HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

W.P.Nos.27670, 27673, 27691, 27693, 27826, 27829, 28010, 28034 of 2021

And

4721, 6249 and 7616 of 2022

COMMON ORDER :

With the consent of the learned counsel appearing for the respective parties, the writ petitions were taken up for hearing and disposal.

For the petitioners, learned senior counsel Sri V.Ravinder Rao advanced his arguments and for the main contesting respondent (the contractor), Sri C.V.Mohan Reddy, learned senior counsel has advanced his arguments followed by Sri Ramachandra Rao Gurram.

The question in these cases is about the applicability of the Micro Small and Medium Enterprises Development Act, 2006 (Act 27 of 2006) (for short 'the Act') to the contracts entered into by the contractors with the petitioners'-Steel plant and the consequences there of.

For Petitioner:

For the Steel Plant, learned senior counsel argues that Act 27 of 2006 applies only to contracts of supply of goods and the rendering of services thereunder, but will not apply to the civil construction contracts. Learned senior counsel has filed a list of the works in each of the cases which are being dealt with and the same is reproduced here under:

Writ petition number	Description of work contract
28010 of 2021	Relocation of new steel yard-civil and associated works in Visakhapatnam steel Plant-civil and structural works as per BOQ part-A of Section1& II
27670 of 2021	Miscellaneous structural steel work-RMHP (zone-1) wherein the scope of work is mainly supply, fabrication and erection of mild steel-tubular handrails, supply of high tension bolts; fabrication and erection of structure after collecting raw steel from respondent; collection of fabricated/semi fabricated structures from respondent and directing the same after taking up necessary modifications; and application of painting on all structural steel works in RMHP (zone-1)
27673 of 2021	Design, Indianisation of Soviet materials, preparation of manufacturing drawings for purchase/consultant approval, fabrication/manufacture, supply erection, painting, testing after erection at site and commissioning of tanks in condensation pumphouse for COB-4
27691 of 2021	Structural steel works of coal handling plant, phase-II facilities for COB-4
27693 of 2021	Structural work, sheeting supply work and sheeting erection work for cable gallery in ASU-V area under VSP-V project
27829 of 2021	Indianization of Soviet materials, procurement of new materials, preparation of manufacturing drawings for purchase/consultant approval, fabrication manufacture, testing at works, painting, packing, forwarding, supply FOR-VSP stores/site, transportation of materials from store to election site of fluidised bed dryer and storage, testing before erection at site, grouting, erection, testing after direction at site painting, commissioning and trial run, guarantee for

	workmanship and performance of fluidised bed dryer for ammonia sulphate plant of COB-4.
27826 of 2021	Structural steel works for power plant phase-Il facilities for COB-4
28034 of 2021	Design, engineering, supply, erection, testing commissioning and performance guarantee tests of the plant including supervision of all site services and insurance and training of VSP personnel for indoor LBDS, HVLC and inter-plant cabling
4721 of 2022	Design, engineering and supply of equipment, erection, testing and commissioning including commissioning spares and insurance, space for indoor LBDS for structural mill
6249 of 2022	Structural steel and cladding works for raw material handling system (zone-1, area-3) conveyor system for feeding raw material to new BF, SP, SMS and CRMP.
7616 of 2022	Structural steel work for Madharam Mines (Specification No.VSP-6.3-11-STF-001)

The contention of the learned senior counsel in essence is that all though there is an element of supply in certain aspects of the contract, the essential work that is being executed by the contractor-respondent is 'civil construction/erection' etc., or what is termed as a works contract. He points out that these contracts are not a standalone supply contracts or service contracts. Therefore, learned senior counsel states that Act, 27 of 2006 will not apply. He also points out that the requisite memorandum under Section 8 of the Act is also not filed and therefore it is

alleged that the respondent-contractors cannot take the benefit of Act 27 of 2006. In some of the cases, learned counsel submits that the respondent-contractors have unilaterally approached the Facilitation Council under Section 18 of the Act, but the petitioner-Steel Plant has raised its protest before the said council and urged that the council does not have the jurisdiction to decide this issue. Learned senior counsel submits in general that once the Steel Plant appears under protest, they are not precluded from questioning the action in a writ under Article 226 of the Constitution of India. It is his contention that the facilitation council lacks the inherent jurisdiction to entertain the matter. Therefore, learned counsel argues that the writ petitions are maintainable. He relies upon ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors.***[1] and other cases which are filed along with this compilation of case law for this submission. He also cites ***Pioneer Traders and Ors. v. Chief Controller of Imports and Exports Pondicherry***[2], ***Cantonment Board and Ors. v. Church of North India***[3] and ***Hindustan Zinc Limited vs. Ajmer Vidyut Vitran Nigam Limited***[4] to argue that once there is an inherent lack of jurisdiction, this Court can and must interfere. Relying upon the provisions of the Act 27 of 2006 and in particular, sections 2(e), 2(n) and 2(d), learned senior counsel reiterates that it is only a

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[1] 1998 (8) SCC 1

[2] AIR 1963 SC 734

[3] 2012 (12) SCC 573

[4] 2019 (17) SCC 82

supply contract, which is dealt with under these sections. He points out that the Act refers to a buyer and supplier and not to a contractor. He points out that under Section 8 of the Act, filing of a memorandum is mandatory and unless the same is filed, the respondent-contractor cannot approach the facilitation council. Therefore, he argues that chapter V, which provides for payment, reference of dispute etc., is not applicable. He relies upon the decision of ***Silpi Industries etc., v. Kerala State Road Transport Corporation and another***[5]**.**

In the compendium of case law filed, learned senior counsel refers to case laws 4 to 8 i.e. ***Commissioner of Central Excise & Customs Kerala v. Larsen and Tourbro Ltd.,***[6], ***Shree Gee Enterprises v. Union of India and another***[7] , ***Rahul Singh v. Union of India***[8], ***Sterling & Wilson Private Ltd., v. Union of India***[9] to argue that the contract in question is essentially a works contract, which may have an incidence of supply of certain material. Therefore, he argues that the contract in question is a works contract only. He points out that in ***P.L.Adke v. Wardha Municipal Corporation***[10], Act 27 of 2006 itself fell for consideration and an argument similar to one that is advanced in this Court has been upheld and the works has been classified as

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[5] 2021 SCC Online SC 439

[6] 2016 (1) SCC 170

[7] 2015 SCC online Del 13169

[8] 2017 (122) ALR 65

[9] 2017 SCC Online Bom 6829

[10] 2021 (4) ABR 652

works contract. In all fairness, he also submits that this matter is pending before the Hon'ble Supreme Court, but no stay is granted. The learned senior counsel submits that the invocation of the jurisdiction of the facilitation council has no legal basis and the facilitation council cannot entertain such disputes. He prays that the writs should be allowed.

For respondent:

In reply to this, learned senior counsel Sri C.V.Mohan Reddy representing the contractor in W.P.No.28010 of 2021 advances the argument on behalf of all the contesting respondents. He has taken the lead and made the submissions for the respondent-contractor. Learned senior counsel submits that there is no dispute about the essential facts.

As far as the submission of the petitioners counsel about the filing of Section 8 memorandum, he submits that the same is not mandatory and it is so held by a judgment of the combined High Court of Telangana and Andhra Pradesh in W.P.No.35872 of 2012 and batch. Apart from that, the learned senior counsel also submits that the petitioners-Steel Plant has given benefits to the contractors at the time of tender itself, recognised their status as a small scale industry by waiving the security deposit, cost of the tender papers etc. Therefore, he submits that the objection raised on the basis of Section 8 of the Act is not tenable.

Learned senior counsel argues that the respondent-contractors in this batch of matters are all registered under the Act 27 of 2006. He argues that this is a beneficial legislation meant to promote, develop and enhance the competitiveness of

the micro, small and medium enterprises. Relying upon the Preamble of the Act, learned senior counsel points out that the purpose for which this Act has been brought into existence cannot be overlooked while interpreting the provisions of the Act. He points out that if a purposive interpretation is given to the provisions of this Act, it will be clear that the purpose of the enactment is to facilitate the development and enhancement of the MSMED and all matters connected thereto. It is also submitted that a separate facilitation council with its own rules and regulations for adjudicating the dispute has been created for the purpose of quick disposal of the disputes.

Learned senior counsel relies on a compendium of case laws that is filed by him including ***Ishwar Singh Bindra and Ors. vs. State of U.P.***[11], ***D.N. Banerji vs. P.R. Mukherjee and Ors.***[12], ***Lanco Anpara Power Limited vs. State of Uttar Pradesh and Ors.***[13] and ***Union of India (UOI) vs. Prabhakaran Vijaya Kumar and Ors.***[14]. In particular, learned senior counsel relies upon ***Lanco Anpara Power Limited*** (13 supra) and Paras 40 to 45 of this case to argue that a purposive interpretation is necessary and the intention behind the Act, is to be looked into and the purpose for which the Act has been enacted should always be kept in mind in deciding the cases.

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[11] AIR 1968 SC 1450

[12] AIR 1953 SC 58

[13] 2016 (10) SCC 329

[14] 2008 (9) SCC 527

On the issue of inherent lack of Jurisdiction etc., learned senior counsel submits that there is no question of an inherent lack of jurisdiction in the case for the Facilitation Tribunal. He submits that the Tribunal has the 'jurisdiction' to decide the entire dispute and to decide about the petitioners' objections or the respondent-contractors claim. Relying on ***Sushil Kumar Mehta v. Gobind Ram Bohra (Dead) through his Lrs.***[15] and ***V. Appannammanayuralu vs. B. Sreeramulu***[16], learned senior counsel argues that there is no question of inherent lack of jurisdiction and that therefore, a writ is not maintainable.

Sri Gurram Ramachandra Rao, learned counsel appearing for the respondents essentially adopted the arguments of Sri C.V.Mohan Reddy. In addition, relying upon the provision of law and the booklet of citations with the following decisions in ***Bhaven Construction through Authorised Signatory Premjibhai K.Shah v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd.***,[17], ***Deep Industries Limited v. Oil and Natural Gas Corporation Limited and another***[18] and ***Silpi Industries etc.,*** (5 supra) he submits that all the issues raised by the petitioners including the issue of competency/jurisdiction have to be raised before and decided by the Arbitrator only. He submits that the issue has already been raised also. Hence, he strongly argues that the writ petitions are not maintainable. He

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[15] 1990 (1) SCC 193

[16] 1978 (1) APLJ (HC) 63

[17] 2021 SCC Onlie SC 8

[18] (2020) 15 SCC 706

submits that in view of section 5 (minimal judicial intervention); section 16 of the Arbitration Act, 1996 and the law laid down in the leading judgments, this Court should not interfere and must relegate the parties to the council only, where all the issues will be decided.

The Government Pleader appearing for the other respondents submit that they adopt the arguments advanced by the learned senior counsel. The Union of India through the learned Assistant Solicitor General clarified that there is no separate counter or issue to be argued by them and that the learned counsels have covered all the issues raised.

COURT: The essential issues that arise for consideration in this batch of writ petitions are: (1) whether the contractors who were the successful tenderers for certain works awarded by the petitioner can invoke the provisions of Act 27 of 2006 for redressal of their grievances?. (2) Whether such contracts can be called 'service' contracts under Act 27 of 2006?

The facts in W.P.No.28010 of 2021 are being looked into since that is the lead case that was argued by both the learned senior counsels. The work in question in this case is the relocation of New Steel Yard and Civil Associate works. The letter of acceptance was initially issued on 19.05.2016. There are four sub-orders in this. (i) civil and structural works, (ii) Modular furniture work, (iii) Supply of water system works, Electrical, Telecom, Lan-datacom & Air-conditioning works, (iv) Erection, Testing & Commissioning of water system works, Electrical, Telecom, Lan-datacom & Air-conditioning works.

The contractor was requested by the petitioner to provide the tax bifurcation for the sub-orders on 20.05.2016. He provided the tax bifurcation including the taxes on 03.06.2016. Thereafter, a formal acceptance dated 19.07.2016 was issued to the contractor for a work valuing Rs.11,96,84,455/- and then the articles of agreement were signed on 10.11.2016. Thus, the award of the work and the formal contract were concluded in the period 19.05.2016 to 10.11. 2016.

A Reading of this agreement shows that the tender was accepted from the 'contractor', who agreed under articles 4 as follows:

> "In consideration of the payments to be made by the Employer to the Contractor as hereinafter mentioned, the Contractor hereby covenants with the Employer to construct, complete and maintain the Work in all respects and in conformity with the provisions of this Contract."

In clause 8, the following is agreed:

> "All disputes arising out of or in any way connected with this Agreement shall be deemed to have arisen in Visakhapatnam. Only the Courts in Visakhapatnam shall have jurisdiction to determine the same. However, the disputes, if any, shall be settled by Arbitration mentioned in the General Conditions of Contract."

The successful tenderer is referred to as a contractor only and not as a supplier.

Apart from this, this Court notices that basing on the quoted values with taxes given the total value of the work is Rs.13.11

crores. If the respondent-contractor's letter is taken into consideration, the civil and structural work is worth Rs.11,23,76,585/- without the taxes. The Modular furniture work or supply work and all the erection work put together come to Rs.1.49 crores i.e. the supply work is essentially limited to Rs.1.49 crores only, which includes supply of modular furniture and all other supply works. The balance of Rs.33.55 lakhs is the other erection work. Thus, it can be very clearly seen from the figures submitted by the respondent-contractor himself that a very very large percentage of the work or the predominant part of the work is civil and structural work only. Supply element is a small part.

Act 27 of 2006:

This Court also agrees that when an issue like that arises, there is a need to look into the purposes of the Act to come to a conclusion as to what was the intent of the legislature. As rightly pointed out by the learned senior counsel for the respondents in the decision of ***D.N.Banerji v. P.R.Mukherjee and others***[19] itself it was held as follows:

> "15. These remarks are necessary for a proper understanding of the meaning of the terms employed by the statute. It is no doubt true that the meaning should be ascertained only from the words-employed in the definitions, but the set-up and context are also relevant for ascertaining what exactly was meant to be conveyed by the terminology employed. As observed by Lord Atkinson in Keates v. Lewis Merthyr Consolidated

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[19] AIR 1953 SC 58

> Collieries [1911] A.C. 641 at 642, "In the construction of a statute it is, of course, at all times and under all circumstances permissible to have regard to the state things existing at the time the statute was passed, and to the evils which, as appears of thin from it provisions, it was designed to remedy." If the words are capable of one meaning alone, then it must be adopted, but if they are susceptible of wider import, we have to pay regard to what the statute or the particular piece of legislation had in view. Though the definition may be more or less the same in two different statutes, still the objects to be achieved not only as set out in the preamble but also as gatherable from the antecedent history of the legislation may be widely different. The same words may mean one thing in one context and another in a different context. This is the reason why decisions on the meaning of particular words or collection of words found in other statutes are scarcely of much value when we have to deal with a specific statute of our own; they may be helpful, but cannot be taken as guides or precedents."

This Court notices that Act 27 of 2006 was enacted to facilitate the MSMED. Prior to that, the industries were classified under the Industries (Development and Regulation) Act, 1951 (Act 65 of 1951). Section 11B of this Act 65 of 1951 dealt with the power of the Central Government to specify the requirements to be complied by small scale industrial units. Section 11B (1) of Act 65 of 1951 is extracted here under:

> 11B. Power of Central Government to specify the requirements which shall be complied with by small scale industrial undertakings.—(1) The Central Government may, with a view to ascertaining which ancillary and small scale industrial undertakings need supportive measures, exemptions or other favourable treatment under this Act to enable them to maintain their viability and strength and so

> as to be effective in— (a) promoting in a harmonious manner the industrial economy of the country and easing the problem of unemployment, and (b) securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good,

Section 29B of the Act 65 of 1951 also gives the power to the Central Government to exempt certain industries on the basis of the smallness of the number of workers employed, or the amount invested in the undertaking, or the desirability of encouraging small undertakings. The Government can by a notification exempt the application of the Act. The first schedule of this Act gives the list of industries which are regulated by the said Act. Section 2A and 2B of section 29B of Act 65 of 1951 are reproduced here under:

> 29 (2A) In particular, and without prejudice to the generality of the provisions of sub-section (1), the Central Government may, if it is satisfied, after considering the recommendations made to it by the Advisory Committee constituted under sub-section (2B), that it is necessary so to do for the development and expansion of ancillary, or small scale, industrial undertakings, by notified order, direct that any article or class of articles specified in the First Schedule shall, on and from such date as may be specified in the notified order (hereafter in this section referred to as the "date of reservation"), be reserved for exclusive production by the ancillary, or small scale, industrial undertakings (hereafter in this section referred to as "reserved article").
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> 29(2B) The Central Government shall, with a view to determining the nature of any article or class of articles that may be reserved for production by the ancillary, or small scale, industrial undertakings, constitute an Advisory Committee consisting of such persons as have, in the opinion of that Government, the necessary expertise to give advice on the matter.

If these sections are read in conjunction with the first schedule of the Act, which contains 38 items, it is clear that the Act was meant to regulate the industries for the manufacture or production of the 38 items/products with different nomenclatures in the first schedule. All of them relate to 'manufacture' and 'production' only.

After this, Act 32 of 1993 was promulgated for the purpose of Payment of Interest on Delayed Payments to Small Scale and Ancillary Undertaking Acts. This Act essentially concentrated on the payments and the interest payable of the amount due through the council.

This Act was repealed by Act 27 of 2006 (the Act being considered now). The statement and objects of Act, 27 of 2006 are as follows:

> "**STATEMENT OF OBJECTS AND REASONS**
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> Small scale industry is at present defined by notification under section 118 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." (emphasis supplied)

The Preamble to the Act 27 of 2006 is as follows:

"An Act 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."

In addition, in the opinion of this Court, the following definitions of Act 27 of 2006 are also important:

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

(e) "enterprise" means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (55 of 1951) or engaged in providing or rendering of any service or services;

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

(i)…

(ii)…

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

If a careful analysis of these sections is done and in particular, Section 2(e) and 2(n) of the Act, the following emerges:-

An enterprise is one by whatever name called, which is engaged in the manufacture or production of goods in any manner pertaining to an industry specified in the first schedule of the Act 65 of 1951 or engaged in providing or rendering of any services. Therefore, this enterprise is an enterprise engaged in manufacture or production of goods.

Supplier is defined in section 2(n). Of particular importance is section 2(n) (iii), which states that a supplier by whatever name called should be engaged in selling goods "produced by micro or small enterprises and rendering services which are provided by such enterprises'. Therefore, here also the emphasis is on services required for the purpose of selling etc., of goods which are produced by micro or small enterprises. The conjunction 'and' used in section 2(n) (iii) makes it clear that the services that are rendered are services related to the goods which are produced by micro and small enterprises. The legislature used the conjunction and therefore, in the opinion of this Court the services, which are rendered are the services pertaining to the goods manufactured and produced by the enterprises. Enterprise is defined as a unit engaged in production and manufacture of items with reference to an industry in the First Schedule. This is also clear from a reading of the statements of objects once again, wherein it is said that the emergence of a large service sectors assisting the small scale industry in the last two decades warrants a composite view

of the sector encompassing both industrial units and related service entities.

Therefore, in line with the judgments cited, this Court has examined the purpose and intent of the Act and is of the firm opinion that the services that are referred to under the said Act cannot be treated as every service that is rendered. The services referred to must have a direct connection with the manufacture and production of goods.

Apart from this; this Court also draws support from the following passage reported in ***Commissioner of Central Excise & Customs Kerala*** (6 supra):

> "19. In Larsen and Toubro Ltd. v. State of Karnataka, this Court stated: (SCC p.750, para 72)
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> 72. In our opinion, the term "works contract" in Article 366(29-A)(b) is amply wide and cannot be confined to a particular understanding of the term or to a particular form. The term encompasses a wide range and many varieties of contract. Parliament had such wide meaning of "works contract" in its view at the time of the Forty-sixth Amendment. The object of insertion of Clause (29-A) in Article 366 was to enlarge the scope of the expression "tax on sale or purchase of goods" and overcome Gannon Dunkerley [State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd. MANU/SC/0152/1958 : AIR 1958 SC 560 : 1959 SCR 379]. Seen thus, even if in a contract, besides the obligations of supply of goods and materials and performance of labour and services, some additional obligations are imposed, such contract does not cease to be works contract. The additional obligations in the contract would not alter the nature of contract so long as the contract provides for a contract for works and satisfies the primary description of works contract. Once the characteristics or elements of works contract are satisfied in a contract then irrespective of additional

> obligations, such contract would be covered by the term "works contract". Nothing in Article 366(29-A)(b) limits the term "works contract" to contract for labour and service only. The learned Advocate General for Maharashtra was right in his submission that the term "works contract" cannot be confined to a contract to provide labour and services but is a contract for undertaking or bringing into existence some "works". We are also in agreement with the submission of Mr. K.N. Bhat that the term "works contract" in Article 366(29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Parliament had all genre of works contract in view when Clause (29-A) was inserted in Article 366."

To the same effect is the judgment in ***Shree Gee Enterprises*** (7 supra). In this case, a notice inviting tender for replacement of sewer, waste water lines of residential flats of Indian Oil Nagar was issued. The purchase preference was given to MSE industries. The third respondent was given the contract in terms of the public procurement policy of MSEs 2012. This was challenged by the unsuccessful contractor. The Division Bench of the Delhi High Court clearly held that the purchase preference policy which was advocated by the Government is meant for giving preference to procurement of goods produced and services rendered of MSEs and that it would not be applicable to a work contract simpliciter. Therefore, the award of the work of the 3rd respondent was set aside. To the same effect is the judgment of the Division Bench of the Bombay High Court in ***Sterling & Wilson Private Ltd.*** (9 supra), wherein in para 43 it was clearly held that the provisions of this Act 27 of 2006 will not apply to the works contract which are essentially contracts of a composite nature involving supply of goods as well as labour and

services. The learned Judges also relied upon judgments of the other Courts to come to the conclusion.

Lastly, in the case of ***P.L.Adke*** (10 supra) also, the issue is similar to the present dispute before this Court. A contractor invoked the provisions of MSME Act for redressal of his grievances. The contract in question did not provide for an arbitration at all. The single Judge held that a major stumbling block the petitioner faces is the nature of the contract. In this case also, the work awarded to a contractor was a Sewerage scheme, which included sewerage, network, property connection, construction of bore house, sewage treatment plant etc. Learned single Judge clearly held that it is only a works contract and not a contract for supply of goods and providing services simpliciter.

Therefore, this Court for all the above reasons and in line with the case law cited holds that the work that the Act 27, 2006 would not apply to the works contracts which were awarded by the Visakhapatnam Steel Plant in these cases by a process of tender. Some element of supply is involved in these works and that by itself is not enough for this Court to hold that the stand of the respondents is correct.

The second and equally important issue raised is about the filing of the memorandum under section 8 of the Act 27 of 2006 and the invocation of the jurisdiction of the facilitation council. This Court finds that the definition of supplier in section 2(n) of the Act 27 of 206 is as follows:

> 2 (n) "supplier" means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes,—

In addition, the decision of the Hon'ble Supreme Court in ***Silpi Industries etc.,*** (5 supra) supports this view. In para 25 of the said decision, the Hon'ble Supreme Court noted all the dates. It was found that bids were invited on 25.02.2010; bid was submitted on 17.05.2010; work was awarded on 21.09.2010 and contract was signed on 29.07.2011. The section 8 memorandum was applied for by the appellant on 25.03.2015. Thereafter, in para 26, the following was decided among other things:

> "……………….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. ……………….. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of MSMED Act 2006, by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation."

In view of this clear and categorical finding, this Court has to hold that unless the 'memorandum' is filed under section 8 of Act 27 of 2006 and the contract is a pure and simple supply contract, a party cannot move the facilitation council nor can the council entertain and decide any dispute. In the words of the Hon'ble Supreme Court any other interpretation would lead to an

absurdity and conferring unwarranted benefits on a party that is not intended by the legislation. The fact that some of the contractors were registered as SSI units; or that EMD etc., were waived by the petitioner is immaterial in view of this clear legal position as enunciated by the highest Court of the land. Both these conditions must be present (a) the work must be 'supply' contract pure and simple (in contra distinction to a works contract) and (b) the memorandum under section 8 must be filed.

The factual position is as follows:

Writ Petition Number	Description
W.P. 27670 of 2021	Agreement 04.08.2012 R.4- No MSMED Memorandum under section 8
W.P.27673 of 2021	Agreement : 04.12.2007 MSMED Memorandum : 22.06.2013
W.P.27691 of 2021	Agreement: 10.06.2008 No MSMED Memorandum filed under section 8.
W.P.27693 of 2021	Agreement : 27.12.2011 No MSMED Memorandum under section 8.
W.P.27826 of 2021	Agreement : 10.06.2008 SSI on 30.09.1991 MSMED Memorandum on 22.06.2013
W.P.27829 of 2021	Agreement :04.12.2007 SSI – 30.09.1991 MSMED Memorandum – 22.06.2013
W.P.28010 of	Agreement : 10.11.2016 MSMED Memorandum not filed as per SO 1636(E) dated 29.09.2006 or as per SO 2052 (E)

	dated 30.06.2017. Only NSIC registration.
W.P.28034 of 2021	Date of Contracts :18.09.2008 Registration of MSMED Memorandum: 23.04.2007
W.P.6249 of 2021	Agreement 08.05.2007 Letter of acceptance – 02.08.2007 MSMED Memorandum : 24.07.2013
W.P.7616 of 2022	Order / agreement: 05.01.2008 MSMED Memorandum 24.07.2013
W.P.4721 of 2022	Agreement 14.08.2010 MSME Memorandum 23.04.2007

It is thus clear that only the respondent in WP.No.28034 and 4721 of 2021 filed their section 8 memorandum before the award of the work. However, due to the finding that Act, 27 of 2006 will not apply to a works contract, the said company is also denied the benefit.

The next issue is about the invocation of the writ jurisdiction by this Court. This Court is of the firm opinion that in view of its interpretation mentioned above and the case law referred to, the Act 27 of 2006 will not apply to a works contract like the works in question. As the respondent-contractor will not fall within the definition of a 'supplier' and the petitioner will not fall within the definition of a buyer, this Court holds that the Act

27 of 2006 will not apply. The contractors did not also file the section 8 memorandum as required to claim the benefit of the Act except in one case.

If the Act will not apply, the question that arises is does the 'facilitation council' have the 'jurisdiction' to entertain the matter. Para 7 of the Division Bench judgment of the A.P. High Court reported in ***V. Appannammanayuralu*** (16 supra) defines inherent lack of jurisdiction lucidly and as follows:

> "7. In the first place, it must be found out what is meant by inherent lack of jurisdiction. The adjective "inherent" has its origin in the verb "inhere". According to the Oxford Dictionary "inhere" means "exist, abide in, be vested in". Therefore, the adjective "inherent" indicates something which exists or abides or vests in a person or authority. When this adjective is applied to a court's jurisdiction, it means that a jurisdiction to dispose of a cause is vested in it or abides in it. Consequently, inherent lack of jurisdiction means a power or jurisdiction which does not at all exist or vest in a Court. To put it in other words, a Court can be said to lack inherent jurisdiction when the subject-matter before it is wholly foreign to its ambit and is totally unconnected with its recognised jurisdiction. ...."

Once this Court holds that the Act does not apply; the council also does not have the jurisdiction to entertain and decide this sort of dispute. It means that the subject matter is wholly outside its power or totally foreign to its ambit. Therefore, the petitioners are fully within their rights in raising the issue and

seeking a decision by this Court. It is an admitted case that the petitioners have appeared under protest before the Facilitation Council. Once a party appears before the Court or a Tribunal and raises an issue about the jurisdiction of the said Tribunal, it cannot be said that they have submitted to its jurisdiction. They are appearing under protest. Therefore, they are at liberty to seek an adjudication of this issue before this Court under Article 226 of the Constitution of India since it is a case of absolute lack of jurisdiction.

Related to this issue of the writ being filed is the issue raised by Sri Gurram Ramachandra Rao, learned counsel that all the issues of jurisdiction etc., must be raised before and decided by the Facilitation Council only. He states that in view of section 5 of the Arbitration Act, 1996 the Courts interference is ruled out. He argues that the Facilitation Council has the competence to decide all the issues as per Section 16 of the Arbitration Act. He relies upon the case law mentioned earlier. However, a close examination of the case law reveals the following:

In para 17 of ***Deep Industries Limited*** (18 supra), it is held as follows:

> 17. This being the case, there is no doubt whatsoever that if petitions were to be filed Under Articles 226/227 of the Constitution against orders passed in appeals Under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante Clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed Under Article 227 against judgments allowing or dismissing first

> appeals Under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.

Similarly, in para 18 of ***Bhaven Construction*** (17 supra) it is held as follows:,

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

This Court is conscious of its very limited jurisdiction in view of these judgments but the question is when this Court holds that there is a patent lack of jurisdiction as the mandate of ***Silpi Industries*** (5 supra), is not followed and the provisions of Act, 27 of 2006 are not applicable to works contract - should this Court be a silent spectator and allow the issue to go to the Facilitation Council - then the challenge to the Award under section 34 of Arbitration Act; the appeals etc., thereon before the issue is settled or should the Court express its opinion now itself? This case in the opinion of this Court falls within the 'exceptional circumstances' of para 18/20 of ***Bhaven Construction*** (17 supra) and para 16 of ***Deep Industries Limited*** (18 supra). This Court therefore is of the opinion that it must interfere at this stage itself. Hence, this objection is also overruled.

Conclusion:

As (1) the contracts are works contracts with an element of supply and not mere supply and service contracts and (b) the contractors have also not filed the memorandum under section 8 of Act 27 of 2006 as held in ***Silpi Industries etc.,*** (5 supra), this Court holds that the writ petitions are to be allowed. Accordingly, the writ petitions are allowed.

As a sequel, the miscellaneous petitions, pending if any, shall stand closed.

D.V.S.S.SOMAYAJULU,J

Date : 26.04.2022
Note: L.R. copy be marked
KLP