units with representatives from all the States, governmental bodies and industrial sector was also of the same view. Therefore, it was felt that prompt payments of money by buyers should be statutorily ensured and mandatory provisions for payment of interest on outstanding money, in case of default, should be made. The “appointed day”, as defined under Section 2(b) of the said Act, 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. Therefore, a liability to make payment by the buyer

was made under Section 3 of the said Act mandating that buyer shall make payment before the agreed date by the parties, where there is no agreement, before the appointed day. In case of failure to make payment by the buyer within the stipulated time as per Section 3, buyer was made to pay interest at one and a half time of Prime Lending Rate charged by the State Bank of India. There was also a mechanism for recovery and created Industry Facilitation Council, as primary body and appellate authority was notified under Section 7 of the said Act. Under Section 10 of the said Act, Act 32 of 1993 was given overriding effect.

16. The Micro, Small and Medium Enterprises Development Act, 2006 was enacted to provide, for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto. By bringing the aforesaid Act (Act 27 of 2006) w.e.f. 16th June 2006, the earlier Act, namely, Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 was repealed by virtue of Section 32 of the 2006 Act. Prior to the enforcement of Act 32 of

1993, the small scale industry was defined only by notification under Section 11B of the Industries (Development and Regulation) Act, 1951. As per Section 29B of the said Act, notifications were being issued notifying reservation of items for exclusive manufacture in small scale industry sector. Except the above said two provisions, as there was no legal framework for the small scale industry, and by noticing that the small scale industry is the dynamic and vibrant sector of the country's economy, it was felt to bring a comprehensive Central enactment to provide appropriate legal framework for the sector to facilitate its growth and development. It is also clear from the Statement of Objects and Reasons of the Act, that the need which was felt to extend policy support for small scale sector so that they are enabled to grow into medium ones and to adopt better and higher levels of technology and achieve higher productivity to remain competitive in fast globalization period. It was also noticed that medium industry or enterprise was not defined by any law. From the Statement of Objects and Reasons, it is clear that the said Act was enacted to provide statutory definitions to 'small enterprise' and 'medium enterprise'; to provide for

establishment of National Small and Medium Enterprises Board; provide for classification of small and medium enterprises on the basis of investment in plant and machinery; empower the Central Government to notify programmes, guidelines for enhancing the competitiveness of small and medium enterprises; to make provisions for ensuring timely and smooth flow of credit to small and medium enterprises to minimize the incidence of sickness; empower the Central and State Governments to notify preference policies in respect of procurement of goods and services; empowering the Central Government to create a Fund or Funds for facilitating promotion and development and enhancement of the competitiveness of small enterprises and medium enterprises; to make further improvements in the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 and to make that enactment a part of the proposed legislation and to repeal the enactment, etc.

17. From the Statement of Objects and Reasons of both the above legislations, it is clear that the earlier legislation, i.e., Act No.32 of 1993 was confined only with regard to delayed payments to small scale and ancillary industrial undertakings

but by subsequent enactment of 2006, a comprehensive legislation was brought covering the micro, small and medium enterprises. Under the new Act, there is a provision for establishment of Board by the Central Government, namely, National Board for Micro, Small and Medium Enterprises. The 'enterprises' were classified under Chapter III of the 2006 Act into micro, small and medium enterprises. Liability of buyer and the mechanism in the event of default is by various provisions under Chapter V of the Act. Sections 5 to 19 which are relevant for the purpose of disposal of these cases read as under :

“5. Functions of Board.—The Board shall, subject to the general directions of the Central Government, perform all or any of the following functions, namely:—

(a) examine the factors affecting the promotion and development of micro, small and medium enterprises and review the policies and programmes of the Central Government in regard to facilitating the promotion and development and enhancing the competitiveness of such enterprises and the impact thereof on such enterprises;

(b) make recommendations on matters referred to in clause (a) or on any other matter referred to it by the Central Government which, in the opinion of that Government, is necessary or expedient for facilitating the promotion and development and enhancing the competitiveness of the micro, small and medium enterprises; and

(c) advise the Central Government on the use of the Fund or Funds constituted under section 12.

6. Powers and functions of Member-Secretary of Board.—Subject to other provisions of this Act, the Member-Secretary of the Board shall exercise such powers and perform such functions as may be prescribed.

7. Classification of enterprises.—(1) Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central Government may, for the purposes of this Act, by notification and having regard to the provisions of sub-sections (4) and (5), classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, association of persons, co-operative society, partnership firm, company or undertaking, by whatever name called,—

(a) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), as—

(i) a micro enterprise, where the investment in plant and machinery does not exceed twenty five lakh rupees;

(ii) a small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or

(iii) a medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;

(b) in the case of the enterprises engaged in providing or rendering of services, as—

(i) a micro enterprise, where the investment in equipment does not exceed ten lakh rupees;

(ii) a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or

(iii) a medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees.

Explanation 1.—For the removal of doubts, it is hereby clarified that in calculating the investment in plant and machinery, the cost of pollution control, research and development, industrial safety devices and such other items as may be specified, by notification, shall be excluded.

Explanation 2.—It is clarified that the provisions of section 29B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall be applicable to the enterprises specified in sub-clauses (i) and (ii) of clause (a) of sub-section (1) of this section.

(2) The Central Government shall, by notification, constitute an Advisory Committee consisting of the following members, namely:—

(a) the Secretary to the Government of India in the Ministry or Department of the Central Government having administrative control of the small and medium enterprises who shall be the Chairperson, ex officio;

(b) not more than five officers of the Central Government possessing necessary expertise in

matters relating to micro, small and medium enterprises, members, ex officio;

(c) not more than three representatives of the State Governments, members, ex officio; and

(d) one representative each of the associations of micro, small and medium enterprises, members, ex officio.

(3) The Member-Secretary of the Board shall also be the ex officio Member-Secretary of the Advisory Committee.

(4) The Central Government shall, prior to classifying any class or classes of enterprises under sub-section (1), obtain the recommendations of the Advisory Committee.

(5) The Advisory Committee shall examine the matters referred to it by the Board in connection with any subject referred to in section 5 and furnish its recommendations to the Board.

(6) The Central Government may seek the advice of the Advisory Committee on any of the matters specified in section 9, 10, 11, 12 or 14 of Chapter IV.

(7) The State Government may seek advice of the Advisory Committee on any of the matters specified in the rules made under section 30.

(8) The Advisory Committee shall, after considering the following matters, communicate its recommendations or advice to the Central Government or, as the case may be, State Government or the Board, namely:—

(a) the level of employment in a class or classes of enterprises;

(b) the level of investments in plant and machinery or equipment in a class or classes of enterprises; 8

(c) the need of higher investment in plant and machinery or equipment for technological upgradation, employment generation and enhanced competitiveness of the class or classes of enterprises;

(d) the possibility of promoting and diffusing entrepreneurship in micro, small or medium enterprises; and

(e) the international standards for classification of small and medium enterprises.

(9) Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951) and clause (h) of section 2 of the Khadi and Village Industries Commission Act, 1956 (61 of 1956), the Central Government may, while classifying any class or classes of enterprises under sub-section (1), vary, from time to time, the criterion of investment and also consider criteria or standards in respect of employment or turnover of the enterprises and include in such classification the micro or tiny enterprises or the village enterprises, as part of small enterprises.

8. Memorandum of micro, small and medium enterprises.—(1) Any person who intends to establish,—

(a) a micro or small enterprise, may, at his discretion; or

(b) a medium enterprise engaged in providing or rendering of services may, at his discretion; or

(c) a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951),

shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):

Provided that any person who, before the commencement of this Act, established—

(a) a small scale industry and obtained a registration certificate, may, at his discretion; and

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O. 477(E), dated the 25th July, 1991 filed an Industrial Entrepreneur's Memorandum,

shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.

(2) The form of the memorandum, the procedure of its filing and other matters incidental thereto shall be such as may be notified by the Central Government after obtaining the recommendations of the Advisory Committee in this behalf.

(3) The authority with which the memorandum shall be filed by a medium enterprise shall be such as may be specified, by notification, by the Central Government.

(4) The State Government shall, by notification, specify the authority with which a micro or small enterprise may file the memorandum.

(5) The authorities specified under sub-sections (3) and (4) shall follow, for the purposes of this section, the procedure notified by the Central Government under sub-section (2).

9. Measures for promotion and development.—The Central Government may, from time to time, for the purposes of facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises, particularly of the micro and small enterprises, by way of development of skill in the employees, management and entrepreneurs, provisioning for technological upgradation, marketing assistance or infrastructure facilities and cluster development of such enterprises with a view to strengthening backward and forward linkages, specify, by notification, such programmes, guidelines or instructions, as it may deem fit.

10. Credit facilities.—The policies and practices in respect of credit to the micro, small and medium enterprises shall be progressive and such as may be specified in the guidelines or instructions issued by the Reserve Bank, from time to time, to ensure timely

and smooth flow of credit to such enterprises, minimise the incidence of sickness among and enhance the competitiveness of such enterprises.

11. Procurement preference policy.—For facilitating promotion and development of micro and small enterprises, the Central Government or the State Government may, by order notify from time to time, preference policies in respect of procurement of goods and services, produced and provided by micro and small enterprises, by its Ministries or departments, as the case may be, or its aided institutions and public sector enterprises.

12. Funds.—There shall be constituted, by notification, one or more Funds to be called by such name as may be specified in the notification and there shall be credited thereto any grants made by the Central Government under section 13.

13. Grants by Central Government.—The Central Government may, after due appropriation made by Parliament by law in this behalf, credit to the Fund or Funds by way of grants for the purposes of this Act, such sums of money as that Government may consider necessary to provide.

14. Administration and utilisation of Fund or Funds.—(1) The Central Government shall have the power to administer the Fund or Funds in such manner as may be prescribed. (2) The Fund or Funds shall be utilised exclusively for the measures specified in sub-section (1) of section 9. (3) The Central Government shall be responsible for the coordination and ensuring timely utilisation and release of sums in accordance with such criteria as may be prescribed.

15. Liability of buyer to make payment.—Where any supplier supplies any goods or renders any services to

any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day: Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

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

17. Recovery of amount due.—For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16. 10

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.

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.”

18. With regard to first issue, namely, applicability of Limitation Act, 1963 to the arbitration proceedings initiated under provisions of Micro, Small and Medium Enterprises Development Act, 2006, we need to notice certain relevant sections of the Act. As per Section 15 of the said Act, where supplier supplies any goods or renders any services to any buyer, the buyer shall make payment on or before the agreed date between the parties in writing or where there is no agreement, before the appointed day. Section 16 deals with date from which and rate of interest payable in the event of not making the payment. The recovery mechanism for the amount due is covered by Sections 17 and 18 of the said Act. If any party has a dispute with regard to amount due under Section 17, a reference is required to be made to the Micro and Small Enterprises

Facilitation Council. On such reference, the Council is empowered to conduct conciliation in the matter or seek assistance of any institution or centre providing alternate dispute resolution services by making a reference to such institution for conducting conciliation. If the conciliation is not successful, as contemplated under Section 18(2) of the said Act, same stands terminated under Section 18(3) of the said Act. Thereafter, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of Arbitration and Conciliation Act, 1996 are made applicable as if the arbitration was in pursuance of arbitration agreement between the parties, under sub-section (1) of Section 7 of the 1996 Act. Applicability of Limitation Act, 1963 to the arbitrations is covered by Section 43 of the 1996 Act. The High Court, while referring to abovesaid provisions and the judgment of this Court in the case of **Andhra Pradesh Power Co-ordination Committee & Ors. v. Lanco Kondapalli Power Ltd. & Ors.**³ has held that the Limitation Act, 1963 is applicable

³ (2016) 3 SCC 468

to the arbitrations covered by Section 18(3) of the 2006 Act. A reading of Section 43 itself makes it clear that the Limitation Act, 1963 shall apply to the arbitrations, as it applies to proceedings in court. When the settlement with regard to a dispute between the parties is not arrived at under Section 18 of the 2006 Act, necessarily, the Micro and Small Enterprises Facilitation Council shall take up the dispute for arbitration under Section 18(3) of the 2006 Act or it may refer to institution or centre to provide alternate dispute resolution services and provisions of Arbitration and Conciliation Act 1996 are made applicable as if there was an agreement between the parties under sub-section (1) of Section 7 of the 1996 Act. In view of the express provision applying the provisions of the Limitation Act, 1963 to arbitrations as per Section 43 of the Arbitration and Conciliation Act, 1996, we are of the view that the High Court has rightly relied on the judgment in the case of **Andhra Pradesh Power Coordination Committee**³ and held that Limitation Act, 1963 is applicable to the arbitration proceedings under Section 18(3) of the 2006 Act. Thus, we are of the view that no further elaboration is necessary on this issue and we hold that the provisions of Limitation Act,

1963 will apply to the arbitrations covered by Section 18(3) of the 2006 Act. We make it clear that as the judgment of the High Court is an order of remand, we need not enter into the controversy whether the claims/counter claims are within time or not. We keep it open to the primary authority to go into such issues and record its own findings on merits.

19. The other issue is with regard to maintainability of counter claim in the arbitration proceedings initiated as per Section 18(3) of the 2006 Act. It is true that recovery amount under Section 17 of the said Act is only with reference to the amounts claimed by the supplier under Section 16 of the said Act. But coming to Section 18 of the said Act, the words used are, 'any party to a dispute' for making a reference to Micro and Small Enterprises Facilitation Council under Section 18 of the Act. To decide the issue of maintainability we refer to the first batch of appeals, which are filed aggrieved by the judgment of the High Court of Kerala. The appellants are suppliers of thread rubber for tyre rebuilding to the respondent-KSRTC. They were given purchase orders by the Corporation and they were paid 90% of the total price and 10% was to be paid based on the final

performance report. Whereas it is the case of the appellants that they are entitled for balance amount of 10%, same was withheld illegally, on the other hand it is the case of the Corporation that as the performance of the supplies were not in accordance with the contractual terms, as such, the appellants are not entitled for any amount and in some of the matters counter claims were made by the Corporation against the appellants. Sri V. Giri, learned senior counsel appearing for the appellants in first batch of appeals has mainly contended that a comprehensive reading of the various provisions under Chapter V of the 2006 Act, makes it clear that the conciliation and arbitration, is referable to the claims of the supplier only. It is submitted that 2006 Act is a beneficial legislation to the micro and small enterprises, as such, scope of the Act cannot be expanded by allowing counter claims by buyer. It is submitted that the object of 2006 Act is solely intended to protect the micro and small enterprises, if counter claims are allowed it amounts to expanding the scope of the enactment. On the other hand it is submitted by Ms. Aishwarya Bhati, learned Addl. Solicitor General appearing for the respondent-Corporation and Sri P.B. Suresh, learned counsel

appearing for the appellant in Civil Appeal arising out of C.A.Nos.1620-1622 of 2021 that the MSMED Act which is a beneficial legislation to “unpaid seller” cannot be rendered *otiose*, and the authorities constituted under the Act cannot be denied its jurisdiction to entertain the claims, at the instance of buyer on the mere plea of counter claim. It is submitted that only on such ground that Facilitation Council is denied its jurisdiction, the various benefits conferred under the Act to the sellers will be denied. It is submitted that in every case to deny the benefits conferred under the Statute, the seller cannot be deprived of such benefits on the plea that counter claim is not maintainable before the authorities constituted under 2006 Act. By referring to Section 16 of the Act, it is submitted that where any buyer fails to make payment of the amounts 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 agreed upon, at three times of the bank rate notified by the

Reserve Bank. By further referring to Section 19 of the Act it is submitted that when an application is filed for setting aside decree, award or order same shall not be entertained by any court unless the appellant (not being a supplier), has deposited with it 75% of the amount in terms of the decree or award. The said benefits are conferred, in view of the beneficial objects of the Act, to the sellers. It is submitted that if the jurisdiction of the Council is ousted on the ground that counter claim cannot be entertained, buyer can easily get over the legal obligations of payment of compound interest and pre-deposit of 75% of the awarded amount in the event of challenge to the same, as referred above. Thus, it is submitted that the counter claim is maintainable before the authorities constituted under 2006 Act. Further, it is submitted that when the conciliation is failed, for further proceedings, provisions of the Arbitration and Conciliation Act, 1996 are made applicable as if there is an agreement between the parties under sub-section (1) of Section 7 of the 1996 Act, as such there is no reason for not allowing counter claim by the buyer. A specific reference is made to Section 23(2A) of the 1996 Act. Learned senior counsel Sri

Basava Prabhu S. Patil, appearing for the respondent in C.A.Nos.1620-1622 of 2021 has submitted that no claim or counter claim under Section 18 is contemplated or permissible. It is submitted that the expression 'any party' occurring in Section 18 is referable to supplier alone. Thus, it is submitted that in absence of jurisdiction, no counter claim can be entertained. Further it is submitted that in any event as the supply of goods and services were made much prior to filing of memorandum by the appellant, the appellant cannot make any claim before the authority constituted under MSMED Act.

20. From a reading of Section 18(3) of the 2006 Act it is clear that when the conciliation initiated under sub-section (2) of Section 18 of the said Act is not successful, the Council shall either itself take up the dispute for arbitration or refer to any institution for arbitration. Further Section 18(3) of the said Act also makes it clear that the provisions of 1996 Act are made applicable as if there is an agreement between the parties under sub-section (1) of Section 7 of the 1996 Act. Section 23 of the 1996 Act deals with the statement of claim and defence. Section 23(2A), which gives a right to respondent to submit a counter

claim or plead set-off with regard to claims within the scope of the arbitration agreement, is brought into Statute by Amending Act 3 of 2016. If we look at the Statement of Objects and Reasons of the Amending Act, same is also enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. Clause 11 of the Bill, by which sub-section (2A) was proposed to be inserted, states that sub-section (2A) was intended to give an opportunity to the respondent, in support of his case, to submit counter-claim or a set-off if such counter-claim or set-off falls within the scope of arbitration agreement. When Section 18(3) makes it clear that in the event of failure by the Council under Section 18(2) if proceedings are initiated under Section 18(3) of the 1996 Act, the provisions of 1996 Act are not only made applicable but specific mention is made to the effect as if the arbitration was in pursuance to an arbitration agreement referred to in sub-section (1) of Section 7 of the 1996 Act. When there is a provision for filing counter-claim and set-off which is expressly inserted in Section 23 of the 1996 Act, there is no reason for curtailing the right of the respondent for making

counter-claim or set-off in proceedings before the Facilitation Council.

21. It is also further to be noted that if we do not allow the counter-claim made by the buyer in the proceedings arising out of claims made by the seller, it may lead to parallel proceedings before the various fora. On one hand, in view of beneficial legislation, seller may approach the Facilitation Council for claims, in the event of failure of payment by the buyer under provisions of 2006 Act, at the same time, if there is no separate agreement between the parties for any arbitration in a given case, buyer may approach the civil court for making claims against the seller, or else if there is an agreement between the parties for arbitration in the event of dispute between the parties, parties may seek appointment of arbitrator. At the same time if the seller is covered by definition under micro, small and medium enterprises, seller may approach the Facilitation Council for making claims under the provisions of Micro, Small and Medium Enterprises Development Act, 2006. In such event, it may result in conflicting findings, by various forums.

22. In second set of cases it is clear that when the seller approached the Facilitation Council making certain claims against the buyer, buyer after his appearance, has approached the High Court under Section 11(6) of the 1996 Act for appointment of arbitrator on the ground that there is an agreement between the parties for arbitration. Though it was pleaded before the High Court by the appellant that it has already approached the Facilitation Council and proceedings are pending, the respondent as well contest the proceedings and also lay its counter-claim, the High Court has rejected such plea on the ground that the 2006 Act primarily deals with the claims of the seller only. The High Court has held that as the buyer cannot make counter-claim, the proceedings cannot be proceeded with before the Council under 2006 Act and accordingly ordered by appointing second arbitrator.

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

⁴ (2010) 1 SCC 756

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.

24. For the aforesaid reasons and on a harmonious construction of Section 18(3) of the 2006 Act and Section 7(1) and Section 23(2A) of the 1996 Act, we are of the view that counter-claim is maintainable before the statutory authorities under MSMED Act.

25. In C.A.Nos.1620-1622 of 2021, the High Court, while negating the plea of the appellant, on the maintainability of counter-claim, has allowed the application filed by the respondent under Section 11(6) of the 1996 Act and appointed the second arbitrator. Though, we are of the view that counter-claim and set-off is maintainable before the statutory authorities

under MSMED Act, appellant in this set of appeals is not entitled for the relief, for the reason that on the date of supply of goods and services the appellant did not have the registration by submitting the memorandum as per Section 8 of the Act. The bids were invited on 23.02.2010, appellant submitted its bid on 17.05.2010, respondent awarded contract to the appellant on 24.09.2010 and the parties signed the contract documents for supply of material, installation/commissioning of the power plant on 29.07.2011. Thereafter, supplies were made and the appellant has raised first invoice on 02.11.2011 for supply contract and also raised the first invoice pursuant to contract for installation on 07.07.2012 and the appellant has raised the last invoice in furtherance of contract for supply of material, on 29.03.2014. The appellant also claims to have raised last invoice on 29.03.2015 in furtherance of contract for installation. It is to be noticed that appellant approached the District Industrial Centre for grant of entrepreneur memorandum only on 25.03.2015.

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**⁵, 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

⁵ 2017 SCC OnLine Del 6978

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

⁶ (2019) 19 SCC 529

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.

28. For the aforesaid reasons, these Civil Appeals are dismissed with no order as to costs.

.....J.
[Ashok Bhushan]

.....J.
[R. Subhash Reddy]

New Delhi.
June 29, 2021