



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 08.04.2024

% *Judgment pronounced on: 05.07.2024*

+ **LPA 216/2019, CM Nos.14315/2019, 37744/2019, 4213/2020 & 43568/2022**

MANGALORE REFINERY &
PETROCHEMICALS LTD

..... Appellant

Through: Mr Gopal Jain, Sr Adv. with Mr
Saswat Pattnaik, Mr Rijul Singh
Uppal and Mr Pragyanshu Pandey,
Advs.

versus

MICRO & SMALL ENTERPRISES
FACILITATION COUNCIL & ANR

..... Respondents

Through: Mr Santosh K. Tripathi,
Advocate for R-1.

Mr Ritin Rai, Sr Adv. with Mr
Ganesh Chandru, Mr Siddharth
Agrawal, Mr Himanshu Setia and Mr
Dayaar Singla, Advs. for R-2.

+ **O.M.P. (COMM) 235/2022 & I.A.No.8460/2022**

MANGALORE REFINERY &
PETROCHEMICALS LTD

..... Petitioner

Through: Mr Gopal Jain, Sr Adv. with Mr
Saswat Pattnaik, Mr Rijul Singh
Uppal and Mr Pragyanshu Pandey,
Advs.

versus

DRIPLEX WATER ENGINEERING
PRIVATE LIMITED

..... Respondent



Through: Mr Ritin Rai, Sr Adv. with Mr Ganesh Chandru, Mr Siddharth Agrawal, Mr Himanshu Setia and Mr Dayaar Singla, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE AMIT BANSAL

RAJIV SHAKDHER, J.:

Background:

1. The above-captioned appeal i.e., LPA 216/2019 seeks to assail the judgment dated 24.01.2019 [hereafter referred to as the “impugned judgment”] rendered by the learned Single Judge.

1.1 The appellant, i.e., Mangalore Refinery and Petrochemicals Ltd. [hereafter referred to as "MRPL"] had filed a writ petition under Article 226 of the Constitution to challenge the order dated 16.06.2016 passed by respondent no.1, i.e., Micro and Small Enterprises Facilitation Council [hereafter referred to as the "Council"] whereby, disputes obtaining between MRPL and respondent no.2, i.e., Driplex Water Engineering Ltd. [hereafter referred to as “Driplex”] were referred to an arbitral tribunal which would operate under the aegis of the Delhi International Arbitration Centre [DIAC].

1.2 The learned Single Judge, for reasons given in the impugned judgment, dismissed the writ action preferred by MRPL. Being aggrieved, MRPL has filed the instant appeal.

2. In the course of hearing of the appeal, the following two issues were raised on behalf of MRPL:

2.1 First, the Council lacked the jurisdiction to refer the purported



disputes obtaining between MRPL and Driplex for adjudication *via* arbitration since Driplex had obtained registration under Section 8 of the Micro and Small Enterprises and Development Act, 2006 [hereafter referred to as the "2006 Act"] after the disputants, i.e., MRPL and Driplex had entered into a contract.

2.2 In other words, according to MRPL, the provisions of the 2006 Act could not operate retrospectively. In support of this plea, reference was made to the definition of 'supplier' and 'buyer' contained in Section 2(n)¹ and Section 2(d)², read with Section 8(1)³ of the 2006 Act. MRPL contended

¹ Section 2– In this Act, unless the context otherwise requires,--

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(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;

² Section 2– In this Act, unless the context otherwise requires,--

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xxx

xxx

(d) - "buyer" means whoever buys any goods or receives any services from a supplier for consideration;

³ Section 8(1) - Any person who intends to establish,--

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

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

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

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

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

(b) an industry engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), having investment in plant and machinery of more than one crore rupees but not exceeding ten crore rupees and, in



that only a micro or small enterprise that has filed a memorandum with the authority referred to under Section 8(1) of the 2006 Act would be considered a 'supplier' under the said Act.

2.3 In this context, it was submitted on behalf of MRPL that a 'buyer' under Section 2(d) would be a person or entity which buys any goods or receives any services for consideration from a 'supplier', who meets the criteria stipulated in Section 8 of the 2006 Act.

2.4 This argument was extrapolated to cover the provisions of Sections 15 to 17⁴ and 22⁵ of the 2006 Act, which alludes to the expressions 'supplier'

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 Entrepreneur's 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.

⁴ Section 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.

Section 16 – Date from which and rate at which interest is payable.

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

Section 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.

⁵ Section 22 - Requirement to specify unpaid amount with interest in the annual statement of accounts.

Where any buyer is required to get his annual accounts audited under any law for the time being in force, such buyer shall furnish the following additional information in his annual statement of accounts, namely:--

- (i) the principal amount and the interest due thereon (to be shown separately) remaining unpaid to any supplier as at the end of each accounting year;
- (ii) the amount of interest paid by the buyer in terms of section 16, along with the amount of the payment made to the supplier beyond the appointed day during each accounting year;
- (iii) the amount of interest due and payable for the period of delay in making payment (which have been paid but beyond the appointed day during the year) but without adding the interest specified under this Act;
- (iv) the amount of interest accrued and remaining unpaid at the end of each accounting year; and
- (v) the amount of further interest remaining due and payable even in the succeeding years, until such date when the interest dues as above are actually paid to the small enterprise, for the purpose of disallowance as



and 'buyer'. In other words, the argument was that the liability of the buyer to make payment within the maximum period of 45 days from the date of acceptance of goods or services, as contained in the proviso to Section 15, and the consequences of infraction of the said statutory dicta to pay interest at the rate provided in Section 16 of the 2006 Act would not trigger, if, at the time when an agreement was arrived at between the buyer and supplier, the supplier had not obtained registration under Section 8 of 2006 Act.

2.5 Second, the Council ought not to have referred the disputants for arbitration since no monies were payable by MRPL after the issuance of a "No Claim Certificate" (NOC) by Driplex.

3. At the very outset, it is essential to note that the first issue captured above was, concededly, not raised on behalf of MRPL before the learned Single Judge. It was, however, contended on behalf of MRPL that since the issue concerned the jurisdiction of the Council to refer disputants to arbitration for adjudication of their inter se disputes, it could be raised at any stage, including the appellate stage.

3.1 Thus, having regard to the fact that the issue concerned jurisdiction of the Council, we heard arguments raised *qua* the said issue.

3.2 Accordingly, the preliminary objection raised on behalf of Driplex was rejected.

3.3 We agree with MRPL that a jurisdictional issue could be raised at any stage, not only in the main action but also in collateral proceedings. [See *Kiran Singh v. Chaman Paswan*, 1954 SCC OnLine SC 11]

Prefatory Facts:

a deductible expenditure under section 23.



4. Before we proceed, we must outline the broad contours of the case to gain a better perspective of the issues at hand.

5. Driplex registered itself as a small-scale industrial unit, *albeit* with the Department of Industries, Haryana, as far back as on 08.05.1981.

5.1 With the advent of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 [hereafter referred to as the “1993 Act”], on 07.12.2000, Driplex registered itself as a small-scale enterprise with the District Industries Centre, Gautam Budh Nagar (UP).

5.2 On 08.07.2009, MRPL invited bids for supply and services, which comprised, amongst other things, design, engineering, supply, civil works, erection, testing, etcetera, of DM water and CPU plant package for its Phase-III Refinery Project. Since the bid submitted by Driplex was the lowest, MRPL accepted it. Accordingly, on 01.12.2009, a Letter of Acceptance [hereafter referred to as “LoA”] was issued in favour of Driplex by MRPL. As per the LoA, the contract was priced at Rs.51 crores. Driplex submitted its acceptance of the offer made by MRPL.

5.3 The LoA accorded eighteen (18) months to Driplex to complete the awarded work. However, 1st two “trains” of the DM Plant were to be commissioned within sixteen (16) months, commencing from the date of issuance of the LoA, i.e., 01.12.2009. Therefore, the commissioning of the 1st two trains of DM Plant was to be completed by 31.03.2011, and the entire plant was to be set up and commissioned on or before 31.05.2011. The record discloses that Driplex was able to complete the awarded work on 11.03.2013, after which MRPL issued it a completion certificate.

5.4 Driplex, thus, submitted a final bill. Concededly, MRPL withheld certain amounts. The record also discloses, as indicated above, that Driplex



submitted an NOC to MRPL on 25.09.2013. Therefore, while according to MRPL, nothing was due and payable to Driplex once it submitted an NOC, Driplex contended to the contrary. The stand taken by Driplex was that the NOC was conditional, and, therefore, the amounts which, according to it, were due and payable would not stand foreclosed with the submission of the NOC. It is in this background that Driplex, on 09.07.2014, preferred an application under Section 18 of the 2006 Act⁶ with the Council for adjudication of its unpaid claims by taking recourse to the arbitration mechanism provided under the said provision.

5.5 Evidently, notice *qua* the application preferred by Driplex under Section 18 of the 2006 Act was issued, and MRPL was called upon to file a reply. MRPL filed the reply dated 20.02.2016 before the Council, raising its objections.

5.6 Council appears to have attempted to catalyse a conciliation between the disputants. The attempt at conciliation, however, failed, which impelled

⁶ Section 18 – Reference to Micro and small Enterprises Facilitation Council.

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

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

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



the Council to refer the disputants to an arbitral tribunal for adjudication of their inter se disputes under Section 18(3) of the 2006 Act, *albeit* under the aegis of DIAC, *via* order dated 16.06.2016.

5.7 Since MRPL was dissatisfied, it chose to assail the order dated 16.06.2016 by lodging a writ action in this court. As alluded to above, the Single Judge dismissed the writ petition.

6. Significantly, before the learned Single Judge, MRPL had raised the following three (03) issues:

(i) Since an arbitration agreement obtained between the disputants, only notified claim(s) could be referred to an arbitrator. As the disputes raised by Driplex were not concerned with notified claims, the reference to arbitration was without jurisdiction.

(ii) Because Driplex had issued an NOC, obligations, if any, of MRPL stood discharged due to accord and satisfaction.

(iii) Driplex was not a small-scale enterprise as contemplated under Section 7 or 8 of the 2006 Act.

7. As noted right at the outset, except for the aspect concerning Driplex's issuance of NOC, the other two issues, which had been raised before the learned Single Judge, were not pressed before us on behalf of MRPL. The two issues that were pressed before us, including the aspect concerning NOC, were noted right at the beginning of our discussion.

8. Suffice it to say, the learned Single Judge rejected the contention advanced on behalf of MRPL *vis-à-vis* all three issues raised before him.

Submissions by counsel:



9. It is against this backdrop that Mr Gopal Jain, Senior Advocate, advanced the arguments on behalf of MRPL, while submissions on behalf of the Council were made by Mr Santosh K. Tripathi, Advocate. Insofar as Driplex was concerned, arguments were advanced by Mr Ritin Rai, Senior Advocate.

10. Mr Gopal Jain's submissions can broadly be paraphrased as follows:

(i) To avail the benefits of the provisions of the 2006 Act, the persons/entity concerned was mandatorily required to register itself in accordance with the provisions of Section 8 of the said Act. The benefits under the 2006 Act would trigger from the date of its registration. The contracts which the registrant executed before its registration would not fall within the ambit of the beneficial provisions contained in the 2006 Act.

(ii) Since Driplex was not registered as a **“supplier”** on the date when disputants had entered into an agreement, the 2006 Act could not apply to MRPL. A contrary view would result in vitiating the right of the appellant to enter into a contract, the terms of which are known to it.

(iii) Driplex had failed to produce any material demonstrating that claims preferred by it concern supplies made or services rendered after its registration under Section 8 of the 2006 Act. Therefore, in any event, Driplex must refrain from seeking to take recourse to the provisions of the 2006 Act to MRPL.

(iv) As Driplex issued an NOC on 25.09.2013, it was estopped from making an application to the Council to refer its disputes to an arbitral tribunal.

(v) Lastly, the Council could not act as a mere post office. It was obliged to render a decision on its jurisdiction. The decision taken by the Council to



refer the disputes to an arbitral tribunal in the exercise of powers under Section 18 of the 2006 Act was erroneous.

11. In support of his submissions, Mr Jain relied upon the following judgments: *Messers Silpi Industries v. Kerala State Road Corporation*, 2021 SCC OnLine SC 439; *Vaishno Enterprises v. Hamilton Medical AG and Anr.*, 2022 SCC OnLine SC 355 and *Nitesh Estates Ltd. v. Micro & Small Enterprises Facilitation Council for Haryana and Ors.*, 2022 SCC OnLine SC 1198.

12. On the other hand, Mr Tripathi contended that the Council had jurisdiction to refer disputes to arbitration under Section 18 of the 2006 Act, even in respect of those transactions which had occurred before a micro or a small enterprise filed a memorandum, as prescribed under Section 8 of the 2006 Act.

12.1 Since Section 2 of the 2006 Act opened with words "unless the context otherwise requires", the provisions of Sections 15 to 18 would apply even to those suppliers who had entered into an agreement with a buyer prior to its registration under Section 8 (1) of the 2006 Act. The expression "unless the context otherwise requires" denotes that the definition of 'supplier' contained in clause (n) of Section 2 has to be contextualised. The definition could not be applied to the provisions of Sections 16 to 18 of the 2006 Act without regard to its scheme and the purpose for which the Legislature enacted it.

12.2 In this context, it was pointed out that while the definition of 'supplier' provided in Section 2(n) was confined to a micro or small enterprise, Section 8 was concerned with micro, small and medium enterprises [hereafter referred to as "MSMEs"].



12.3 Furthermore, while discretion had been given to micro and small enterprises to register themselves with the designated authority, no such discretion was available to medium enterprises, who were 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, under Section 8(1)(c) of the 2006 Act.

12.4 Besides this, sub-clause (b) of clause 1 of Section 8 also gave the discretion to register to those medium enterprises engaged not in manufacture or production but involved in providing or rendering services.

13. In a nutshell, Mr Tripathi attempted to highlight the dissonance that would creep in if the expressions 'supplier' and 'buyer' referred to in Sections 15 to 18 were confined to those micro and small enterprises that fit the prescription provided in Section 2(n) and 2(d) of the 2006 Act, respectively.

13.1 Mr Tripathi argued that although under Section 8(1)(a) and (b) of the 2006 Act discretion was given to the concerned enterprise to register itself, the benefits provided under Sections 15 to 18 of the 2006 Act, accorded to a supplier, would get effaced if the stand taken by MRPL was accepted.

13.2 Mr Tripathi emphasised that the court should render a contextual interpretation, having regard to the fact that the 2006 Act was a beneficial legislation framed to ensure timely payment of dues owed to micro and small enterprises. It was argued that Sections 15 to 18 of the 2006 Act were framed with this object in mind.

14. Furthermore, our attention was also drawn to sub-clauses (i) to (iii) of clause (n) of Section 2, that the entities referred to therein are deemed enterprises, which do not come within the definition of 'enterprise' as outlined in Section 2(e) of 2006 Act. It was contended that the enterprises



referred to in Section 2(n)(i) to (iii) of the 2006 Act, although defined as a 'supplier', need not file a memorandum, i.e., have themselves registered under Section 8 of the 2006 Act. The submission was that entities falling within the ambit of Section 2(n) need not necessarily be those who have obtained registration under Section 8 of the said Act. In this regard, in particular, reference was made to provisions of sub-clause (iii) of Section 2(n), which consisted of a company, cooperative 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.**

15. Thus, in other words, the entities referred to in sub-clause (i) to (iii) of Section 2(n) could be treated as 'suppliers' for the purposes of Sections 15 to 18 of the 2006 Act, even if they had not obtained registration under Section 8 of the Act.

16. The true and fundamental purpose of having registration under Section 8 of the 2006 Act is two-fold:

(i) To effectively work out measures provided in Chapter IV of the 2006 Act, as embedded in Sections 9 to 14, by the Central Government/ the concerned State Government, as well as for effective discharge of functions by the National Board for MSMEs [hereafter referred to as “National Board”] and the Advisory Committee constituted by the Central Government as per Sections 5 and 7 of the said Act.

(ii) To protect and safeguard the interest of the buyer in relation to the provisions of Sections 22 and 23 of the 2006 Act. The obligation and the disincentive provided in Sections 22 and 23 of the 2006 Act would apply to



only those buyers who purchased goods or received services from a 'supplier' as defined in Section 2(n) of the 2006 Act. The definition of 'supplier' as contained in Section 2(n) is relatable to the provisions of Sections 22 and 23 and not to the remaining provisions, i.e., Sections 15 to 18, which also fall in Chapter V of the 2006 Act.

17. The registration under Section 8 of the 2006 Act with the District Industries Centre is to enable the concerned authority to take measures for the promotion, development and enhancement of competitiveness of MSMEs as provided in Chapter IV (Sections 9 to 14) of the 2006 Act. This aspect would emerge upon perusal of the prescribed format, as set forth in Schedule II issued by the Central Government under Section 8(2) of the 2006 Act.

18. Thus, various policies and measures that are referred to in Chapter IV of the Act are progressed further if an enterprise registers itself under Section 8 of the 2006 Act. It is in this context that provisions of Sections 5 and 7 of the 2006 Act are important, as they define the functions of the National Board as well as the Advisory Committee, both of which are constituted by the Central Government as per the provisions of Section 3 of 2006 Act.

19. Assuming, without admitting, that to avail and/or enjoy the rights and remedies under Section 15 to 18 of the 2006 Act, a micro/small enterprise is required to register itself under Section 8 of the 2006 Act mandatorily, there is nothing stated in Section 2(n) read with Section 8 and 15 to 18 of the Act which would lead to the conclusion that the registration has to be carried out prior to the supplier entering into a transaction with the buyer. It would suffice if the enterprise is registered as a supplier before the concerned



authority makes a reference under Section 18 of the Act.

20. Since the definition of 'supplier' contained in the first limb of Section 2(n) is incapable of being harmonised with Section 8(i), 8(ii) read with the statutory format of the notified memorandum as well as with sub-clauses (i) to (iii) of Section 2(n), the latter provisions should prevail over the first limb of definition of 'supplier' as provided in Section 2(n) of the Act. Such an interpretation is based on the doctrine of "leading positive". [See *Union of India & Ors. v. Dileep Kumar Singh*, (2015) 4 SCC 421 and *Laxmi Devi v. Mukund Kanwar and Ors.*, (1965) 1 SCR 726]

21. In support of his submissions, Mr Tripathi relied upon the following judgments: *GE T&D India Ltd. v. Reliable Engg Projects & Marketing*, 2017:DHC:902; *Ramky Infrastructure Pvt. Ltd v. MSEFC & Anr.* 2018:DHC:3837; *Sharad Vasant Kotak and Ors. v. Ramniklal Mohanlal Chawda and Anr.* (1998) 2 SCC 171; *Chief General Manager (Contracts), Neyveli Lignite Corporation Ltd. v. Driplex Water Engineering Ltd. and Another*, 2020 SCC OnLine Del 2228; *Godwin Construction Private Limited and Ors. v. Tulip Contractors and Anr*, 2020:DHC:831; *Snehadeep Structures Private Limited v. Maharashtra Small-Scale Industries Development Corporation Limited*, (2010) 3 SCC 34; *Purbanchal Cables and Conductors Private Limited v. Assam State Electricity Board and Anr.* (2012) 7 SCC 462; *Modern Industries v. Steel Authority of India*, (2010) 5 SCC 44; *Indur District Cooperative Marketing Society v. Microplex*, 2015 SCC OnLine Hyd 494; *Hameed Leather Finishers v. Associated Chemical Industries*, 2013 SCC OnLine All 9058; *Nitesh Estates Ltd. v. MSEFC Haryana and Ors.*; *P. Anand Gajapathi Raju & Ors. v. V. PVG Raju & Ors.*, (2000) 4 SCC 539.



22. Mr Rai, in rebuttal, on behalf of respondent no.2, made the following broad submissions:

22.1 Regarding the first issue, it was submitted, as indicated above, that MRPL ought not to be allowed to raise it before this court as it had failed to do so before the learned Single Judge. The contention raised by MRPL before the Single Judge was that Driplex has failed to meet the criteria of a small enterprise as provided in Section(s) 7/8 of the 2006 Act. [See paragraph 6 of the impugned judgment.]

22.2 This contention was squarely dealt with by the learned Single Judge in paragraphs 12 to 16 of the impugned judgment. MRPL had not advanced any submission with regard to applicability of the 2006 Act because the agreement between the disputants was arrived at before Driplex's registration under Section 8 of the 2006 Act.

22.3 The three judgments on which reliance was placed by MRPL in support of its contention that the Council does not have jurisdiction since the contract between the disputants was executed prior to registration under Section 8 of the 2006 Act are distinguishable.

22.4 In *Silpi's* case, the Supreme Court found that supplies had been made, undisputedly, prior to the supplier's registration under Section 8 of the 2006 Act. Mr Rai pointed out that the Supreme Court distinguished the judgment of this court rendered in the *GN T&D Ltd.* case based on this fact alone.

22.5 Furthermore, the judgment of the Supreme Court in *Shanti Conductors P. Ltd. & Anr v. Assam State Electricity Board & Ors. etc.*, (2019) 19 SCC 529, rendered under the 1993 Act, was also distinguished in *Silpi* on the ground that in *Shanti Conductors*, the supply of goods had been made after the appellant's registration under the 1993 Act. In this context,



Mr Rai drew our attention to paragraphs 42 and 43 of the decision rendered in the *Silpi* case.

22.6 As regards the judgment in *Nitesh Estates* is concerned, in that case, the date when the parties had entered into the contract, i.e., 23.07.2014 and services provided thereunder, which was terminated on 11.12.2014, occurred prior to registration under the 2006 Act. Since the date of registration in that case was 17.03.2016, the said judgment was also distinguishable.

22.7 As far as the judgment rendered in *Vaishno Enterprises* was concerned, the court observed that the decision was based on peculiar facts and circumstances prevailing in that case. While doing so, the court observed that it had left the larger question of law arising in the matter open for consideration in another case, in view of the judgment rendered in *Silpi* and *Shanti Conductors*.

23. Driplex had succeeded in similar facts and circumstances in a writ action filed by Neyveli Lignite Corporation (NLC). In that case, the contract between Driplex and NLC was executed on 25.09.2006. Since registration of Driplex under Section 8 occurred on 09.12.2011, the reference made by the Council under Section 18 of the 2006 Act was challenged by NLC *via* WP (C.) 9670/2016. The writ petition was dismissed by the learned Single Judge on 02.09.2019. The appeal, i.e., LPA 688/2019, titled *Chief General Manager (Contracts) Neyveli Lignite Corporation Ltd. v. Driplex Water Engineering Ltd. and Anr.*, 2020 SCC OnLine Delhi 2228 preferred by NLC was dismissed by a coordinate bench of this court *via* judgment dated 29.01.2020. The Special Leave Petition, i.e. SLP (C) No.9268/2020, preferred against the Division Bench judgement, was dismissed by a three-



judge bench *via* order dated 22.09.2020.

23.1 The issue raised by MRPL is, thus, no longer *res integra* and, therefore, this appeal ought to be dismissed.

24. Mr Rai further submitted that as regards the issue concerning NOC, the arbitral tribunal has dealt explicitly with it, noting that the appellant failed to make any submission, either oral or written, concerning the same. Since the appellant failed to raise the issue, despite expressly having been allowed the liberty in terms of the impugned order, the appellant should not be allowed to raise the same at the present stage.

Analysis and reasons:

Issue no.(i)

25. Before we proceed further, it may be relevant to note that we had indicated to Mr Jain that since the issue concerning the applicability of the 2006 Act had been agitated before the arbitral tribunal, which had rendered an award which was pending adjudication in a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 [hereafter referred to as the "Arbitration Act"], it may perhaps be appropriate to test the legal viability of MRPL's contention in those proceedings.

25.1 Since Mr Jain, on instructions, pressed the objection, we, as indicated at the outset, heard submissions concerning the said issue on merits.

25.2 Mr Jain, however, was made cognizant of the legal consequences, i.e., if we were to rule against MRPL on this issue, it would not be open for MRPL to agitate the same issue in the petition pending adjudication under Section 34 of the Arbitration Act.

26. To adjudicate this issue, one would first have to consider the broad scheme of the 2006 Act.



26.1 The 2006 Act, which came into force on 02.10.2006, *via* notification dated 18.07.2006, repealed the 1993 Act. The Legislature took this step to provide a comprehensive central enactment so that a legal framework would be in place to facilitate the growth and development of the small-scale industry. Thus, to facilitate the promotion and development and to enhance the competitiveness of MSMEs by putting in place a single legal framework, the 2006 Act was enacted.

26.2 Before the 2006 Act, a small-scale industry was defined *via* a notification issued under Section 11B of the Industries (Development and Regulation) Act, 1951 [hereafter referred to as IDR Act].

26.3 Section 29B of the IDR Act provided leeway for reserving items that could be exclusively manufactured by small-scale industries by issuing a suitable notification. The 2006 Act was enacted to abolish this regime and, as alluded to above, to establish a single legal framework.

27. Bearing the aforesaid object in mind, the 2006 Act, spread over six (06) chapters was enacted.

27.1 Chapter I, *inter alia*, deals with definitions. Chapter II adverts to the constitution of the National Board, which is, amongst other things, burdened with examining factors affecting the promotion and development of MSMEs and reviewing policies and programmes made by the Central Government in that regard. Besides this, the National Board is also responsible for making recommendations on aspects referred to above and rendering advice to the Central Government on the use of fund(s) constituted under Section 12 of the 2006 Act.

27.2 Chapter III contains only two (02) provisions, i.e., Sections 7 and 8. Section 7 deals with classification of enterprises and the power of the



Central Government to constitute an Advisory Committee and its functions, while Section 8 concerns submission of memorandum with the authority designated by the Central or State Government. As noticed above, while the micro and small enterprises as well as the medium enterprises (engaged in providing or rendering services) have been given discretion regarding submission of the memorandum, i.e., registration under Section 8, the medium enterprises which are engaged in manufacturing are mandatorily required to register themselves. [See Section 8(1) of the 2006 Act.] The existing small-scale industries were required to do so within 180 days of the commencement of the 2006 Act. The memorandum is to be filed as per the format provided in Schedule II appended to the 2006 Act.

27.3 Chapter IV contains six (06) provisions i.e., Section 9 to 14. Broadly, these sections provide for measures that the Central Government may take from time to time for promotion and development, credit facilities, procurement preference policy, constitution of funds, grants that the Central Government may credit to the fund(s), as may be considered necessary, and lastly, the power to administer and utilise the funds for promotion and development of the MSMEs.

27.4 Chapter V, which contains eleven (11) provisions, i.e., Sections 15 to 25, provides for the following:

- (i) Ensuring timely payments to the suppliers and the consequences of breaching the statutory timeline of 45 days fixed by the Legislature by requiring the buyer to pay interest at the stipulated rates. [See Sections 15 and 16 of the 2006 Act.]
- (ii) Fixes the liability on the buyer to pay the amount once the maximum timeframe of 45 days has passed from the date of acceptance of goods or



receipt of services. [See Section 17 of the 2006 Act.]

(iii) Modes for resolving disputes between the buyer and the seller through the intercession of the Council. [See Section 18 of the 2006 Act.] Before the amendment was carried out in the 2006 Act *via* Mediation Act, 2023, the Council could, in the first instance, attempt to resolve the dispute through conciliation, either on its own or through assistance of an ADR institution or Centre, and if attempts at conciliation failed, resort to arbitration on its own or refer the same to an ADR institution or Centre.

(iv) Prohibit courts from entertaining a challenge to any decree, award or other order made, either by the Council or any ADR/Centre, till such time the appellant (not being a supplier) deposited 75% of the amount, in terms of the decree, award or other order, in the manner directed by such court. Furthermore, pending the disposal of such action to set aside the decree, award or order, the court is empowered to release such percentage of the amount deposited, as it considers reasonable, under circumstances obtaining in a given case, subject to conditions deemed necessary to be imposed.

(v) Provides for the establishment and composition of the Council. [See Sections 20 and 21 of the 2006 Act.]

(vi) Chapter V also casts an obligation on the buyer to disclose the amounts not paid and the interest stipulated in Section 16 of the 2006 Act in its annual statement of accounts. [See Section 22 of the 2006 Act.] To secure the interest of the supplier, a non-obstante provision is made in Section 23 of the 2006 Act, which states that interest payable or paid by any buyer, under or in accordance with the provisions of the 2006 Act, shall not be allowed as a deduction under the Income Tax Act, 1961.

(vii) The overriding effect of the provisions made in Sections 15 to 23 is



captured in Section 24 of the 2006 Act.

(viii) Section 25 of the 2006 Act authorises the Central Government to notify a scheme to facilitate the closure of MSMEs not registered as companies.

27.5 The last chapter, i.e., Chapter VI, contains miscellaneous provisions regarding officers and other employees that the Central Government or State Government may appoint for administering the Act, penalties for contravention of the provisions of Section 8, Section 22 or Section 26 of the 2006 Act and lastly, provides under Section 28 that no court inferior to that of a Metropolitan Magistrate or Magistrate of First Class would try offences punishable under the 2006 Act.

28. Therefore, what comes through upon perusal of the scheme of the 2006 Act is that the definition provisions i.e., Section 2(d) and (n) of the said Act, concerning 'buyer' and 'supplier', respectively, have to be contextualised. This is evident upon reading the opening words of Section 2 of the 2006 Act, which states, "In this Act, unless context otherwise requires....".

28.1 Thus, the fact that under Section 8(1)(a) of the 2006 Act, discretion has been given to a micro or small enterprise as also a medium enterprise rendering services to submit a memorandum, i.e., to register itself with the designated authority, would not take them out from the ambit of the definition of 'supplier' contained in Section 2(n) and as a logical sequitur, the benefits of securing timely payment under Section 15 of the 2006 Act. Likewise, the supplier would also be entitled to interest at the statutory rate stipulated under Section 16 if the buyer breached the timeframe given under Section 15 of the 2006 Act. This would also be true of the provisions of



Sections 17 and 18 of the 2006 Act.

28.2 The argument advanced on behalf of MRPL that only micro and small enterprises which stood registered under the 2006 Act, either prior to or at the time when the agreement was struck between such supplier and buyer, would be eligible for seeking benefits under the provisions mentioned above is inconsistent with the plain reading of Section 8 of the 2006 Act.

29. If otherwise, an enterprise is classifiable as a micro, small or even a medium enterprise in terms of the criteria provided under Section 7 of the 2006 Act, it should be entitled to the benefits of the provisions embedded in the 2006 Act, in particular, Sections 15 to 19 of the said Act. Failure to register or submit their memorandum under Section 8 of the 2006 Act before the execution of a given contract will not deprive such enterprise of the beneficial provisions contained in Sections 15 to 19 of the said Act.

30. This apart, as correctly submitted by Mr Rai, the three (03) Supreme Court judgments relied upon by Mr Jain are distinguishable on facts. Both in *Silpi* and *Nitesh Estates*, the supply of goods/services rendered was concluded before registration under Section 8 of the 2006 Act.

30.1 In the instant matter, MRPL and Driplex entered into an agreement on 01.12.2009. Driplex submitted a memorandum to register itself as a small enterprise under the 2006 Act on 09.12.2011. Concededly, Driplex completed its work and obtained a certificate from MRPL after registration under Section 8 of the 2006 Act i.e., only on 11.03.2013. Since Driplex had been awarded a turnkey contract, the work, quite naturally, would have continued even after it filed a memorandum i.e., obtained registration under the 2006 Act.

31. In this context, it is required to be noticed that the argument advanced



on behalf of MRPL that there was no material on record to conclude that execution of work continued post registration under Section 8 of the 2006 Act is untenable given the following finding of fact returned in paragraph 7.11 of the arbitral award dated 27.11.2021.

“7.11 It is a matter of record that the Claimant had been registered as a small-scale industry under the earlier Act. The present Act was enacted in the year 2006. No doubt, the Claimant did not apply for registration under this Act immediately, but was registered as such in the year 2011 on the issuance of registration by the Commissioner of Industries, New Delhi on 09.12.2011. More importantly, the disputes relate to the period after the registration. The factum of registration was communicated to the Respondent. Work finished, thereafter, monies/amounts which have claimed by the Claimant became due only after the registration, i.e., in the year 2016. The tribunal, therefore, holds that it has the jurisdiction to entertain the present claims. Issue No. 1 is decided accordingly in the affirmative”

32. This finding given by the arbitral tribunal would have to be accepted by MRPL, having invited a judgment from this court on the aforesaid issue. In any event, even in the action preferred under Section 34 of the Arbitration Act, this finding, as per the established view, cannot be unsettled, unless it is found to be perverse.

33. We may note that the third judgment cited by Mr Jain, i.e. ***Vaishno Estates*** is also distinguishable as it was rendered, as observed by the Supreme Court, 'in peculiar facts and circumstances' obtaining in that matter.

34. The judgment in ***Shanti conductors***' case, which was rendered by a three-judge bench of the Supreme Court and concerned *pari materia* provisions contained in the 1993 Act tilts the balance in favour of Driplex as it, *inter alia*, holds that the applicability of the Act i.e., the 1993 Act would be determined on the date when the goods were supplied, and services were rendered and not the date when contract was entered into between the



disputants. [See paragraph 61⁷ of the said judgment.]

35. We also note that MRPL had filed a reply dated 20.02.2016 in which the jurisdictional issue appears to have been raised before the Council. This was clearly given up at the later stage as, concededly, this issue was not raised before the learned Single Judge. However, we have dealt with the same as issue no. i, hereinabove.

36. Given the aforesaid position, we conclude that the Council had the jurisdiction to refer the disputes under Section 18 of the 2006 Act to the arbitral tribunal.

Issue no. ii

37. Insofar as this issue is concerned, the learned Single Judge has correctly ruled that the said issue needed to be agitated before the arbitral

⁷ 61. We have noticed above that the incidence of applicability of the liability under the Act is supply of goods or rendering of service. In event the supply of goods and rendering of services is subsequent to Act, can liability to pay interest on delayed payment be denied on the ground that agreement in pursuance of which supplies were made were entered prior to enforcement of the Act? Entering into an agreement being not expressly or impliedly referred to in the statutory scheme as an incident for fastening of the liability, making the date of agreement as date for imposition of liability does not conform to the statutory scheme. This can be illustrated by taking an example. There are two small scale industries who received orders for supply of materials. 'A' received such orders prior to the enforcement of the Act and 'B' received the order after the enforcement of the Act. Both supplied the goods subsequent to enforcement of the Act and became entitled to receive payment after the supply, on or before the day agreed upon between the supplier and buyer or before the appointed day. Payments were not made both to A and B as required by Section 3. Can the buyer who has received supplies from supplier A escape from his statutory liability to make payment of interest under Section 3 read with Section 4 ? The answer has to be No. Two suppliers who supply goods after the enforcement of the Act, become entitled to receive payment after the enforcement of the Act one supplier cannot be denied the benefit of the statutory protection on the pretext that 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 Act, 1993 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 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 Act, 1993. 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 agreement entered between the parties for supply was prior to Act, 1993. To hold that liability of buyer for payment shall arise only when agreement for supply was entered subsequent to enforcement of the Act, it shall be adding words to Section 3 which is not permissible under principles of statutory construction.



tribunal. Since then, as noticed above, an award has been rendered. The arbitral tribunal had framed an issue about the issuance of the NOC *qua* which, evidently, no arguments were advanced by the disputants. This is plainly evident from the issue framed by the arbitral tribunal and its findings *vis-a-vis* the same.

“Issue No. 2

Whether the present claims are tenable in the light of the No-Claim Certificate dated 25.09.2013 issued by the Claimant

7.13 No arguments were advanced by the learned counsel for the parties. Even in the written submissions filed by the Respondent, the Respondent has not raised this issue. Therefore, the Tribunal proceeds on the assumption that the Respondent has not pressed this issue though raised. Thus, the tribunal would discuss the claims on merits”

38. Therefore, we need not delve into this area since a petition preferred by MRPL under Section 34 of the Arbitration Act is pending adjudication.

39. Accordingly, O.M.P. (COMM.) 235/2022 will be placed before the learned Single Judge, as per the roster, on 19.07.2024.

40. Needless to add, disposal of the above-captioned appeal will not come in the way of the concerned court dealing with this issue on merits in the pending action preferred under Section 34 of the Arbitration Act.

41. The appeal is disposed of in the aforesaid terms. However, there will be no order as to costs.

**(RAJIV SHAKDHER)
JUDGE**

**(AMIT BANSAL)
JUDGE**

JULY 5, 2024

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