

Jurisdiction in Arbitration under MSMED Act

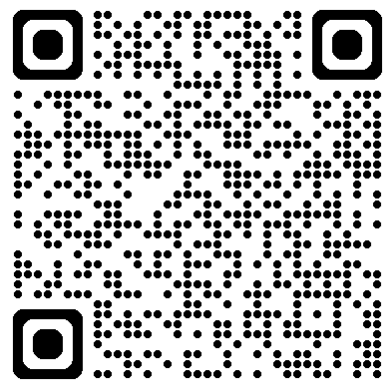
Case Name: Gammon Engineers And Contractors Pvt. Ltd.
v. Rohit Sood

Citation: 2024:BHC-OS:16438

Act: Arbitration and Conciliation Act, 1996, Micro, Small and Medium Enterprises Development Act, 2006.

Case Brief & MCQs on this case is
available in the eBook:

"Bombay High Court Cases in
October 2024"



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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION (ARBP) (L) NO.28089 OF 2022

Gammon Engineers and Contractors Pvt. Ltd.	.. Petitioner
Versus	
Rohit Sood	.. Respondent

**WITH
INTERIM APPLICATION (L) NO.37553 OF 2022
IN
ARBITRATION PETITION (ARBP) (L) NO.28089 OF 2022**

Gammon Engineers and Contractors Pvt. Ltd.	.. Applicant
<u>In the matter between:-</u>	
Gammon Engineers and Contractors Pvt. Ltd.	.. Petitioner
Versus	
Rohit Sood	.. Respondent

.....

- Mr. P. G. Sabnis – Advocate for Petitioner.
- Mr. Abhijeet A. Desai a/w. Mr. Karan Gajra, Mr. Vijay Singh – Advocate for Respondent.

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**CORAM : M. S. SONAK AND
JITENDRA S. JAIN, JJ.**

**ARGUMENTS CONCLUDED ON : OCTOBER 9, 2024
JUDGMENT PRONOUNCED ON : OCTOBER 16, 2024**

Judgment (Per Jitendra S. Jain, J.) :-

1. The following question is referred for the consideration of the Larger Bench on account of contrary views expressed by the two learned Single Judges of this Court in case of *Gammon Engineers and*

Contractors Pvt. Ltd. Vs. Sahay Industries¹ wherein it was held that Application under Section 34 of the Arbitration and Conciliation Act, 1996 [**‘Arbitration Act’**] in case of the award passed under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 [**‘MSMED Act’**] is to be filed as per original agreement between the parties at the place where exclusive jurisdiction is agreed upon and not at the place where the award under Section 18 was passed. The contrary view was taken in the case of ***Microvision Technologies Pvt. Ltd. Vs. Union of India***², wherein in paragraph No. 38, the learned Single Judge observed that the challenge to the award under Section 34 of the Arbitration Act is to be filed before the Court where the supplier is located.

“Whether the jurisdiction of the Court to hear a Petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenging an Award in a statutory Arbitration under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006 (“MSMED Act”) would be governed by the non obstante provision under Section 18(4) of the MSMED Act or would be governed by the Arbitration Agreement between the parties which has conferred the exclusive jurisdiction to a particular Court.”

Brief facts relevant for the present reference are as under :-

2. Respondent is a Micro, Small and Medium Enterprises Unit [**‘MSME Unit’**] and has supplied goods and rendered services to the Petitioner. As per the original agreement between the Petitioner and the

1. 2023 SCC OnLine Bom 750

2. 2023 SCC Online Bom. 1848

Respondent, the Courts at Mumbai would have exclusive jurisdiction for resolving the disputes between them. Disputes arose between the Petitioner and the Respondent, and since the Respondent was a MSME Unit, a reference was made under Section 18 of the MSMED Act to decide the disputes between them. The Micro, Small and Medium Enterprises Facilitation Council [**Facilitation Council**] at Shimla, where the Respondent was located, adjudicated the disputes between the parties, and an award was passed against the Petitioner. The Petitioner has challenged the said award under Section 34 of the Arbitration Act by applying to this Court. The Respondent has raised a preliminary objection on the maintainability of the application under Section 34 of the Arbitration Act on the ground that since the Facilitation Council at Shimla has adjudicated the disputes between the parties under Section 18(4) of the MSMED Act, the Court at Mumbai do not have the jurisdiction and Section 34 application ought to have been filed in the Court at Shimla.

3. On 4 September 2023, the learned Single Judge (Justice R. I. Chagla) noted the conflict between the two decisions of this Court referred to above, namely *Gammon Engineers and Contractors Pvt. Ltd. (supra)* and *Microvision Technologies Pvt. Ltd. (supra)* and requested the Hon'ble Chief Justice of this Court to refer the issue to a Larger Bench.

Submissions of the Petitioner:-

4. Mr. Sabnis, learned counsel appearing for the Petitioner, submitted that under the MSMED Act there is no provision dealing with challenge post passing the award and therefore the award has to be challenged as per the Arbitration Act of 1996. It is his submission that although under the original agreement it was agreed by the parties that Court at Mumbai would have exclusive jurisdiction but because of Section 18 of the MSMED Act, they had no option but to agree for reference of the dispute to Arbitration under the said Act at the Facilitation Council at Shimla. It is his submission that the moment the award came to be passed, the original agreement between the parties dealing with the exclusive Court having jurisdiction would revive and therefore the proper Court for filing application under Section 34 of the Arbitration Act would be Bombay High Court. Mr. Sabnis, learned counsel for Petitioner relied upon following decisions in support of his contention that the Court at Mumbai only would have jurisdiction.

(i) ***Gammon Engineers and Contractors Pvt. Ltd. Vs. Shahay Industries.***³

(ii) ***Odisha Power Generation Corporation Ltd. Vs. Techniche Consulting Services & Ors.***⁴

³ 2023 SCC OnLine Bom 750

⁴ IA No. GA 1 and GA 2 of 2023 in A.P.Com. 365 of (2024) (Cal.)

(iii) ***Indian Oil Corporation Ltd. Vs. Fepl Engineering (P) Ltd. & Anr.***⁵

(iv) ***Ircon International Limited Vs. Pioneer Fabricators Private Limited.***⁶

Submissions of the Respondent:-

5. *Per contra*, Mr. Desai, learned counsel for the Respondent, submitted that the MSMED is a Special Act and overrides the agreement between the parties in so far as the agreement relating to conferring exclusive jurisdiction by the parties is concerned. It is his submission that on a conjoint reading of Section 18 and 24 of the MSMED Act and Section 42 of the Arbitration Act, once having agreed to resolve the dispute by the Facilitation Council at Shimla, further proceedings relating thereto to challenge the award would also lie before the Court at Shimla and not at Mumbai. It is his submission that the contract between the parties conferring exclusive jurisdiction over the Courts at Mumbai gets obliterated by virtue of the provisions of the MSMED Act, and therefore, the appropriate Court to challenge the award would be the Courts at Shimla and not at Mumbai. Mr. Desai relied upon the following decisions in support of his submissions:-

(i) ***Microvision Technologies Private Limited Vs. Union of India.***⁷

5 2019 SCC OnLine Del 10265

6 2023 SCC OnLine Del 1811

- (ii) *Marsons Electrical Industries Vs. Chairman, Madhya Pradesh State Electricity Board and Anr.*⁸
- (iii) *Gujarat State Civil Supplies Corporation Limited Vs. Mahakali Foods (P) Ltd.*⁹
- (iv) *Ahluwali Contract (India Limited) Vs. Ozone Research & Applications.*¹⁰
- (v) *Malaviya National Institute of Technology (MNIT) Vs. Micro and Small Enterprises & Facilitation Council.*¹¹
- (vi) *Bharat Heavy Electricals Ltd. Vs. State of U.P.*¹²

6. The counsel for the Petitioner and the Respondent has also filed written submissions supporting their contentions.

7. We have heard learned counsel for the Petitioner and the Respondent and noted the judgments brought to our notice.

ANALYSIS :-

8. Before we proceed to analyse the question posed for our consideration, it is relevant to reproduce certain clauses of the agreement between the Petitioner and the Respondent.

“5. GOVERNING LAWS :

“The Work Order / Subcontract shall be governed by the Laws of India and Courts in Mumbai shall have exclusive jurisdiction over all matters, arising out of or relating to this Work Order / Subcontract. Notwithstanding the place where the Work Order/ Subcontract is signed or the place where the work under the Work Order/ Subcontract is to be executed, it is mutually understood and agreed by and between the Parties hereto, that this work order /

7 2023 SCC OnLine Bom 1848

8 2023 SCC OnLine All 2675

9 (2023) 6 SCC 401

10 2023 SCC OnLine Del 518

11 Writ Petition No. 1236 of 2020 :

12 2014 SCC OnLine All 2895.

Subcontract shall be deemed to have been entered into by the Parties concerned in the City of Mumbai.”

17. ARBITRATION

“All and any disputes arising out of or in connection with this Agreement, after written notice by either Party to the Contract, shall be referred to the Sole arbitration of a person appointed by the Chairman and Managing Director or Director of the Company. The place of arbitration shall be Mumbai. The arbitration shall be conducted in English language. The arbitration award shall be final and binding. Subject as aforesaid, the provisions of the Arbitration and Conciliation Act, 1996, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this Clause.””

To a similar effect as that of the above, Clause 17 is Clause 33 of the agreement.

9. The relevant provisions of the MSMED Act which would be relevant for our consideration are Sections 18 and 19, as amended by the Act of 32 of 2023, which reads thus:-

“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 conduct mediation itself or refer the matter to any mediation service provider as provided under the Mediation Act, 2023.

(3) The conduct of mediation under this section shall be as per the provisions of the Mediation Act, 2023.

(4) Where the mediation initiated under sub-section (3) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing

alternative 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.

(5) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternative dispute resolution services shall have jurisdiction to act as an Arbitrator or mediator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

19. Application for setting aside decree, award or order. - *No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution by the services to which a reference is made by Council, shall be entertained by any/Court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such Court:*

Provided that pending disposal of the application to set aside the decree, award or order, the Court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case, subject to such conditions as it deems necessary to impose.”

10. Prior to Act No. 32 of 2023, Section 18 of the MSMED read as under :-

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

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for

arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the disputes as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the 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.”

11. For our purpose the amendment would not be relevant since pre and post 2023 our analysis to answer the question posed would be same.

12. Section 7 of the Arbitration Act reads as under :-

“7. Arbitration agreement.”-(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

13. Clause-5 of the agreement between the parties expressly states that the work order / sub-contract shall be governed by the laws of India and that courts in Mumbai would have exclusive jurisdiction over all matters arising out of order relating to the said work order / sub-contract. It is further agreed in the said clause that notwithstanding the place where the work order / sub-contract is signed or the place where the work is to be executed, it is mutually understood and agreed by the parties that the said work order / sub-contract would be deemed to have been entered into by the parties concerned in the city of Mumbai. It is an admitted position that both the parties, i.e. the Petitioner and the Respondent, had agreed to be governed by the Courts in Mumbai, and Courts in Mumbai would have exclusive jurisdiction over all matters arising out of work order / sub-contract.

14. Clause-17 of the General Conditions of the Work Order states that all and any disputes arising out of order in connection with this agreement shall be referred to the sole arbitrator to be appointed by the Chairman / Managing Director / Director of the Petitioner and the place of arbitration shall be Mumbai. It further states that provisions of the

Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the Rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause.

15. Clause No. 33 of the agreement deals with the mechanism of dispute resolution and it is stated therein that in case of any difference or dispute, parties would attempt to settle the difference amicably before the commencement of arbitration. It further states that disputes if not settled would be referred to the sole arbitration of a person to be appointed by the Chairman / Managing Director / Director of Petitioner. The said clause further states that the place of arbitration would be Mumbai and it is further agreed that provisions of Arbitration Act would apply to the arbitration proceedings under the said clause.

16. The object of the MSMED Act was to provide for facilitating the promotion, development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto.

17. Section 18(1) of MSMED Act provides that notwithstanding anything contained in any other law for the time being in force, any party to the dispute with regard of any amount due under Section 17 of the MSMED Act may make a reference to Micro and Small Enterprises

Facilitation Council. The Facilitation Council is established under Section 20 by the State Government at such places and / or such areas as may be notified. On receipt of the reference, the Facilitating Council would try to resolve the dispute through mediation under 2023 Act and through conciliation prior to 2023 amendment. Section 18(4) provides that if the mediation is not successful and settlement between parties could not take place, then the Facilitating Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternative dispute resolution services for such arbitration and the provisions of the Arbitration Act shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to under Section 7(1) of the Arbitration Act.

18. The provisions of Section 18(4) of the MSMED Act referring the matter for arbitration would apply in two cases. Firstly, where parties to the dispute do not have an arbitration agreement as defined under Section 7(1) of the Arbitration Act and therefore by virtue of Section 18(4) an arbitration agreement is statutorily and contractually deemed to have been entered into by the parties. Secondly, if there is an arbitration clause in the agreement between the parties and it provides certain mechanism for appointment of an Arbitrator, then in that situation the said mechanism provided in the agreement gets overridden by the provisions of Section 18(4) because said section

provides that the Facilitation Council would take upon itself the dispute for arbitration or refer the dispute to any institution or centre providing dispute resolution services. The effect of Section 18(4) in the second case would be that the mechanism provided under original agreement between the parties gets superseded by Section 18(4) in so far as the issue of who should be the Arbitrator is concerned. It is in these two scenarios, the provisions of Section 18(4) gets triggered. In the present case, Clause 17 of the agreement between the parties dealing with the mechanism to settle the dispute and for appointment of Sole Arbitrator by the Chairman / Managing Director / Director of the Petitioner gets obliterated by virtue of Section 18(4) of the MSMED Act. The original agreement between the parties empowering the officers of the Petitioner-Company to appoint the Sole Arbitrator also gets obliterated by Section 18(4) of the MSMED Act in as much as now the Facilitation Council would either be an Arbitrator itself or would refer dispute to any institution or centre providing dispute resolution services irrespective of what the original agreement between the parties was. Therefore, Section 18(4) of the MSMED Act overrides original agreement between the parties only to the extent of the mechanism provided for resolution of dispute and appointment of Arbitrator is concerned. In the instant case, by virtue of Section 18(4) of the MSMED Act only the Clauses 17 and 33 of the original agreement gets

overridden and substituted by Section 18(4) of the MSMED Act. However, clause 5 of the agreement which provides for governing laws and Courts in Mumbai having exclusive jurisdiction does not get overridden by the provisions of Section 18(4) of the MSMED Act. Section 18(4) of the MSMED Act does not provide that if parties have agreed to exclusive jurisdiction of Courts in Mumbai, then such clause would also get overridden and obliterated by the said provision. Therefore, Clause 5 agreed between the parties in original agreement conferring exclusive jurisdiction on Mumbai Courts, would continue to govern even if the dispute is referred to Arbitration under Section 18(4) of the MSMED Act.

19. Section 18(5) of the MSMED Act provides by non obstante clause that the Facilitation Council or the centre providing dispute resolution services shall have jurisdiction to act as an Arbitrator or Mediator under Section 18 in dispute between supplier located within its jurisdiction and a buyer located anywhere in India. The purport of Section 18(5) of the MSMED Act is to identify which Facilitation Council or centre providing alternative dispute resolution would decide the dispute between the supplier and buyer and since the MSMED Act is enacted for protecting supplier, the Facilitation Council located within the jurisdiction of the supplier would be acting as an Arbitrator even if buyer is located anywhere in India. The phrase 'supplier located within

its jurisdiction' would mean that the Facilitation Council or any centre providing dispute resolution services referred to by such Facilitation Council at the place where the supplier is located would be the Arbitrator. The phrase 'jurisdiction' interpreted in the context of its setting in Section 18(5) of the MSMED Act would not mean that the original clause agreed upon by the parties to govern its disputes by the Courts in Mumbai would get overridden. The phrase 'jurisdiction' used in Section 18(5) is only for the limited purpose for identification of the Facilitation Council where the supplier is located who would be the authority to whom the arbitration would be referred to or to any centre providing dispute resolution services referred to by such Facilitation Council. The objective is that in arbitration a trial takes place by leading evidence and the convenient place for a trial would be the place where the supplier is located. Looking at the intention and object of the MSMED Act, the State Government in India have to establish Facilitation Council under Section 20 of the MSMED Act. If any dispute arose between the supplier located in one State and a buyer located in another State and both the cities have Facilitation Council then which Facilitation Council will act as an Arbitrator will be a subject matter of dispute and it is to overcome that, keeping in mind the object of MSMED Act, Section 18(5) of the MSMED Act provides that the Facilitation Council located within the area of the supplier would be

acting as an Arbitrator for the purpose of dispute resolution. It is for that limited purpose provision of Section 18(5) has been engrafted. To read provisions of Section 18(5) of the MSMED Act to mean that the original agreement dealing with governing laws and conferring exclusive jurisdiction to the Courts in Mumbai is overridden, in our view would be contrary to the reading of Section 18(5) of the MSMED Act. Section 18(5) would be *pari materia* to Section 20(3) of the Arbitration Act and the place where the Council is located would be the venue of the Arbitration. The exclusive jurisdiction clause is the 'seat' of arbitration, which in the instant case is in Mumbai as per clause 5 of the agreement between the parties.

20. Section 18(4) of the MSMED Act would apply if there is no arbitration agreement between the parties. In such a case, Section 18(4) states on failure of settlement, it will be deemed that there is an arbitration agreement between the parties as defined by Section 7(1) of the Arbitration Act. The scope of Section 18(4) ends at this stage and cannot be extended to ascertain the appropriate Court to which the application for setting aside can be made. Now coming to Section 18(5) would come into effect in case after stage of Section 18(4) is over or if, in the original agreement, parties have agreed to a "particular arbitrator" or have agreed to a mechanism for the appointment of an arbitrator then Section 18(5) provides that Facilitation Council or centre

providing dispute resolution services having jurisdiction over the place where supplier is located would be acting as an arbitrator. Section 18(5) of the MSMED Act overrides only Section 11 of the Arbitration Act, which deals with appointing an Arbitrator. Therefore appointment of arbitrator is provided by Section 18(5) and nothing more. In our view, to submit that by virtue of Section 18(5), the Courts at Shimla would have jurisdiction would not be the correct reading of said section. Therefore, in our view, clause 5 of the agreement between the parties dealing with governing laws would not get overridden by the provisions of Section 18(5) of the MSMED Act.

21. Section 20(3) of the Arbitration and Conciliation Act, 1996 states that unless otherwise agreed, the Tribunal may meet at any place it considers appropriate for hearing, for inspection, etc. In our view, provisions of Section 20(3) of the Arbitration and Conciliation Act, dealing with place is replaced by Section 18(5) of the MSMED Act by providing that the Facilitation Council or centre providing dispute resolution service located at the place of the supplier will have jurisdiction to act as an Arbitrator. The parties have agreed under Clauses 5, 7 and 33 for seat of exclusive jurisdiction at Mumbai and, therefore, under Section 20(1) of the Arbitration and Conciliation Act, 1996 Mumbai Court will be the Appropriate Court for challenging the award. Therefore, in our view, the phrase “jurisdiction” used in Section

18(5) is akin to a venue of arbitration, but it does not mean that the jurisdiction to challenge the award would be before the Courts where supplier is located by virtue of Section 18(5) of the MSMED Act.

22. Section 19 of the MSMED Act provides that no application for setting aside any decree, award or other order made by the Council or by centre providing dispute resolution services referred to by the Council shall be entertained by any Court unless 75% of the amount determined in terms of the decree or award is deposited. It is important to note that Section 19 only provides for pre-deposit of certain amount before any application for setting aside any decree, award or order are challenged before the Court. Said Section 19 does not provide for the proper forum before whom the application for setting aside the award is to be made. Therefore, even by virtue of Section 19 of the MSMED Act, Clause 5 of the agreement between the parties conferring exclusive jurisdiction to Mumbai Courts is not overridden. The phrase 'any Court' used in Section 19 would be the Court having jurisdiction to entertain the application for setting aside award or decree and such Court would be the Court agreed upon by both the parties under original agreement, which in the instant case, is Courts in Mumbai. Court is not defined under the MSMED Act and since an Application has to be made under Section 34 of the Arbitration Act, Section 2(e) of the said Act, which defines Court, would be applicable. Since the parties have agreed to be

governed by the Courts in Mumbai and the parties have agreed that the work order / sub-contract is deemed to have been entered into in the city of Mumbai, in our view, Courts in Mumbai would have the jurisdiction to entertain application under Section 34 of the Arbitration Act. The seat of Arbitration as per the parties is at Mumbai and Shimla is only the venue for arbitration.

23. Section 19 of the MSMED Act provides that no application for setting aside of any award made by the Council or any institution to which the reference is made by the Council shall be entertained by “**any Court**” unless pre-deposit in terms of the decree and as specified in Section 19 is made. It is important to note the phrase “**any Court**”. If the intention of the legislature was that the application under Section 34 of the Arbitration Act, 1996 was also to be filed at the place where the supplier is located then in Section 19 they would have stated that “Court having jurisdiction over the supplier or Court within whose jurisdiction, the supplier is located”. This is in sharp contrast to Section 18(5) of MSMED Act which provides that the Council at the place where the supplier is located would have jurisdiction as an Arbitrator. This also indicates that post passing the award the Appropriate Court before whom an application for setting aside the award is to be made would be governed by the original agreement between the parties which in the instant case is the Courts in Mumbai. It is also important

to note Section 28 of the MSMED Act, which provides for jurisdiction of Courts to try offence punishable under the Act. The legislature could have very well made a provision with respect to the jurisdiction of Courts at the place where the supplier is located or the place where the Facilitation Council passes the award as a Court before whom “an application for setting aside the award would lie”. No such provision dealing with jurisdiction of Courts to entertain application for setting aside the award is enacted in the MSMED Act.

24. It is important to note that provisions of the MSMED Act are silent post-passing the award except to the extent of making a provision in Section 19 for a pre-deposit as a pre-condition for entertaining the Application. The MSMED Act does not provide any mechanism for challenging the award passed under Section 18. The Arbitration Act takes over once an award is passed under Section 18 of the MSMED Act. Therefore, once the award is passed, the provisions of the Arbitration Act would govern for the purpose of challenging the award and ascertaining the Court before such an Application for setting aside the award is to be made. In the instant case, the parties have agreed to be governed by the Courts in Mumbai, and which, as observed by us above is not overridden by any of the provisions of the MSMED Act, the Courts in Mumbai would have jurisdiction to entertain Section 34 application for setting aside the award.

25. The Hon'ble Supreme Court in the case of *Swastik Gas Pvt. Ltd. Vs. Indian Oil Corporation Ltd. Vs. Indian Oil Corporation Limited*¹³ and Indus *Mobile Distribution Pvt. Ltd. Vs. Datawind Innovations Private Limited & Ors.*¹⁴ has laid down that even though the venue of the arbitration may be different from the seat of arbitration agreed between the parties, the challenge to an arbitration award shall be entertained only by the Courts having jurisdiction over the seat of the arbitration and the seat of the arbitration would be determined on the basis of the agreement between the parties including the agreement to exclusively provide for jurisdiction in a particular Court. In the instant case before us parties have agreed in the original agreement to confer exclusive jurisdiction to the Courts in Mumbai. The place for conducting arbitration under Section 18(4) read with Section 18(5) of the MSMED Act would only constitute a venue keeping in mind the convenience of the supplier during the course of trial leading to the award. However, by virtue of clause 5, agreed upon by the parties conferring jurisdiction in Mumbai, would not get disturbed or obliterate in so far as maintainability of Application under Section 34 of the Arbitration Act before Courts in Mumbai is concerned. Once an award is passed and the trial is concluded, the convenience of the place of supplier at which the trial took place gets satisfied and for the purpose of Section 34 the

13 (2013) 9 SCC 32

14 (2017) 7 SCC 678

convenience of the supplier would thereafter not be a factor and therefore, the MSMED Act has not provided that even for challenging an award or decree the Courts having jurisdiction where the supplier is located would be the appropriate Court. If the intention of the legislature was to confer jurisdiction on the Courts where the supplier is located, then nothing prevented them to make a provision similar like Section 18(5) of the MSMED Act. In the absence of any such provision and in the absence of any procedure being described in the MSMED Act for challenging award passed under the said Act, it would be the original agreement agreed upon between the parties conferring exclusive jurisdiction which would govern the Courts before which an Application for setting aside the award under Section 34 would be applicable.

26. Section 24 of the MSMED Act provides that provisions of Sections 15 to 23 shall have effect notwithstanding anything inconsistent therein contained in any other law for the time being in force. Therefore, for invoking provisions of Section 24 of the MSMED Act, it is imperative that an exercise is to be done to find out the conflict between the two Acts or two provisions and only in case of such a conflict that Sections 15 to 23 of the MSMED Act will have preference.

27. Section 24 of the MSMED Act provides for an overriding effect with regard to Sections 15 to 23 of the said Act. It is crucial to analyse this group of sections for ascertaining whether the contention of Respondents with respect to the overriding effect *qua* agreement between the parties to confirm jurisdiction Courts in Mumbai is overridden. Section 15 deals with the credit period for payment to the supplier by the buyer and the maximum period specified in the said section would prevail, if the same is contrary to the agreement between the parties. Section 16 deals with the rate at which the interest rate is payable if the rate of interest agreed by the parties is contrary to the rate provided in Section 16 then the rate as per Section 16 of the MSMED Act would prevail. Section 17 provides for payment along with interest would prevail if the agreement between the parties is not so. Section 18 provides for the mechanism to resolve the dispute between the parties on account of amount due to the supplier by the buyer. It provides that it overrides the agreement between the parties with respect to the Arbitration and the Facilitation Council at the place where supplier is located would act as an Arbitrator. Section 19 provides for pre-deposit of the amount specified therein as a condition precedent for entertaining an application for setting aside the award. The said Section 19 overrides Section 36(3) of the Arbitration and Conciliation Act, 1996. Sections 20 to 22 deals with the establishment and composition

of the Facilitation Council and disclosure with respect to unpaid amount in the annual statement of accounts. Section 22 which provides to specify unpaid amount with interest in the accounts of the buyer would override the disclosure requirement under the Companies Act, 2013; and Section 23 which provides that the amount of interest payable under the MSMED Act shall not be allowed as deduction overrides the provisions of the Income Tax Act. In our view, as analysed above, provisions of Section 24 giving overriding effect is only restricted to the above referred sections and the eventualities specified therein. Sections 15 to 23 nowhere provides for the Appropriate Court before whom an application for setting aside the award passed under Section 18 is to be challenged. Therefore, the contention that Section 24 overrides the agreement between the parties with respect to conferring exclusive jurisdiction to a particular Court is to be rejected.

28. In the instant case before us, we have already observed that provisions of Sections 18(4), 18(5) and 19 of the MSMED Act does not provide to determine which Court would have jurisdiction for entertaining an Application for setting aside award under Section 34 of the Arbitration Act. On the contrary, none of the provisions from Sections 15 to 23 provides for a particular Court located at a particular place for conferring jurisdiction to entertain Application for setting aside the award. Therefore, there is no conflict between the provisions

of the MSMED Act or any other Act in so far as the issue relating to determining the appropriate Court to which the Application is to be made for setting aside the award is concerned. Therefore, the contention of the Respondent by relying upon the provisions of Section 24 of the MSMED Act in respect of its preliminary objection is misconceived. The non-obstante clause does not mean that in any and every case provision of such non-obstante clause engrafted would prevail but it would be only in those situation where there is conflict between two provisions or two Acts that provision contained in non-obstante clause would prevail. Such non-obstante clauses cannot be read in vacuum where there is no conflict between the two statutes or provisions.

29. Section 42 of the Arbitration Act has been pressed into service by the Respondent in support of their preliminary objection. Section 42 of the Arbitration Act provides that notwithstanding anything contained in any other law for the time being in force where with respect to an arbitration agreement any application has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court. In the instant case before us, there cannot be two views that Facilitation Council under Section 20 of the MSMED Act cannot fall within the

meaning of the term 'Court' as defined under Section 2(e) of the Arbitration Act. Therefore, we fail to understand as to how this provision would apply to the facts of the present case and in support of contention raised by the Respondent on maintainability.

30. Section 42 of the Arbitration and Conciliation Act, 1996 provides where with respect to an arbitration agreement any application under this Part-I has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court. This section has been relied upon by Respondents to contend that the jurisdiction would be the Courts at Shimla and not at Mumbai which was the exclusive jurisdiction conferred by the parties in the original agreement. To test this proposition let us take an example that before invocation of Section 18 of the MSMED Act, a party for obtaining interim measures approaches the Court under Section 9 of the Arbitration and Conciliation Act, 1996. The Appropriate Court for filing the said application would be the Court which was agreed upon by the parties to have exclusive jurisdiction which in the instant case is Mumbai. After this proceeding, provisions of Section 18 of the MSMED Act are invoked and an award is passed. In this situation as per Section 42 of the Arbitration and Conciliation Act, 1996, the application for setting aside

the award would lie before the Court which was conferred exclusive jurisdiction by the parties in the original agreement and before whom Section 9 application was made. Therefore, the reliance placed by Respondents on provision of Section 42 would support the case of the Petitioner and not the Respondents and subsequent applications for challenging the award would be in Courts at Mumbai only.

31. Whether a particular Act or provision is special or general has to be examined based on the situation faced for ascertaining the same. Same Act or provision may change its colour from special to general and *vice-versa* based on the situation to which the provision is required to be applied. Although MSMED Act is a special provision insofar as it deals with the dispute resolution mechanism before the Arbitrator, however, post making the award by the Arbitrator under Section 18, there is no provision in the MSMED Act which provides for mechanism to ascertain the Court to which the application for setting aside the award is to be made. In that scenario, the only provisions which could be made applicable would be the provisions of the Arbitration and Conciliation Act, 1996 which becomes a special law for challenging the award and for ascertaining the Appropriate Court to which such an application is required to be made. In the instant case, the exclusive jurisdiction as per the agreement between the parties is with the Courts in Mumbai and, therefore, even on this count, application under Section

34 of the Arbitration and Conciliation Act, 1996 would lie before the Courts over which the parties have agreed to confer exclusive jurisdiction.

32. Another way of looking at the issue is that the parties have entered into agreement of exclusive jurisdiction to Mumbai Courts and the resolution of disputes as per the Arbitration Act. This agreement is entered into by the parties post enactment of the Arbitration Act and also the MSMED Act. The parties were conscious that Arbitration clause as per agreement would be superseded by Section 18(4) of the MSMED Act and the place of arbitration as per section 18(5) would be at Shimla. Therefore assuming seat of arbitration would be at Shimla and Courts at Shimla would have jurisdiction but at the same time as per the agreement the work was deemed to have been executed at Mumbai including execution of the agreement at Mumbai, thereby conferring jurisdiction on Courts in Mumbai. Therefore at the time of execution of agreement both parties were aware that Courts at Mumbai as well as Shimla will have jurisdiction but they agreed to confer exclusive jurisdiction to Court at Mumbai in exclusion to Shimla. Therefore even on this Court Respondents today cannot turn around to contend that they are not bound by exclusive jurisdiction clause which was agreed by them. These observations and views expressed herein are

on the basis that governing clause 5 is not overridden by any of the provisions of the MSMED Act.

33. Therefore, in our view, the preliminary objection raised by the Respondent that the Courts in Mumbai would not have jurisdiction under Section 34 of the Arbitration Act is to be rejected.

34. We now propose to deal with the case laws relied upon by the Petitioner.

35. The first decision relied upon by the Petitioner is the decision of the learned Single Judge of this Court in case of **Gammon Engineers & Contractors Pvt. Ltd. (supra)**. The issue of which Court would have jurisdiction to entertain Application under Section 34 of the Arbitration Act arose in a very identical situation before the Court in this case. The party raised a preliminary objection that since Facilitation Council at Madurai has passed the award, application under Section 34 would not lie before the Bombay High Court. The learned Single Judge by a detailed order rejected the said contention. The relevant paragraphs of the said decision are reproduced herein below :-

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

“19. A conspectus of all the aforesaid provisions shows that the moment the seat is designated, it is akin to an exclusive jurisdiction

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

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

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

36. We are in complete agreement with the decision and judgment rendered by the learned Single Judge in the case of **Gammon Engineers & Contractors Pvt. Ltd. (supra)**.

37. The second decision relied upon by the Petitioner is of the Delhi High Court in the case of **Indian Oil Corporation Ltd. (supra)**. The issue raised before the Delhi High Court was as to whether the Courts at Thane where the Facilitation Council has passed an order would have the jurisdiction or the Court in Delhi would have the jurisdiction and the Delhi High Court in a very similar facts which is before us held that the exclusive jurisdiction to entertain the petition under Section 34 would be the Court at New Delhi. The relevant paragraphs of the said decision reads as under :-

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

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

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

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

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.”

(Emphasis supplied).

“23. Undoubtedly, the MSME Act is a special legislation dealing with Micro, Small and Medium Enterprises and would have precedence over the general law. There are decisions of several Courts holding that the provisions of MSME Act would override the provisions of the Contract between the parties. However, we are not engaged with the said controversy and, in fact, we had made it clear to the learned counsel for the Appellant, during the course of arguments, that the questions relating to the jurisdiction of the MSME Council to act as an Arbitrator and other similar issues will not be examined by us, as the learned Single Judge has not considered any of those aspects and has decided the objection petition only on the ground of territorial jurisdiction. However, this

does not mean that the jurisdiction clause agreed between the parties has to be given a go-by. The overriding effect of the MSME Act, cannot be construed to mean that the terms of the agreement between the parties have also been nullified. Thus, jurisdiction of the MSME Council which is decided on the basis of the location of the supplier, would only determine the 'VENUE', and not the 'SEAT' of arbitration. The 'SEAT' of arbitration would continue to be governed in terms of the arbitration agreement between the parties, which in the present case as per jurisdiction Clause No. 35 is New Delhi. As a result, in terms of the decision of the Supreme Court in Indus Mobile (supra), it would be the Courts at New Delhi that would have exclusive jurisdiction to entertain the petition under Section 34 of the Act."

38. The above decision in the case of **Indian Oil Corporation Ltd. (supra)** was also relied upon by the learned Single Judge of this Court in the case of **Gammon Engineers & Contractors Pvt. Ltd. (supra)** which we have agreed upon.

39. The third decision relied upon by the counsel for the Petitioner is a decision of the Division Bench of the Delhi High Court in the case of **Ircon International Limited (supra)**. Before the Delhi High Court, a similar issue was raised as to whether the Courts at Kanpur, where the Facilitation Council passed the award, would have jurisdiction to entertain the Section 34 petition or the Courts at Delhi, which was agreed upon by the parties in the agreement. The Division Bench of the Delhi High Court followed the decision in the case of **Indian Oil Corporation (supra)** and held that the Courts in Delhi would have the jurisdiction for challenging award passed under the MSMED Act. The Division Bench of Delhi High Court in the case of **Ircon**

International Limited (supra) have referred and relied upon the decision passed by the learned Single Judge of this Court in the case of **Gammon Engineers & Contractors Pvt. Ltd. (supra)**. Said decision has also considered the decision of the learned single Judge of Delhi High Court in case of **Ahluwali Contract (India Limited) (supra)** which Respondent has relied before us. We do not propose to reproduce the relevant paragraph of this Judgment however, we reproduce the paragraph No. 20 of the said decision which reads as under :-

“20. With respect, we are not in agreement with the view taken by the learned Single Judge, for the reasons stated by the learned Single Judge of the Bombay High Court in para 16 of the judgment, which we have reproduced above, which we reiterate in the following manner:

(i) Once the arbitral award is pronounced, and there is an exclusionary clause of jurisdiction agreed between the parties, thereby, agreeing upon the jurisdiction of only one court, in exclusion to others, the challenge initiated by the aggrieved party under the Act of 1996, even against an award passed by the Facilitation Council under the MSMED Act, will lie only before the court upon which the parties have agreed to place exclusive jurisdiction.

(ii) Similar is the conclusion of the Division Bench of this Court in Indian Oil Corpn. Ltd. case, to the effect that arbitration proceedings undertaken before the Facilitation Council under Section 18 of the Msmed Act, are undertaken at the "venue" where the Facilitation Council is located.

(iii) The place of the arbitration continues to be the place over which the court has exclusive jurisdiction, as agreed between the parties.

(iv) By operation of the provisions of the MSMED Act, only the procedure of constitution of the Arbitral Tribunal is obliterated in terms of the law laid down by the Supreme Court in Gujarat State Civil Supplies Corpn. Ltd. casell.

(v) The same does not eclipse the agreement between the parties of foisting exclusive jurisdiction on a particular court.”

40. The next decision relied upon by the Petitioner is a decision of the Calcutta High Court in the case of **Odisha Power Generation Corporation Ltd. (supra)** wherein once again, a very same issue was raised before the learned Single Judge of the Calcutta High Court and the Calcutta High Court by a detailed order held that the Courts where Facilitation Council has passed an award would not have the jurisdiction to entertain application under Section 34 of the Arbitration Act but the Court at Bhubaneshwar would have the jurisdiction. The learned Single Judge has observed in paragraph No. 26 that the Arbitration agreement between parties pending adjudication by the Facilitation Council is eclipsed, not obliterated. The learned Single Judge of the Calcutta High Court has referred to the decision of the Delhi High Court in the case of **Indian Oil Corporation Ltd. (supra)** and also decision of the learned Single Judge of this Court in the case of **Gammon Engineers & Contractors Pvt. Ltd. (supra)**.

41. We once again, for the sake of repetition, observe that given above, we are in complete agreement with the Judgment and decision of the learned Single Judge of this Court in the case of **Gammon Engineers & Contractors Pvt. Ltd. (supra)** on the issue of the appropriate Court for entertaining petition under Section 34 of the

Arbitration Act at Mumbai when the award of the Facilitation Council is passed at a place outside the State of Maharashtra.

42. We now propose to deal with the decisions relied upon by the learned counsel for the respondent.

43. The first decision relied upon is the decision in the case of **Microvision Technologies Private Limited (supra)** and, more particularly, paragraph No. 38 of the said decision wherein it is observed that since the supplier was located at Nashik, the District Court at Nashik will have jurisdiction with respect to the arbitral proceedings and any challenge to the award by way of application under Section 34 of the Arbitration Act is to be filed before that Court. It is this observation of the learned Single Judge of this Court which resulted into a conflict being arisen between decision in the case of **Microvision Technologies Private Limited (supra)** and **Gammon Engineers & Contractors Pvt. Ltd. (supra)** which led to issue being referred to the larger Bench.

44. The issue before the learned Single Judge in the case of **Microvision Technologies Private Limited (supra)** was with respect to appointment of an arbitrator under Section 11 of the Arbitration Act. The issue before learned Single Judge was not as to which Court would have jurisdiction to entertain an Application under Section 34 of the Arbitration Act for setting aside the award. It is in the context of Section

11 of the Arbitration Act and by relying upon provisions of Section 18 of the MSMED Act and Section 11 of the Arbitration Act, the learned Single Judge came to the conclusion that provisions of the MSMED Act would prevail in so far as the appointment of the arbitrator is concerned and since supplier was located at Nashik, by virtue of provisions of Sections 18(4) and 18(5) of the MSMED Act, District Court at Nashik will have the jurisdiction. However, by way of passing observation, the learned Single Judge further observed that any challenge to the award by way of petition under Section 34 would also lie before the District Court at Nashik which is the Court where the supplier was located. In our view, since the issue of the appropriate Court for entertaining application under Section 34 of the Arbitration Act was not before the learned Single Judge, any passing observation made therein would only at the most be in the nature of the obiter.

45. The decision of **Gammon Engineers & Contractors Pvt. Ltd. (supra)**, decided on 27 January 2023, was not brought to the notice of the learned Single Judge in the case of **Microvision Technologies Private Limited (supra)**, which was decided on 24 August 2023. We have already, by our detailed reasoning, observed that the Courts at Mumbai would have the jurisdiction and not the Courts where the Facilitation Council or the supplier is located and therefore, for the reasons mentioned herein above, we do not approve the observations made by

the learned Single Judge in the case of **Microvision Technologies Private Limited (supra)** that even application under Section 34 of the Arbitration Act will have to be filed at the place where the supplier is located.

46. The next decision relied upon by the Respondent is of a learned single Judge of the Delhi High Court in the case of **Ahluwalia Contract (India Limited) (supra)**. The learned Single Judge of Delhi High Court notes the decision of the Division Bench in the case of **Indian Oil Corporation Ltd. (supra)** and observes that in the case of **Indian Oil Corporation Ltd. (supra)**, contractual provisions contained in the arbitration clause and exclusive jurisdiction clause of the agreement was considered by the Division Bench. However, in the case of **Ahluwali Contract (India Limited) (supra)** the purchase order did not contain an arbitration clause at all therefore seat of Arbitration was at Nagpur and it is in these circumstances it was observed that Delhi High Court would not have jurisdiction but the jurisdiction would be at Nagpur where the Facilitation Council conducted arbitration which was the seat of the arbitration. In our view, the said decision is not applicable to the facts of the present case in as much as in the agreement entered into by the parties before us there is an express contractual provision conferring jurisdiction in the Courts at Mumbai and also as observed above the seat of arbitration was at Mumbai. Therefore this decision is of no

assistance and distinguishable on facts. In any case, we would prefer to agree with two Division Bench of the Delhi Court, namely **Indian Oil Corporation (supra)** and **Ircon (supra)**, than the decision of the learned Single Judge of that Court.

47. The next decision relied upon by the learned counsel for the Respondent is the decision of the Allahabad High Court in the case of **Marsons Electrical Industries (supra)**. In this case the issue which was raised in Appeal under Section 37 of the Arbitration Act was since the parties have agreed to confer jurisdiction to the Courts at Jabalpur only for resolving the disputes the Kanpur Facilitation Council had no jurisdiction. It was in this context that the Allahabad High Court after referring to Section 18 of the MSMED Act opined that by virtue of Section 18(4) of the said Act the arbitrator located within the jurisdiction of the supplier would have the jurisdiction and since the supplier was located in Kanpur, award passed by Facilitation Council at Kanpur had the jurisdiction. In our view, the issue before us is not with respect to the jurisdiction of the Facilitation Council to decide the arbitration, but the issue before us is which is the appropriate Court for challenging the award passed by the Facilitation Council. Therefore, in our view, the issue before the Allahabad High Court and the issue raised for our consideration are totally different, and therefore, this decision is not applicable to the facts of the present case. It is settled that a

Judgment must be read in the context of the facts before the Courts and the question raised in that context.

48. The learned counsel for Respondent has also relied upon the decision of the Supreme Court in the case of **Gujarat State Civil Supplies Corporation Limited (supra)** and more particularly paragraph Nos. 42 and 45. There is no dispute on the ratio of the said decision of the Supreme Court that provisions of the MSMED Act being a special Act would prevail over the Arbitration Act. However, it is to be noted that the issue before the Supreme Court was whether the Arbitration agreement as per the Arbitration Act between the parties would prevail or whether the provisions of Section 18 of the MSMED Act dealing with arbitration would prevail. The Supreme Court held that since the provisions of the MSMED Act is a special provision, the mechanism for resolving the disputes provided under Section 18 of the MSMED Act would prevail over private agreement between the parties agreed as per the Arbitration Act. The issue before the Supreme Court was not as to before which Court, application under Section 34 would lie for setting aside the award passed under Section 18 of the MSMED Act. Therefore, the decision relied upon by the Respondent in the case of **Gujarat State Civil Supplies Corporation Limited (supra)** would certainly be of no assistance in support of the submission that Courts at Mumbai would have no jurisdiction to entertain an application under Section 34 of the

Arbitration Act. Similarly, the decision of the Allahabad High Court in the case of **Bharat Heavy Electricals Ltd. (supra)** is also not applicable since the issue of Section 34 was not before the said Court.

49. In our view, none of the decisions relied upon by the Respondents has laid down that the application under Section 34 of the Arbitration Act to challenge an award passed under Section 18 of the MSMED Act would lie before the Court where the supplier is located or where the Facilitation Council has passed an award when there exists an exclusive jurisdiction clause conferring jurisdiction to a particular Court by the parties.

50. In view of the above, we answer the question raised for our consideration by holding that the jurisdiction of the Court to hear the application under Section 34 of the Arbitration Act to challenge the award passed under Section 18(4) of the MSMED Act would be governed by the agreement between the parties which has conferred exclusive jurisdiction to a particular Court, which in the instant case is Courts in Mumbai.

51. We acknowledge the assistance of the counsel of both parties rendered to this Court for deciding the present reference. We have attempted to find the destination of the Section 34 application by adopting various routes, but all the routes lead to Mumbai, as agreed

upon by the parties, although Shimla is a very beautiful place, which was only used for vacation to conduct the trial.

52. The Reference is answered accordingly, and the Interim Application (L) No.37553 of 2022 and Arbitration Petition (L) No.28089 of 2022 both are referred to the learned Single Judge for further consideration.

[JITENDRA S. JAIN, J.]

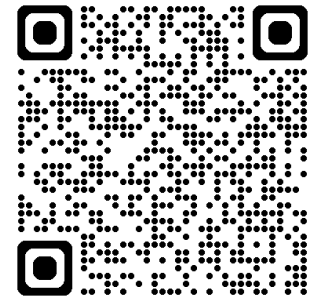
[M. S. SONAK, J.]

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