

NBCC (India) Ltd Vs State Of West Bengal & Ors

Court: Supreme Court Of India

Date of Decision: Jan. 10, 2025

Acts Referred: Constitution of India, 1950 " Article 136, 141, 226

Arbitration and Conciliation Act, 1996 " Section 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 89, 81

Micro, Small and Medium Enterprises Development Act, 2006 " Section 2(a), 2(c), 2(e), 2(n), 4, 5, 6, 7, 8, 17, 18, 18(2), 18(3), 20, 21

Industries (Development and Regulation) Act, 1951 " Section 11(b)

Hon'ble Judges: Pamidighantam Sri Narasimha, J; Pankaj Mithal, J

Bench: Division Bench

Advocate: Gopal Sankaranarayanan, Nagarkatti Kartik Uday, Sanidhya Kumar, Shivani Vij, Madhumita Bhattacharjee, Debarati Sadhu, Srijia Choudhury, Anant, Sudarshan Rajan, Satyam Dwivedi, Puja Jakhar, Harshit Prakash, Roshan Santhalia

Final Decision: Allowed

Judgement

S. No., "Dates of Work

Orders", Dates of Construction Contracts, "Bills raised after Registration

on 19.11.2016

1., "Contract-I

30.07.2015", "27.08.2015

Office Building for National Jute

Board, Rajarhat, Kolkata", 10 Bills for 34.71 crores

2., "Contract-II

26.10.2015", "17.11.2015

Residential Quarters for ISI, Kolkata", 8 Bills for 14.18 crores

3., "Contract-III

19.01.2016", "28.07.2016

ITI Campus, Darjeeling", 10 Bills for 10.49 crores

4., "Contract-IV

19.08.2016", "20.08.2016

Regional Centre for Lalit Kala

Academy, Kolkata", 8 Bills for 12.46 crores

, 19.11.2016, Registration of Respondent No. 4 as Small Undertaking,

5., "Contract-V

15.09.2017", "11.10.2017

MSTC Office, Rajarhat, Kolkata", 5 Bills for 15.72 crores

that, with respect to the fifth contract, the Enterprise instituted a commercial suit [(Comm.) No. 229 of 2021] before the High Court of Delhi, which is",,,

said to be pending consideration. However, this fact does not have any bearing on the issues before this Court.",,,

2.3 Seeking resolution of disputes, on 28.03.2019, the Enterprise made a reference under Section 18 of the Act for recovery of the amounts due to it",,,

to the West Bengal State Micro and Small Enterprises Facilitation Council. The Facilitation Council initiated action, and",,,

with the failure of the conciliation proceedings under Section 18(2) of the Act, the dispute was referred to arbitration under Section 18(3) on",,,

19.01.2021. A further notice of the arbitral proceedings was also issued, and it was received by the appellant on 30.09.2021.",,,

2.4 The appellant objected to the Facilitation Council entertaining the reference, firstly on the ground that the Enterprise was not registered before the",,,

execution of the contracts and, as such, the Facilitation Council does not have jurisdiction under Section 18. Secondly, it was also argued that the",,,

subject matter of the contract relates to the execution of the works contracts, which falls outside the scope and ambit of the Act. Carrying these",,,

objections further, the appellant filed a Writ Petition under Article 226 of the Constitution of India before the High Court of Calcutta, raising the",,,

jurisdictional question of the Facilitation Council entertaining the reference.,,,

3. Decisions of the Single Judge and the Division Bench: The learned Single Judge dismissed the Writ Petition on 16.12.2021 by simply holding,,,

that "the question of jurisdiction can be raised before the Arbitral Tribunal, which shall decide the same before entering into other questions. The",,,

decision of the Single Judge was challenged unsuccessfully before the Division Bench of the High Court by the order impugned before us. The,,,

Division Bench also referred the decision of this Court in *Kone Elevator India Private Limited v. State of Tamil Nadu* (2014) 7 SCC 1 to hold that a,,,

works contract is an indivisible contract and also that the Act, being a special legislation, overrides other statutes. The Division Bench agreed with the",,,

finding of the Single Judge that all objections, including those relating to maintainability, can be raised and contested before the arbitrator. Thus, the",,,

appellant is in appeal before us.,,,

4. Submissions: Mr. Gopal Sankaranarayanan, learned senior counsel, appearing for the appellant, challenged the jurisdiction of the Facilitation Council",,,

Council in entertaining the reference under Section 18 of the Act by the Enterprise for the simple reason that it registered itself after the contracts,,,

were executed and not before. His submission is based on the decision of this Court in Silpi Industries (supra) and Mahakali Foods (supra). Though,,,

the impugned decision of the High Court was on 18.05.2022, almost a year after the judgment of this Court in Silpi Industries (supra), it has not taken",,,

note of the judgment of this Court. Mr. Gopal Sankaranarayanan also referred to certain subsequent orders of this Court, which we will be examining",,,

while considering the issue.,,,

4.1 Ms. Madhumita Bhattacharjee and Mr. Roshan Santhalia, learned counsels for respondents, opposed the appellant's arguments and contended",,,

that these questions can always be raised before the Arbitral Tribunal as directed by the Single as well as the Division Bench of the High Court.,,,

5. Issue for our consideration: The question of law for our consideration is whether an MSME cannot make a reference to the Facilitation Council,,,

for dispute resolution under Section 18 of the Act if it is not registered under Section 8 of the Act before the execution of the contract with the buyer.,,,

6. Before we examine the provisions of the Act and the ratio of the judgment of this Court in Silpi Industries (supra) and Mahakali Foods (supra), it",,,

is necessary to take note of the statute (repealed Act) that preceded the Act and also the important judgment of this Court in Shanti Conductors,,,

Private Ltd. v. Assam State Electricity Board (2019) 19 SCC 529, which also has a direct bearing on the decision in Silpi Industries (supra) and for",,,

interpreting the provisions of the Act.,,,

7. The repealed Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 referred to as the repealed",,,

statute and the judgment in Shanti Conductors v. Assam State Electricity Board:,,,

The decision of this Court in Shanti Conductors (supra), a three-Judge Bench Judgment, was necessitated because of the difference of opinion",,,

between two Judges. The relevant facts of Shanti Conductors (supra) are that the Small-Scale Industry therein entered into a contract for supply of,,,

goods and services to the buyer before the said 1993 repealed statute came into force. However, the supplies under the contract were rendered after",,,

the said statute came into force. Of the seven questions of law that were formulated by the three-judge bench, the first two questions, relevant to our",,,

purpose, are extracted for ready reference. It is necessary to mention here that filing of a memorandum by any MSME was never an issue there, as",,,

Act, become entitled to receive payment after the enforcement of the Act one supplier cannot be denied the benefit of the statutory protection on the pretext that "..."

the agreement in his case was entered prior to enforcement of the Act. When the date of agreement is not referred as material or incidence for fastening the,,,

liability, by no judicial interpretation the said date can be treated as a date for fastening of the liability. The 1993 Act being beneficial legislation enacted to",,,

protect small scale industries and statutorily ensure by mandatory provision for payment of interest on the outstanding money, accepting the interpretation as put",,,

by the learned counsel for the Board that the day of agreement has to be subsequent to the enforcement of the Act, the entire beneficial protection of the Act shall",,,

be defeated. The existence of statutory liability depends on the statutory factors as enumerated in Section 3 and Section 4 of the 1993 Act. Factor for liability to,,,

make payment under Section 3 being the supplier supplies any goods or renders services to the buyer, the liability of buyer cannot be denied on the ground that",,,

the agreement entered into between the parties for supply was prior to the 1993 Act. To hold that liability of buyer for payment shall arise only when agreement,,,

for supply was entered into subsequent to enforcement of the Act, it shall be adding words to Section 3 which is not permissible under the principles of statutory",,,

construction.,,,

62. We, thus, are of the view that the judgments in Purbanchal Cables & Conductors Purbanchal Cables & Conductors (P) Ltd. v. Assam SEB, (2012) 7 SCC 462,",,

Assam Small Scale Industries Development Corpn. Ltd. v. J.D. Pharmaceuticals, (2005) 13 SCC 19 and Shakti Tubes Ltd.v. State of Bihar, (2009) 7 SCC 673",,,

which held that the 1993 Act shall be applicable only when the agreement to sale/contract was entered into prior/subsequent to the enforcement of the Act, does",,,

not lay down the correct law. We accept the submission of the learned counsel for the appellants that even if agreement of sale is entered into prior to enforcement,,,

of the Act, liability to make payment under Section 3 and liability to make payment of interest under Section 4 shall arise if supplies are made subsequent to the",,,

enforcement of the Act.Ã¢â€â€,,

(emphasis supplied),,,

7.4 The ratio of the decision in Shanti Conductors can be formulated as follows:,,,

i) Even if contracts are entered into before the commencement of the repealed statute, the liability to make payment under Section 3, and to pay",,,

interest thereon under Sections 4 and 5 and to recover the amount under Section 6 will arise if the supplies are made subsequent to the enforcement of,,,

the statute. The incidence of liability under the repealed statute is Ã¢â€â€supply of goods or rendering of servicesÃ¢â€â€,,

ii) when the date of contract is neither referred to nor made an incident for fastening the liability under the statute, by way of judicial interpretation",,,

courts cannot treat the said date as the date for fastening the liability. The existence of the statutory liability depends on the language employed in,,,

Sections 3 to 6 of the statute," ,,,

iii) to hold that the liability of the buyer to make payment shall arise only when the contract for supply was entered into subsequent to the enforcement," ,,,

of the Act will defeat the purpose and object of the beneficial legislation intended to protect small-scale and ancillary industrial undertakings," ,,,

8. The Micro, Small and Medium Industry in our Country :After the repeal of the 1993 Act, the present Act came into force with effect from" ,,,

02.10.2006. The Act is a comprehensive legislation that recognises and seeks to rejuvenate the importance of MSMEs, whose importance and" ,,,

contribution is accepted in contemporary economies across the globe, and accredited by the United Nations
Åçâ,~Ëœ2024 Theme: MSMEs and the" ,,,

SDGsÅçâ,~â,,ç (United Nations)h <https://www.un.org/en/observances/micro-small-medium-businesses-day> Å,
(2024).United Nations, commenting on the" ,,,

significance of MSMEs observes that:" ,,,

Åçâ,~Å"MSMEs help reduce levels of poverty through job creation and economic growth; they are key drivers of employment, decent jobs and entrepreneurship for" ,,,

women, youth and groups in vulnerable situations. They are the majority of the worldÅçâ,~â,,çs food producers and play critical roles in closing the gender gap as" ,,,

they ensure womenÅçâ,~â,,çs full and effective participation in the economy and in societyÅçâ,~â€ç" ,,,

8.1 In the statement of object and reasons of the Act, it is mentioned that Åçâ,~Å"many Expert Groups and Committees appointed by the Government" ,,,

from time to time as well as small scale industry sector itself has emphasised the need for a comprehensive central enactment to provide an," ,,,

appropriate framework for the sector to facilitate its growth and development, emergence of a large service sector assisting the small scale" ,,,

industry in the last two decades also warrants a composite view of the sector encompassing both industrial units and related service entities," ,,,

The world over, the emphasis has now been shifted from industries to Enterprises.Åçâ,~â€ç" ,,,

8.2 The rights, incentives and remedies provisioned under the Act are the backbone of our economy. Statistics indicate that MSMEs provide" ,,,

employment to 62% of the countryÅçâ,~â,,çs workforce, contribute 30% to IndiaÅçâ,~â,,çs GDP, A microscope on small businesses: The productivity" ,,,

opportunity by countryÅçâ,~â,,ç (McKinsey Global Institute)
<https://www.mckinsey.com/mgi/our-research/a-microscope-on-small-businesses-the-> ,,,

productivity-opportunity-by-country#/ (May 29, 2024); Åçâ,~ËœContribution Of MSMEs to the GDPÅçâ,~â,,ç (Press Information Bureau)" ,,,

<https://pib.gov.in/PressReleaseFramePage.aspx?PRID=2035073>Å, (July 22, 2024). and account for around 45% of IndiaÅçâ,~â,,çs total exports The" ,,,

MSME Revolution: Transforming IndiaÅçâ,~â,,çs Economic LandscapeÅçâ,~â,,ç (Press Information Bureauh)
<https://pib.gov.in/PressReleasePage.aspx?> ,,,

PRID=2087361Ã, (Dec 23, 2024).. The Indian MSME sector is projected to grow to \$1 trillion by 2028 Ã, -ËœMSMEs: The Backbone of IndiaÃ, -â,,çs" ,,,

Economic FutureÃ, -â,,ç (Invest India)

<https://www.investindia.gov.in/team-india-blogs/msmes-backbone-indias-economic-futureÃ,> (June 28, 2024).. " ,,,

Moreover, MSMEs play a crucial role in promoting rural development, womenÃ, -â,,çs employment, and inclusive growth. 19.5% of total MSMEs" ,,,

Ã, -ËœWomen-led EnterprisesÃ, -â,,ç (Lok Sabha Digital Library)

<https://eparlib.nic.in/bitstream/123456789/2502792/1/AU3648.pdfÃ,> (Aug 10, 2023). and" ,,,

70% of informal micro-enterprises are owned by women Ã, -ËœÃ, -â,,çParticipation of Females in MSMEsÃ, -â,,ç (Lok Sabha Digital Library),,,

<https://eparlib.nic.in/bitstream/123456789/2974207/1/AU1128.pdfÃ,> (Feb 8, 2024).. There is undoubtedly a global consensus regarding the" ,,,

indispensable importance of MSMEs.,,,

8.3 However, while the United Nations and even the Expert Groups and Committees appointed by the Government from time to time have" ,,,

underscored the importance of MSMEs, and that has led to the Parliament enacting the present legislation, MSMEs in India have been facing many" ,,,

challenges which are reflected in their performance. A recent report records that, Ã, -Ã"MSMEs in India contribute 30% to value-addition and" ,,,

62% to employmentÃ, -, as against Ã, -Ã"49% and 77%, in other emerging economiesÃ, -. Ã, -ËœA microscope on small businesses: The productivity" ,,,

opportunity by countryÃ, -â,,ç (McKinsey Global Institute)

<https://www.mckinsey.com/mgi/our-research/a-microscope-on-small-businesses-the-,>,,,

productivity-opportunity-by-country#/ Ã, (May 29, 2024). The 2023-2024 Economic Survey also recorded the concerns faced by MSMEÃ, -â,,çs. " ,,,

Economic Survey 2023-24Ã, -â,,ç [https://www.indiabudget.gov.in/economicsurvey/doc/echapter.pdf Ã,](https://www.indiabudget.gov.in/economicsurvey/doc/echapter.pdfÃ,) (2024) Ã, -Ã"Licensing, Inspection, and" ,,,

Compliance requirements that MSMEs have to deal with, imposed particularly by sub-national governments, hold them back from growing" ,,,

to their potential and being job creators of substanceÃ, -Ã!Further, many MSMEs struggle to secure the necessary funds to start, operate, or" ,,,

expand their business due to a variety of reasons including lack of collateral or credit history, high interest rates, complex documentation" ,,,

requirements, and long processing times, etc.Ã, -â€ (emphasis supplied)" ,,,

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

10. Interpretation of Statutory Remedies by Constitutional Courts: When a statutory remedy falls for consideration, it is the duty of the" ,,,

Constitutional Court to adopt an interpretation which would not only reduce the hiatus between a right and a remedy, but also to ensure that the" ,,,

remedy is effective. If rights are recognition of a claim, remedies are their actualization. While the rights regime receives broad recognition under our",,,

constitutional framework, it is imperative that remedies must keep pace and be strengthened. One of the core functions of the higher judiciary is to",,,

bridge the gap between rights and remedies, and this would immediately give rise to the legislative, executive and judicial obligations for their provision," ,,,

implementation, and declaration, respectively." ,,,

10.1 The right to an effective judicial remedy is an integral part of access to justice.[See, generally, Anita Kushwaha v. Pushap Sudan, (2016) 8 SCC",,,

509 ¶,~¶!Four main facets that, in our opinion, constitute the essence of access to justice are: (i) the State must provide an effective adjudicatory",,,

mechanism; (ii) the mechanism so provided must be reasonably accessible in terms of distance; (iii) the process of adjudication must be speedy; and",,,

(iv) the litigant's access to the adjudicatory process must be affordable¶,~¶!In order that the right of a citizen to access justice is protected, the",,,

mechanism so provided must not only be effective but must also be just, fair and objective in its approach...¶,~] An effective judicial remedy under a",,,

constitutional scheme must be (i) accessible, (ii) affordable, (iii) expeditious and (iv) cohesive. Accessibility requires the remedy to be easily available," ,,,

physically and informationally. Affordability is an aspect that is related to the cost of availing the remedy, it must be at a reasonable price with a",,,

provision for legal aid, if need be. The expeditious nature of a remedy is concerned with the quick disposal of the case and abhors unreasonable",,,

delays. Yet another facet of effective judicial remedy is its cohesiveness. The cohesiveness of a remedy simply means that a person must have one",,,

specified forum for the redressal of grievances. This requirement must be understood as an antithesis of fragmentation of remedies, i.e., a litigant",,,

ought not to be forced to approach multiple forums for the same cause of action. When a statute provisioning a judicial remedy falls for construction," ,,,

the choice of interpretative outcome is not governed so much by the power or privileges under the Constitution, but by the constitutional duties to",,,

create effective judicial remedies in furtherance of the right to access to justice. A meaningful interpretation that furthers effective judicial access is a",,,

constitutional imperative and it is this duty that must inform the interpretative criteria. It is in the above referred context that we will now examine",,,

Section 18 of the Act",,,

11. Statutory Scheme of the MSMED Act, 2006 :Sections 2(a), (c), (e), (n), 7, 8, 17, 18, 20 and 21, to the extent that they are relevant, are",,,

reproduced hereinbelow for ready reference",,,

¶,~"2. Definitions- In this Act, unless the context otherwise requires, -" ,,,

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

(b) "Board",,,

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

(e) "Enterprise" means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or",,,

production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of",,,

1951) or engaged in providing or rendering of any service or services;,,,

7. Classification of enterprises-(1) Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951)," ,,,

the Central Government may, for the purposes of this Act, by notification and having regard to the provisions of sub-sections (4) and (5), classify any class or",,,

classes of enterprises, whether proprietorship, Hindu undivided family, association of persons, co-operative society, partnership firm, company or undertaking, by",,,

whatever name called,--",,,

(a) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries,,,

(Development and Regulation) Act, 1951 (65 of 1951), as--",,,

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

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

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

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

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

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

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

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

(3) "Board",,,

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

Committee.,,,

15. Liability of buyer to make payment." Where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefor",,,

on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:",,,

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

of deemed acceptance.,,,

16. Date from which and rate at which interest is payable.Ã¢â¬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.",,

Ã¢â¬17. Recovery of amount due.- For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon",,,

as provided under section 16.,,,

18. Reference to Micro and Small Enterprises Facilitation Council- (1) Notwithstanding anything contained in any other law for the time being in force, any",,,

party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.",,

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or",,,

centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of",,,

sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that",,,

Act.,,,

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall",,,

either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the,,,

provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration",,,

agreement referred to in sub-section (1) of section 7 of that Act.,,,

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre",,,

providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier,,,

located within its jurisdiction and a buyer located anywhere in India.,,,

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference.Ã¢â¬Ã¢â¬

20. Establishment of Micro and Small Enterprises Facilitation Council.- The State Government shall, by notification, establish one or more Micro and Small",,,

Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification.",,,

21. Composition of Micro and Small Enterprises Facilitation Council.Ã¢â,¬",,,

(1) The Micro and Small Enterprise Facilitation Council shall consist of not less than three but not more than five members to be appointed from among the,,,

following categories, namely: Ã¢â,¬"Ã¢â,¬Ã¢â,¬",,,

11.1 First and foremost, Chapter V of the Act deals with delayed payments to micro and small enterprises and specifies the rights, liabilities, recovery,",,

and remedies in favour of micro and small enterprises. The rights and liabilities are based on the incidence of supply made by the micro and small,,,

enterprise. To this extent, the Act continues the statutory scheme contemplated under the repealed statute and, therefore, the principle laid down in",,,

Shanti Conductors (supra) that the liability of a buyer commences from the date of supply and not from the date of execution of the agreement or,,,

contract, even though the contract was prior to coming into force of the Act, continues to apply. Up to this point, there seems to be no difficulty. The",,,

issue in the present case takes a different turn, as explained in the following part.",,,

12. Whether registration is a necessary precondition to referring a dispute under Section 18 of the Act: The question that we are called upon to,,,

answer is whether the reference to the Facilitation Council under Section 18 of the Act is impermissible if the Enterprise is not registered by filing a,,,

memorandum under Section 8 of the Act before the contract is executed. This issue was not formulated, discussed and decided in any other judgment",,,

of this Court, including the two substantive judgments under the Act, i.e. Silpi Industries (supra) or Mahakali Foods (supra). In these two",,,

judgements, it is worth mentioning, such an issue was neither formulated, nor discussed. We will explain this in detail while discussing the facts and the",,,

ratios of these judgements. Apart from the submission of the appellant that the issue arising for our consideration is covered by the decision in Silpi,,,

Industries (supra), as approved in Mahakali Foods (supra), on our specific enquiry as to under which provision of the Act an Enterprise, which has not",,,

filed a memorandum under Section 8 would be barred from invoking remedies under Section 18 of the Act, Mr. Gopal Sankaranarayanan made the",,,

following submission.,,,

13. According to him, though Section 18 provides that Ã¢â,¬Ëœany party to a disputeÃ¢â,¬â„¢ may make a reference to the Facilitation Council, the said",,,

Ã¢â,¬ËœdisputeÃ¢â,¬â„¢ must be Ã¢â,¬Ëœwith regard to any amount due under Section 17Ã¢â,¬. This requirement, he would submit, takes us to Section 17, which",,,

provides that, "for any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest",

thereon under Section 16. Section 16 is the liability of the buyer to pay interest to the supplier on the amounts payable to it under Section,

15 for the supply of goods and rendering of any services. The expression "supplier" mentioned in Sections 15, 16 and 17 is defined in Section,

2(n), as "a micro or small enterprise which has filed a memorandum with the authority referred to in sub-section (1) of Section 8 and",

includes. Thus, it was submitted that a "supplier" can only be an Enterprise that has filed a memorandum under Section 8 of the Act. He,

would conclude by submitting that for supplies made prior to such registration, Enterprise cannot avail the remedies under Section 18 of the Act. ",

14. We will now examine the submission in detail, the statutory provisions have already been extracted hereinabove. ",

14.1 Simply the Text: The text of Section 18 is clear and categorical. The words employed herein are "any party to a dispute". The text, "any",

party to a dispute, cannot be read as a "supplier" by adopting a process of interpretation, by first referring to Section 17, then to Sections 15,

and 16 and thereafter, in search of the definition of supplier, to Section 2(n) and finally stopping at Section 8 to hold that "any party to a dispute",

will only be an Enterprise which is registered under Section 8 of the Act. This meaning-making process to metamorphose the clear text "any",

party to a dispute to a supplier is not the legal method to understand true meaning of words employed by the legislature. The age-old principle,

referred to as the Golden Rule of Interpretation, is that "words of a statute have to be read and understood in their natural, ordinary and popular",

sense. State of Andhra Pradesh v. Linde (India) Ltd. , (2020) 16 SCC 335; Grid Corpn. of Orissa Ltd. v. Eastern Metals & Ferro Alloys, ",

(2011) 11 SCC 334 The choice of the words "any party to a dispute" in Section 18 of the Act is deliberate. The legislative device of employing,

different expressions in successive provisions of the same statute is well known and intended to effectuate the desired purpose of the Act. If the,

Parliament had intended that "any party" must be confined only to a "supplier", or even a buyer, which expression is also defined, it would",

as well have used that or those very expressions. The Court cannot substitute the expression "any party" with "supplier" and change the text,

and, consequently, the scope and ambit of Section 18 altogether. ",

14.2 The context: Mention of Section 17 in Section 18 is only to provide context for a reference of dispute. The contextual relevance of locating,

Section 17 in Section 18 is only to provide the purpose of reference, not to confine the remedy to a registered Enterprise. This is to clarify that the",

reference shall be to adjudicate the dispute arising out of a liability of the buyer which is declared under Sections 15 and 16.,,,

14.3 The purpose and object of Section 18: Apart from the text and context in which Section 18 of the Act employs the expression "any party to,,,

the dispute", it is also to be seen that the section is provisioning a remedy for resolution of disputes. This remedy is provided by the statute, not by an",,,

agreement between the parties. It is therefore, necessary to keep it unrestricted and open-ended, enabling any party to a dispute to access the",,,

remedy. When statutory provision incorporation remedies for resolution of disputes fall for consideration, constitutional courts must interpret such",,,

remedies in a manner that would effectuate access to justice.,,,

14.4 The definition clause: We will now examine the sheet anchor of Mr. Gopal Sankaranarayanan's arguments that a supplier is defined under,,,

Section 2(n) can only be an Enterprise that has filed a memorandum under Section 8 of the Act. For this purpose, we will extract the entirety of the",,,

definition of supplier under Section 2(n) of the Act;,,,

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

includes,"",,,

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

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

Act, 1956 (1 of 1956);",,,

(iii) any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged",,,

in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises;,,,

From a plain reading of the Section 2(n), it is clear that the definition of a supplier is relatable only to a micro or a small enterprise and does not",,,

encompass a medium enterprise. Supplier not only means a micro or small enterprise, which have filed a memorandum with the authority referred",,,

to under sub-Section (1) of Section 8, but also includes (i) NSIC, (ii) SIDC, and the (iii) company, cooperative society, trust or a body engaged in",,,

selling of goods produced by micro or small enterprise and rendered services which are produced by such enterprise. In other words, a supplier will",,,

also be an entity engaged in selling goods or rendering services, produced or provided by a micro or small enterprise. All such entities, irrespective of",,,

filing of the memorandum will be suppliers. Thus, the definition of a supplier encompasses not only those who have filed a memorandum, but also",,,

those who have not filed. The reason for keeping the definition is not difficult to imagine. This is still an unorganised industry, growing, evolving and",,,

many of them are at start-up levels. The reason for keeping the definition wide is supported by an Expert Committee, whose opinion we will refer to in",,,

the next Section.,,,

14.5 Filing of memorandum under Section 8 is discretionary: We will now examine Section 8 of the Act relied on by the appellants to contend that,,,

filing of a memorandum by micro, small and medium enterprises is mandatory. Section 8 is extracted herein for ready reference:" ,,,

8. Memorandum of micro, small and medium enterprises." ,,,

Ã¢â¬ (1) Any person who intends to establish, Ã¢â¬",,,

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

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

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

First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall file the memorandum of micro, small or, as the case may be, of",,,

medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):,,,

Provided that any person who, before the commencement of this Act, establishedÃ¢â¬",,,

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

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and,,,

Regulation) Act, 1951 (65 of 1951), having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in",,,

pursuance of the notification of the Government of India in the erstwhile Ministry of Industry (Department of Industrial Development) number S.O.477 (E) dated,,,

the 25th July, 1991 filed an Industrial Entrepreneurs Memorandum, shall within one hundred and eighty days from the commencement of this Act, file the",,,

memorandum, in accordance with the provisions of this Act." ,,,

(2) The form of the memorandum, the procedure of its filing and other matters incidental thereto shall be such as may be notified by the Central Government after",,,

obtaining the recommendations of the Advisory Committee in this behalf.,,,

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

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

(5) The authorities specified under sub-sections (3) and (4) shall follow, for the purpose of this section, the procedure notified by the Central Government under",,,

sub-section (2).“a micro or a small enterprise may, at his discretion and even a medium

(emphasis supplied),,,

enterprise engaged in providing or”,,,

rendering services, also “may at his discretion file a memorandum with the authority as may be specified by the Government. This important”,,,

feature of the statute recognising and vesting of the discretion has not been noticed. There is also a logical follow-up to this choice or discretion vested”,,,

in the micro or small enterprise and the medium enterprise engaged in rendering services for filing a memorandum in sub-section (4) of Section 8 and”,,,

also proviso (a) to Section 8(1). As the said sub-section (4) of Section 8 relates to micro or small enterprises, the State Government shall by”,,,

notification, specify the authority with which such micro or small enterprise may file a memorandum. Considering the choice and discretion specifically”,,,

provided to these enterprises, it becomes very clear that there is no mandatory prescription of filing a memorandum. Conversely it appears that”,,,

medium enterprises engaged in manufacture or production of goods, “shall file a memorandum with such authority as may be specified, and this”,,,

is reflected in the proviso (b) to Section 8(1). At this stage, it is relevant to note that the definition of supplier under Section 2(n) is confined only to”,,,

micro or small enterprise and does not encompass a medium enterprise.,,,

14.6 There is a reason for this. The report of the Expert Committee on Micro, Small and Medium Enterprises clarifies the position that filing of”,,,

memorandum by these enterprises is never mandatory. The relevant portion is as under Report of the Expert Committee on Micro, Small and Medium”,,,

Enterprises (June, 2019) <https://dcmsme.gov.in/Report%20of%20Expert%20Committee%20on%20MSMEs%20->”,,,

[The%20U%20K%20Sinha%20Committee%20constitutes%20by%20RBI.pdf](https://dcmsme.gov.in/Report%20of%20Expert%20Committee%20on%20MSMEs%20-%20The%20U%20K%20Sinha%20Committee%20constitutes%20by%20RBI.pdf) :”,,,

4.5 Formalization of MSMEs,,,

As per 73rd round of National Sample Survey (NSS), there are 63.39 million MSMEs in the country. However, a large number of MSEs exist in the informal sector”,,,

and are not registered with any statutory authority. Reasons for lack of registration are many and varied. For nano/household type of enterprises, in their view, ”,,,

not obtaining registration is an escape from official machinery, paperwork, costs and rent seeking. For them, it is perhaps “the art of not being governed”.,,,

Registration offers them little by way of tangible benefits. There are other MSEs who, upon reaching a minimum size seek legitimacy and acknowledgement of”,,,

their existence to seek benefits or credit for instance, but they too struggle. While Udyog Aadhaar offers a simple mode of registration, it is usually not enough.”,,,

Often, more is needed e.g., Shops and Establishments, PAN, GST, etc. Lack of formalization impacts the sector in terms of development and also impacts in availing”,,,

credit from financial institutions like banks and in terms of policy making as well as development interventions. Registration provides information on nature of,,,

business, location, segmentation, etc. In the absence of a robust system of registration for capturing information on operational units, new units and exits, ",,,

reliance has to be placed on surrogate data or on national census/ surveys, which are infrequent. The various avenues available to the MSMEs for formalization" ,,,

are discussed below:,,,

4.5.1 Registration of Enterprises,,,

i. The Committee deliberated on the lack of formalization of a large number of MSMEs particularly in the micro category. The registration requirements of Indian,,,

enterprises is primarily governed by the First Schedule to the Industrial Development and Regulation (IDR) Act, 1951. It is mandatory only for a class of Medium" ,,,

enterprises which are engaged in the manufacture of goods. The registration of MSEs and Medium enterprises engaged in services activities is discretionary.,,,

However, over a period of time, registration has been an intrinsic part of the development of MSMEs itself. Having a registration certificate entitles an MSME for" ,,,

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

greater importance.,,,

(emphasis supplied),,,

14.7 The above-referred extract from the Report of expert committee clearly indicates that MSME still exists as informal sector and it is also,,,

recognized that "registration offers them little by way of tangible benefits". The committee also recognises that even though simpler modes of,,,

registration have been introduced, they are usually not enough. It further suggests that filing of memorandum provides information on the nature of" ,,,

business, location, and segmentation so that the regulators can capture "information on operational units". Paragraph 4.5.1 also recognises the" ,,,

policy of lack of formalisation and it is expected that over a period of time filing of memorandum could be an intrinsic part of development of MSME,,,

itself. The above referred committee report as well as other documents very clearly establish that at no point of time filing of registration of MSME,,,

was ever considered to be precondition for availing the dispute resolution remedy under Section 18.,,,

14.8 We have noted three clear features in the statutory regime. To start with, Section 18 does not use the expression supplier, instead employs the" ,,,

phrase, "any party to a dispute, may". We have also noted that the definition of the expression "supplier" is not confined to a micro or a" ,,,

small enterprise which has filed a memorandum under Section 8(1) but also includes companies or other entities engaged in selling goods or rendering,,,

services by an enterprise. Thirdly, Section 8 grants a discretion to a micro or a small enterprise in filing a memorandum with the authority." ,,,

14.9 Further, it is noteworthy that a "micro" [section 2(h)], "small" [section 2(m)] or "medium enterprises" [section 2(g)], formation and" ,,,

existence is simply on the basis of their investment as provided in Section 7 relating to classification of an Enterprise. They subsist without any formal" ,,,

"recognition", "consent" or "registration". The Act uses the expression filing of a "memorandum". That is all. That too, at the" ,,,

discretion of the micro and small enterprises. The cumulative account of these four features is compelling and leads us to the conclusion that an" ,,,

application by a micro or a small enterprise to the Facilitation Council under Section 18 cannot be rejected on the ground that the said enterprise has" ,,,

not registered itself in Section 8." ,,,

15. Having considered the definition of the expression "supplier", and also having considered the classification of enterprises into micro, small" ,,,

and medium with respect to each of which there is a separate legal regime to be suggested by the Advisory Committee and notified by the Central and" ,,,

State Governments, and in view of the discretion specifically vested with the micro and small enterprises for filing a memorandum under Section 8 of" ,,,

the Act, the submission that the Facilitation Council cannot entertain a reference under Section 18 if the enterprise is not registered under Section 8" ,,,

must be rejected." ,,,

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

17. Re: Silpi Industries v. Kerala State Road Transport Corporation :This is the lead judgment which has given the impression that this Court has" ,,,

laid down the law that Section 18 cannot be invoked by an Enterprise if it has not filed a memorandum under Section 8 of the Act before entering into" ,,,

a contract. However, the issues that arose for consideration in Silpi Industries are in complete contrast with the present case. In that case, there were" ,,,

two appeals, and they involved different facts and circumstances. The short facts in the first appeal was that the appellants referred the matter to the" ,,,

Facilitation Council which made an award in favour of the appellant under the Arbitration and Conciliation Act. The award was challenged under" ,,,

Section 34 and the same was dismissed. During the pendency of the appeal under Section 37, the High Court decided a preliminary issue as to" ,,,

whether the Limitation Act would apply to arbitral proceedings under the MSME. In the other appeal, the issue that arose before the High Court was" ,,,

whether there is a right to file a counterclaim in arbitral proceedings under MSME. The High Court answered both issues in the affirmative, thus the" ,,,

appeal before this Court in Silpi Industries (supra). Before considering the appeals, the following two issues were framed." ,,,

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

Enterprises Development Act, 2006?" ,,,

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

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

“Thus, we are of the view that no further elaboration is necessary on this issue and we hold that the provisions of the Limitation Act, 1963 will apply to" ,,,

the arbitrations covered by Section 18(3) of the 2006 Act. We make it clear that as the judgment of the High Court is an order of remand, we need not enter into" ,,,

the controversy whether the claims/counterclaims are within time or not. We keep it open to the primary authority to go into such issues and record its own" ,,,

findings on merits.” ,,,

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

“40. For the aforesaid reasons and on a harmonious construction of Section 18(3) of the 2006 Act and Section 7(1) and Section 23(2-A) of the 1996 Act, we" ,,,

are of the view that counterclaim is maintainable before the statutory authorities under the MSMED Act.” ,,,

17.3 In view of the finding that the Limitation Act will apply to MSME arbitration and also that a counterclaim is maintainable in an MSME arbitration," ,,,

the Court could have disposed of the appeal as nothing further remained for adjudication and determination. However, it appears that the respondent" ,,,

seems to have made an argument that the appellant in the second set of appeals is not entitled to any relief whatsoever. This argument led to the court," ,,,

making the following observation in paragraph 41 of the judgment." ,,,

“41 Though, we are of the view that counterclaim and set-off is maintainable before the statutory authorities under the MSMED Act, the appellant in this set" ,,,

of appeals is not entitled for the relief, for the reason that on the date of supply of goods and services the appellant did not have the registration by submitting the" ,,,

memorandum as per Section 8 of the Act.” ,,,

17.4 This fact led to the Court rejecting the claim of the appellant therein that there were no supplies after the registration under Section 8 of the Act." ,,,

The relevant portion of the order of the judgment is as under;" ,,,

“42. Though the appellant claims the benefit of provisions under the MSMED Act, on the ground that the appellant was also supplying as on the date of" ,,,

making the claim, as provided under Section 8 of the MSMED Act, but same is not based on any acceptable material. The appellant, in support of its case placed" ,,,

reliance on a judgment of the Delhi High Court in GE T&D India Ltd., GE T&D India Ltd. v. Reliable Engg. Projects & Mktg., 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 the Delhi High Court relied on by the",,,

appellant also would not render any assistance in support of the case of the appellant. In our view, to seek the benefit of provisions under the MSMED Act, the",,,

seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract",,,

made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under the MSMED Act.",,,

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

in Shanti Conductors Shanti Conductors (supra). 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 the appellant as the",,,

unit under the MSMED Act, 2006. By taking recourse to filing memorandum under sub-section (1) of Section 8 of the Act, subsequent to entering into contract",,,

and supply of goods and services, one cannot assume the legal status of being classified under the MSMED Act, 2006, as an enterprise, to claim the benefit",,,

retrospectively from the date on which the appellant entered into contract with the respondent.,,,

44. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of the MSMED Act, 2006, by submitting a",,,

memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be",,,

prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision",,,

would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation.Ã¢â€â€,,,

18. In the first place, whether an Enterprise is disabled from seeking a reference before filing a memorandum under Section 8 for registration never",,,

arose for consideration in Silpi (supra). More importantly, the Court did not examine any provisions of the Act and their implication on the right to seek",,,

a reference under Section 18 of the Act. This was natural because the Court did not frame an issue of registration. On the facts, the Court also held",,,

that there was no proof whatsoever that the appellant had made any supplies as contemplated in the Shanti Conductors (supra) case. Though we are",,,

concerned about the interpretation of the Act, we may mention at this very stage that it is an admitted fact that the respondent has, in fact, raised 41",,,

out of 53 bills after its registration on 19.01.2016. The complete details regarding bills raised after registration are indicated in paragraph no. 25, page",,,

13 of the counter affidavit filed by the enterprise. Be that as it may, in view of the above referred analysis, we are of the opinion that Silpi Industries",,,

(supra) is not an authority on the issue that a reference under Section 18 cannot be made by a micro or small enterprise if supplies were made or",,,

contracts were executed before filing of the memorandum under Section 8 of the Act.,,,

19. Re:Ā, GujaratĀ, StateĀ, CivilĀ, SuppliesĀ, CorporationĀ, Ltd.Ā, v. Mahakali Foods Pvt. Ltd. (2023) 6 SCC 4 0T1his case considered a",,,

batch of appeals which gave rise to the following questions of law, which were formulated as under:",,,

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

(ii) Whether any party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the",,,

Micro and Small Enterprises Facilitation Council under sub-section (1) of Section 18 of the said Act, if an independent arbitration agreement existed between the",,,

parties as contemplated in Section 7 of the Arbitration Act, 1996?"",,,

(iii) Whether the Micro and Small Enterprises Facilitation Council, itself could take up the dispute for arbitration and act as an arbitrator, when the Council",,,

itself had conducted the conciliation proceedings under sub-section (2) of Section 18 of the MSMED Act, 2006 in view of the bar contained in Section 80 of the",,,

Arbitration Act, 1996?Āçâ,Āâ€",,,

20. It is evident from the above that the substantial question for consideration that arose for consideration in Mahakali Foods (supra) was whether the",,,

MSME Act overrides the Arbitration and Conciliation Act, 1996, and such other incidental questions. There was no issue whatsoever, as has arisen in",,,

our case, that is, about the right or rather a disability to seek a reference under Section 18, if the enterprise has not filed a memorandum. Answering",,,

the issues that have arisen for consideration, the Court returned the findings in paragraph 52.1 to 52.5 which are as follows:",,,

Āçâ,Ā“52. The upshot of the above is that:",,,

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

52.2 No party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro",,,

and Small Enterprises Facilitation Council, though an independent arbitration agreement exists between the parties.",,,

52.3. The Facilitation Council, which had initiated the conciliation proceedings under Section 18(2) of the MSMED Act, 2006 would be entitled to act as an",,,

arbitrator despite the bar contained in Section 80 of the Arbitration Act.,,,

52.4. The proceedings before the Facilitation Council/institute/centre acting as an arbitrator/Arbitral Tribunal under Section 18(3) of the MSMED Act, 2006",,,

would be governed by the Arbitration Act, 1996.",,,

52.5. The Facilitation Council/institute/centre acting as an Arbitral Tribunal by virtue of Section 18(3) of the MSMED Act, 2006 would be competent to rule on",,,

its own jurisdiction as also the other issues in view of Section 16 of the Arbitration Act, 1996.",,,

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

52.6. A party who was not the "supplier" as per the definition contained in Section 2(n) of the MSMED Act, 2006 on the date of entering into contract cannot",,,

seek any benefit as the "supplier" under the MSMED Act, 2006. If any registration is obtained subsequently the same would have an effect prospectively and",,,

would apply to the supply of goods and rendering services subsequent to the registration.",,,

22. Something similar to the decision in Silpi Industries (supra) transpired in Mahakali Foods (supra) as well. Even though the issue of registration",,,

did not arise, a submission was made to the following effect.",,,

"49. One of the submissions made by the learned counsel for the buyers was that if the party supplier was not the "supplier" within the meaning of Section",,,

2(n) of the MSMED Act, 2006 on the date of the contract entered into between the parties, it could not have made reference of dispute to Micro and Small",,,

Enterprises Facilitation Council under Section 18(1) of the MSMED Act, 2006 and in such cases, the Council would not have the jurisdiction to decide the",,,

disputes as an arbitrator.",,,

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

~",,,

"50. At this juncture, very pertinent observations made by this Court in Silpi Industries case [42. In our view, to seek the benefit of provisions under the",,,

MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant",,,

to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under",,,

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

the judgment in Shanti Conductors (P) Ltd. v. Assam SEB [Shanti Conductors (P) Ltd. v. Assam SEB, (2019) 19 SCC 529 : (2020) 4 SCC (Civ) 409] has held that",,,

date of supply of goods/services can be taken as the relevant date, as opposed to date on which contract for supply was entered, for applicability of the aforesaid",,,

Act. Even applying the said ratio also, the appellant is not entitled to seek the benefit of the Act. By taking recourse to filing memorandum under sub-section",,,

(1) of Section 8 of the Act, subsequent to entering into contract and supply of goods and services, one cannot assume the legal status of being classified under the",,,

MSMED Act, 2006, as an enterprise, to claim the benefit retrospectively from the date on which appellant entered into contract with the respondent. 44. The",,,

appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of the MSMED Act 2006, by submitting a memorandum to",,,

obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and",,,

applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead to",,,

absurdity and confer unwarranted benefit in favour of a party not intended by legislation. On this issue are required to be reproduced",,,

51. Following the abovestated ratio, it is held that a party who was not the "supplier" as per Section 2(n) of the MSMED Act, 2006 on the date of entering",,,

into the contract, could not seek any benefit as a supplier under the MSMED Act, 2006. A party cannot become a micro or small enterprise or a supplier to claim",,,

the benefit under the MSMED Act, 2006 by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods or",,,

rendering services. If any registration is obtained subsequently, the same would have the effect prospectively and would apply for the supply of goods and",,,

rendering services subsequent to the registration. The same cannot operate retrospectively. However, such issue being jurisdictional issue, if raised could also be",,,

decided by the Facilitation Council/Institute/Centre acting as an Arbitral Tribunal under the MSMED Act, 2006.",,,

24. It is evident from the above that even in Mahakali Foods (supra), the issue which has arisen for our consideration never arose. There was",,,

neither an issue, discussion, nor analysis on the applicability of Section 18 for enterprises that have not filed a memorandum. The decision in Mahakali",,,

Foods (supra) is certainly an authority on the issues that were formulated in paragraph 11 of the said judgment, which have already been extracted",,,

hereinabove. Even the concluding paragraph in Mahakali Foods (supra) clearly establishes the fact that the Court was only considering the issue of",,,

whether the MSMED Act, being a special legislation, overrides the Arbitration Act or not. The relevant portion of the judgement is as under: -",,,

"77. The issues raised and the submissions made by the learned counsel appearing for the appellant with regard to the overriding effect of the MSMED Act,",,

2006 over the Arbitration Act, 1996, jurisdiction of Facilitation Council, the parties autonomy to enter into an agreement qua the statutory provisions, the issue",,,

of casus omissus, etc. have been discussed and decided hereinabove which need not be reiterated or repeated. Accordingly, it is held that the reference made to",,,

the Facilitation Council would be maintainable in spite of an independent arbitration agreement existing between the parties to whom the MSMED Act, 2006 is",,,

applicable, and such Council would be entitled to proceed under sub-section (2) of Section 18 of the MSMED Act, 2006 as also to act as an arbitrator or to refer",,,

the disputes to the institution or centre as contemplated under Section 18(3) of the MSMED Act, 2006. As held earlier, such Facilitation Council/Institute/Centre",,,

acting as an Arbitral Tribunal would have the jurisdiction to rule over on its own jurisdiction as per Section 16 of the Arbitration Act, 1996. In that view of the",,,

matter, the present appeal also deserves to be dismissed and is, accordingly, dismissed.Ã¢â€",,,

25. Apart from Silpi Industries (supra), Mahakali Foods (supra), Mr. Sankaranarayanan also relied on two orders of this Court in Vaishno",,,

Enterprises v. Hamilton Medical AG and Anr. 2022 SCC OnLine SC 355 and M/s Nitesh Estates Ltd. v. Micro and Small Enterprises",,,

Facilitation Council of Haryana & Ors. C.A. No. 5276/2022@ SLP (C) No. 26682/2018. These short orders do not lay down the law but follow",,,

the decision of this Court in Silpi Industries (supra).",,,

26. In Vaishno (supra), the contract was entered into on 24.08.2020, but as the registration was made on 28.08.2020, the Court held that the appellant",,,

was not an MSME and, therefore, the Act will not apply.",,,

The order seems to have been made in the facts and circumstances of the case. There was neither an issue about the supply of goods nor a",,,

formulation of the question as to whether the filing of a memorandum is mandatory for invocation of reference under Section 18.",,,

26.1 The order in Nitesh Estates (supra), also relied on, observed that the issue involved is squarely covered against the respondents in view of the",,,

decision in Silpi Industries (supra) holding that filing of a memorandum is mandatory for initiation of proceedings under Section 18.",,,

27. A decision where the issue was neither raised nor preceded by any consideration, in State of U.P. v. Synthetics and Chemicals Ltd. (1991) 4",,,

SCC 139 this Court held, Ã¢â€“the Court did not feel bound by earlier decision as it was rendered without any argument, without reference to the",,,

crucial words of the rule and without any citation of the authorityÃ¢â€“. Further, approving the decision of this Court in Municipal Corporation of Delhi",,,

v. Gurnam Kaur (1989) 1 SCC 101 which held that Ã¢â€“precedents sub-silentio and without argument are of no momentÃ¢â€“ this Court held that, Ã¢â€“a",,,

decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law",,,

declared to have a binding effect as is contemplated by Article 141. The same approach was adopted in *Arnit Das v. State of Bihar* (2000) 5,,,

SCC 488 where it was held that "a decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration",,

of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the,,,

judgment is not the *ratio decidendi*. This is the rule of *sub-silentio*, in the technical sense when a particular point of law was not consciously",,

determined",,

28. In this context, it is also important to note that, as an institution, our Supreme Court performs the twin functions of decision-making and precedent-",,

making. A substantial portion of our jurisdiction under Article 136 is reflective of regular appellate disposition of decision making. Every judgment or,,,

order made by this Court in disposing of these appeals is not intended to be a binding precedent under Article 141. Though the arrival of a dispute for,,,

this Court's consideration, either for decision-making or precedent-making is at the same tarmac, every judgment or order which departs from this",,

Court lands at the doorstep of the High Courts and the subordinate courts as a binding precedent. We are aware of the difficulties that High Courts,,,

and the subordinate courts face in determining whether the judgment is in the process of decision-making or precedent-making, particularly when we",,

have also declared that even an obiter of this Court must be treated as a binding precedent for the High Courts and the courts below. In the process of,,,

decision making, this Court takes care to indicate the instances where the decision of the Supreme Court is not to be treated as precedent. [Union of",,

India v. All Gujarat Federation of Tax Consultants, (2006) 13 SCC 473; *Francis Stanly v. Intelligence Officer, Narcotic Control Bureau*,",,

Thiruvananthapuram (2006) 13 SCC 210; *Bharat Petroleum Corporation Ltd. v. P. Kesavan*, (2004) 9 SCC 772; *Vishnu Dutt Sharma v.*",,

Manju Sharma, (2009) 6 SCC 379; *Chandigarh Housing Board v. Narinder Kaur Makol*, (2000) 6 SCC 41;5 Also refer to the commentary",,

citing catena of judgements where this Court has enumerated the events when decision-making is not to be treated as a precedent",,

Durga Das Basu, Commentary on Constitution of India (9th Edition, Vol. IX), page 9858; See also, *Allen v. Flood*, (1893) AC 1",,

"a case is only an authority for what it actually decides" It is therefore necessary to be cautious in our dispensation and state whether a,,,

particular decision is to resolve the dispute between the parties and provide finality or whether the judgment is intended to and in fact declares the law,,,

under Article 141.,,

29. Conclusion and reference to larger Bench: On the interpretation of the provisions of the Act we have arrived at a clear opinion and have,,,

expressed the same. Though it is possible for us to follow the precedents referred to in para 27 to arrive at the conclusion that the judgments in the,,,

case of Silpi Industries (supra) and Mahakali Foods (supra) coupled with the subsequent orders in Vaishno Enterprises (supra) and M/s Nitesh,,,

Estates (supra) cannot be considered to be binding precedents on the issue that has arisen for our consideration, taking into account the compelling" ,,,

need to ensure clarity and certainty about the applicable precedents on the subject, we deem it appropriate to refer this appeal to a three Judge Bench. " ,,,

30. The Registry is directed to place the appeal paperbooks along with our detailed judgment before the Hon'ble Chief Justice of India for,,

constitution of an appropriate Bench.,,,