

(2024) 12 JH CK 0083

In the Jharkhand High Court

Case No : Writ Petition (C) No. 5099 Of 2023

M/s. Shiva Minerals (a Proprietorship concern)

APPELLANT

Vs

Sagar Mining and Metal Industries Pvt. Ltd

RESPONDENT

Date of Decision : 18-12-2024

Acts Referred:

Constitution of India. 1950 — Article 226, 226(2), 226(3), 227
Micro, Small and Medium Enterprises Development Act, 2006 — Section 2(n), 18, 18(2), 18(3), 18(4), 24
Arbitration and Conciliation Act, 1996 — Section 34, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

Citation : (2024) 12 JH CK 0083

Hon'ble Judges : Deepak Roshan, J

Bench : Single Bench

Advocate : Sumeet Gadodia, Shrestha Gautam

Final Decision : Disposed Of

Judgement

Deepak Roshan, J

1. Heard learned counsel for the parties.

2. The brief fact of the case as it appears from the pleadings is that the Respondent No.1- Sagar Mining and Metal Industries Pvt. Ltd. filed a reference under Section 18 of 'The Micro, Small and Medium Enterprises Development Act, 2006' (hereinafter referred to as 'MSME Act' for short) before the Micro and Small Enterprises Facilitation Council, Odisha (hereinafter referred to as 'MSME Council' and/or 'Facilitation Council') which was registered as M.S.M.E.F.C. Case No. 60 of 2022.

3. A perusal of the aforesaid petition filed by Respondent No.1 would reveal that Respondent No.1 claimed itself to be a small-scale enterprise and a 'supplier' within the meaning of Section 2(n) of the MSME Act and claimed that it is registered under the said Act w.e.f. 19.06.2019. Respondent No.1 further claimed that it was having technical expertise and capability to handle execution

of contracts of mining and quarrying and a work order dated 07.11.2015 was issued to it by the Petitioner for installation of fully automated crushing plant and screening unit in the plant premises of Petitioner located at Barabhumri in the State of Jharkhand.

4. It has been further stated by the Respondent No.1 that an agreement was executed with the Petitioner on 1st July, 2016 for transfer of right to use the machinery of the Respondent and, in furtherance to the said agreement, Respondent gave on rent the aforesaid machinery for a period of 4 years at a consideration of Rs. 12,50,000/- per month. It was further contended that a tripartite Memorandum of Understanding (for short 'MoU') was entered on 10.02.2016 between the Claimant-Sagar Mining and Metal Industries Pvt. Ltd., the Petitioner M/s Shiva Minerals and one M/s Steel Re-rollers. It was stated that under the aforesaid MoU, Respondent-Claimant was responsible for creating infrastructure for mining in the leasehold area allotted by the Government of Jharkhand and the Petitioner was responsible for setting up of the processing plant and the third-party M/s Steel Re-rollers was responsible for infusing funds for the venture; however, it was pleaded that the said third party M/s Steel Re-rollers voluntarily withdrew from the memorandum of understanding.

5. It was further pleaded before MSME Council, Odisha that before completion of the contract period of 5 years the work ceased to continue and Petitioner neither returned the installed machinery nor rent was paid by the Petitioner. Accordingly, claim was made towards unpaid rent of machinery for the period from July, 2016 till August, 2018 of an amount of Rs. 5,75,25,000/-.

It was further pleaded by the Respondent No.1 that as per the work order, Respondent No.1 was entitled to further charge a sum of Rs. 100 per metric tonne for processing 30,000 metric tonne stone chips but since as per the environmental clearance certificate only 18,000 metric tonne stone chips were allowed to be processed, the Respondent-Claimant carried out the aforesaid work under the work order for the period July, 2016 till August, 2018 and raised bills for an amount of Rs. 5,52,24,000/- which was unpaid by the Petitioner. Under the aforesaid circumstances, Respondent-Claimant preferred the application under Section 18 of the MSME Act for realization of a total sum of Rs. 11,27,49,000/- along with interest thereupon from the Petitioner and, accordingly, filed reference before MSME Council, Odisha which was registered as MSMEFC Case No. 60 of 2022.

6. From records it further transpires that a notice contained in memo No. 8320 dated 14.10.2022 was issued to the Petitioner directing the Petitioner to file his written statement/counter in respect of the aforesaid case. Thereafter, the first proceeding of MSME Council was held on 29.03.2023 being its 100th sitting but the Petitioner did not appear on the said date of hearing and MSME Council directed for initiation of conciliation process as contemplated under Section 18(2) of the MSME Act and adjourned the proceedings to be held on 2nd May, 2023. On 2nd May, 2023, the Petitioner appeared before MSME Council and sought time for

filing reply affidavit which was granted to it, but on the said date itself it was recorded by MSME Council that conciliation process failed and, accordingly, MSME Council proceeded to invoke arbitration proceedings under Section 18(3) of the Act and fixed the next date of hearing on 05th June, 2023.

On 05th June, 2023, the MSME Council recorded that both the parties were present for hearing and the matter was heard at length and judgment was reserved, thereafter, vide impugned order dated 09.08.2023 order was passed by the MSME Council allowing the entire claim of Respondent-Claimant of Rs. 11,27,49,000/- and further interest claim of Rs. 9,46,00,574/- was allowed up to 31.12.2021 and further compound interest with monthly rest was further directed to be paid @ 3 times of bank rate as notified by Reserve Bank of India payable till realization of dues. The aforesaid order has been impugned in the present writ application.

7. Mr. Sumeet Gadodia, learned counsel appearing for the petitioner vehemently submits that the Order/Award passed by MSME Council is non est, patently illegal, and there exists no arbitral award in the eyes of law. While assailing the impugned order, it has been submitted that the said order has been passed in utter violation of the provisions of Section 18(2) of the MSME Act, without carrying out any conciliation as prescribed under the provisions of Section 65 to 81 of the Arbitration and Conciliation Act, 1996 (for short 'Arbitration Act'), MSME Council recorded that conciliation process has failed. It has been submitted that notice in reference case was issued to Petitioner on 14.10.2022, and first proceeding of MSME Council was held on 21.03.2023, wherein the Petitioner could not appear, but in absence of the Petitioner, MSME Council directed for initiation of conciliation process and adjourned the proceedings to be held on 2nd May, 2023. On 2nd May, 2023, the Petitioner appeared before MSME Council and sought time to file reply which was accorded to the Petitioner and next date in the matter was fixed on 05th June, 2023, but interestingly, on the said date itself it was recorded that conciliation proceedings undertaken by MSME Council failed, and consequently, arbitration proceedings under Section 18(3) of the MSME Act were invoked.

8. It has been further submitted by learned counsel that almost identical issue came up for consideration before the Hon'ble Supreme Court in the case of Jharkhand Urja Vikas Nigam Limited V. State of Rajasthan & Ors. reported in (2021) SCC Online SC 1257, wherein the Hon'ble Apex Court held that writ petition would be maintainable challenging the Award of MSME Council as the said award would be a nullity in view of the fact that mandatory provisions of conciliation under the MSME has not been followed by the Council. Reliance is further placed upon the decision of the Hon'ble Supreme Court in the case of Vijeta Construction v. Indus Smelters Ltd. and Another reported in (2021) SCC OnLine SC 3436, wherein the Hon'ble Apex Court, again under similar circumstances, held that provisions of MSME Act are required to be followed and in absence of any conciliation proceedings being undertaken by the Council, the

Award rendered by the Council would be a nullity and can even be set aside in exercise of writ jurisdiction by the High Court and availability of alternative remedy of challenging the award under Section 34 of the Arbitration and Conciliation Act, 1996 would not be a bar for entertaining such writ petition. Further, reliance has been made upon a Division Bench decision of this Court in the case of M/s G.P.T. Infraprojects Limited and Another v. State of Jharkhand and Others, wherein the Division Bench of this Court, while relying upon the aforesaid decisions of the Hon'ble Apex Court under similar circumstances where no conciliation proceedings were undertaken by the MSME Council, declared the award as nullity and non-existent in the eye of law and further set aside the same in exercise of the powers under Article 226 of the Constitution of India.

9. Mr. Gadodia further referred to the proceedings of the MSME Council recorded in the impugned order, and contended that from the impugned order, it would be evident that final hearing before the MSME Council was held on 05th June, 2023 and it was recorded on the said date that the matter had been heard at length and thereafter, final order was passed on 09th August, 2023. While referring to an e-mail dated 25th May, 2023 (Annexure-10), it was submitted that prior to the date fixed by MSME Council i.e. 05th June, 2023, an application for adjournment was submitted by the counsel of the Petitioner seeking adjournment due to ensuing holidays and fixing further date of hearing for filing reply affidavit before MSME Council. While referring to the reply affidavit contained at Annexure-11 and counterclaim contained at Annexure-12 of the writ application, it has been submitted that the reply affidavit was filed by the Petitioner including counterclaim before MSME Council on 04th July, 2023 and as per the Petitioner on 05th June, 2023, no proceedings were held of MSME Council and it has been incorrectly recorded that final hearing was concluded by MSME Council on 05th June, 2023.

In order to substantiate the aforesaid submission, it has been submitted that from the impugned order dated 09th August, 2023, it would transpire that the said impugned order not only considers the reply filed by the Petitioner but also the counterclaim filed by the Petitioner and the said reply affidavit and counterclaim filed by Petitioner was affidavited on 4th July, 2023 and only thereafter the same was filed before the MSME Council. It was thus contended that it is unconceivable as to how MSME Council proceeded to pass impugned order considering the reply as well as the counter claim which were affidavited on 04th July, 2023, whereas it has been recorded by the MSME Council that the arguments were concluded on 05th June, 2023 itself.

On the basis of the above, it has been submitted that entire proceedings conducted by MSME Council was in violation of the principles of natural justice and were liable to be set aside by this Court under its Writ jurisdiction.

It has been further argued that from a bare perusal of the claim petition, it would be evident that the Claimant claimed the amount towards unpaid rent of machinery from July, 2016 till August, 2018 and has further claimed an amount

towards conversion charges from July, 2016 to August, 2018. Reference was made to the pleadings made by Respondent-Claimant itself to demonstrate that Respondent-Claimant was registered under the provisions of the MSME on 19th June, 2019 and by placing reliance upon the decision of the Hon'ble Apex Court in the case of *Silpi Industries Etc. v. Kerela State Road Transport Corporation and Another*, reported in (2021) SCC OnLine SC 439, and as well as the decision in the case of *Gujarat State Civil Supplies Corporation Limited v. Mahakali Foods Private Limited and Anr.* reported in (2023) 6 SCC 401, it was submitted that Hon'ble Supreme Court clearly held that a party who is not the 'Supplier' as per the definition contained in Section 2(n) of the MSME Act on the date of entering into the contract cannot seek any benefit as 'Supplier' under the said Act.

It has been contended that if any registration is obtained subsequently, the same would have an effect prospectively, and the party would be entitled for the benefit under the MSME Act in respect of supply of goods and services subsequent to the said registration. On the basis of aforesaid two decisions, it has been submitted that, admittedly, as per the pleading of the Respondent-Claimant itself, the claim pertained to the period July, 2016 to August, 2018; whereas Respondent-Claimant got itself registered under the MSME Act on 19th August, 2019 and, hence, its petition itself was not maintainable before MSME Council and, thus, any consequential award passed thereupon is a nullity in the eye of law.

On the issue of territorial jurisdiction of this High Court as raised by the Respondents, learned counsel for the Petitioner relied upon the provisions of Section 18(4) of the MSME Act and contended that under Section 18(4) of the MSME Act, the supplier can invoke the jurisdiction of MSME Council at the place where the supplier is located, but the same would only be construed as a 'venue' of arbitration and not the 'seat' of arbitration, if any contrary intention is reflected in the agreement entered between the parties. On this issue he referred the MoU dated 10th February, 2016, entered between the parties, wherein it was clearly provided inter alia that the courts at Jamshedpur shall have jurisdiction in the matter. It was, thus, contended that an order passed by MSME Council being in the nature of an arbitral award, the location of the MSME Council would only be treated as the venue of such arbitration, but in view of the agreement between the parties conferring jurisdiction to the courts at Jamshedpur, the seat of such arbitration proceedings would be deemed to be at Jamshedpur within the State of Jharkhand within the jurisdiction of this High Court, and, thus, writ petition in terms of Article 226 (2) of the Constitution of India would be maintainable before this Court. Reliance has been placed in this regard to the decision of the Bombay High Court in the case of *Gammon Engineers and Contractors Pvt. Ltd. v. Sahay Industries* reported in (2023) SCC OnLine Bom 750 as well as the decision of the Delhi High Court in the case of *Indian Oil Corporation Ltd. v. Fepl Engineering (P) Ltd. and Another* reported in (2019) SCC OnLine Del 10265.

The Petitioner further relied upon the decision of the Hon'ble Supreme Court in the case of *State of Goa v. Summit Online Trade Solutions Pvt. Ltd. and Others* reported in (2021 SCC OnLine 439) on the issue of maintainability of writ petition on the ground of territorial jurisdiction and submitted that admittedly a part of cause of action being alleged execution of the work by Respondent-Claimant has been executed within the territorial jurisdiction of this High Court i.e. State of Jharkhand and thus this High Court even otherwise in terms of the constitutional mandate of Article 226 (2) of the Constitution of India is having territorial jurisdiction to entertain the writ petition.

10. Per contra, Mr. Shrestha Gautam, learned counsel appearing for Respondent-Claimant has vehemently opposed the writ petition and argued that this High Court has no territorial jurisdiction to entertain the writ petition. At this stage itself, it may be recorded that Respondent No.1 filed its appearance and filed an interlocutory application under Article 226(3) of the Constitution of India for vacating the interim order dated 10.10.2023 earlier passed by this Court; however, no counter affidavit was filed by Respondent No. 1, but, during the course of argument, Mr. Gautam agreed that the matter would be finally decided by this Court on the basis of pleadings and the statements made in the interlocutory application by Respondent No.1. In fact, liberty was also given to the parties for filing written submissions and Respondent No.1 filed its detailed written submission before this Court.

The Respondent No.2 i.e. MSME Council, Odisha despite service of notice did not enter appearance before this Court.

11. Learned counsel for the Respondent No.1 by relying upon the provisions of Section 18(4) of the MSME Act contended, inter alia, that said provision contains a non-obstante clause and provides, inter alia, that MSME Council, where the supplier is located, shall have jurisdiction to act as an Arbitrator or Conciliator under the Act. It has been submitted that since the supplier i.e. Respondent-Claimant was located within the territorial jurisdiction of the State of Odisha, as such, MSME Council, Odisha has rightly exercised its jurisdiction while adjudicating the dispute between Petitioner and Respondent-Claimant. It has been submitted that cause of action in the present writ application arose in the State of Odisha as the order was passed by MSME Council, Odisha, and as such, only the courts in Odisha will have territorial jurisdiction to adjudicate upon any dispute between Writ Petitioner and Respondent-Claimant.

12. Further, while placing reliance upon Section 24 of the Act, it has been submitted that the MSME Act has an overriding effect over any law which is in existence and it was submitted that the Hon'ble Supreme Court in the case of *Union of India v. Alapan Bandyopadhyay* reported in (2022) Live Law SC 12, held that the power vested in High Court to exercise judicial superintendence over the decisions of all Courts and Tribunals within the respective jurisdictions, is a part of the basic structure of the Constitution and the decisions of Tribunals would be subjected to the High Court's writ jurisdiction within whose territorial jurisdiction

the particular tribunal is located.

Further, reliance has been placed upon the decision of the Delhi High Court, wherein an order was passed by a Tribunal at Mumbai was challenged before the Delhi High Court in the case of *Army Welfare Housing Organisation v. Halko Infra Projects and Another* (2024) SCC OnLine Del 3378. Relying upon the said decision, it has been submitted that the Delhi High Court held that it has no territorial jurisdiction to entertain the challenge to the order passed by MSME Council, Mumbai, wherein a reference under Section 18 was challenged before the Delhi High Court and the same was dismissed on the ground of territorial jurisdiction. Further, reliance was placed to the decision of the Kerala High Court in the case of *M/s Shreyas Marketing v. MSME Bangalore and Ors.*, being W.P.C. No. 3327 of 2021, wherein the Kerala High Court dismissed the writ petition even though a part of cause of action arose within its territorial jurisdiction based on the doctrine of forum convenience. It has been submitted that in the said decision, the Kerala High Court held that since the Facilitation Council and the supplier are both located in the State of Karnataka, any award passed by the Facilitation Council can only be challenged in Karnataka Principal Civil Court and, thus, the majority of cause of action took place in the State of Karnataka and, on the said ground, writ petition was not entertained.

Further, reliance has been placed upon the decision of the Hon'ble Supreme Court in the case of *Ambika Industries v. Commissioner of Central Excise* reported in (2007) 6 SCC 767 on the principle of forum convenience. Reliance has also been placed upon the decision of this High Court in the case of *Central Bank of India v. Their Workman Dinanath Tiwary* reported in (2018) SCC OnLine Jhar 1703, wherein again this Court declined to interfere and exercise its jurisdiction based on the principle of forum convenience.

13. Mr. Shrestha Gautam further argued that Writ Petitioner has an alternative remedy of filing an application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award of the MSME Council dated 09.08.2023 and reliance was placed in that regard to a Division Bench of this Court in the case of *M/s MECON Ltd. v. Jharkhand MSME Facilitation Council, Ranchi and Another* being L.P.A. No. 400 of 2022.

14. Learned Counsel further, while relying upon the provisions of Section 19 of the MSME Act, argued that the instant writ petition is not maintainable in the light of the aforesaid provision which provides inter alia that no application for setting aside any decree, award or any other order made by the Council shall be entertained unless the supplier has deposited 75% of the amount in terms of the decree or award. In this regard, reliance was placed by Respondent-Claimant upon the decision of the Hon'ble Apex Court in the case of *India Glycols Limited and Another v. MSMEFC, Medchal and Ors.* (2023) SCC OnLine SC 1852.

15. Having heard learned counsel for the rival parties and after going through the documents annexed with the respective affidavits and the averments made

therein, the following questions of law are involved for determination by this Court namely: -

(i) Whether the instant writ application is maintainable challenging the order dated 09.08.2023 passed by Micro and Small Enterprises Facilitation Council, Odisha under the provisions of Micro, Small and Medium Enterprises Development Act, 2006?

(ii) Whether this High Court has territorial jurisdiction under Article 226(2) of the Constitution of India to entertain the writ petition challenging an order passed by Micro and Small Enterprises Facilitation Council, Odisha?

(iii) Whether order dated 09.08.2023 passed by Micro and Small Enterprises Facilitation Council, Odisha warrants interference by this Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India?

So far as the first issue is concerned i.e. "Whether instant writ application is maintainable challenging the order passed by MSME Council, Odisha under the provisions of MSME Act", from the pleadings, it would be evident as under:-

Sl. No.

Date

Proceedings

1

2022

Reference application registered as MSMEFC Case No. 60 of 2022 filed by Respondent No.1-M/s. Sagar Mining and Metal Industries Pvt. Ltd. before MSME Council, Odisha at Cuttack.

2

14th October, 2022.

Notice was issued to Petitioner M/s. Shiva Minerals by MSME Council, Odisha for filing Written Statement/Counter against the claim filed by Respondent No.1. No date of hearing was fixed in the said notice.

3

29.03.2022

100th sitting of MSME Council was held on 29.03.2023 and Writ Petitioner was absent on the said date and it was recorded in the order that no Counter has been filed to the claim petition and, due to absence of Writ Petitioner, process of adjudication could not be furthered and, accordingly, case was adjourned. A decision was taken to initiate conciliation process under Section 18(2) of the MSME Act.

4

02.05.2023

101st sitting of MSME Council was held and Writ Petitioner appeared and prayed for time for filing Counter, and, the Council permitted the Writ Petitioner to file its Counter before the next sitting. However, on the said date itself, it was recorded that conciliation proceeding under Section 18(2) of the Act failed and the dispute is referred for arbitration under Section 18(3) of MSME Act. Next date was fixed on 5th June, 2023.

5

25.05.2023

Counsel for Writ Petitioner/Opposite Party sent an e-mail to MSME Council seeking adjournment for the next date on 5th June, 2023 citing personal grounds and copy of the said e-mail was marked to Claimant/Respondent No.1.

6

05.06 2023

102nd sitting of MSME Council was held and it was recorded that both the parties are present and matter was heard at length and Judgment was reserved.

7

04.07.2023

Writ Petitioner/Opposite Party filed its reply affidavit and counter claim before MSME Council which was affidavited on 4 th July, 2023.

8

09.08.2023

Order has been passed by MSME Council ultimately recording, inter alia, that on 5th June 2023, Judgment was reserved which has been pronounced on 09.08.2023. In the order, reply filed by Writ Petitioner as well as counter claim has also been adjudicated.

16. A perusal of the aforesaid dates would clearly reveal the following two facts, namely:-

(i) Conciliation proceeding under Section 18(2) was initiated on 29.03.2023 in 100th sitting of MSME Council, where, admittedly, Writ Petitioner did not appear and on the next date fixed i.e. 2nd May, 2023 when Writ Petitioner appeared for the first time, it was recorded, inter alia, that conciliation proceeding failed.

(ii) Alleged hearing of the matter was held on 5th June, 2023 i.e. on the first date of initiation of arbitration proceeding and, on the said date itself, it was recorded that Judgment has been reserved and final order was passed on

09.08.2023 wherein counter and counter claim of Writ Petitioner was even considered which was, in fact, affidavited on 4th July, 2023.

17. Section 18 of MSME Act, which is relevant for the present context is quoted herein-under:-

"18. Reference to Micro and Small Enterprises Facilitation Council.-(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(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 disputes 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 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."

18. A perusal of Section 18(2) of the Act would reveal that MSME Council, on receipt of any reference, would either itself conduct conciliation or seek assistance of an Institution or Centre providing alternate dispute resolution services for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply, as if, conciliation has been initiated under Part-III of the said Act.

19. Hon'ble Supreme Court, in the case of Jharkhand Urja Vikas Nigam Ltd. v. State of Rajasthan & Ors, (2021 SCC OnLine SC 1257), while noticing the aforesaid mandatory provisions of conciliation under Section 18(2) of the Act, under almost identical facts and circumstances of the case, wherein supplier of the goods did not appear pursuant to notice of conciliation and Facilitation

Council proceeded to pass the Award, Hon'ble Apex Court held that the Award passed by MSME Council is a nullity and runs contrary not only to the provisions of the MSME Act but contrary to mandatory provisions of the Arbitration Act. Award was held to be patently illegal and it was further held that, ordinarily, such an award can only be questioned by way of application under Section 34 of the Arbitration Act, but since the Award itself has been passed contrary to mandatory provisions of MSME Act and Arbitration Act, it was held by Hon'ble Apex Court that writ petition challenging said award is also maintainable.

20. Similar view was re-iterated by Hon'ble Apex Court in the case of M/s.Vijeta Construction (supra), wherein, after noticing the provisions of Sections 65 to 81 of the Arbitration Act relating to conciliation and, further, after noticing that no process was followed by Facilitation Council for carrying out conciliation under the provisions of Sections 65 to 81 of the Arbitration Act, held that Award passed by MSME Council is, in fact, no Award in the eye of law and writ petition challenging such Award is maintainable before Hon'ble High Court under Article 226 of the Constitution of India.

21. The Division Bench of this Court, in the case of M/s G.P.T. Infraprojects Limited (supra), after considering aforesaid Judgments of Hon'ble Apex Court, has expressed similar view and has held that MSME Council is obliged to conduct conciliation for which provisions of Sections 65 to 81 of the Arbitration Act would apply, and, if the purchaser has not submitted its reply at the conciliation stage and failed to appear, the Facilitation Council could, at best, have recorded failure of conciliation and proceeded to initiate arbitration proceeding in accordance with the Arbitration Act to adjudicate the dispute and make an Award. In the said Judgment, it was held that Award passed by Facilitation Council without following mandatory provisions of conciliation, would be patently illegal and would amount to 'no Award' in the eye of law and can also be questioned by filing writ petition before High Court under Article 226 of the Constitution of India.

22. The facts of the present case are almost identical to aforesaid Judgments and, in the present case, on the first meeting fixed by MSME Council pursuant to issuance of notice, despite the fact that Opposite Party did not appear, it was recorded, inter alia, that conciliation process has been initiated.

23. In the said order, there is no recording of the Facilitation Council regarding direction to each party to submit brief Written Statement describing general nature of the dispute. Thereafter, second sitting of MSME Council was held on 2nd May, 2023 and, on the said date, for the first time, Opposite Party appeared and prayed for time for filing its counter/reply. However, interestingly, on the said date itself, it was recorded that conciliation proceeding has failed and further direction was issued for proceeding with arbitration under Section 18(3) of MSME Act.

Provisions of Section 18(2) of MSME Act clearly provides, inter alia, that Council can, either itself or through any institution, take steps for conciliation and such

conciliation proceeding would be governed under the provisions of Sections 65 to 81 of the Arbitration Act.

A perusal of Sections 65 to 81 of the Arbitration Act would reveal that in order to provide for effective conciliation between the parties, the Conciliator is to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute and Conciliator is to be guided by principles of objectivity, fairness and justice.

Further, Sections 61 to 81 of the Arbitration Act provides a detailed mechanism for carrying out conciliation proceeding, but in the present case, Facilitation Council, on the first date of appearance of Opposite Party itself, recorded, inter alia, that conciliation failed. In fact, from the impugned order dated 09.08.2023, wherein proceeding held on 02.05.2023 has been recorded, it would be evident that Opposite Party sought time on the said date to put forth its reply and the same was even allowed to Opposite Party by the Council.

Thus, on one hand the Council recognized appearance of the Opposite Party and granted it time to file reply, but, on the other hand, on the said date itself, proceeded to declare that conciliation proceeding has failed. In the opinion of this Court, aforesaid record of proceedings itself clearly reveal that mandatory provisions of conciliation have not been followed by Facilitation Council and, in view of the Judgments referred hereinabove, this court is of the opinion that present writ application is maintainable challenging alleged Award passed by Facilitation Council.

Further, facts of the case would reveal that Facilitation Council further proceeded to pass Award in stark disregard to the provisions of the Arbitration Act. As noticed above, on 5th June, 2023, date was fixed by Facilitation Council being the first date after giving time to Opposite Party for filing its Counter. It is the case of Opposite Party that it prayed for time in advance for the said date of hearing and, in fact, on the said date, no hearing took place. However, such disputed question cannot be adjudicated by this Court and, this Court is required to go by the proceeding recorded by Facilitation Council, which records that on the said date, hearing was held and Judgment was reserved.

24. Admittedly, till 5th June, 2023, Opposite Party neither filed its reply nor its counter claim, but, interestingly, in the impugned Award dated 09.08.2023, it has been recorded that Opposite Party filed its counter as well as counter claim, which was even considered in the impugned order and was summarily rejected.

25. It is really astonishing as to how, when Judgment has been reserved on 5th June, 2023, said Judgment can record facts pertaining to reply and counter claim, which were, admittedly affidavited on 4th July, 2023 i.e. after one month after the date of hearing.

26. Learned counsel for Respondent tried to submit that Facilitation Council would have permitted the Writ Petitioner to file its reply and counter claim

subsequently and Judgment would have been reserved on 5th June, 2023 by hearing the parties and, thus, there is no error in the impugned Award dated 09.08.2023 which considered the reply and counter claim filed by Opposite Party/Writ Petitioner filed on a subsequent date.

This court is of the considered opinion that said submission of Respondent-Claimant cannot be sustained, as, firstly, there is no recording in the impugned Award that opportunity was granted to Opposite Party/Writ Petitioner for filing its reply and counter claim subsequently and Judgment was reserved prior to filing of such reply. Secondly, even if, it is presumed that aforesaid course of action, as suggested by Respondent-Claimant, was adopted by MSME Council, the also, said procedure followed by MSME Council would be in stark disregard to the provisions of Arbitration Act, including provisions of Section 18 of the said Act, which reads as under:-

“18. Equal treatment of parties,.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.”

27. Learned counsel for the respondent heavily relied upon decision in the case of India Glycols Limited and Another vs. MSME Facilitation Council, Medchal & ors. (2023 SCC OnLine SC 1852), particularly paragraph 12 thereof, which reads as under:-

“12. The appellant failed to avail of the remedy under Section 34. If it were to do so. It would have been required to deposit seventy-five per cent of the decretal amount. This obligation under the statute was sought to be obviated by taking recourse to the jurisdiction under Article 226/227 of the Constitution. This was clearly impermissible”

Aforesaid observation of Hon’ble Apex Court was given in the factual background of the said case, wherein an Award passed by MSME Council was challenged on the ground that claim was time barred and though High Court held that writ petition was not maintainable, but proceeded to enquire into the claim that since claim was time barred, by relying upon the decision of Hon’ble Apex Court in the case of ‘Gujarat State Civil Supplies Corporation Ltd., held that Award could not have been passed by Facilitation Council entertaining the claim.

28. The facts of the aforesaid case are clearly distinguishable from the facts of the present case, inasmuch as, in aforesaid case, Award of Facilitation Council was challenged only on the ground of claims being time barred, whereas in the present case, Award is being challenged on the ground of ‘nullity’, being no Award in the eye of law. The ratio of the Judgment of Hon’ble Supreme Court in the case of Jharkhand Urja Vikas Nigam Ltd. (supra) and Vijeta Construction (supra) are applicable in the present case and, hence, in view of the facts stated hereinabove, this Court holds that instant writ application is maintainable.

29. So far as second issue i.e. ‘whether this Court has territorial jurisdiction to entertain instant writ petition under Article 226 of the Constitution of India’ is

concerned; learned counsel for Respondent vehemently relied upon the provisions of Section 18(4) of the MSME Act and contended that MSME Council, where supplier is located, would have jurisdiction to entertain the claim and since the supplier in the instant case was located in the State of Odisha, MSME Council has rightly entertained the said claim and challenge to the Award of MSME Council and can only be made before the Principal District Court at Cuttack by filing an application u/s 34 and the writ application under Article 226 before this Hon'ble Court is not maintainable due to lack of territorial jurisdiction.

30. In order to appreciate the aforesaid contention, it would be appropriate to refer to the decision of Hon'ble Apex Court in the case of Gujarat State Civil Supplies Corporation Ltd. (supra), wherein Hon'ble Supreme Court was examining the question as to whether provisions of Chapter-V of MSME Act would have an effect of overriding the provisions of the Arbitration Act 1996; the Hon'ble Apex Court held as under:-

"32. Now, the first and foremost issue involved in these appeals is whether the provisions contained in Chapter V of the MSMED Act, 2006 with regard to the Delayed Payments to Micro and Small Enterprises would have precedence over the provisions contained in the Arbitration Act, 1996, more particularly when the parties by execution of an independent agreement as contemplated in Section 7 of the Arbitration Act had agreed to submit to arbitration the disputes arising between them? In other words, whether the provisions contained in Chapter V of the MSMED Act, 2006 would have an effect overriding the provisions contained in the Arbitration Act, 1996?"

"40.6 The provisions of the Arbitration Act, 1996 have been made applicable to the dispute only after the conciliation initiated under sub-section (2) does not succeed and stands terminated without any settlement between the parties."

"43. The Court also cannot lose sight of the specific non obstante clauses contained in sub-sections (1) and (4) of Section 18 which have an effect overriding any other law for the time being in force. When the MSMED Act, 2006 was being enacted in 2006, the legislature was aware of its previously enacted Arbitration Act of 1996, and therefore, it is presumed that the legislature had consciously made applicable the provisions of the Arbitration Act, 1996 to the disputes under the MSMED Act, 2006 at a stage when the conciliation process initiated under sub-section (2) of Section 18 of the MSMED Act, 2006 fails and when the Facilitation Council itself takes up the disputes for arbitration or refers it to any institution or centre for such arbitration. It is also significant to note that a deeming legal fiction is created in Section 18(3) by using the expression "as if" for the purpose of treating such arbitration as if it was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act, 1996. As held in K. Prabhakaran v. P. Jayarajan²⁵, a legal fiction presupposes the existence of the state of facts which may not exist and then works out the consequences which flow from that state of facts. Thus, considering the overall purpose, objects and scheme of the MSMED Act, 2006

and the unambiguous expressions used therein, this Court has no hesitation in holding that the provisions of Chapter V of the MSMED Act, 2006 have an effect overriding the provisions of the Arbitration Act, 1996.”

“45. There cannot be any disagreement to the proposition of law laid down in various decisions of this Court, relied upon by the learned counsel for the buyers that the Court has to read the agreement as it is and cannot rewrite or create a new one, and that the parties to an arbitration agreement have an autonomy to decide not only on the procedural law to be followed but also on the substantive law, however, it is equally settled legal position that no agreement entered into between the parties could be given primacy over the statutory provisions. When the Special Act i.e. the MSMED Act, 2006 has been created for ensuring timely and smooth payment to the suppliers who are the micro and small enterprises, and to provide a legal framework for resolving the dispute with regard to the recovery of dues between the parties under the Act also providing an overriding effect to the said law over any other law for the time being in force, any interpretation in derogation thereof would frustrate the very object of the Act.”

“48. When the Facilitation Council or the institution or the centre acts as an arbitrator, it shall have all powers to decide the disputes referred to it as if such arbitration was in pursuance of the arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act, 1996 and then all the trappings of the Arbitration Act, 1996 would apply to such arbitration. It is needless to say that such Facilitation Council/institution/centre acting as an Arbitral Tribunal would also be competent to rule on its own jurisdiction like any other Arbitral Tribunal appointed under the Arbitration Act, 1996 would have, as contemplated in Section 16 thereof.”

Emphasis Supplied

31. From bare perusal of aforesaid Judgment, it would reveal that Hon’ble Supreme Court, in the said Judgment, clearly held that Chapter-V of MSME Act would override the provisions of Arbitration Act and no party to a dispute with regard to any amount due under Section 17 of the MSME Act would be precluded from making a reference to ‘The Micro, Small and Medium Enterprises Facilitation Council’, though an arbitration agreement exists between the parties.

32. However, on a careful reading of the aforesaid Judgment, it transpires that although Hon’ble Apex Court held that Chapter-V of MSME Act would have been overriding effect over the Arbitration Act to the extent of maintainability of reference despite existence of arbitration agreement, but in the aforesaid Judgment itself it has been held that when conciliation process initiated under sub-section (2) of Section 18 of the MSME Act fails and the Facilitation Council itself takes up the dispute or refers to it to any institution or Centre for such arbitration, as per deeming fiction created in Section 18(3) of the MSME Act, such arbitration process would be deemed to have been instituted, as if, it was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7

of the Arbitration Act.

33. A reading of aforesaid Judgment would, thus, reveal that the moment Facilitation Council takes up arbitration proceeding, by deeming legal fiction created under Section 18(3), arbitration proceeding would be deemed to be in pursuance of an arbitration agreement under sub-section (1) of Section 7 of the Act.

34. The effect of the aforesaid Judgment was examined in detail by the High Court of Bombay in the case of Gammon Engineers and Contractors Pvt. Ltd. (supra), wherein an order passed by Facilitation Council at Madurai in Tamil Nadu was challenged before the High Court of Bombay. Under the arbitration clause of the supply agreement, the court at Mumbai had exclusive jurisdiction to try the dispute between the parties. In the aforesaid Judgment, the Bombay High Court has held as under:-

"11. Having heard the learned Counsel for the rival parties, as noted at the outset, two questions arise for consideration. The first question pertains to the very jurisdiction of this Court, as the respondent claims that this Court does not have territorial jurisdiction to entertain challenge against the impugned award, as it was rendered by the Facilitation Council at Madurai in Tamil Nadu. Some admitted facts need to be appreciated, while considering the rival contentions pertaining to the said question of territorial jurisdiction. It is an admitted position that the Arbitration Clause in the sub-contract executed between the parties, specifically provides for exclusive jurisdiction of the Mumbai Courts in case disputes arise between the parties. It is also an admitted position that the Arbitration proceedings in the present case stood initiated under section 18 of the MSMED Act and it was placed before the Facilitation Council at Madurai for Arbitration. The petitioner did not challenge the jurisdiction of the Facilitation Council at Madurai in Tamil Nadu to entertain the claim raised by the respondent by invoking section 18 of the MSMED Act.

12. A proper reading of the judgment of the Hon'ble Supreme Court in the case of Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods Pvt. Ltd. (supra) shows that once Arbitration is initiated under section 18 of the MSMED Act, the provisions of the said Act would have an overriding effect on the provisions of the Arbitration Act. The Hon'ble Supreme Court has taken into consideration the non-obstante clauses in sub-sections (1) and (4) of section 18 of the MSMED Act, read with section 24 thereof, to arrive at the said conclusion. The Hon'ble Supreme Court has also referred to section 19 of the MSMED Act, which mandates pre-deposit of 75% of the awarded amount, before a challenge to the award is entertained by any Court.

13. The Hon'ble Supreme Court found that the Arbitration Act has to be treated as the general law and MSMED Act as the Special Law and that the Special law must prevail over the general law. It is also observed that even if both the laws are to be treated as Special Laws, the MSMED Act, having been enacted in the

year 2006, subsequent to the Arbitration Act, the provisions of the MSMED Act shall prevail over the provisions of the Arbitration Act.

14. There can be no quarrel with the said proposition, as it is law of the land. But, the crucial question is, as to which Court shall have jurisdiction when an aggrieved party intends to challenge an Arbitral Award passed by the Facilitation Council under the provisions of the MSMED Act. It is an admitted position that under the provisions of the MSMED Act, there is no avenue of challenge or appeal provided to the aggrieved party. In fact, sub-section (3) of section 18 of the MSMED Act, specifically provides that when the Facilitation Council takes up the dispute for Arbitration, the provisions of the Arbitration Act shall apply to the dispute, as if the Arbitration was in pursuance of an Arbitration Agreement under section 7(1) of the Arbitration Act. In the said judgment in the case of Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods Pvt. Ltd. (supra), the Hon'ble Supreme Court concluded that the proceedings before the Facilitation Council, acting as the Arbitral Tribunal, would be governed by the Arbitration Act. Consequently, when the Facilitation Council renders its Arbitration Award, any challenge raised against the same is governed by the provisions of the Arbitration Act. The only provision under which the Arbitration Award can be challenged is section 34 of the Arbitration Act. The Court having jurisdiction to entertain such a challenge is the Court where the place of Arbitration was agreed between the parties. The Hon'ble Supreme Court in the cases of Swastik Gases Pvt. Ltd. v. Indian Oil Corporation Ltd. and Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. laid down that even though the venue of Arbitration may be different from the place of Arbitration agreed between the parties, the challenge to an Arbitration Award shall be entertained only by the Court having jurisdiction over the place of Arbitration. It was held that the place of Arbitration would be determined on the basis of agreement between the parties, including an agreement to exclusively provide for jurisdiction in a particular Court.

15. It is relevant that the Hon'ble Supreme Court in the case of Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. (supra), in the context of exclusionary jurisdiction clause contained in an arbitration agreement held as follows:

"19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai Courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in Courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction — that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of sections 16 to 21 of Civil Procedure Code be attracted. In arbitration law

however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai Courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties."

16. This Court is of the opinion that even though, in the case of Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods Pvt. Ltd. (supra), the Hon'ble Supreme Court has observed that statutory Arbitration under section 18 of the MSMED Act, would override the agreement between the parties, it necessarily applies to the agreed procedure of Arbitration between the parties. It is clear that if parties agreed for Arbitration by a sole Arbitrator or by an agreed procedure of constituting an Arbitral Tribunal, the same would stand obliterated by operation section 18 of the MSMED Act. But once the Arbitration Award is pronounced, and there is an exclusionary clause of jurisdiction agreed between the parties, thereby agreeing upon jurisdiction of only one Court, in exclusion to others, the challenge initiated by the aggrieved party under the Arbitration Act, even against an award passed by the Facilitation Council under the MSMED Act, will lie only before the Court upon which the parties agreed to place exclusive jurisdiction. This Court is in agreement with the view taken by the Division Bench of the Delhi High Court in the case of Indian Oil Corporation Ltd. v. Fepl Engineering (P) Ltd.. (supra), to the effect that Arbitration proceedings undertaken before the Facilitation Council under section 18 of the MSMED Act are undertaken at the venue where the Facilitation Council is located. The place of the Arbitration continues to be the place over which the Court has exclusive jurisdiction, as agreed between the parties. By the operation of the provisions of the MSMED Act, only the procedure of constitution of the Arbitral Tribunal is overshadowed in terms of the law laid down by the Hon'ble Supreme Court in case of Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods Pvt. Ltd. (supra) and it does not eclipse the agreement between the parties of foisting exclusive jurisdiction on a particular Court. In law, it is that place which is covered under the exclusive jurisdiction of the Court agreed between the parties, which continues to be the place of Arbitration, thereby determining the Court that shall have territorial jurisdiction to entertain a petition under section 34 of the Arbitration Act, to challenge the award passed by the Facilitation Council under the MSMED Act.

17. In the present case, there is no dispute about the fact that the parties agreed that the Courts at Mumbai shall have exclusive jurisdiction. Therefore, the place of Arbitration continues to be Mumbai, although the venue of Arbitration was Madurai, where the Facilitation Council under the MSMED Act passed the impugned award. Thus, this Court finds that there is no substance in the preliminary objection raised on behalf of the respondent regarding territorial jurisdiction of this Court to entertain the present petition."

Emphasis supplied

35. Similar view has been expressed by the Delhi High Court in the case of

Indian Oil Corporation (supra), wherein an arbitral award passed by MSME Facilitation Council, Konkan Region, Thane was assailed under Section 34 of the Arbitration Act before the Delhi High Court. The learned Single Judge has dismissed the said Section 34 application on the ground that the Delhi High Court has no territorial jurisdiction to entertain the said petition. However, the Division Bench of Delhi High Court, after noticing the clause in the agreement regarding jurisdiction of the Court at Delhi to adjudicate the dispute, held as under:-

"9. While interpreting the afore-noted Clauses, the learned Single Judge has held that this Court does not have the territorial jurisdiction to entertain the petition under Section 34 of the Arbitration Act. The reasoning employed by the Learned Single Judge can be summarized in the following words:

a) The aforesaid Clauses (34 and 35) do not provide any exclusive "seat of arbitration" nor vest exclusive jurisdiction to Courts in Delhi. Clause 34 leaves the venue of arbitration as blank or at New Delhi. Therefore, the parties have not decided on an exclusive venue of arbitration in terms of Clause 34 of the GPC.

b) Clause 35 of GPC also has blanks, which exhibits that parties could not arrive at a consensus of vesting exclusive jurisdiction to any Court. Merely because an alternate has been given, does not vest exclusive jurisdiction in this Court.

c) Swastik Gases Pvt. Ltd. (supra) and Indus Mobile Distribution Pvt. Ltd. (supra) have no application and the transaction between the parties and the documents do not show that any cause of action has arisen in Delhi.

d) Clause 18 of MSME Act shows that the jurisdiction of the MSME Council is on the basis of the location of the supplier. In the instant case, the MSME Council at Thane exercised its jurisdiction. The seat of arbitration was at Thane and accordingly in terms of the judgement of Indus Mobile (supra), the Courts at Thane would have the exclusive jurisdiction.

e) Any interpretation would be contrary to the mandate of MSME Act.

10. An analysis of the impugned judgement reveals that the learned Single Judge was persuaded to reject the petition, primarily for the reason that the Clauses, referred to above, contain certain blanks, with respect to the seat and venue of Arbitration. The learned Single Judge held that since the relevant portion of the said Clauses is blank, it demonstrates that the parties could not arrive at a consensus on vesting exclusive jurisdiction to any Court.

11. We do not agree with the aforesaid findings. The fact that the parties did not fill the blanks, would be a measure of significance, but to the contrary. The contracting parties had the option to agree to the venue of the arbitration as also to decide the Court of competent Jurisdiction [i.e. the place/seat of arbitration), other than "New Delhi", Since that option was not exercised by the parties and they proceeded to sign the agreement without filling the blanks, it manifests that the parties elected to display express agreement for exclusive jurisdiction to be vested in Courts at New Delhi. The conjunction "or" used in Clauses 34 and 35

loses its significance and becomes redundant. As a corollary, the Clause relating to the 'VENUE' of arbitration can only be construed to mean that the parties agreed that the 'VENUE' for arbitration shall be at New Delhi. Likewise, the jurisdiction clause would also have to be read and interpreted in the same way. The words "shall vest exclusively in the Court preceding the space intentionally kept blank, distinctly and unmistakeably shows the agreement between the parties to confer jurisdiction in courts at New Delhi.

12. Learned Single Judge's assumption that there was no consensus is based on conjecture, and is contrary to the principles of interpretation of Contracts. It is a well-settled principle of interpretation that the clauses of the Contract have to be read and interpreted upon a plain reading. The explicit terms of a contract are always the final word with regards to the intention of the parties and the multi-clause contract inter se the parties has to be understood and interpreted in a manner that any view, on a particular Clause of the contract, should not do violence to another part of the contract. (Ref: Principles relating to interpretation of commercial contracts have been extensively discussed by the Apex Court in *Nabha Power Ltd. v. Punjab State Power Corporation Ltd. (PSPCL)*, (2018) 11 SCC 508; followed in *Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission*, (2019) 19 SCC 9: AIR 2019 SC 3397]. The clauses, to our mind, convey in their meaning, with absolute certainty, the intention of the parties. The problem in interpretation can arise when the intent is not so visible in the obvious expression. Since the name of a State/City is blank, the name of one of the agreed cities [New Delhi] appearing after the conjunction "or" would convey accord between the parties not to agree on any other place but the one mentioned in the clause. Interpreting the "blanks" to mean that parties were not *ad idem*, would amount to disregarding the test of business efficacy. This is because the placeholder that was not filled does not render the clause unworkable. The clause remains legally enforceable. It is also to be noted that filling in the name of another city before conjunction 'or' would have rendered the exclusivity of jurisdiction ambiguous. "New Delhi" was certainly one of the firmed-up choice of venue and seat, agreed between the parties. Introduction of another place was certainly a selection that the parties could have made, but since parties did not avail this opportunity, it only means that the agreed place was preserved as final.

13. As a result of the foregoing discussion, the judgements of the Supreme Court in *Swastik Gases (supra)* and *Indus Mobile (supra)* would be relevant and applicable.

14. In the case of *Swastik Gases (supra)*, the Supreme Court held that where the ouster is included in an agreement between the parties, it conveys the intention to exclude the jurisdiction of Courts other than those mentioned in the agreement. The Supreme Court also held that absence of the use of words like "alone", "only", "exclusive" or "exclusive jurisdiction" is not decisive, and does not make any material difference in deciding the jurisdiction of a Court. The

intention of the parties has to be gathered from the Clauses appearing in the agreement.

15. In *Indus Mobile* (supra), the Supreme Court has succinctly highlighted the difference between the 'VENUE' and 'SEAT' of arbitration. The Supreme Court held that merely because the arbitrator chooses to hold arbitration at a VENUE different from the SEAT of arbitration, it shall not confer territorial jurisdiction on the Courts where the VENUE of arbitration exists. The relevant paras of the said Judgement read as under:

"18. The amended Act, does not, however, contain the aforesaid amendments, presumably because the *BALCO* [*BALCO v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 (2012) 4 SCC (Civ) 810] judgment in no uncertain terms has referred to "place" as "Juridical seat for the purpose of Section 2(2) of the Act. It further made it clear that Sections 20(1) and 20(2) where the word "place" is used, refers to "juridical seat", whereas in Section 20(3), the word "place" is equivalent to "venue". This being the settled law, it was found unnecessary to expressly Incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act."

(emphasis supplied)

16. Further, in the said judgement, the Supreme Court also held that under the law of arbitration, unlike the Courts to which Code of Civil Procedure applies, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties in the arbitration clause. The relevant paras explaining the above concept are as under:-

"19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

20. It is well settled that where more than one court has Jurisdiction, it is open for the parties to exclude all other courts. For an exhaustive analysis of the case law, see *Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.* [*Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.*, (2013) 9 SCC 32: (2013) 4 SCC (Civ) 157] This was followed in a recent judgment in *B.E. Simoes Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.* [*B.E. Simoes Von Staraburg Niedenthal v.*

Chhattisgarh Investment Ltd., (2015) 12 SCC 225 (2016) 1 SCC (Civ) 427] Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai. This being the case, the impugned judgment (Datawind Innovations (P) Ltd. v. Indus Mobile Distribution (P) Ltd., 2016 SCC OnLine Del 3744] is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court, The appeals are disposed of accordingly."

(emphasis supplied)

17. It is also pertinent to take note of the decision in Devyani International Limited v. Siddhivinayak Builders and Developers, 2017 SCC OnLine Del 11156, wherein it has been held as under: -

"6. As far as the issue of jurisdiction is concerned, reference may be had to the arbitration clause in the Agreement being Clause 11.1 which reads as follows:-

11. ARBITRATION

11.1 Any dispute or difference arising between the parties shall be resolved amicably at the first instance. Unresolved disputes, controversies, contests, disputes, if any shall be submitted to arbitration to a sole arbitrator. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act 1996 along with the Rules there under and any amendments thereto. The arbitration shall be conducted in English. The decision/award of the arbitrator shall be final/conclusive and binding on the Parties: The seat of the arbitration shall be at New Delhi.

7. Clause 12 of the Agreement reads as follows:

12. GOVERNING LAW

12.1 This Agreement shall be construed, interpreted and applied in accordance with, and shall be governed by, the laws applicable in India. The courts at Mumbai shall have the exclusive jurisdiction to entertain the dispute or suit arising out of or in relation to this Agreement."

8. In view of the clause 11.1 above, it is obvious that the seat of arbitration is Delhi. In this context reference may be had to the judgment of the Supreme Court in Indus Mobile Distribution Private Ltd. v. Datawind Innovations Pvt. Ltd., (2017) 7 SCC 678, the Supreme Court held as follows:

"19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction clause. On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts. Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue

can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction that is, no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Sections 16 to 21 of CPC be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

9. In the light of the above legal position, it is manifest that the Agreement records that the seat of arbitration shall be Delhi. In view of the above legal position the courts at Delhi would have exclusive jurisdiction to adjudicate the dispute between the parties. The reliance of the learned counsel for the respondent on clause 12 of the agreement is misplaced due to the clear terminology used in clause 11.1 of the agreement, i.e. "seat of arbitration shall be Delhi."

18. Thus, in view of the aforesaid decisions of the Supreme Court and the principles laid down therein, it clearly emerges that Section 20 (1) and Section 20(2) of the Arbitration Act, would be applicable to the place where seat/place of arbitration is fixed under the Contract. The venue relates to convenience of parties, and in such a case, Section 20 (3) of the Arbitration Act is applicable.

19. The maxim "expressio unius exclusio alterius" referred to in the aforesaid judgement, is also attracted to the facts of the present case. The aforesaid maxim means "the explicit mention of one (thing) is the exclusion of another". In the present case since the parties made a provision in the agreement to have the venue of the arbitration at New Delhi and also provided the seat by vesting jurisdiction in the Courts at New Delhi, it would be construed to mean that the jurisdiction of the other Courts has been intentionally excluded. In fact, as discussed above, the jurisdiction clause does use the word "exclusively", in Clause No. 35. Thus, even if there was any element of ambiguity or doubt with respect to intention of the parties regarding "exclusivity", the same gets settled by conscious decision of the parties not to fill in the blank. In this case the venue shifted to Thane not on account of an agreement between the parties, but just because the supplier was located in a Jurisdiction that fell with the domain of the regional MSME council. That does not however mean that the arbitration was seated at Thane. For Jurisdiction, the clause agreed between the parties continues to be valid and binding.

20. In the present case, both the VENUE as well as the SEAT (by way of the jurisdiction clause) has been agreed to be at New Delhi. We, therefore, have no hesitation to say that the Courts at Delhi would have the jurisdiction to entertain the petition challenging the award passed by the MSME Council. Since the parties agreed to confer exclusive Jurisdiction to Courts at New Delhi, notwithstanding the fact that the purchase order in question dated 10th March 2016, was issued by the Petitioner from its Vadodra Office to the Respondent at Navi Mumbai. and even if no cause of action has arisen in Delhi, the Courts of Delhi would have

jurisdiction to entertain the petition under Section 34 of the Arbitration Act. This is pertinent because in *Indus Mobile* (supra) as noted in para 19 of the judgement, the Court has held that Section 16 to 21 of CPC would not be attracted. Thus notwithstanding the fact that cause of action may not have arisen in New Delhi, since the Seat has been agreed to be in Delhi, the courts here would have the jurisdiction to entertain the petition under section 34 of the Arbitration Act.

21. There is yet another aspect, which needs to be dealt with at the present stage. Section 18 of the MSME Act provides that the provisions of the Arbitration and Conciliation Act 1996 shall apply to the dispute between the parties. Learned Single Judge has decided the 'SEAT' of arbitration in the present case, on the basis of Section 18 of the MSME and has held that exclusive jurisdiction would be with the Courts at Thane.

22. Section 18 of the MSME Act, reads as under:

"18. Reference to Micro and Small Enterprises Facilitation Council.

(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(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 to it 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."

(Emphasis supplied)

23. Undoubtedly, the MSME Act is a special legislation dealing with Micro, Small and Medium Enterprises and would have precedence over the general law. There are decisions of several Courts holding that the provisions of MSME Act would override the provisions of the Contract between the parties. However, we are not engaged with the said controversy and, in fact, we had made it clear to the learned counsel for the Appellant, during the course of arguments, that the questions relating to the jurisdiction of the MSME Council to act as an Arbitrator and other similar issues will not be examined by us, as the learned Single Judge has not considered any of those aspects and has decided the objection petition only on the ground of territorial jurisdiction. However, this does not mean that the jurisdiction clause agreed between the parties has to be given a go-by. The overriding effect of the MSME Act, cannot be construed to mean that the terms of the agreement between the parties have also been nullified. Thus, jurisdiction of the MSME Council which is decided on the basis of the location of the supplier, would only determine the 'VENUE', and not the 'SEAT' of arbitration. The 'SEAT' of arbitration would continue to be governed in terms of the arbitration agreement between the parties, which in the present case as per jurisdiction Clause No. 35 is New Delhi. As a result, in terms of the decision of the Supreme Court in Indus Mobile (supra), it would be the Courts at New Delhi that would have exclusive jurisdiction to entertain the petition under Section 34 of the Act.

24. The writ petition filed by the Appellant before the Bombay High Court was against the MSME Council, and filing of the said petition would not oust the jurisdiction of the Court to deal with petition under Section 34 of the Amendment Act and accordingly, the contention of the Respondent that the filing of the aforesaid writ petition bars the Appellant to approach this Court is rejected."

36. In the present case, admittedly, the agreement being Memorandum of Understanding dated 10th February, 2016, vide Clause 14, clearly provided inter alia that courts of Jamshedpur shall have jurisdiction in the matter. Clause 14 of the MoU is quoted as under:-

"14. That it is unanimously covenanted amongst the parties that if any dispute arises in execution of terms of this MoU, efforts shall be made to resolve the same first mutually and thereafter, after intervention of well-wishers and friends and even then if any issue remains unresolved in course of legal remedy shall be taken by the aggrieved party and the Courts at Jamshedpur shall have jurisdiction in the matter."

37. That apart, the agreement pertained to stone mining lease which is situated at Mauza Barabhumri, Ghatshila, Thana No. 1358, situated over a piece of land bearing Khata No. 208, Khesra No. 1080 (Part), total measuring 9.25 acres, which is situated in the State of Jharkhand.

38. Article 226 of the Constitution of India enables a High Court to issue directions, orders or writs in relation to the territories within which the cause of

action, wholly or in part, arises for exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. [See *State of Goa v. Summit Online Trade Solutions (P) Ltd.* (supra)].

39. In the present case, although MSME Council of State of Odisha at Cuttack exercised jurisdiction in terms of Section 18(4) of the MSME Act, but since, admittedly, part of cause of action has arisen within the State of Jharkhand, this Court, even otherwise, has territorial jurisdiction to entertain the writ petition challenging an Award of the Facilitation Council on the ground of patent illegality and/or nullity.

40. The Judgments relied upon by Respondent on doctrine of forum convenience would not be applicable in the present case, as not only in the agreement the Court at Jamshedpur has jurisdiction, but even majority of cause of action has arisen within the territorial jurisdiction of this Court.

Further arguments advanced by the counsel of Respondent relying upon decision of this Court in the case of *MECON Ltd.* (supra) is also not tenable, as alternative remedy of filing an application under Section 34 of the Arbitration Act cannot be a bar for entertaining writ petition where mandatory provisions of MSME Act and Arbitration Act itself has not been followed by the Facilitation Council.

41. Third issue to be adjudicated in the instant writ petition is 'whether the Award dated 09.08.2023 passed by MSME Council, Odisha warrants interference by this Court or not?'

While adjudicating Issue No.1, this Court has recorded in detail the procedure followed by MSME Council regarding non-compliance of statutory provisions of Section 18(2) and also passing of the order in stark disregard to the provisions of the Arbitration Act. Thus, in the opinion of this Court, Award dated 09.08.2023 passed by MSME Council is a nullity and suffers from patent illegality and warrants interference by this Court in exercise of power under Article 226 of the Constitution of India.

42. Ordinarily, this Court would have remanded the matter back to MSME council to follow the due process under MSME Act and Arbitration Act, but, in the facts and circumstances of the present case, said recourse is not warranted by this Court in view of Judgment of Hon'ble Supreme Court in the case of '*Silpi Industries Etc. v. Kerala State Road Transport Corporation and Anr.* (2021 SCC OnLine 439).

43. A bare perusal of the claim petition filed by Respondent No.1 would reveal that Respondent No.1 has made claim towards 'Unpaid Rent of Machinery' and claim towards realization of conversion charges from July, 2016 to August, 2018. Thus, claims of Respondent No.1 are, admittedly, for the period July, 2016 to August, 2018 and from the Claim petition itself it would be evident that Respondent was registered as a Small Scale Enterprise as a 'Supplier' within the

meaning of Section 2(m) of the MSME Act, only on 19.06.2019 which would be evident from its 'Udyog Aadhar Registration Certificate' (Annexure-2).

The Hon'ble Supreme Court, in the case of Silpi Industries Etc. (supra) has clearly held that in order to seek benefit of provisions of MSME Act, the seller should have been registered under the provisions of the Act on the date of entering into the contract, and, for supplies made pursuant to the contract before registration of the Unit under the provisions of the MSME Act, no benefit can be sought by such entity.

It has been held that benefit cannot be taken by an enterprise of MSME Act retrospectively prior to the date of its registration.

Aforesaid principle was further explained in the case of 'Gujarat State Civil Supplies Corporation' (supra) vide Para 52.6, as under:-

"52.6 A party who was not the "supplier" as per the definition contained in Section 2(n) of the MSMED Act 2006 on the date of entering into contract cannot seek any benefit as the "supplier" under the MSMED Act, 2006. If any registration is obtained subsequently the same would have an effect prospectively and would apply to the supply of goods and rendering services subsequent to the registration."

44. In view of the admitted facts that the claim pertained to the period July, 2016 to August, 2018 and registration was obtained by Respondent No.1 only with effect from 19.06.2019, it was not entitled to claim any benefit under the provisions of the MSME Act. Hence, this Court is of the opinion that the matter should not be remanded back to MSME Council, Odisha at Cuttack for fresh determination. Accordingly, instant writ application stands allowed and the Order/Award dated 09.08.2023 passed by Respondent No.2 in M.S.E.F.C. Case No. 60 of 2022 is, hereby, quashed and set aside by this Court. However, the Respondent No.1 would be at liberty to take alternative measures for redressal of his grievance before appropriate forum.

45. Pending I.A.s, if any, also stands disposed of. However, there shall be no order as to cost.