

(2018) 08 BOM CK 0114

In the Bombay High Court

Case No : Commercial Appeal Nos. 1, 2, 3, 4, 5, 6, 7, 8 , 9 of 2018

M/s. Sonali Power Equipment And Other

APPELLANT

Vs

Chairman, Maharashtra State Electricity Board, Mumbai

RESPONDENT

Date of Decision : 24-08-2018

Acts Referred:

Micro, Small and Medium Enterprises Development Act, 2006 — Section 2(b), 3, 5, 6(2), 7B, 8, 8(3), 8(4), 9, 9(1), 10, 11, 12, 14, 15, 17, 18, 22, 22(2), 23, 24, 26, 27, 28

Arbitration and Conciliation Act, 1996 — Section 2[4], 7[1], 18(3), 18(4), 18(5), 21, 34, 40, 41, 42, 43, 43[1], 43[3], 43[4], 65, 81

Limitation Act, 1963 — Section 4, 5, 6, 18, 19, 22, 32, 43, 132(5)

Income Tax Act, 1961 — Section 23

Companies Act, 1956 — Section 25, 27

Citation : (2018) 08 BOM CK 0114

Hon'ble Judges : B.P. DHARMADHIKARI, J; Z.A HAQ, J

Bench : Division Bench

Advocate : S.P. Dhole, S.V. Purohit

Judgement

B.P. DHARMADHIKARI, J

1. This Court has issued notice in all these Appeals on 15.02.2018, and thereafter on 05.06.2018, after hearing the respective learned Counsel for

some time, the same came to be adjourned to 10.07.2018 for hearing at 2.30 p.m. Efforts were being made to decide the appeals finally. Accordingly

we admit these appeals and hear them finally with consent, as only legal contentions are being raised. Needless to mention that facts are not

in dispute between the parties.

2. Before proceeding further, bone of contention need to be mentioned briefly. Submission advanced by Shri S.P. Dhole, learned counsel who appears

for appellants, is that the judgment of Hon'ble Supreme Court in case of T.N.

Generation and Distribution Corporation .vrs. PPN Power Generation

Company Pvt. Ltd (Civil Appeal No. 4126/2013), delivered on 04.04.2014, is not properly considered by the Division Bench of this Court at Bombay in

(M/s. Delton Electricals .vrs. MSEDCL and others) Commercial Appeal No.38/2017. This judgment is delivered on 31.08.2017, and that appeal arose

out of an Arbitration Petition (L) No.2464/2015 allowed by the learned Single Judge on 15.11.2016. Appellants state that judgment in case of T.N.

Generation (supra), specifically observes that the provisions of Limitation Act, 1963 are not applicable to Statutory Arbitrations. This unequivocal

declaration made in paragraph no.50 of that judgment clinches the issue in present matters.

3. According to Shri S.V. Purohit, learned Counsel who appears for respondents, the Division Bench judgment at Bombay in M/s. Delton Electricals

.vrs. MSEDCL and others) (Commercial Appeal No.38/2017, decided on 31.08.2017, (supra) attempted to be distinguished by the appellants, is

squarely attracted in present matters. In the light of this limited submission, appeals are taken up and heard finally.

4. Shri Dhole, learned counsel for appellants submits that the provisions contained in Micro, Small and Medium Enterprises Development Act, 2006

(hereinafter referred to as 'MSMED Act' for short), show a special scheme and treatment provided to dues receivable by the enterprises

regulated by it. He has taken us through relevant provisions to urge that when an enterprise or unit governed by it, like appellants, approaches Council

under Section 18 of the MSMED Act, there is no question of limitation being pressed into service. He has also invited our attention to overriding effect

extended by Section 24 thereof.

5. He has then invited our attention to the Division Bench judgment of this Court in case of M/s. Delton Electricals (supra). He points out that learned

Single Judge there has looked into the provisions of Section 42 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996

Act' for short), only and said consideration is further widened or expanded by the Division Bench. According to him, while adopting a 'slightly

different angle', the Division Bench has relied upon interpretation of words 'amounts due'. That interpretation in other enactments is in the

context in which those words appear, and therefore, irrelevant in Scheme of the

MSMED Act, when Section 2[4] of the 1996 Act itself stipulates that

Section 43 is not applicable to such Arbitration proceedings and therefore, Limitation Act, 1963 also has no application.

6. He invites attention to the findings in this respect recorded by the learned Counsel in favour of appellants. He submits that the Council has found

that the Arbitration Act does not apply. In application under Section 34 of the 1996 Act, the Commercial Court at Nagpur has reversed this findings

and applied limitation of three years, as the proceedings are found to be initiated beyond the period of three years, award in favour of appellants has

been set aside. He relies upon judgment reported at AIR 2010 SC 972 (M/s. Ravindra Kumar Gupta and Company .vrs. Union of India) (paragraph

nos. 11 and 12), to urge that under Section 34, the Commercial Court could not have taken a different view in such matter.

7. He invites attention to provisions of Section 18 of the 1963 Act to contend that obligation to mention principal amount and interest compounded

monthly, separately in books of accounts cast by Section 22 of the MSMED Act, makes such mention an acknowledgment. The amount written as

unpaid therefore, cannot grow time barred and concept of "amount due" as accepted in Delton's case, is therefore, not attracted. Because of

Section 17 read with Section 22 and Section 24 of the MSMED Act, right vests in Small Unit like appellants, which can be exercised at any time under

Section 18, thereof.

8. Even otherwise, when Council has passed an award under Section 18, and its view cannot be said to be perverse or arbitrary, there is no question

of interference in it under Section 34 of the 1996 Act, since it is not against public policy. Finding that granting of Arbitration Award for time barred

claim is against public policy, is therefore, unsustainable.

9. He has relied upon a judgment reported at 2017 (6) All MR 259 (Zee Sports Ltd. .vrs. Nimbus Medial P. Ltd.), to contend that when a possible

view on limitation has been taken, same could not have been interfered with under Section 34 of the 1996 Act. To explain, how the understanding of

"amount due" may vary from enactment to enactment, he draws support from a judgment reported at 2010 (3) All MR 464 (SC) (M/s. Modern

Industries .vrs. M/s. Steel Authority of India Ltd. and others).

10. Shri Purohit, learned Counsel for respondents argues that the controversy is

clearly covered by Division Bench judgment in Delton's case (supra).

He submits that, proceedings under Section 34 of the 1996 Act, were dealt with by the learned Single Judge at Bombay, and there after condoning

delay in filing proceedings, a finding on limitation has been delivered. Division Bench has looked into that finding and then sustained it. In the process it

has additionally resorted to the well settled meaning of word 'amounts due'. The efforts of appellants to distinguish that judgment must fail. He

submits that the judgment of Hon'ble Supreme Court in T.N. Generation (supra), is looked into and explained by the Hon'ble Supreme Court in later

judgment reported at 2016 [3] SCC 468 (Andhra Pradesh Power Coordination Committee and others .vrs. Lanco Kondapalli Power Ltd. And others).

This later judgment therefore, is binding on High Courts.

The Division Bench at Bombay has looked into this later judgment and also judgment in case of T.N. Generation (supra). Contentions based upon

Section 19 of the Limitation Act, 1963 are being raised for the first time before this Court. That was not the contention before the Council or then in

proceedings under Section 34 of the 1996 Act.

11. Shri Purohit, learned Counsel has also taken us through relevant findings and papers to seek dismissal of present appeals.

12. Shri Dhole, learned counsel for appellants in his brief reply submitted that the scheme of the MSMED Act, needs to be properly construed. He

adds that Division Bench judgment in case of Delton (supra), is already assailed in Special Leave Petition before the Hon'ble Supreme Court, and that

Special Leave Petition is pending.

13. Before proceeding further a look into the scheme of the MSMED Act, is necessary. The salient features of this enactment also need to be noted

along with the earlier enactment No. 32 of 1993, namely the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act,

1993.

It has been brought into force on 16.06.2006, for facilitating the promotion and development and enhancing competitiveness of Micro Small and

Medium Enterprises and for matters connected therewith or incidental thereto. Section 32 of this Act repeals the earlier enactment No. 32 of 1993,

Fact that appellants before this Court is of enterprises/units falling in Section 2[e] of this Act, is not in dispute. Chapter IV of this enactment provides

measures for the purpose of enhancement of competitiveness of such units. It begins with Section 9 and enables Central Government to specify

programs, guidelines or instructions as it may deem fit in the interest of such enterprises. Section 10 is about extending credit to such enterprises and it

obliges Creditors to ensure timely and smooth flow of credit, to minimize incidence of sickness and to develop, promote and enhance competitiveness.

Section 11 obliges Central Government and State Government to notify preference policies for procurement of goods and services from such

enterprises. Section 12 envisages Constitution of a separate fund for this purpose. Central Government has to release grants for such fund. Under

Section 14, the fund is to be administered by the Central Government for measures specified in Section 9[1].

14. Under Section 5, a special agency by name the National Board for Micro, Small and Medium Enterprises formed in terms of Section 3 is given the

responsibility to recommend the Central Government on how to utilize this fund for advancing the object of the MSMED Act. Design behind selection

of the Members constituting the Board show the intention to have an expert body for the special purpose. Thus, responsible persons drawn from

different but, related fields recommend or advise the Central Government on factors having bearing on the promotion, development or the

enhancement of the capacity of such a Unit/Enterprise.

15. Act No. 32 of 1993 is designed at making provision for and regulating payment of interest on delayed payments to Small Scale and Ancillary

Industrial Undertakings. Section 6 thereof is about recovery of amounts due and sub-Section [2] permits any party to a dispute, to make reference to

Industrial Facilitation Council. The said Council can arbitrate or conciliate in the matter and provisions of 1996 Act were applicable to it. Section 7A

prescribed establishment of Industrial Facilitation Council, while Section 7B prescribed composition thereof.

16. When viewed in this backdrop, the provisions of MSMED Act, definitely occupy a wider field. Provisions relating to resolution of dispute under

Section 18 there are more systematic when compared with Section 6 of the repealed enactment No.32 of 1993. Sections 27 and 28 thereof also make

a provisions for conviction and punishment for contravention of mandate of Section

22. Chapter III of MSMED Act is on classification of Enterprises, Advisory Committee and also about Memorandum of Micro, Small and

Medium Enterprises. Section 7 is on Classification of Enterprises. The classification is to be done by the Central Government, having regard to sub-

section [4] and sub-section [5]. Sub-section [4] obliges Central Government to obtain recommendation of Advisory Committee for this purpose.

Subsection [2] gives composition of this Advisory Committee. Subsection [8] stipulates the factors which Advisory Committee shall look into before

making recommendations. Those factors are " level of employment in class or classes of enterprises, level of investment in plant and machinery or

equipment, need of higher investment or technological upgradation, employment generation and enhancing competitiveness of such enterprises,

possibility of permitting and diffusing entrepreneurship in Micro or Medium Enterprises and the International Standards for classification of such

Enterprises. Section 7[1] points out classes for division dependent upon the investment. We need not, in this matter, comment more upon the scheme.

Sub-section [9], is an overriding provision which permits Central Government to vary the norms as stipulated therein.

17. Section 8 of MSMED Act requires a person intending to establish such enterprise, to file memorandum with the Authorities specified by the State

Government under its sub-section [4] or the Central Government under sub-section [3]. Proviso thereof also cast an obligation on the person who

has already commenced the Small Scale Industry or Industry of nature mentioned therein, to submit such memorandum within 180 days.

18. Chapter IV is about measures for promotion, development, enhancement of competitiveness. Section 9 permits Central Government to specify by

a notification, programs, guidelines or instructions for said purpose. Section 10 mandates progressive credit facilities as per guidelines or instructions

issued by the Reserve Bank. Section 11 obliges the Central Government or the State Government to notify preference policies in respect of

procurement of goods and services from such Enterprises. Section 12 is on constitution of one or more "Funds" by Central Government. Section

13 allows the Central Government to release grants to these funds after appropriation by the Parliament. Section 14 mandates utilization of amounts in

such fund/funds for measures specified in Section 9[1]. These provisions therefore show a special, advanced and more comprehensive scheme

enacted by the Parliament for catering the peculiar need of Micro Small and Medium Enterprises.

19. Chapter V is the important chapter in scheme of MSMED Act and we are concerned mostly with the provisions appearing therein. Said Chapter

is about delayed payments to Micro and Small Enterprise. It begins with Section 15 and last section there in is Section 25. Section 15 casts an

obligation upon the supplier or buyer to make payment before agreed date. If there be no such agreed date, payment needs to be made before the

appointed day. Section 2[b] defines what is 'appointed day'. Appointed day cannot be more than 15 days after acceptance of goods or services by

buyer. Proviso thereto clarifies that if there is any agreed date between the buyer and such enterprise, it cannot exceed 45 days from the date of

acceptance. Thus, to that extent, agreement between the parties is modified or superseded by this statutory provision.

20. Section 16 prescribes date from which and rate at which interest is payable. Scheme in this Chapter V is unique and it is apparent from this

Section. In case of default in clearing the amount payable to small enterprises as warranted by Section 15, the buyer is made liable to pay compound

interest with monthly rests. The interest is to be calculated from appointed day at three times the Bank rate notified by Reserve Bank of India. Thus, a

Nationalized Bank in a commercial transaction is entitled to charge rate as specified by the Reserve Bank, while the person receiving the goods or

services from an enterprise/unit protected under MSMED Act, has to pay that interest at three times said rate. Not only this, the interest is to be

compounded every month. With the result, the enterprise or unit enjoys a peculiar protection under the MSMED Act and it has been shown a special

favour by the Parliament looking to its weak financial condition. This mandate operates in supercession of any agreement between the parties or in

law inÂ?force. It is therefore a strong factor to compel the buyers to be extra prompt in clearing the dues of such a Unit or Enterprise.

21. Section 17 has a head noteÂ? â??Recovery of amount dueâ?. It directs the buyer to pay supplier i.e., Unit or Enterprise, the amount with interest

as provided for in Section 16. The words 'amounts due' appear only in the head note of Section 17. It does not appear in substantive part thereof. This

Chapter therefore, contains even an express provision obliging buyer to pay to supplier the principal amount and interest as stipulated under Section 16.

22. Section 22 requires a buyer who has to get his accounts audited under any law, to furnish some additional information in his annual statement of accounts. It obliges such buyer to show separately the principal amount and the interest due thereon remaining unpaid to any supplier at the end of each accounting year. Amount of interest paid in terms of Section 16 along with amounts paid to supplier beyond appointed day during such accounting year are also to be mentioned. Thus, if mandate in Section 16 is violated, said violation can be noticed in annual statements also. Amount of interest due and payable for delayed period but paid without adding the interest in terms of Section 16, is also required to be mentioned. Interest accrued and remaining unpaid to such supplier at the end of each accounting year is to be mentioned in such annual statement. Amount of further interest remaining due and payable even in succeeding years until such date when the interest dues are actually paid to Small Enterprise, is also required to be recorded. This entry is for the purpose of its disallowance as deductible expenditure in terms of Section 23 of the MSMED Act.

Section 22 employs the word 'unpaid amount' and not 'amounts due'. It uses the word 'due' in relation to interest amount also in sub-clause [iii] and [iv]. Scheme of Section 22 therefore, obliges buyer to record amounts remaining unpaid as also interest remaining unpaid upon such amount. It also requires compounded interest to be mentioned separately. Scheme of Section 22 therefore is distinct and does not exempt the buyer from mentioning the principal amount of which recovery may have become time barred in terms of Limitation Act, 1963 by instituting a Civil Suit. The duty to pay interest at thrice the Bank rate and to compound it monthly is a statutory liability and amount outstanding in that respect is also required to be mentioned separately in annual statement of accounts. This statutory liability, therefore, accrues after appointed day and subsists in terms of Section 16 and Section 17, till it is discharged by actual payment. Liability of a buyer in default, therefore, accrues every month and liability to pay interest appears to be distinct from the liability to pay principal amount. The quantum of interest demand may have a nexus with the computation of principal amount but, it may not be wiped out totally, if recovery of the principal amount can get time-barred.

23. Section 23 operates and overrides the provisions of Income Tax Act, 1961. Interest paid by buyer under the MSMED Act, is not allowable as

deduction. This therefore, shows a legislative sanction and a sort of punishment to induce defaulters to pay principal amounts by appointed day.

Section 24 of the MSMED Act, gives provisions of Sections 15 to 23 an overriding effect over the provisions of all Laws for the time being in force.

24. At this juncture, it is necessary to look into Section 21 which provides for composition of Micro and Small Enterprises Facilitation Council. We

need not look into exact composition thereof, however, Section 18 enables supplier or then a buyer to make a reference to this Council. Dispute

regarding any amount due under Section 17 may be referred to said council by any party to it.

This Section 18 again overrides all other laws. Under sub-Section [2], Council itself can conduct conciliation or then seek assistance to any institution

or centre providing alternate dispute resolution services by making a reference to such institution or centre, for conducting conciliation. Provisions of

Sections 65 to 81 of 1996 Act apply to it, as if it is conciliation initiated under Part-III of that Act.

25. In sub-Section [3] of Section 18, when such conciliation is not successful and is terminated without any settlement, Council can either itself take

up dispute for Arbitration or then refer it to above mentioned agency for such Arbitration. 1996 Act then applies to such dispute as if arbitration is in

pursuance of Arbitration agreement referred to in Section 7[1] of the 1996 Act.

26. Sub-Section [4] again contains a non-obstante provision and empowers Council or the Agency rendering alternate dispute resolution services, to

act as an Arbitrator or Conciliator in all dispute between supplier within its jurisdiction and buyer located outside its territorial jurisdiction but, anywhere

in India. Subsection [5] of Section 18 mandates adjudication of such dispute or reference within 90 days. Hence, a special forum is also created by

MSMED Act with special procedure for expeditious redressal of all grievances in which a small enterprise or Unit is involved. The apparent object

behind this scheme in Section 18 is to keep the protected units free from all contingent burdens to the extent possible.

27. Section 19 does not permit a person to apply for setting aside an award or order made under Section 18 unless he deposits with the Council 75%

of the amount in terms of such decree, award or order. The proviso thereto gives a Court power to permit the supplier to withdraw a reasonable

amount as it deems necessary, subject to suitable terms and conditions.

28. Section 25 i.e., last section in Chapter V is about scheme for closure of business of such Small Enterprise/Unit. Again it opens with non obstante

clause and empowers Central Government to notify a scheme to facilitate such closure. However, this section is not applicable if such Small

Unit/Enterprise is a Company registered under the Companies Act, 1956. Chapter VI contains section 27 which prescribes punishment for violating

Section 8, Section 26 as also separately in sub section (2) for violating Section 22 also of the MSMED Act. Though sub section (1) prescribes

punishment of fine upto Rs. 1000/ for first conviction, its quantum may increase to Rs.10,000/ for subsequent convictions under section 8 or

Section 26. Section 28 confers power on Metropolitan Magistrate or Judicial Magistrate First Class to try offences under MSMED Act. When

Sections 27 and 28 are read together, it becomes evident that breaching Section 22 is made an offence. Under sub section (2) of Section 27, on

conviction for contravention of Section 22, fine prescribed is not less than Rs.10,000/. Thus, it does not stipulate any ceiling on maximum possible

fine imposable thereunder.

29. Perusal of above scheme in MSMED Act, therefore, shows that it contains peculiar provisions to safeguard interest of such Small Enterprise/Unit.

Not only this, important provisions therein operate notwithstanding anything contained in any other law or then even agreement between the parties.

Grant of interest at a rate much higher than bank rate, its compounding monthly and special forum for dispute resolution with complete power to

resolve the grievance of buyer if he is within its area, as also coercive measures against buyers are the noteworthy provisions which may this Chapter

in the MSMED Act unique. This chapter contains provisions which override other Laws. It also expressly saves certain situations like where buyer is

not required to audit its accounts, where buyer is a Company under Companies Act, 1956. This chapter while giving overriding effect to MSMED Act

also expressly points out the few situations excepted therefrom.

30. It is in this backdrop that Section 18 which permits remedy of reference needs to be construed. First of all it obliges Council to conduct conciliation

or order conciliation proceedings. Section 18[2] does not leave any discretion with the council in this respect. Sub section [3], in case of failure of

conciliation, mandates Arbitration either by the Council or by alternate dispute resolution agency. Section 18[1] has non obstante opening and sub

section [4] again opens with similar provision. It empowers the council or other agency to whom conciliation / arbitration is made over, to exercise

jurisdiction over a buyer located anywhere in India.

31. There is no provision in Chapter V or the MSMED Act prescribing the limitation. According to the parties, Limitation flows from Section 43 [1] of

the 1996 Act. Its sub section [2] explains that an arbitration is deemed to have commenced on the date on which a request for dispute being referred

to the arbitration is received by the respondent. Sub section [3] thereof speaks of arbitration agreement to submit future dispute to arbitration and

contemplates cases in which a time limit is prescribed in agreement between the parties. That sub section empowers the Court to waive such agreed

condition, if it finds that it would cause undue hardship. In that situation, court may extend the time on suitable terms and conditions. Sub section [4]

to Section 43 is about setting aside or the Arbitral award and again it stipulates that period between commencement of arbitration and date of order of

court would be excluded in computing the time period prescribed in the Limitation Act, 1963.

32. Section 43 of 1996 Act, therefore, contains a complete Scheme which when compared with Sections 18 and 19 of the MSMED Act, is

inconsistent therewith. Section 18 does not envisage any arbitration agreement and it supersedes any such agreement statutorily. It obligates the

Council to adopt that procedure which it finds expedient to effectively resolve the dispute referred to it. Section 21 of the 1996 Act, therefore, is

irrelevant for MSMED Act.

33. Section 2[4] of the 1996 Act lays down that Part I of the 1996 Act applies to every arbitration under any other enactment for the time being in

force, as if it is pursuant to an arbitration agreement and as if that other enactment is an arbitration agreement. It also declares that such application of

Part I will not be permissible if provisions therefor are inconsistent with other enactment or with any rule made thereunder. This section 2[4] also

specifies that even if there be no inconsistency, Section 40[1], Section 41 and Section 43 of 1996 Act will not apply to arbitration under other

enactments. Section 40 of the 1996 Act, lays down that the arbitration

agreement is not discharged by death of a party thereto. Section 41 thereof contains a provisions in case when any person subject to arbitration agreement is adjudged insolvent. Section 43 deals with limitation. Thus, subÂ sections (2) and (3) of Section 43 of the 1996 Act, are not consistent with Section 18 and Section 19 of the MSMED Act. It is important to note that Section 18(3) of the MSMED Act itself extends provisions of 1996 Act to the arbitration by the Council or the other alternate agency. Hence, it follows that Section 2(4), is not relevant at all. Section 24 of the MSMED Act must prevail and it does not permit use of entire of 1996 Act in proceedings under MSMED Act. Provisions of 1996 Act to the extent they do not militate with scheme in Sections 18 and 19 of the MSMED Act and hence, the Limitation Act,1963 govern the arbitration proceedings under MSMED Act after the same begin.

34. Next question to be addressed is whether MSMED Act excludes application of the Limitation Act,1963 independently i.e., whether a claim timeÂ

barred for the Civil Suit can be still be referred to Council under Section 18 of the MSMED Act.

35. The Division Bench of this Court in Delton's case notices the objections raised by the MSEDCL like the application moved by Delton suffered

from misÂjoinder of causes of action, that to the proceedings before the Council, the law of limitation applies and if at all any claim for interest was to

be laid, it should have been instituted within a period of three years from the date on which the cause of action arose. The Council took up the

proceedings initially in conciliation. The meetings were held between the parties on 6th September, 2013, 11th October, 2013, 21st December, 2013

and 18th January, 2014. The parties were present. However, after considering the records and exhaustive arguments, the Council held that the

conciliation had failed, and it decided to go for arbitration, but, in the meanwhile, the earlier Act No. 32 of 1993 stood repealed and the MSMED Act,

came into force. It enabled the Council to take up the arbitration as per 1996 Act and accordingly it made an award holding that Delton (supra), was

entitled to get interest from the respondent MSEDCL of Rs. 83,54,695/Â upto 31st March, 2005, and subsequent interest as per claim submitted upto

the date, namely, 31st October, 2013 of Rs. 6,95,18,435/Â with further interest till payment as per section 10 of the MSMED Act, 2006 till realization.

The Council gave time of one month to the MSEDCL to pay this sum. MSEDCL then challenged it under Section 34 of the 1996 Act before the learned Single Judge of the High Court and in terms of Section 19 of the MSMED Act, also deposited seventy five per cent of the amount in terms of the decree/Award. Its petition was accompanied by the application seeking condonation of delay. The learned Single Judge by composite order condoned delay and set aside the Award passed by the Minor and Small Enterprises Facilitation Council. This order of the learned single Judge was challenged in appeal by the appellant—original applicant Delton before the Division Bench at Bombay.

36. Division Bench in paragraph 34 of the judgment reproduces the arguments of Delton (supra), on limitation. Delton had invited attention to Section

2(4) of the Arbitration Act, 1940, Section 24 of the MSMED Act, and Section 43 of the Arbitration and Conciliation Act, 1996 to submit that it was a

statutory arbitration. Due to clarification in sub-section (4) of Section 2, certain provisions of the 1996 Act including Section 43 were inapplicable to

statutory arbitration. Therefore, the Limitation Act, 1963, was inapplicable to the arbitration contemplated by the MSMED Act. On other hand

MSEDCL (para 40 of the DB judgment) did urge that such a petition could not have been entertained by the Council and the Reference itself was

barred by limitation. No suit could have been laid in a competent civil court after such a long period. The claim was, therefore, hopelessly time barred.

37. The Division Bench in para 41 notes that alternatively and without prejudice MSEDCL used the language of Sections 4, 5 and 6 of the Act No. 32

of 1993 and the corresponding provisions in the MSMED Act, to submit that it is the "amount due" from a buyer together with the amount of interest

calculated upon it which could form subject matter of the proceedings. In para 42, the Division Bench mentions the reply of MSEDCL on the

contention that learned single Judge dealt with delay in filing the Section 34 petition together with the merits. In present appeal filed by Shri Dhole,

learned counsel, we are not required to evaluate these aspects.

38. Issue II framed in para 48 of the judgment is—(II) Whether, as held by the learned single Judge, these claims were barred by limitation ?

Question — Whether the Limitation Act, 1963 is applicable to the arbitration under MSMED 2006 Act is looked into in paragraphs 58 onwards. In

Deltons case, the Division Bench finds that section 43(1), the Arbitration and Conciliation Act, 1996, states that the Limitation Act, 1963, shall apply to

arbitrations as it applies to proceedings in Court. Subsection (4) of Section 2 says that Part I of the Arbitration and Conciliation Act, 1996,

containing Chapter I General Provisions, except subsection (1) of Section 40, Sections 41 and 43 shall apply to every arbitration under any other

enactment for the time being in force as if that arbitration were pursuant to an arbitration agreement and as if that other enactment were an

agreement. These words and expressions, according to Delton ruled out the application of the Limitation Act, 1963.

In paragraph 60, the Division Bench declares that it was unable to agree with this contention of Delton for more than one reason. In paragraph 64, it

prefers to approach from a perspective different from the one presented by Shri Madkholkar, learned counsel for Delton and Shri Joshi, learned

counsel for MSEDCL. The Division Bench considers the words "amount due" in scheme of the 2006 Act, and concludes that it does not include a

time-barred debt. It refers to the judgment of the Hon'ble Supreme Court in State of Kerala v. V.R. Kalliyankutty and Anr. reported in

MANU/SC/0226/1999 : AIR 1999 SC 1305, Black's Law Dictionary, 6th Edn. at page 499, and judgment in Hansraj Gupta and Ors. Vrs. Dehradun

Mussoorie Electric Tramway Co. Ltd. MANU/ PR/0062/1932 : AIR 1933 PC 63. The Division Bench takes note of the finding of the Hon'ble

Supreme Court that since Kerala Revenue Recovery Act does not create any new right, the person claiming recovery cannot claim recovery of

amounts which are not legally recoverable nor can a defence of limitation available to a debtor in a suit or other legal proceeding be taken away under

the provisions of the Kerala Act. This Division Bench also notes from the Supreme Court Judgments that that a wide interpretation of "amount due

would destroy an important defence available to a debtor in a suit against him by the creditor and may attract Article 14. In Nav Rattanmal and Ors.

v. State of Rajasthan MANU/SC/0035/1961 : AIR 1961 SC 1704, the Statutes of Limitation have been considered as Statutes of Repose and Statutes

of Peace. The generally accepted basis for such statutes is that they are designed to effectuate a beneficent public purpose.

39. This Division Bench in Delton's case in paragraph 66 also holds that the Hon'ble Supreme Court has held that there are good reasons for

supporting the existence of defence of limitation. In paragraph 67 it holds

“67. Once we approach this matter from this angle, we cannot place a interpretation which would enable the Council and set up under the Acts of

1993 and 2006 to make an Award of the present nature awarding claims which are barred by limitation. In the sense that Award enabled recoveries

of amount which were not due.”

In paragraph 69, the Division Bench notices that in the case of A.P. Power Coordination Committee v. M/s. Lanco Kondapalli Power Limited and

Ors. (supra), the Hon'ble Supreme Court held that the inquiry should be not whether the Limitation Act 1963 is applicable to proceedings before

statutory Tribunals as that would rule out the application of the law of limitation, but, it should be whether a defence based on that law of limitation has

been expressly ruled out. The provisions cannot be stretched to infer applicability of the Limitation Act, 1963 but, what is equally important, according

to the Hon'ble Supreme Court, is whether the parties intended to rule out a defence based on its provisions. In accepting an argument on such lines,

the Hon'ble Supreme Court held that not only the principles underlying and emphasized namely, delay and laches but, to avoid stale claims being

awarded and granted, the defence based on the provisions of the Limitation Act, 1963 being entirely ruled out would mean that public policy is at

stake.

40. Shri Dhole, learned Counsel in matters before us, has placed a strong reliance on PPN Power Generating Co. (P) Ltd. (supra) where in para 66, it

was held by Hon'ble Supreme Court that the provisions with regard to the Limitation Act, 1963 under Section 43 of the Arbitration Act would not be

applicable to statutory arbitration conducted under the Electricity Act, 2003. Later judgment of Hon'ble Apex Court in A.P. Power Coordination

Committee v. M/s. Lanco Kondapalli Power Limited and Ors. (supra), considers it and explains this conclusion. The Division Bench of this Court at

Bombay in Deltons case has noted this distinguishing factor also. Judgment of the Hon'ble Supreme Court in A.P. Power Coordination Committee v.

M/s. Lanco Kondapalli Power Limited and Ors, (supra), in paragraph 16 observes that in paras 64 and 68 in PPN Power Generating Co. (P) Ltd., the

Hon'ble Supreme Court was satisfied on facts itself that the principle of delay and laches was not attracted. Further, the provisions in the PPA in PPN

Power Generating Co. (P) Ltd. (supra) provided that the seat of arbitration would be in London and that alone made Part I of the 1996 Act

inapplicable to the arbitration proceeding and ruled out applicability of Section 43 also. In para 69 of the reported judgment in A.P. Power Coordination

Committee v. M/s. Lanco Kondapalli Power Limited and Ors.(supra), the Hon'ble Court, in absence of any provision in the Electricity Act, creating a

new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of

limitation, is persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot

be entertained or allowed if found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of

limitation. In paragraph 30, it is held that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed

for an ordinary suit before the civil court.

41. Division Bench in Deltons case observes Â?Â?Â?

â??70. We have, therefore, no hesitation in agreeing with the learned single Judge, but for different reasons. The Act in the present case namely, the

Act of 32 of 1993 and the MSMED Act, should create a right in the appellant before us to seek claims which are barred by the law of limitation.

Therefore, it is not as if we have to only limit our inquiry or restrict it in finding out whether the law of limitation which applies to arbitration under the

Arbitration and Conciliation Act is wholly ruled out in its application to proceedings under the above two laws, but whether a right is created by the

other two laws in a claimant like the appellant to seek claims which are barred by the law of limitation.

71. We have also noted that the interest for delayed payment to the industries covered by the Act 32 of 1993 and the MSMED can be claimed in

proceedings other than an arbitration under these Acts. The interest can be awarded by a civil court in a suit. An incongruous situation will emerge

then in the sense that the claim for interest involved in such a suit filed in the competent civil court will be considered by applying the law of limitation

but in arbitral proceedings before the Council or other forum that law will be inapplicable. A civil court will not award the claim if it is timeÂ?barred, but

a Council under the above two Acts can award it even if it is hopelessly barred by

time and ignoring even the general principles of laches. Apart from the fact that the Act 32 of 1993 and the MSMED Act employing the same expression "recovery of amounts due" additionally section 6 of the Act 32 of 1993 and section 19 of the MSMED Act read together would denote that a decree for payment of interest can be passed by a civil court in terms of the MSMED Act. The reference to the Council for recovery of such interest and a civil suit, therefore, can lie only if the claims are not barred by limitation and the defence that they are so barred even by delay and laches is available in both proceedings.â??

The principle laid down in the Privy Council decision (Ramdutt Ramkissen Dass v. E.D. Sassoon and Co.) reported in MANU/PR/0126/1929 : AIR

1929 Privy Council 103, is also looked into to reach this view. The Division Bench in Deltons case therefore observes in para 75 â?

â?? If the amount or money is due even under the statutory instrument as above, if that rules out completely the applicability of law of limitation and

enables a Council to award time barred claims, then, such a stipulation must be expressly found in that statute or its provisions read together and

harmoniously only ought to lead to this implied conclusion. It is that statute which empowers the Council to enter as arbitrator and which arbitration

must proceed in terms of the Arbitration and Conciliation Act, 1996, by treating the whole arrangement as an agreement for arbitration. That statute,

namely, Act 32 of 1993 and the successor law does not enable, to our mind, granting of a time barred claim.â??

42. This Bench observes in paragraph 76 â?

Â â??76. We have, therefore, no hesitation in agreeing with the learned single Judge that the claims which were hopelessly time barred have been

awarded and such an Award cannot stand the scrutiny on the touchstone of public policy. It could have been, therefore, set aside by taking recourse

to an application under section 34 of the Arbitration and Conciliation Act, 1996.â??

In paragraph 93, it concludes â?

â??The claims were admittedly time barred and still awarded. That renders the award illegal and contrary to public policy.â??

Contentions of Shri Dhole, learned counsel on lack of nexus between limitation and recovery under 2006 Act, or then no violation of â??public

policy? if such time barred claim is decreed and hence, absence of jurisdiction under Section 34 of 1996 Act to set it aside; all stand answered by

these observations of the Division Bench in Deltons case. We do not find any reason to differ from it.

43. Hon'ble Supreme Court in ESI Corpn. v. HMT Ltd., (2008) 3 SCC 35, at page 38 in para 19 observes :

19. Our attention, however, has been drawn to a decision of this Court in Hindustan Times Ltd. v. Union of India¹ wherein it has been laid down:

(SCC pp. 254-55, para 29)

29. From the aforesaid decisions, the following principles can be summarized:

The authority under Section 14-B has to apply his mind to the facts of the case and the reply to the show-cause notice and pass a reasoned order

after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually

takes into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the

employer based on plea of power cut, financial problems relating to other indebtedness or the delay in realization of amounts paid by the cheques or

drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action

for recovery of damages under Section 14-B.

44. Hon'ble Supreme Court in Director of Inspection of Income Tax (Investigation) v. Pooran Mal and Sons, (1975) 4 SCC 568, at page 576 in para 14 holds :

14. In Wright v. John Bagnall and Sons Ltd. a case arising under the Workmen's Compensation Act, 1897 which requires the claim for

compensation to be made within six months of the occurrence of the accident causing the injury, it was held that:

An agreement arrived at between the parties shortly after the accident that there is a statutory liability on the employer to pay compensation, the

amount of compensation being left open for future settlement, is evidence upon which the Judge or arbitrator may properly find that the employer is

estopped from setting up the defence that the request for arbitration was not filed within six months of the accident.

The agreement between the parties in this case that the Income Tax Officer may

pass a fresh order within two months of the order of the High Court

is an agreement which proceeded on the basis that the Income Tax Officer had jurisdiction to pass a fresh order. The principle of these decisions is

also stated in Craies on Statute Law (6th Edn.) at p. 269 as follows:

“As a general rule, the conditions imposed by statutes which authorise legal proceedings are treated as being indispensable to giving the court

jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action

themselves, and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without

affecting the jurisdiction of the court.”

Thus, Hon'ble Supreme Apex Court holds that there was no question of the period of limitation in section 132(5) involving public interests. It is

intended for the benefit of the parties.

45. The Division Bench of this Court at Bombay was not asked to examine the impact of Sections 27 or 28 and the object behind mandate to mention

the “unpaid amount” or the principal and interest amounts separately and its specific disallowance. It draws support from *State of Kerala v.*

V.R. Kalliyankutty and Anr. (supra), where the provisions of Kerala Revenue Recovery Act, 1968 have been extended to a recovery not otherwise

possible under it. Paragraphs 3 and 4 of this Apex Court judgment shows that in exercise of power under Section 71 of Kerala Revenue Recovery

Act, 1968, only the provisions pertaining to recovery are extended to expedite the debt recovery. Debt extended under some other provision and found

“due” is allowed to be recovered under this expeditious remedy. In scheme of MSMED Act, Section 18 giving special powers to Council is placed

after Section 17 and it contains appropriate machinery for resolving all disputed questions including computation of principal amount and interest

amount. Both these sections appear in same Enactment. In other words for amount becoming due and recoverable under one law, forum for recovery

(execution) is not prescribed. We need not observe more on this aspect here but, we, with respect, feel that exposition of “amount due” in

Delton's case by the Division Bench may not be correct. Impact of this view on limitation facet or time-barring concept for invoking Section 18 of

MSMED Act, also in that even needs closer scrutiny. We also find that MSMED Act

2006 alters and widens the legal field till then covered by the

Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 i.e., Act No. 32 of 1993 substantially. The natural

sweep of Sections 18, 22, 27 and 28 of the MSMED Act may not sustain a civil suit and a relook on correctness of the view of Division Bench in

Delton's case on applicability of the Limitation Act, 1963 also becomes necessary.

46. We find that in Delton's case, this Court was not required to look into cardinal issues which may have made some difference on the outcome.

Those issues are â?

A. Whether in view of a more comprehensive scheme in MSMED Act and improvement made by it over Act no. 32 of 1993, the jurisdiction of Civil

Court is taken away by 2006 Act?

B. Whether an incongruous situation perceived in paragraph 71 of its judgment by the Division Bench in Delton's case (supra) can emerge due to

reading of Section 6 of Act no. 32 of 1993, (not in force) and Section 18 of the MSMED Act?

C. Whether the period of limitation runs from the appointed date only to find out limitation for cause of action to approach Council under Section 18 of

2006 Act?

D. Whether Section 21 of 1996 Act has any relevance in the scheme of Section 18 of the MSMED Act?

E. Whether the peculiar provisions like â??thrice the bank rate of interestâ?, interest compounded monthly, direction to mention principal, interest and

amount unpaid in balance sheet by buyer, step by step approach adopted in Section 18 and overriding effect in Section 24 of the 2006 Act, all are

sufficient to exclude the applicability of the Limitation Act, 1963?

F. Whether the mention of â??unpaid amountâ?? in balance sheet of the buyer must include â??time barredâ?? claims?

G. What is the legislative intent in mandating the mention of â??unpaid amountâ?? or even timebarred recoveries separately?

H. Whether such disclosure of â??unpaid principal amount' or the â??compound interest quantumâ?? separately gives rise to the fresh or repeated

annual causes of action for recovery of the principal and/or interest amount ?

I. Whether the present controversy need to be viewed independent of the Act No.

32 of 1993?

47. In the light of this consideration, we find that the correctness of the view of the Division Bench on applicability of the Limitation Act, 1963 to

claims arising under the MSMED Act, 2006 needs to be examined by a Larger Bench of this High Court. Registry therefore, to place the papers

before the Hon'ble the Chief Justice for constitution of a Larger Bench at the earliest.