M/S Easun Reyrolle Limited vs M/S Nik San Engineering Co Ltd on 18 January, 2019

Author: A.J.Shastri

Bench: A.J. Shastri

C/SCA/6265/2018 CAV JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 6265 of 2018

With

CIVIL APPLICATION NO. 1 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE A.J. SHASTRI Sd/-

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1 Whether Reporters of Local Papers may be allowed to Yes see the judgment ?
2 To be referred to the Reporter or not ? Yes
3 Whether their Lordships wish to see the fair copy of the No judgment ?
4 Whether this case involves a substantial question of law No as to the interpretation of the Constitution of India or any order made thereunder ?

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M/S EASUN REYROLLE LIMITED

Versus

M/S NIK SAN ENGINEERING CO LTD

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Appearance:
MR.R.S.SANJANWALA, SENIOR COUNSEL WITH MR. MN MARFATIA(6930) for the PETITIONER(s) No. 1
for the RESPONDENT(s) No. 2,3,4
MR. JAIMIN R DAVE(7022) for the RESPONDENT(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE A.J. SHASTRI

Date : 18/01/2019

CAV JUDGMENT

[1] Rule. Mr.Jaimin R.Dave, learned advocate waives service of rule on behalf of the respondent.

[2] With the consent of learned advocates appearing for the respective parties, the matters are taken up for final disposal today itself.

[3] The present petition under Article 226 of the Constitution of India is filed by the petitioners for seeking following reliefs:-

> "10.(A) Your Lordship may kindly be pleased to admit and allow this petition in the interest of justice;
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> (B) Your Lordship may be pleased to issue a writ of certiorari or any other appropriate writ, order or direction and be please to quash and set aside the application for reference dated 21.2.2017 made by the Respondent No.1 to the Respondent No.2 under section 18 of the Micro, Small and Medium Enterprises Development Act, 2006, the subsequent reference dated 20.11.2017 made by the Respondent No.2 under section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 and all other subsequent proceedings including the Arbitration Case No.A-009 of 2017;
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> (C) Your Lordship may be pleased to issue a writ of Prohibition or any other appropriate writ order or direction and restrain the Respondent No.4 from passing any orders in Arbitration Case No. A-009 of 2017 and further be pleased to declare that the reference dated 20.11.2017 made by the Respondent No.2 under section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 and all other subsequent proceedings including the orders passed so far in the Arbitration Case No. A-009 of 2017 are without jurisdiction and a nullity;
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> (D) Pending admission, hearing and final disposal of the present petition, Your Lordship may be pleased to restrain the Respondents herein, more specifically the Respondent No. 4 from proceeding with the arbitral proceedings in Arbitration Case No. A-009 of 2017;
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> (E) Your Lordship may be pleased to pass such other and further reliefs that may be deemed just, fit and proper."

[4] The case of the petitioners is that petitioner No.1 issued two purchase orders dated 21.09.2010 to

respondent No.1 for the purpose of supply of 25KVA,11/0.433KV Sealed Type Distribution Transformer (hereinafter referred to as the "transformers"). One purchase order bearing No. ERPD/P.O/SS- 14/035/09-10 for the supply of 754 units of transformers at the cost of Rs.2,29,97,000.00/-, and another purchase order bearing No. ERPD/P.O/SS-15/027/09-10 for the supply of 900 units of transformers at the cost of Rs.2,74,50,000.00/-. The said purchase orders were amended to the effect that the units of both the purchase orders were interchanged and the units were to be supplied and the price to be paid for the supply remained intact.

[4.1] The case of the petitioners further that respondents supplied transformers from March, 2010 onwards, however, made it transformers were found to be of poor quality, hence, were rejected and as such transformers were not cleared during quality check test and out of 1654 transformers to be supplied in total. However, under the aforesaid purchase orders, only 968 transformers were supplied / accepted and all the transformers were to be supplied on or before 14.06.2011 and with respect to that the last invoice was raised on 14.06.2011.

[4.2] It is further the case of the petitioners that at the time when the purchase orders were issued however, till last supply of transformers i.e. 14.06.2011, the respondent No.1 who was supposed to be registered as SMALL ENTERPRISE in view of Section 8 of the Act, but was not registered as such. It was noticed by the petitioners that at the much later period on 28/30.03.2012, respondent No.1 got registered as SMALL ENTERPRISE, and subsequently, on 10.08.2012, the respondent No.1 changed his registered office from the State of Gujarat to the State of Maharashtra. The said certificate issued to respondent No.1 under Section 8 from the Office of the Registrar of Companies. The case of the petitioners further is that Section 2 sub-clause (n) of the Act defines supplier to mean a micro or small enterprise, which has filed a Memorandum with the authority by virtue of sub section 1 of Section 8 of the Act. It is the case of the petitioners that unless the stipulations contained in these provisions are fulfilled, a party will not have locus to avail the remedy under Chapter-V and to maintain proceedings under Sections 17 and 18 of the Act. Additionally, subsequent registration under the Act will not create a right in respondent No.1 to avail remedy under the Act in respect of a dispute which has arisen much prior in point of time than registration, and therefore, it will not confer jurisdiction to the respondent No.2 to make reference under Section 18(3) of the Act.

[4.3] The petitioners have also further asserted that for 968 transformers supplied, an amount of Rs.3,32,16,292/- was to be paid to respondent No.1 by the petitioner No.1, and towards the said amount, the petitioner No.1 has paid an amount of Rs.2,43,66,154/-. However, since the petitioner No.1 did not pay the balance amount winding up a petition was filed before the Madras High Court in the year 2015, for the failure of an amount of Rs.89,53,080/- plus interest. In response thereto, petitioner No.1 has paid an amount of Rs.78,01,699/- being an admitted amount by petitioner No.1 and by virtue of this also, the respondent No.1 was specifically aware that he did not any right to avail remedy under Sections 17 and 18 of the Act with respect to dispute with the petitioner No.1. Additionally, respondent No.1 has changed its registered office from State of Gujarat to State of Maharashtra with effect from 10.08.2012 and application for reference under Section 18 of the Act made by the respondent No.1 could not have been entertained by respondent No.2. Simultaneously, the respondent No.2 could not refer the dispute to respondent No.4 since the respondent No.4 could

only exercise powers under Section 18(2) and Section 18(3) of the Act, if the supplier, in this case, the respondent No.1 is located within its jurisdiction otherwise not. As such, the very initiation of reference under the provisions of the Act since without jurisdiction of respondent authorities, the petitioners have asserted his plea for want of authority of respondent No.2 and in turn of respondent No.4.

[4.4] It has further been asserted that while disposing of winding up petition before the Madras High Court though the admitted amount is paid, but since liberty is granted to respondent No.1 to avail appropriate remedy for any other remaining not accepted and not admitted amount claimed taking advantage of such liberty, respondent No.2 was persuaded by respondent No.1 to refer the dispute and make reference ultimately before respondent No.4 and a false claim was generated. It is the case of the petitioners that subsequently, respondent No.2 referred the matter to respondent No.3 for initiation of arbitration proceedings and respondent No.3 accordingly, appointed respondent No.4 to act as an arbitrator and the same was accepted by respondent No.4. Pursuant to it, the first and preliminary arbitration meeting was held on 06.04.2018, on that very day, the petitioners filed an application on 06.04.2018 itself pointing out that petitioner No.1 intends to challenge the reference made by respondent No.1 to respondent No.2 under the Act and subsequent reference for arbitration made by respondent No.2 under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006, but respondent No.4 directed respondent No.1 to submit claim statement by 19.04.2018 and further ordered that if no interim relief staying Arbitration Case No. A-009 of 2017 is obtained, petitioner No.1 will have to submit its reply to claim statement by 11.05.2018 and it is these proceedings has ultimately brought the petitioners before this Court by way of present petition under Article 226 of the Constitution of India.

[5] The Court upon such premise permitted the learned advocate for respondent No.1 to prefer affidavit-in-reply in present proceedings, and subsequently, both the sides were heard at length and upon their request, the petition was to be disposed of finally at admission stage itself. However, in the meantime, it was noticed by the petitioners that the last date was given for submission of counter claim and the submission of pleadings on or before 29.06.2018 a Civil Application was preferred by original petitioners being Civil Application No. 1 of 2018 inter alia requesting the Court to extend the time till Court passes final order in the aforesaid main petition and it is with this background, the present petition is being disposed of finally as per the request by way of present judgment and order.

[6] Learned senior counsel Mr.R.S.Sanjanwala with learned advocate Mr.M.N.Marfatia appearing for the petitioners has vehemently contended that on the admitted pleadings, respondent No.1 does not qualify as a supplier in view of Section 2 (n) of the Act and further undisputedly not having registration within a period of 2 years, respondent No.1 does not qualify and eligible to resort to the Sections 17 and 18 of the Act or peruse such remedy. It has further been contended that even documents which are part of the record, if to be read conjointly respondent No.1 will not be possible to be construed as a supplier within the meaning of definition, and as such, the proceedings initiated are not tenable at the instance of and in pursuance of respondent No.1. In any case, there is no locus standi of respondent No.1 to avail remedy provided under Chapter-V precisely under Sections 17 and 18 of the Act, and therefore, reference itself is without the authority of law. Mr.Sanjanwala,

learned senior counsel has further contended that even assuming without admitting that respondent No.1 falls within the definition of supplier then also by virtue of effect of undisputed registration and shifting of it at State of Maharashtra with effect from 10.08.2012, the respondent authorities will not have any jurisdiction within the territory of State of Gujarat. It has further been contended that apart from this even the claim which has been generated is also out of place since in the winding up proceedings, admitted liability is already paid, but it is only on account of the fact that liberty is kept open by misusing such liberty these proceedings have been initiated within the State of Gujarat, and therefore, also the proceedings initiated in the form of reference itself is not tenable in the eye of law.

[6.1] Mr.Sanjanwala, learned senior counsel further submitted that even looking at the proceedings which were filed in Madras High Court this claim which has been submitted is nothing but a frevolous claim and it is nothing but an improvement of a claim which is not bone fide, and surprisingly, by resorting to Section 16 now an attempt has made to claim interest from the year 2011. Once having agreed at an appropriate rate before the Madras High Court by raising this frivolous claim in the present proceedings in the form of arbitration, an attempt is made to excavate approximately Rs.2 crores as against the total principal amount of Rs.10 Lac. This is nothing but an abuse of process of law at the instance of respondent No.1, and therefore, the reference itself deserves to be quashed. Apart from this, the learned senior counsel has submitted that registered office of respondent No.1 got transferred on 10.08.2012 whereas transaction in question is dated 14.06.2011 and the approach before respondent council is on 19.04.2018 though the same is not maintainable, irrespective of it the respondent authorities have no jurisdiction to entertain the claim from want of even territorial jurisdiction even if the office of council is within the State of Gujarat. By referring to the relevant provisions, it has been contended that making of a reference is not backed by valid and cogent reasons, but the same is made without even considering the objections raised by the petitioners, and therefore also, making of a reference and initiation of such itself is bad, not tenable, and hence, the relief prayed for be granted in the interest of justice.

[6.2] Learned senior counsel Mr.Sanjanwala has further submitted that at the time when issuance of purchase orders, respondent No.1 had projected that it is a SMALL ENTERPRISE under the Act and got registration, but the same was found to be far from truth. On the contrary, had it been clarified at the time of issuance of purchase orders itself, petitioner No.1 might have thought it to grant or not, and therefore, on the contrary, the petitioner No.1 is seriously misled by respondent No.1. Learned senior counsel has submitted that respondent No.1 was obliged to bring this to the notice of petitioner No.1 at the time of issuance of purchase orders itself. The reason being that section 16 of the Act is a penal provision which stipulates that payment of compound interest with monthly rates to a supplier at 3 times of the bank rate notified by the Reserve Bank. However, respondent No.1 informed petitioner No.1 about its registration for the first time only on 16.12.2016. Considering the aforesaid situation which is prevailing, learned senior counsel has requested the Court that proceedings initiated in the form of reference, and subsequently, references are not tenable in the eye of law, and therefore, the same may be quashed in the interest of justice.

[6.3] Mr.Sanjanwala, learned senior counsel has relied upon few of the decisions to strength his submission, which are as follow:

(i) A decision delivered by the Madhya Pradesh High Court in the case of M/s Frick India Limited vs. Madhya Pradesh Micro and Small Enterprises Facilitation Council and others -

(WRIT PETITION NO.19319 OF 2014).

(ii) A decision delivered by the Bombay High Court in the case of M/s Faridabad Metal Udyog Pvt. Ltd. Vs. Mr.Anurag Deepak & Anr. -

(ARBITRATION PETITION NO. 1193 OF 2012).

(iii) A decision delivered by the Andhra Pradesh High Court in the case of Indur District Co-

operative Marketing Society Ltd. vs. Microplex (India), Hyderabad & ors.

(iv) A decision delivered by Hon'ble Supreme Court in the case of Morgan Stanley Mutual Fund vs. Kartick Das reported in 1994 (4) SCC.

[6.4] By referring to these decisions and by making the aforesaid submissions, learned senior counsel has submitted that even by virtue of provisions contained under the Arbitration and Conciliation Act 1996, the arbitrator i.e. respondent No.4 herein would not have authority to decide on the validity of order of respondent No.2 by referring the matter to Arbitration under Section 18 of the Act and to determine as to whether respondent No.1 is a supplier within the meaning of the Act as well as whether respondent No.2 had jurisdiction to make reference under Section 18(2) of the Act or respondent No.2 could have referred the matter to the said arbitrator under Section 18(3) of the Act. These issues for which since respondent No.4 is unable to decide and adjudicate, the present petition is the efficacious remedy. With these backgrounds, the learned counsel requested the Court to grant the relief as prayed for in the present petition.

[7] To meet with the stand taken by learned senior counsel for the petitioners, Mr.Jaimin R. Dave learned advocate for the respondent No.1 submitted that there is an alternative efficacious remedy available to the petitioners and the arbitrator by virtue of Section 16 of the Arbitration Act, 1996 can decide these issues, the Hon'ble Court may not exercise jurisdiction under Article 226 of the Constitution of India. It has further been contended that the petitioners have never raised such contention of jurisdiction before the State level facilitation council despite opportunities having been granted, and therefore, now the petitioners cannot raise such issue of jurisdiction as has acquiescence his right of agitating the same even petitioners did not bother to remain present before the authority to raise the issue related to jurisdiction, and therefore once, the petitioners have submitted to the jurisdiction of respondent authority, the petition may not be entertained and only idea behind bringing this petition is just to delay the proceedings.

[7.1] Mr.Dave, learned advocate has further contended that respondent No.1 is a duly registered under MSME Act, 2008 since 24.04.2008 and the registration certificate is not under challenge. Respondent No.1 was issued an acknowledgment for EM Part-I on 24.04.2008, page 97 of the

petition compilation, and thereafter, the respondent No.1 was required to file EM-II within two years from the date of issuance of EM-I, the date of such filing is not on record. It has further been pointed out be that as it may, petitioners are claiming that respondent No.1 has filed EM-II only on 28.03.2012 however, perusal of the document, it becomes clear about the date of issuance is very much mentioned in the certificate itself. The date of application is not mentioned and since the date of filing EM-II is relevant petitioners have conveniently not brought the same in the present proceedings. It has further been pointed out that respondent No.1 not filed EM-II within two years, the council would not have issued EM-II at first place. Furthermore, if the petitioners are contending that respondent No.1 did not file EM-II within two years, the onus to prove is that on the shoulder of petitioners and in any case this cannot be examined under Article 226 of the Constitution of India and as such petition may not be entertained on this count also. It has further been contended that it is not the case of petitioners that respondent wrongly registered and registration certificate is also not under challenge by the petitioners. Further from the pleadings, it transpires that it is the case of the petitioners that since the respondent No.1 obtained registration certificate on 28.03.2012, the respondent No.1 will not be entitled to claim the benefit of Section 18 of MSME Act, 2006 and without their being any pleadings, the petitioners are trying to improve upon the case as can be seen from the record.

[7.2] It has further been submitted that without prejudice to the aforesaid circumstances, Mr.Dave, learned advocate has stated that definition of supplier contained in Section 2(n) of the MSME Act, 2006 is an inclusive definition and the benefit of beneficial legislation can be extended to an entity even if it is not registered under the MSME Act, 2006 in view of Section 2(n)(iii) of the Act and for that purpose reliance is placed by two decisions, one delivered by Allahabad High Court in the case of M/s. Hameed Leather Finishers vs. M/s. Associated Chemical Industries Private Limited and Another, reported in 2014 (102) ALR 771 (Para 21 & 22) and second in the case of Indur District Co-operative Marketing Society vs. Microplex (India), Hyderabad reported in 2016(3) ALD 588 [para 27] and by referring to this, another contention which has been raised that shifting of registration office by respondent No.1 from the State of Gujarat to State of Maharashtra would not have any bearing on the facts of the present case, first of all MSME Act, 2006 nowhere requires that the supplier should have registered office in State of Gujarat. Secondly, had the intention of the legislature been to confer jurisdiction only on the councils with respect to only those companies whose registered office is located within State of Gujarat it would have mentioned so in the clear and unequivocal terms, like it is mentioned in other statutes such as Section 60(1) of Insolvency and Bankruptcy Code, 2016. Thirdly, under the Insolvency and Bankruptcy Code, 2016, the legislature has clearly stipulated that Insolvency Application can be filed only where registered office of corporate debtor is located. However, here in the present case Section 18(4) which is only require is that supplier has to be located in State of Gujarat and for that purpose, a reference is made in case of Indur District Co-operative Marketing Society (supra) and since in the present case supplier i.e. respondent No.1 is very much located in the State of Gujarat respondent authorities have jurisdiction to entertain the proceedings. Fourthly, the transaction got concluded lastly on 14.06.2011 and at a relevant point of time, the registered office of respondent No.1 undisputedly was located in State of Gujarat and even the purchase orders were also placed at Baroda, and therefore, at a relevant point of time when transaction concluded the registered office of respondent No.1 was very much within the State of Gujarat and as such the proceedings are maintainable.

[7.3] Mr.Dave, learned advocate has further contended that it is the case of the petitioners that MSME Act, 2006 cannot be applied retrospectively, but this submission is ill- founded in view of the fact that respondent No.1 is not requesting for retrospective application at all. It is stated that when transaction took place, the respondent No.1 was duly registered under MSME Act, 2008, and therefore, this Act is applicable to the transaction which took place between 2010 - 2011. Additionally, without prejudice to the aforesaid submissions, the learned counsel contended that even if respondent No.1 was not registered under MSME Act, 2006 respondent No.1 cannot be debarred from availing remedy under Section 18 of the Act. Section 18 of the MSME Act, 2006 is only providing an additional remedy which cannot be availed at any point of time, more particular, when MSME Act, 2006 was operative when transaction took place, and therefore, by referring to a decision in the case of M.D.Frozen Foods Exports vs. Hero Fincorp Ltd., AIR 2017 SC 4481, (Para 36 and 37) and by relaying upon this, it has been contended that respondent No.1 is entitled to have penal interest under Section 16 of the MSME Act, 2006 which issue since at large before the Arbitrator. The remedy under Section 18 can be availed by all the MSME, irrespective of registration date so long as transaction was done after MSME Act, 2006 came into force and further contended that Sections 16 and 18 are two independent provisions. Lastly to summarize the case and the defence of respondent No.1, the learned counsel submitted that the respondents have not waived their rights to claim under MSME Act, 2006, as this issue can very well be agitated before the learned Arbitrator, and secondly, the order passed in winding up petition before the High Court of Madras will not operate as a waver or estopple since the High Court of Madras itself vide order dated 06.10.2016 granted liberty to file appropriate proceedings with respect to remaining outstanding claim and by referring to such decision particularly from page 50, the request is made by learned advocate Mr.Dave to dismiss the petition by not granting any relief. No other submissions have been made.

[8] Having heard learned advocates appearing for the respective parties and having gone through the material on record, following issues are not possible to be unnoticed by this Court to arrive at ultimate conclusion on the present controversy:

> [8.1] First of all, a perusal of the pleadings indicate that pursuant to the transaction, the transformers in question had been supplied out of which some transformers delivery was rejected on account of poor quality and the last supply undisputedly on 14.06.2011. It is reflecting from the record that the respondent unit was not registered as a Small Enterprise within the meaning of Section 2(m) and the procedure established by Section 8 of the Act has not been complied with.
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> [8.2] It is also emerging that Section 2(n) has defined the meaning of supplier and it indicates that a Micro or Small Enterprise, which had filed a Memorandum with authority referred to in Sub-Section 1 of Section 8, and therefore, at the time when the transaction took place and at the time when supply was made, it appears that the respondent unit was not a supplier as defined under Section 2(n), and as such, there appears to be a force in the contention raised by the petitioner that it has no locus to avail remedy of Chapter-V and to take advantage thereof.

[8.3] Yet another circumstance, which cannot be unnoticed is that since the requirement of Section 8 appears to have not been complied with as the form of Memorandum which is required to be filled in has not been done at all and the same is mandate of the statute that every person intending to establish a Micro, Small or Medium Enterprise shall file a Memorandum with the State Government or the Central Government, as the case may be. The details about filing is not reflecting so cogently on the record, and therefore, it appears that the respondent is not in a position to avail the benefits of delayed payment as prescribed under Chapter-V of the Act of 2006. It is further emerging from the record that Section 8 is giving a mandate to the establishment to file with such authority, the Memorandum in view of Part-I with the District Industrial Centre and once it starts the production and rendering services shall have to file in Part-II and thereto the same will have to be filed within a period of 2 years from the filing of Part-I Memorandum. Herein, the instant case as per the say of respondent itself, Part-I Memorandum has been filed on 24.08.2008 whereas Part-II has been filed much beyond the period of 2 years and that has been filed only on 30.03.2012, and therefore, since the period of 2 years is not maintained, later on filing Part-II is of no consequence and became invalid, and therefore, there is hardly any issue for respondent to avail the benefit of Chapter-V, more specifically, it is not indicating from the record that Part-II Memorandum is filed at any time on or around 24.04.2010. Resultantly, since the respondent has failed in complying the requirement of the statute cannot take advantage of its own negligence and the effect of statutory provision cannot be given a go-bye. As a resultant effect, the reference which has been made under Section 18 itself is impermissible.

[8.4] Apart from this, even the reference could not have been made in view of the fact that the status of Small Enterprises has not been obtained prior to entering into transaction as well as within a period of 2 years as per the requirement of statute and the claim cannot be availed by resorting to Chapter-V of the Act. This has not been appreciated in its true purspective. As a result of this, the matter could not have been referred to at all for arbitration. The record of the petition indicates that initial date of production commencement has been stated to be on 04.08.2007, but then Part-II Memorandum which has been submitted to the District Industrial Centre, Varodadra is on 20.03.2012 almost after 5 years much beyond the period, and therefore, there is no jurisdiction lies with the authority to make reference under Section 18 of the Act.

[8.5] Further, it is also noticed from the record that requirement of Section 8 would have been fulfilled prior to the dispute arose which is not a question visible on hand. Here, the last supply is of 14.06.2011 and there was a dispute about the poor quality etc. was in the year 2011 whereas the Memorandum has been submitted in 2012 only, and therefore also, respondent No.1 cannot have any remedy under the Act. Additionally, it is reflecting that registered office of respondent No.1 has been shifted in the State of Maharashtra on 10.08.2012 and the place of residence of the company is not within the territorial limits of respondent No.2 or 3 in any case, and therefore, it was not open for respondent No.2 to assume the jurisdiction and referred the matter under Section 18 and in turn

before the learned Arbitrator. It is a settled position of law that the residence of company is to be assumed at a place where its registered office is situated, and therefore, since the registered office of respondent No.1 is located outside the state of Gujarat, respondent Nos.2 and 3 have no jurisdiction to assume it. Hence, in any case, the dispute which has been raised and ultimately referred before the Arbitrator itself lacks proper authority.

[8.6] In addition to this, further it is reflecting that when in the year 2015, respondent No.1 raised a grievance with regard to the outstanding payment, the winding up proceedings have been filed by it in the High Court of Judicature at Madras. Therefore, in any case whenever such dispute arose, the same was at a place where ordinarily the residence of a company is situated either of the petitioner or of respondent No.1, and hence, after disposal of winding up petition when the present claim is generated, the same should have been either at Madras where petitioner's company is located or at the best where respondent No.1 is having a usual residence i.e. registered office within the State of Maharashtra, but in any case, it cannot be within the State of Gujarat.

[8.7] If the order of winding up is to be seen dated 25.10.2016, substantially the claim is already over. But even if some claim is remaining left out which is not admitted then a remedy is provided under clause 9 of the said order of winding up proceeding, as can be seen from page 47 of the petition compilation. The said order in which the claim of interest was resisted and not accepted / admitted as the petitioner company has indicated that no interest is payable and at that point of time, no proceedings were initiated in any form by respondent No.1, and therefore, only liberty is kept reserved for left out amount of approximately Rs.10 Lac which is in serious controversy. But when the order is passed in the year 2016, the usual residence of a company being a registered office is already shifted within the State of Maharashtra, and therefore, simply because at the relevant point of time supply is from Varodadra that place will not confer jurisdiction in such a peculiar set of circumstances. Resultantly, the claim itself is not validly presented at a proper forum hence without much entering into merit or demerit, the reference itself is not competent as made by the authority.

[8.8] Since the proceedings are held to be invalid before respondent No.4 and the reference itself is not maintainable, the Court has refrained itself from commenting anything further on merit of the claim. However, the Court has taken a note of a situation wherein for a left out amount of interest after winding the proceedings having been over of Rs.10,48,439/- by taking advantage of the present Act and Chapter-IV with compounding interest claim is generated i.e. of Rs.3,35,28,132/- (Rupees Three Crores Thirty Five Lakhs Twenty Eight Thousand One Hundred Thirty Two only).

[8.9] So far as the contention with regard to the maintainability of petition raised by respondent No.1 by asserting that it can be gone in to by the learned Arbitrator but in view of the scheme of the Act and in view of this peculiar set of circumstances since reference itself is not tenable for want of jurisdiction and authority it is always open for the petitioner to invoke extraordinary jurisdiction of this Court. As a result of this, the petition is maintainable and it is settled position of law that challenge to the reference itself is amenable to the writ jurisdiction if it is without the authority of law made by the concerned authority and here is the case in which the authority has made an attempt to allow respondent No.1 to invoke such jurisdiction by respondent Nos. 2 and 3 to raise such a huge claim though not entitled to seek benefit of the provisions of the Act in question. The

contentions raised by the learned counsel for the petitioner have got its own impact and the Court is therefore, inclined to accept the petition by granting relief as prayed for.

[8.10] In wake of aforesaid situation if the decision which have been cited by respective sides if to be looked into, it appears that the judgments which have been cited by learned advocate appearing for the petitioners have got some impact on the case of the petitioners. The first judgment which is relied upon is the decision delivered by High Court of Madhya Pradesh at Jabalpur Bench in Writ Petition No.19319 of 2014 decided on 24.07.2015. In the said decision, the Court had analysed the very provision of Act of 2006 and has made certain observations on the issue of the company being supplier or not within the meaning of Section 2(n). Some of the observations contained therein since relevant quoted hereinafter:

> "31. It is in the context of these principles, present issue is being considered.
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> 32. Section 2(n) of the Act of 2006 defines "supplier" in the following terms -
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> (n) "supplier" means a micro or small enterprise, which has filed a memorandum with the authority referred to in clause
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> (a) of sub-section (1) of section 8, and includes, -
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> (i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956;
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> (ii) the Small Industries Development Corporation of a State or a Union territory, by
> :: 17 ::
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> Writ Petition No.19319/2014 whatever name called, being a company registered under the Companies Act, 1956;
>
> (iii) any company, cooperative society, 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;

33. Sub-clause (iii) of clause (n) on the basis whereof, the respondent no.3 claims to be eligible to avail the remedy under Chapter V stipulates that a supplier would include any company, co-operative society, trust or a body by whatever name called, registered under 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.

34. It has been contended on behalf of respondent no.3 that since it is registered partnership concerned, a right is inherent in it to take recourse to remedies under the Act.

35. The submissions though attractive but it is no so, because for availing the benefit under the Act, the entity, whether it is micro or small enterprise must be rendering services which are provided by such enterprises. There being no material on record to establish that respondent no.3 is rendering construction work since 25.7.2007. It is only from 21.6.2013 that the firm got registered as engaged in construction works as per the entry made in Part II of memorandum for additional service activity.

36. It will not, in the considered opinion of this Court, confer a benefit in respondent no.3 from an anterior date; in other words, respondent no.3 who got engaged in construction work by virtue of the agreement dated 18.10.2008 and completed the work on 10.5.2010 will not on the basis of subsequent registration on 21.6.2013 can avail the benefit of Chapter V of the Act 2006 to settle the dispute of the work completed on 10.5.2010 because it is not a continuing wrong.

37. Sub-section (1) of Section 18 of the Act 2006 envisages that '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'. The expression "any party" in this clause draws its reference from Sections 15, 16 and 17 i.e. it must be a supplier which, in turn, is defined under Section 2(n) of the Act, 2006.

38. Since it is the supplier alone who can avail the benefit under the Act 2006 and respondent no.3 being not the supplier in context to the dispute in question, it was beyond the jurisdiction of the Council to have entertained the reference under Section 18 of Act 2006. It having addressed the facts in wrong manner assumed the jurisdiction in respect of the dispute in question. The assumption of jurisdiction by the Council in respect of dispute in question cannot be approved. Therefore, the impugned Award deserves to be and is hereby set aside."

[8.11] Other decisions which have been pressed into service is a decision delivered by Bombay High Court in Arbitration Petition No.1193 of 2012 decided on 17.06.2013, which has also analysed the provisions and has interpreted the charing section of 15, 16 and 17 of the Act in question. The relevant observations contained in para:10, 11 and 12 read as under:

> "10. Mr Sawant, learned counsel also invited my attention to Sections 15, 16, 17 and 18(1) of the said Act which read as under :
>
> 15. Liability of buyer to make payment :- Where any supplier, supplies nay goods or renders any services to any buyer. The buyer shall make payment therefore on or before the date 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.

11. Learned counsel thus submits that in view of the fact that the transaction between the petitioners and respondent No.2 was much prior to the day on which the said Act itself came into force and the registration of the petitioners under the provisions of the said Act was much after the said transaction between the parties, petitioners would not be entitled to make any application for referring the dispute to the Micro and Small Scale Enterprises Facilitation Council . Mr Sawant also placed reliance upon the Judgment of this Court and Supreme court which were considered by this Court while deciding the matter in case of M/s Hindustan Wires Ltd. (supra). This Court in case of M/s Hindustan Wires (Ltd.), after considering the Judgments relied upon by the parties held that when parties raise question as to jurisdiction it would be legitimate to draw an inference that they themselves have given a go-bye to the stipulation as to the time within which the award has to be made. Considering the fact that petitioners in that matter had filed various applications under Sections 12, 13 and 14, this Court held that the petitioner could not be allowed to raise plea that arbitrator had become functus officio on expiry of two years or that his mandate stood terminated due to delay on the part of the arbitrator. As far as issue as to whether MSME Act would have overriding effect over the provisions of Arbitration Act 1996, this Court referred to the Judgment of this Court in case of M/s Steel Authority of India (Ltd.) and held that provisions under the arbitration agreement existing between the parties would not be affected by enactment of said Act and the dispute would be governed by the provisions of the existing arbitration agreement between the parties and would be governed by the provisions of the Arbitration Act 1996. I do not propose to take any different view than the view already taken by this Court in case of M/s Hindustan Wires Ltd. (supra) as the said Judgment, in my view on these issues raised by the petitioners in this case squarely apply to the facts of this case.

12. As far as Judgment of Delhi High Court in case of M.L. Dalmiya & Co.Ltd. (supra) relied upon by the petitioners is concerned, in that matter respondents had committed default in filing its counter-claim. Petitioners were pressing for hearing before the learned arbitrator which the learned arbitrator failed. In the facts of that case, Delhi High Court terminated the mandate of learned arbitrator appointed by the respondents and appointed another arbitrator. In my view, facts of that case are clearly distinguishable with the facts of this case. On perusal of the facts of this case and on conjoint reading of definition of Section 2(b) and (n) of the MSME Act, it is clear that dispute between the parties to these proceedings arose much prior to the said Act having came into force. In

my view, remedy under Section 18 to refer the dispute to Micro and Small Scale Enterprises Facilitation Council would not apply to the dispute arising out of existing arbitration agreement between the parties. Similarly, the said provisions also cannot be invoked in respect of the dispute having arisen between the parties prior to the said Act having came into force and prior to the "Supplier" having filed the memorandum and is registered under Section 8 of the said Act. Admittedly these first four petitioners were registered as micro small enterprises much after the dispute had arisen between the parties. In my view, the said provisions would not apply with retrospective effect to the past transaction and thus provisions of the said MSME Act have no applicability to the facts of this case. Even otherwise reliefs under Section 14 and 11 cannot be claimed in the same proceedings. Proceedings filed under Section 14 are filed before Court whereas application filed under Section 11 is not before the Court. In any event, since mandate of arbitrator is not terminated, question of appointment of any other arbitrator did not arise.

[8.12] Learned advocate appearing for the petitioner has relied upon further decisions mainly on the issue about the Company's registered office. But here is the case in which undisputedly registered office has already be shifted to the limited of State of Maharashtra. The said decisions which are reported in AIR 1996 SC 543 and AIR 2000 SC 1926 are not dealt with in detail but taking advantage of the observations which have been made, the Court is of the considered opinion that the case is made out by the petitioner.

[9] To counter this propositions which have been relied upon by learned counsel for the petitioners Mr.Jaimin Dave, learned advocate has relied upon two decisions decided by the Apex Court in Civil Appeal No.15147 of 2017 and another is the decision which has been relied upon by High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh. The first judgment of the Apex Court which has been relied upon is altogether in a different statute and based upon an issue of applicability of SARFESI Act and hence para:35 and 36 are quite in distinct form that of the case on hand, this Court is unable to stretch the proposition to decide the issue in the present controversy. Hence, the said judgment is of no avail to the respondent. Similarly, the case which has been decided by Hyderabad High Court referred to above is slightly on a different background of facts if closely to be looked into. In that case, it has been propounded that as long as companies were supplier within the meaning of Section 2(a) of the Act of 2006 and were located within the jurisdiction of councilor as required under Section 18, the councilor had jurisdiction to dealt with their claim. Whereas here in the present case, the respondent is neither falling within the definition of supplier on account of its own neglect at the relevant point of time and undisputedly situated and located not within the jurisdiction of respondent council. Hence, a reference itself was without the authority of law. As a result of this, referring to para:30, the Court is of the opinion that this case will not come to any assistance to the respondent.

[10] The overall consideration of aforesaid propositions would lead to a situation whereby entertaining of application for reference by respondent no.1 and consequential reference dated 20.11.2017 is incompetent and, therefore, requires no adjudication for want of jurisdiction. Resultantly, entertainment of application of respondent no.1 and consequential reference to respondent no.4 being incompetent are quashed and set aside respectively.

[10.1] However, while parting with the judgment, the Court has clarified that it has not examined the merit of the claim of the respondent no.1 since reference is disposed of for want of jurisdiction and made without the authority of law. It would be open for the respondent no.1 to agitate the claim if permissible in law before the appropriate competent forum. With this clarification petition stands disposed of as allowed. Rule is made absolute to the aforesaid extent with no order as to costs.

[11] In view of the order passed in the main matter, Civil Application does not survive and stands disposed of accordingly.

Sd/-

(A.J.SHASTRI ,J.) Further Order While pronouncing the judgment, the learned advocate for the petitioner requests for suspension of the order of this Court, which the Court finds its not acceptable in view of the fact that the petition is partly allowed. Request is rejected.

Sd/-

(A.J.SHASTRI ,J.) dharmendra