

Nbcc (India) Ltd vs The State Of West Bengal on 10 January, 2025

Author: Pamidighantam Sri Narasimha

Bench: Pankaj Mithal, Pamidighantam Sri Narasimha

2025 INSC 54

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3705 OF 2024

NBCC (INDIA) LTD.

VERSUS

THE STATE OF WEST BENGAL & ORS.

JUDGMENT

PAMIDIGHANTAM SRI NARASIMHA, J.

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1. Introduction: The old value of ‘Small is beautiful’¹ has not lost its relevance. Recognising the contribution of micro, small and medium enterprises towards economic development, the United Nations declared June 27th as MSME day. MSMEs are said to be the backbone of many economies, including India. This resonates with the statement of the father of our nation, Mahatma Gandhi, declaring that the ‘salvation of India lies in cottage and small scale industries’. The Parliament enacted the Micro, Small and Medium Enterprises Development Act, 2006² for facilitating the promotion and development of the enterprises by creating certain rights and duties and establishing a Board, Advisory Committee, and Facilitation Council. Importantly, the Act provided a mechanism for dispute resolution. 1.1 The MSME before us has a simple prayer. It seeks to refer the dispute that it has with the buyer regarding payment of its dues to the Facilitation Council for arbitration under Section 18 of the Act, which provides that “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”. The appellant opposes this prayer by contending that ‘any party’ can only be a ‘supplier’ and that supplier 1 E.F. Schumacher, ‘Small Is Beautiful: A Study of Economics as if People Mattered’ (1973) “We need the freedom of lots and lots of small, autonomous units, and, at the same time, the orderliness of large-scale, possibly global, unity and co-ordination. When it comes to action, we obviously need small units, because action is a highly personal affair, and one cannot be in touch with more than a very limited number of persons at any one time.”² Hereinafter referred to as ‘the Act’.

should have been registered under Section 8 of the Act even before execution of the contract, if not, the reference is impermissible. The High Court did not answer this question. Instead, it permitted the parties to raise such objections before the Arbitral Tribunal. The buyer is in appeal before us, raising the same question as a jurisdictional issue.

1.2 We have examined the text, context, and purpose of the Act to arrive at the decision that Section 18 is not restrictive and is a remedy for the resolution of disputes, and as such, it is kept open-ended to enable ‘any party’ to refer the dispute to seek redressal. For the reasons to follow, we rejected the submission that ‘any party to a dispute’ is confined to a ‘supplier’ who has filed a memorandum under Section 8 of the Act. We have also explained that the issue(s) that have arisen in the decisions of this Court in *Silpi Industries v. Kerala State Road Transport Corporation*³ and *Gujarat State Civil Supplies Corporation Limited v. Mahakali Foods Private Limited*⁴ were very different from the issue that has arisen for our consideration. However, for clarity and legal certainty, we have directed the appeal be placed before the Hon’ble Chief Justice of India for referring the matter to a bench of

three Judges for an authoritative pronouncement.

3 (2021) 18 SCC 790, hereinafter referred to, in short as Silpi Industries. 4 (2023) 6 SCC 401, hereinafter referred to, in short as Mahakali Foods. 1.3 We will first state the necessary facts before considering the submissions, followed by our reasons and conclusions.

2. Facts: The appellant, National Buildings Construction Corporation, granted four work orders between July 2015 to August 2016 to M/s Saket Infra Developers Private Limited, respondent No. 45 for undertaking construction work at different places in West Bengal. Pursuant to the work orders, contracts were executed on 27.08.2015, 17.11.2015, 28.07.2016 and 20.08.2016. The Enterprise filed a memorandum under Section 8 of the Act on 19.11.2016 as a 'small enterprise'. Thereafter, on 15.09.2017, the appellant also executed a fifth contract in favour of the Enterprise.

2.1 Work is said to have commenced on various dates, supplies continued, and bills were raised from time to time by the Enterprise, even after filing of the memorandum under Section 8 of the Act. The Table showing dates of the work orders, contract and particulars of the work awarded and details of bills raised after registration is as under:

S. No. Dates of Dates of Construction Bills raised after Contracts Registration on Work 19.11.2016 Orders Contract-I 27.08.2015 10 Bills for 34.71 crores

1. 30.07.2015 Office Building for National Jute Board, Rajarhat, Kolkata 5 Hereinafter referred to as the 'Enterprise'.

2.	Contract-II	17.11.2015	8 Bills for 14.18 crores
	26.10.2015	Residential Quarters for ISI, Kolkata	
3.	Contract-III	28.07.2016	10 Bills for 10.49 crores
	19.01.2016	ITI Campus, Darjeeling	
4.	Contract-IV	20.08.2016	8 Bills for 12.46 crores
	19.08.2016	Regional Centre for Lalit Kala Academy, Kolkata	

19.11.2016 Registration of Respondent No. 4 as Small Undertaking Contract-V 11.10.2017 5 Bills for 15.72 crores

5. 15.09.2017 MSTC Office, Rajarhat, Kolkata 2.2 During the subsistence of the contract, disputes arose between the parties in connection with all five contracts. It may be mentioned here itself that, with respect to the fifth contract, the Enterprise instituted a commercial suit [(Comm.) No. 229 of 2021] before the High Court of Delhi, which is said to be pending consideration. However, this fact does not have

any bearing on the issues before this Court.

2.3 Seeking resolution of disputes, on 28.03.2019, the Enterprise made a reference under Section 18 of the Act for recovery of the amounts due to it to the West Bengal State Micro and Small Enterprises Facilitation Council 6. The Facilitation Council initiated action, and with the failure of the conciliation proceedings under Section 18(2) of the 6 Hereinafter referred to as the 'Facilitation Council'.

Act, the dispute was referred to arbitration under Section 18(3) on 19.01.2021. A further notice of the arbitral proceedings was also issued, and it was received by the appellant on 30.09.2021. 2.4 The appellant objected to the Facilitation Council entertaining the reference, firstly on the ground that the Enterprise was not registered before the execution of the contracts and, as such, the Facilitation Council does not have jurisdiction under Section 18. Secondly, it was also argued that the subject matter of the contract relates to the execution of the works contracts, which falls outside the scope and ambit of the Act. Carrying these objections further, the appellant filed a Writ Petition under Article 226 of the Constitution of India before the High Court of Calcutta, raising the jurisdictional question of the Facilitation Council entertaining the reference.

3. Decisions of the Single Judge and the Division Bench: The learned Single Judge dismissed the Writ Petition on 16.12.2021 by simply holding that "the question of jurisdiction can be raised before the Arbitral Tribunal, which shall decide the same before entering into other questions." The decision of the Single Judge was challenged unsuccessfully before the Division Bench of the High Court by the order impugned before us. The Division Bench also referred the decision of this Court in *Kone Elevator India Private Limited v. State of Tamil Nadu*⁷ to hold that a works contract is an indivisible contract and also that the Act, being a special legislation, overrides other statutes. The Division Bench agreed with the finding of the Single Judge that all objections, including those relating to maintainability, can be raised and contested before the arbitrator. Thus, the appellant is in appeal before us.

4. Submissions: Mr. Gopal Sankaranarayanan, learned senior counsel, appearing for the appellant, challenged the jurisdiction of the Facilitation Council in entertaining the reference under Section 18 of the Act by the Enterprise for the simple reason that it registered itself after the contracts were executed and not before. His submission is based on the decision of this Court in *Silpi Industries (supra)* and *Mahakali Foods (supra)*. Though the impugned decision of the High Court was on 18.05.2022, almost a year after the judgment of this Court in *Silpi Industries (supra)*, it has not taken note of the judgment of this Court. Mr. Gopal Sankaranarayanan also referred to certain subsequent orders of this Court, which we will be examining while considering the issue.

7 (2014) 7 SCC 1.

4.1 Ms. Madhumita Bhattacharjee and Mr. Roshan Santhalia, learned counsels for respondents, opposed the appellant's arguments and contended that these questions can always be raised before the Arbitral Tribunal as directed by the Single as well as the Division Bench of the High Court.

5. Issue for our consideration: The question of law for our consideration is whether an MSME cannot make a reference to the Facilitation Council for dispute resolution under Section 18 of the Act if it is not registered under Section 8 of the Act before the execution of the contract with the buyer.

6. Before we examine the provisions of the Act and the ratio of the judgment of this Court in Silpi Industries (supra) and Mahakali Foods (supra), it is necessary to take note of the statute (repealed Act) that preceded the Act and also the important judgment of this Court in Shanti Conductors Private Ltd. v. Assam State Electricity Board⁸, which also has a direct bearing on the decision in Silpi Industries (supra) and for interpreting the provisions of the Act.

7. The repealed Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993⁹ and the judgment in Shanti Conductors v. Assam State Electricity Board: 8 (2019) 19 SCC 529, hereinafter referred to, in short as Shanti Conductors. Hereinafter referred to as the repealed statute.

The decision of this Court in Shanti Conductors (supra), a three-Judge Bench Judgment, was necessitated because of the difference of opinion between two Judges. The relevant facts of Shanti Conductors (supra) are that the Small-Scale Industry therein entered into a contract for supply of goods and services to the buyer before the said 1993 repealed statute came into force. However, the supplies under the contract were rendered after the said statute came into force. Of the seven questions of law that were formulated by the three-judge bench, the first two questions, relevant to our purpose, are extracted for ready reference. It is necessary to mention here that filing of a memorandum by any MSME was never an issue there, as, in fact, there was no such requirement under the repealed statute. The issues in Shanti Conductors (supra) are as follows:

“34.1.(1) Whether the 1993 Act is not applicable when the contract for supply was entered into between the parties prior to the enforcement of the Act i.e., 23-9-1992?

34.2. (2) Whether in the event it is found that the Act is applicable also with regard to contract entered prior to the 1993 Act in pursuance of which contract, supplies were made after the enforcement of the 1993 Act, the 1993 Act can be said to have retrospective operation?” 7.1 The repealed statute comprised of 11 provisions, of which Section 3 related to the liability of the buyer to make payment, Section 4 related to the date and rate of interest payable, Section 5 related to the liability to pay compound interest, and Section 6 related to the right of recovery of the amount payable to the supplier.

7.2 Having considered the statutory scheme, the Court came to the conclusion that the incidence of applicability of the liability under that statute is supply of goods or rendering of services. The Court categorically held that the liability of the buyer for payment under the Act arises even if the agreement of sale is prior to the Act (repealed) but if the supplies were made after the Act.

7.3 Answering the first question, this Court held as under: -

“61. We have noticed above that the incidence of applicability of the liability under the Act is supply of goods or rendering of service. In event the supply of goods and rendering of services is subsequent to the Act, can liability to pay interest on delayed payment be denied on the ground that agreement in pursuance of which supplies were made were entered prior to enforcement of the Act? Entering into an agreement being not expressly or impliedly referred to in the statutory scheme as an incident for fastening of the liability, making the date of agreement as date for imposition of liability does not conform to the statutory scheme. This can be illustrated by taking an example. There are two small scale industries which received orders for supply of materials. ‘A’ received such orders prior to the enforcement of the Act and ‘B’ received the order after the enforcement of the Act. Both supplied the goods subsequent to enforcement of the Act and became entitled to receive payment after the supply, on or before the day agreed upon between the supplier and buyer or before the appointed day. Payments were not made both to ‘A’ and ‘B’ as required by Section 3. Can the buyer who has received supplies from supplier ‘A’ escape from his statutory liability to make payment of interest under Section 3 read with Section 4? The answer has to be No. Two suppliers who supply goods after the enforcement of the Act, become entitled to receive payment after the enforcement of the Act one supplier cannot be denied the benefit of the statutory protection on the pretext that the agreement in his case was entered prior to enforcement of the Act. When the date of agreement is not referred as material or incidence for fastening the liability, by no judicial interpretation the said date can be treated as a date for fastening of the liability. The 1993 Act being beneficial legislation enacted to protect small scale industries and statutorily ensure by mandatory provision for payment of interest on the outstanding money, accepting the interpretation as put by the learned counsel for the Board that the day of agreement has to be subsequent to the enforcement of the Act, the entire beneficial protection of the Act shall be defeated. The existence of statutory liability depends on the statutory factors as enumerated in Section 3 and Section 4 of the 1993 Act. Factor for liability to make payment under Section 3 being the supplier supplies any goods or renders services to the buyer, the liability of buyer cannot be denied on the ground that the agreement entered into between the parties for supply was prior to the 1993 Act. To hold that liability of buyer for payment shall arise only when agreement for supply was entered into subsequent to enforcement of the Act, it shall be adding words to Section 3 which is not permissible under the principles of statutory construction.

62. We, thus, are of the view that the judgments in Purbanchal Cables & Conductors 10, Assam Small Scale Industries 11 and Shakti Tubes Ltd. 12 which held that the 1993 Act shall be applicable only when the agreement to sale/contract was entered into prior/subsequent to the enforcement of the Act, does not lay down the correct law. We accept the submission of the learned counsel for the appellants that even if agreement of sale is entered into prior to enforcement of the Act, liability to make

payment under Section 3 and liability to make payment of interest under Section 4 shall arise if supplies are made subsequent to the enforcement of the Act.” (emphasis supplied) 7.4 The ratio of the decision in Shanti Conductors can be formulated as follows:

i) Even if contracts are entered into before the commencement of the repealed statute, the liability to make payment under Section 3, and to pay interest thereon under Sections 4 and 5 and to 10 Purbanchal Cables & Conductors (P) Ltd. v. Assam SEB, (2012) 7 SCC 462. 11 Assam Small Scale Industries Development Corpn. Ltd. v. J.D. Pharmaceuticals, (2005) 13 SCC

19.

12 Shakti Tubes Ltd. v. State of Bihar, (2009) 7 SCC 673. recover the amount under Section 6 will arise if the supplies are made subsequent to the enforcement of the statute. The incidence of liability under the repealed statute is ‘supply of goods or rendering of services’,

ii) when the date of contract is neither referred to nor made an incident for fastening the liability under the statute, by way of judicial interpretation, courts cannot treat the said date as the date for fastening the liability. The existence of the statutory liability depends on the language employed in Sections 3 to 6 of the statute,

iii) to hold that the liability of the buyer to make payment shall arise only when the contract for supply was entered into subsequent to the enforcement of the Act will defeat the purpose and object of the beneficial legislation intended to protect small- scale and ancillary industrial undertakings.

8. The Micro, Small and Medium Industry in our Country: After the repeal of the 1993 Act, the present Act came into force with effect from 02.10.2006. The Act is a comprehensive legislation that recognises and seeks to rejuvenate the importance of MSMEs, whose importance and contribution is accepted in contemporary economies across the globe, and accredited by the United Nations 13. United Nations, commenting on the significance of MSMEs observes that:

“MSMEs help reduce levels of poverty through job creation and economic growth; they are key drivers of employment, decent jobs and entrepreneurship for women, youth and groups in vulnerable situations. They are the majority of the world’s food producers and play critical roles in closing the gender gap as they ensure women’s full and effective participation in the economy and in society”.

8.1 In the statement of object and reasons of the Act, it is mentioned that “many Expert Groups and Committees appointed by the Government from time to time as well as small scale industry sector itself has emphasised the need for a comprehensive central enactment to provide an appropriate framework for the sector to facilitate its growth and development, emergence of a large service sector assisting the small scale industry in the last two decades also warrants a composite view of the sector

encompassing both industrial units and related service entities. The world over, the emphasis has now been shifted from industries to Enterprises.” 8.2 The rights, incentives and remedies provisioned under the Act are the backbone of our economy. Statistics indicate that MSMEs provide employment to 62% of the country’s workforce, contribute 30% to 13 ‘2024 Theme: MSMEs and the SDGs’ (United Nations) <<https://www.un.org/en/observances/micro-small-medium-businesses-day>> (2024).

India’s GDP, 14 and account for around 45% of India’s total exports¹⁵. The Indian MSME sector is projected to grow to \$1 trillion by 2028¹⁶. Moreover, MSMEs play a crucial role in promoting rural development, women’s employment, and inclusive growth. 19.5% of total MSMEs¹⁷ and 70% of informal micro-enterprises are owned by women¹⁸. There is undoubtedly a global consensus regarding the indispensable importance of MSMEs.

8.3 However, while the United Nations and even the Expert Groups and Committees appointed by the Government from time to time have underscored the importance of MSMEs, and that has led to the Parliament enacting the present legislation, MSMEs in India have been facing many challenges which are reflected in their performance. A recent report records that, “MSMEs in India contribute 30% to value- addition and 62% to employment”, as against “49% and 77%, in other 14 ‘A microscope on small businesses: The productivity opportunity by country’ (McKinsey Global Institute) <https://www.mckinsey.com/mgi/our-research/a-microscope-on-small-businesses-the-productivity-opportunity-by-country#> (May 29, 2024); ‘Contribution Of MSMEs to the GDP’ (Press Information Bureau) <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2035073>> (July 22, 2024).

‘The MSME Revolution: Transforming India’s Economic Landscape’ (Press Information Bureau) <<https://pib.gov.in/PressReleasePage.aspx?PRID=2087361>> (Dec 23, 2024). ¹⁶ ‘MSMEs: The Backbone of India’s Economic Future’ (Invest India) <<https://www.investindia.gov.in/team-india-blogs/msmes-backbone-indias-economic-future>> (June 28, 2024).

¹⁷ ‘Women-led Enterprises’ (Lok Sabha Digital Library) <<https://eparlib.nic.in/bitstream/123456789/2502792/1/AU3648.pdf>> (Aug 10, 2023). ¹⁸ ‘Participation of Females in MSMEs’ (Lok Sabha Digital Library) <<https://eparlib.nic.in/bitstream/123456789/2974207/1/AU1128.pdf>> (Feb 8, 2024). emerging economies”. ¹⁹ The 2023-2024 Economic Survey also recorded the concerns faced by MSME’s. ²⁰

9. It is in the above-referenced context that we need to comprehend, interpret and construct the remedies contemplated under the Act.

10. Interpretation of Statutory Remedies by Constitutional Courts: When a statutory remedy falls for consideration, it is the duty of the Constitutional Court to adopt an interpretation which would not only reduce the hiatus between a right and a remedy, but also to ensure that the remedy is effective.

If rights are recognition of a claim, remedies are their actualization. While the rights regime receives broad recognition under our constitutional framework, it is imperative that remedies must keep pace and be strengthened. One of the core functions of the higher judiciary is to bridge the gap between rights and remedies, and this would immediately give rise to the legislative, executive and judicial obligations for their provision, implementation, and declaration, respectively.

19 ‘A microscope on small businesses: The productivity opportunity by country’ (McKinsey Global Institute) <<https://www.mckinsey.com/mgi/our-research/a-microscope-on-small-businesses-the-productivity-opportunity-by-country#/>> (May 29, 2024). 20 ‘Economic Survey 2023-24’ <<https://www.indiabudget.gov.in/economicsurvey/doc/echapter.pdf>> (2024) “Licensing, Inspection, and Compliance requirements that MSMEs have to deal with, imposed particularly by sub-national governments, hold them back from growing to their potential and being job creators of substance...Further, many MSMEs struggle to secure the necessary funds to start, operate, or expand their business due to a variety of reasons including lack of collateral or credit history, high interest rates, complex documentation requirements, and long processing times, etc.” (emphasis supplied).

10.1 The right to an effective judicial remedy is an integral part of access to justice.²¹ An effective judicial remedy under a constitutional scheme must be (i) accessible, (ii) affordable, (iii) expeditious and (iv) cohesive. Accessibility requires the remedy to be easily available, physically and informationally. Affordability is an aspect that is related to the cost of availing the remedy, it must be at a reasonable price with a provision for legal aid, if need be. The expeditious nature of a remedy is concerned with the quick disposal of the case and abhors unreasonable delays. Yet another facet of effective judicial remedy is its cohesiveness. The cohesiveness of a remedy simply means that a person must have one specified forum for the redressal of grievances. This requirement must be understood as an antithesis of fragmentation of remedies, i.e., a litigant ought not to be forced to approach multiple forums for the same cause of action. When a statute provisioning a judicial remedy falls for construction, the choice of interpretative outcome is not governed so much by the power or privileges under the Constitution, but by the constitutional duties to create effective judicial remedies in furtherance of the right to access to justice. A meaningful interpretation that furthers effective judicial access is a constitutional ²¹ See, generally, Anita Kushwaha v. Pushap Sudan, (2016) 8 SCC 509 “...Four main facets that, in our opinion, constitute the essence of access to justice are: (i) the State must provide an effective adjudicatory mechanism; (ii) the mechanism so provided must be reasonably accessible in terms of distance; (iii) the process of adjudication must be speedy; and (iv) the litigant's access to the adjudicatory process must be affordable...In order that the right of a citizen to access justice is protected, the mechanism so provided must not only be effective but must also be just, fair and objective in its approach...” imperative and it is this duty that must inform the interpretative criteria. It is in the above referred context that we will now examine Section 18 of the Act.

11. Statutory Scheme of the MSMED Act, 2006: Sections 2(a), (c),

(e), (n), 7, 8, 17, 18, 20 and 21, to the extent that they are relevant, are reproduced hereinbelow for ready reference.

“2. Definitions- In this Act, unless the context otherwise requires, -

(a) “Advisory Committee” means the committee constituted by the Central Government under sub-section (2) of section 7.

(b) ...

(c) “Board” means the National Board for Micro, Small and Medium Enterprises established under Section 3;

(e) “Enterprise” means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951) or engaged in providing or rendering of any service or services;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16.

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.”

20. Establishment of Micro and Small Enterprises Facilitation Council.- The State Government shall, by notification, establish one or more Micro and Small Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification.

21. Composition of Micro and Small Enterprises Facilitation Council.— (1) The Micro and Small Enterprise Facilitation Council shall consist of not less than three but not more than five members to be appointed from among the following categories, namely: —... 11.1 First and foremost, Chapter V of the Act deals with delayed payments to micro and small enterprises and specifies the rights, liabilities, recovery, and remedies in favour of micro and small enterprises. The rights and liabilities are based on the incidence of supply made by the micro and small enterprise. To this extent, the Act continues the statutory scheme contemplated under the repealed statute and, therefore, the principle laid down in *Shanti Conductors* (supra) that the liability of a buyer commences from the date of supply and not from the date of execution of the agreement or contract, even though the contract was prior to coming into force of the Act, continues to apply. Up to this point, there seems to be no difficulty. The issue in the present case takes a different turn, as explained in the following part.

12. Whether registration is a necessary precondition to referring a dispute under Section 18 of the Act: The question that we are called upon to answer is whether the reference to the Facilitation Council under Section 18 of the Act is impermissible if the Enterprise is not registered by filing a memorandum under Section 8 of the Act before the contract is executed. This issue was not formulated, discussed and decided in any other judgment of this Court, including the two substantive judgments under the Act, i.e. *Silpi Industries* (supra) or *Mahakali Foods* (supra). In these two judgements, it is worth mentioning, such an issue was neither formulated, nor discussed. We will explain this in detail while discussing the facts and the ratios of these judgements. Apart from the submission of the appellant that the issue arising for our consideration is covered by the decision in *Silpi Industries* (supra), as approved in *Mahakali Foods* (supra), on our specific enquiry as to under which provision of the Act an Enterprise, which has not filed a memorandum under Section 8 would be barred from invoking remedies under Section 18 of the Act, Mr. Gopal Sankaranarayanan made the following submission.

13. According to him, though Section 18 provides that ‘any party to a dispute’ may make a reference to the Facilitation Council, the said ‘dispute’ must be “with regard to any amount due under Section 17”. This requirement, he would submit, takes us to Section 17, which provides that, “for any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon under Section 16”. Section 16 is the liability of the buyer to pay interest to the ‘supplier’ on the amounts payable to it under Section 15 for the supply of goods and rendering of any

services. The expression ‘supplier’ mentioned in Sections 15, 16 and 17 is defined in Section 2(n), as “a micro or small enterprise which has filed a memorandum with the authority referred to in sub-section (1) of Section 8 and includes,...”. Thus, it was submitted that a ‘supplier’ can only be an Enterprise that has filed a memorandum under Section 8 of the Act. He would conclude by submitting that for supplies made prior to such registration, Enterprise cannot avail the remedies under Section 18 of the Act.

14. We will now examine the submission in detail, the statutory provisions have already been extracted hereinabove. 14.1 Simply the Text: The text of Section 18 is clear and categoric. The words employed herein are “any party to a dispute”. The text, “any party to a dispute”, cannot be read as a ‘supplier’ by adopting a process of interpretation, by first referring to Section 17, then to Sections 15 and 16 and thereafter, in search of the definition of supplier, to Section 2(n) and finally stopping at Section 8 to hold that ‘any party to a dispute’ will only be an Enterprise which is registered under Section 8 of the Act. This meaning-making process to metamorphosise the clear text ‘any party’ to ‘a supplier’ is not the legal method to understand true meaning of words employed by the legislature. The age-old principle, referred to as the Golden Rule of Interpretation, is that “words of a statute have to be read and understood in their natural, ordinary and popular sense”.²² The choice of the words ‘any party to a dispute’ in Section 18 of the Act is deliberate. The legislative device of employing different expressions in successive provisions of the same statute is 22 *State of Andhra Pradesh v. Linde (India) Ltd.*, (2020) 16 SCC 335; *Grid Corpn. of Orissa Ltd. v. Eastern Metals & Ferro Alloys*, (2011) 11 SCC 334.

well known and intended to effectuate the desired purpose of the Act. If the Parliament had intended that ‘any party’ must be confined only to a “supplier”, or even a buyer, which expression is also defined, it would as well have used that or those very expressions. The Court cannot substitute the expression “any party” with “supplier” and change the text and, consequently, the scope and ambit of Section 18 altogether.

14.2 The context: Mention of Section 17 in Section 18 is only to provide context for a reference of dispute. The contextual relevance of locating Section 17 in Section 18 is only to provide the purpose of reference, not to confine the remedy to a registered Enterprise. This is to clarify that the reference shall be to adjudicate the dispute arising out of a liability of the buyer which is declared under Sections 15 and 16.

14.3 The purpose and object of Section 18: Apart from the text and context in which Section 18 of the Act employs the expression “any party to the dispute”, it is also to be seen that the section is provisioning a remedy for resolution of disputes. This remedy is provided by the statute, not by an agreement between the parties. It is therefore, necessary to keep it unrestricted and open-ended, enabling any party to a dispute to access the remedy. When statutory provision incorporation remedies for resolution of disputes fall for consideration, constitutional courts must interpret such remedies in a manner that would effectuate access to justice.

14.4 The definition clause: We will now examine the sheet anchor of Mr. Gopal Sankaranarayanan’s arguments that a supplier is defined under Section 2(n) can only be an Enterprise that has filed a

memorandum under Section 8 of the Act. For this purpose, we will extract the entirety of the definition of supplier under Section 2(n) of the Act;

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

(i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956);

(ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956);

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

From a plain reading of the Section 2(n), it is clear that the definition of a supplier is relatable only to a micro or a small enterprise and does not encompass a medium enterprise. Supplier not only means a micro or small enterprise, ‘which have filed a memorandum with the authority referred to under sub-Section (1) of Section 8’, but also includes

(i) NSIC, (ii) SIDC, and the (iii) company, cooperative society, trust or a body engaged in selling of goods produced by micro or small enterprise and rendered services which are produced by such enterprise. In other words, a supplier will also be an entity engaged in selling goods or rendering services, produced or provided by a micro or small enterprise. All such entities, irrespective of filing of the memorandum will be suppliers. Thus, the definition of a supplier encompasses not only those who have filed a memorandum, but also those who have not filed. The reason for keeping the definition is not difficult to imagine. This is still an unorganised industry, growing, evolving and many of them are at start-up levels. The reason for keeping the definition wide is supported by an Expert Committee, whose opinion we will refer to in the next Section.

14.5 Filing of memorandum under Section 8 is discretionary: We will now examine Section 8 of the Act relied on by the appellants to contend that filing of a memorandum by micro, small and medium enterprises is mandatory. Section 8 is extracted herein for ready reference:

8. Memorandum of micro, small and medium enterprises.

— (1) Any person who intends to establish, —

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

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

(c) a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):

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

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

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O.477 (E) dated the 25th July, 1991 filed an Industrial Entrepreneurs Memorandum, shall within one hundred and eighty days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.

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

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

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

(5) The authorities specified under sub-sections (3) and (4) shall follow, for the purpose of this section, the procedure notified by the Central Government under sub-section (2).” (emphasis supplied) Section 8(1)(a) provides that, “a micro or a small enterprise may, at his discretion” and even a medium enterprise engaged in providing or rendering services, also “may at his discretion” file a memorandum with the authority as may be specified by the Government. This important feature of the statute recognising and vesting of the discretion has not been noticed. There is also a logical follow-up to this choice or discretion vested in the micro or small enterprise and the medium enterprise engaged in rendering services for filing a memorandum in sub-section (4) of Section 8 and also proviso (a) to Section 8(1). As the said sub-section (4) of Section 8 relates to micro or small enterprises, the State Government shall by notification, specify the authority with which such micro or small enterprise may file a memorandum.

Considering the choice and discretion specifically provided to these enterprises, it becomes very clear that there is no mandatory prescription of filing a memorandum. Conversely it appears that medium enterprises engaged in manufacture or production of goods, “shall file a memorandum” with such authority as may be specified, and this is reflected in the proviso (b) to Section 8(1). At this stage, it is relevant to note that the definition of supplier under Section 2(n) is confined only to micro or small enterprise and does not encompass a medium enterprise.

14.6 There is a reason for this. The report of the Expert Committee on Micro, Small and Medium Enterprises clarifies the position that filing of memorandum by these enterprises is never mandatory. The relevant portion is as under 23:

4.5 Formalization of MSMEs As per 73rd round of National Sample Survey (NSS), there are 63.39 million MSMEs in the country. However, a large number of MSEs exist in the informal sector and are not registered with any statutory authority. Reasons for lack of registration are many and varied. For nano/household type of enterprises, in their view, not obtaining registration is an escape from official machinery, paperwork, costs and rent seeking. For them, it is perhaps “the art of not being governed”. Registration offers them little by way of tangible benefits. There are other MSEs who, upon reaching a minimum size seek legitimacy and acknowledgement of their existence to seek benefits or credit for instance, but they too struggle. While Udyog Aadhaar offers a simple mode of registration, it is usually not enough. Often, more is needed e.g., Shops and Establishments, PAN, GST, etc. Lack of formalization impacts the sector in terms of development and also impacts in availing credit from financial institutions like banks and in terms of policy making as well as development interventions. Registration provides information on nature of business, location, segmentation, etc. In the absence of a robust system of registration for capturing information on operational units, new units and exits, reliance has to be placed on surrogate data or on national census/ surveys, which are infrequent. The various avenues available to the MSMEs for formalization are discussed below:

4.5.1 Registration of Enterprises i. The Committee deliberated on the lack of formalization of a large number of MSMEs particularly in the micro category. The registration requirements of Indian enterprises is primarily governed by the First Schedule to the Industrial Development and Regulation (IDR) Act, 1951. It is mandatory only for a class of Medium enterprises which are engaged in the manufacture of goods. The registration of MSEs and Medium enterprises engaged in services activities is discretionary. However, over a period of time, registration has been an intrinsic part of the development of MSMEs itself. Having a registration certificate entitles an MSME for numerous benefits.

Particularly after the MSMED Act, 2006, which came into effect from October 2, 2006, availability of registration certificate has assumed greater importance.

(emphasis supplied) 23 Report of the Expert Committee on Micro, Small and Medium Enterprises (J u n e , 2 0 1 9) <<https://dcmsme.gov.in/Report%20of%20Expert%20Committee%20on%20MSMEs%20-%20The%20U%20K%20Sinha%20Committee%20constitutes%20by%20RBI.pdf>> 14.7 The above-referred extract from the Report of expert committee clearly indicates that MSME still exists as informal sector and it is also recognized that “registration offers them little by way of tangible benefits”. The committee also recognises that even though simpler modes of registration have been introduced, they are usually not enough. It further suggests that filing of memorandum provides information on the nature of business, location, and segmentation so that the regulators can capture “information on operational units”. Paragraph 4.5.1 also recognises the policy of lack of formalisation and it is expected that over a period of time filing of memorandum could be an intrinsic part of development of MSME itself. The above referred committee report as well as other documents very clearly establish that at no point of time filing of registration of MSME was ever considered to be precondition for availing the dispute resolution remedy under Section 18.

14.8 We have noted three clear features in the statutory regime. To start with, Section 18 does not use the expression supplier, instead employs the phrase, “any party to a dispute, may”. We have also noted that the definition of the expression ‘supplier’ is not confined to a micro or a small enterprise which has filed a memorandum under Section 8(1) but also includes companies or other entities engaged in selling goods or rendering services by an enterprise. Thirdly, Section 8 grants a discretion to a micro or a small enterprise in filing a memorandum with the authority.

14.9 Further, it is noteworthy that a “micro” [section 2(h)], “small” [section 2(m)] or “medium enterprises” [section 2(g)], formation and existence is simply on the basis of their investment as provided in Section 7 relating to classification of an Enterprise. They subsist without any formal “recognition”, “consent” or “registration”. The Act uses the expression filing of a “memorandum”. That is all. That too, at the discretion of the micro and small enterprises. The cumulative account of these four features is compelling and leads us to the conclusion that an application by a micro or a small enterprise to the Facilitation Council under Section 18 cannot be rejected on the ground that the said enterprise has not registered itself in Section 8.

15. Having considered the definition of the expression ‘supplier’, and also having considered the classification of enterprises into micro, small and medium with respect to each of which there is a separate legal regime to be suggested by the Advisory Committee and notified by the Central and State Governments, and in view of the discretion specifically vested with the micro and small enterprises for filing a memorandum under Section 8 of the Act, the submission that the Facilitation Council cannot entertain a reference under Section 18 if the enterprise is not registered under Section 8 must be rejected.

16. We will now discuss the cases relied on by the appellant.

17. *Re: Silpi Industries v. Kerala State Road Transport Corporation*: This is the lead judgment which has given the impression that this Court has laid down the law that Section 18 cannot be invoked by an Enterprise if it has not filed a memorandum under Section 8 of the Act before entering into a

contract. However, the issues that arose for consideration in Silpi Industries are in complete contrast with the present case. In that case, there were two appeals, and they involved different facts and circumstances. The short facts in the first appeal was that the appellants referred the matter to the Facilitation Council which made an award in favour of the appellant under the Arbitration and Conciliation Act. The award was challenged under Section 34 and the same was dismissed. During the pendency of the appeal under Section 37, the High Court decided a preliminary issue as to whether the Limitation Act would apply to arbitral proceedings under the MSME. In the other appeal, the issue that arose before the High Court was whether there is a right to file a counterclaim in arbitral proceedings under MSME. The High Court answered both issues in the affirmative, thus the appeal before this Court in Silpi Industries (supra). Before considering the appeals, the following two issues were framed.

(i) Whether the provisions of the Limitation Act, 1963 is applicable to arbitration proceedings initiated under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006?

(ii) Whether, counterclaim is maintainable in such arbitration proceedings?

17.1 On the first issue, this Court held that the Limitation Act applies. The relevant portion of the order is as under;

“27...Thus, we are of the view that no further elaboration is necessary on this issue and we hold that the provisions of the Limitation Act, 1963 will apply to the arbitrations covered by Section 18(3) of the 2006 Act. We make it clear that as the judgment of the High Court is an order of remand, we need not enter into the controversy whether the claims/counterclaims are within time or not. We keep it open to the primary authority to go into such issues and record its own findings on merits.”

17.2 On the second issue also, this Court held that the counterclaim is maintainable. The relevant portion is as under:

“40. For the aforesaid reasons and on a harmonious construction of Section 18(3) of the 2006 Act and Section 7(1) and Section 23(2-A) of the 1996 Act, we are of the view that counterclaim is maintainable before the statutory authorities under the MSMED Act.” 17.3 In view of the finding that the Limitation Act will apply to MSME arbitration and also that a counterclaim is maintainable in an MSME arbitration, the Court could have disposed of the appeal as nothing further remained for adjudication and determination. However, it appears that the respondent seems to have made an argument that the appellant in the second set of appeals is not entitled to any relief whatsoever. This argument led to the court making the following observation in paragraph 41 of the judgment.

“41...Though, we are of the view that counterclaim and set-off is maintainable before the statutory authorities under the MSMED Act, the appellant in this set of appeals is not entitled for the relief, for the reason that on the date of supply of goods and services the appellant did not have the registration by submitting the memorandum as per Section 8 of the Act....” 17.4 This fact led to the Court rejecting the claim of the appellant therein that there were no supplies after the registration

under Section 8 of the Act. The relevant portion of the order of the judgment is as under;

“42. Though the appellant claims the benefit of provisions under the MSMED Act, on the ground that the appellant was also supplying as on the date of making the claim, as provided under Section 8 of the MSMED Act, but same is not based on any acceptable material. The appellant, in support of its case placed reliance on a judgment of the Delhi High Court in GE T&D India Ltd., 24 but the said case is clearly distinguishable on facts as much as in the said case, the supplies continued even after registration of entity under Section 8 of the Act. In the present case, undisputed position is that the supplies were concluded prior to registration of supplier. The said judgment of the Delhi High Court relied on by the appellant also would not render any assistance in support of the case of the appellant. In our view, to seek the benefit of provisions under the MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under the MSMED Act.

43. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court, in the judgment in Shanti Conductors 25 has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply 24 GE T&D India Ltd. v. Reliable Engg. Projects & Mktg., 2017 SCC OnLine Del 6978. 25 Shanti Conductors (supra).

was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act. There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of the appellant as the unit under the MSMED Act, 2006. By taking recourse to filing memorandum under sub-section (1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under the MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which the appellant entered into contract with the respondent.

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

18. In the first place, whether an Enterprise is disabled from seeking a reference before filing a memorandum under Section 8 for registration never arose for consideration in Silpi (supra). More importantly, the Court did not examine any provisions of the Act and their implication on the right to seek a reference under Section 18 of the Act. This was natural because the Court did not frame an issue of registration. On the facts, the Court also held that there was no proof whatsoever that the appellant had made any supplies as contemplated in the Shanti Conductors (supra) case. Though we

are concerned about the interpretation of the Act, we may mention at this very stage that it is an admitted fact that the respondent has, in fact, raised 41 out of 53 bills after its registration on 19.01.2016. 26 Be that as it may, in view of the above referred analysis, we are of the opinion that Silpi Industries (supra) is not an authority on the issue that a reference under Section 18 cannot be made by a micro or small enterprise if supplies were made or contracts were executed before filing of the memorandum under Section 8 of the Act.

19. Re: Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods Pvt. Ltd.²⁷ This case considered a batch of appeals which gave rise to the following questions of law, which were formulated as under:

“(i) Whether the provisions of Chapter V of the MSMED Act, 2006 would have an effect overriding the provisions of the Arbitration Act, 1996?

(ii) Whether any party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council under sub-section (1) of Section 18 of the said Act, if an independent arbitration agreement existed between the parties as contemplated in Section 7 of the Arbitration Act, 1996?

(iii) Whether the Micro and Small Enterprises Facilitation Council, itself could take up the dispute for arbitration and act as an arbitrator, when the Council itself had conducted the conciliation proceedings under sub-section (2) of Section 18 of the MSMED Act, 2006 in view of the bar contained in Section 80 of the Arbitration Act, 1996?”²⁶ The complete details regarding bills raised after registration are indicated in paragraph no. 25, page 13 of the counter affidavit filed by the enterprise. ²⁷ (2023) 6 SCC 401.

20. It is evident from the above that the substantial question for consideration that arose for consideration in Mahakali Foods (supra) was whether the MSME Act overrides the Arbitration and Conciliation Act, 1996, and such other incidental questions. There was no issue whatsoever, as has arisen in our case, that is, about the right or rather a disability to seek a reference under Section 18, if the enterprise has not filed a memorandum. Answering the issues that have arisen for consideration, the Court returned the findings in paragraph 52.1 to 52.5 which are as follows:

“52. The upshot of the above is that:

52.1. Chapter V of the MSMED Act, 2006 would override the provisions of the Arbitration Act, 1996.

52.2 No party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council, though an independent arbitration agreement exists between the parties.

52.3. The Facilitation Council, which had initiated the conciliation proceedings under Section 18(2) of the MSMED Act, 2006 would be entitled to act as an arbitrator despite the bar contained in Section 80 of the Arbitration Act. 52.4. The proceedings before the Facilitation Council/institute/centre acting as an arbitrator/Arbitral Tribunal under Section 18(3) of the MSMED Act, 2006 would be governed by the Arbitration Act, 1996.

52.5. The Facilitation Council/institute/centre acting as an Arbitral Tribunal by virtue of Section 18(3) of the MSMED Act, 2006 would be competent to rule on its own jurisdiction as also the other issues in view of Section 16 of the Arbitration Act, 1996.

21. The Court also reached another conclusion in paragraph 52.6, which is as follows:

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.”

22. Something similar to the decision in Silpi Industries (supra) transpired in Mahakali Foods (supra) as well. Even though the issue of registration did not arise, a submission was made to the following effect.

“49. One of the submissions made by the learned counsel for the buyers was that if the party supplier was not the “supplier” within the meaning of Section 2(n) of the MSMED Act, 2006 on the date of the contract entered into between the parties, it could not have made reference of dispute to Micro and Small Enterprises Facilitation Council under Section 18(1) of the MSMED Act, 2006 and in such cases, the Council would not have the jurisdiction to decide the disputes as an arbitrator.”

23. In view of the above submission, the Court proceeded to rely on Silpi Industries (supra), and allowed the prayer. The relevant portion is as under: -

“50. At this juncture, very pertinent observations made by this Court in Silpi Industries case 28 on this issue are required to be reproduced

28 “42. ... In our view, to seek the benefit of provisions under the MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under MSMED Act.

43. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court, in the judgment in

Shanti Conductors (P) Ltd. v. Assam SEB [Shanti Conductors (P) Ltd. v. Assam SEB, (2019) 19 SCC 529 : (2020) 4 SCC (Civ) 409] has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act. ... By taking recourse to filing memorandum under sub-section (1) of Section 8 of the Act, subsequent to entering into contract and

51. Following the abovestated ratio, it is held that a party who was not the “supplier” as per Section 2(n) of the MSMED Act, 2006 on the date of entering into the contract, could not seek any benefit as a supplier under the MSMED Act, 2006. A party cannot become a micro or small enterprise or a supplier to claim the benefit under the MSMED Act, 2006 by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods or rendering services. If any registration is obtained subsequently, the same would have the effect prospectively and would apply for the supply of goods and rendering services subsequent to the registration. The same cannot operate retrospectively. However, such issue being jurisdictional issue, if raised could also be decided by the Facilitation Council/Institute/Centre acting as an Arbitral Tribunal under the MSMED Act, 2006.”

24. It is evident from the above that even in Mahakali Foods (supra), the issue which has arisen for our consideration never arose. There was neither an issue, discussion, nor analysis on the applicability of Section 18 for enterprises that have not filed a memorandum. The decision in Mahakali Foods (supra) is certainly an authority on the issues that were formulated in paragraph 11 of the said judgment, which have already been extracted hereinabove. Even the concluding paragraph in Mahakali Foods (supra) clearly establishes the fact that the Court was only considering the issue of whether the MSMED Act, supply of goods and services, one cannot assume the legal status of being classified under the MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which appellant entered into contract with the respondent.

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

“77. The issues raised and the submissions made by the learned counsel appearing for the appellant with regard to the overriding effect of the MSMED Act, 2006 over the Arbitration Act, 1996, jurisdiction of Facilitation Council, the parties autonomy to enter into an agreement qua the statutory provisions, the issue of casus omissus, etc.

have been discussed and decided hereinabove which need not be reiterated or repeated. Accordingly, it is held that the reference made to the Facilitation Council would be maintainable in spite of an independent arbitration agreement existing between the parties to whom the MSMED Act, 2006 is applicable, and such Council would be entitled to proceed under sub-section (2) of Section 18 of the MSMED Act, 2006 as also to act as an arbitrator or to refer the disputes to the institution or centre as contemplated under Section 18(3) of the MSMED Act, 2006. As held earlier, such Facilitation Council/Institute/Centre acting as an Arbitral Tribunal would have the jurisdiction to rule over on its own jurisdiction as per Section 16 of the Arbitration Act, 1996. In that view of the matter, the present appeal also deserves to be dismissed and is, accordingly, dismissed.”

25. Apart from Silpi Industries (supra), Mahakali Foods (supra), Mr. Sankaranarayanan also relied on two orders of this Court in Vaishno Enterprises v. Hamilton Medical AG and Anr.²⁹ and M/s Nitesh Estates Ltd. v. Micro and Small Enterprises Facilitation Council of Haryana & Ors.³⁰ These short orders do not lay down the law but follow the decision of this Court in Silpi Industries (supra).

26. In Vaishno (supra), the contract was entered into on 24.08.2020, but as the registration was made on 28.08.2020, the Court held that the appellant was not an MSME and, therefore, the Act will not apply.

²⁹ 2022 SCC OnLine SC 355.

The order seems to have been made in the facts and circumstances of the case. There was neither an issue about the supply of goods nor a formulation of the question as to whether the filing of a memorandum is mandatory for invocation of reference under Section 18. ^{26.1} The order in Nitesh Estates (supra), also relied on, observed that the issue involved is squarely covered against the respondents in view of the decision in Silpi Industries (supra) holding that filing of a memorandum is mandatory for initiation of proceedings under Section 18.

27. A decision where the issue was neither raised nor preceded by any consideration, in State of U.P. v. Synthetics and Chemicals Ltd.³¹ this Court held, “the Court did not feel bound by earlier decision as it was rendered without any argument, without reference to the crucial words of the rule and without any citation of the authority”. Further, approving the decision of this Court in Municipal Corporation of Delhi v. Gurnam Kaur ³² which held that “precedents sub-silentio and without argument are of no moment” this Court held that, “a decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141”. The same approach was adopted in Arnit ³¹ (1991) 4 SCC 139.

³² (1989) 1 SCC 101.

Das v. State of Bihar 33 where it was held that “a decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub- silentio, in the technical sense when a particular point of law was not consciously determined”.

28. In this context, it is also important to note that, as an institution, our Supreme Court performs the twin functions of decision-making and precedent-making. A substantial portion of our jurisdiction under Article 136 is reflective of regular appellate disposition of decision making. Every judgment or order made by this Court in disposing of these appeals is not intended to be a binding precedent under Article 141. Though the arrival of a dispute for this Court’s consideration, either for decision-making or precedent-making is at the same tarmac, every judgment or order which departs from this Court lands at the doorstep of the High Courts and the subordinate courts as a binding precedent. We are aware of the difficulties that High Courts and the subordinate courts face in determining whether the judgment is in the process of decision-making or precedent-making, particularly when we have also declared that even an obiter of this Court must be 33 (2000) 5 SCC 488.

treated as a binding precedent for the High Courts and the courts below. In the process of decision making, this Court takes care to indicate the instances where the decision of the Supreme Court is not to be treated as precedent. 34 It is therefore necessary to be cautious in our dispensation and state whether a particular decision is to resolve the dispute between the parties and provide finality or whether the judgment is intended to and in fact declares the law under Article 141.

29. Conclusion and reference to larger Bench: On the interpretation of the provisions of the Act we have arrived at a clear opinion and have expressed the same. Though it is possible for us to follow the precedents referred to in para 27 to arrive at the conclusion that the judgments in the case of Silpi Industries (supra) and Mahakali Foods (supra) coupled with the subsequent orders in Vaishno Enterprises (supra) and M/s Nitesh Estates (supra) cannot be considered to be binding precedents on the issue that has arisen for our consideration, taking into account the compelling need to ensure clarity and certainty about the applicable precedents on the subject, we deem it appropriate to refer this appeal to a three Judge Bench. 34 Union of India v. All Gujarat Federation of Tax Consultants, (2006) 13 SCC 473; Francis Stanly v. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram (2006) 13 SCC 210; Bharat Petroleum Corporation Ltd. v. P. Kesavan, (2004) 9 SCC 772; Vishnu Dutt Sharma v. Manju Sharma, (2009) 6 SCC 379; Chandigarh Housing Board v. Narinder Kaur Makol, (2000) 6 SCC 415; Also refer to the commentary citing catena of judgements where this Court has enumerated the ‘events when decision-making is not to be treated as a precedent’ in Durga Das Basu, ‘Commentary on Constitution of India’ (9th Edition, Vol. IX), page 9858; See also, Allen v. Flood, (1893) AC 1 “a case is only an authority for what it actually decides”.

30. The Registry is directed to place the appeal paperbooks along with our detailed judgment before the Hon’ble Chief Justice of India for constitution of an appropriate Bench.

.....J. [PAMIDIGHANTAM SRI NARASIMHA]J.
[PANKAJ MITHAL] NEW DELHI;

JANUARY 10, 2025