# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# CIVIL APPELLATE JURISDICTION

## WRIT PETITION NO.12897 OF 2016

JSW Steel Ltd.
(formerly known as Ispat Metallics India Ltd.),
a company incorporated under
the Companies Act, 1956 with its
registered office at Geetapuram, Dolvi Village,
Tal: Pen, Alibaug, District Raigad,
Pin: 402107. ..Petitioner

Versus

1. Kamlakar V. Salvi,
carrying on business in the name and style of
M/s. Krunal Engineering Works,
at Krunal Compound, Gala No.1,
Near Hindalco, Ganapati Pada,
Vitava, Kalwa (East), Thane-400 605.

2. Micro and Small Enterprises
Facilitation Council, Konkan Region,
Thane, constituted under the Micro, Small
and Medium Enterprises Development Act,
2006 and having its office at MIDC Office
Complex Building, opposite Mulund Check
Naka, Wagle Estate Corner,
Thane-400 604.

3. Union of India,
through the Ministry of Micro, Small and Medium
Enterprises at Room No.123, Udyog Bhawan,
Rafi Marg, New Delhi-110011. ..Respondents

WITH
CIVIL APPLICATION NO.268 OF 2018
WITH

CIVIL APPLICATION NO.935 OF 2018
IN
WRIT PETITION NO.12897 OF 2016

Kamlakar V. Salvi,
Age 62 years, Occ: Business,
Office Address -
M/s. Krunal Engineering Works,
At Krunal Compound, Gala No.1,
Near Hindalso, Ganpati Pada,
Vitava, Kalwa. ..Applicant

IN THE MATTER BETWEEN

JSW Steel Ltd.
(Erstwhile Ispat Metallics India Ltd.),
A company incorporated under
the Companies Act, 1956 with its
registered office at Geetapuram, Dolvi Village,
Tal: Pen, Alibaug, District Raigad. ..Petitioner

Versus

1. Kamlakar V. Salvi,
carrying on business in the name and style of
M/s. Krunal Engineering Works,
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Near Hindalco, Ganapati Pada,
Vitava, Kalwa (East), Thane-400 605.

2. Micro and Small Enterprises
Facilitation Council, Konkan Region,
Thane, ..Respondents

Mr. Janak Dwarkadas, Senior Counsel a/w Ms. Rishika Harish, Mr. M. P. Bharucha, Ms. Sneha Jaisingh, Mr. Manan Shah and Mr. Aniruddha Banerji i/by Bharucha & Partners, for the Petitioner.
Mr. R. A. Thorat, Senior Advocate a/w Ms. Gauri Jadhav, Ms. Pratibha Shelke and Mr. Suryajeet P. Chavan, for Respondent No.1.

Mr. Aditya Thakkar and Mr. D. P. Singh, Advocate for Respondent No.3 – UOI.

CORAM : UJJAL BHUYAN &
MADHAV J. JAMDAR, JJ.

RESERVED ON : 2nd SEPTEMBER, 2021
PRONOUNCED ON : 4th OCTOBER, 2021

JUDGMENT (Per Ujjal Bhuyan J.)

Heard Mr. Janak Dwarkadas, learned senior counsel for the petitioner and Mr. R. A. Thorat, learned senior counsel for respondent No.1. We have also heard Mr. Aditya Thakkar alongwith Mr. D. P. Singh, learned counsel for respondent No.3 – Union of India.

2. By filing this petition under Articles 226 and 227 of the Constitution of India, petitioner initially sought for quashing of orders dated 08.05.2015 passed by respondent No.2 as well as order dated 05.09.2015 passed by the said respondent. Certain incidental prayers were also made, such as, for quashing of registration of respondent No.1 under the Micro, Small and Medium Enterprises Development Act, 2006 as well as Darkhast No.188 of 2016 on the files of the Court of District Judge at Alibaug.

3. By the order (award) dated 08.05.2015, the Micro and Small Enterprises Facilitation Council, Konkan Region, Thane in Application No.39 of 2011 filed by respondent No.1 directed the petitioner to pay principal amount of Rs.54,16,462.00 together with interest as per section 16 of the Micro, Small and Medium Enterprises Development Act, 2006 within a period of one month from the date of receipt of the said order. By the second order dated 05.09.2015, it was held that the order (award) dated 08.05.2015 was a valid one and that there was no question of rehearing the matter. Consequently, notices for rehearing were withdrawn.

4. The writ petition was subsequently amended and post amendment, an additional prayer was made to declare section 16 of the Micro, Small and Medium Enterprises Development Act, 2006 to be *ultra vires* the Constitution of India.

5. At the outset, we may set out the relevant facts as pleaded.

6. On 06.11.1999, petitioner's predecessor in interest had awarded two contracts to respondent No.1. One contract was for manufacture/fabrication and supply of fire fighting and security systems. The second contract was for erecting, testing and commissioning of such

systems. It is stated that respondent No.1 had to complete the two contracts on or before 06.03.2000 but respondent No.1 failed to complete the contract works whereafter the works had to be completed by the petitioner.

7. Aggregate value of the two contracts was Rs.1,15,41,839.00, out of which petitioner paid respondent No.1 Rs.94,83,693.00. According to the petitioner, no further payments were due by the petitioner to respondent No.1, as respondent No.1 had failed to complete the contract works. Rather, it was respondent No.1 who was liable to compensate the petitioner for the cost and expenses incurred in completing the contract works.

8. It is stated that the Micro, Small and Medium Enterprises Development Act, 2006 (briefly "the MSMED Act" hereinafter) came into effect on and from 02.10.2006. "Supplier" has been defined under section 2(n) of the MSMED Act which basically means a micro or small enterprise which has filed a memorandum with the authority referred to in sub section (1) of section 8. Section 8 provides for registration of a micro or small or medium enterprise which is intended to be set up. As per the proviso, such an existing enterprise may also register under the MSMED Act within 180

days from the date of commencement of the said statute.

9. As per section 16, if a buyer fails to make payment of the amount to the supplier, then the buyer would be liable to pay compound interest with monthly rests to the supplier at three times of the bank rate notified by the Reserve Bank of India. Under section 18, either the supplier or the buyer may make a reference to the Micro and Small Enterprises Facilitation Council (briefly "the Council" hereinafter), which is respondent No.2 in the present proceeding, and on such reference being made the Council shall conduct conciliation. If the conciliation is unsuccessful, then the Council either by itself or through an institution or centre resolve the dispute by way of arbitration, in which event provisions of the Arbitration and Conciliation Act, 1996 would become applicable.

10. Respondent No.1 had commenced production on or about 01.03.1996 and had applied for registration under the MSMED Act sometime in the year 2010 which was much beyond the period of 180 days as provided by the proviso to section 8. Upon such application, registration certificate under section 8 of the MSMED Act was issued to respondent No.1 on 14.12.2010.

11. Respondent No.1 made a reference to respondent No.2 under the MSMED Act on 13.09.2011 claiming an amount of Rs.54,16,462.00 as principal on account of alleged non-payment of contractual dues and interest of Rs.97,49,629.00, aggregating Rs.1,51,66,091.00, from the petitioner. The said reference was registered as Application No.39 of 2011.

12. The reference was forwarded for conciliation under section 18(2). In the conciliation proceedings petitioner had raised the issue that the claim of respondent No.1 was barred by limitation and therefore the proceedings should be terminated. The conciliation process failed whereafter the matter was referred to arbitration.

13. After a lapse of about two years, petitioner was informed about the hearing scheduled on 15.11.2014 before respondent No.2. Though petitioner was represented, there was no representation on behalf of respondent No.1. Thereafter the matter was adjourned on a couple of occasions. Throughout petitioner took the stand that respondent No.2 had no jurisdiction and that Application No.39 of 2011 of respondent No.1 was not maintainable.

14. On 08.05.2015 respondent No.2 passed the order (award)

directing the petitioner to pay principal amount of Rs.54,16,462.00 and interest as per section 16 within one month.

15. Subsequently, petitioner received letter dated 24.08.2015 from respondent No.2 that since the order (award) dated 08.05.2015 was not signed by the Chairman of the Council, therefore, a rehearing was notified on 04.09.2015. Petitioner attended the rehearing and reiterated its contention that Application No.39 of 2011 was not maintainable and that respondent No.2 had no jurisdiction.

16. Respondent No.2 in the proceedings held on 05.09.2015 noted that the order dated 08.05.2015 was not signed by the Chairman due to administrative reason. However, referring to section 31(1)(2) of the Arbitration and Conciliation Act, 1996, a view was taken that in an arbitral proceeding having more than one arbitrator, signatures of majority of the arbitrators would be sufficient so long as the reason for signature being omitted is stated. Referring to the order dated 08.05.2015, it was stated that signatures of majority members of the Council were present. Signature of the Chairman could not be obtained as he was transferred. Therefore, the order (award) passed on 08.05.2015 was valid. As such, there was no

question of rehearing the reference. Consequently, all the notices of rehearing were withdrawn.

17. Petitioner has alleged that it was not furnished with a copy of the order dated 05.09.2015. However, based on the impugned order dated 05.09.2015, respondent No.1 lodged Darkhast No.188 of 2016 in the Court of the District Judge at Alibaug. Upon notice, petitioner had entered appearance and filed its objection.

18. It was at that stage that the present writ petition came to be filed questioning the impugned orders dated 08.05.2015 and 05.09.2015 along with the related prayers.

19. On 22.02.2018 submission was made before the Court by learned counsel for the petitioner that it would deposit the principal amount. However, learned counsel for respondent No.1 submitted that the said amount was highly inadequate as by that time the interest amount came to around Rs.91,00,00,000.00. This Court directed the petitioner to deposit Rs.5,00,00,000.00 with the Registrar, Judicial-I within two weeks and stayed execution of the impugned award subject to such deposit.

20. Thereafter petitioner carried out certain amendments in the writ petition. It is stated that petitioner's objection was dismissed by the Court of the District Judge, Alibaug vide order dated 06.06.2017. Application for staying the execution proceedings on the ground of pendency of the writ petition was also rejected. That apart, respondent No.1 had filed application for attachment of movable and immovable properties of the petitioner. However, learned counsel appearing on behalf of respondent No.1 gave an undertaking not to proceed with the execution proceedings.

21. The above facts have been brought on record by the petitioner by way of amendment. By the said amendment, petitioner has also challenged the *vires* of section 16 of the MSMED Act as being *ultra vires* the Constitution of India.

22. Respondent No.1 in its reply affidavit has taken a preliminary objection that the writ petition should not be entertained in view of the decision of the Supreme Court in ***SBP & Company Vs. Patel Engineering Ltd., (2005) 8 SCC 618*** that an order passed by an Arbitral Tribunal is incapable of being corrected by the High Court under Articles 226 and 227

of the Constitution of India. Referring to section 34(1) of the Arbitration and Conciliation Act, 1996, it is stated that petitioner has remedy of filing application against the award passed by the Council which is an Arbitral Tribunal but instead of availing the statutory remedy, petitioner has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, because the statutory remedy has become time barred. Reference has also been made to section 19 of the MSMED Act which says that no application for setting aside any decree, award or order made by the Council or by any institution to which reference is made by the Council shall be entertained unless the appellant (not being supplier) deposits 75% of the amount in terms of the award. It is stated that 75% would be from out of the amount awarded plus interest as per section 16 till the date of deposit.

22.1. Respondent No.1 has also questioned the motive of the petitioner to challenge the *vires* of section 16 as being an attempt to circumvent section 34(1) of the Arbitration and Conciliation Act, 1996. Respondent No.1 has explained the rational behind liability to pay compound interest by the buyer under section 16 and states that under the aforesaid provision there is only marginal increase in the rate of interest as

was provided by section 4 of the earlier act called the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993.

23. Respondent No.1 has filed an additional affidavit post amendment of the writ petition justifying the impugned orders. Reference has been made to section 24 of the MSMED Act which says that provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent in any other law for the time being in force; thus the aforesaid provisions have over-riding effect. Reference has also been made to section 32(2) of the MSMED Act which says that notwithstanding the repeal of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, anything done or any action taken under the said act shall be deemed to have been done or taken under the corresponding provisions of the MSMED Act. Finally respondent No.1 has justified its claim made under section 16 of the MSMED Act and the orders passed thereon.

24. Reply affidavit has also been filed by respondent No.3 but the said affidavit is confined to challenge made by the petitioner to the *vires* of section 16 of the MSMED Act. Since learned senior counsel for the petitioner in the hearing held on 29.07.2021 made a statement that

petitioner would not press the challenge to section 16 at this stage though reserving the right to raise this issue before the higher forum, if necessary, it may not be necessary to refer to in detail averments made by respondent No.3 in the reply affidavit.

25. Mr. Janak Dwarkadas, learned senior counsel for the petitioner has taken us through the provisions of the MSMED Act as well as the related provisions of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 which act was repealed by virtue of section 32 of the MSMED Act. Referring to section 8 of the MSMED Act more particularly to the proviso thereto he submits that respondent No.1 was an existing or already established enterprise but nevertheless it did not register itself within the 180 days period prescribed under the proviso to section 8(1) but registered only on 14.10.2010 i.e. after more than four years of coming into force of the MSMED Act. Submission of Mr. Janak Dwarkadas is that all references to a "supplier" under the MSMED Act must necessarily mean and should be taken as references to a "supplier" who is registered under section 8 of the MSMED Act. Equally the MSMED Act would not apply to a "supplier" who is not so registered.

25.1. Regarding the claim of respondent No.1, learned counsel has referred to Exh.A to the writ petition and submits therefrom that the alleged liability regarding payment of principal amount arose between 01.08.2000 to 31.08.2001 and the alleged liability to pay interest on the principal amount arose on and from 01.09.2001. Learned counsel submits that MSMED Act and the entire scheme of benefits contemplated thereunder applies to persons registered under section 8 of the MSMED Act on the date of entering into the contract and in respect of services rendered or goods supplied after filing of the memorandum under section 8 of the MSMED Act.

25.2. Placing reliance on a decision of the Supreme Court in ***Shilpi Industries Vs. Kerala State Road Transport Corporation***, Civil Appeal Nos.1570-1578-2021, he submits that firstly provisions of the Limitation Act, 1963 would apply to arbitration proceedings under the MSMED Act. Referring to section 18(3) of the MSMED Act, it is submitted that provisions of the Arbitration and Conciliation Act, 1996 ("1996 Act" hereinafter) shall apply to a dispute upon termination of conciliation proceedings and the arbitration would be construed as if in pursuance of an arbitration agreement under section 7(1) of the 1996 Act. He submits that

it is settled law that provisions of the Limitation Act, 1963 is applicable to proceedings under the 1996 Act. In the above context, he submits that claim made by respondent No.1 pertained to a contract which was much prior to registration under section 8(1) and was also clearly barred by limitation.

25.3. Reverting back to ***Shilpi Industries*** (*supra*), Mr. Janak Dwarkadas submits that as per decision of the Supreme Court benefits of the MSMED Act are available only to a registered supplier. In other words, the seller should have registered under the provisions of the MSMED Act as on the date of entering into the contract. For supplies pursuant to a contract made before registration under the MSMED Act, no benefit can be sought by such entity.

25.4. Learned senior counsel argues with great emphasis that provisions of the MSMED Act are prospective. Those cannot be applied retrospectively. The contracts and supplies and claims based thereon are all prior to coming into force of the MSMED Act as well as registration by respondent No.1 under section 8(1) of the MSMED Act. There being no retrospective operation of the MSMED

Act can be availed of by respondent No.1. That apart, these are jurisdictional facts which go to the root of the matter. Since these jurisdictional facts were absent, Micro and Small Enterprises Facilitation Council (Council) was rendered *coram non judice*. Thus any order passed by such Council would be a nullity. In this connection reliance has been placed on a decision of the Supreme Court in ***Arun Kumar Vs. Union of India, (2007) 1 SCC 732***.

25.5. Referring from the list of dates, learned senior counsel for the petitioner submits that respondent No.1 had filed application before the Council i.e. respondent No.2 on 13.09.2011 seeking benefit of the MSMED Act by claiming amounts of Rs.54,16,462.00 and Rs.97,49,629.00 respectively as principal and interest, totaling Rs.1,51,66,091.00, for works carried out and completed as of 31.08.2001 which would be evident from the fact that respondent No.1 had calculated interest from 01.09.2001. In the circumstances, he submits that not only the claim is barred by limitation, respondent No.1 is not entitled to claim benefit under the MSMED Act for goods supplied before coming into force of the said act and before registration of respondent No.1 under section 8(1).

25.6. Assailing the impugned order (award) dated 08.05.2015, he submits that the same is not a reasoned order at all. Issues raised by the petitioner were not discussed. No finding is rendered on limitation despite petitioner specifically raising the said issue. The impugned order dated 08.05.2015 is a non-speaking one and being violative of the principles of natural justice is a nullity. The second impugned order dated 05.09.2015 does not in any manner rectify the situation.

25.7. Learned senior counsel submits that since the Council i.e. respondent No.2 acted without jurisdiction, impugned orders passed by it would be nullity having been passed by an authority which is rendered *coram non judice*. Reference has been made amongst others to the following decisions:-

i) *Kiran Sing Vs. Chaman Paswan, AIR 1954 SC 340*.

ii) *Embassy Property Development Pvt. Ltd. Vs. State of Karnataka, (2020) 13 SCC 308*.

25.8. Finally on the question of maintainability of the writ petition, Mr. Janak Dwarkadas submits that petitioner's challenge is not only to the award passed by the Council but to the very applicability of the MSMED

Act to the claim of the petitioner as well as other related issues. In any event, power of judicial review under Article 226 is always available in a case where the order complained of is inherently lacking in jurisdiction. In this connection, he has placed reliance on a decision of the Supreme Court in ***Whirlpool Corporation Vs. Registrar of Trademarks, (1998) 8 SCC 1***.

25.9. Learned senior counsel for the petitioner has also submitted a compilation of judgments relied upon by the petitioner.

26. Mr. R. A. Thorat, learned senior counsel for respondent No.1 has referred to various provisions of the MSMED Act and submits that since the provisions of the 1996 Act are made applicable under section 18(3) of the MSMED Act in terms of which arbitration proceedings were conducted by the Council which were contested by the petitioner, the only recourse which was open to the petitioner to challenge the award of the Council dated 08.05.2015 was under section 34 of the 1996 Act for setting aside the award and not by way of a writ petition. In such circumstances, he submits that the writ petition is not maintainable.

26.1. Referring to the judgment of the Supreme Court in ***Patel Engineering*** (*supra*), he submits that Supreme Court has made it very clear

that once an award is passed, the only recourse available is to challenge the same in terms of section 34 and/or section 37 of the 1996 Act. He further submits that following the decision in ***Patel Engineering*** (*supra*), Supreme Court in ***Modern Industries Vs. Steel Authority of India Ltd., (2010) 5 SCC 244,*** has held that challenging an award passed by the Industrial Facilitation Council under the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (briefly "the 1993 Act" hereinafter) before the High Court under Article 226 would not be justified. Highlighting this aspect, Mr. R. A. Thorat submits that in the body of the writ petition there is no reason or explanation as to why the statutory remedy under section 34 of the 1996 Act has not been availed of. Again, referring to the language of sub section (1) of section 34 of the 1996 Act, he submits that language of the said provision makes it abundantly clear that an arbitral award can only be challenged by an application for setting aside such award in accordance with sub sections (2) and (3) of section 34.

26.2. Mr. R. A. Thorat also submits that challenge to *vires* of section 16 of the MSMED Act which came to be incorporated in the writ petition by way of an amendment is only an after thought to somehow bring the

case within the ambit of Article 226 of the Constitution of India, as petitioner is fully aware that only a challenge to the award may not be entertained by a writ court. Strategy of the petitioner to incorporate challenge to *vires* of section 16 is a clever attempt to overcome the bar of section 34 of the 1996 Act. However, now that petitioner has given up the challenge to *vires* of section 16, the writ petition as it stands is nothing but a challenge to the award made by the Council for which the appropriate statutory remedy is under section 34 of the 1996 Act.

26.3. Mr. R. A. Thorat has refuted the argument of learned senior counsel for the petitioner that the Council did not have jurisdiction to entertain the reference made by respondent No.1 under section 18. He submits that as per requirement of sub section (3) of section 18 of the MSMED Act, once the conciliation is not successful, then the dispute is taken up for arbitration by the Council itself or the Council may refer it to any institution or center. Reverting back to sub section (1) of section 18 of the MSMED Act, he submits that this provision starts with a *non obstante* clause and therefore has overriding effect over any other law for the time being in force. This position is further strengthened by section 24 of the MSMED Act which clarifies that provisions of sections 15 to 23 shall have

effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

26.4. Referring to the provisions of section 32 of the MSMED Act more particularly to sub section (2) thereof, Mr. R. A. Thorat submits that though the 1993 Act stood repealed with the coming into force of the MSMED Act, notwithstanding such repeal anything done or any action taken under the 1993 Act shall be deemed to have been done or taken under the corresponding provisions of the MSMED Act. In this connection, he submits that respondent No.1 had filed the requisite memorandum as per section 8 of the MSMED Act on 14.12.2010 and therefore when respondent No.1 made the reference to respondent No.2 on 13.09.2011 it already had filed a memorandum as per section 8 of the MSMED Act. Thus, the claim of respondent No.1 would be saved and would be deemed to have been made under the MSMED Act by virtue of sub section (2) of section 32.

26.5. In so far contention of the petitioner that the claim of respondent No.1 is barred by limitation is concerned, Mr. R. A. Thorat submits that it was open to the petitioner to challenge the award of the

Council under section 34 of the 1996 Act but that would not imply that the Council lacked jurisdiction to entertain the dispute.

26.6. Mr. R. A. Thorat further submits that petitioner cannot simply contend that the award passed by the Council is a nullity. Law is well settled that an order becomes a nullity only in the event the Court or the authority passing such order inherently lacks jurisdiction. A conjoint reading of sections 18 and 24 of the MSMED Act would make it abundantly clearly that the Council alone had jurisdiction to entertain the reference of respondent No.1. If there is any inadequacy in the award that would be a ground for challenge before the statutory forum under section 34 of the 1996 Act but that would not make the award a nullity.

26.7. Finally, Mr. R. A. Thorat submits that section 8 of the MSMED Act would not have much relevance in the facts and circumstances of the case inasmuch as the contract between the parties was entered into under the repealed act i.e. the 1993 Act before coming into force of the MSMED Act. But by virtue of sub section (2) of section 32 of the MSMED Act the said claim can be recovered under provisions of the MSMED Act.

26.8. He therefore submits that the writ petition so filed is misconceived and should be dismissed.

27. In his response to submissions made by Mr. R. A. Thorat, learned counsel for respondent No.1, Mr. Janak Dwarkadas, learned senior counsel for the petitioner submits that respondent No.1 has not claimed the benefit of the 1993 Act or the savings clause under section 32(2) of the MSMED Act. This has also not been taken by respondent No.1 as a defence in its reply affidavit. However, even otherwise also such a contention is wholly misplaced and misconceived. Even if the contracts were entered into during the subsistence of the 1993 Act, respondent No.1 could not have taken the benefit of the 1993 Act because even under the 1993 Act it had to meet the definition of "supplier". Respondent No.1 was not a "supplier" under the 1993 Act because it had not obtained any registration under the 1993 Act. In this connection, learned senior counsel has referred to various definitions provided in the 1993 Act including the definition of "supplier" under section 2(f). He therefore submits that to be a "supplier" under the 1993 Act one had to hold a permanent registration certificate issued by the Directorate of Industries of a State or Union territory. There is no averment to that effect by respondent No.1 and no

document has been produced to show that it was a "supplier" under the 1993 Act. Therefore, contention of learned counsel for respondent No.1 that the contracts were entered into under the repealed act i.e. under the 1993 Act is completely misconceived because to make the contracts come within the ambit of the 1993 Act, respondent No.1 was required to be registered as a "supplier" under the said act.

27.1. Responding to the submission of learned counsel for respondent No.1 that section 8 of the MSMED Act has no relevance, it is submitted that under the proviso to section 8 any person who before commencement of the MSMED Act had established a small scale industry is required to file memorandum within 180 days for registration. Therefore, not only the 1993 Act but also the MSMED Act requires registration without which the person entering into a contract under the repealed act or under the MSMED Act would not be a "supplier". Highlighting this aspect, Mr. Janak Dwarkadas has again referred to the decision of the Supreme Court in ***Shilpi Industries*** (*supra*) and submits that registration is a prerequisite for a person to be "supplier" and to claim benefits under the MSMED Act.

27.2. Elaborating further, Mr. Janak Dwarkadas submits that by taking recourse to filing memorandum under sub section (1) of section 8 of the MSMED Act subsequent to entering into contract and supply of goods and services, respondent No.1 cannot assume the legal status of being classified as a "supplier" under the MSMED Act to claim the benefits retrospectively from the date on which respondent No.1 had entered into the contracts with the petitioner.

27.3. Learned senior counsel for the petitioner referring to the savings clause in sub section (2) of section 32 of the MSMED Act submits that the expression "anything done or any action taken under the act so repealed" is meant to save acts and actions taken under the 1993 Act. He submits that what is saved by section 32(2) are those acts done or those actions undertaken in compliance to or in accordance with the provisions of the repealed act and not otherwise. If what is argued by learned counsel for respondent No.1 is accepted, it would mean that the repealed act and the benefits thereunder would be available to every ancillary industrial undertaking and every small scale industrial undertaking without them even holding a permanent registration as required under the repealed act.

27.4. It is the contention of learned counsel for the petitioner that merely holding registration under section 8 of the MSMED Act before filing of a reference under section 18 thereof is not sufficient. The contract in question has to be entered into after the registration.

27.5. Insofar jurisdiction of the Council under section 18 of the MSMED Act is concerned, it is submitted that the jurisdiction exercised is not plenary; rather it is confined to the statutory restrictions under the MSMED Act. Referring to the decision of the Supreme Court in ***Arun Kumar*** (*supra*), he submits that existence of jurisdictional facts is a *sine qua non* or a condition precedent for the exercise of power by a court of limited jurisdiction. In the present case, there is absolute absence of jurisdictional facts; besides the claim is clearly barred by limitation. In such circumstances, the Council rendered itself *coram non judice*. If that be so, then the order passed by the Council is a nullity and therefore the writ petition filed by the petitioner is clearly maintainable.

27.6. Regarding challenge to the constitutionality of section 16 of the MSMED Act is concerned, learned senior counsel for the petitioner submits that in view of a few judicial pronouncements that once validity of

a central statute is upheld by one High Court, then it would preclude another High Court to consider constitutional validity of the said provision, petitioner has reserved its right to raise the challenge before a higher forum, if necessary.

27.7. Contention of respondent No.1 that section 34 of the 1996 Act is the only remedy for the petitioner cannot and doesn't arise. While scope of section 34 of the 1996 Act is not in dispute, it is equally well settled that any order which is a nullity or passed by an authority which had rendered itself *coram non judice* is liable to be set aside in exercise of writ jurisdiction and not confined to the specified statutory remedy. In this connection, reliance has been placed amongst others on the following decisions :-

I) ***State of U. P. Vs. Mohammed Mooh, AIR 1958 SC 86.***

II) ***Whirlpool Corporation Vs. Registrar of Trademarks, (1998) 8 SCC 1.***

28. Submissions made by learned counsel for the parties have received the due consideration of the Court.

29. Before we enter into the rival contentions, it would be apposite

to highlight the relevant statutory provisions.

30. The 1993 Act was enacted to provide for and to regulate payment of interest on delayed payments to small scale and ancillary industrial undertakings and for matters connected therewith or incidental thereto. Section 2(f) defines the word "supplier" to mean an ancillary industrial undertaking or a small scale industrial undertaking holding a permanent registration certificate issued by the Directorate of Industries of a State or Union territory and includes, -

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

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

30.1. Under section 3, there is liability of the buyer to make payment to a supplier which had supplied any goods or which had rendered any services to the buyer, failing which the buyer would have to pay interest from the date specified. As per sub section (1) of section 6, the amount due

from a buyer, together with interest shall be recoverable by the supplier from the buyer by way of a suit or other proceeding under any law for the time being in force. However, sub section (2) of section 6 made it clear that notwithstanding anything contained in sub section (1), any party to a dispute could make a reference to the Industry Facilitation Council for acting as an arbitrator or conciliator in respect of the matters referred to in sub section (1) in which event provisions of the 1996 Act would become applicable as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub section (1) of section 7 of the 1996 Act. Section 7A deals with establishment of Industry Facilitation Council.

31. The MSMED Act is an act to provide for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto. Section 2(n) defines the word "supplier" to mean a micro or small enterprise, which has filed a memorandum with the authority referred to in sub section (1) of section 8, and includes,-

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

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

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

31.1. Section 8 deals with memorandum of micro, small and medium enterprises. Sub section (1) says that any person who intends to establish,-

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

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

(c) a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in

the First Schedule to the Industries (Development and Regulation) Act, 1951,

shall file the memorandum of micro, small or as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub section (4) or by the Central Government under sub section (3).

However, as per the proviso, any person who, before the commencement of the MSMED Act, had established -

(a) a small scale industry and obtained a registration certificate; and

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951, having investment in plant and machinery of more than one crore rupees to not exceeding ten crore rupees and, in pursuance of the notification of Government of India in the erstwhile Ministry of Industry (Department of

Industrial Development) dated 25th July 1991 had filed an Industrial Entrepreneur's Memorandum,

shall within one hundred and eighty days from the commencement of the MSMED Act, file the memorandum, in accordance with the provisions of the MSMED Act.

31.2. Section 15 deals with liability of buyer to make payment. It says that where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between the buyer and the supplier in writing and where there is no agreement, before the appointed day. However, as per the proviso, in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or deemed acceptance.

31.3. Section 16 provides for the date from which and the rate at which interest is payable where the buyer fails to make payment of the amount to the supplier in terms of section 15.

31.4. Section 17 says that 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.

31.5. Section 18 deals with reference to Micro and Small Enterprises Facilitation Council which we have already referred to as the Council. Sub section (1) starts with a *non obstante* clause and it says 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 Council. In terms of sub section (2), on receipt of a reference under sub section (1), the Council shall either conduct conciliation in the matter itself or seek the assistance of any institution or centre providing alternate dispute resolution services for conducting conciliation. In such an event provisions of sections 65 to 81 of the 1996 Act shall apply to such a dispute as if the conciliation was initiated under the 1996 Act. Sub section (3) deals with a situation where conciliation is not successful. In such an eventuality 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 provisions of the 1996 Act shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in the

1996 Act. As per sub section (5) every reference made under section 18 shall be decided within a period of ninety days from the date of making such reference.

31.6. Section 24 of the MSMED Act provides that provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. In other words, section 24 makes it clear that sections 15 to 23 of the MSMED Act shall have overriding effect.

31.7. That brings us to section 32 of the MSMED Act. As per sub section (1), the 1993 Act stood repealed. However as per sub section (2), notwithstanding such repeal, anything done or any action taken under the 1993 Act, so repealed under sub section (1) shall be deemed to have been done or taken under the corresponding provisions of the MSMED Act.

32. Let us now deal with the last of the three enactments i.e. the Arbitration and Conciliation Act, 1996 which we have already referred to as the 1996 Act. The other provisions of the 1996 Act may not have much relevance to the present dispute; therefore, we may confine our deliberation to sections 34, 37 and 43 of the 1996 Act. As per sub section (1) of section

34 recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub section (2) and sub section (3). While sub section (2) sets out the grounds for which an arbitral award may be set aside by the court, sub section (3) provides for the timeline within which such an application for setting aside an arbitral award may be made.

32.1. Section 37 provides for appeal. As per sub section (1), an appeal shall lie to the competent court amongst others against an order setting aside or refusing to set aside an arbitral award under section 34.

32.2. As per sub section (1) of section 43 of the 1996 Act, the Limitations Act, 1963 applies to arbitrations as it applies to proceedings in court.

33. Having surveyed the relevant legal provisions, we may now highlight the undisputed facts of the case as could be culled out from the pleadings and documents on record.

i) Petitioner had awarded two contracts to respondent No.1 on 06.11.1999.

ii) MSMED Act came into force on and from 02.10.2006.

iii) Respondent No.1 had filed memorandum under section 8(1) of the MSMED Act sometime in the year 2010.

iv) Respondent No.1 received registration certificate under section 8(1) of the MSMED Act on 14.12.2010.

v) Reference was made by respondent No.1 to respondent No.2 under section 18 of the MSMED Act on 13.09.2011 claiming an amount of Rs.54,16,462.00 as principal and interest of Rs.97,49,629.00, aggregating Rs.1,51,66,091.00, from the petitioner. The reference was registered as Application No.39 of 2011.

vi) As per summary of delayed payment annexed to the reference application, an amount of Rs.28,14,081.43 was claimed on account of the first contract as per statement upto 31.08.2001. For the second contract, as per statement upto 31.08.2001, respondent No.1 claimed Rs.26,02,381.00, totaling Rs.54,16,462.43 as the principal amount. As per the

interest calculation statement, interest was calculated from 01.09.2001 to 31.08.2011 for an amount of Rs.97,49,629.00. Thus, the principal amount was as on 31.08.2001 and the interest amount was calculated from 01.09.2001 to 31.08.2011. In the supporting statement at Sr. No.12, respondent No.1 described the matter of dispute as non-payment (payment not received for last ten years).

vii) Respondent No.2 passed the order (award) on 08.05.2015 directing the petitioner to pay the principal amount together with interest. However, signature of the chairman was not there.

viii) By the subsequent order dated 05.09.2015 respondent No.2 clarified that the order (award) passed on 08.05.2015 was a valid order notwithstanding the fact that signature of the chairman of respondent No.2 could not be obtained.

34. In ***Shilpi Industries*** (*supra*) decided recently on 29.06.2021 two issues were raised for consideration before the Supreme Court. The issues were :-

(i) Whether provisions of the Indian Limitation Act, 1963 are applicable to arbitration proceedings initiated under section 18(3) of the MSMED Act ?

(ii) Whether counter claim is maintainable in such arbitration proceedings ?

34.1. Insofar the first issue is concerned, namely, applicability of the Indian Limitation Act, 1963 to arbitration proceedings initiated under the MSMED Act, Supreme Court held that as per sub section (3) of section 18 of the MSMED Act, provisions of the 1996 Act are made applicable to arbitrations under the said provision as if the arbitration is in pursuance of arbitration agreement between the parties under sub section (1) of section 7 of the 1996 Act. It was noted that applicability of the Limitation Act to arbitrations is covered by section 43 of the 1996 Act. The High Court on the basis of the aforesaid provision and relying on the judgment of the Supreme Court in ***Andhra Pradesh Power Coordination Committee Vs. Lanco Kondapalli Power Limited, (2016) 3 SCC 468,*** had held that the Limitation Act 1963 is applicable to arbitrations covered by section 18(3) of the MSMED Act. In ***Shilpi Industries*** (*supra*), Supreme Court opined

that the view of the High Court that the Limitation Act, 1963 is applicable to arbitration proceedings under section 18(3) of the MSMED Act is correct and accordingly it was held that provisions of the Limitation Act, 1963 will apply to arbitrations covered by section 18(3) of the MSMED Act.

34.2. Though not necessary for the present purpose, we may mention that Supreme Court answered the second issue by holding that counter claim is maintainable before the statutory authorities under the MSMED Act.

34.3. However, what is of significance is that Supreme Court had also dealt with the claim of the appellant in the said case seeking benefit of the provisions of the MSMED Act on the ground that the appellant was also supplying as on the date of making the claim. In that case the undisputed position was that the supplies were concluded prior to registration of the supplier. Supreme Court held that to seek the benefit of the provisions under the MSMED Act, the seller should have registered under the MSMED Act as on the date of entering into the contract. For supplies pursuant to the contract made before registration under the

MSMED Act, no benefit under the MSMED Act would be available. By taking recourse to filing memorandum under sub section (1) of section 8 subsequent to entering into contract and supply of goods and services one cannot assume the legal status of being classified under the MSMED Act to claim the benefit retrospectively. It was clearly held that the appellant cannot become micro or small enterprise or supplier to claim the benefits within the meaning of the MSMED Act by submitting a memorandum to obtain registration subsequent to entering into contract and supply of goods and services. Paragraph 26 of ***Shilpi Industries*** (*supra*) is relevant and the same is extracted hereunder :-

> "26. Though the appellant claims the benefit of provisions under MSMED Act, on the ground that the appellant was also supplying as on the date of making the claim, as provided under Section 8 of the MSMED Act, but same is not based on any acceptable material. The appellant, in support of its case placed reliance on a judgment of the Delhi High Court in the case of *GE T&D India Ltd. v. Reliable Engineering Projects and Marketing*, **2017 SCC OnLine Del 6978** but the said case is clearly distinguishable on facts as much as in the said case, the supplies continued even after registration of entity under Section 8 of the Act. In the present case, undisputed position is that the supplies were

concluded prior to registration of supplier. The said judgment of Delhi High Court relied on by the appellant also would not render any assistance in support of the case of the appellant. In our view, to seek the benefit of provisions under MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under MSMED Act. While interpreting the provisions of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, this Court, in the judgment in the case of *Shanti Conductors Pvt. Ltd. & Anr. etc. v. Assam State Electricity Board & Ors. etc.,* (2019) 19 SCC 529 has held that date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act. There is no acceptable material to show that, supply of goods has taken place or any services were rendered, subsequent to registration of appellant as the unit under MSMED Act, 2006. By taking recourse to filing memorandum under sub-section (1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified

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

34.4. From the above, we find that Supreme Court has clarified that if any registration under the MSMED Act is obtained, the same will be prospective and would apply to supply of goods and services subsequent to registration but cannot operate retrospectively. According to the Supreme Court, any other interpretation of section 8 would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation.

35. There is no dispute to the proposition laid down in ***Patel Engineering*** (*supra*). Primarily, the question before the seven judge bench of the Supreme Court was about the nature of function of the Chief Justice

or his designate under section 11 of the 1996 Act. Earlier a three judge bench of the Supreme Court had taken the view that it was purely an administrative function, being neither judicial nor quasi-judicial; Chief Justice or his nominee performing functions under section 11(6) of the 1996 Act could not decide any contentious issue between the parties. The said view was approved subsequently by a constitution bench. Correctness of such view was under consideration in ***Patel Engineering*** (*supra*). In that case the seven judge bench held that the power exercised by the Chief Justice of a High Court or the Chief Justice of India under section 11(6) of the 1996 Act is not an administrative power; it is a judicial power. Before summing up the conclusions, Supreme Court noted that some High Courts had proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration would be capable of being challenged under Articles 226 or 227 of the Constitution of India. Adverting to section 37 of the 1996 Act, which makes certain orders of the Arbitral Tribunal appealable and to section 34 whereby the aggrieved party has an avenue for ventilating his grievance against an award, Supreme Court disapproved of such stand and held that such an intervention by the High Courts is not permissible. Explaining further, Supreme Court held that the object of minimizing judicial intervention while dispute is being arbitrated upon will be

defeated, if the High Courts could be approached under the Article 227 or under Article 226 of the Constitution against every order made by the Tribunal.

36. This position has been reiterated by the Supreme Court in ***Modern Industries*** (*supra*). That was a case under the 1993 Act. In the facts of that case, Supreme Court observed that though the 1993 Act provides a statutory remedy of appeal against an award passed by the Industry Facilitation Council but the buyer did not avail the statutory remedy of appeal against the award and instead challenged the award passed by the Council before the High Court under Article 226 of the Constitution of India bypassing the statutory remedy which was viewed as not justified.

37. From a careful analysis of the above two judgments of the Supreme Court in ***Patel Engineering*** (*supra*) and in ***Modern Industries*** (*supra*), we find that view of the Supreme Court is that <u>any and every order</u> (emphasis is ours) made by an Arbitral Tribunal would not be open to challenge or being corrected by the High Court under Articles 226 or 227 of the Constitution of India. Ordinarily, an order or award passed by the

Industry Facilitation Council under the 1993 Act or by the Micro and Small Enterprises Facilitation Council (Council) is to be challenged under section 34 of the 1996 Act or appealed against under section 37 of the said Act.

38. In ***Arun Kumar*** (supra), Supreme Court discussed what is a jurisdictional fact and held that a jurisdictional fact is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. It was held as under :-

> "74. A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of *certiorari*. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess."

38.1. Explaining further, Supreme Court held that a jurisdictional fact is one on the existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. By erroneously assuming existence of a jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise doesn't possess. Thus, existence of jurisdictional fact is the *sine qua non* or the condition precedent for exercise of power by a court having limited jurisdiction. It was held as under :-

> "76. The existence of jurisdictional fact is thus *sine qua non* or condition precedent for the exercise of power by a court of limited jurisdiction."

38.2. After referring to several decisions, Supreme Court reiterated that existence of jurisdictional fact is *sine qua non* for the exercise of power and held as follows :-

> "84. From the above decisions, it is clear that existence of 'jurisdictional fact' is *sine qua non* for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of 'jurisdictional fact', it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in

> issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present."

39. The concept of jurisdictional fact was as a matter of fact addressed by the Supreme Court way back in the year 1955 in the case of ***Kiran Singh*** (*supra*). It was held that a defect of jurisdiction whether it is pecuniary or territorial or whether it is in respect of subject matter of the action, strikes at the every authority of the court. It was held that a decree passed by a court without jurisdiction is a nullity and that its invalidity can be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution or even in collateral proceedings. A court without jurisdiction would be *coram non judice*. It was held as under :-

> "6. The answer to these contentions must depend on what the position in law is when a court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of Section 11 of the Suits Valuation Act is on that position. It is a fundamental principle well-established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution

> and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was *coram non judice*, and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits Valuation Act on this position."

40. Insofar the question of exhaustion of alternative remedy is concerned, again way back in the year 1958 in the case of ***Mohammad Nooh*** (*supra*) Supreme Court held that the rule requiring exhaustion of statutory remedies before the writ is granted is a rule of policy, convenience and discretion rather than a rule of law.

41. This principle continues to hold good despite the passage of time. It has been reiterated by the Supreme Court in ***Whirlpool Corporation*** (*supra*), in the following manner :-

> "15. Under Article 226 of the Constitution, the High Court, having regard to the facts of a case, has a discretion to

entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

41.1. After surveying various decisions, Supreme Court summed up the position as under :-

"20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a Writ Petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is

shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

42. In ***Embassy Property Developments Pvt. Ltd.*** (*supra*) one of the questions before the Supreme Court was whether the High Court ought to interfere under Articles 226/227 of the Constitution with an order passed by the National Company Law Tribunal in a proceeding under the Insolvency and Bankruptcy Code, 2016, ignoring the availability of the statutory remedy of appeal to the National Company Law Appellate Tribunal. Supreme Court observed that the distinction between lack of jurisdiction and wrongful exercise of available jurisdiction should certainly be taken account by the High Courts when Article 226 is sought to be invoked bypassing the statutory alternative remedy provided by a special statute. In the facts of that case, it was held that National Company Law Tribunal did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute supplemental lease-deeds for extension of mining lease. Since the National Company Law Tribunal chose to exercise a jurisdiction not vested in it in law, the High Court was justified in entertaining the writ petition on the ground that National Company Law Tribunal was *coram non judice*.

43. On the basis of the above analysis and legal provisions, we may now advert to the facts of the present case. As noticed above, the contracts were awarded by petitioner's predecessor in interest to respondent No.1 on 06.11.1999. The principal amounts as per statement of delayed payment were upto 31.08.2001. MSMED Act came into force on 02.10.2006. Respondent No.1 received registration under section 8(1) of the MSMED Act on 14.12.2010. Reference was made by respondent No.1 to respondent No.2 under section 18 of the MSMED Act on 13.09.2011 claiming principal not received for last ten years and therefore claimed interest. There is no averment in the affidavit of respondent No.1 or any document placed on record that it was registered as a supplier under section 2(f) of the 1993 Act or under section 2(n) of the MSMED Act. The word "supplier" used in both the enactments can only mean a "supplier" as defined under the two enactments. That means it ought to have had a permanent registration certificate issued by the Directorate of Industries as an ancillary industrial undertaking or as a small scale industrial undertaking under the 1993 Act or as a micro or as a small enterprise which had filed a memorandum with the authority referred to in sub section (1) of section 8 of the MSMED Act. In the absence of any material on record, respondent No.1 cannot justify its claim to be a supplier under the 1993 Act to bring

the contracts entered into with the petitioner and the resultant dues under the saving clause of section 32(2) of the MSMED Act. To bring anything done or any action taken under the 1993 Act within the ambit of the savings clause under sub section (2) of section 32 of the MSMED Act, it is axiomatic that such thing or action must have been done in accordance with the 1993 Act, otherwise it will lead to an absurd situation as expressed by the Supreme Court in ***Shilpi Industries*** (*supra*).

44. Moreover, as explained by the Supreme Court in ***Shilpi Industries*** (*supra*), respondent No.1 cannot avail the benefits of the MSMED Act for contracts executed and supplies made prior to registration under section 8(1) of the MSMED Act. As held by the Supreme Court, this provision is prospective and cannot be applied retrospectively. Thus, there was no relationship of buyer and seller between the petitioner and respondent No.1 either under the 1993 Act or under the MSMED Act. That apart there is admittedly delay of about 10 years in making the claim by respondent No.1 rendering the same time-barred.

45. The above are jurisdictional facts which were absent before respondent No.2 could assume jurisdiction. In the absence of such

jurisdictional facts, respondent No.2 could not have proceeded under section 18(3) of the MSMED Act and could not have passed the impugned order (award) dated 08.05.2015. As held by the Supreme Court in ***Arun Kumar*** (*supra*), in the absence of the jurisdictional facts, respondent No.2 had rendered itself *coram non judice*. Any order or award passed by an authority which is rendered *coram non judice* is a nullity and can certainly be interfered with by the High Court under Article 226 of the Constitution of India. Therefore, reverting back to our discussions made in paragraph 37 of this judgment, from an analysis of the judgments of the Supreme Court in ***Patel Engineering*** (*supra*) and ***Modern Industries*** (*supra*) the position becomes very clear. While the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India would not entertain any and every order passed by an Arbitral Tribunal, certainly the High Court would entertain an order or award passed by a statutory Arbitral Tribunal which is a nullity or when the Tribunal had rendered itself *coram non judice*.

46. Consequently, we are of the unhesitant view that order (award) dated 08.05.2015 as well as the consequential order dated 05.09.2015 passed by respondent No.2 are wholly unsustainable in law and are as such

set aside and quashed.

47. Writ petition is accordingly allowed to the above extent. However, there shall be no order as to cost.

MADHAV J. JAMDAR, J UJJAL BHUYAN, J